P.E.R.C. NO. 83-10

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

FREEHOLD REGIONAL HIGH SCHOOL
DISTRICT BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-81-197-176

FREEHOLD REGIONAL HIGH SCHOOL
EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge the Freehold Regional High School Education Association filed against the Freehold Regional High School District Board of Education. The Charge had alleged that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (2), (3), and (5), when, following the absence of a number of teachers on October 2 and 3, 1980, it required certain teachers to submit proof of sickness in order to receive paid sick leave, placed letters of reprimand in the personnel files of non-complying teachers, and improperly docked the pay of non-complying teachers.

The Commission adopts the findings of fact and conclusions of law of its Hearing Examiner.

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FREEHOLD REGIONAL HIGH SCHOOL
EDUCATION ASSOCIATION,

Charging Party.

Appearances:
For the Respondent, Murray, Granello & Kenney, Esqs.
(Malachi J. Kenney, of Counsel)

For the Charging Party, Chamlin, Schottland, Rosen & Cavanagh, Esqs.
(Thomas W. Cavanagh, Jr., of Counsel)

DECISION AND ORDER

On January 8, 1981, the Freehold Regional High School Education Association ("Association") filed an unfair practice charge against the Freehold Regional High School District Board of Education ("Board") with the Public Employment Relations Commission. The charge alleged that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4(a)(1),(2),(3) and (5),[1/]

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

when, following the absence of a number of teachers on October 2 and 3, 1980, it required certain teachers to submit proof of sickness in order to receive paid sick leave, placed letters of reprimand in the personnel files of non-complying teachers, and docked the pay of non-complying teachers by an improper amount under N.J.S.A. 18A:30-6.2/

On June 23, 1981, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On July 13, 1981, the Board filed an Answer. It asserted, in essence, that its actions were a legitimate, non-discriminatory response to a sympathy strike of teachers in support of striking school cafeteria workers employed by a private contractor.

On November 30, December 1, and December 11, 1981, Commission Hearing Examiner Alan R. Howe conducted hearings and allowed the parties to examine witnesses, present evidence, and argue orally. The parties also filed post-hearing briefs.

On April 20, 1982, the Hearing Examiner issued his report and recommendations, H.E. No. 82-48, 8 NJPER ___ (¶_____

2/ N.J.S.A. 18A:30-6 provides:

> When absence, under the circumstances described in section 18A:30-1 of this article, exceeds the annual sick leave and the accumulated sick leave, the board of education may pay any such person each day's salary less the pay of a substitute, if a substitute is employed or the estimated cost of the employment of a substitute if none is employed, for such length of time as may be determined by the board of education in each individual case. A day's salary is defined as 1/200 of the annual salary.

1982) (copy attached). He recommended dismissal of the Complaint. He specifically found that the Board did not violate (1) subsection 5.4(a)(5) because it acted within its statutory authority under N.J.S.A. 18A:30-4[3/] to prevent the abuse of sick leave; see, In re Piscataway Twp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982), (2) subsection 5.4(a)(3) because the Association did not prove either anti-union animus or protected activity, In re Haddonfield Bd. of Ed., P.E.R.C. No. 77-36, 3 NJPER 71 (1977);(3) subsection 5.4(a)(1), either independently or derivatively, because the Board required medical verification for legitimate and substantial business reasons, In re N.J. Sports & Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979); and (4) subsection 5.4(a)(2) because there was no proof that the Board was motivated to interfere, destroy, or dominate the majority representative. In re Red Bank Bd. of Ed., D.U.P. No. 79-17, 5 NJPER 56 (¶10037 1979); In re North Brunswick Twp. Bd. of Ed., P.E.R.C. No. 80-122, 6 NJPER 193 (¶11095 1980).

On May 14, 1982, the Association filed five detailed Exceptions. First, the Association contends that the record does not establish that the absent teachers engaged in an illegal strike, job action, or other concerted activity. Second, the Association contends that the Board did not have a reserved right, under either the contract or the law, to require medical

3/ This statute provides: "In case of sick leave claimed a Board of Education may require a physician's certificate to be filed with the Secretary of the Board of Education in order to obtain sick leave."

verification for paid sick leave under the circumstances confronting it on October 2 and 3, 1980. Third, the Association contends that anti-union animus motivated the Board's actions with respect to the sick leave claims of certain employees, and the Board's failure to negotiate the sick leave policy changes. Fourth, the Association asserts that there was no legitimate business reason to require verification for illness for less than a three day absence, to dock the pay of certain employees in an amount calculated on the number of actual instructional days, or to reprimand absent employees who did not supply the proof the Board required. Fifth, the Association contends that the Hearing Examiner erred in failing to distinguish properly between the actions of school administrators taken without prior Board approval and the subsequent decision of the Board to support, or "rubberstamp," these actions.

On June 2, 1982, the Board filed a response. The Board argues that the record supports each finding of fact and the Hearing Examiner's conclusions correctly apply the law.

We have carefully reviewed the record. Substantial evidence supports the Hearing Examiner's findings of fact. We adopt and incorporate them. We also agree with his conclusions of law.

We are satisfied that the Board had reason to believe that some of the teachers absent on October 2 and 3, 1980 were not entitled to paid sick leave. Given this reasonable belief,

the Board had the power, under N.J.S.A. 18A:30-4, the management rights clause of the contract, and our decision in Piscataway, supra, to require absent teachers to submit proof of illness in order to receive paid sick leave.[4/] The Board has properly allowed teachers to grieve an administrator's rejection of their proof supporting a paid sick leave claim, see Piscataway, supra, and the parties have agreed to stay binding arbitration over these grievances pending the issuance of this decision. Further, the Association has not persuaded us that the Board treated the sick leave claims of individual teachers differently because they supported the Association or that the Board's actions were designed to interfere with or destroy the Association. Accordingly, the Board did not violate subsections 5.4(a)(1),(2), (3), or (5), and we dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani and Commissioner Butch voted for this decision. Commissioner Graves voted against this decision. Commissioners Hipp and Newbaker abstained. Commissioners Hartnett and Suskin were not present.

DATED: Trenton, New Jersey
July 20, 1982
ISSUED: July 21, 1982

4/ To reach this conclusion, it is not necessary to find that the teachers were engaged in concerted, illegal activity in support of the striking cafeteria workers; it suffices to find that, on this record, it was not inappropriate for the Board to require evidence from absent teachers that they were entitled to paid sick leave.

H. E. No. 82-48

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

In the Matter of

FREEHOLD REGIONAL HIGH SCHOOL
DISTRICT BOARD OF EDUCATION,

Respondent, Docket No. CO-81-197-176

FREEHOLD REGIONAL HIGH SCHOOL EDUCATION
ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent did not violate Subsection(a)(1), (2), (3) and (5) of the New Jersey Employer-Employee Relations Act. The Unfair Practice Charge centered around conduct of the Respondent in response to an illegal job action by a substantial number of teachers on October 2 and October 3, 1980. The Respondent on October 2 prepared and read a letter to absent teachers advising them that they would be docked for unauthorized absence, that a doctor's note would be required and subject to verification and that if personal business is claimed that too would have to be documented and subject to verification. The Association claimed that the Board unilaterally altered the teachers' terms and conditions of employment by requiring a doctor's note and verification for sick leave pay in alleged violation of Section 5.4(a)(5) of the Act. The Association also alleged that the Respondent was motivated by anti-union animus in its conduct toward the Association, its officers and members in alleged violation of Section 5.4(a)(3) of the Act. Finally, the Association alleged that the Respondent was engaged in interference with the administration of the Association and independently violated Section 5.4(a) (1) of the Act.

The Hearing Examiner found that because the job action of October 2 and October 3, 1980 was illegal under New Jersey Law the Association and its members were not engaged in any protected activity under the Act. Further, the Hearing Examiner found that the Respondent had exercised a legitimate managerial prerogative when it advised absent teachers on October 2 and October 3, 1980 that they would be docked for unauthorized absence and requiring a doctor's note subject to verification in order to receive sick leave pay. There was no proof whatsoever that the Respondent had interfered with the administration of the Association by its conduct herein.

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.

H. E. No. 82-48

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Appearances:

For the Respondent
Murray, Granello & Kenney, Esqs.
(Malachi J. Kenney, Esq.)

For the Charging Party
Chamlin, Schottland, Rosen & Cavanagh, Esqs.
(Thomas W. Cavanagh, Jr., Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on January 8, 1981, and amended on January 19, 1981, by the Freehold Regional High School Education Association (hereinafter the "Charging Party" or the "Association") alleging that the Freehold Regional High School District 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, following the absence of a portion of its teaching staff on October 2 and October 3, 1980 required of certain teachers medical documentation for the absences in order to qualify for sick leave payment for the day or two of absence and, when a substantial number of teachers refused to comply, letters of reprimand were placed in their personnel files and their pay was reduced by a fraction reflective of the actual teaching days in the District rather than the statutory 1/200th, all of which the Charging Party alleges demonstrates disparate treatment among the teachers represented by

the Association, and all of which was alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (5) of the Act.[1/]

It appearing that the allegations of the Unfair Practice Charge, as amended, if true, may constitute unfair practices within the meaning of the Act a Complaint and Notice of Hearing was issued on June 23, 1981. Pursuant to the Complaint and Notice of Hearing, hearings were held on November 30, December 1 and December 11, 1981[2/] in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. The parties filed post-hearing briefs by April 5, 1982.[3/]

An Unfair Practice Charge, as amended, 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:

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

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

"(2) Dominating or interfering with the formation, existence or administration of any employee organization.

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

"(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ The delay in bringing the case on for hearing was occasioned by a cancellation of original hearing dates in mid-September 1981 in order to mutually agree upon a stipulation of certain facts and to accommodate the trial schedule to the parties in other matters.

3/ The delay in the filing of post-hearing briefs was occasioned by the delay in the receipt of transcript by counsel for the Charging Party and the necessity for reply briefs by counsel for both parties.

FINDING OF FACTS

1. The Freehold Regional High School District Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Freehold Regional High School Education Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. The Association has been recognized by the Board as the exclusive collective negotiations representative for a broad-based unit of employees including, inter alia, teachers, certain secretaries, nurses, attendance officers, security guards, special service personnel, guidance counselors and long-term substitutes (J-1, Article I, the Recognition clause from the 1980-82 agreement).

4. The instant dispute arose under the current collective negotiations agreement, effective during the term July 1, 1980 through June 30, 1982 (J-3). Except as modified by the Memorandum of Agreement of September 26, 1980 (J-3) the basic provisions of the current agreement are as set forth in the prior agreement, effective July 1, 1978 through June 30, 1980 (J-2).

5. In the early days of October 1980 the Board's cafeteria employees, who were employed by a private contractor, engaged in a legal strike.

6. On October 2, 1980, over ninety (90) teachers, a substantial number, failed to report to work, which involved the following schools within the District: Freehold High School, Freehold Township High School, Howell High School, Manalapan High School and Marlboro High School.

7. The Board, by telephone and letter dated October 2, 1980 (J-4), notified absent teachers as follows:

a. The teachers will be docked for unauthorized absences.

b. A claim of illness for absence should be accompanied by "an acceptable doctor's certificate" upon returning to work or at least by Monday,

October 6.

c. Any doctor submitting a note will be called for confirmation and the medical excuse will be subject to review by the Board's physician.

d. Absence claims based on emergency personal business have to be accompanied by a "written statement of the nature of the personal business which will be subject to investigation and review by the Board of Education."

8. Again on October 3, 1980 certain teachers from the aforementioned High Schools were absent from work.

9. No teacher was directed to submit to a medical examination at the Board's expense.

10. Letters of reprimand were placed in the files of those teachers who refused to comply with the directive set forth in the October 2, 1980 letter (J-4, supra) or whose reasons were not accepted.

11. Nine teachers were advised that their notes would not be accepted and the names of those teachers appear on Exhibit J-5.

12. With respect to challenging the use of sick leave, N.J.S.A. 18A:30-4 provides as follows:

> "Physician's Certificate Required For Sick Leave
>
> "In case of sick leave claimed a Board of Education may require a physician's certificate to be filed with the Secretary of the Board of Education in order to obtain sick leave."

13. The fractional rate of reduction of pay for those absences determined by the Board to be unauthorized was 1/187, a fraction based on the actual teaching days in the District (as opposed to the statutory 1/200). The same fraction of 1/187 was used by the Board in calculating the rate of reduction of pay for absences by teachers during a June 1980 strike where the absences were determined by the Board to be improper and unauthorized.

14. Article VII, Calendar, in the parties' collective negotiations agreement specifically sets forth the maximum number of work days for teachers as follows:

> "A. The in-school work year of teachers employed on a ten (10) month basis (other than new personnel who may be required to attend an additional two (2) days of orientation) shall not exceed one hundred and eighty-seven (187) days, and the in-school work year of teachers employed on an eleven (11) month basis shall not exceed two hundred and six (206) days and the in-school work year of teachers employed on a (12) month basis shall not exceed two hundred and twenty-five (225) days. The in-school work year shall include days when pupils are in attendance, orientation days, or any other day on which teacher attendance is required." (J-2,p.9).

15. When the Superintendent, H. Victor Crespy, learned on October 1, 1980 that the cafeteria employees would strike the following day, October 2, he directed the Principals of each school in his District to read a statement to the staff and students informing them that they were expected to report to school the following day.

16. At approximately 6:30 a.m. on October 2, 1980 the Superintendent received a call from the Assistant Superintendent, Walter Zuber, informing him of the number of teachers calling in to advise that they were going to be absent on that day. Upon arriving at his office, the Superintendent contacted the Principals of the Schools that opened early, specifically, Marlboro and Howell, to learn what the situation was. The Assistant Principal of Marlboro informed the Superintendent that some teachers had reported to work and then left and that about 40 teachers were absent. The Superintendent made a decision to divert certain teaching staff from one to school to another in order to cover for absent teachers.

17. Thereafter, on October 2, the Superintendent called the Board President, John Horrisberger, to inform him of the events taking place.

18. At about 10:00 a.m. on October 2, after learning that a substantial number of teachers were absent from Marlboro, Irene Warga, the President of the Association, and Robert Ugrovics, the Negotiations Committee Chairman of the Association, went to the Superintendent to reassure the Administration that the Association was not responsible for any job action and that the Association had

not asked any teachers to stay home.

19. After speaking to the Superintendent, Warga and Ugrovics stopped at the Freehold Township High School and informed a number of teachers that if they wanted to honor the cafeteria workers' picket line then they should "stay out" but that they had an obligation to report if there was no picket line.

20. During that day, October 2, the Assistant Superintendent observed approximately 13 teachers on the picket line in front of the Freehold Township High School and their names were given to the Superintendent.

21. A tally of absent teachers on October 2 indicated that 40 teachers were absent at Marlboro, five at Manaplan, 12 at Howell, 18 at Freehold Township and 12 at Freehold High School.

22. Subsequently, on October 2, counsel for the Board drafted a statement to be read to the absent teachers over the telephone, which was approved by the Board's President (see Finding of Fact No. 7, supra). This was the first time that such a statement had been prepared and read to teachers absent from school.

23. Prior to directing the High School Principals to telephone absent teachers and read the prepared statement (J-4, supra), the Administration attempted to ascertain which teachers were legitimately absent on that day, i.e., the taking of a "professional" day, a previously approved personal day or a teacher illness on October 1. This information was communicated by the Principals to the Superintendent or the Assistant Superintendent, who made no independent assessment of the validity thereof. Thereafter the absent teachers were telephoned by persons under the direction of the High School Principals. All of this was reported to members of the Board of Education on that day.

24. The same procedure was followed on October 3, 1980 regarding absent teachers and the informing of Board members.

25. There was introduced in evidence a chart for each High School showing

the names of absent teachers, the dates of absence, the excuse proffered, the submission or non-submission of a note and the number of days "docked," if any. A summary of these exhibits is as follows:

a. Freehold High School: Nineteen (19) teachers were absent and of these, six (6) teachers were docked one (1) or two (2) days (J-7).

b. Freehold Township High School: Twenty-six (26) teachers were absent and, of these, 14 teachers were docked one or two days (J-8).

c. Howell High School: Nineteen (19) teachers were absent and, of these, seven (7) teachers were docked one or two days (J-9).

d. Manalapan High School: Nine (9) teachers were absent and none were docked (J-10).

e. Marlboro High School: Fifty-five (55) teachers were absent and, of these, 42 were docked one day (J-11).

26. Not all of the teachers who had been asked to submit a doctor's note by October 6, 1980 did so, some of the notes were rejected and teachers were docked either one or two days pay by the Administration. The Board was involved only when grievances, infra, were filed by certain teachers.

27. At a public meeting of the Board on October 20, 1980 a resolution was adopted approving the action of the Superintendent in docking teaching staff members who were illegally absent on October 2, 1980 and also confirming the letters of reprimand, which were to be placed in each of the employee's personnel files (J-13).

28. On November 15, 1980 the Association filed seven grievances in connection with the docking of teaching staff members on October 2 and October 3, 1980 (J-17). These grievances are described as follows:

G.#1. Grievance on docking formula.

G.#2. Grievance of docking of alleged sick days for 36 teachers for which no excuses were given (J-5, letter #1).

G.#3. Grievance concerning docking of alleged sick days for two individuals for two days' absence for illness (J-5, letter #2).

G.#4. Grievance concerning docking of alleged sick days for eight teachers for one day in which a note was unacceptable (J-5, letter #3).

G.#5. Grievance concerning docking of alleged sick day for two days for one individual in which the note was unacceptable (J-5, letter #3A).

G#6. Grievance concerning docking of alleged sick days for 22 teachers for which no excuses were given for one day (J-5, letter #4).

G.#7. Grievance concerning docking for alleged sick days for one individual for two days with no excuses given (J-5, letter #4A).

29. The above grievances were denied by the Superintendent and by the Board.

30. Subsequently the Board on December 15, 1980 decided to conduct a hearing so as to afford staff members the opportunity to obtain further consideration on the merits of their respective grievances (J-15). The staff members pursuing a grievance before the Board were requested by letter dated January 14, 1981 to appear before the Board on February 2, 1981 (J-6). Under date of January 28, 1981 the Assistant Superintendent sent a letter to the grieving teachers requesting that they indicate whether or not they would be present at the Board hearing on February 2, 1981 and whether or not they would have representation (J-6A).

31. It is uncontroverted that the Association did not receive from the Board separate written notification regarding the Board's December 15, 1980 offer of hearings for certain of its teaching staff. It was stipulated that the Association Grievance Chairman, Alvin Applegate, would have testified that he had no recollection of the Superintendent orally advising him that the Board intended to schedule individual hearings for certain teachers. Association President Warga testified that she had no recollection of having discussed these hearings with the Superintendent between December 15, 1980 and mid-January 1981. Also, Warga admitted that

she had been present at the December 15, 1980 Board meeting, at which the resolution providing for hearings was adopted. Finally, Grievance Chairman Applegate signed the Board's preliminary answer to the grievance on December 18, 1980 (J-17).

32. At no time did any officer or member of the Association inform the Superintendent that the sending of the hearing letters to individual teaching staff was in violation of the collective negotiations agreement. The Association's attorney, in informing the Board's attorney that the only grievant who wished to exercise the option of appearing before the Board was Irv Kurinsky, raised no objection on behalf of the Association regarding notice to the Association of the hearings to be conducted by the Board on February 2, 1981.

33. No evidence of anti-union animus is found regarding the actions of the Board and its Administration in the docking of Patrick Reading, a Vice President of the Association, and John Evans, a member of the Association's Negotiations Team, for having failed to submit a doctor's note as requested for unauthorized absences on October 2 and October 3 in the case of Reading and October 2 only in the case of Evans. The Hearing Examiner does not accept the Association's proofs that the Board and its Administration should have known of a prior health problem for both Reading and Evans, as a result of which, according to the Association, no request for a doctor's note should have been made.

34. Under date of January 29, 1981 counsel for the Association advised counsel for the Respondent that the grievants, with exception of Irv Kurinsky, declined to appear at the February 2, 1981 Board hearing (J-19).

35. The instant unfair practice charge was filed by the Association on January 8 and amended on January 19, 1981.

36. Grievances raising "just cause" issues involving those employees as to whom medical notes were not accepted, and those employees who worked part of the day and were docked for a full day, are pending before the American Arbitration Association and are being held in abeyance pending the outcome of the instant proceeding.

THE ISSUES

1. Did the Respondent violate Subsection(a)(5) of the Act by its conduct in connection with the absence of certain of its teaching staff on October 2 and October 3, 1980?

2. Did the Respondent violate Subsection(a)(3) of the Act by its conduct vis-a-vis the Association, its officers or members as a result of certain absences of its teaching staff on October 2 and October 3, 1980?

3. Did the Respondent independently violate Subsection(a)(1) of the Act by its conduct surrounding the absence of certain of its teaching staff on October 2 and October 3, 1980?

4. Did the Respondent violate Subsection(a)(2) of the Act by its conduct vis-a-vis the Association commencing October 2, 1980?

DISCUSSION AND ANALYSIS

Introductory Remarks

Essentially, the instant Unfair Practice Charge, as amended, involves several complaints by the Association as to conduct by the Board under the circumstances of a substantial number of teachers withholding their services on October 2 and/or October 3, 1980 in support of a labor dispute involving the Board and its cafeteria employees, who commenced a legal strike on October 2, 1980. The Hearing Examiner is not persuaded that approximately 90 teachers elected on October 2 and October 3, 1980 to absent themselves from their teaching duties as a result of bona fide illness. It appears to the Hearing Examiner that this case involves concerted activity on the part of a substantial number of teachers to support the cafeteria employees in their labor dispute with the Board.

It is well settled in New Jersey that public employees have no right to strike or to engage in a concerted job action, the effect of which is to withhold services from their employer: Board of Education, Borough of Union Beach v. New Jersey Education Association, 53 N.J. 29 (1968). Thus, there is involved no protected activity engaged in by the instant teachers, which would be a preliminary requisite

to the finding of a violation of Subsection(a)(3) of the Act. This will be considered again infra.

The Hearing Examiner also notes preliminarily that the Board on October 2, 1980 was faced with an emergent situation when approximately 90 of its teaching staff failed to report to work. The Board clearly exercised its managerial prerogatives when, after consulting with its attorney, it composed a letter on October 2, 1980 (J-4, supra), which was read to absent teachers over the telephone on that day. This point will be dealt with in more detail hereinafter.

Thus, the Hearing Examiner perceives no bona fide "sick leave" dispute herein. Plainly, there were certain teachers who were on bona fide sick leave on October 2 or October 3, 1980. The Board acknowledged as much and those teachers were granted sick leave with pay. Further, the Board acknowledged that certain teachers had obtained prior approval for the taking of a "professional" day or that certain teachers had called in sick on at least one day prior to October 2, 1980 and thus there was no question raised as to their continued absence on October 2 and/or October 3, 1980.

With all of the foregoing in mind the Hearing Examiner now turns to the alleged violations of the Act seriatim.

The Respondent Did Not Violate Subsection (a)(5) Of The Act By Its Conduct In Connection With The Absences Of Certain Of Its Teaching Staff On October 2 And October 3, 1980

The Hearing Examiner has no difficulty in concluding that the Respondent did not violate Subsection(a)(5) of the Act when it engaged in certain conduct and activity in response to the absence of a substantial number of its teaching staff on October 2 and October 3, 1980. Basically, the Board operated within the area of its managerial prerogatives under emergent conditions when its Administration prepared J-4 and read it to the absent teachers over the telephone

on October 2, 1980.

Essentially J-4 advised teachers that they would be docked for unauthorized absence, that a claim of illness should be accompanied by "an acceptable doctor's certificate," that any doctor submitting a note would be called and be subject to review by the Board's physician and, finally that absences based on emergency personal business would have to be accompanied by a written statement as to the nature thereof and would be subject to investigation and review by the Board. The Hearing Examiner's reaction to the content of J-4 is that it was emminently justified and reasonable under the circumstance of some 90 teachers not having reported to work on October 2, 1980.

The Commission has recently considered the question of the verification and monitoring of sick leave in the context of a Board's managerial prerogative: Piscataway Township Board of Education, P.E.R.C. 82-64, 8 NJPER 95 (1982). There the Commission found completely lawful the Baord's unilateral adoption of a sick leave policy, which provided for conferences with employees suspected of sick leave abuse and for telephone verification or visits to homes of employees on sick leave. The Commission also found lawful the Board's requirement of a physician's certificate before an employee could obtain sick leave. The Commission did, however, acknowledge that the particular application of the policy adopted by the Board might be subject to the contractual grievance procedure.

The Hearing Examiner, based on the above decision of the Commission in Piscataway, has no difficulty in concluding that the instant case involves the same issue, namely the legitimate exercise of a managerial prerogative. The Hearing Examiner notes that the Commission said in Piscataway that while the Association may not prevent the Board from attempting to verify the bona fides of a claim of sickness the Board may not prevent the Association from contesting its determination in a particular case that an employee was not actually sick. The Hearing Examiner also notes that the Commission said in Piscataway that

"...we conclude that the mere establishment of the Board's sick leave policy does not impinge on the Association's ability to negotiate sick leave benefits or on an individual's ability to utilize sick leave for proper purposes. To the contrary, the policy serves a legitimate and non-negotiable management need to insure that employees do not abuse contractual sick leave benefits..." (8 NJPER at 96, 97).

The Hearing Examiner also notes that the Board had statutory authority to require a physician's certificate under N.J.S.A. 18A:30-4 (see Finding of Fact No. 12, supra).

It appears to the Hearing Examiner that the Board on October 2, 1980 acted to prevent the abuse of sick leave in the context of maintaining the efficient operation of the District. Although the letter, J-4, supra, was prepared and initiated by the Administration there is no doubt whatever but that the Board was informed of the contents and by telephone poll approved J-4. Thus, it was clearly Board policy on October 2, 1980 that the requisites set forth in J-4 be met. Additionally, the Board approved the policy formally at its October 20, 1980 meeting (J-13). In this context, the Hearing Examiner notes with approval the Respondent's citation of Farmer v. Board of Education of the City of Camden, 1967 S.L.D. 287.

The next related consideration is the placing of letters of reprimand in the files of teachers who did not comply with the October 2, 1980 directive (J-4). The law of New Jersey is clear that the Board had the right to take such disciplinary action under State of New Jersey v. Local 195, IFPTE et al., 179 N.J. Super. 146 (App. Div. 1981), pet. for certif. denied, ___ N.J. ___(1982). Also, the parties' collective negotiations agreement, in Article VI, "Management Rights," affords the Board the right to take disciplinary action "for just cause." The Hearing Examiner notes that the "just cause" issue is pending before the American Arbitration Association (see Finding of Fact No. 36, supra).

The final consideration under review herein is the formula used by the Board

in the docking of the pay of teachers whose absences were deemed to be unauthorized. The Association contested the 1/187 docking formula on the ground that it deviates from the statutory 1/200 rate for sick leave. The Board has previously used the 1/187 formula when Association members engaged in a strike in June 1980 (see Finding of Fact No. 13, supra). The Hearing Examiner finds nothing illegal or inappropriate in use of the 1/187 formula by the Board in the docking of teachers on October 2 and October 3, 1980. The Board had done so before and, to the knowledge of the Hearing Examiner, there was no protest by the Association. The Hearing Examiner notes that his conclusion in this regard in consistent with the rationale of the Commission in Cherry Hill Board of Education, P.E.R.C. No. 79-18, 4 NJPER 462 (1978).

Accordingly, based on the foregoing, the Hearing Examiner will recommend dismissal of the Subsection(a)(5) allegations in the Unfair Practice Charge and Complaint.

The Respondent Did Not Violate Subsection (a)(3) Of The Act By Its Conduct Toward The Association, Its Officers And Members As A Result Of The Events Herein Commencing October 2, 1980

It is noted preliminarily that the Charging Party's problem in establishing a violation by the Respondent of Subsection(a)(3) of the Act is that it cannot demonstrate that it was engaged in protected activity during the days of October 2 and October 3, 1980. The Hearing Examiner has heretofore noted his conclusion that there was an illegal strike or job action engaged in by a substantial number of teachers on October 2 and October 3, 1980 in response to the picket line and labor dispute involving the Board's cafeteria employees. That this activity was not protected is clear from Union Beach, supra. Further, while the Association disclaimed any responsibility for the teachers' actions Warga and Ugrovics did not on October 2 advise teachers that should unqualifiedly report to work (see Finding Fact No. 19, supra).

Additionally, the Hearing Examiner has found as a fact that the Board did not demonstrate anti-union animus toward Association representatives Patrick Reading and John Evans by requesting that they submit a doctor's note for unauthorized absences on October 2 and October 3, 1980 (see Finding of Fact No. 33, supra). The Hearing Examiner does not accept the Association's proofs that the Board and its Administration should have known of a prior health problem for both Reading and Evans, as a result of which no request for a doctor's note should have been made.

Additionally, the Hearing Examiner finds no evidence of anti-union animus or illegal action on the part of the Board by the Board having failed to notify separately the Association as to the Board's decision on December 15, 1980 to hold hearings for certain teachers in connection with their grievances over the pay docking for alleged unauthorized absences. It is clear to the Hearing Examiner that Association had actual or constructive notice of the Board's action on December 15, 1980 (see Finding of Fact No. 31, supra).

Notwithstanding, that the Appellate Division in East Orange Public Library v. Taliaferro, 180 N.J. Super. 155 (1981) adopted the "Mt. Healthy" standard of the United States Supreme Court in Subsection(a)(3) cases, this decision did not undermine the Commission's requirement, which was enuniciated in Haddonfield Borough Board of Education, P.E.R.C. 77-36, 3 NJPER 71 (1977), that a Charging Party must preliminarily demonstrate that he or she was engaging in a protected activity and that the employer had actual or implied knowledge thereof. As indicated previously, there was no protected activity involved herein and, thus, the Haddonfield requirement has not and could not be met.

For all of the foregoing reasons the Hearing Examiner will recommend that the Subsection(a)(3) allegations in the Unfair Practice Charge and Complaint be dismissed.

The Respondent Did Not Independently Violate Subsection(a)(1) Of The Act By Its Conduct Herein

The Association has plainly failed to prove an independent violation of Subsection(a)(1) of the Act. For an independent violation of the Act to be found an employer must engage in activities which "...tend to interfere with, restrain or to coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification:" New Jersey Sports and Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550 (1979).

Basically, for the reasons set forth above, there can be no finding of an independent violation of Subsection(a)(1) of the Act inasmuch as no employee herein was engaged in the exercise of rights guaranteed by the Act: Union Beach supra. Further, even if it was assumed that there was a protected activity involved, clearly the Respondent acted with legitimate and substantial business justification when it prepared and implemented unilaterally the policy set forth in the letter of October 2, 1980 (J-4, supra).

Accordingly, the Hearing Examiner will recommend dismissal of the Subsection (a)(1) allegations in the Unfair Practice Charge and Complaint.

The Respondent Did Not Violate Subsection (a)(2) Of The Act By Its Conduct Herein Vis-a-Vis The Association Commencing October 2, 1980

The Hearing Examiner finds and concludes that the Respondent engaged in no activity or conduct which remotely involves Subsection(a)(2) of the Act.

The Director of Unfair Practices in Red Bank Board of Education, D.U.P. No. 79-17, 5 NJPER 56 (1979) stated, inter alia, "...Inasmuch as there is no factual assertion that the Board was motivated to interfere or destroy the employee organization, or to dominate the majority representative, there is no basis for a conclusion that the employer is in violation of Section(a)(2)." (5 NJPER at 58). See also, North Brunswick Township Board of Education, P.E.R.C. No. 80-122,

6 NJPER 193, 194 (1980).

The cases where a violation of Subsection(a)(2) can be sustained are few in number and the instant case plainly fails to meet the burden of proof by any standard. Accordingly, the Hearing Examiner will recommend dismissal of the Subsection(a)(2) allegations in the Unfair Practice Charge and Complaint.

* * * *

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

CONCLUSION OF LAW

The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (5) by its actions and conduct undertaken in response to the absence of a substantial number of its teachers on October 2 and October 3, 1980.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that Complaint be dismissed in its entirety.

Alan R. Howe
Hearing Examiner

Dated: April 20, 1982
Trenton, New Jersey