

D.U.P. NO. 2003-9

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION  
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

NEWARK STATE-OPERATED SCHOOL DISTRICT  
& NEWARK TEACHERS UNION,

Respondents,

-and-

Docket No. CI-2003-2

ESTHER SCHNEIDER,

Charging Party.

**SYNOPSIS**

The Director of Unfair Practices dismisses an unfair practice charge filed by Esther Schneider against the Newark State-Operated School District and her majority representative, the Newark Teachers Union. The Director found that most of Schneider's allegations were untimely. As to her allegations that the NTU acted in bad faith when it gave her only five-days notice before a grievance hearing and assisted the District by clarifying witness testimony, the Director found there were no facts alleged that the notice was less than given to other unit members or that the NTU prevailed her from appearing. Additionally, the NTU retained an interest in making sure the record before the arbitrator was accurate and did not waive that right by permitting Schneider's attorney to represent her. Finally, the Director found the NTU did not breach its duty of fair representation by refusing to move the grievance to arbitration where it considered the merits of her claim, the Hearing Officer's report and post-hearing briefs before making a decision.

As to the claims against the District, the Director found the District's decision to withdraw its settlement offer after release of the Hearing Officer's report did not violate the Act. Schneider had not accepted the offer and ran the risk it would be withdrawn.

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Appearances:

For the Respondent School District,  
Raphael Felli, attorney

For the Respondent Teachers Union,  
Eugene G. Liss, attorney

For the Charging Party,  
Bronstein, Gewirtz & Grossman, attorneys  
(Neil Grossman, of counsel)

**REFUSAL TO ISSUE COMPLAINT**

On July 12, 2002, Esther Schneider, a teacher employed by the Newark State Operated School District (District), filed an unfair practice charge with the Public Employment Relations Commission (Commission) against the District and her employee representative, the Newark Teachers Union (NTU). Schneider alleges that the District violated 5.4a(1) and (3)<sup>1/</sup> of the New

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<sup>1/</sup> Section 5.4a(1) and (3) prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the  
(continued...)

Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when, beginning in 1996, it refused to assign her to teach at the high school level, transferred her to Peshine School in 1997, and transferred her to Vailsburg School in 2001, all in retaliation for a complaint she filed with the New Jersey State Department of Education (DOE). Schneider also alleges the 2001 transfer violated certain notice and procedural provisions of the NTU's collective agreement with the District.

Schneider also asserts that the District violated the Act in December 2001 by refusing her request for a reasonable accommodation under the New Jersey Law Against Discrimination (LAD). Finally, after the District's hearing officer denied her grievance concerning the 2001 transfer, the District withdrew its settlement offer in April 2002 to consider reassigning Schneider back to Peshine School.

Schneider alleges that the NTU violated 5.4b(1)<sup>2/</sup> when it failed to file a grievance on her 1996 transfer to West Kinney School and when it initially refused to file a grievance

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<sup>1/</sup> (...continued)  
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."

<sup>2/</sup> Section 5.4b(1) prohibits employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act."

regarding the September 2001 transfer to Vailsburg School. She contends the NTU acted in bad faith when it gave her only five days notice before the scheduled grievance hearing. She also contends the NTU representative assisted the District during the grievance hearing by gratuitously clarifying and elaborating on the testimony of the District's witness.

Schneider further asserts the NTU violated the Act when it refused to move her grievance to arbitration after the District's hearing officer was late in issuing his decision. Charging Party contends that since the decision was issued two days after her attorney's letter demanding the NTU move the grievance to arbitration, there was collusion between the District and NTU. Finally, Schneider contends that the hearing officer's decision did not address all issues raised at the hearing and, therefore, the NTU's refusal to move the grievance to arbitration was arbitrary and violated the Act.

The District disputes Schneider's factual allegations and denies it violated the Act. It contends that it exercised a managerial prerogative when it transferred Schneider both in 1997 and in 2001 to fulfill District staffing needs. It asserts that the two individuals Schneider claims were embarrassed by the 1996 DOE investigation did not have the authority nor were they the decision makers in any of her transfers. Finally, it denies that the NTU assisted the District in presenting its case before the

hearing officer. It asserts that the NTU's representative merely clarified the District's transfer process and the "Success for All" program.

The NTU also disputes Schneider's factual allegations and asserts that the allegations are untimely. It contends that Schneider wrote to the NTU initially complaining about her 2001 transfer to Vailsburg but articulated no contractual violation and made no mention of safety issues. The NTU concluded that the District was exercising its managerial prerogative to transfer and reassign employees and, therefore, it declined to initiate a grievance. NTU contends that despite its initial reluctance to grieve the transfer, it did eventually grieve the matter to allow Schneider's attorney to present her grievance as permitted under the parties' collective agreement. The NTU asserts that it determined not to arbitrate the matter only after a review of the hearing officer's decision and the grievance hearing record lead it to conclude that the grievance did not have a likelihood of success. It argues that the delay in issuing the hearing officer's report did not automatically trigger a duty to move the matter to arbitration since the merits of Schneider's claim did not warrant it. Moreover, the NTU and District routinely granted extensions of time. Finally, it denies the allegation that its representation at the hearing assisted the District to Schneider's detriment.

The Commission has authority to issue a complaint where it appears that the charging party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3. By letter dated February 21, 2003, I advised the parties that I did not intend to issue a Complaint on any of the allegations set forth in the charge, and I explained the basis for that conclusion. I provided the parties with an opportunity to respond by March 10, 2003. No responses were filed. Based upon the following, I find the complaint issuance standard has not been met.

#### **FINDINGS OF FACTS**

The NTU is the majority representative of the District's non-supervisory certificated and non-certificated personnel including teachers and other employees. The District and the NTU are parties to a collective negotiations agreement effective from July 1, 2000 through June 30, 2003. The agreement provides for a four-step grievance procedure ending in binding arbitration. The first step is an informal conference with an immediate supervisor. The second step is an appeal to the principal. The third step is an appeal to the State District Superintendent. A grievance hearing may be conducted at this stage. The final step

is binding arbitration. The employee may move the grievance at any step including arbitration and, at his/her own expense, has a right to be represented at any step by private counsel. In all cases, the NTU has the right to attend and present the NTU's view at each step of the grievance procedure.

Article V, Section 6C, INVOLUNTARY TRANSFERS FROM SCHOOL TO SCHOOL, provides:

1. TRANSFERS

When an involuntary transfer or reassignment is being recommended, the principal shall meet with the teacher involved, no later than June 15, **whenever possible**, to notify the teacher of the reason for the recommended transfer or reassignment. **If requested**, the reason for the recommended transfer or reassignment shall be given to the teacher, in writing, by the principal within five (5) school days of the meeting. [emphasis added]

2. WRITTEN REASON

**Upon request**, the Human Resources Department shall furnish the employee who has been transferred an explanation, in writing, for said transfer. [emphasis added]

Esther Schneider holds a kindergarten through 12th grade certification in English as a Second Language (ESL), English and nursery school. In 1985 she was hired by the Board to teach ESL and in 1988 was assigned to East Side High School. Schneider joined the NTU in 1985.

In 1996, as the result of a reorganization of East Side High School, Schneider was transferred to West Kinney Alternative High School to teach ESL. Shortly after the transfer, Schneider complained to the NTU that she was performing essentially administrative duties and had virtually no duties as an ESL teacher. The NTU refused to file a grievance on her behalf because it concluded that, since she had not lost her position nor any benefits, there was no contractual basis for a grievance. Schneider then complained to an assistant superintendent who also took no action.

Next, Schneider contacted the DOE and received a response informing her that it would look into her situation. Schneider never heard from the DOE again. However, because she was transferred in April 1997 to Peshine Elementary School, Schneider concluded that the DOE determined her complaint was meritorious which embarrassed the District.

At Peshine, Schneider was assigned to teach as a bilingual coordinator and ESL needs assessment teacher. Unlike her assignment at West Kinney, she had actual teaching duties. However, because it was an elementary school, Schneider applied for positions in the District's high schools where she had most of her previous teaching experience. She was unsuccessful in her efforts to transfer and learned from a Board member in 1998 that Director of Bilingual Education Daniel Dantes and Fred McCarthy, an



administrator in the School Leadership Team 2 program, sent an e-mail stating that Schneider would never teach high school again. Schneider concluded that they were embarrassed by the 1996 DOE investigation.

Beginning in the 1999-2000 school year, Peshine's principal assigned Schneider to teach a program called "Success for All." Schneider felt that she was not certified to teach the program. However, she filed no grievance over the assignment nor did she ask the NTU to file one on her behalf.

Two weeks after the commencement of the 2001-2002 school year (on or about September 12, 2001), Schneider was transferred from Peshine to Vailsburg Middle School to teach ESL. She was told that another ESL teacher exercised bumping rights to be assigned to Peshine, and therefore, Schneider was reassigned to fill a vacancy created by a retirement at Vailsburg Middle School. Schneider asserts that her complaints about her lack of certification to teach the "Success for All" program as well as her 1996 complaints to DOE triggered the transfer to Vailsburg.

On or about September 27, 2001, there was an incident involving Schneider and a group of young, African-American men outside Vailsburg School. Schneider left the school in order to retrieve something from her car. The school's doors locked behind her. When she was approached by the group of young men, Schneider perceived a threat and ran to the school's main entrance. The

security guard let her into the building and told her the men were former students. He cautioned her to be careful. Schneider did not file a police report nor did she report the incident to the building principal or school nurse. She returned to her class.

After school that day Schneider went to her physician because she did not feel well. Her physician indicated that her blood pressure was elevated. She did not return to school; instead, Schneider applied for and was granted a twelve-week medical leave without pay pursuant to the Family Medical Leave Act (FMLA).

On October 26, 2001 Schneider wrote NTU Executive Director Pietro Petino about her September 12, 2001, transfer to Vailsburg and requested that a grievance be filed. She asserted (1) there are no longer bumping rights in the District; (2) her transfer in the second week of school to replace a retired employee was questionable since notice of retirement has to be given in advance; (3) she was initially sent to the wrong school (Mount Vernon School not Vailsburg) and (4) her evaluations at Peshine were not unsatisfactory. She did not mention the September 27 incident outside Vailsburg or raise any safety concerns in the letter, nor did she cite any procedural notification provisions required by the parties' collective agreement regarding her transfer.

On October 30, 2001, Petino responded to her in writing indicating that he did not view her concerns regarding her transfer and reassignment as a violation of her contractual rights and

requested Schneider contact him if she wished to discuss her concerns further.

Subsequently, Schneider retained private counsel. She wrote the District requesting a reasonable accommodation for her medical condition, namely a transfer to another school. In December 2001 the District contacted Schneider directing her to submit medical documentation and an accommodation request form. It also requested that she undergo a physical examination with the District's physicians and submit a release from her personal physician to return to work at Vailsburg. However, Schneider's personal physician refused to release her to return to work at Vailsburg because of the stressful incident she had undergone there. Therefore, the District did not process her accommodation request and her leave ended December 19, 2001. It is unclear whether Schneider returned to work at Vailsburg.

Schneider's attorney also wrote Petino on December 3, 2001, acknowledging that the parties' collective agreement permits teacher transfers but asserted that her transfer violated notice and other procedural provisions of the agreement. He further cited the September 27 incident as a violation of employee health and safety provisions. The letter threatened to file a claim against the NTU if it did not file a grievance on her behalf.

On January 8, 2002, Petino filed a step 3 grievance regarding the Vailsburg transfer and consented to have Schneider's attorney

present the grievance. In addition to grieving violations relating to procedural requirements in involuntary transfers, the grievance asserted that the District failed to provide adequate security measures at the Vailsburg School which caused physical injury to Schneider requiring her to take a twelve-week unpaid medical leave.

The NTU apparently sent Schneider notice of the grievance hearing five days before the February 27, 2002 scheduled hearing date. She appeared at the hearing and was represented by private counsel. Over the objection of Schneider's attorney, Petino voluntarily clarified testimony of the District's witness regarding the transfer process and the Success for All program. The grievance hearing officer's decision was due to issue on March 15, 2002. When by April 8, 2002 the hearing officer had not yet issued his decision, Schneider's attorney demanded that the NTU file for arbitration. Two days later the hearing officer's decision was issued. The hearing officer found that the grievance was timely but denied the grievance on all issues finding no contractual violations. Specifically, he found that Schneider's principal informed her at the end of the 2000/2001 school year that there were cut backs in the District's ESL program which would cause staff reductions in the next school year. Schneider never requested written explanations for the transfer in either her June or September meetings with the principal as permitted under the collective agreement nor did she request an explanation from the

human resources department. Additionally, the hearing officer found that Schneider was properly certified to teach the Success for All program. Finally, he rejected Schneider's request for restoration of pay for a leave which she took voluntarily.

According to the grievant's attorney, the decision did not address all issues raised, specifically whether the involuntary transfer to Vailsburg was done to cover-up the "Success for All" teaching assignment for which Schneider claimed she was not appropriately certificated. Schneider demanded the NTU proceed to arbitration. After reviewing the hearing officer's report, the post-hearing briefs and witness testimony the NTU decided not to arbitrate Schneider's grievance.

#### **ANALYSIS**

The Act provides for a six-month statute of limitations for unfair practice charges to prevent the litigation of stale claims.

N.J.S.A. 34:13A-5.4©) states:

no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the 6 months period shall be computed from the day he was no longer so prevented.

Cases interpreting this subsection include Piscataway Township Teachers Association (Abbamont), D.U.P. No. 90-10, 16 NJPER 162 (¶21066 1990) (statute of limitations period began when employee's majority representative informed him that it had no basis for

further action on his behalf; charge untimely where it was filed more than six months after this notice); No. Warren Bd. of Ed., D.U.P. No. 78-7, 4 NJPER 55 (¶4026 1977).

In application, the statute of limitations period normally begins to run from the date of some particular action, such as the date the alleged unfair practice occurred, provided the person(s) affected thereby are aware of the action. The date of action is known as the "operative date," and the six-month limitations period runs from that date. To be timely, a charge must ordinarily be filed within six months of the operative date. Two exceptions to timeliness requirements are (1) tolling of the limitations period and (2) a demonstration by the charging party that it was "prevented" from filing the charge prior to the expiration of the period.

The standard for evaluating statute of limitations issues was set forth in Kaczmarek v. N.J. Turnpike Auth., 77 N.J. 329 (1978). The Supreme Court explained that the statute of limitations was intended to stimulate litigants to prevent litigation of stale claims, but it did not want to apply the statute strictly without considering the circumstances of individual cases. Id. at 337-338. The Court noted it would look to equitable considerations in deciding whether a charging party slept on its rights. The Court still expected charging parties to diligently pursue their claims.

Here, the charge was filed on July 12, 2002. Schneider offers no facts to suggest that she was prevented from filing a timely charge. Thus, only those operative events occurring between January 11, 2002 and July 12, 2002, may be considered; as to events occurring before January 11, 2002, the charge is untimely and must be dismissed.

Specifically, the charge alleges that the NTU violated the Act by refusing to grieve a 1996 teaching assignment at West Kinney High School, her 1997 transfer to Peshine School, and her Success for All teaching assignment in the 2000/2001 school year. Schneider also contends the NTU violated its duty of fair representation by initially refusing in October 2001 to file a grievance on her behalf concerning her September 2001 transfer to Vailsburg School. As to these events, the charge is untimely.

Schneider contends that the District acted improperly in 1996 when it did not address her concerns about her West Kinney teaching assignment, transferred her in 1997 to Peshine Avenue Elementary School, thereafter prevented her from teaching in the District's high schools, failed to respond to her concerns in 2000/2001 regarding her lack of certification to teach the Success for All program at Peshine School and transferred her in September 2001 to Vailsburg School because of her concerns and in violation of notice and other procedural provisions of the parties' collective agreement. Additionally, Schneider asserts the District failed to

grant her request for a reasonable accommodation under the Americans with Disabilities Act (ADA) or the New Jersey Law Against Discrimination (LAD) at the end of her unpaid medical leave in December 2001. All of these alleged events occurred prior to January 11, 2002, and, therefore, are outside of the Commission's statute of limitations and must be dismissed.

As to the remaining timely allegations, for the following reasons, they do not meet the Commission's complaint issuance standard and must be dismissed.

The Charge against the NTU

Schneider asserts the NTU violated its duty of fair representation in processing her grievance concerning the 2001 transfer. Specifically, she contends the NTU acted in bad faith when it gave her only five days notice before the February 27, 2002 hearing, and its representative assisted the District during the hearing by clarifying witness testimony. Additionally, Schneider asserts the NTU refused to file for arbitration after March 15, 2002, when the hearing officer's report was late or when the report was issued and did not address all issues raised at the hearing. Finally, as further evidence of the NTU's bad faith, Charging Party alleges the NTU colluded with the District because the hearing officer's report was issued two days after her attorney wrote the NTU requesting that it move the grievance to arbitration.



Section 5.3 of the Act empowers an employee representative to exclusively represent employees in the negotiation and administration of a collective agreement. With that power comes the duty to represent all unit employees fairly. The standards in the private sector for measuring a union's compliance with the duty of fair representation were articulated in Vaca v. Sipes, 386 U.S. 171 (1967). Under Vaca, a breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the negotiations unit is arbitrary, discriminatory, or in bad faith. Id. at 191. That standard has been adopted in the public sector. Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976); see also Lullo v. International Ass'n of Fire Fighters, 55 N.J. 409 (1970); OPEIU Local 153, P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983).

A majority representative does not have an obligation to file every grievance which a unit member asks it to submit. Carteret Ed. Ass'n (Radwan), P.E.R.C. No. 97-146, 23 NJPER 390 (¶28177 1997); Camden Cty. College (Porreca), P.E.R.C. No. 88-28, 13 NJPER 755 (¶18285 1987); Trenton Bd. of Ed. (Salter), P.E.R.C. No. 86-146, 12 NJPER 528 (¶17198 1986). Rather, an employee representative is obligated to exercise reasonable care and diligence in investigating, presenting and processing grievances; it should exercise good faith in determining the merits of the grievance; and it must treat individuals equally by granting equal

access to the grievance procedure and arbitration for similar grievances of equal merit. Middlesex Cty. (Mackaronis), P.E.R.C. No. 81-62, 6 NJPER 555 (¶11282 1980), aff'd NJPER Supp.2d 113 (¶94 App. Div. 1982), certif. den. 91 N.J. 242 (1982); Carteret Ed. Ass'n; N.J. Turnpike Employees Union Local 194 (Kaczmarek).

Here, the NTU apparently gave Schneider five days notice of the grievance hearing. However, without a showing that the notice was less than notice given to other unit members, this fact alone does not establish that the NTU's conduct was arbitrary, discriminatory, or in bad faith. Moreover, there is no allegation that the notice prevented Schneider or her attorney from appearing at the hearing.

Next, the fact that the hearing officer's report was issued two days after Schneider's attorney asked the NTU to move her grievance to arbitration is not a violation of the Act where the parties' regularly granted extensions of time at various steps of the grievance process. Even if the report's issuance was triggered by the NTU contacting the District about Schneider's demand to move the grievance immediately to arbitration, this conduct only establishes that the NTU followed through on Schneider's complaint about the hearing officer's alleged tardiness in issuing his report.

As to the conduct of the NTU's representative at the hearing, Schneider alleges the NTU acted in bad faith when its

representative, over the objection of Schneider's attorney, voluntarily elaborated on and clarified the testimony of a District witness. However, although the parties' collective agreement permits a member at his/her own expense to be represented by private counsel, the NTU retains the right under the agreement to participate fully in the hearing, including the examination of witnesses. Moreover, our cases and statute support the NTU's duty to represent its members as a unit. Op. of Edison (Cies), D.U.P. No. 99-15, 25 NJPER 274 (§30116 1999) (no violation found where employee represented by private counsel objected to union's examination of witnesses during grievance hearing). Certainly, the NTU retained an interest in making sure that the record before the hearing officer accurately portrayed the District's transfer process and the Success for All program. It did not waive that right by allowing Schneider's attorney to represent her.

Additionally, there are no facts asserted that the clarification of testimony prevented the Charging Party from presenting her grievance or that, as a result, she was deprived of a fair hearing and thus treated differently than other unit members regarding grievance presentation. The union did not prevent her from filing a grievance and its agent assisted her effort by agreeing to her request for private counsel and moving the grievance to the third step.

Finally, Charging Party asserts the NTU violated the Act by refusing to move her grievance to arbitration when the hearing officer's report did not address all issues raised by Schneider, including her allegation that she was transferred to cover up her alleged illegal assignment to teach the Success for All program. However, the grievance filed by Schneider asserted violations of the parties' collective agreement in regard to notice and other procedural requirements regarding her transfer, failure to provide adequate security measures outside the school and unpaid medical leave caused by the incident outside Vailsburg School. The Hearing Officer's report addressed each of these issues. Moreover, the hearing officer found that Schneider was properly certified to teach the Success for All program.

The NTU considered the merits of her claim, the hearing officer's report and post-hearing briefs before reaching its decision not to file for arbitration. Nevertheless, even if the hearing officer's report did not address all issues, our cases allow the union to exercise its discretion provided that it exercises reasonable care and diligence in investigating and processing grievances. Without a showing that its decision was arbitrary, discriminatory or in bad faith, even negligence or a mistake of judgment does not support a breach of its duty of fair representation. OPEIU Local 153. Based upon all of the above, I

find that the NTU did not breach its duty of fair representation to Schneider. Accordingly, I dismiss the charge against the NTU.

The Charge against the District

Schneider contends the District violated the Act when it withdrew its settlement offer to reassign her to another school after the hearing officer's report was issued in April 2002. It is not an unfair practice to make a settlement offer and then, if the offer is not accepted, to withdraw it. For instance, in Op. of Mantua, P.E.R.C. No. 82-99, 8 NJPER 302 (¶13133 1982), the Commission found that prior settlement negotiations were irrelevant to the merits of the unfair practice charge. It found that in New Jersey, evidence that a party has, in an attempt to compromise, offered or promised to accept a settlement proposal is inadmissible to establish either a defendant's liability or the invalidity of a plaintiff's claim. N.J.R. Evid. 52 and 53. The Commission recognized that in proceedings before our agency the parties are not strictly bound by the rules of evidence, N.J.A.C. 19:14-6.6, but held, nevertheless, that these rules espouse valid public policy concerns, especially where negotiations are the foundation of the labor relations process.

Here, the District allegedly decided to withdraw its previous offer to reassign Schneider to another school after the grievance hearing officer's decision issued. Timing is an important element in any settlement negotiations. When Charging Party did not accept

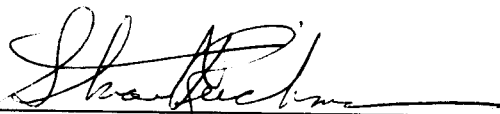
the District's offer, she ran the risk that the offer would be withdrawn. An offer without acceptance does not constitute a settlement agreement. The District did not violate our Act by either making the settlement offer or withdrawing it and proceeding to litigation.

Based on the foregoing, I find that the District's conduct did not violate 5.4a(1) or (3) of the Act, and I dismiss the charge against the District. I find that the Commission's complaint issuance standard has not been met and I decline to issue a complaint on the allegations of this charge.<sup>3/</sup>

**ORDER**

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR  
OF UNFAIR PRACTICES

  
Stuart Reichman, Director

DATED: March 13, 2003  
Trenton, New Jersey

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<sup>3/</sup> N.J.A.C. 19:14-2.3.