P.E.R.C. NO. 83-25

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COMMERCIAL TOWNSHIP BOARD
OF EDUCATION,

Respondent,

-and- Docket No. CO-82-271-171

COMMERCIAL TOWNSHIP SUPPORTIVE
STAFF ASSOCIATION and DARLENE
COLLINGWOOD,

Charging Parties.

SYNOPSIS

The Public Employment Relations Commission holds that the Commercial Township Board of Education violated subsections N.J.S.A. 34:13A-5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act when its superintendent sent Darlene Collingwood, the president of the Commercial Township Supportive Staff Association, a letter threatening her dismissal if she continued to engage in protected activities and when its president also threatened Collingwood at a negotiations session with dismissal. The Commission also holds that these threats are not constitutionally immune, that the charging parties were not required to prove that these threats actually intimidated Collingwood, that the Board is responsible for the acts of its superintendent and its president, that the allegedly improper certification of the charge did not warrant dismissal, that the president's threat could be considered an unfair practice, although not alleged in the Complaint, since it had been fully and fairly litigated, and that the placement of the superintendent's letter in a grievance file rather than a personnel file was immaterial.

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COMMERCIAL TOWNSHIP SUPPORTIVE STAFF ASSOCIATION and DARLENE COLLINGWOOD,

Charging Parties.

Appearances:
For the Respondent, Barbour & Costa, Esqs.
(John T. Barbour, of Counsel)

For the Charging Parties, Selikoff & Cohen, P.A.
(Steven R. Cohen, of Counsel)

DECISION AND ORDER

On March 30, 1981, the Commercial Township Supportive Staff Association ("Association") and Darlene Collingwood, its president, filed an unfair practice charge against the Commercial Township Board of Education ("Board") with the Public Employment Relations Commission. The charge alleged that the Board violated subsections 5.4(a)(1) and (3) [1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), when its superintendent sent Collingwood a letter in which he threatened to recommend her dismissal from the position of playground aide unless she substantially improved her attitude and

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

behavior and stopped her continual griping. The letter was allegedly intended to intimidate and coerce Collingwood in the exercise of activities protected under the Act.[2/]

On June 17, 1981, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On June 24, the Board adopted an earlier statement of position as its Answer and added an additional defense. The Board admitted that its superintendent sent the letter, but denied that the letter was sent to intimidate or coerce Collingwood in her capacity as Association president. In separate defenses, the Board asserted that: (1) the certification of the charge was improper, (2) the charge was untimely, (3) the First Amendment of the United States Constitution and Article I, paragraph six of the New Jersey Constitution sheltered the superintendent's letter, (4) the merits of the charge were not within the purview of the Act since they implicated potential or actual disciplinary determinations, and (5) the charging parties had refused to use the negotiated grievance procedure.

On October 6, 1981, Commission Hearing Examiner Alan R. Howe commenced a hearing, and the charging parties presented their case. The Board then made a Motion to Dismiss in which it contended that counsel for the charging parties had improperly certified the charge since he lacked personal knowledge of the facts alleged and did not disclose the source of his

2/ A copy of this letter, dated September 29, 1980, is attached as an appendix to this decision.

information, knowledge and belief which enabled him to certify the charge. On November 6, 1981, after receiving briefs, the Hearing Examiner denied this motion. H.E. No. 82-16, 7 NJPER 664 (¶12297 1981) (copy attached).

On December 4, 1981, the hearing was to resume. On that date, however, the Board, asserting that the charging parties had not presented a prima facie case, made another Motion to Dismiss. On January 28, 1982, after receiving briefs, the Hearing Examiner denied this motion. H.E. No. 82-28, 8 NJPER 143 (¶13063 1982) (copy attached). He specifically found a prima facie case that the superintendent's letter violated the Act and was not constitutionally protected. He further found a prima facie violation in a statement by the Board president to Collingwood during a negotiation session that she was a liar and a trouble-maker who, if he had his way, would have been fired a long time ago and would not now be employed by the school system.[3/]

On April 1, 1982, the last hearing session was held. The Board presented its case, and the Association called rebuttal witnesses. The parties waived oral argument, but filed further briefs.

On June 30, 1982, the Hearing Examiner issued his report and recommendations. H.E. No. 82-67, 8 NJPER ____ (¶_____ 1982) (copy attached). He concluded that the superintendent's letter and the president's statement violated subsections

3/ Noting that the Complaint had not alleged that this statement violated the Act, the Hearing Examiner nevertheless reached this issue because the parties litigated it at the first day of hearing and the Board defended on this issue in its brief supporting its second Motion to Dismiss. H.E. No. 82-28, supra, at p. 6, n. 3.

5.4(a)(1) and (3) of the Act and recommended an order requiring the Board to stop making such threatening statements, remove the letter from its files, and post a notice concerning the violations found and the remedial actions taken.

On July 23, 1982, after receiving an extension of time, the Board filed Exceptions. The Board contends that the Hearing Examiner erred in: (1) denying the two motions to dismiss; (2) finding a prima facie case that Collingwood's protected activity was a motivating factor in either the superintendent's letter or the president's statement; (3) holding the Board responsible for the superintendent's letter and its president's statement to Collingwood; (4) finding a violation in the absence of evidence that Collingwood was actually interfered with, discriminated against, intimidated, or coerced; (5) finding the letter and statement constitutionally unprotected; (6) finding irrelevant the fact that the letter to Collingwood was not placed in her personnel file; and (7) going beyond the pleadings to find that the president's statement violated the Act. On August 2, 1982, the charging parties filed a response asking that the Commission adopt the Hearing Examiner's report and recommendations.

The Board has not excepted to any of the Hearing Examiner's findings of fact. H.E. No. 82-28, supra, at pp. 2-6; H.E. No. 82-67, supra, at pp. 2-6. In reviewing the record, we have found substantial evidence to support them. Accordingly, we adopt and incorporate them here.

The Board first contends that the Hearing Examiner erred in not dismissing the Complaint because counsel for the

Association and Collingwood did not properly certify the charge. Our charge form provides that the charging party, or its representative, must either: (1) swear an oath that the facts in the charge are true to the best of his knowledge and belief, or (2) certify that the statements made by him are true and that he is aware that if the statements are false, he is subject to punishment. See N.J.A.C. 19:14-1.3. The Board contends that the attorney who certified the charge did not have personal knowledge of all statements in the charge and thus could not properly certify that all such statements were "true." For the reasons stated in the Hearing Examiner's decision dismissing this motion, H.E. No. 82-16, supra, we disagree.[4/]

We now consider whether the Hearing Examiner erred in finding a prima facie violation of the Act and thus denying the Board's second motion to dismiss. We hold he ruled correctly, incorporate the discussion of this issue set forth in H.E. No. 82-28, supra at pp. 6-17, and add the following analysis.

The superintendent's letter and the Board president's statements violate our Act for a simple reason: they threaten an employee's job status not because of that employee's job

4/ We add that the instant case does not present a jurisdictional problem since a certification has in fact been signed by an attorney who is the representative of the charging parties. Once either the charging party or its representative has signed an oath or certification, we will not permit litigation over the adequacy of that oath or certification as a precondition to the assumption of jurisdiction. If, however, it becomes apparent an attorney has willfully sworn to or certified statements he knew were false, disciplinary proceedings may be appropriate. R. 1:4-8. That is not the case here. Indeed, the Board has admitted all the factual allegations in its Answer and at the hearings except those pertaining to whether the superintendent's letter was intended to intimidate, threaten, coerce, or restrain Collingwood.

performance, but because of her conduct as an employee representative. Black Horse Pike Regional Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981), ("Black Horse Pike") articulates this fundamental distinction:

> A public employer is within its rights to comment upon those activities or attitudes of an employee representative which it believes are inconsistent with good labor relations, which includes the effective delivery of governmental services, just as the employee representative has the right to criticize those actions of the employer which it believes are inconsistent with that goal. However, as we have held in the past, and as noted by the Hearing Examiner, the employer must be careful to differentiate between the employee's status as the employee representative and the individual's coincidental status as an employee of that employer. See, In re Hamilton Township Board of Education, P.E.R.C. No. 79-59, 5 NJPER 115 (¶10068 1979) and In re City of Hackensack, P.E.R.C. No. 78-30, 4 NJPER 21 (¶14001 1977).
>
> When an employee is engaged in protected activity the employee and the employer are equals advocating respective positions; one is not the subordinate of the other. If either acts in an inappropriate manner or advocates positions which the other finds irresponsible criticism may be appropriate and even legal action, as threatened here, may be initiated to halt or remedy the other's actions. However, as in this case, where the employee's conduct as a representative is unrelated to his or her performance as an employee, the employer cannot express its dissatisfaction by exercising its power over the individual's employment. In the instant case, when Horton represented Ms. Cohen at the November 13 meeting he was not engaged in activity which was relevant to his performance as an industrial arts teacher.
>
> . . . .
>
> The Board may criticize employee representatives for their conduct. However, it cannot use its power as employer to convert that criticism into discipline or other adverse action against the individual as an employee when the conduct objected to is unrelated to that individual's performance as an employee. To permit this to occur would be to condone conduct by an employer which would discourage employees from engaging in organizational activity.

Supra at pp. 503-504 (Emphasis supplied).

See also In re Jackson Twp. Bd. of Ed., P.E.R.C. No. 8270, 8 NJPER 108 (¶13045 1982); In re City of Trenton Bd. of Ed., P.E.R.C. No. 80-130, 6 NJPER 216 (¶11108 1980).

In his letter, the superintendent threatened to recommend Collingwood's dismissal unless her attitude, behavior, and acceptance of responsibility substantially improved within 90 days. He listed the unacceptable behavior patterns. As the Hearing Examiner found, only one of the items listed (paragraph 4) is clearly outside the realm of protected activity and related to Collingwood's performance as a school aide. Many of the remaining items -- for example, paragraph 2 on proper use of the negotiated grievance procedure and paragraph 5 on discussing salary questions with unit members -- manifestly concern her activity as president of the Association and have nothing whatsoever to do with her job performance. Read as a whole, this letter indisputably threatens Collingwood's job status primarily because of her performance as an Association representative engaging in protected activity, and not as a school aide.[5/]

The statement of the Board president is a clear threat. The nexus between Collingwood's union activity and the threatened dismissal is readily apparent and substantial.

The Board asserts that Collingwood's activity was unprotected because the grievances concerned, in part, a non-negotiable subject, reduction in force, and had already been presented and abandoned by Collingwood's predecessor as Association president.

5/ The superintendent conceded as much when he testified that the letter was not placed in Collingwood's personnel file because it was not material to her work performance.

With respect to the first objection, our Supreme Court has recognized that employees have a legitimate interest in presenting their views on matters that affect them as employees through their representative, even if these matters may not ultimately be submitted to binding arbitration. Bd. of Ed. of Twp. of Bernards v. Bernards Twp. Ed. Assn., 79 N.J. 311 (1979). See also In re Salem County Board for Vocational Education, P.E.R.C. No. 79-99, 5 NJPER 239 (¶10135 1979), aff'd in part, rev'd in part, App. Div. Docket No. A-3417-78 (9/29/80); In re Trenton Bd. of Ed., supra; N. J. Const., Article I, Paragraph 19. An employer cannot retaliate against a union representative in that representative's capacity as an employee for seeking an appropriate forum for asserting the employees' position. In re Salem County Bd. for Vocational Education, supra; In re Trenton Bd. of Ed., supra.

With respect to the second objection, the Board mistakenly cites In re City of Hackensack, P.E.R.C. No. 78-30, 4 NJPER 21 (1977) for the proposition that there is no protected right to seek to reprocess already decided or abandoned grievances. That case holds only that the employer may deny a grievance an employee representative improperly seeks to reprocess. The right to deny such a grievance does not carry with it the right to threaten to dismiss an employee for attempting to reprocess the grievance. As Black Horse Pike establishes, the employer must leave an employee's job status out of a dispute over protected activity that has nothing to do with that employee's job performance. See also In re City of Hackensack, P.E.R.C. No. 78-71, 4 NJPER 190 (1978), aff'd App. Div. Docket No. A-3562-77 (3/5/79).

The Board next argues that it should not be held responsible for the actions of its superintendent and president. It relies upon the statutory definition of "employer," N.J.S.A. 34:13A-3(c), which provides, in part: "The term 'employer' includes an employer and any person acting, directly or indirectly, on behalf of or in the interest of an employer with the employer's knowledge or ratification." (Emphasis supplied) The Board argues that it did not know of or ratify the actions in question. We reject this argument.

N.J.S.A. 34:13A-5.4(a) sets forth the unfair practices our Act proscribes. That section prohibits "public employers, their representatives or agents" from committing the specified acts. N.J.S.A. 34:13A-3(e) defines representative, in part, as "...any person authorized or designated by a public employer... to act on its behalf and represent it...." There is no statutory definition of agent.

We entertain no doubt that the superintendent and president were representatives and agents of the Board in this case. The superintendent's normal duties include evaluating employees, discussing these evaluations with the Board, making recommendations concerning employees, and participating in the grievance process. The letter in question was issued in connection with the discharge of these functions. Indeed, the superintendent prefaced his threat of dismissal with the statement that Collingwood's poor behavior and attitude had been the subject of much discussion with the Board. Thus, it is clear that the superintendent

was performing the duties contemplated by the Board when he issued the letter. Similarly, the president of the Board attended the negotiations meeting at which he threatened Collingwood as a representative of the Board authorized to participate in the negotiations. In sum, the superintendent and the principal both were acting within the scope of the authority delegated to them by the Board and their apparent authority as Board agents, regardless of whether the Board formally ratified or even knew of the threats they made. Compare R. Gorman, Basic Text on Labor Law, pp. 134-137 (1976) (employer responsible for actions of supervisors which are impliedly authorized or within apparent authority of actor; whether specific acts were actually authorized or subsequently ratified is not controlling).

The Board next argues that it did not violate subsection 5.4(a)(1) because the Association and Collingwood did not prove that Collingwood was actually interfered with, restrained, or coerced in the exercise of her rights under our Act. We hold, however, that proof of actual interference, restraint, or coercion is not necessary in order to make out a violation of subsection 5.4(a)(1) and thus reject this contention.

When the employer, its representative, or agent threatens an employee with dismissal in a deliberate attempt to restrain the employee's participation in protected activity, subsection 5.4(a)(1) is violated, regardless of whether the threatened employee is actually intimidated. As we said in In re City of Hackensack, P.E.R.C. No. 77-49, 3 NJPER 143, 144 (1977), rev'd on other grounds, 162 N.J. Super 1 (App. Div. 1978), aff'd as mod.,

82 N.J. 1 (1980):

> To adopt the City's contention that there must be a showing of actual discouragement would be in effect to say that there is no unfair practice unless the employer is successful in his attempt to reduce union activity, and if he fails the motivation will be ignored thereby giving the employer a free shot at achieving an unlawful result.

See also In re City of Hackensack, P.E.R.C. No. 78-71, supra (it is the tendency of an employer's conduct to interfere with employee rights that is controlling element of a subsection 5.4 (a)(1) violation). Compare R. Gorman, Basic Text on Labor Law, supra, at pp. 132-134 (it is not necessary to demonstrate that particular employees were actually coerced; it is sufficient to prove that the employer's actions would tend to coerce a reasonable employee).[5/]

The Board next contends that the First Amendment of the United States Constitution and Article I, paragraph six of the New Jersey Constitution preclude finding unfair practices on the basis of the personal opinions of its superintendent and president. Neither the superintendent or the president, however, merely registered his personal opinion of Collingwood; both threatened to use

5/ As evidence of the lack of actual intimidation, the Board cites Collingwood's continued exercise of her rights and the filing of the instant charge on the last day permitted by the six month statute of limitations, assertedly because Collingwood wanted to obtain leverage over contemporaneous contract negotiations. Given the above analysis, this proof of lack of actual intimidation is irrelevant. We also accept the explanation of the NJEA representative that the timing of the charge reflected the breakdown of settlement discussion rather than the pendency of contract negotiations.

their official power against Collingwood unless her participation in statutorily protected conduct subsided. We completely agree with the Hearing Examiner's discussion of the constitutional issue, H.E. No. 82-28, supra, at pp. 16-17 and H.E. No. 82-67, supra, at pp. 10-11, and hold that threats made by employer representatives or agents in their official capacities to dismiss an employee in retaliation for statutorily protected activity are not constitutionally immune. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969); International Brotherhood of Teamsters Local 695, AFL v. Vogt, Inc., 354 U.S. 284 (1957); Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); Zurn Industries v. NLRB, ___ F.2d ___, 110 LRRM 2944 (9th Cir. 1982).

We next consider the Board's argument that the Hearing Examiner erred in finding that there was no meaningful distinction between the personnel file and the superintendent's grievance file. The Board asserts that if the superintendent's letter was placed in the grievance file, rather than the personnel file, no violation occurred. We disagree. Regardless of where the letter was placed, it contained a threat of official action the superintendent would take if Collingwood's attitude and behavior did not improve. Based upon the evidence, it is reasonable to conclude that the superintendent intended to extract the letter from its repository, whether in the personnel or grievance file, and use it against Collingwood if he was not satisfied with her improvement. While placement in Collingwood's personnel file rather than the grievance file might have been further evidence that the superintendent improperly considered her Association activity relevant to her continued employee status, Black Horse Pike,

at p. 504, the crucial consideration here is the superintendent's threatening communication of his intention to use, if necessary, the letter against Collingwood with respect to her tenure of employment. The letter itself, rather than its file location, communicates and establishes the threat.[6/]

We next consider whether the Hearing Examiner erred in finding that the president's statement violated the Act, even though this statement was not set forth in the charge or Complaint. We hold he did not.

The New Jersey Supreme Court has encouraged this Commission to follow decisions and policies of the National Labor Relations Board. Lullo v. Int'l Ass'n of Firefighters Local 1066, 55 N.J. 409 (1970). The Board, with the approval of several Circuit Courts of Appeal, has consistently held that it may decide an issue, although not specifically pleaded, if the issue has been "fairly and fully tried." United Brotherhood of Carpenters and Joiners of America, Carpenters' Dist. Council of Western Pennsylvania and Industrial Local No. 2605, AFL-CIO, 256 NLRB No. 92, 107 LRRM 1285 (1981); Southern Newspapers, Inc., 107 LRRM 1058, 255 NLRB No. 142 (1981); Hacienda Hotel and Casino, 254 NLRB No. 7, 106 LRRM 1212 (1981), aff'd ___ F.2d ___, 110 LRRM 2167 (9th Cir. 1982); Vegas Village Shopping Corp, 229 NLRB No. 40, 96 LRRM 1551 (1977), aff'd, ___ F.2d ___, 103 LRRM 2604 (9th Cir. 1979); Kroger Co., 228 NLRB No. 19, 94 LRRM 1586 (1977); W. & W. Tool and Die Mfg. Co., 225 NLRB No. 138, 93 LRRM 1006 (1976); Multi-Medical Convalescent & Nursing Center of Towson,

6/ Contrast Black Horse Pike where the letters in question did not explicitly tie continued employment to a diminution of protected activity.

225 NLRB No. 56, 93 LRRM 1170 (1976), aff'd 550 F.2d 974, 95 LRRM 2021 (4th Cir. 1977); Soule Glass and Glazing Co. v. NLRB, 652 F. 2d 1055, 107 LRRM 2781, 2786-2787 (1st Cir. 1981); NLRB v. Iron Workers, Local 433, 600 F.2d 770, 101 LRRM 3119 (9th Cir. 1979), cert. den. 445 U.S. 915 (1980); Alexander Dawson, Inc. v. NLRB, 586 F.2d 1300, 99 LRRM 3105 (9th Cir. 1978); NLRB v. Sunnyland Packing Co., 557 F.2d 1157, 96 LRRM 2047 (5th Cir. 1977); Thompson Transport Co., Inc. v. NLRB, 421 F.2d 154, 73 LRRM 2387 (10th Cir. 1970); American Boiler Manufacturers Ass'n v. NLRB, 404 F.2d 547, 69 LRRM 2851 (8th Cir. 1968), cert. denied. 398 U.S. 960, 74 LRRM 2420 (1970). This approach insures that a respondent has had notice of what is in issue and a fair opportunity to present a defense. Soule Glass and Glazing Co. v. NLRB, supra.

We have twice implicitly followed the Board's approach in finding a violation when an issue in dispute has been fairly and fully litigated, albeit not specifically pleaded. In re Salem County Bd. for Vocational Ed., supra; In re Englewood Bd. of Ed., H.E. No. 76-2, at p. 21, n. 15, P.E.R.C. No. 76-18, 2 NJPER 53 (1976). We explicitly embrace this approach now and find that the parties fully and fairly litigated the facts and law concerning the president's statements.

At the first hearing session, Collingwood testified that the Board president, who was upset at the presence of an NJEA representative at a negotiations meeting, told her that she was "...nothing but a liar, a troublemaker and [that] if he had his way [she] would not be employed by the school system,

that [she] would have been fired a long time ago." She further testified that the superintendent then produced a copy of his letter to Collingwood detailing her faults and threatening her dismissal. The NJEA representative subsequently sent the Board president a letter objecting to his statement to Collingwood. The Board's attorney cross-examined Collingwood concerning the meeting.

At the beginning of the second day of hearing, the Board moved to dismiss, asserting that there was not a prima facie case. The Board subsequently submitted a brief in which it stated that "[t]he sole and exclusive actions complained of in the instant matter is the utterance of [superintendent] Costello's letter dated September 29, 1980, and the statement of personal opinion by [Board president] Perielli." The Board argued that its president's statement did not violate the Act because it was constitutionally protected and had not resulted in an adverse action. Thus, the Board itself framed and litigated its president's statement as one of the two main issues in the case.

In denying the motion to dismiss, H.E. No. 82-28, supra, the Hearing Examiner identified the following issues:

THE ISSUES

1. Has the Charging Party presented a prima facie case of alleged violations of the Act by the Respondent, i.e., (a) the issuance of Superintedent Costello's letter to Collingwood on September 29, 1980 (CP-1) and (b) the statement of Board President Perrelli to Collingwood on December 11, 1980 at a negotiations meeting?

2. Were the actions of Costello and Perrelli protected by the First Amendment to the United States Constitution?
(Footnote omitted)

He specifically observed that the Board had litigated, at the hearing and in its brief, the president's statements, found a prima facie violation of the Act based on the threat contained in this statement, and directed the Board to present its defense concerning this statement at the next hearing session.

At the third day of hearing, the Board put on its case. The superintendent testified concerning the negotiations meeting at which the president made his statement. The charging parties called the NJEA representative at that meeting on rebuttal; he corroborated Collingwood's testimony. After he did so, the Board objected, for the first time, to continued questioning concerning the president's statement. The Hearing Examiner, determining that the objection came after the matter had been extensively litigated and hence too late, overruled the objection. Cross-examination of the NJEA representative concerning the statement ensued.

Under all these circumstances, we believe that the Board knew that the statement of its president was in issue and presented its defense concerning this statement. The Board's objection to this testimony came far too late, after the Board itself had identified the statement as an issue in the case and after the statement had been extensively litigated. Accordingly, we uphold the finding of an unfair practice based on the threat made by the Board president.

Based upon the foregoing discussion, we dismiss the Board's Exceptions and adopt the Hearing Examiner's recommendations

concerning the liability of the Board.[7/] Since neither party has excepted to his proposed remedy, we also adopt the recommended order. We explicitly add, however, that the order applies to the Board's representatives and agents.[8/]

ORDER

The Commercial Township Board of Education, its representatives and agents are ordered to,

A. 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 issuing letters containing threats of future discipline to employees for the exercise of protected activity, such as that engaged in by Darlene Collingwood, or by the making of threatening statements to representatives of the Association at collective negotiations sessions.

7/ The Board has not excepted to the Hearing Examiner's conclusion that its superintendent would not have written the letter and its president would not have made his statement in the absence of Collingwood's protected activity. The record demonstrates the correctness of this conclusion. The Board did not introduce any evidence, besides paragraph 4 in the superintendent's letter, suggesting that Collingwood's performance as a playground aide was deficient.

8/ The requirement that the offending letter be removed from any file maintained for Collingwood should impose no burden on the Board since the superintendent testified that it was his intention to remove the letter from his grievance file within 90 days if Collingwood made the contemplated improvement. According to the superintendent, she did. In any event, our order should not be read as precluding the Board from keeping a memorandum reflecting the incidents of alleged misconduct described in the fourth paragraph of the superintendent's letter.

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 issuing letters containing threats of future discipline to employees for the exercise of protected activity, such as that engaged in by Darlene Collingwood, or by the making of threatening statements to representatives of the Association at collective negotiations sessions.

B. Take the following affirmative action:

1. Forthwith remove from any file maintained for Darlene Collingwood any copy or copies of CP-1, the letter from superintendent Costello to Darlene Collingwood dated September 29, 1980.

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

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

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Graves, Hartnett and Suskin voted in favor of the decision. None opposed. Commissioners Hipp and Newbaker abstained.

DATED: Trenton, New Jersey
September 14, 1982
ISSUED: September 15, 1982

"APPENDIX A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce employees in the exercise of the rights guaranteed to them by the Act, particularly, by issuing letters containing threats of future discipline to employees for the exercise of protected activity, such as that engaged in by Darlene Collingwood, or by the making of threatening statements to representatives of the Association at collective negotiations sessions.

WE WILL NOT discriminate 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 issuing letters containing threats of future discipline to employees for the exercise of protected activity, such as that engaged in by Darlene Collingwood, or by the making of threatening statements to representatives of the Association at collective negotiations sessions.

WE WILL forthwith remove from any file maintained for Darlene Collingwood any copy or copies of CP-1, the letter from Superintendent Costello to Darlene Collingwood dated September 29, 1980.

COMMERCIAL TOWNSHIP 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, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

COMMERCIAL TOWNSHIP PUBLIC SCHOOLS
R.D. 1 — PORT NORRIS, NEW JERSEY 08349

10-5-81
CP-1 Ev.
R.H.

ORLANDO R. COSTELLO
Superintendent

Telephone (609) 785-0222

September 29, 1980

Mrs. Darlene Collingwood
6 So. Market Street
Port Norris, N.J. 08349

Dear Mrs. Collingwood:

This is to inform you of my great dissatisfaction for your behavior as a school aide. I tried to be tolerant expecting that you would soon adjust to your transfer to the Haleyville-Mauricetown School. However, I was wrong, especially after receiving an account of your recent behavior during a conference with your principal on September 25, 1980.

The poor behavior and attitude which you have displayed since your recent transfer has been the subject for much discussion with both your building principal and our Board of Education. I am now advising you that you have ninety days (90) in which to improve your attitude, behavior and acceptance of your responsibility. If substantial improvement is not evident by January 5, 1981 I will recommend your dismissal to the Commercial Township Board of Education.

The following is a list of behavior patterns that are unacceptable and suggestions to be followed to insure improvement.

1. Harassment of members of the Board of Education and Administration.

While there is no objection to your being friendly to members of the Board, you should not discuss school business in the hopes that your position would be easier and more secure. You must follow the Chain of Command which is part of the Organizational Chart (enclosed). Your telephone calls to Board members to inform them of your problems is most annoying and causes many problems for the Administration. Your telephone calls which reflect school business must stop.

2. Your failure to use the negotiated Grievance Procedure properly.

On several occasions you followed procedures to review problems that are completely outside the realm of negotiated procedures.

a. Specifically your letter to Mr. Killeen on July 18, 1980.
b. Especially my response to your letter of July 23, 1980, dated July 28, 1980.

Orlando R. Costello

c. My letter to you dated August 13, 1980.
d. Mr. Killeen's letter to you dated August 20, 1980.
e. Your letters of August 19, 1980 to me concerning pay days and informing me that you were at step level 2 of the grievance procedure.

3. Threats to the administration must stop. Specifically your letter to me on August 19, 1980.

Again, if you have to review any problem, please contact your principal first. Please do not bring up matters that have been resolved. A continual repeat of your personal concerns is aggravating and takes up entirely too much administrative time.

4. You have been insubordinate many times. Insubordination must stop. I refer to your meeting with Mr. Ballard on September 23, 1980 when you stated that you will visit employees of the school system whenever you pleased but that you will tell him when you will visit.

You are advised that at the conclusion of your responsibility you must leave the building and not disturb other employees as they go about their work. Union business must be conducted outside of regular working hours.

At that meeting you were told that your job was to monitor students at lunch and you could not be doing that if you are sitting at a table conferring with other aides.

I was informed that you laughed at that, stating that it was stupid to circulate among children.

You must follow the directions of your immediate supervisor. That is your job here.

5. You continually try to find situations that can be turned into controversy. You are aware or were made aware that all salaries of members of the Supportive Staff were negotiated and agreed upon. Yet you continually impress your own views upon members of your union stating that salaries are unfair.

You are advised not to upset members of the Supportive Staff by telling one member that another member receives more money. Please, live with the negotiated rates. If they are unfair then make an attempt to renegotiate them properly.

6. I have been informed that you openly discuss school matters in public at a local store.

While I cannot document number six I urge you to stop this practice if it is true. School matters are to remain in school. If you cannot leave school matters in the school then I question your continuance as a school employee.

While these charges are many, little effort on your part is required to correct them. You are reminded that we should both be concerned with the welfare of little children. Our behavior and attitudes reflect upon them. Therefore, I repeat, you as a school aide must perform your duties in a responsible manner and stop, what appears to be a common practice of yours, making people around you unhappy with your continual griping.

If you have problems with which the administration can help please review these with your building principal.

Sincerely yours,

Orlando R. Costello

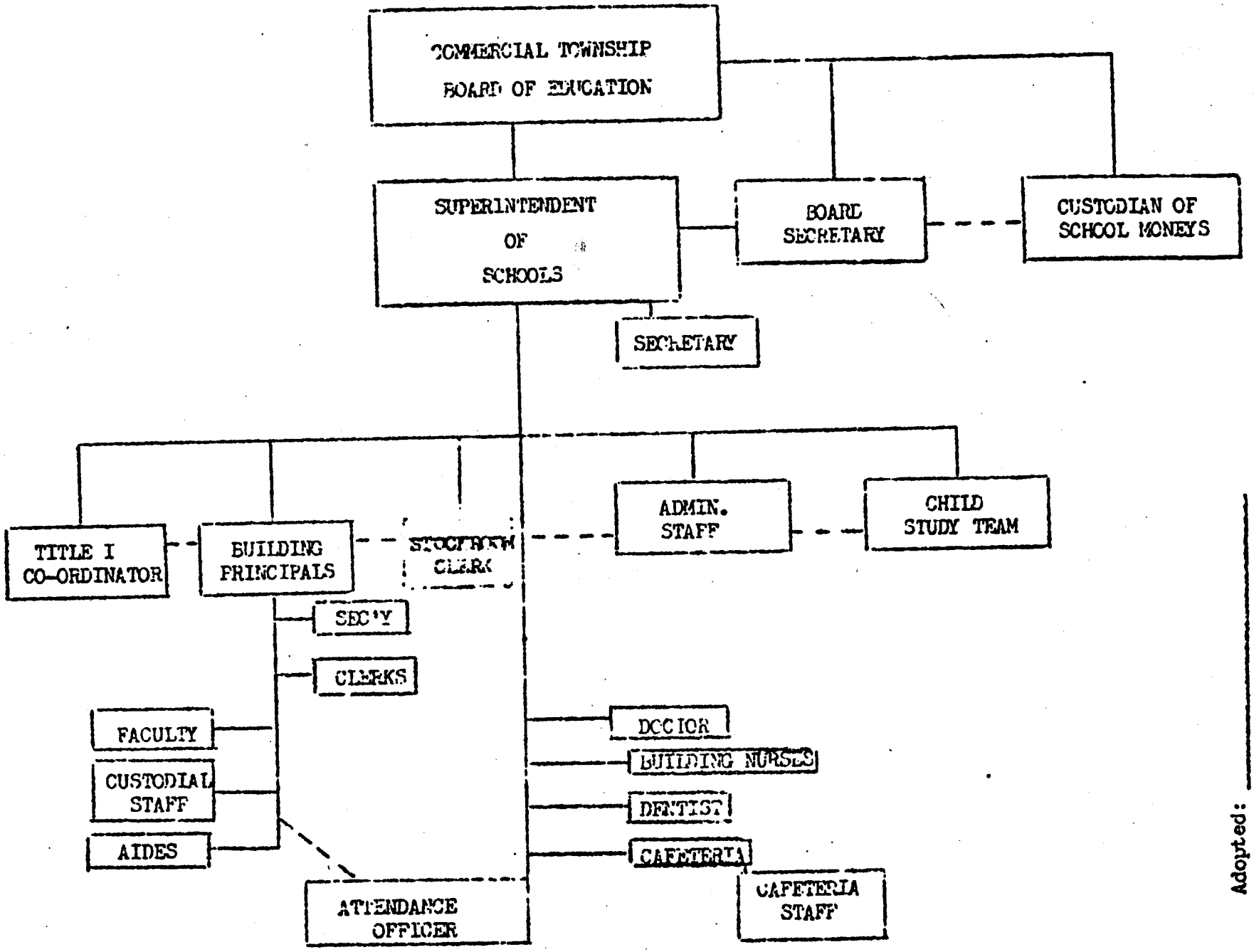
Orlando R. Costello
Superintendent

ORC/slp

cc: Barry Ballard, Principal
Board Secretary
President of the Board of Education
Vice President of the Board of Education
File

Enclosure

COMMERCIAL TOWNSHIP PUBLIC SCHOOLS ORGANIZATION CHART



Adopted: _____

H.E. No. 82-16

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

In the Matter of

COMMERCIAL TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-81-271-171

COMMERCIAL TOWNSHIP SUPPORTIVE STAFF ASSOCIATION
& DARLENE COLLINGWOOD,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission denies a motion by the Respondent Board to dismiss unfair practice charges filed by the Charging Party. The Respondent had contended that the attorney for the Charging Party did not properly certify the statements in the Unfair Practice Charge as true to the best of his knowledge, information and belief. The Hearing Examiner, in agreement with the Charging Party, found that the New Jersey Court Rules provided adequate precedent for the sufficiency of a certification by the attorney for the Charging Party who, by so certifying, represents that he has read the charge and that to the best of his knowledge, information and belief there is good ground to support it.

H.E. No. 82-16

STATE OF NEW JERSEY
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COMMERCIAL TOWNSHIP SUPPORTIVE STAFF ASSOCIATION
& DARLENE COLLINGWOOD,

Charging Party.

Appearances:

For the Commercial Township Board of Education
Barbour & Costa, Esqs.
(John T. Barbour, Esq.)

For the Charging Party
Selikoff & Cohen, Esqs.
(Steven R. Cohen, Esq.)

DECISION AND ORDER ON
RESPONDENT'S MOTION TO DISMISS

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on March 30, 1981 by the Commercial Township Supportive Staff Association and Darlene Collingwood (hereinafter the "Charging Party" or the "Association") alleging that the Commercial Township Board of Education (hereinafter the "Respondent" or the "Board") had 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. (hereinafter the "Act"), in that the Respondent sent a letter dated September 29, 1980 to Darlene Collingwood, the President of the Association, the content and tenor of which intimidated Collingwood and interfered with the exercise of rights protected by the Act, namely, carrying out the duties and responsibilities of the office of President of the Charging Party, all which was alleged to be a violation of N.J.S.A. 34:13-5.4(a)(1) and (3)

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 June 17, 1981. Pursuant to the Complaint and Notice of Hearing a hearing was held on October 5, 1981 in Trenton, New Jersey, at which time the Charging Party was given an opportunity to examine witnesses and present relevant evidence. At the conclusion of the Charging Party's case the Respondent made a Motion to Dismiss on the record. Thereafter the matter was adjourned to December 4, 1981. In the intervening period, the parties filed briefs on the Respondent's Motion to Dismiss, the last brief being filed by the Charging Party on October 29, 1981.

DISCUSSION

The Respondent's Motion to Dismiss is predicated on a very narrow ground, namely, that counsel for the Charging Party, in certifying that the statements in the Unfair Practice Charge are true, was remiss in not having the requisite basis for certifying that the statements are true to the best of his knowledge and belief and without having disclosed the source of the information and knowledge and the grounds of belief.

The Respondent's argument may be summarized as follows: (1) hearsay is incompetent in an affidavit and allegations of fact in an affidavit, if claimed to be based on information and belief, without giving the source of the information and the grounds of belief are insufficient; (2) affidavits in a judicial proceeding must contain competent factual evidence based upon personal knowledge; and (3) issuance of a Complaint and Notice of Hearing is a quasi-judicial act and is subject to the foregoing requirements as in any judicial proceeding.

1/ These Subsections prohibit public employers, their agents or representatives from:

"(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.

"(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act."

The Charging Party responds to the contentions of the Respondent as follows: (1) counsel for the Charging Party is not required to make an affidavit to the Unfair Practice Charge and, therefore, the rules governing affidavits are inapposite; (2) the New Jersey Court Rules 1:4-7 and 1:4-8 indicate that pleadings need not be verified unless ex parte relief is sought or a rule or statute otherwise provides; and (3) the signature of an attorney on pleadings "constitutes a certification by him that he has read the pleadings or motion; to the best of his knowledge, information and belief there is good ground to support it; that it does not contain scandalous or indecent matter; and that it is not interposed for delay..."

The Hearing Examiner, after fully considering the arguments and contentions of the parties in their respective briefs is clearly persuaded that the Respondent's Motion to Dismiss must be denied. The Charging Party correctly cites as precedent the New Jersey Court Rules, supra, which distingush between an affidavit and a certification by an attorney. In signing his name to the instant Unfair Practice Charge clearly counsel certified only that the statements made by him are true.

There is no requirement that an affidavit must be utilized in order for there to be a valid Unfair Practice Charge for ajudication by the Commission. Further, there is no requirement whatever, either in the charge form or in any rule of the Commission, that the source of information or grounds of belief be disclosed. The cases cited by the Respondent are clearly inapposite to the instant Motion to Dismiss.

For all the foregoing reasons, the Hearing Examiner makes the following:

ORDER

The Respondent's Motion to Dismiss is denied and the Respondent will be required to present its defense(s) at the next scheduled hearing on December 4, 1981 in Trenton, New Jersey.

Dated: November 6, 1981
Newark, New Jersey

Alan R. Howe
Hearing Examiner

H.E. No. 82-28

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

In the Matter of

COMMERCIAL TOWNSHIP BOARD OF EDUCATION

Respondent,

-and-

Docket No. CO-81-271-171

COMMERCIAL TOWNSHIP SUPPORTIVE STAFF ASSOCIATION
& DARLENE COLLINGWOOD,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission denies the Respondent's Motion To Dismiss for the reason that the Charging Party at the conclusion of its case had presented prima facie evidence of a violation by the Respondent of Sections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act. The Charging Party had demonstrated to the satisfaction of the Hearing Examiner that Collingwood's exercise of the protected activity of filing a grievance and making complaints regarding terms and conditions of employment was a "substantial factor" or "motivating factor" in the Superintendent's action of issuing a letter on September 29, 1980 threatening future discipline. The Hearing Examiner also found that threats to Collingwood regarding her employment status by the Board's President at a negotiations meeting on December 11, 1980 were likewise illegally motivated. Finally, the Hearing Examiner rejected the Respondent's contention that the actions of its Superintendent and President were constitutionally protected as the legitimate exercise of free speech.

H.E. No. 82-28

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

In the Matter of

COMMERCIAL TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-81-271-171

COMMERCIAL TOWNSHIP SUPPORTIVE STAFF ASSOCIATION
& DARLENE COLLINGWOOD,

Charging Party.

Appearances:

For the Commercial Township Board of Education
Barbour & Costa, Esqs.
(John T. Barbour, Esq.)

For the Charging Party
Selikoff & Cohen, Esqs.
(Steven R. Cohen, Esq.)

DECISION AND ORDER ON
RESPONDENT'S SECOND MOTION TO DISMISS

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on March 30, 1981 by the Commercial Township Supportive Staff Association and Darlene Collingwood (hereinafter the "Charging Party" or the "Association") alleging that the Commercial Township Board of Education (hereinafter the "Respondent" or the "Board") had 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. (hereinafter the "Act"), in that the Respondent sent a letter dated September 29, 1980 to Darlene Collingwood, the President of the Association, the content and tenor of which intimidated Collingwood and interfered with the exercise of rights protected by the Act, namely, carrying out the duties and responsibilities of the office of President of the Charging Party, all which was alleged to be a violation of N.J.S.A. 34:13-5.4(a)(1) and (3)

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 June 17, 1981. Pursuant to the Complaint and Notice of Hearing, a hearing was held on October 5, 1981 in Trenton, New Jersey, at which time the Charging Party was given an opportunity to examine witnesses and present relevant evidence. At the conclusion of the Charging Party's case on October 5, 1981 the Respondent made its first Motion to Dismiss on the record. Thereafter the matter was adjourned to December 4, 1981. In the intervening period, the parties filed briefs on the Respondent's Motion to Dismiss. The Motion to Dismiss was denied on November 6, 1981: H.E. No. 82-16.

At the hearing on December 4, 1981 the Respondent made a second Motion to Dismiss on the record. Briefs were filed by January 7, 1982. For the reasons hereinafter set forth the second Motion to Dismiss is denied.

For purposes of disposing of the Motion, the Hearing Examiner makes the following interim:

FINDINGS OF FACT[2/]

1. The Commercial Township Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Commercial Township Supportive Staff Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. Darlene Collingwood is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

1/ These Subsections prohibit public employers, their agents or representatives from:

"(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.

"(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act."

2/ In making these findings the Hearing Examiner is guided by Commission decisions in Township of North Bergen, P.E.R.C. No. 78-28, 4 NJPER 15 (1977) and New Jersey Turnpike Authority, et al., P.E.R.C. No. 79-81, 5 NJPER 197 (1979).

4. Collingwood was hired in September 1976 by the Board as a Playground Aide. She held no office in the Association until she was elected President in May 1980.

5. After Collingwood became President she served on the Association's Negotiations Committee and, in general, discharged the duties of the office of President of the Association.

6. On July 18, 1980 Collingwood, as President, sent a letter to Michael P. Killeen, the Principal of the Port Norris Elementary School, in which she raised a series of seniority and hours problems of the Aides at the Port Norris Elementary School and at the Haleyville-Mauricetown Elementary School (CP-2). More specifically, Collingwood questioned the reduction in hours of certain Aides as being inconsistent with a resolution of the Board on April 8, 1980 (CP-3), which set forth the specific hours of named Aides. Collingwood requested the reinstitution of the position of one 4-hour Aide position and also made reference to one 4-hour Aide having lost hours plus benefits.

7. Under date of July 23, 1980 Collingwood sent to the Superintendent, Orlando R. Costello, a letter (CP-4) setting forth identically the matters contained in her letter to Killeen (CP-3, supra).

8. Under date of July 28, 1980 Costello sent a letter to Collingwood in response to CP-4, in which he stated that the reduction in Aides was because of a recent budget defeat and that contract seniority procedure had been followed (CP-5). Costello also pointed out to Collingwood that she was not following the grievance procedure inasmuch as her predecessor, Nancy Dawson, had initiated a grievance involving the same subject matter in May 1980 and had abandoned it.

9. On August 11, 1980 Collingwood wrote to Costello requesting a meeting with the Board "... in reference to a grievance that the Supportive Staff feels still exist (sic) ..." (CP-6).

10. Under the date of August 13, 1980 Costello wrote to Collingwood denying

her request for a meeting with the Board (CP-7). He again reminded her about her failure to comply with the grievance procedure, citing the 10-working day provision for the initiation of a grievance after its alleged occurrence.

11. On August 10, 1980 Collingwood had written to Killeen raising a level one grievance regarding the position of an Aide (CP-9). Collingwood urged that due to seniority a Mrs. Bradway should receive a certain a 3-hour position because she was a senior employee to a Mrs. Bellinger.

12. Under date of August 20, 1980 Killeen responded to Collingwood rejecting her contention that she had a right to raise a level one grievance at this time, in view of the prior action of Dawson in May 1980, which was abandoned (CP-8). Killeen, however, invited Collingwood to meet with him if she wished to do so.

13. On August 19, 1980 Collingwood had written to Costello regarding his denial of her request for a meeting with the Board (CP-10). Collingwood stated that she would thus have to attend a public meeting of the Board and said that "If you would like to see this matter get into the newspapers we can arrange for this to be done."

14. Also, On August 19, 1980 Collingwood wrote to Costello pursuant to level two of the grievance procedure raising again the issue of Bradway not having been given a 3-hour Aide position based on her being senior to Bellinger (CP-11).

15. Also, On August 19, 1980 Collingwood wrote to Costello regarding pay for the Aides, citing the contract provision which requires that Aides be paid on the fifteenth and thirtieth day of each month (CP-12).

16. On September 29, 1980 Costello sent a letter to Collingwood (CP-1), which indicated a copy to "file," expressing great disatisfaction as to her behavior as a school aide and giving her 90 days in which "... to improve your attitude, behavior and acceptance of your responsibility. If substantial improvement is not evident by January 5, 1981 I will recommend your dismissal to the Commercial Township Board of Education." Costello then listed on two succeeding pages the specifics of

his dissatisfaction with Collingwood, which the Hearing Examiner preliminarily finds were substantially directed to Collingwood in her capacity as President of the Association. For example, Costello cited "Harrassment of members of the Board of Education and Administration." Collingwood acknowledged that she spoke with two members of the Board of Education during the Summer of 1980, Noah J. Beachaump and Mary Carmichael, regarding reductions in staff contrary to seniority. Costello also stated that she failed to use the negotiated grievance procedure properly and outlined the various letters that Collingwood had sent to Killeen and to Costello in July and August (CP-2, CP-4, CP-6, CP-9, CP-10, CP-11 and CP-12, supra). Costello further stated that Collingwood's insubordination must cease, referring to a meeting with Barry L. Ballard, the Principal of Haleyville-Mauricetown Elementary School, on September 23, 1980 (CP-12 and CP-14). Finally, Costello remonstrated with Collingwood that she should not discuss school matters in public at a "local store." Collingwood acknowledged that she had spoken of dissatisfaction with the Board and Administration to a candidate for election to the Board, Guy Chamberlain, but insisted that she did not convey any confidential information.

17. On October 10, 1980 Collingwood sent a memo to Costello stating that the Association would like to commence negotiations for the 1981-82 successor agreement (CP-15).

18. On December 11, 1980, at a negotiations meeting between the parties, the President of the Board, James M. Perrelli, personally attacked Collingwood as being "... nothing but a liar, a troublemaker ..." and "If he had his way that I would not be employed by the school system, that I would have been fired a long time ago ..." (1 Tr. 54). In the course of Perrelli's outburst Costello went to his desk and pulled out a copy of CP-1, supra, and threw it in front of Arthur E. Knudsen, an N.J.E.A. Negotiation Consultant, requesting that Knudsen read it. Knudsen replied that he was familiar with the letter and subsequently objected in writing in a letter to Perrelli regarding the latter's conduct on December 11,

1980 (CP-16).

19. Prior to the receipt of CP-1, supra, Collingwood had never been disciplined in any manner by the Board nor had any adverse material been placed in her personnel file. Further, Collingwood has not been disciplined since CP-1, supra, notwithstanding Costello's threat therein to recommend her termination by January 5, 1981.

20. Collingwood acknowledged on cross-examination that she was not claiming that there has been any pattern of employer conduct against officers of the Association (1 Tr. 65, 66) or that other persons who negotiated or presented grievances had been disciplined (1 Tr. 93, 94).

THE ISSUES

1. Has the Charging Party presented a prima facie case of alleged violations of the Act by the Respondent, i.e., (a) the issuance of Superintendent Costello's letter to Collingwood on September 29, 1980 (CP-1) and (b) the statement of Board President Perrelli to Collingwood on December 11, 1980 at a negotiations meeting?[3/]

2. Were the actions of Costello and Perrelli protected by the First Amendment to the United States Constitution?

DISUCSSION AND ANALYSIS

The Applicable Standard on a Motion To Dismiss

The Commission in New Jersey Turnpike Authority, et al.,[4/] amplified upon the standard that it had enunciated in Township of North Bergen,[5/] with respect to the applicable standard on a Motion to Dismiss made at the conclusion of the Charging Party's case. The Commission there restated that it utilizes the standard set forth by the New Jersey Supreme Court in Dolson v. Anastasia, 55 N.J. 2 (1969). The Commission observed that:

3/ Although the Unfair Practice Charge does not specifically allege a violation of the Act by Perrelli's conduct on December 11, 1980, it was litigated and the Respondent defends as to Perrelli in its brief (pp. 4, 9, 12).

> "...Therein the Court declared that when ruling on a motion for involuntary dismissal (at the close of the plaintiff's case) the trial court 'is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion' (emphasis added). Unlike a number of other jurisdictions, New Jersey Courts have consistently held that before a motion for involuntary dismissal will be granted the moving party must demonstrate that not even a scintilla of evidence exists to support the plaintiff's case. Thus, while the process does not involve the actual weighing of evidence...some consideration of the worth of the evidence presented may be necessary. This is particularly true in the administrative context where evidence, which would ordinarily be ruled inadmissible by a trial court may, under In re Application of Howard Savings Bank, 143 N.J. Super. 1 (App. Div. 1976), be allowed in at an administrative hearing..." (5 NJPER at 198)6/ (Emphasis supplied).

Having set forth the applicable standard on a Motion to Dismiss at the conclusion of the Charging Party's case, the Hearing Examiner now turns to a consideration of the evidence presented by the Charging Party in the light of the governing legal authorities.

The Respondent's Motion To Dismiss Is Denied Since The Charging Party Has Presented A Prima Facie Case Of Alleged Violations Of The Act By The Respondent, i.e., The Issuance Of Costello's Letter To Collingwood On September 29, 1980 And Perrelli's Statement To Collingwood At The December 11, 1980 Negotiations Meeting

The Hearing Examiner is persuaded that the Charging Party has adduced more that a "scintilla" of evidence that the Respondent violated Subsections(a)(1) and (3) of the Act by the actions of Costello and Perrelli. Additionally, as will be discussed hereinafter, the actions of Costello and Perrelli were not protected by the First Amendment to the United States Constitution.

The Respondent first cites Black Horse Pike Regional Board of Education, P.E.R.C. No. 82-19, 7 NJPER 502 (1981) for the proposition that the Commission

6/ The Commission then proceeded to consider the matter of the weight to be given hearsay evidence, which is not involved in the instant case.

has held that letters such as CP-1 are not per se violations of the Act. Respondent further seeks to distinguish the instant case from Black Horse, where a violation was found, on the ground that the Charging Party herein has failed to adduce evidence that CP-1 was placed in Collingwood's personnel file. The Hearing Examiner, however, concludes that he may draw a reasonable inference that CP-1 was placed in Collingwood's personnel file, and, in so concluding, relies upon the following:

a. CP-1 was addressed by Costello to Collingwood as an individual employee and not as the President of the Association. This is confirmed in the first paragraph by his reference to "great dissatisfaction" regarding her "behavior as a school aide." In the second paragraph he states that her "poor behavior and attitude" has been the subject of much discussion "with both your building principal and our Board of Education" and then Costello advises Collingwood that she has 90 days in which to improve your "attitude, behavior and acceptance of ... responsibility." The second paragraph concludes with the statement that if "substantial improvement is not evident by January 5, 1981" Costello will recommend her dismissal to the Board of Education.

b. Item 4 of CP-1 (p.2) refers to many instances of insubordination, particularly a meeting with Barry Ballard, Collingwood's Principal, on September 23, 1980.

c. The final page of CP-1 (p.3) significantly shows a copy to "File" together with copies to Barry Ballard, Principal, the Board Secretary, and the President and Vice President of the Board of Education.

d. CP-1 was given to Collingwood by Barry Ballard, her Principal, with no discussion.

It may be true that after the Respondent has presented its case the Hearing Examiner will reach a different conclusion as to whether or not CP-1 was placed in Collingwood's personnel file.

The Hearing Examiner now turns to a detailed analysis of the six items in CP-1 wherein Costello states that Collingwood's "behavior patterns... are unacceptable." In dealing with these complaints, the Hearing Examiner will consider the parties' arguments as to whether or not a given item does or does not constitute the exercise of a protected activity by Collingwood.

ITEM 1. Harassment of members of the Board of Education and Administration

Costello here complains that Collingwood's telephone calls to Board members "to inform them of your problems" is annoying and causes many problems for the Administration. He concludes with the statement that Collingwood's telephone calls "which reflect school business must stop." Collingwood acknowledged that during the Summer of 1980 she spoke with two members of the Board regarding reductions in staff contrary to seniority (see Finding of Fact No. 16, supra).

The Hearing Examiner notes that the 1979-81 collective negotiations agreement (J-1) contains in Article XII, "Seniority," a provision that for purposes of lay off the Board shall utilize seniority within the job category with the person having the shortest length of service being the first laid off. Thus, it would appear that Collingwood was arguably addressing two Board members regarding a seniority concern that had a substantive underpinning in the agreement.

At this juncture the Hearing Examiner refers to the Commission's decision in North Brunswick Township Board of Education, P.E.R.C. No. 79-14, 4 NJPER 451 (1978), aff'd App. Div. Docket No. A-698-78 (1979) where the Commission said:

> "...individual employee conduct, whether in the nature of complaints, arguments, objections, letters or other similar activity relating to enforcing a collective negotiations agreement or existing working conditions in a recognized or certified unit, constitute protected activities under our Act..." (4 NJPER at 453, f.n. 16).

It appearing to the Hearing Examiner that Collingwood was plainly exercising protected activity in her conversations with two members of the Board there remains only the question as to whether or not she had a right to speak

to members of the Board other than at public meeting.

The Charging Party's citation of City of Hackensack, P.E.R.C. 78-71, 4 NJPER 190 (1978) presents a factual situation closely analogous to the facts in the instant case. In that case the President of the Union wrote to the Mayor expressing displeasure over the unsafe conditions of fire patrol vehicles. The Commission, in finding that a threat of future discipline for such activity was a violation of the Act, said that:

> "...The presentation of a position to an elected official concerning a term and conditions of employment, employee safety, is indisputably a protected activity (citing decisions from the private sector)..." 4 NJPER at 191.

See also, Laurel Springs Board of Education, P.E.R.C. 78-4, 3 NJPER 228 (1977): the right of a public employee to speak at a public meeting of the Board.

ITEM 2. Your failure to use the negotiated Grievance Procedure properly.

Here Costello complains about various letters that Collingwood sent to Killeen and to Costello in July and August of 1980 (CP-2, CP-4, CP-6, CP-9, CP-10, CP-11 and CP-12, supra).

The Hearing Examiner has dealt in detail with these letters in Findings of Fact Nos. 6, 7, 9, 11, 13-15, supra. In summary: (1) Collingwood complained to Killeen and Costello, both within and outside of the Grievance Procedure, regarding seniority and hours problems of the Aides, questioning whether the reduction in hours of certain Aides was consistent with a Board resolution of April 8, 1980 (CP-3); (2) Collingwood on August 10, 1980 raised a level one grievance with Killeen based on the greater seniority of a Mrs. Bradway, stating that she should receive a certain 3-hour position, and then raised the matter to a level two grievance on August 19, 1980 with Costello; and (3) on August 19, 1980 Collingwood wrote to Costello regarding the frequency of pay for Aides, citing Article VIII, B, 1 of the Contract (J-1) which requires that Aides be paid on the fifteenth and thirtieth day of each month.

While it is true that Killeen and Costello both wrote to Collingwood, stating that she was not following the Grievance Procedure of J-1, either because she was raising a matter previously grieved upon by her predecessor, Nancy Dawson, or that she had exceeded the 10-day limit for raising a grievance (CP-5, CP-7 and CP-8), there can be no doubt but what Collingwood during July and August 1980 raised a series of matters involving terms and conditions of employment of Aides in the collective negotiations unit. Plainly, Collingwood was engaged in protected activities either by "...complaints, arguments, objections, letters..." or by the one formal grievance, which she raised with Killeen and Costello on August 10 and 19, 1980: North Brunswick Township Board of Education, supra, and Lakewood Board of Education, P.E.R.C. No. 79-17, 4 NJPER 459 (1978).

Although the Respondent may be correct that Collingwood's objections involved, in part, a reduction in force, which is non-negotiable, either as to decision or impact,[7/] the Hearing Examiner elects to adopt the argument of the Charging Party that if, indeed, Collingwood was objecting to a non-negotiable subject, the New Jersey Supreme Court and the Commission have recognized such activity as legitimate: See Board of Education of Township Bernards v. Bernards Township Education Association, 79 N.J. 311, 325, 326 (1979) and Salem County Board for Vocational Education v. McGonigle, P.E.R.C. No. 79-99, 5 NJPER 239, 240 (1979), aff'd. App. Div. Docket No. A-3417-78 (1980).

There is no Commission precedent holding that the filing of a grievance over the same subject matter is not a protected activity. The Respondent erroneously cites the City of Hackensack, P.E.R.C. No. 78-30, 4 NJPER 21 (1977) as standing for the proposition that there is no protected right to bring up matters that have

7/ Union Co. Reg. H.S. Bd. of Ed. v. Union Co. Reg. H.S. Teachers Ass'n, 145 N.J. Super. 435 (App. Div. 1976) and Maywood Bd. Ed., 168 N.J. Super. 45 (App. Div. 1979), cert. den. 81 N.J. 292 (1979).

previously been processed in accordance with the collectively negotiated grievance procedure as a new grievance (Respondent's brief, pp. 10, 11).

ITEM 3: Threats to the Administration must stop.

Here Costello refers to Collingwood's letter to him of August 19, 1980 (CP-10). Collingwood had written to Costello regarding his denial of her request for a meeting with the Board. She then said to Costello that if he would like to see the matter get into the newspapers "...we can arrange for this to be done." (See Finding of Fact No. 13, supra).

The Hearing Examiner finds that Collingwood's statement does not rise to the level of a threat inasmuch as the "newspapers" have as much right as a public employee to attend a public meeting of the Board. Collingwood can hardly be charged with a threat to do that which, if done, would not be illegal, namely, arranging for the presence of the newspapers at a public Board meeting. See Laurel Springs Board of Education, supra.

ITEM 4: You have been insubordinate many times. Insubordination must stop.

Collingwood acknowledged that prior to September 23, 1980 she had been remiss in not asking her Principal, Barry Ballard, for permission to visit employees during working hours. She testified that on and after September 24, 1980 she always asked his permission. Collingwood denied ever stating that it was stupid to circulate among children and, also, denied laughing at anything Ballard said to her at the meeting.

There is no element of protected activity involved in Collingwood's alleged insubordination.

ITEM 5: You continually try to find situations that can be turned into controversy.

The gravaman of this paragraph of CP-1 is that Collingwood is guilty of creating dissatisfaction among the Aides and implicitly as a result files complaints, grievances, etc.

The Hearing Examiner finds that this area of CP-1 is closely akin to Item 2,

supra, and, therefore, involves the exercise of protected activity by Collingwood for the reasons stated above under Item 2.

ITEM 6. Discussing school matters in public at a local store.

Collingwood acknowledged that she had spoken of dissatisfaction with the Board and the Administration to a candidate for election to the Board, Guy Chamberlain, but insisted that she did not convey any confidential information to him.

The Hearing Examiner finds this conduct of Collingwood marginal as to whether or not it was a protected activity. The fact that Chamberlain was a candidate for election to the Board arguably brings Collingwood's conduct under the protective wing of City of Hackensack, supra and Laurel Springs Board of Education, supra.

The Hearing Examiner next takes up the statement of Costello in the second paragraph of CP-1 that Collingwood had 90 days to improve her attitude, behavior and acceptance or responsibility, and that if improvement was not evident by January 5, 1981, Costello would recommend her dismissal to the Board of Education. The Hearing Examiner finds and concludes that this statement by Costello constitutes a threat of future discipline. Since the Commission has found that threats of future discipline for the exercise of protected activities constitute unfair practices under either Subsection(a)(1) and/or Subsection(a)(3) of the Act, the Charging Party has made a prima facie case of such violation in the instant case: City of Hackensack, supra; Hamilton Township Board of Education, P.E.R.C. No. 79-59; 5 NJPER 115 (1979); Trenton Board of Education, P.E.R.C. No. 80-130, 6 NJPER 216 (1980); and Black Horse Pike Regional Board of Education, supra. The fact that Collingwood was never disciplined on and after January 5, 1981 is irrelevant. She was under the threat of discipline on and after September 29, 1980 (CP-1) and this threat would necessarily have a chilling effect on Collingwood's exercise of protected activities in violation of Subsection(a)(1) of the Act. See Galloway Twp. Bd. of Ed. v. Galloway Twp. Ed. Ass'n., 78 N.J. 25, 49 (1978).

The Hearing Examiner next takes up the conduct of Perrelli at the December 11, 1980 negotiations meeting (see Finding of Fact No. 18, supra). The Hearing Examiner finds and concludes at this stage of the proceeding that when Perrelli personally attacked Collingwood as a "liar, a troublemaker" and that "if he had his way" Collingwood "would not be employed by the school system" and "would have been fired a long time ago" Perrelli was manifesting anti-union animus toward Collingwood as President of the Association in a collective negotiations context: see City of Hackensack, P.E.R.C. No. 77-49, 3 NJPER 143, 144 (1977), rev'd. on other grounds, 162 N.J. Super. 1 (App. Div.1978), aff'd. as modified, 82 N.J. 1 (1980).

Added to Perrelli's outburst on December 11, 1980 is the fact that Costello produced a copy of CP-1 and threw it in front of the N.J.E.A. Negotiations Consultant, Arthur E. Knudsen, requesting that Knudsen read it. Knudsen replied that he was familiar with the letter and subsequently objected to Perrelli's conduct by letter dated December 22, 1980 (CP-16).

The Respondent cites Hamilton Township Board of Education, supra, as a mitigating factor in evaluating Perrelli's outburst. Hamilton dealt with the conduct of a grievant at a grievance meeting and cited Federal Court of Appeals precedent for evaluating the outbursts of grievants at grievance meetings. It is first noted that the instant case does not involve a grievance meeting but, rather, a negotiations meeting. Even if one accepts as applicable herein the Commission observation "...that wide latitude in terms of offensive speech and conduct must be allowed in the context of grievance proceedings to insure the efficacy of this process..." (5 NJPER at 116), the content of Perrelli's utterance in the context of Costello producing a copy of CP-1 takes the instant matter far beyond mere "offensive speech" inasmuch as Collingwood's employment status was being severely threatened. This would necessarily have a chilling effect on the role that Collingwood could be expected to play in collective negotiations.

The Hearing Examiner turns finally to the applicability of East Orange Public Library v. Taliaferro, 180 N.J. Super. 155 (App. Div. 1981) to the instant case. It is first noted that the Court in East Orange made generous reference to the National Labor Relations Board's decision in Wright Line, Inc., 251 NLRB No. 150, 105 LRRM 1169 (1980) where the Board adopted the analysis of the United States Supreme Court in Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977). In so doing, the NLRB modified its Section 8(a)(3) standard in cases where the decision to discipline involves two factors: (1) employer disciplinary reaction to an employee's engaging in protected activities and (2) the employer's legitimate business justification for imposing the discipline.

Thus, the NLRB adopted, with appropriate modification, the Supreme Court's standard where the Court, in reversing a District Court, stated that the burden was initially upon the Respondent plaintiff:

> "...to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor' - or, to put it in other words, that it was a 'motivating factor' in the (school) Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to Respondent's reemployment even in the absence of the protected conduct..." (429 U.S. at 287).

The Appellate Division in East Orange, supra, specifically approved the NLRB's Wright Line analysis, incorporating the Mt. Healthy test, stating that: "We are persuaded that the Mt. Healthy approach is sound, balanced and fair to both sides..." (180 N.J. Super. at 163).

Applying the foregoing legal rationale of East Orange to the instant case, the Hearing Examiner finds and concludes that at this stage of the instant proceeding Collingwood has made a prima facie case that her exercise of protected activities during July and August 1980 was a "substantial factor" or a "motivating factor" in Costello's decision to write to Collingwood on September 29, 1980 (CP-1) and in Perrelli's outburst at the negotiations session on December 11, 1980. Thus, the Respondent must come forward and prove by a preponderance of the evidence that there

was a legitimate business justification for the issuance by Costello of CP-1 and for Perrelli's statement to Collingwood at the negotiations session on December 11, 1980.

Respondent's Motion To Dismiss Is Also Denied For The Reason That The Actions Of Costello And Perrelli Are Not Protected By The First Amendment To The United States Constitution

In dealing with Respondent's First Amendment constitutional argument, the Hearing Examiner will not recite again the facts regarding Costello's issuance of CP-1 on September 29, 1980 and Perrelli's outburst at a negotiations session on December 11, 1980.

The Hearing Examiner elects to note first that Article I, para. 19 of the New Jersey Constitution provides, with respect to public employees, as follows:

> "...Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing."

Thus, public employees, such as Collingwood, enjoy a constitutional protection in this State in the presenting of grievances and proposals to a public employer such as the Board herein. In order for this provision of the New Jersey Constitution to be given meaningful effect public employers cannot engage in "speech," which obstructs and undermines public employees in presenting and making known "their grievances and proposals."

As the Charging Party notes, there is no provision in our Act analogous to Section 8(c) of the Labor-Management Relations Act of 1947, as amended (LMRA): 29 U.S.C. 158(c). 8/

8/ This provision provides that: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

Thus, a compelling argument can be made that the absence of a like provision in our Act, coupled with the above-quoted provision from the New Jersey Constitution, grants even greater protection than the LMRA to public employees to be free of threats of reprisal made by public employers under the guise of "free speech."

After due consideration of the Respondent's citation of constitutional decisions delineating the right of free speech in the public sector, the Hearing Examiner finds and concludes that, by analogy to the private sector, a public employer's speech must be free from a "threat of reprisal or force or promise of benefit": NLRB v. Gissel Packing Co., 395 U.S. 575, 71 LRRM 2481, 2497 (1969).

For the reasons hereinbefore set forth regarding Costello and Perrelli, the Hearing Examiner finds and concludes that CP-1 contained a "threat of reprisal" in the second paragraph thereof as did Perrelli's outburst at the negotiations session on December 11, 1980.

In conclusion the Hearing Examiner notes the Charging Party's citation of Giboney v. Empire Storage & Ice Co., 336 U.S. 490 where the United States Supreme Court said at 502:

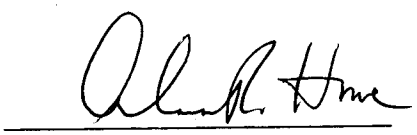
> "...it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."

* * * *

For all of the foregoing reasons, the Hearing Examiner makes the following:

ORDER

The Respondent's Second Motion To Dismiss is denied and the Respondent will be required to present its defense(s) at the next scheduled hearing in Trenton, New Jersey.



Alan R. Howe
Hearing Examiner

Dated: January 28, 1982
Trenton, New Jersey

H. E. No. 82-67

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

In the Matter of

COMMERCIAL TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-81-271-171

COMMERCIAL TOWNSHIP SUPPORTIVE STAFF ASSOCIATION
& DARLENE COLLINGWOOD,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent violated Subsections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act when its Superintendent on September 29, 1980 issued a letter to Darlene Collingwood, the President of the Association, threatening her with dismissal by Janaury 5, 1981 if improvement in her attitude, behavior and acceptance of responsibility was not evident. The Hearing Examiner found that Collingwood was being threatened with discipline for the exercise of protected activities during the Summer of 1980 in her capacity as President. Further, the Hearing Examiner found that the Respondent violated the Act by the conduct of its President at a negotiations meeting on December 11, 1980 where Collingwood was the subject of a personal attack, inter alia, that she was a "liar" and a "troublemaker" and should have been "fired a long time ago."

By way of remedy, the Hearing Examiner ordered that the Respondent remove from any files maintained for Collingwood copies of the Superintendent's letter of September 29, 1980.

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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Docket No. CO-81-271-171

COMMERCIAL TOWNSHIP SUPPORTIVE STAFF ASSOCIATION
& DARLENE COLLINGWOOD,

Charging Party.

Appearances:

For the Commercial Township Board of Education
Barbour & Costa, Esqs.
(John T. Barbour, Esq.)

For the Charging Party
Selikoff & Cohen, Esqs.
(Steven R. Cohen, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on March 30, 1981 by the Commercial Township Supportive Staff Association and Darlene Collingwood (hereinafter the "Charging Party" or the "Association") alleging that the Commercial Township Board of Education (hereinafter the "Respondent" or the "Board") had 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. (hereinafter the "Act"), in that the Respondent sent a letter dated September 29, 1980 to Darlene Collingwood, the President of the Association, the content and tenor of which intimidated Collingwood and interfered with the exercise of rights protected by the Act, namely, carrying out the duties and responsibilities of the office of President of the Charging Party, all which was alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1) and (3)

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 June 17, 1981. Pursuant to the Complaint and Notice of Hearing, hearings were held on October 5 and December 4, 1981 in Trenton, New Jersey, at which time the Charging Party only examined witnesses and presented relevant evidence.[2/] The Respondent's case was heard on April 1, 1982. Both parties waived oral argument and filed post-hearing briefs by June 28, 1982.

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 Commercial Township Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Commercial Township Supportive Staff Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. Darlene Collingwood is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

1/ These Subsections prohibit public employers, their representatives or agents from:

"(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.

"(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act."

2/ A Motion to dismiss by the Respondent was denied on November 6, 1981 after consideration of briefs filed by the parties: H.E. No. 82-16, 7 NJPER 664. A second Motion to dismiss by the Respondent was made on December 4, 1981. It was denied on January 28, 1982 after consideration of the briefs filed by the parties: H.E. No. 82-28, 8 NJPER 143.

4. Collingwood was hired in September 1976 by the Board as a Playground Aide. She held no office in the Association until she was elected President in May 1980.

5. After Collingwood became President she served on the Association's Negotiations Committee and, in general, discharged the duties of the office of President of the Association.

6. On July 18, 1980 Collingwood, as President, sent a letter to Michael P. Killeen, the Principal of the Port Norris Elementary School, in which she raised a series of seniority and hours problems of the Aides at the Port Norris Elementary School and at the Haleyville-Mauricetown Elementary School (CP-2). More specifically, Collingwood questioned the reduction in hours of certain Aides as being inconsistent with a resolution of the Board on April 8, 1980 (CP-3), which set forth the specific hours of named Aides. Collingwood requested the reinstitution of the position of one 4-hour Aide position and also made reference to one 4-hour Aide having lost hours plus benefits.

7. Under date of July 23, 1980 Collingwood sent to the Superintendent, Orlando R. Costello, a letter (CP-4) setting forth identically the matters contained in her letter to Killeen (CP-3, supra).

8. Under date of July 28, 1980 Costello sent a letter to Collingwood in response to CP-4, in which he stated that the reduction in Aides was because of a recent budget defeat and that contract seniority procedure had been followed (CP-5). Costello also pointed out to Collingwood that she was not following the grievance procedure inasmuch as her predecessor, Nancy Dawson, had initiated a grievance involving the same subject matter in May 1980 and had abandoned it.

9. On August 11, 1980 Collingwood wrote to Costello requesting a meeting with the Board "... in reference to a grievance that the Supportive Staff feels still exist (sic) ..." (CP-6).

10. Under the date of August 13, 1980 Costello wrote to Collingwood denying her request for a meeting with the Board (CP-7). He again reminded her about her failure to comply with the grievance procedure, citing the 10-working day provision for the initiation of a grievance after its alleged occurrence.

11. On August 10, 1980 Collingwood had written to Killeen raising a level one grievance regarding the position of an Aide (CP-9). Collingwood urged that due to seniority a Mrs. Bradway should receive a certain a 3-hour position because she was a senior employee to a Mrs. Bellinger.

12. Under date of August 20, 1980 Killeen responded to Collingwood rejecting her contention that she had a right to raise a level one grievance at this time, in view of the prior action of Dawson in May 1980, which was abandoned (CP-8). Killeen, however, invited Collingwood to meet with him if she wished to do so.

13. On August 19, 1980 Collingwood had written to Costello regarding his denial of her request for a meeting with the Board (CP-10). Collingwood stated that she would thus have to attend a public meeting of the Board and said that "If you would like to see this matter get into the newspapers we can arrange for this to be done." Costello perceived this statement as a threat. The Hearing Examiner finds to the contrary.

14. Also, on August 19, 1980 Collingwood wrote to Costello pursuant to level two of the grievance procedure raising again the issue of Bradway not having been given a 3-hour Aide position based on her being senior to Bellinger (CP-11).

15. Further, on August 19, 1980 Collingwood wrote to Costello regarding pay for the Aides, citing the contract provision which requires that Aides be paid on the fifteenth and thirtieth day of each month (CP-12).

16. On September 29, 1980 Costello sent a letter to Collingwood (CP-1), which indicated a copy to "file," expressing great dissatisfaction as to her behavior as a school aide and giving her 90 days in which "...to improve your attitude, behavior and acceptance of your responsibility. If substantial

improvement is not evident by January 5, 1981 I will recommend your dismissal to the Commercial Township Board of Education." [3/] Costello then listed on two succeeding pages the specifics of his dissatisfaction with Collingwood, which the Hearing Examiner finds were substantially directed to Collingwood in her capacity as President of the Association. [4/] For example, Costello cited "Harrassment of members of the Board of Education and Administration." Collingwood acknowledged that she had spoken with two members of the Board of Education during the Summer of 1980, Noah J. Beachaump and Mary Carmichael, regarding reductions in staff contrary to seniority. Costello also stated that she failed to use the negotiated grievance procedure properly and outlined the various letters that Collingwood had sent to Killeen and to Costello in July and August (CP-2, CP-4, CP-6, CP-9, CP-10, CP-11 and CP-12, supra). Costello further stated that Collingwood's insubordination must cease, referring to a meeting with Barry L. Ballard, the Principal of Haleyville-Mauricetown Elementary School, on September 23, 1980 (CP-12 and CP-14). Finally, Costello remonstrated with Collingwood that she should not discuss school matters in public at a "local store." Collingwood acknowledged that she had spoken of dissatisfaction with the Board and Administration to a candidate for election to the Board, Guy Chamberlain, but insisted that she did not convey any confidential information. The Hearing Examiner credits Collingwood's version.

17. On October 10, 1980 Collingwood sent a memo to Costello stating that the Association would like to commence negotiations for the 1981-82 successor agreement (CP-15).

18. On December 11, 1980, at a negotiations meeting between the parties, the President of the Board, James M. Perrelli, personally attacked Collingwood as being

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3/ The Hearing Examiner must credit Costello's testimony that CP-1 was never placed in Collingwood's personnel file. Rather, as Costello testified, it was placed in a Collingwood "Grievance File" and it was to remain there until Costello determined what would happen by January 5, 1981. Whether any distinction should be made between placing CP-1 in Collingwood's "personnel file" or "Grievance File" vis-a-vis a violation of the Act will be considered infra.

4/ Costello's responses to the contents of CP-1 will be discussed infra.

"... nothing but a liar, a troublemaker ..." and "If he had his way that I would not be employed by the school system, that I would have been fired a long time ago ..." (1 Tr. 54). Arthur E. Knudsen, an N.J.E.A. Consultant, essentially confirmed that Perrelli made these statements and the Hearing Examiner so finds. In the course of Perrelli's outburst Costello went to his desk and pulled out a copy of CP-1, supra, and threw it in front of Knudsen and requested that Knudsen read it.[4/] Knudsen replied that he was familiar with the letter and subsequently objected in writing in a letter to Perrelli regarding the latter's conduct on December 11, 1980 (CP-16).

19. Prior to the receipt of CP-1, supra, Collingwood had never been disciplined in any manner by the Board nor had any adverse material been placed in her personnel file. Further, Collingwood has not been disciplined since CP-1, supra, notwithstanding Costello's threat therein to recommend her termination by January 5, 1981.

20. Collingwood acknowledged on cross-examination that she was not claiming that there has been any pattern of employer conduct against officers of the Association (1 Tr. 65, 66) or that other persons who negotiated or presented grievances had been disciplined (1 Tr. 93, 94).

THE ISSUES

1. Did the Respondent violate Subsections(a)(1) and (3) of the Act by: (a) the issuance of Superintendent Costello's letter to Collingwood on September 29, 1980 (CP-1); and (b) the statements of Board President Perrelli to Collingwood on December 11, 1980 at a negotiations meeting?[5/]

2. Were the actions of Costello and Perrelli protected by the First Amendment to the United States Constitution?

4/ Costello testified that Perrelli told him to go to his desk. The Hearing Examiner credits Knudsen's testimony that Costello did so on his own initiative.

5/ Although the Unfair Practice Charge does not specifically allege a violation of the Act by Perrelli's conduct on December 11, 1980, it was fully litigated and the Respondent has defended as to Perrelli in an earlier brief and at the hearing. See Multi-Medical Convalescent & Nursing Center of Towson, 225 NLRB 429, 93 LRRM 1170 (1976) and Englewood Bd. of Ed., P.E.R.C. No. 76-18, 2 NJPER 53 (1976), aff'g H.E. No. 76-2.

DISCUSSION AND ANALYSIS

The Respondent Violated Subsections(a)(1) And (3) Of The Act By The Issuance Of Costello's Letter To Collingwood On September 29, 1980 And Perrelli's Statement To Collingwood At The December 11, 1980 Negotiations Meeting

The Hearing Examiner is persuaded that the Charging Party has proven by a preponderance of the evidence that the Respondent violated Subsections(a)(1) and (3) of the Act by the actions of Costello and Perrelli. Additionally, as will be discussed hereinafter, the actions of Costello and Perrelli were not protected by the First Amendment to the United States Constitution.

The instant Hearing Examiner, in his decision on the Respondent's Motion To Dismiss at the conclusion of the Charging Party's case,[6/] held that Collingwood, in her capacity as President of the Association, was engaged in the exercise of protected activities during July and August 1980, and further, that this exercise was a "substantial factor" or a "motivating factor" in Costello's decision to write to Collingwood on September 29, 1980 (CP-1) and in Perrelli's outburst at the negotiations session on December 11, 1980. In other words, the Charging Party satisfied the initial burden of proof under East Orange Public Library v. Taliaferro, 180 N.J. Super. 155 (App. Div. 1981), which adopted the analysis of the United States Supreme Court in Mount Healthy City School District v. Doyle, 429 U.S. 274 (1977) and the National Labor Relations Board's decision adopting Mt. Healthy in Wright Line, Inc., 251 NLRB No. 150, 105 LRRM 1169 (1980). The Hearing Examiner's conclusion that the Charging Party met the East Orange test is confirmed herein.

Thus, the Hearing Examiner's attention now turns to whether or not the Respondent has established by a preponderance of the evidence that CP-1 would have been written by Costello on September 29, 1980 and that Perrelli would have made the same statements to Collingwood on December 11, 1980 "...even in the absence of the protected conduct..." (429 U.S. at 287). Put another way, has the Respondent established by a preponderance of the evidence that it had a legitimate business

6/ H.E. No. 82-28, 8 NJPER 143 (1/28/82).

justification for the actions of Costello and Perrelli?

First, the Hearing Examiner notes that the timing of CP-1 is suspect if, in fact, Costello was remonstrating with Collingwood regarding her performance as a school aide. Collingwood had been employed by the District for four years without incident. The contents of CP-1 concerned events involving Collingwood during the months of July and August 1980 when Collingwood was not engaged in the performance of her duties as a school aide. Finally, it is noted that CP-1 was issued after the lapse of approximately 18 or 19 working days in the 1980-81 school year.

Costello, although somewhat evasive, did acknowledge on cross-examination that Collingwood's correspondence with Killeen and Costello during July and August 1980 was in her capacity as President of the Association, and that the correspondence from Collingwood did not raise personal concerns (3 Tr. 49-63). The Hearing Examiner rejects Costello's contention that underlying Collingwood's July and August letters was her dissatisfaction with a transfer from one school to another in the District. (3 Tr. 49, 50).

The Hearing Examiner has previously rejected Costello's contention that Collingwood's letter of August 19, 1980 (CP-10) was a "threat" to the Administration (Finding of Fact No. 13, supra). Quite aside from how the contents of CP-10 are construed, Costello acknowledged that this letter had nothing to do with Collingwood's behavior as a school aide nor did it involve any personal concerns of Collingwood (3 Tr. 74, 75).

Item 5 of CP-1 alleges that Collingwood continually attempted to find situations that could be turned into controversy. The gravamen of this paragraph of CP-1 is that Collingwood created dissatisfaction among the other school aides regarding salaries and thereafter filed complaints, grievances, etc. Quite aside from the fact that the Hearing Examiner has previously found that this subject involved the exercise of protected activity, the Hearing Examiner now notes that Costello's

personal knowledge of Collingwood's discussion with other school aides regarding salaries is somewhat lacking. Costello testified that he was not privy to any conversations between Collingwood and other school aides regarding salaries (3 Tr. 85). He could only state that "..cases were got to me where people were just dissatisfied, primarily the ones Mrs. Collingwood was talking to..." (3 Tr. 86).

Regarding Item 6, Collingwood's alleged discussing of school matters in public at a local store, the Hearing Examiner has previously found that Collingwood's discussion with a candidate for election to the Board did not involve the conveying of confidential information, and that it was arguably protected by the Commission's decisions in City of Hackensack, P.E.R.C. No. 78-71, 4 NJPER 190 (1978) and Laurel Springs Board of Education, P.E.R.C. No. 78-4, 3 NJPER 228 (1977).

Based on the foregoing, the Hearing Examiner finds and concludes that the issuance of CP-1 by Costello was in reality directed at Collingwood in her capacity as President of the Association in a deliberate attempt to curtail activities undertaken by her on behalf of the members of the collective negotiations unit. Costello's statement advising that he would recommend her dismissal "if improvement was not evident by January 5, 1981..." constituted a threat of future discipline, which constituted a violation of Subsections(a)(1) and/or (a)(3) of the Act under the Commission's decisions in the City of Hackensack, supra, and Hamilton Township Board of Education, P.E.R.C. No. 79-59, 5 NJPER 115 (1979) and Trenton Board of Education, P.E.R.C. No. 80-130, 6 NJPER 216 (1980).

The Hearing Examiner next takes up the conduct of Perrelli at the December 11, 1980 negotiations meeting (see Finding of Fact No. 18, supra). Perrelli was not called as a witness and, thus, the Hearing Examiner necessarily credits the testimony of Collingwood and Knudsen as to what Perrelli said regarding her being "liar, a troublemaker" and that if Perrelli had his way she would have been "fired a long time ago." Added to Perrelli's outburst is the fact that Costello produced a copy of CP-1 from his desk and threw it in front of Knudsen. As previously found by

the Hearing Examiner Perrelli's conduct went far beyond mere "offensive speech" under Hamilton Township, supra, inasmuch as Collingwood's employment status was being severely threatened. This would necessarily have a chilling effect on the role that Collingwood could be expected to play in collective negotiations.

Finally, the Hearing Examiner herein considers whether or not there is any distinction to be made in this case between Costello's having put a copy of CP-1 in Collingwood's "grievance file" rather than in her "personnel file." It is first noted that the Respondent never established as part of its case any meaningful distinction between Collingwood's personnel file and the so-called grievance file. Leaving aside the Charging Party's contention that the contents were shifted back and forth between the two files, Costello did admit that the two files were interchangeable (3 Tr. 98). It that is the case then it appears to the Hearing Examiner that any attempted differentiation between the two files is a distinction without meaning. According to Costello there was nothing in the grievance file except a copy of CP-1. Thus, since there was no legitimate "grievance" pending, the contents of the so-called grievance file are suspect.

Having concluded that there exists no legitimate distinction between Collingwood's personnel file and the so-called grievance file, the Hearing Examiner is persuaded that the placing of CP-1 in the "grievance file" constituted a violation of the Act under the Commission's decision in Black Horse Pike Regional Board of Education, P.E.R.C. No. 82-19, 7 NJPER 502 (1981).

Accordingly, the Hearing Examiner will recommend an appropriate remedy for the Respondent's violation of Subsections(a)(1) and (3) of the Act regarding the issuance of CP-1 by Costello on September 29, 1980 at the placing of a copy in Collingwood's so-called "grievance file."

The Respondent's Defense That The Actions Of Costello And Perrelli Are Protected By The First Amendment To The United States Constitution Is Rejected

The Hearing Examiner here refers to the discussion and analysis in his Decision

on Respondent's Motion to Dismiss at the conclusion of the Charging Party's case: H.E. No. 82-28, 8 NJPER 143, 148 (1982). Suffice it to say that public employees should be free from threats of reprisal made by public employers under the guise of "free speech." See NLRB v. Gissel Packing Co., 395 U.S. 575, 71 LRRM 2481, 2497 (1969) and Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502, 23 LRRM 2505 (1949).

* * * *

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

CONCLUSION OF LAW

The Respondent Board violated N.J.S.A. 34:13A-5.4(a)(1) and (3) by Superintendent Costello's issuance of CP-1 on September 29, 1980 to Darlene Collingwood, the President of the Association, and by placing it in her "file," and further, by Board President Perrelli's outburst to Collingwood at the negotiations meeting on December 11, 1980.

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 issuing letters containing threats of future discipline to employees for the exercise of protected activity, such as that engaged in by Darlene Collingwood, or by the making of threatening statements to representatives of the Association at collective negotiations sessions.

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 issuing letters containing threats of future discipline to employees for the exercise of protected activity, such as that engaged in by Darlene Collingwood, or by the making of

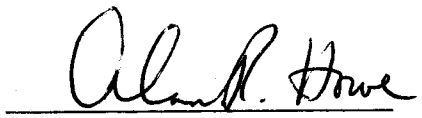
threatening statements to representatives of the Association at collective negotiations sessions.

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

1. Forthwith remove from any file maintained for Darlene Collingwood any copy or copies of CP-1, the letter from Superintendent Costello to Darlene Collingwood dated September 29, 1980.

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

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



Alan R. Howe
Hearing Examiner

Dated: June 30, 1982
Trenton, New Jersey

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly, by issuing letters containing threats of future discipline to employees for the exercise of protected activity, such as that engaged in by Darlene Collingwood, or by the making of threatening statements to representatives of the Association at collective negotiations sessions.

WE WILL NOT discriminate 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 issuing letters containing threats of future discipline to employees for the exercise of protected activity, such as that engaged in by Darlene Collingwood, or by the making of threatening statements to representatives of the Association at collective negotiations sessions.

WE WILL forthwith remove from any file maintained for Darlene Collingwood any copy or copies of CP-1, the letter from Superintendent Costello to Darlene Collingwood dated September 29, 1980.

COMMERCIAL TOWNSHIP 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 Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780