P.E.R.C. NO. 90-97

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matters of

BERGEN COUNTY SPECIAL SERVICES
SCHOOL DISTRICT,

Respondent,

-and- Docket No. CO-H-89-379

BERGEN COUNTY SPECIAL SERVICES
BUS DRIVERS' ASSOCIATION,

Charging Party.

BERGEN COUNTY SPECIAL SERVICES
BUS DRIVERS' ASSOCIATION,

Respondent,

-and- Docket No. CE-H-90-1

BERGEN COUNTY SPECIAL SERVICES
SCHOOL DISTRICT,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, pursuant to authority granted by the full Commission in the absence of exceptions, dismisses a consolidated Complaint based on an unfair practice charges filed by the Bergen County Special Services Bus Drivers Association and the Bergen County Special Services School District. The Association's charge alleged that the District violated the New Jersey Employer-Employee Relations Act by reducing the work hours of three bus drivers to punish them for organizing and to chill the representation election process. The School District's charge alleged that the Association violated the Act when it filed its unfair practice charge to chill negotiations with the District. The Chairman, in agreement with the Hearing Examiner, finds that neither party has proved the unfair practices it alleges against the other.

P.E.R.C. NO. 90-97

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matters of

BERGEN COUNTY SPECIAL SERVICES
SCHOOL DISTRICT,

Respondent,

-and- Docket No. CO-H-89-379

BERGEN COUNTY SPECIAL SERVICES
BUS DRIVERS' ASSOCIATION,

Charging Party.

BERGEN COUNTY SPECIAL SERVICES
BUS DRIVERS' ASSOCIATION,

Respondent,

-and- Docket No. CE-H-90-1

BERGEN COUNTY SPECIAL SERVICES
SCHOOL DISTRICT,

Charging Party.

Appearances:

For the School District, Gruen & Ritvo, attorneys
(Harold Ritvo, of counsel)

For the Association, Balk, Oxfeld, Mandell
& Cohen, attorneys (Sanford R. Oxfeld, of counsel)

DECISION AND ORDER

On June 22, 1989, the Bergen County Special Services Bus Drivers' Association filed an unfair practice charge against the Bergen County Special Services School District. The charge alleges

that the District violated subsections 5.4(a)(1), (2) and (3)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it reduced the work hours of three bus drivers, allegedly to punish them for organizing the Association and to chill the representation election process.

On July 6 and September 6, 1989, the District filed a charge and an amended charge against the Association. The charge, as amended, alleges that the Association violated subsections 5.4(b)(1) and (3)[2/] of the Act when it filed its unfair practice charge, allegedly to chill negotiations with the District.

On September 15, 1989, the charges were consolidated and a Complaint and Notice of Hearing issued.

On September 27 and 28, 1989, respectively, the Association and District filed Answers denying each other's unfair practice allegations.

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."

2/ These subsections prohibit 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. (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit."

On December 19, 1989, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and introduced exhibits.[3/] They argued orally, and the District filed a post-hearing brief on January 24, 1990.

On March 29, 1990, the Hearing Examiner recommended dismissing the consolidated Complaint. H.E. No. 90-42, 16 NJPER ___ (¶____ 1990). He found that the Association had not proved that protected activity was a substantial or motivating factor in any personnel actions or that the District had dominated or interfered with the Association. He also found that the District had not proved that the Association had committed an unfair practice by filing its charge.

The Hearing Examiner served his report on the parties and advised them that exceptions were due by April 11, 1990. Neither party filed exceptions or requested an extension of time.

Pursuant to N.J.S.A. 34:13A-6(f), the full Commission has delegated authority to me to decide this case in the absence of exceptions. I have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 4-20) are accurate with one exception. I incorporate them, but correct finding no. 7 to reflect that Semeraro referred to company time, not working hours. Based on these findings of fact, I agree with the Hearing Examiner that neither party has proved the unfair practices it alleges against the other.

3/ The Association also amended its charge to change the date of one employee's alleged workhour reduction.

ORDER

The consolidated Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

DATED: Trenton, New Jersey
May 10, 1990

H.E. NO. 90-42

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

In the Matters of

BERGEN COUNTY SPECIAL SERVICES
SCHOOL DISTRICT,

Respondent,

-and- Docket No. CO-H-89-379

BERGEN COUNTY SPECIAL SERVICES
BUS DRIVERS' ASSOCIATION,

Charging Party.

BERGEN COUNTY SPECIAL SERVICES
BUS DRIVERS' ASSOCIATION,

Respondent,

-and- Docket No. CE-H-90-1

BERGEN COUNTY SPECIAL SERVICES
SCHOOL DISTRICT,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss charges of unfair practices contained in a Consolidated Complaint. The Association alleged that the District violated Sections (a)(1) to (3) of the Act when it advanced the starting times of three of its bus drivers by one-half hour per day, resulting in an alleged loss of earnings, in retaliation for the protected activities of these drivers in organizing a "union." The Association failed to adduce any evidence that employer hostility or anti-union animus had been manifested by the supervisors of the District and no element of retaliation for the exercise of protected activities was involved: Bridgewater.

Similarly, the Hearing Examiner recommends dismissal of the District's Unfair Practice Charge against the Association, which was based upon its having filed an Unfair Practice Charge during the course of negotiations for an initial collective negotiations agreement in alleged violation of Sections (b)(1) and (3) of the Act.

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. 90-42

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

In the Matters of

BERGEN COUNTY SPECIAL SERVICES
SCHOOL DISTRICT,

Respondent,

-and- Docket No. CO-H-89-379

BERGEN COUNTY SPECIAL SERVICES
BUS DRIVERS' ASSOCIATION,

Charging Party.

BERGEN COUNTY SPECIAL SERVICES
BUS DRIVERS' ASSOCIATION,

Respondent,

-and- Docket No. CE-H-90-1

BERGEN COUNTY SPECIAL SERVICES
SCHOOL DISTRICT,

Charging Party.

Appearances:

For the School District, Gruen & Ritvo, Esqs.
(Harold Ritvo, of counsel)

For the Association, Balk, Oxfeld, Mandell & Cohen, Esqs.
(Sanford R. Oxfeld, of counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on June 22, 1989, by

the Bergen County Special Services Bus Drivers' Association ("Association") alleging that the Bergen County Special Services School District ("District") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"), in that the Association is the exclusive majority representative for all Bus Drivers and Bus Aides employed by the District; that on or about April 18, 1989, the supervisor of Patricia Quinones, a bus driver, reduced her work week by one hour and eliminated a job responsibility, which further reduced her work week; that on or about April 18, 1989, the supervisor of Nancy Alzaher, a bus driver, reduced her work week by one hour and also eliminated a job responsibility, which further reduced her work week; that in March 1989,[1/] the supervisor of Robin Farina, a bus driver, reduced her work week by one half-hour; that Quinones, Alzaher and Farina are officers of the Association, who were instrumental in securing signatures for an election conducted by the Commission on April 25, 1989; that the foregoing activities of these three individuals occurred during the period when the Commission had notified the District of a pending representation election by the posting of notices; all which is

---

1/ At the hearing, the Association amended ¶7 of its Charge to reflect that Farina's work week reduction occurred in March 1989 and not in April 1989 (Tr 169).

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

An additional Unfair Practice Charge was filed with the Commission on July 6, 1989, and amended on September 6, 1989, by the District alleging that the Association has engaged in unfair practices within the meaning of the Act, in that subsequent to the entering into of negotiations and the scheduling of meetings for negotiations, the Association filed an Unfair Practice Charge, supra, dealing with matters long resolved, namely, the Commission-conducted election, supra, which resulted in exclusive representation by the Association; that these actions by the Association, which commenced on June 21, 1989, are calculated to cause a chilling effect on negotiations; all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(b)(1) and (3) of the Act.[3/].

2/ 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."

3/ These subsections prohibit public 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. (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit."

It appearing that the allegations of the two Unfair Practice Charges, if true, may constitute unfair practices within the meaning of the Act, a Consolidated Complaint and Notice of Hearing was issued on September 15, 1989. Pursuant to the Consolidated Complaint and Notice of Hearing, following several adjournments, a hearing was held on December 19, 1989, in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Both parties argued orally but only the District filed a post-hearing brief by January 24, 1990.

Two Unfair Practice Charges 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 oral argument of the parties and the post-hearing brief of the District, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Bergen County Special Services School District is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Bergen County Special Services Bus Drivers' Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. The Association was certified by the Commission as the exclusive collective negotiations representative for a unit of Bus Drivers and Bus Aides of the District on May 3, 1989 (RO-89-102).[4/] The collective negotiations unit currently consists of 19 or 20 employees. The Association was engaged in negotiations with the District for an initial collective agreement as of the date of the hearing on December 19th. [Tr 20, 21, 147-150].[5/]

4. The principals involved in the organizing of the Association were Robin Farina, a bus driver with the District for two years; Patricia Quinones, a bus driver with the District for seven years; and Nancy Alzaher, a bus driver with the District for six years (Tr 10, 56, 76).

5. The beginning of the Association may be traced back to its first organizational meeting with the Teamsters in the spring or summer of 1988, which took place in the parking lot of a "deli" in Paramus (Tr 39, 40). John Dwyer, the Secretary and Business Manager of the District, knew of this organizational meeting, having been informed of it by Daniel Semeraro, the Head Custodian of Transportation (Tr 91, 140, 141). Upon learning of this

---

4/ The circumstances leading to this certification appear in Findings of Fact Nos. 9 & 10, infra.

5/ It is apparent from the allegations made by the District in its Unfair Practice Charge and the testimony that the current litigation has caused a hiatus in collective negotiations (Tr 147-150).

organizational meeting, Dwyer stated to Semeraro that "...they had the perfect right, it was on their own time..." and that "...They had a perfect right to be with union representatives..." (Tr 140, 141).

6. The testimony of Semeraro confirmed that of Dwyer except that Semeraro added that Dwyer had also stated "...just tell them they can't pass out cards on the boss's time..." (Tr 92).[6/]

7. There was no further organizational activity on behalf of the Association until January and early February 1989 when Farina solicited signatures for authorization cards in the parking lot where she worked (Tr 17, 18). Farina testified without apparent contradiction that in or around March 1989, Semeraro, who was her supervisor, stated that she could not hand out authorization cards during working hours (Tr 18, 115). However, the Hearing Examiner credits the denial of Semeraro that he knew about the union and who was involved (Tr 18, 114). Further, the testimony of Farina that Semeraro stated to her that he knew that Quinones had "started it...," is not credited (Tr 18, 114, 115) The crediting of Semeraro on this disputed issue is based upon the respective demeanors of Farina and Semeraro and the absence of any likelihood that Semeraro would have made such statements given his prior exercise of protected activities on behalf of the Custodians.

6/ Semeraro, as Head Custodian, has been a member of the NJEA in a collective negotiations unit of Custodians and was the former President (Tr 87, 148).

8. The first formal Association meeting took place on February 4, 1989, where officers were elected: Farina was elected President, Quinones was elected Vice-President and Alzaher was elected Secretary (Tr 14, 19, 59). The meeting was held at either the Bleshman School or the Central Office building. A room had been reserved, following District procedure, by either Quinones or Alzaher. [Tr 19, 20, 36-38].[7/] The purpose of the February 4th meeting and the subsequent meeting in February 1989 was "...to have all the bus drivers in and the aides for the union..." (Tr 20, 37, 39).[8/]

9. Farina testified that when the District would not recognize "...us going into the union..." the Association consulted Mark Press, an NJEA Consultant, and Press thereafter processed all filings and correspondence on behalf of the Association in obtaining an eventual Commission-conducted representation election (Tr 15, 40, 41).[9/] Dwyer testified that Press contacted him in March 1989,

---

7/ A subsequent meeting was also held at the Bleshman School in February 1989 (Tr 57-59). In each instance the District granted permission for the holding of the Association's meeting as requested.

8/ Semeraro, as Head Custodian, attended an Association meeting at the Bleshman School in April 1989, under the mistaken impression that custodians were to attend (Tr 119, 121). He left when the meeting first started (Tr 121).

9/ As requested by counsel for the parties at the hearing, the Hearing Examiner has acquainted himself with the Commission's file in Docket No. RO-89-102, supra. Thus, references hereinafter to the representation election process are based upon the Hearing Examiner's knowledge as gleaned from the Commission's file.

and indicated that the Association wanted the District to proceed jointly to the Commission for an election. The District consented. [Tr 143, 144].

10. A Petition for Certification of Representative was filed by the Association with the Commission on March 3, 1989 (RO-89-102). On March 7, 1989, the Director of Representation sent a letter to the Superintendent of the District with a copy to Press, scheduling a conference for March 17th. The original conference date was rescheduled by agreement to March 23, 1989. Thereafter, also by mutual agreement, an election was scheduled and conducted on April 25, 1989, where the eligible employees voted 18-1 for representation by the Association. In the absence of objections to the conduct of the election, the Director of Representation certified the Association as the exclusive representative for a unit of Bus Drivers and Bus Aides on May 3, 1989.[10/]

* * * *

11. Over the last ten years, Dwyer has had the responsibility for the transportation system in the District and he has periodically reviewed the bus routes for the purpose of increasing economy (Tr 134, 137, 138, 146).

12. In 1988, the District's ongoing effort to improve the economy of its transportation system was interrupted when Semeraro

---

10/ There is no question but that the District consented to a Commission-conducted representation election and that it cooperated in arranging for the holding of this election (Tr 151, 152).

was involved in an automobile accident on September 2, 1988. He was unable to return to work until the end of December of that year when he assumed the duties of Head Custodian without his prior supervisory function. During Semeraro's absence, the District hired Donald Leuseque as Head Custodian of Transportation. [Tr 87, 88, 138, 139].

13. After Leuseque was hired to supervise transportation in the latter part of 1988, Dwyer requested that he analyze the "morning hours" in order to "economize" on the "various runs" (Tr 139, 140, 145). Although Leuesque did make some changes, Dwyer felt that "...transportation...was getting out of control..." Thus, about March 15, 1989, Dwyer requested that Semeraro return to his prior position as Head Custodian of Transportation. [Tr 88, 89, 141].

14. Upon Semeraro's return as supervisor of transportation on March 15th, he, like Dwyer, found the transportation situation out of control (Tr 89, 90). Semeraro was immediately asked by Dwyer to ride the bus routes with each driver. After several weeks, Semeraro recommended the elimination of one bus from the Rockleigh route and one bus from the Woodridge route for greater efficiency. [Tr 89-91, 142].[11/]

* * * *

11/ Semeraro's recommendation to eliminate these Rockleigh and Woodridge routes did not affect Farina, Quinones or Alzaher (see A-1, A-3 & A-5).

Findings as to Robin Farina

15. Immediately prior to March 1, 1989, the start of Farina's workday was 7:00 a.m. when she commenced her daily "Renaissance" run from the Bleshman School parking lot to Oakland (Tr 21). However, on March 2, 1989, Semeraro informed Farina that she was to be "...cut a half-hour..." and would, commencing that day, start her "Renaissance" bus run at 7:30 a.m. (Tr 21, 26, 27; A-1).[12/] Farina testified that her "...end of the workday..." schedule was never changed (Tr 28). Farina also testified without contradiction that since there was no change in her mode of operation with students the half-hour reduction in her workday was not justified (Tr 53, 54).[13/]

16. In addition to Farina's regular "Renaissance" bus run, she has sometimes been given extra work work in the form of moving "mobiles," which are movable classrooms. On the days when she had

---

12/ All bus drivers are paid on an hourly basis (Tr 32).

13/ It is noted that the change in Farina's starting time from 7:00 a.m. to 7:30 a.m. on March 2nd, occurred one day prior to the filing with the Commission of the Association's Petition for Certification of Representative. The Commission's file in RO-89-102 discloses that no covering letter was submitted with the petition. In its oral argument at the conclusion of the hearing, the Charging Party suggested that a causal connection might have existed between the date of the filing of the petition with the Commission and the date of Semeraro's change in Farina's starting time on March 2nd (Tr 157, 158). However, the record and the Commission's representation file appear to suggest the contrary, i.e., that there was no causal connection between the two events. However, still unresolved is the possibility of a causal linkage between Semeraro's having changed Farina's starting time on March 2, 1989, and her prior activities on behalf of the Association, supra.

this task assigned, she reported to work at 6:00 a.m. and the task would be completed by 7:00 a.m. or 7:30 a.m. [Tr 34, 50-52]. Also Semeraro has assigned Farina (and other bus drivers) extra work in the form of "midday" runs (Tr 50).

17. Farina prepared her own summary of time worked from March 2, 1989, through July 21, 1989, which was transposed from her own time sheets and indicates the hours and wages allegedly "lost" (A-1; Tr 21-26). Farina entered on this Exhibit (A-1) four dates on which she had "no work" (June 27, July 5, July 14 & July 21, 1989)[Tr 28-30]. Farina testified without contradiction that although Semeraro told her that there was no work for her on those four dates she observed employees with "less seniority"[14/] at work on each date (Tr 28-31).

18. Farina acknowledged on cross-examination that she had also prepared two time sheets summarizing her hours of work and assignments, the first between April 3, 1989 and April 14, 1989 (D-1), and the second between October 3, 1988 and October 14, 1988 (D-2)[Tr 35, 36, 46]. During the two-week period in October 1988, Farina acknowledged that she had worked 112-1/2 hours (D-2) and that in April 1989, she had worked 114 hours (D-1)[Tr 46, 47]. Yet Farina still insisted that she had been subjected to a "cut" in hours in April 1989, notwithstanding that she acknowledged that she had worked 1-1/2 more hours in April 1989 than in October 1988 (D-1,

---

14/ But see testimony of Dwyer that the Association's demands in negotiations include "seniority" (Tr 150).

D-2; Tr 47). Farina did concede, in response to a hypothetical question put by the Hearing Examiner, that if at the end of 1989 she had worked 50 more hours than she had at the end of 1988, e.g., 2150 hours in 1989 versus 2100 hours in 1988, she would have to admit that her hours had not been "cut" in 1989 since she had worked 50 additional hours (Tr 48, 49).

* * * *

Findings as to Patricia Quinones

19. During Quinones' seven years as a bus driver she has been assigned the Woodridge bus run, where she has picked up handicapped adults at their homes or at group homes between Paramus, Hasbrouck Heights and Lodi and has discharged them at the Woodridge Workshop (Tr 60). Like Farina, Quinones also has had "midday" bus runs once or twice a week, which typically consume approximately two hours but sometimes last 3-1/2 hours (Tr 60-62). On days when Quinones does not have a "midday" bus run, she is not paid for the period of time from 10:00 a.m. until 2:00 p.m. when she returns to complete the Woodridge bus run (Tr 62).

20. From the beginning of the 1988-89 school year until the end of March 1989, Quinones' starting time was 7:00 a.m. Quinones insisted that during her years of bus driving she had always started at 7:00 a.m. as did other bus drivers (Tr 62, 63).[15/] However, on April 18, 1989, Quinones received a

---

15/ However, Exhibit D-3 would appear to contradict Quinones on the point of her insisting that she had always started at 7:00 a.m.: see Finding of Fact No. 22, infra.

handwritten note from Semeraro, stating that if there were no "mobiles" she should "come in at 7:30 a.m." as of the next day, April 19th. However, if there were "mobiles" then she should "come in at 6:00 a.m." [A-2; Tr 63-65].

21. Quinones prepared Exhibit A-3, which is a "time lost" summary like Exhibit A-1, which was prepared by Farina, supra. According to Quinones, Exhibit A-3 establishes that she lost one-half hour per day since starting at 7:30 a.m. instead of 7:00 a.m. on certain dates between April 19, 1989 and June 9, 1989 (A-3; Tr 65, 66). Quinones also claimed that A-3 established that she had lost one hour per day on the days that she had worked on "mobiles" and that her "midday" bus runs were reduced by Semeraro after March 1989 (Tr 70-73).

22. Quinones was cross-examined on Exhibit D-3, which she had prepared, and which indicated that her starting times during the period April 4th through August 26, 1988 had consistently been 7:30 a.m., and not 7:00 a.m. Her only response was that she was "...not lying, I had forgotten..." [Tr 68-70).

* * * *

Findings as to Nancy Alzaher

23. In the six years that Alzaher has worked as a bus driver for the District, she, like Quinones, has had a Woodridge bus run and prior to April 1989 her starting time had been 7:00 a.m. (Tr

76, 77).[16/] Alzaher was notified of her change in starting time in the same manner as Quinones, namely, she received a handwritten note from Semeraro on April 18, 1989. The note stated that if there were no "mobiles" then she should "come in at 7:30 a.m." but if there were "mobiles" then she should "come in at 6:00." [A-4; Tr 78].

24. Exhibit A-5 is a "time lost" summary, which was prepared by Alzaher and, like Exhibits A-1 and A-3, supra, it is a record of her 7:30 a.m. starting times from April 18th through August 18, 1989, including the days and hours lost in in the moving of "mobiles" (Tr 79, 80).[17/]

* * * *

Findings as to Daniel Semeraro

25. Semeraro testified that when he was told by Dwyer to "cut" Farina's starting time because she was "...coming in too early...," he told Farina that she should "...make it a half-hour

---

16/ Alzaher volunteered that sometime around August 1988, her starting time had been changed to 7:30 a.m. but, because of logistical difficulties, Dwyer restored her starting time to 7:00 a.m. (Tr 77)[The date of this latter change was not established].

17/ The District did not proffer as an exhibit a document similar to Exhibits D-1, D-2 and D-3 (Farina and Quinones), supra, with respect to Alzaher.

later..." (Tr 93). Semeraro also made the same "cut" in the starting times of Quinones and Alzaher (Tr 94, 112-114).[18/]

26. It was, however, Semeraro's decision to eliminate the moving of "mobiles" by Quinones and Alzaher on Friday afternoons since there was no need to do so after 12 o'clock noon. This was done notwithstanding that Leuesque earlier had assigned Quinones and Alzaher to this task on Friday afternoons (Tr 95, 96). Finally, the changes that Semeraro made upon his return on March 15, 1989, regarding the assignment of "midday" runs, were his own and were not ordered by anyone else in administration (Tr 96, 97).

27. With respect to the starting times of Farina, Quinones and Alzaher between April and September 1988, Semeraro was clear that the starting time for each driver was 7:30 a.m. (Tr 101, 102, 108-110). Semeraro's testimony is consistent with Exhibits D-1 through D-3, supra.

28. Finally, Semeraro testified credibly that no one had asked that he take any "action" against Farina, Quinones or Alzaher (Tr 98, 99).

* * * *

Findings as to John Dwyer

29. Dwyer testified credibly that he had never directed Semeraro to make "...changes against..." Farina, Quinones or

---

18/ Semeraro also testified that he had made a like "cut" in starting times for three other drivers but on cross-examination he retracted this testimony, stating that their hours were not "cut" (Tr 94, 95, 112).

Alzaher. Dwyer testified further that the "changes" that Semeraro had made upon his return as transportation supervisor in March 1989 were to increase efficiency. [Tr 142, 143]. Dwyer also denied that Semeraro had ever taken any "action" to impede the union activities of Farina, Quinones and Alzaher; nor had he himself ever directed that any "action" be taken against them (Tr 143, 147).[19/] The Hearing Examiner has credited Dwyer's testimony as to motivation vis-a-vis Farina, Quinones and Alzaher due to the apparent absence of any evidence on the record indicating "hostility" or "retaliation" in his actions or others in the supervision of the District. This conclusion is reinforced by the conduct of Dwyer: (1) in connection with the District's granting the Association the use of buildings for meetings upon request; (2) the fact that there was no retaliation against the Association's organizers when Dwyer learned that there had been a meeting with the Teamsters in the spring or summer of 1988 or when Farina commenced active solicitation in January and February 1989; and (3) the District's cooperation in the holding of a consent election on April 25, 1989.

19/ Theodore Swartz, the Assistant Superintendent of Schools, also testified credibly that from his vantage point he was never aware of anyone having directed the taking of "...any action against these three women as a result of their union organization..." (Tr 133).

30. Dwyer testified, contrary to Semeraro, that he did not order that the hours of any bus drivers be "cut" but merely told Leuesque and Semeraro to "analyze routes" (Tr 145).[20/]

* * 8 *

Additional Findings as to the District

31. Exhibits D-4, D-5 and D-6 were introduced in evidence through Swartz, who explained that each exhibit was a chart, which indicates the total number of hours worked per month, respectively, by Alzaher, Quinones and Farina between April 1988 and June 1989. These exhibits also indicate the number of hours worked per month on the "midday" bus runs during the same period. [Tr 126-128]. The total number of hours worked per month appears on the top line of each chart in RED while the total number of hours worked per month on "midday" bus runs is the difference between the top RED line and the bottom line which appears in BLACK (Tr 126, 127). Each of the foregoing three charts shows wide swings in the total number of hours worked per month, respectively, by Alzaher, Quinones and Farina. The widest swings are those on the chart for Farina (D-6).

32. In the case of Alzaher (D-4), her chart shows a decline in the total monthly hours worked between February and April

---

20/ The Hearing Examiner attaches no significance to the discrepancy in the testimony of Semeraro and Dwyer as to whether or not Dwyer told Semeraro to make the "cuts" in the starting times of Farina, Quinones and Alzaher, or whether Semeraro did this on his own, since the ultimate decision in this case is unaffected by their respective testimonies on this issue.

1989 but a corresponding increase occurred thereafter through May of 1989. It is noted that while Exhibit A-4 indicates that Semeraro changed Alzaher's starting time from 7:00 a.m. to 7:30 a.m. on April 18, 1989, her total hours worked increased from about 112 hours to approximately 148 hours between April and May (see D-4). Between May and June 1989, Alzaher's hours worked increased only slightly to 150 hours.

33. The total monthly hours worked by Quinones dropped sharply between December 1988 and January 1989, i.e. from 205 hours to 125 hours, but then increased to 195 hours in February 1989, before decreasing to 160 hours in March (D-5). Between April and May 1989, Quinones' hours worked decreased from about 180 hours to 140 hours, followed by an increase to 170 hours in June 1989 (D-5). It it noted again that Semeraro also changed Quinones' starting time to 7:30 a.m. on April 18th (A-2), following which her hours worked decreased between April and May but then increased between May and June.

34. Finally, in the case of Farina, her total number of hours worked per month vastly exceeded those of both Alzaher and Quinones between October 1988 and January 1989, but then dropped precipitously in February 1989, i.e., from about 200 hours per month in January to almost zero in February (D-6). However, a dramatic increase occurred between February and June 1989. For example, Farina's total for March was about 104 hours but thereafter it reached almost 240 hours in June 1989 (D-6). It is noted, in

particular, that between March and April, Farina's total hours increased from about 105 hours per month to approximately 180 hours (D-6). Recall that Semeraro changed Farina's starting time to 7:30 a.m. on March 2nd (Finding of Fact No. 15, supra) and yet her hours worked increased by about 75 during March.

35. Exhibit D-7 was also introduced through Swartz. It consisted of a transparent overlay, which when placed upon any one of the three exhibits (D-4 through D-6, supra) provides a comparison between the total hours worked per month by Alzaher, Quinones and Farina and the average hours worked by all other bus drivers in the District during the period between April 1988 and June 1989 (Tr 129-132).

36. When this overlay is placed upon the chart of Alzaher (D-4), it indicates that at least from November 1988 to mid-March 1989, Alzaher's total hours worked were either slightly higher or equal to the total number of hours worked per month by all other drivers. From mid-March to June 1989, her total hours were about ten hours per month lower than those of all other drivers (compare D-4 with D-7).

37. In the case of Quinones, the total hours worked by her between November 1988 and June 1989 when compared with the average for all other drivers shows that she worked substantially more hours except in January 1989 when the differential was about ten hours in her favor. A differential in Quinones' favor of about 40 hours per month above all other drivers continued between February and

mid-March, following which her hours worked per month decreased to about ten to 20 hours below the hours worked by all other drivers between mid-May and June 1989 (compare D-5 with D-7).

38. Finally, in the case of Farina, and again starting with November 1988, her hours for that month were about 210 compared with an average of 145 hours worked by all other bus drivers for that month. This differential continued until Farina's precipitous drop in hours in February 1989 to almost zero, at which point the average for all other drivers was about 150 hours per month. Farina's hours worked then increased dramatically from about 105 hours in March to about 180 hours as of April 1989. In April her hours exceeded the average for all other drivers by about 50 hours per month and this differential continued through June 1989.

39. By agreement of the parties at the hearing, counsel for the District undertook a post-hearing investigation of the starting times of the bus drivers during the 1989-90 school year. It was determined that some drivers appear before 7:00 a.m. and other drivers appear at 7:00 a.m., this change having been made by the District on the advice of counsel in order to preserve the status quo. [District's Brief, p. 7; Tr 165, 176-179].

The District Did Not Violate The Act As Alleged When It Changed The Starting Times Of Robin Farina, Patricia Quinones And Nancy Alzaher In March And April 1989 Thereby Reducing Their Number Of Hours Worked Per Month.

Both parties agree that the Association's allegations that the District illegally discriminated against Farina, Quinones and

Alzaher must be decided under the test devised by the New Jersey Supreme Court in Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984)[Tr 155; District's Brief, p. 1]. In Bridgewater, the Court adopted the analysis of the National Labor Relations Board in Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980)[21/] in "dual motive" cases, involving an alleged violation of Section 8(a)(1) or Section 8(a)(3) of the National Labor Relations Act.[22/] In such cases, Wright Line and Bridgewater articulated the following test in assessing employer motivation: (1) the Charging Party must make a showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the employer's decision; and (2) once this is established, the employer has the burden of demonstrating that the same action would have taken place even in the absence of protected activity (see 95 N.J. at 242).

The Court in Bridgewater made clear that no violation may be found unless the Charging Party has proved by a preponderance of the evidence on the record as a whole that protected activity was a substantial or a motivating factor in the employer's adverse action. The Charging Party may do so by direct evidence or by circumstantial evidence demonstrating that the employee engaged in

---

21/ The United States Supreme Court approved the NLRB's "Wright Line" analysis in NLRB v. Transportation Mgt. Corp., 562 U.S. 393, 113 LRRM 2857 (1983.)

22/ These provisions of the NLRA are directly analogous to Section 5.4(a)(1) and (3) of our Act.

protected activity, that the employer knew of this activity, and, finally, that the employer was hostile toward the exercise of the protected activity. [95 N.J. at 246].[23/]

If, however, the employer has failed to present sufficient evidence to establish the legality of its motive under our Act, or if its explanation has been rejected as pretextual, then there is a sufficient basis for finding a violation of the Act without more. However, where the record demonstrates that a "dual motive" is involved, the employer will be found not to have violated the Act if it has proven by a preponderance of the evidence that its action would have occurred even in the absence of protected conduct [Id. at 242].[24/]

There is no question but that Farina, Quinones and Alzaher each openly engaged in activities protected under the Act. These activities began with the initial organizational meeting in the spring or summer of 1988 with the Teamsters and continued in January and February 1989 when Farina solicited authorization cards in a District parking lot. Further, the Association held its first formal meeting on February 4, 1989, where Farina was elected

---

23/ However, the Court in Bridgewater stated further that the "Mere presence of anti-union animus is not enough. The employee must establish that the anti-union animus was a motivating force or a substantial reason for the employer's action..." (95 N.J. at 242).

24/ This affirmative defense need only be considered if the Charging Party has proven on the record as a whole that anti-union animus was a "...motivating force or substantial reason for the employer's action..." [Id].

President, Quinones was elected Vice-President and Alzaher was elected Secretary. Additionally, Quinones and Alzaher had arranged for a meeting room for the February 4th meeting and also for a subsequent meeting in February. In each instance they followed the District's procedure for reserving rooms.

Obviously, there is no question but that the District had actual knowledge of the exercise of the above protected activities by Farina, Quinones and Alzaher since, as early as the spring or summer of 1988, Dwyer acknowledged that he had learned of the initial organizational meeting with the Teamsters from Semeraro. Further, Semeraro encountered Farina soliciting authorization cards in January or February 1989, and spoke with her about the permissible limits for solicitation. Necessarily, the District also had direct knowledge of the activities of Quinones and Alzaher in reserving meeting rooms for the two Association meetings in February 1989.

Thus, the Association has satisfied the first two of the three requisites established in Bridgewater. It adduced direct evidence that Farina, Quinones and Alzaher were engaged in protected activities and, also, that agents of the District had actual knowledge of this exercise. However, the Hearing Examiner must conclude that the Association has failed to adduce either direct or circumstantial evidence that the District was hostile toward the exercise of protected activities by Farina, Quinones and Alzaher, i.e., no one in the hierarchy of supervision manifested anti-union

animus. The only possible evidence of hostility by the District is circumstantial and involves the alleged retaliatory reduction in the hours of work scheduled for Farina, Quinones and Alzaher by advancing their starting times.

However, when Farina was confronted with Exhibits D-1 and D-2, covering, in part, April 3 to April 14, 1989, and October 3 to October 14, 1988, respectively, she acknowledged that she had worked 1-1/2 hours more in the April 1989 segment than in the October 1988 segment. Yet she continued to insist that she was subjected to a "cut" in hours in April 1989. [See Finding of Fact No. 18, supra]. Although Farina's total hours worked in March 1989 had approximated 104 hours, her monthly hours increased to almost 240 hours in June 1989.[25/] [See Findings of Fact Nos. 34 & 38, supra].

After a sharp drop in the hours that Quinones worked between December 1988 and January 1989 from 205 hours to 125 hours, her hours then increased to 195 hours in February, followed by another decrease to 160 hours in March. However, beginning in April 1989, her hours increased to about 180 hours and then dropped to 140

25/ Further, as of April 1989, her total hours per month exceeded the average for all other drivers by about 50 hours and this differential continued through June.

hours in May, followed by another increase to 170 hours in June 1989. [See Finding of Fact No. 33, supra].[26/]

As to Alzaher, Exhibit D-4 shows a decline in the total monthly hours worked between February and April 1989, but then a corresponding increase through May 1989 when her total hours increased from about 112 hours to approximately 148 hours. Thus, it appears that her April 18, 1989 change of starting time did not result in a decrease in total hours worked between April and May 1989. [See Finding of Fact No. 32, supra].[27/]

* * * *

It must be obvious that there is no way that the Hearing Examiner can draw an inference that retaliation by the District was involved in the alleged reduction in the hours worked by Farina, Quinones and Alzaher. Their testimony and supporting exhibits (A-1, A-3 and A-5) simply do not square with their allegations that a

---

26/ Compared with the average for all other bus drivers in the District, Quinones worked substantially more hours between November 1988 and June 1989, except that she worked only ten hours above the average in January 1989, and ten to 20 hours less than the average from mid-May through June 1989. [See Finding of Fact No. 37, supra].

27/ Alzaher's total hours worked compared favorably with the average hours worked by all other drivers from November 1988 to mid-March 1989. However, beginning around mid-March, her total hours worked dropped to about ten hours per month below the average of all other drivers through June 1989. [See Finding of Fact No. 36, supra].

reduction in hours occurred as a result of retaliation against them for the exercise of their admitted protected activities.[28/]

Thus, at best the Association's evidence is inconclusive as against its contention that it has proven that the reduced hours of its three officers occurred as a result of illegal retaliation by the District. Based upon the record as a whole, the Hearing Examiner concludes that the exercise of protected activity was not a substantial or a motivating factor in the decision of Semeraro (or Dwyer) to change the starting times of Farina on March 2nd and Quinones and Alzaher on April 18, 1989.

Even assuming arguendo that the Association has proven hostility by the District's supervisors, the District has proven by a preponderance of the evidence that the changes in starting times would have occurred even in the absence of protected activities. At least by the beginning of March 1989, it had demonstrated the need for operational changes in the transportation system. Therefore, the Hearing Examiner must recommend dismissal of the allegations that the District violated Section 5.4(a)(3), or derivatively Section 5.4(a)(1), of the Act.

* * * *

The Association has also alleged that the District violated Section 5.4(a)(2) of the Act .

28/ The Hearing Examiner has previously found as a fact that there was no causal nexus between the filing of the Association's Representation Petition on March 3rd and Farina's change in starting time [see Findings of Fact Nos. 10, 15, supra]. It is now clear that her activities prior thereto did not result in a reduction in hours worked.

In adjudicating an alleged violation of Section 5.4(a)(2) of the Act, the Commission has laid down a clear-cut rule for determining the type of activity in which a public employer must have engaged: North Brunswick Twp. Bd. of Ed., P.E.R.C. No. 80-122, 6 NJPER 193 (¶11095 1980). See also, Old Bridge Tp. Bd. of Ed., P.E.R.C. No. 87-3, 12 NJPER 599, 600 (¶17224 1986). In North Brunswick, the Commission said:

> With regard to the Board's alleged violation of section (a)(2), the Education Association has not presented any additional facts to support this allegation, other than the Board's refusing to negotiate with its chosen representatives. While the Board's conduct does, in a sense, "interfere" with the Education Association's ability to collectively negotiate, it does not constitute pervasive employer control or manipulation of the employee organization itself, which is the type of activity prohibited by section (a)(2). Duquesne University, [198 NLRB No. 117] 81 LRRM 1091 (1972)...Kurz-Kasch, Inc., [239 NLRB No. 107] 100 LRRM 1118 (1978)...(Emphasis supplied)(6 NJPER at 194, 195).

See, also, several decisions of the NLRB to the same effect, namely, that it is pervasive employer control or manipulation that is proscribed by §8(a)(2) of the NLRA, after which the §5.4(a)(2) of our Act is patterned: Deepdale General Hospital, 253 NLRB No. 92, 106 LRRM 1039 (1980); Homemaker Shops, Inc., 261 NLRB No. 50, 110 LRRM 1082 (1982); and Farmers Energy Corp., 266 NLRB No. 127, 113 LRRM 1037 (1983); Ona Corp., 285 NLRB No. 77, 128 LRRM 1013 (1987).

The Hearing Examiner notes that the instant record is totally devoid of any evidence that the District sought to exercise or did exercise pervasive control or manipulation of the Association

either before or after the date that the Association formally organized at its February 4, 1989 meeting. Thus, the Hearing Examiner concludes that the Association's allegation that the District violated Section 5.4(a)(2) of the Act must be dismissed.

The Association Did Not Violate The Act As Alleged When During The Course Of Initial Collective Negotiations It Filed An Unfair Practice Charge, Which May Have Caused A Chilling Effect On Negotiations.

Section 5.4(c) of the Act provides, in part, that "...Whenever it is charged that anyone has engaged or is engaging in any...unfair practice, the commission...shall have the authority to issue...a complaint stating the specific unfair practice charged..." Additionally, the Commission's Rules, governing Unfair Practices, provide, in part, in N.J.A.C.19:14-1.1 that "...A charge that any public employer...has engaged or is engaging in any unfair practice...may be filed by any...public employee organization, or their representative..."

A reading of the above excerpts from our Act and Rules together with the "Declaration of Policy" of the Act found in N.J.S.A. 34:13A-2 persuades the Hearing Examiner that, as a matter of public policy, there exists an absolute right of anyone to file a charge of unfair practices with the Commission. While research has disclosed no specific decision of the Commission where this issue was raised and decided, the course undertaken by the Association seems clearly sanctioned by our Act and Rules.

It is, of course, regrettable that the filing of the Association's Unfair Practice Charge has resulted in a temporary suspension in the negotiations for an initial collective agreement. However, the Association cannot be faulted for having taken this course since it is the party which is seeking a first collective negotiations agreement, following its certification as the majority representative on May 3, 1989. On occasion, this being one, the threshold resolution of a charge of unfair practices by the Commission must precede the ultimate conclusion of the collective negotiations process.

Therefore, the Hearing Examiner finds and concludes that the Association did not violate the Act as alleged by the District when it filed the instant Unfair Practice Charge on June 22, 1989, notwithstanding that the subject matter of the Charge allegedly contained matters that were long resolved or that the Charge was calculated to cause a chilling effect on negotiations. The allegations by the District, if true, are common to many of the unfair practice charges filed with the Commission which involve interference with the negotiations process. Accordingly, the Hearing Examiner will recommend dismissal of the allegations by the District that the Association violated Sections 5.4(b)(1) and (3) of the Act.

* * * *

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

CONCLUSIONS OF LAW

1. The District did not violate N.J.S.A. 34:13A-5.4(a)(1), (2) or (3) when it changed the starting time of Robin Farina on March 2, 1989 and the starting times of Patricia Quinones and Nancy Alzaher on April 18, 1989 since the Association failed to prove that their protected activities were a substantial or a motivating factor in these actions of the District; nor did the Association prove pervasive control or manipulation of the Association by the District.

2. The Association did not violate N.J.S.A. 34:13A-5.4(b)(1) or (3) by its having filed an Unfair Practice Charge with the Commission on June 22, 1989, or by any other conduct herein.

RECOMMENDED ORDER

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

Alan R. Howe
Hearing Examiner

DATED: March 29, 1990
Trenton, New Jersey