P.E.R.C. NO. 87-149

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY & THE CHANCELLOR
OF THE DEPARTMENT OF HIGHER EDUCATION,

Respondent,

-and-

Docket No. CO-87-51-27

COUNCIL OF NEW JERSEY STATE COLLEGE
LOCALS, NJSFT-AFT/AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO against the State of New Jersey and the Chancellor of the Department of Higher Education. The charge alleged that the State and the Chancellor violated the New Jersey Employer-Employee Relations Act when they refused to provide AFT with correspondence between the Chancellor and the Salary Adjustment Committee concerning a document entitled "Resolution to Ensure an Orderly Transition to Full Autonomy for the State Colleges." The Commission holds, in agreement with a Hearing Examiner, that the State and the Chancellor supplied the AFT with sufficient information concerning that document to meet its duty to supply information.

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Docket No. CO-87-51-27

COUNCIL OF NEW JERSEY STATE COLLEGE LOCALS, NJSFT-AFT/AFL-CIO,

Charging Party.

Appearances:

For the Respondent, W. Cary Edwards, Attorney General
(Melvin E. Mounts, Deputy Attorney General)

For the Charging Party, Dwyer & Canellis, Esqs.
(Michael E. Buckley, of counsel)

DECISION AND ORDER

On August 15, 1986, the Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO ("AFT") filed an unfair practice charge against the State of New Jersey and the Chancellor of the Department of Higher Education. The charge alleges that the respondents violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) 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; and (5) Refusing to negotiate in good faith with a majority representative of

Footnote Continued on Next Page

when they refused to provide AFT with correspondence between the Chancellor and the Salary Adjustment Committee ("SAC") concerning a document entitled: "Resolution To Ensure an Orderly Transition to Full Autonomy for the State Colleges."

AFT requested interim relief. On August 19, 1986, the parties argued orally before Commission designee Edmund G. Gerber. On August 22, the designee denied AFT's request that it receive the verbatim contents of the Chancellor's letters, but he ordered the State "to keep the AFT apprised of all recommendations by the Chancellor, the State Department of Higher Education or the State colleges to [SAC] concerning recommendations from that body to enact regulations on matters which otherwise are terms and conditions of employment." I.R. No. 87-3, 12 NJPER 664 (¶17251 1986) State representatives then orally informed AFT that the Chancellor had sent SAC a memorandum requesting that State colleges have the right to hire employees above Step 4 of the salary scale without SAC approval; this memorandum contained nothing else affecting members of AFT's negotiations unit although it did contain other requests relating to employees in other units.

1/ Footnote Continued From Previous Page

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."

On September 4, 1986, the Director of Unfair Practices issued a Complaint and Notice of Hearing. The respondents filed an Answer admitting that it had refused to provide the document requested, but asserting that it had no statutory or contractual obligation to do so and that the charge was in any event moot since it had complied with the interim relief order.

On November 6, 1986, Hearing Examiner Alan R. Howe conducted a hearing. The parties stipulated facts, introduced joint exhibits and filed post-hearing briefs by February 19, 1987.

On March 11, the Hearing Examiner recommended the Complaint's dismissal. H.E. No. 87-54, 13 NJPER ___ (¶ 1987). He concluded that the respondents had complied with their statutory obligation to produce requested information relevant to collective negotiations by orally informing AFT of the substance of the Chancellor's memorandum to SAC.

On March 25, AFT filed exceptions. It contends that the Hearing Examiner erred in: (1) not relying on the New Jersey Right to Know Law, N.J.S.A. 47:1A-1 et seq., and similar rights under common law; (2) relying upon Cincinnati Steel Castings Co., 86 N.L.R.B. No. 83, 24 LRRM 1657 (1949) to find that respondents need not produce the memorandum itself, and (3) relying on Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979) and Hickman v. Taylor, 329 U.S. 495 (1947) to suggest that respondents had a privilege to withhold the memorandum.

On April 14, after receiving an extension of time, the respondents filed a response supporting the report.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-6) accurately track the stipulations. We adopt and incorporate them.

N.J.S.A. 34:13A-5.4(a)(5) makes it an unfair practice for an employer to refuse to negotiate in good faith with the majority representative over the terms and conditions of employment of unit employees. A refusal to provide requested information relevant to contract negotiations evidences a refusal to negotiate in good faith. Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985); Shrewsbury Bd. of Ed., P.E.R.C. No. 81-119, 7 NJPER 235 (¶12105 1981). Compare NLRB v. Acme Industrial Co. 385 U.S. 432 (1967); NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956). See also Gorman, Basic Text on Labor Law at 409-418 (1976); Morris, The Developing Labor Law, at 606-621 (2d ed. 1983).2/

The employer's obligation to produce requested information is not absolute and turns on the circumstances of a particular case. We have especially recognized that information need not always be disclosed in the precise form requested. Downe Tp.;

2/ The United States Supreme Court has held that the duty to furnish information relevant to negotations is a statutory obligation independent of any contract and that a party may therefore elect to file an unfair practice charge even if a grievance could also be filed. NLRB v. Acme Industrial Co.. The Hearing Examiner thus properly held that State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984) does not divest the Commission's jurisdiction. A specific contractual provision, however, may validly call for less or more information than statutorily required.

Shrewsbury; City of Union City, P.E.R.C. No. 83-162, 9 NJPER 394 (¶14179 1983). Compare Cincinnati Steel Castings Co. (under the circumstances, employer did not violate Labor-Management Relations Act, 29 U.S.C. §141 et seq., when it orally gave the union the names, classifications and wages of unit employees); J.I. Case Co. v. NLRB, 253 F. 2d 149 (7th Cir. 1958) (under the circumstances, oral presentation of complicated information at single bargaining session insufficient to meet statutory obligations). See also Gorman at 416-417; Morris at 615-616.

Under all the circumstances of this case, we agree with the Hearing Examiner that respondents met their obligations under subsection 5.4(a)(5). We believe that AFT's initial request and the Chancellor's initial response were both too broad; that our designee properly narrowed the dispute to the relevant negotiations information, and that respondents complied with his order and their statutory obligations when they orally informed AFT of the portions of the memorandum which concerned mandatorily negotiable issues affecting AFT unit members.

In 1986, the Legislature enacted a statute providing a new system of governance for State colleges and making them autonomous under their boards of trustees under the general supervision of the

State Board of Higher Education. N.J.S.A. 18A:3-14 et seq.[3/] Section 18 requires the State Board of Higher Education to establish a schedule for the Act's implementation so that each college is able to effect an orderly transition to full autonomy without a disruption of its educational program or fiscal position. Pursuant to this section, the State Board of Higher Education authorized the Chancellor to take the necessary action to implement a revised relationship between SAC and the State colleges and the Chancellor in turn wrote the memorandum to SAC now in dispute.

AFT's initial request sought all correspondence between SAC and the Chancellor concerning the resolution of the State Board of Higher Education. The Chancellor's initial response denied AFT any correspondence concerning this resolution. In the interim relief proceedings, our designee balanced and accomodated the interests of both parties. The Chancellor acted in a regulatory capacity when he wrote the memorandum, but at the same time his actions could have had significant implications for the successor contract negotiations then in progress between the State and AFT. Council of New Jersey State College Locals v. State Bd. of Higher Ed., 91 N.J. 18 (1982); State of New Jersey (UMDNJ), P.E.R.C. No. 85-106, 11 NJPER 290

3/ Section 15 of this Act states: "Nothing in this...act shall be construed or interpreted to contravene or modify the provisions of the New Jersey Employer-Employee Relations Act...or to limit or restrict the scope of negotiations as provided pursuant to that law." This decision does not require us to interpret this section or the other provisions of the autonomy statute.

(¶16105 1985), recon. den. P.E.R.C. No. 86-7, 11 NJPER 452 (¶16158 1985), aff'd App. Div. Dkt. No. A-11-85T7 (4/14/86). The designee carefully accommodated the Chancellor's regulatory powers and AFT's negotiations rights when he ordered respondents to inform AFT about those portions of the memorandum (and future communications) concerning mandatorily negotiable issues affecting AFT unit members, but did not order broader disclosure.4/

The employer complied with that order when its representatives told AFT representatives about that portion of the memorandum concerning the initial salaries of employees hired into AFT's negotiations unit. Under all the circumstances of this case, we agree with the Hearing Examiner that it was not an unfair procedure to produce this simple, limited information orally rather than to produce the entire memorandum. Accordingly, we dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Reid, Smith and Wenzler voted in favor of this decision. Commissioner Bertolino was opposed.

DATED: Trenton, New Jersey
May 20, 1987
ISSUED: May 21, 1987

4/ We do not enforce the Right to Know Law or any common law rights to disclosure which might pertain to the portions of the memorandum not affecting AFT negotiations. We also need not decide whether any privileges would nevertheless protect those portions from disclosure if we deemed them relevant to AFT negotiations. We simply construe our Act to require disclosure of the portion of the memorandum implicating the negotiations relationship between AFT and the State.

H.E. NO. 87-54

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

In the Matter of

STATE OF NEW JERSEY & THE CHANCELLOR
OF THE DEPARTMENT OF HIGHER EDUCATION,

Respondent,

-and- Docket No. CO-87-51-27

COUNCIL OF NEW JERSEY STATE COLLEGE
LOCALS, NJSFT-AFT/AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent State did not violate §§5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when it refused the request of the Charging Party on July 24, 1986, to provide it with certain data, which involved communications between the Chancellor of Higher Education and the Salary Adjustment Committee, pursuant to a resolution adopted by the Board of Higher Education on July 18, 1986. The Hearing Examiner reviewed the various decisions of the National Labor Relations Board and the Commission, involving requests for relevant data to the negotiations, and concluded that when the State on August 27, 1986, made an oral presentation to the Charging Party of the substance of communications between the Chancellor and the Salary Adjustment Committee it had fulfilled its obligation to provide relevant data: Cincinnati Steel Castings Co., 86 NLRB No. 83, 24 LRRM 1657 (1949).

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. 87-54

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

In the Matter of

STATE OF NEW JERSEY & THE CHANCELLOR
OF THE DEPARTMENT OF HIGHER EDUCATION,

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-and- Docket No. CO-87-51-27

COUNCIL OF NEW JERSEY STATE COLLEGE
LOCALS, NJSFT-AFT/AFL-CIO,

Charging Party.

Appearances:

For the Respondent
Hon. W. Cary Edwards, Attorney General
(Melvin E. Mounts, D.A.G.)

For the Charging Party
Dwyer & Canellis, Esqs.
(Michael E. Buckley, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on August 15, 1986, by the Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO (hereinafter the "Charging Party" or the "AFT") alleging that the State of New Jersey & the Chancellor of the Department of Higher Education (hereinafter the "Respondent" or the "State") has engaged in unfair practices within the meaning of the

New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that on July 18, 1986, the Respondent adopted a "Resolution to Ensure an Orderly Transition to Full Autonomy for the State Colleges," which provided, inter alia, that the Chancellor take the necessary action to implement a revised relationship between the Salary Adjustment Committee and the State Colleges equivalent to that of Rutgers, The University of Medicine and Dentistry of New Jersey and the New Jersey Institute of Technology; the AFT on July 24, 1986, requested that the Chancellor provide copies of any and all correspondence to the Salary Adjustment Committee relating to the implementation of the aforesaid Resolution; and on August 7, 1986, the Chancellor refused to provide the requested information, which was concurred in by the Respondent's Office of Employee Relations; all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act.[1/]

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; 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."

September 4, 1986.. Pursuant to the Complaint and Notice of Hearing, a hearing was held on November 6, 1986, in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. A complete stipulation of facts was entered into on that date and oral argument was waived. The parties filed post-hearing briefs by February 19, 1987.

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 stipulated record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The State of New Jersey and the Chancellor of the New Jersey Department of Higher Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. On July 18, 1986, the State Board of Higher Education adopted a "Resolution to Ensure an Orderly Transition to Full Autonomy for the State Colleges," which provided in part:

> That the Chancellor shall take the necessary action to implement a revised relationship between the Salary Adjustment Committee and the state colleges equivalent to that with Rutgers, The University of Medicine and Dentistry of New Jersey and the New Jersey Institute of Technology... (J-3).

4. The regulations of the Salary Adjustment Committee applicable to the State Colleges concern such matters as salary caps, initial salaries of new appointees, and a variety of other matters relating to the salaries of employees under the auspices of the Department of Higher Education (Tr 11, 12).

5. On July 24, 1986, the Charging Party, by Thomas H. Wirth, addressed a letter to Chancellor T. Edward Hollander of the Department of Higher Education, in which data was requested, namely, copies of all correspondence between Mr. Hollander and the members of the Salary Adjustment Committee relating to the implementation of the Resolution of July 18, 1986 (J-3, supra)[J-4]. (Tr 12).

6. On August 7, 1986, the Chancellor addressed a responding letter to Mr. Wirth, acknowledging receipt of J-4 and stating that, "The information you request is not information to which you are entitled under the terms of the Agreement nor was the release of such information contemplated by the parties when agreement was reached on this contractual language," referring to Article VIII, Section C of the 1983-1986 collective negotiations agreement (J-1)[J-5]. (Tr 13).

7. Following the receipt of J-5, supra, Mr. Wirth contacted Mr. Edwin Evans of the New Jersey Office of Employee Relations on August 15, 1986, and verbally requested a copy of the documentation demanded in J-4, supra (Tr 14).

8. On August 22, 1986, Edmund G. Gerber, a designee of the Commission, issued a decision on the Charging Party's application for interim relief (I.R. No. 87-3), in which he concluded:

> Accordingly, it is ORDERED that during the course of the negotiations between the Union and the State, the State must keep the Union apprised of all recommendations by the Chancellor, the State Department of Higher Education or the state colleges to the Salary Adjustment Committee concerning recommendations for that body to enact regulations on matters which otherwise are terms and conditions of employment. (J-9 & Tr 14, 15).

9. On August 27, 1986, Mr. Wirth and Michael E. Buckley, representing the Charging Party, met with Mr. Evans, Judith Turnbull and Melvin E. Mounts, D.A.G. The Respondent asserted that certain information was being supplied without prejudice. The representatives of the Charging Party were informed orally that the Chancellor's memorandum to the Salary Adjustment Committee: (1) referenced the Board of Higher Education Resolution of July 18, 1986; (2) contained a specific request that the Colleges have the right to hire employees above Step 4 of any salary scale without SAC approval; (3) contained nothing else affecting members of the AFT bargaining unit; and (4) contained other requests relating to employees not included in the AFT bargaining unit (Tr 15-17).

10. On August 29, 1986, Mr. Wirth, on behalf of the Charging Party, addressed a letter to Judith Turnbull, stating that, "The Union does hereby request copies of all Salary Adjustment Committee regulations currently applicable to Rutgers, UMDNJ and/or

NJIT," and that the information was relevant and necessary to the negotiation of a successor agreement (J-6)[Tr 17, 18].

11. On September 9, 1986, Ms. Turnbull addressed a letter to Mr. Wirth, responding to his letter of August 29th, supra, in which she stated that, "...I am attaching the SAM for FY'85 which is the last one promulgated by the Committee. This regulation is in the category of publicly available information and is being forwarded to you on that basis." (J-7 & J-8; Tr 18-20).

12. To date, the data requested by the Charging Party on July 24, 1986 (J-4, supra) has not been provided (Tr 20).[2/].

DISCUSSION AND ANALYSIS

The Respondent State Did Not Violate §§5.4(a)(1) And (5) Of The Act When It Refused To Provide The Charging Party With All Correspondence Between The Chancellor And The SAC Relating To The Implementation Of The Resolution Of July 18, 1986.

On July 18, 1986, the State Board of Higher Education adopted a resolution "...To Ensure an Orderly Transition to Full Autonomy for the State Colleges," which provided that the Chancellor, T. Edward Hollander, was to take the "necessary action" to implement a revised relationship between the SAC ("Salary Adjustment Committee") and the state colleges equivalent to that with Rutgers, UMDNJ and NJIT (see Finding of Fact No. 3). SAC

2/ At the conclusion of the hearing in this matter the parties stipulated that the foregoing stipulation of facts (¶'s 1-12) were "...complete and to their satisfaction..." (Tr 21).

regulations applicable to the state colleges concern such matters as salary caps, initial salaries of new appointees and other matters (see Finding of Fact No. 4). On July 24, 1986, the Charging Party requested Hollander to provide copies of all correspondence between him and the SAC relating to the implementation of the July 18th resolution, supra (see Finding of Fact No. 4). This request was refused by the Chancellor on August 7th, referring to Article VIII, §C of the 1983-86 collective negotiations agreement (see Finding of Fact No. 6).

On August 22, 1986, a designee of the Commission, Edmund G. Gerber, issued a decision on the AFT's application for interim relief, in which he concluded that during negotiations the Respondent must keep the AFT apprised of all recommendations by the Chancellor, the State Department of Higher Education or the state colleges to the SAC concerning recommendations for it to enact regulations on matters which otherwise are terms and conditions of employment (see Finding of Fact No. 8). Following this interim relief decision (I.R. No. 87-3), the State met on August 27, 1986 with representatives of the AFT where, without prejudice, the State (orally) provided the AFT with the following information from the Chancellor's memorandum to the SAC: (1) (reference was made to the Board of Higher Education resolution of July 18, 1986; (2) it contained a specific request that the Colleges have the right to hire employees above Step 4 of any salary scale without SAC approval; (3) it contained nothing else affecting members of the AFT

bargaining unit; and (4) it contained other requests relating to employees not included in the AFT bargaining unit (see Finding of Fact No. 9).

Thereafter on August 29th, the AFT addressed a letter to the State requesting "...copies of all Salary Adjustment Committee regulations currently applicable to Rutgers, UMDNJ and/or NJIT," adding that the information was relevant and necessary to the negotiation of a successor agreement (see Finding of Fact No. 10). On September 9th, the State addressed a letter to the AFT in response to its request of August 29th, advising that it was attaching the "SAM" for fiscal year 1985, this being the last one promulgated by the Salary Adjustment Committee, adding that it was in the category of publicly available information and was being forwarded on that basis (see Finding of Fact No. 11).

As of the date of the hearing in this matter the data requested by the AFT on July 24, 1986 had not been provided (see Finding of Fact No. 12).

The Hearing Examiner first notes the contention of the Respondent State that the instant matter is moot because of the consummation of a successor collective negotiations agreement in September 1986. However, the Hearing Examiner agrees that several of the cases cited by the Charging Party in its Reply Brief are controlling on this question: see Galloway Tp. Bd.Ed. v. Galloway Tp. Ass'n of Ed. Secys., 78 N.J. 1 (1978) and NLRB v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261, 2 LRRM 599, 603 (1938). As the

New Jersey Supreme Court said in Galloway, inter alia, in connection with the issuance of a bargaining order, "...the appropriateness of a bargaining order remedy must be assessed as of the time the case arose before the NLRB; subsequent events affecting the majority status of the union are immaterial in determining whether the bargaining order shall be enforced (citing cases)..." (78 N.J. at 19)(emphasis supplied). Plainly, the events and facts involved herein are analogous to the events and facts in Galloway where a bargaining order remedy was before the Court. Thus, did the Court state further that it could not say on the present record "...that there is no conceivable likelihood of repetition of the Board's unlawful conduct such as would render enforcement of this order inappropriate..." (78 N.J. at 24). So much for the issue of mootness.

The Hearing Examiner next considers the contention of the Respondent State that the subject matter of the instant dispute should be resolved on the basis of the parties' collective negotiations agreements, referring both to the prior collective negotiations agreement, effective July 1, 1983 through June 30, 1986 (J-1) and the successor agreement, effective July 1, 1986 through June 30, 1989 (J-2). In this regard reference is made to Art. VIII, §C in each of the agreements, which are identical, where the Respondent State agrees to furnish to the AFT in response to written requests "...information which is relevant and necessary to the negotiating of subsequent agreements..." (J-1 & J-2, p. 11).

Although not clearly articulated by the State, the Hearing Examiner assumes that the State is suggesting that in view of the fact that the parties have negotiated a grievance procedure for the of their disputes (see Art. VII of J-1 & J-2, pp. 6-10) the instant matter should be deferred to the grievance procedure in accordance with the Commission's decision in N.J. Dept. of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). If, indeed, this is the contention of the State, then it erroneously construes the Commission's decision in Human Services, supra.

The Commission made clear in Human Services that while a mere breach of contract does not state a cause of action under §5.4(a)(5) of the Act, a repudiation by the public employer of a particular contract clause, such as is here alleged, i.e., Art. VIII, §C, may constitute "...specific indicia of bad faith over and above a mere breach of contract..." (10 NJPER at 423). Because the Respondent State takes the position, in connection with the AFT's request for all correspondence between the Chancellor and the SAC relating to the implementation of the July 18th Resolution, the State may have manifested "bad faith" over and above a mere breach of the contractual provisions of Art. VIII of J-1 and J-2 in refusing to provide the requested data.

The Hearing Examiner assumes arguendo, for purposes of this decision, that a dismissal of the Unfair Practice Charge herein would not be appropriate under Human Services, supra. Thus, we proceed to the essential nature of the dispute between the parties,

namely, whether the decisions of the Commission, the NLRB and the courts require that the Respondent State provide the AFT with copies of all correspondence between the Chancellor and the SAC relating to the implementation of the Resolution of the State Board of Higher Education, adopted on July 18, 1986.

The Hearing Examiner first concludes that this case does not involve the "New Jersey Right to Know Law" (N.J.S.A. 47:1A-1 et seq.) or the same alleged right under the "common law" (cf. Charging Party's Main Brief, pp. 7-10). The AFT's case must rise or fall on a finding that the Respondent State violated §5.4(a)(5) of the Act when it refused to provide the AFT with the requested data on and after July 24, 1986.

The Hearing Examiner notes that the Charging Party first cites two Commission decisions: Shrewsbury Bd.Ed., P.E.R.C. No. 81-119, 7 NJPER 235 (¶12105 1981) and City of Union City, H.E. No. 83-34, 9 NJPER 251 (¶14115 1983), aff'd. P.E.R.C. No. 83-162, 9 NJPER 394 (¶14179 1983).

In Shrewsbury the Commission, in holding that a public employer is obligated to provide relevant information to the collective negotiations representative so that it may fulfill its statutory duties and responsibilities, quoted from a decision of the United States Supreme Court in NLRB v. Acme Industrial Co., 385 U.S. 432, 64 LRRM 2069 (1967). In that case the Supreme Court had held that an employer was obligated to furnish a union with information needed to determine if the collective bargaining agreement had been

violated, notwithstanding that the dispute had not been decided by an arbitrator. The Supreme Court, citing NLRB v. Truitt Mfg. Co., 351 U.S. 149, 38 LRRM 2042 (1956) stated that:

> There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties...

In City of Union City, supra, the union was provided with a copy of the municipal budget and the necessary payroll records to identify the names of those employees in which the union was interested for purposes of negotiations. However, the City refused to provide the union with the budget "work sheets," which were prepared by the City as part of its budget process. These "work sheets" included salaries, wages and other expenses, including equipment expenses. This Hearing Examiner, in dismissing the Complaint, concluded that the City was not obligated to provide the union with its "work sheets." This Hearing Examiner concurred with the citation by the City of an NLRB decision in Cincinnati Steel Castings Co., 86 NLRB No. 83, 24 LRRM 1657 (1949), which involved a request for data in connection with negotiations. In Cincinnati, the union had requested a written list of the names of employees in the unit with their classifications and wage rates. The employer's response was to offer to furnish the information orally only. The employer orally furnished all of the information requested.

The Board in Cincinnati, after noting that it had frequently held that an employer's refusal to furnish necessary information to a union during collective bargaining negotiations

constituted a lack of good faith, and a violation of the NLRA, stated:

> ...However, we have not held, nor do we now hold, that the employer is obligated to furnish such information in the exact form requested by the representative. It is sufficient if the information is made available in a manner not so burdensome or time-consuming as to impede the process of bargaining...(24 LRRM at 1658) (emphasis supplied).

Clearly, the facts and holding in Cincinnati are relevant to the disposition of the case at bar. It will be recalled that, following the decision of Commission designee Gerber on August 22, 1986 (I.R. No. 87-3), the State on August 27th met with representatives of the AFT and, without prejudice, provided the AFT's representatives with information regarding the Chancellor's memorandum to SAC. This was done orally and the four points of information provided are set forth in Finding of Fact No. 9, supra.

In reviewing these four items of information, it appears to the Hearing Examiner that the AFT was clearly apprised of the substance of any communications between the Chancellor and the AFT, namely, that such communications referred to the July 18th Resolution and that the communications contained a specific request that the state colleges have the right to hire employees above Step four of any salary scale without SAC approval and, finally, that nothing contained in the communications between the Chancellor and SAC affected members of the AFT unit but did contain other requests relating to employees not in the AFT unit.

As the State contends herein, this is not a case of an employer pleading inability to grant economic increases as a result of which the employer is ordered to provide the union with data substantiating its alleged inability (see Truitt, supra). However, this case does appear to the Hearing Examiner to be very close on its facts and holding to the NLRB's decision in Cincinnati, supra. The oral response by the State on August 27, 1986, appears to the Hearing Examiner to have fulfilled the State's obligation to provide the requested data, the said oral response being consistent with Cincinnati Steel Castings, supra.

Finally, the State has contended at all times that the requested data from the Chancellor to the SAC, pursuant to the Resolution of the State Board of Higher Education on July 18, 1986, was privileged, confidential and part of the regulatory process in contradistinction to the negotiations process. Here the Hearing Examiner refers to the decision of the United States Supreme Court in Detroit Edison Co. v. NLRB, 440 U.S. 301, 100 LRRM 2728 (1979) where the Court reversed the NLRB when it ordered the production of employee aptitude test scores where there was involved an issue of confidentiality or privacy. Admittedly, the Detroit fact situation is not on all fours with the facts in the instant case. Nevertheless, the Hearing Examiner draws a parallel to the confidentiality or privacy considerations in Detroit Edison and those in the instant case, involving communications between the Chancellor and the SAC.

Also, the Hearing Examiner calls attention to a non-labor case, Hickman v. Taylor, 329 U.S. 495 (1947) where the "work product" of an attorney was deemed privileged and not the subject of discovery proceedings or at trial. Discussion of the Hickman case appears in the decision of this Hearing Examiner in City of Union City, supra, and will not be repeated herein. Suffice it to say that privilege is an additional basis for rejecting the request of the AFT for the data sought herein.

In passing, the Hearing Examiner notes that Commission designee Gerber in his decision on August 22, 1986, did not order the State to produce the requested data but, rather, ordered:

> ...that during the course of the negotiations between the Union and the State, the State must keep the Union apprised of all recommendations by the Chancellor, the State Department of Higher Education or the state colleges to the Salary Adjustment Committee concerning recommendations for that body to enact regulations in matters which otherwise are terms and conditions of employment...(12 NJPER 664, 666 (¶17251 1986).

Just as Commission designee Gerber was not constrained to order the State to produce "...the verbatim contents of the Chancellor's letter..." to the AFT, opting instead for a directive to the State to keep the AFT "...apprised of all recommendations by the Chancellor etc...." so, too, does the undersigned Hearing Examiner concur with the conclusions of Commission designee Gerber in this matter. This concurrence is particularly appropriate to the posture of the case at this point, namely, that a successor collective negotiations agreement is in place (J-2), dated October 21, 1986). This is not to suggest that the issue of

mootness is the basis for this observation since, if an unfair practice had been found by the Hearing Examiner to have occurred, there would have been a remedy granted on the basis of Galloway and like cases cited above.

The AFT having failed to prove by a preponderance of the evidence that the Respondent State violated §§5.4(a)(1) and (5) of the Act by its refusal to provide data herein, the Hearing Examiner must recommend dismissal of the Complaint.

* * * *

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

CONCLUSION OF LAW

The Respondent State did not violate N.J.S.A. 34:13A-5.4(a)(1) and (5) when it refused the July 24, 1986 request by the AFT to provide data with respect to communications between the Chancellor of Higher Education and the Salary Adjustment Committee.

RECOMMENDED ORDER

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

Alan R. Howe
Hearing Examiner

Dated: March 11, 1987
Trenton, New Jersey