

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matters of

MERCER COUNTY COMMUNITY COLLEGE,

Respondent,

-and-

Docket No. CI-81-79-13

DOROTHY B. KODYTEK,

Charging Party.

AMERICAN FEDERATION OF TEACHERS,
LOCAL 2319,

Respondent,

-and-

Docket No. CE-81-26-14

MERCER COUNTY COMMUNITY COLLEGE,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by Dorothy B. Kodytek against the Mercer County Community College. The charge had alleged that the College negatively evaluated, harassed and finally dismissed Kodytek in retaliation against her exercise of protected activities. The Commission holds that she was not discharged for engaging in protected activities; rather, that she was discharged due to her poor job performance and insubordinate behavior.

The Commission also dismisses a Complaint based on an unfair practice charge filed by the College against the American Federation of Teachers, Local 2319. The charge alleged that Kodytek's charge was filed to harass and intimidate the College. In the absence of exceptions and in agreement with the Hearing Examiner, the Commission holds that Local 2319 did not violate the Act when Kodytek filed the charge.

P.E.R.C. NO. 86-30

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Charging Party.

Appearances:

For Mercer County Community College
Smith, Stratton, Wise, Heher & Brennan, Esqs.
(Brian P. Sullivan, of Counsel)

For Dorothy B. Kodytek and American Federation of
Teachers, Local 2319
Schlesinger, Schlosser, Foy & Harrington, Esqs.
(Thomas P. Foy, and John F. Pilles, Jr., of Counsel)

DECISION AND ORDER

On April 27, 1981, Dorothy B. Kodytek ("Kodytek") filed an unfair practice charge against Mercer County Community College ("College") with the Public Employment Relations Commission. On May 14 and August 25, 1981, she amended the charge. The charge, as amended, alleges that the College 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 allegedly in retaliation against her because of her activities as president of American Federation of Teachers, Local 2319 ("Local 2319"), it evaluated her negatively and harassed her.

On June 3, 1981, the College filed an unfair practice charge. This charge alleges that Local 2319 violated the Act, specifically subsections 5.4(b)(1) and (3),^{2/} when it filed the aforementioned charges, which were allegedly "spurious, inaccurate and misleading," allegedly in order to harass and intimidate the College during the parties' then ongoing negotiations for a successor agreement.

On July 23, 1981, the Director of Unfair Practices consolidated the charges and issued Complaints and a Notice of Hearing. The parties then filed Answers denying each other's 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; and (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act.

^{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; and (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 October 22, 23, 26, 27 and 28, 1981, Hearing Examiner Charles A. Tadduni conducted hearings. The parties examined witnesses, presented exhibits and argued orally. The parties filed post-hearing briefs by June 30, 1982.

On November 3, 1982, Kodytek filed a motion to amend the Complaint to allege that since the conclusion of the hearing, the College had discharged her, allegedly because of her protected activity on behalf of Local 2319. She also moved to reopen the record to take testimony concerning her dismissal. These motions were granted.

On January 19, 20, 23, 24 and 25, 1984, Hearing Examiner Tadduni conducted hearings on the amended Complaint.^{3/} The

^{3/} These hearings were delayed due to ancillary litigation which occurred following the motion to amend. Specifically, on January 11, 1983, Kodytek filed a civil action in United States District Court. She alleged that the College violated her federal constitutional rights of free speech and association by dismissing her, harassing her and evaluating her negatively in retaliation for her activities on behalf of Local 2319. The Hearing Examiner had scheduled hearings on the amended Complaint for March 21, 22, and 23, 1983. However, on March 17, 1983, the College filed a motion to stay Commission proceedings pending resolution of the federal action. On March 28, 1983, the Hearing Examiner conducted a pre-hearing conference and solicited the parties' position on this motion. At that time, the parties agreed to adjourn Commission proceedings until the holding of a pretrial settlement conference before the federal district court judge. That conference was held on July 13, 1983, but did not produce a settlement.

On July 17, 1983, the Hearing Examiner heard oral argument on the motion to stay Commission proceedings. The parties filed briefs by September 1, 1983.

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parties examined witnesses, introduced exhibits and argued orally. They filed post-hearing briefs by April 16, 1984.

On April 26, 1985, the Hearing Examiner issued his report and recommended decision. H.E. No. 85-40, 11 NJPER 352 (¶16127 1985). Applying the tests set forth in In re Bridgewater Tp., 95 N.J. 235 (1984), he concluded that Kodytek did not make a prima facie showing that her "protected activity" was the motivating factor in the College's decision to negatively evaluate her and ultimately discharge her. He further concluded, assuming arguendo, that such a prima facie case was established, the College had met its burden of demonstrating that the same action would have taken place even absent the protected activity. Accordingly, he recommended dismissal of Kodytek's charge. Finally, he recommended that the College's charge against Local 2319 also be dismissed.

On May 24, 1985, after having received an extension of time, Kodytek filed her exceptions.^{4/} She contends the Hearing Examiner erred in (1) not finding that her protected activity was a

(Footnote continued from previous page)

On October 21, 1983, the Hearing Examiner denied the College's motion, H.E. No. 84-25 9 NJPER 674 (¶14294 1983), and issued an order scheduling hearings for December 20 and 21, 1983. On November 1, 1983, the College, pursuant to N.J.A.C. 19:14-4.6, requested special leave to appeal the denial of its motion. On November 7, 1983, the Chairman of the Commission granted such permission. On December 12, 1983, the Commission affirmed. P.E.R.C. NO. 84-62, 10 NJPER 15 (¶15009 1983).

^{4/} Kodytek also requested oral argument. We deny that request.

substantial factor in the College's decision to discharge her, and (2) not finding that Kodytek's filing of individual grievances was protected activity. The College has not filed exceptions to the recommended dismissal of its unfair practice charge.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 6-31) are accurate. We adopt and incorporate them here. This record overwhelmingly establishes that Kodytek was discharged due to her poor job performance as demonstrated by her poor evaluations from several supervisors and insubordinate behavior over a substantial period of time. She was not discharged or harassed for engaging in protected activities. Given this conclusion, her engaging in the protected activity of filing grievances^{5/} concerning among other things, her negative evaluations, does not insulate her from discharge for good cause, bad cause or no cause at all. e.g., State of New Jersey, P.E.R.C. No. 81-32, 6 NJPER 443 (¶11227 1980).


We also agree with the Hearing Examiner, in the absence of exceptions, that Local 2319 did not violate the Act by Kodytek's filing of the instant charge.

^{5/} Contrary to Kodytek's exception, we do not read the Hearing Examiner's report to find that the filing of individual grievances was not protected activity.

ORDER

The Complaints are dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Suskin and Wenzler voted in favor of this decision. Commissioner Hipp was opposed. Commissioner Graves abstained.

DATED: Trenton, New Jersey
August 27, 1985
ISSUED: August 28, 1985

H.E. NO. 85-40

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
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-and-

DOCKET NO. CI-81-79-13

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DOCKET NO. CE-81-26-14

MERCER COUNTY COMMUNITY COLLEGE,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent College did not violate subsections 5.4(a)(1), (2), (3) or (4) of the New Jersey Employer-Employee Relations Act when it negatively evaluated the work performance of Dorothy Kodytek, a secretary, during the time that she was president of AFT, Local 2319 between 1979 and 1981. The Hearing Examiner concluded that Kodytek's protected activity, compromised of the filing of several grievances and serving as President of the AFT, were not a "substantial" and "motivating" factor of the decision of the College to negatively evaluate her job performance. An amended Unfair Practice Charge was filed by Kodytek on October 19, 1982, alleging that the College has discharged her on April 23, 1982 because of her having filed several grievances challenging additional negative evaluations by the College and as to these allegations, the Hearing Examiner concluded that the College had established a legitimate business justification in that the negative evaluations and discharge were warranted on the overall record.

The Hearing Examiner also recommended that the Commission find that the Respondent AFT, Local 2319 did not violate subsections 5.4(b)(1) or (3) of the Act when it filed an Unfair Practice Charge against the College during the midst of ongoing negotiations for a successor agreement. The Hearing Examiner concluded that the public policy of the Act would be undermined if public employee organizations and others were not free to file charges of unfair practices when events appear to them to so warrant.

The 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. 85-40

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(Thomas P. Foy, Esq.)
(John F. Pilles, 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
April 27, 1981, Docket No. CI-81-79-13, by Dorothy B. Kodytek

(hereinafter "Kodytek") alleging that the Mercer County Community College (hereinafter the "College") 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"). The Unfair Practice Charge was amended on May 14, 1981 ^{1/} and August 26, 1981. The initial Charge, as amended, is hereinafter referred to as the "original Charge".

The original Charge alleged that the College issued several negative performance evaluations and several negative work performance memos to Kodytek and, in various ways, harassed Kodytek and transferred her in retaliation for having engaged in protected activities, particularly as President of the American Federation of Teachers, Local 2319 (hereinafter the "AFT"); all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (2) and (3) of the Act. ^{2/}

An additional Unfair Practice Charge was filed with the Commission on June 3, 1981, Docket No. CE-81-26-14, by the College against the AFT, alleging that the AFT had filed charges against the

^{1/} This amendment was withdrawn on October 28, 1981 (5 Tr 63, 64).

^{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."

College, which were "spurious, inaccurate and misleading," and which were filed for the purpose of harassing and intimidating the College during the parties' then ongoing negotiations for a successor agreement; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(b)(1) and (3) of the Act. ^{3/}

It appearing that the allegations of the Unfair Practice Charges, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on each of the docketed matters, respectively, on July 23, 1981 and simultaneously the matters were consolidated for hearing. Pursuant to the Complaints and Notices of Hearing, supra, hearings were held on October 22, 23, 26, 27 and 28, 1981^{4/} in Trenton, 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 June 30, 1982.

Before a decision issued, Kodytek filed an additional Unfair Practice Charge against the College on October 18, 1982, alleging

^{3/} 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."

^{4/} The transcripts of these hearing dates shall be identified and referred to as "1 Tr, 2 Tr, 3 Tr, etc." corresponding to October 22, 1981, et seq.

that it had engaged in additional unfair practices within the meaning of the Act, particularly when it discharged her from its employ on April 23, 1982, inter alia, for filing several grievances challenging the negative evaluations of Kodytek by College supervisors; which is alleged to be an additional violation of the Act, namely N.J.S.A. 34:13A-5.4(a)(4).^{5/} On November 3, 1982, counsel for Kodytek moved to amend further the original Unfair Practice Charge against the College, coupled with a Motion to Reopen the Record. Following the filing of briefs on the question, the undersigned granted Kodytek's Motion to Amend and to Reopen the Record on January 27, 1983: H.E. No. 83-24, 9 NJPER 169. Thereafter, hearings on Kodytek's amended Unfair Practice Charge and the College's Unfair Practice Charge were scheduled for March 21, 22, 23, 1983. On January 11, 1983, Kodytek filed an action in Federal District Court pursuant to 42 USCA Subsections 1983 and 1985 wherein it was alleged that representatives of the College deprived Kodytek of rights secured by the United States Constitution and the laws of the United States. In the federal action, Kodytek sought compensatory and punitive damages, in

^{5/} In Charging Party's October 18, 1982 amendment, Charging Party alleged further violations of subsections 5.4(a)(1) and (3) of the Act (supra, n.2) and asserted an additional violation of subsection (a)(4).

This subsection prohibits public employers, their representatives or agents from: "(4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act."

addition to attorneys fees and costs plus several of the remedies that could have been provided by the Commission. On March 17, 1983, the College filed a Motion to Stay the Commission's proceedings, pending the resolution of the federal action. Due to various procedural aspects of the Motion to Stay controversy, the Hearing Examiner did not finally dispose of said Motion until October 21, 1983 when it was denied: H.E. No. 84-25, 9 NJPER 674. Additional appeals by the College to the Chairman of the Commission and the Appellate Division delayed the ultimate scheduling of hearings on the merits of Kodytek's discharge. When all of the appeals had been exhausted, the matter was scheduled and heard on January 19, 20, 23, 24 and 25, 1984,^{6/} in Trenton, New Jersey, at which time the parties were again given an opportunity to examine witnesses, present relevant evidence and argue orally. The parties filed post-hearing briefs on this latter phase of the matter by April 16, 1984.

Unfair Practice Charges, as amended, having been filed with the Commission, a question concerning the alleged violations of the Act, as amended, exists and, after hearings, and after consideration of all of the post-hearing briefs of the parties on the merits, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record in this matter, the Hearing Examiner makes the following findings and determinations:

^{6/} The transcripts of these hearings shall be referred to and identified as "6 Tr, 7 Tr, 8 Tr, etc." corresponding to January 19, 1984, et seq.

FINDINGS OF FACT

1. The Mercer County Community College is a public employer within the meaning of the Act, as amended, and is subject to its provisions and was the employer of the employee involved in this proceeding.

2. Dorothy B. Kodytek is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

3. The American Federation of Teachers, Local No. 2319 is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

4. The AFT is the collective negotiations representative for a unit of clerical employees of the College, covering a range of classifications as set forth in Article I, Recognition, in the two collective negotiations agreements submitted in evidence: J-1, effective July 1, 1979 to June 30, 1981 and J-2, effective July 1, 1981 to June 30, 1983.

FINDINGS AS TO DOCKET NO. CE-81-26-14

5. On May 4, 1981, the AFT filed an Unfair Practice Charge, Docket No. CO-81-338, alleging that the College had engaged in a systematic campaign to undermine the recognized representative through its efforts in supporting and encouraging participation in a group called the "Professional Secretaries International" (R-10). The AFT requested that the College cease and desist from supporting the "PSI" as a "rival organization."

6. The Professional Secretaries Association (International) is a professional organization, which fosters personal and professional development of secretaries through sponsorship of conferences, courses, workshops and achievement awards (5 Tr 46).

7. In response to the AFT's Unfair Practice Charge, D. David Conklin, Dean for Planning & Development, and the College's chief negotiator, sent an interoffice memorandum to all unit members on June 16, 1981, in which he stated that, considering the strong stand that the AFT has taken with regard to the Professional Secretaries Association, the College has decided to discontinue any support previously given (R-11). The next day the AFT announced that it was withdrawing the May 4 Unfair Practice Charge (5 Tr 63, 64).

8. On June 22, 1981, Kodytek wrote to Conklin, stating that the unit members were incensed by his recent communication to unit members (R-11) and that it was obvious that Conklin's intent was "...to drive a wedge between the members of Local 2319 and the leadership..." (R-13). On June 24, Conklin wrote to Kodytek, stating his mystification at her letter, and offering to continue to support the Professional Secretaries Association if that was the desire of the unit members (R-14).

9. The next development was on June 26, 1981 when Thomas P. Foy, Esq. wrote to Kodytek with copies to the Mercer County College, the Freeholders, Conklin and others, in which he expressed outrage at Conklin for his having written his memo of June 16, 1981 to unit members (R-11), adding that this might be an unfair practice in and of itself (R-15).

10. The filing of the foregoing Unfair Practice Charge and the subsequent correspondence occurred during a period when the parties were in the midst of negotiations for a new collective negotiations agreement. Ray Peterson, the then President of the State AFT organization, stated to Conklin and others that Kodytek's Unfair Practice Charge was "...the type of thing that melts away during the negotiations process" (5 Tr 67, 68).

FINDINGS AS TO DOCKET NO. CI-81-79-13 (PRE-DISCHARGE)

11. Kodytek was president of AFT Local 2319 for two two-year terms: from 1973-1975 and from 1979-1981. During her second term, she executed J2 on behalf of the Local on July 30, 1981

12. Kodytek has been employed by the College since March 26, 1969 (1 Tr 43). She was hired as a Sr. Clerk Stenographer and later promoted to Administrative Secretary - "C" range.

13. Shortly after Kodytek commenced employment with the College, she became the secretary to M.C. Keith Jones, the Director of Personnel (2 Tr 95, 96). She remained with Jones until November 1972. During this assignment, Kodytek received three evaluations from Jones, all of which were exceptional and highly laudatory (P-1, P-2 and P-3).

14. In January 1973, Kodytek began working for Donald O. Shelton, who at that time was the Director of Evening and Extension Operations (3 Tr 191, 192). Kodytek worked for Shelton as his secretary until July 1979 (5 Tr 3). Shortly after becoming Shelton's secretary, Kodytek became a member of the AFT and later that year,

became its President (2 Tr 87, 88, 89). Between July 8, 1974 and September 25, 1978, Shelton evaluated Kodytek on six occasions, all of which evaluations were uniformly exceptional (P-4 through P-9).

15. When Kodytek first commenced working for Shelton in January 1973, she worked alone without other co-workers (3 Tr 192). However, in the later years with Shelton, Kodytek was required to work with others as the staff increased and Kodytek was instructed by Shelton to work for other administrators on his staff when asked to do so (3 Tr 199). Thomas N. Wilfrid, who became Dean for Students and Community Services in 1977, and who supervised Shelton during much of the latter period that Kodytek worked for Shelton, testified credibly that the department was operating smoothly with the exception of Kodytek (3 Tr 92, 93). As an example, Wilfrid stated that on one occasion he overheard a loud and angry outburst from Kodytek to Shelton during an argument she was having with him (3 Tr 97-100). At one point, in July 1978, Shelton convened a meeting of the administrators to determine whether or not Kodytek should be discharged, but it was concluded that there were not sufficient grounds (3 Tr 200, 201).

16. During at least the first six months of 1979, while Kodytek was still in Shelton's office, Johnson Roney III, the Director of Admissions and Continuing Education, was assigned to Shelton as one of his administrators (4 Tr 148). On January 23, 1979, Roney wrote to Shelton, complaining generally about the poor performance of the full-time secretaries (R-7). Although Roney's

memo did not specifically make reference to Kodytek, Roney testified that the clerical problems he was encountering were caused in part by Kodytek (4 Tr 150). On April 27, 1979, Roney wrote again to Shelton regarding Kodytek's performance, the conclusion of which was that she contributed nothing to what Roney considered being a good secretary (R-3). Also, to the same effect, see Roney's memos to Wilfrid, dated May 2 and June 11, 1979, in which Roney recommends the removal of Kodytek from the office "as soon as possible" (R-1) and complains about Kodytek absenting herself from the office for extended periods, causing the burden to fall upon those of the remaining clerical staff (R-2). Finally, Roney testified credibly that in March 1979, at a time when he was just outside Shelton's office, he overheard Kodytek speaking to Shelton in an abusive tone, accusing Shelton of being prejudicial to her and calling Shelton a "black racist pig" (4 Tr 157, 158). Although Kodytek denied making such a statement on rebuttal (4 Tr 193), the Hearing Examiner credits Roney, based on his demeanor and the unlikelihood that he would fabricate such an incident. 7/

17. Wilfrid testified credibly that he had had discussions with Kodytek between mid-1978 and mid-1979 in an attempt to find a position for her that would be suitable to her needs and performance (3 Tr 112, 113). Kodytek expressed to Wilfrid her desire for a

7/ Recall that the last favorable evaluation of Kodytek by Shelton was September 25, 1978 (P-9).

position where she was assigned to an office with one person as her supervisor (3 Tr 113, 115). In May or June 1979, Shelton left to assume new duties at the James Kerney Campus and Wilfrid decided to assign Kodytek to the new Director of Training Services, Ellen Madill (3 Tr 111, 112, 116). Wilfrid stated that his reasons for assigning Kodytek to Madill included the fact that the assignment would be on a one-on-one basis, that Madill had no preexisting bias toward Kodytek, and that Madill was an expert in training and development of employees, which might be of assistance to Kodytek (3 Tr 116, 118, 119).

18. Madill assumed her new position in July 1979 and remained through June 1980. Kodytek became her secretary in July and, at the beginning, Madill explained to Kodytek that her (Kodytek's) major responsibility was to be in charge of the office during Madill's absence since Madill would be spending the majority of her time out of the office (5 Tr 4, 5). While Madill was initially satisfied with the quality of Kodytek's work, she found that Kodytek was unable to keep up with the work as the load increased. Also, punctuality became a problem with Kodytek arriving 10 or 15 minutes late. There was also a problem with Kodytek's failure to cover the telephone when Madill was out of the office (5 Tr 5, 6).

19. In November 1979, Madill made a formal written evaluation of Kodytek (P-10). This was just prior to Kodytek's assuming the presidency of the AFT for the second time. Although the

evaluation was for the most part favorable, in that Kodytek received the highest or second highest marks in eight of the nine categories, Madill also included some constructive criticisms designed to enhance Kodytek's future performance (5 Tr 15, 16, 19). Notwithstanding the overall favorable evaluation of Kodytek by Madill, Kodytek filed a formal grievance (5 Tr 20). Prior to the formal grievance, Kodytek had met with Madill along with a union representative to discuss the evaluation. During the discussion, the representative did most of the talking while Kodytek sat and listened (5 Tr 17, 18). During the discussion it became evident that Kodytek was not satisfied with anything less than the highest mark in each category. As a result of the meeting, Madill did make some changes in the evaluation (5 Tr 17-20, 39, 40). ^{8/}

20. At some point prior to Madill's leaving the College in June 1980, Kodytek was granted a six-week leave of absence to attend an AFT sponsored seminar. In the anticipation of Kodytek's absence, Madill assigned her various tasks to be completed prior to her departure. Kodytek did not complete the assignments (5 Tr 20).

21. In May 1980, one month prior to Madill's departure in June, Kodytek, on her initiative, met with John P. Hanley, the President of the College, in order to discuss her future, in particular, finding a place for Kodytek after Madill's departure (3

^{8/} The grievance filed by Kodytek against Madill's evaluation was processed through all steps short of advisory arbitration (1 Tr 80; 2 Tr 70).

Tr 26, 43, 44). Kodytek spent two days in Hanley's office discussing her situation and Hanley personally signed her timesheet (P-28). Hanley testified credibly that the problem in finding a suitable place for Kodytek was that there were limited openings coupled with the "great reluctance on the part of supervisors to deal with Mrs. Kodytek" (3 Tr 46). The Hearing Examiner does not credit Kodytek's version of the meetings and discussions with Hanley in May 1980, namely, that the meeting was initiated by Hanley, that while meeting with Hanley, Kodytek felt persecuted and harassed, and finally, that Hanley kissed her on the forehead (4 Tr 233-237). Hanley's version of the events of those two days seems much more likely inasmuch as Kodytek by May 1980 must have felt some insecurity in her job position. Further, the Hearing Examiner finds that if Hanley did kiss Kodytek on the forehead, it would appear to have been more an innocuous gesture than an effort to frighten and intimidate Kodytek as she testified (4 Tr 237, 256). Based upon the record, the entire circumstances of this meeting did not seem calculated to intimidate -- nor does the Hearing Examiner think it did. Rather, the College President's devotion of a substantial amount of time to Kodytek at this point in time seemed motivated by concerns both for a long-time employee and the smooth functioning of the College Administration.

22. After Madill's departure in June 1980, and prior to a new assignment for Kodytek in August of that year, Kodytek continued to report to the same location and did not seek reassignment. According to Kodytek, it was management's function to find a place

for her to work and make assignments. She therefore took no initiative in seeking work assignments (2 Tr 103, 107).

23. In August 1980, Kodytek was assigned as the Administrative Secretary to Robert E. Bolge, the Assistant to the Dean for Student Services, etc. Kodytek was replacing Bolge's prior secretary, Jeremy Parry, who had been a "C" range secretary as was Kodytek (4 Tr 17-19). At the beginning of their working relationship, Bolge stated that he knew Kodytek had had problems but that with him she was "starting from ground zero" and that together they "were going to shine" (4 Tr 25, 116, 117). Bolge gave Kodytek less work than he had given to Parry and was initially satisfied with the quality of Kodytek's work but not with the quantity (4 Tr 19, 20). On December 5, 1980, Bolge evaluated Kodytek's performance (P-11). Bolge continued to note that Kodytek's quality of work was excellent but that her quantity of work was inadequate (4 Tr 31, 33). Bolge testified that Kodytek did only half of the work that Parry, the prior secretary had done (4 Tr 21). After Bolge's evaluation, supra, the working relationship between him and Kodytek "simply went downhill" (4 Tr 34) and Kodytek became hurt and overly questioning of everything that Bolge did (4 Tr 35).

24. On January 6, 1981, Kodytek had filed a grievance with Bolge regarding the answering of certain telephone extensions. Since Bolge considered this the first step, and that an answer was due in two days, he prepared a written answer and read it to Kodytek over

the telephone on January 8, 1981 inasmuch as Kodytek was out of the office on that date (R-6; 4 Tr 65, 70-73).

25. Bolge, in early 1981, proposed that a desk audit be performed in order to ascertain whether or not the amount of work being asked of Kodytek was proper (4 Tr 62, 63). The audit had been prompted by Kodytek's continually complaining that there was simply too much work for any one person to accomplish. Notwithstanding that the audit was intended to resolve the issue of her workload, Kodytek refused to participate and the audit was never performed.

26. On March 9, 1981, Bolge sent Kodytek a memo, in which he stated that he reviewed her work completion rate since her last evaluation (December 5, 1980) and found it "wholly inadequate" (P-21).^{9/} Bolge went on to state that as of March 9, Kodytek's typing assignments, given on February 16, 1981, had not been completed and that filing from January 19 remained undone. Bolge testified that the filing, which was supposed to be done on a weekly basis, had not been done for six weeks and was now five to six inches high (4 Tr 36). Additionally, Kodytek's typing assignments had to be reassigned to other secretaries in order to allow the completion of some of Kodytek's duties (4 Tr 42).

27. On March 17, 1981, Bolge sent a memo to Wilfrid, in which he reported that the services of two secretaries, including

^{9/} In response to Exhibit P-21, Kodytek filed an informal grievance (4 Tr 37).

Parry, had accomplished in seven hours the same amount of typing that would, in the professional opinion of Bolge, have taken Kodytek thirty-five hours to complete (R-5).^{10/}

28. On March 16, 1981, Kodytek, without formal permission, left the department to attend the funeral of a former employee (Laura Tucker) at the James Kerney Campus (2 Tr 49, 52, 113). The next day Bolge told Kodytek that since he had not given her permission to attend the funeral "it was a day off from work" (4 Tr 47). As Kodytek left Bolge's office she became loud and belligerent, and the effect of this outburst was to disrupt the entire department, according to Bolge (4 Tr 47-49). In response to Kodytek's contention that she had received permission from a secretary at the Kerney Campus, Jean Miller, Bolge testified credibly that he spoke with Miller, who stated that she had not given permission to Kodytek to attend the Tucker funeral (4 Tr 49). On March 20, 1981, Bolge sent a memo to Wilfrid regarding the Tucker funeral incident, supra, (P-23). On March 20, 1981, Jones wrote Kodytek, advising her that, because of her unauthorized absence on March 16, 1981, she would not be paid for the day (P-24).

29. On March 30, 1981, Jones held a meeting with Kodytek and Bolge, at which time the job performance of Kodytek was

^{10/} Bolge testified credibly that although components of the secretarial work had changed from the time that Parry had worked for him, the overall workload remained constant during
(Footnote continued on next page)

reviewed. According to a memo of the meeting, prepared by Jones on April 1, 1981, Kodytek felt that there were no "problem areas" but, at the conclusion of the meeting, Jones advised Kodytek that if her performances did not improve (cf. P-11 and P-21) then he would recommend withholding any negotiated salary increase for the 1982 fiscal year. Kodytek stated that she considered her production adequate and that it would not be lifted to a higher level (4 Tr 6).

30. In August 1981, which marked the anniversary date of Kodytek's assignment to Bolge, Bolge decided to evaluate Kodytek's job performance, in view of the fact that it had not improved (4 Tr 51). The evaluation was prepared on August 10, 1981 (P-26). Bolge stated that he found Kodytek's performance significantly below the expected level of other C-range secretaries recognizing that the quality of Kodytek's typing had been good. There follows four paragraphs of specific details of Kodytek's shortcomings, including deficiencies in filing and inability to complete work in a timely manner. With respect to the giving of evaluations, Kodytek testified that while the collective negotiations agreement provides that an evaluation may be made at least once a year (J-2, p.20), this provision does not preclude others (2 Tr 117, 118).

31. On August 17, 1981, Kodytek was transferred and became secretary to David Leeb, the Associate Dean for Institutional

(Footnote continued from previous page)

the time of Kodytek's tenure (4 Tr 127). Parry was able to accomplish, without difficulty, the same amount of work that was expected from Kodytek, which Kodytek did not accomplish (4 Tr 115, 137, 138).

Resources (1 Tr 43; 8 Tr 96-98). The decision to transfer Kodytek resulted from Bolge's meeting with Conklin and Wilfrid in which Bolge indicated strongly that he could not continue to do his job if Kodytek remained as his secretary (8 Tr 95). According to Conklin, there were three possible options for Kodytek at that time, one being in Financial Aid, where the Director displayed an unwillingness to take Kodytek as a transfer, and the other two were inappropriate in that one was as a recorder and the other a lower grade position, to which Kodytek could not have been assigned under the collective negotiations agreement (8 Tr 95, 96). Leeb had, at about that time, requested a secretary and, upon being apprised that Kodytek was available, believed that he would be able to work with her (8 Tr 96-98).

32. On October 14, 1981, James J. Freda, the Executive Assistant to President Hanley, reported an incident where Kodytek failed to answer the telephone, stating that she felt it was an imposition for her to have to answer other people's telephones (R-4). All secretaries have been instructed to pickup the telephone when another person was not present (4 Tr 7, 8). On the same day, Kodytek chastised Freda in his office for his attitude and called him a "double dipper," a phrase which described the fact that he earned a salary and received a pension (4 Tr 9, 10). Kodytek acknowledged that she made the remark and conceded that it was not complimentary (4 Tr 253, 254).

ADDITIONAL FINDINGS AS TO DOCKET NO. CI-81-79-13(EVENTS LEADING UP TO DISCHARGE)

33. Article 34 of the 1981-83 collective negotiations agreement (J-2) provides, inter alia, that an employee who is transferred shall be subject to a 45-day probationary period and, further, that the employee shall be informed of his or her progress in writing during the probationary period (J-2, p.19). Thus, on October 19, 1981, Leeb prepared and submitted to Kodytek a "Formative Evaluation" (P-39). Kodytek acknowledged that such an evaluation was required under the agreement (7 Tr 53). The overall evaluation was less than satisfactory as a detailed reading discloses. Leeb made allowance for Kodytek's inexperience in her new assignment, terming her overall performance as "what can be reasonably expected of an employee assigned to a new work environment and presented with a different set of assignments" (P-39, p.1). Leeb stated that the problems with Kodytek's performance to date were not with the quality of her work but with her attitude toward the work environment. He added that Kodytek has an aversion to getting down to a task and requires a considerable amount of supervision, undertaking tasks only when directed to do so. He concluded by stating that she must be willing to accept constructive criticism and work on improving her interaction and cooperation with others.

34. Kodytek's response to the formative evaluation of Leeb was a letter to Leeb dated October 21, 1981, in which she stated that due to the pendency of an Unfair Practice Charge, she was reserving her right to reply (P-40). In the last line of her letter to Leeb,

Kodytek stated that she protested and disputed the contents of the evaluation. Kodytek testified that at some point she responded verbally, telling Leeb that the evaluation was not true, but never responded in writing (7 Tr 55, 56). Efforts by Leeb to discuss the merits of the evaluation with Kodytek were unavailing and what little discussion there was resulted in a personal attack upon Leeb when Kodytek called him a "henchman" (10 Tr 29, 34, 35). Leeb testified credibly that he took the term "henchman" to mean that he was acting as an agent for President Hanley (10 Tr 29, 30).

35. On October 23, 1981, Conklin sent a memo to Leeb regarding an incident on October 20 where Kodytek permitted the phones to ring while two clerical employees were out to lunch (P-41). Conklin asked Leeb to bring this to Kodytek's attention and he did so by a memo to her dated October 27, 1981 (P-42). In this memo Leeb referred to the fact that the telephone answering had been included in her formative evaluation (P-39, supra) and concluded by stating that her failure to answer the telephone in the future would result in a recommendation that disciplinary action be taken. Kodytek's response was to send a memo to Conklin on November 2, 1981 claiming that Conklin's concerns were unfound inasmuch as she was on her lunch hour and engaged in union business (P-43). Kodytek claimed that Leeb had had no problem with her being flexible in her lunch periods and yet Leeb had brought the matter of the telephone to her attention with a memo that was "of a disciplinary nature." Finally, Kodytek requested that a copy of P-43 be placed in her personnel file

if P-41 had already been placed in her file. This request was granted on November 2, 1981 (P-44). Notwithstanding Kodytek's flexible lunch hour, Conklin testified that he perceived that the quid pro quo for doing union work at her desk was to answer the telephone when it rang repeatedly (8 Tr 163).

36. Pursuant to Article 36 -- which provides that each employee shall be given a written evaluation at least once a year (J-2, p.20) -- Kodytek was evaluated by Leeb on January 6, 1982 (P-45). In an accompanying narrative, Leeb reiterated what he had said in P-39, supra, namely, that an evaluation is a valuable means for improving individual performance and facilitating progress toward the correction of weaknesses. In his evaluation, Leeb expressed concern that there had been no improvement in the weaknesses noted in Kodytek's initial job performance evaluation of October 19, 1981, although he clung to the belief that Kodytek was capable of producing acceptable work. The January 6 evaluation was denominated as unsatisfactory and concluded with the statement that if Kodytek's performance continues as it has been and the work flow does not improve then Leeb stated that he would be forced to recommend that disciplinary action be taken. On January 6, 1982, Leeb gave Kodytek her evaluation (P-45) and asked her to read it and discuss it (10 Tr 52). Kodytek's response was to engage in name-calling and totally to rebuff Leeb's request to discuss the evaluation or to respond to it in writing as provided in J-2 (10 Tr 52-54). According to Leeb, Kodytek in essence said that the evaluation was worthless and was

just more of his harassment (10 Tr 54). Kodytek's own testimony was that her response to Leeb was that the evaluation was not true (7 Tr 71). The collective negotiations agreement in Article 36 provides that an employee "shall sign the evaluation," indicating that the signature does not necessarily mean concurrence (J-2, p.20).

Kodytek, while acknowledging the force of this provision of the agreement, refused repeated requests through January 12, 1982, to affix her signature to the evaluation under pain of discipline (7 Tr 64-71; P-48, P-49 & P-50). An examination of the January 6, 1982, evaluation (P-45) indicates that Kodytek signed it with a brief comment on March 15, 1982.^{11/} Prior to signing the evaluation on March 15, 1982, Kodytek's sole response to the evaluation had been a memo to Conklin on January 12, 1982, in which she acknowledged the provision for signature in Article 36 of the agreement but asserted that the numerous evaluations given to her over a short period of time were harassing tactics because of her union activities and, finally, she claimed that the January 6 evaluation was related to the pendency of the instant proceedings (P-50). Disciplinary action was taken against Kodytek in the form of a memo from Conklin to her on January 19, 1982, which set forth her refusal to sign the evaluation of January 6, 1982, and informing her that the instant memo was being sent to personnel for appropriate disciplinary action (P-51).

^{11/} Kodytek's signing of the evaluation on March 15, 1982, was precipitated by a disciplinary warning from Jones on March 1, 1982 (R-16; 8 Tr 143, 144).

Finally, in the matter of Kodytek having refused to sign her evaluation of January 6, 1982, Theresa Stoy, one of Kodytek's successors as President of the AFT, agreed that the refusal of an employee to sign an evaluation would constitute insubordination (8 Tr 26, 27). During the pendency of Kodytek's refusal to sign her evaluation, Conklin spoke with several representatives of the AFT, stating that he considered it insubordination for an employee to refuse to sign an evaluation, and requesting that they grieve his position if they did not agree (9 Tr 122-124). No grievance was filed.

37. Kodytek filed a grievance as to the annual evaluation of January 6, 1982 (P-45) on February 17, 1982 (P-60j). In this grievance, she stated that the evaluation discriminated against her due to her strong union activities. The grievance was denied by Leeb and appealed by Kodytek to Jones on March 10, 1982 (P-60h). When Jones failed to file a timely response, Kodytek appealed to the President on April 14, 1982 (P-60e) and on April 29, 1982, the President's designee denied the grievance (P-60a).

38. On February 1, 1982, the College was involved in the preparation of a lengthy federally mandated Vocational Education Evaluation Report and Kodytek was one of several secretaries responsible for the typing (8 Tr 105-108). Early in the morning of February 2, Conklin inquired of his secretary, Joan Martin, as to how the typing was progressing and, in reviewing the portions typed by Kodytek, Conklin noticed that the margins were not as specified and

that she had only typed five pages (8 Tr 109). Conklin then called Kodytek into his office to discuss her output on February 1, his purpose being to discuss the matter and not to admonish Kodytek (9 Tr 77, 78). When Conklin asked Kodytek whether her five typed pages of the day before was the sum total of her work, he testified that she replied to the effect "I guess it was," never indicating that she had completed any additional work (8 Tr 114; 9 Tr 124, 125). Kodytek testified that she could not recall with any certainty having done any other work in addition to the five typed pages (7 Tr 79-82). When Conklin stated that he considered five pages an unacceptable level of work, Kodytek became very heated and in a loud voice stated that Conklin did not know what was acceptable or unacceptable and that Conklin "couldn't make it in the business world," a remark that Kodytek was unable to deny having made (7 Tr 87, 88; 8 Tr 114, 115). Kodytek abruptly announced that she had things to do and was going to take her break, notwithstanding that it was then only about 9:30 a.m., and left without obtaining Conklin's permission (8 Tr 116-118). On the same day, February 2, Conklin sent a memo to Leeb regarding Kodytek's performance on February 1, 1982, informing him as to what transpired in Conklin's office on February 2, and concluding with the statement that he had advised Kodytek that if she left her work station it would be considered insubordination (P-52; 8 Tr 117). Kodytek responded in writing to Conklin on February 11, 1982, referring to his memo to Leeb, and stating that she had been advised by her attorney to respond (P-53). She indicated for the first time

that she had typed additional work (six pages) on February 1 and accused Conklin of badgering her and interfering with her right to take a break contrary to Article 9 of the agreement (P-53). Conklin checked the logs pertaining to the additional work that Kodytek claimed she had done on February 1, 1982, and determined that that work had previously been done (9 Tr 125). On February 12, 1982, Conklin sent a memo to Kodytek, responding to her memo of February 11, pointing out that her claim of additional typing was in error since it had been completed by her prior to February 1 and concluding that her behavior on February 2, was inappropriate (P-54). On the same date, February 12, Conklin sent Kodytek a second memo with a copy to her personnel file and Jones, complaining about her voice level and unwarranted personal statements (P-55). Conklin thus apprised her of an official reprimand and gave a warning that if similar conduct was engaged in by Kodytek, "...severe disciplinary action will be taken, including suspension or dismissal" (P-55).

39. Article 9 of the 1981-83 agreement provides that each employee is entitled to one 15-minute rest period per day (J-2; p.7). On March 15, 1982, Kodytek filed a Step-one grievance, alleging that she was ordered not to take a 15-minute break on February 2, 1982 by Conklin, and did not do so during the balance of the day due to his threat that if she left her work station it would be insubordination (P-59e). On June 1, 1982, the Step-three decision of the President's representative was rendered and Kodytek was awarded payment equal to 15 minutes (P-59a).

40. When Kodytek started working for Leeb, he asked her to maintain a worklog so that he would have some record of the work being done, as he had done with his previous secretary (10 Tr 36, 37; P-68). He asked Kodytek to submit the log to him "every couple of weeks" (10 Tr 38). Leeb also maintained his own log of Kodytek's work and the two logs were reviewed together (10 Tr 39). On February 12, 1982, when Leeb asked Kodytek the whereabouts of that portion of her worklog covering the period November 19, 1981 through January 17, 1982, Kodytek indicated that she had taken it home (10 Tr 39-41; P-56). On February 22, Leeb again asked Kodytek for the missing pages of her log and she stated that she would bring them in on February 24. When they were not forthcoming on February 24, Leeb gave her a handwritten note, indicating that it was his second request (R-18; 10 Tr 43, 44). When the missing portions of the log had not been received by February 26, 1982, Leeb sent Kodytek a memo, reciting the events since February 12, and concluding that her continued refusal was insubordination and "...as such you will face disciplinary action" (P-56). Kodytek even refused to sign a statement that she had lost the logs, calling the request "silly" (10 Tr 41). During the course of the instant hearings in January 1984, Kodytek located the missing worklog in her home after a search of three-quarters of an hour and they were introduced in evidence as P-68, supra, (7 Tr 141-144).

41. On February 26, 1982, Leeb made an additional evaluation of Kodytek, in which he found the quality of her work

occasionally satisfactory and the amount of work entirely inadequate (P-46). An examination of this evaluation discloses that it is generally unsatisfactory and this is reinforced by the contents of the typewritten addendum to the evaluation, in which Leeb discussed at length the shortcomings in Kodytek's performance since the last evaluation of January 6, 1982. Leeb, in his concluding paragraph, stated that since he was not sure that this evaluation would have any more impact than previous ones, he was recommending that Kodytek be suspended for a five-day period. Also, on February 26, the date of Leeb's evaluation, supra, Jones wrote to Kodytek, advising her that he was scheduling an informal conference to review her work performance evaluation as of that date (P-65).

42. On the basis of Leeb's recommendation that Kodytek be suspended for five days, Jones suspended her on March 8, 1982 with the suspension becoming effective on that date (P-58f). Kodytek filed a grievance on April 19, 1982 (P-58e), which was appealed to the President's designee. On June 1, 1982, the President's designee noted that the matter was moot inasmuch as Jones, on May 5, 1982, had stated that the grievant (Kodytek) should receive five days pay (P-58d, P-58a). The President's designee did not agree with Kodytek that any additional provision of the agreement had been violated (P-58a).

43. On April 7, 1982, Kodytek filed a grievance regarding the February 26, 1982 evaluation, supra, in which she again contended that she was being discriminated against due to her strong union

activities (P-61g). Like prior grievances, this grievance was appealed to the President and on June 25, 1982, the President's designee found that the grievance was without merit and denied the requested relief (P-61a).

44. On April 16, 1982, Leeb prepared an additional evaluation on Kodytek, in which he again found that the quality of her work was occasionally unsatisfactory and the amount of work entirely inadequate (P-47). The evaluation was generally unsatisfactory and contained an addendum, which was substantially the same as that in the evaluation of February 26, 1982 (P-46, supra,). The concluding paragraph of the addendum stated that Kodytek's performance was unacceptable and unsatisfactory, adding that she requires constant supervision and that her attitude is poor. Finally, Leeb recommended that the College consider imposing appropriate disciplinary action.

45. On April 23, 1982, Kodytek filed a grievance over the April 16 evaluation (P-62e). Once again, she asserted that she was being discriminated against due to her strong union convictions. This grievance, like its predecessors, was appealed to the President, and on June 25, 1982, the President's designee found that the grievance was without merit and denied the requested relief (P-62a).

46. Neither of Kodytek's successors as President of the AFT, Theresa Stoy or Linda Lichtfus, felt that they had ever received a negative evaluation as a result of their activities on behalf of the AFT (8 Tr 7, 34). Lichtfus stated that it is not uncommon for an

employee whom the College feels is doing substandard work to receive multiple evaluations (8 Tr 49). Finally, Lichtfus testified that if an employee receives an evaluation, which he or she considers to be incorrect, the common practice is for the employee to assert his or her contractual right to draft a written response, which must be included in the employee's personnel file (8 Tr 78). Kodytek's reponse in each and every instance to an evaluation was to resort to the grievance procedure rather than to have a response placed in her personnel file (7 Tr 56-58).

47. Kodytek in the last amended Unfair Practice Charge (C-8) alleged that she was denied the right to counsel at various hearings, to which Conklin on behalf of the College, responded that although it was inappropriate for grievants to be represented by counsel at informal proceedings, Conklin nevertheless permitted Mr. Foy to attend provided that he did not participate (8 Tr 167, 168). Kodytek conceded that she was not contractually entitled to have an attorney present (7 Tr 131).

48. On April 23, 1982, Jones sent Kodytek a letter, in which he advised her that she was being dismissed as of May 7, 1982, adding that she should not report to work after April 23, 1982, but would be paid through May 7 (P-57). Jones then set forth seriatim the bases for her dismissal, beginning with reference to her four evaluations between October 19, 1981 and April 16, 1982. Jones alleged that the nine instances cited constituted steps in the progressive disciplinary process and supported the College's decision

to dismiss. The collective negotiations agreement provided in Article 34 (J-2), that progressive discipline shall be followed before dismissal and that an employee should receive notice of unsatisfactory performance before notification of discharge for lack of performance.^{12/}

49. On May 5, 1982, Kodytek filed a grievance regarding her dismissal on April 23, 1982 (P-63d). Kodytek alleged that the discharge was representative of the continuing harassment that had precipitated the filing of the instant Unfair Practice Charges and that she was being discriminated against due to her strong union convictions. This grievance was likewise appealed to the President's designee, who on July 22, 1982, denied the grievance as lacking in merit (P-63a).

50. Kodytek acknowledged that she had requested the AFT to have her various grievances taken to arbitration, but that these requests were denied (7 Tr 100-102). Stoy, who was then the President of the AFT, explained that the AFT grievance committee reviews the merits of a particular grievance, for which arbitration has been requested, and if it concludes that the grievance is not meritorious then it is not taken to arbitration (8 Tr 13).

51. Evidence of Kodytek's grievance activity on behalf of the AFT, other than for herself, was offered in the case of Holly

^{12/} Pursuant to Article 34 of the agreement, Kodytek was given the
(Footnote continued on next page)

DiBalsi where a supervisor, Lois K. Etz, made disparaging remarks in June 1981 regarding Kodytek's use of the collective negotiations agreement (P-27; 2 Tr 65-68).

DISCUSSION AND ANALYSIS

The College Did Not Violate Subsections(a)(1) And (3) Of The Act, Either By Its Conduct In The Pre-Discharge Phase Or By Discharging Kodytek, Effective May 7, 1982 -- 13/

The New Jersey Supreme Court in Bridgewater Tp. v. Bridgewater Tp. Public Works Assoc., 95 N.J. 235 (1984) adopted what has become to be known as the "Wright Line" test which was first enunciated by the National Labor Relations Board in 1980 (251 NLRB 1083, 105 LRRM 1169). The most common aspect of the Wright Line test involves the "dual motive" case where the following requisites are utilized in assessing employer motivation: (1) The Charging Party must make a prima facie showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the employer's decision to discipline; and (2) once this is

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requisite one-week written notice on April 16, 1982 regarding the informal conference and her evaluation of that date (P-47). The notice was received in evidence as R-17 and was hand delivered to Kodytek on April 16 (9 Tr 144, 145).

13/ No evidence was adduced by Kodytek which would establish a violation by the College of subsections (a)(2) and (4) of the Act and, accordingly, the Hearing Examiner will recommend dismissal of these allegations. Cf. North Brunswick Tp. Bd. of Ed., P.E.R.C. No. 80-122, 6 NJPER 193 (1980) and Randolph Tp. Bd. of Ed., P.E.R.C. No. 82-119, 8 NJPER 365, 367 (1982), aff'd. App. Div. Docket No. A-5077-81T2 (1983).

established, the employer has the burden of demonstrating that the same action would have taken place even in the absence of protected activity (95 N.J. at 242).

The Court in Bridgewater further refined the test in dual motive cases by adding that the protected activity engaged in must have been known by the employer and, also, it must be established that the employer was hostile toward the exercise of the protected activity (95 N.J. at 246). The Hearing Examiner also notes that the Charging Party must establish a nexus between the exercise of protected activity and the employer's conduct in response thereto: See, In re North Brunswick Tp., P.E.R.C. 80-69, 5 NJPER 544 (1979).

Also, it is an established principle that an employer may legally discharge an employee for any cause, whatever others may think of its adequacy, so long as the motivation is not interference with rights protected under the Act. See, NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666, 669 (1st Cir. 1979). Similarly, an employer can fire an employee for good, bad, or no reason, so long as the purpose is not to interfere with union activities. See, NLRB v. Loy Foods Stores, Inc., 697 F.2d 798, 801 (7th Cir. 1983).

Based upon the foregoing authorities, the Hearing Examiner finds and concludes that the allegations in Kodytek's "original Charge", as supplemented by the allegations in the additional Charge on October 18, 1982, were not proven by a preponderance of the evidence adduced during the two stages of hearings in October 1981 and January 1984. First, Kodytek failed to make a prima facie

showing that her activities, either as President of the AFT, or as a grieving employee on her own behalf, were a "substantial" or a "motivating" factor in the College's decision, first to evaluate her negatively, and then to discharge her. Even assuming arguendo that Kodytek had met the initial prima facie test in Bridgewater, the College clearly demonstrated that the negative evaluations and the ultimate discharge of Kodytek would have taken place even in the absence of her protected activities.

Further, a reading of the record, coupled with the Hearing Examiner's observation of the demeanor of the witnesses, convinces him that Kodytek has failed to establish a nexus between the exercise of her activities as President of the AFT, and as a grievant on her own behalf, and the College's conduct in response to these activities. See, North Brunswick, supra. Additionally, the Hearing Examiner concludes that the College's action in discharging Kodytek occurred under circumstances which rebut any conclusion that the College was motivated to interfere with Kodytek's rights protected under the Act. See, Eastern Smelting and Loy Foods, supra.

PRE-DISCHARGE DISCUSSION

Considering first the respective conduct of Kodytek and the College in the pre-discharge phase (Findings of Fact Nos. 11-32, supra), Kodytek's protected activity first commenced when she became a member of the AFT in 1973 and later that year became its president, serving a term of approximately two years. She again became president of the AFT in December 1979 and served for a period of

approximately two years. During the pre-discharge phase, beginning with her hire in March 1969 and continuing through October 1981, Kodytek filed one grievance on behalf of another employee in June 1981 (Holly DiBalsi) and three grievances on behalf of herself in November 1979, January 1981 and March 1981 (Findings of Fact Nos. 19, 24, 26 and 51, supra).

It will be recalled that between January 1973 and May or June 1979, Kodytek was Shelton's secretary and that he gave her exceptional evaluations on six occasions between July 1974 and September 1978. Thus, the fact that Kodytek was president of the AFT for two years, between 1973 and 1975, in no way resulted in an unfavorable evaluation.

Notwithstanding Kodytek's exceptional evaluations by Shelton through September 1978, Kodytek commenced having work performance problems in or around late 1977 and early 1978. At one point, in July 1978, Shelton convened a meeting of administrators to determine whether or not Kodytek should be discharged, but it was concluded that the grounds were insufficient (3 Tr 200, 201). In the early part of 1979, prior to Shelton's departure for the Kerney Campus, Roney, who was one of Shelton's administrators, encountered considerable difficulty with Kodytek's performance and in May 1979 recommended that she be removed from the office "as soon as possible" (Finding of Fact No. 16, supra). After Shelton's departure, Wilfrid assigned Kodytek to Ellen Madill; among the reasons for that assignment were that Madill had no preexisting bias toward Kodytek

and that her expertise might be of assistance to Kodytek (Finding of Fact No. 17, supra). In her year with Madill, through June 1980, Madill found that Kodytek was unable to keep up with the workload and that punctuality and handling telephones were a problem. However, despite all this, Madill gave Kodytek a mostly favorably evaluation in November 1979, which Kodytek grieved. See, Findings of Fact Nos. 18 & 19, supra.

In May 1980, one month prior to Madill's departure, Hanley attempted to assist Kodytek in finding a new assignment. In August 1980, Kodytek became Bolge's secretary and although he indicated that he was willing to start with a clean slate, the quantity of Kodytek's work proved inadequate and was so noted in a December 1980 evaluation. The relationship between Bolge and Kodytek went downhill thereafter and, as a result of incidents in March 1981 (Findings of Fact Nos. 26-29, supra), Jones advised Kodytek that if her performance did not improve he would recommend withholding from her any negotiated salary increase for 1982.

On August 10, 1981, Bolge prepared another evaluation of Kodytek, in view of the fact that her performance had not improved, which stated that her performance was significantly below that of other C-range secretaries (Finding of Fact No. 30, supra). On August 17, 1981, Kodytek was transferred to Leeb in view of the fact that Bolge had indicated strongly that he could not continue to do his job if Kodytek remained as his secretary (8 Tr 95). Leeb had indicated a willingness to work with Kodytek, but by October 19, 1981, he had

concluded in a "Formative Evaluation" that her performance was less than satisfactory (P-39).

Based upon the record, a summary of which has just been recited, it is plain as plain can be that Kodytek's two terms as president of the AFT, considered together with her having filed three grievances on her own behalf and one on behalf of another employee, in no way contributed to or influenced the evaluation of her job performance by her supervisors between July 1974 and October 1981. Every manifestation of dissatisfaction with her performance, beginning in and around late 1977 or early 1978, appears to the Hearing Examiner to have been totally warranted. Thus, it is concluded first, that Kodytek has not made a prima facie showing as sufficient to support an inference that her protected activities were a "substantial" or "motivating" factor in the decision of the supervisors of the College to criticize or negatively evaluate her job performance; and second, even if it is assumed that Kodytek did satisfy the prima facie standard of Bridgewater, supra, the College has clearly met the burden of demonstrating that the criticism and negative evaluations of its supervisors would have occurred even in the absence of Kodytek's protected activity. For these reasons, the Hearing Examiner recommends dismissal of the pre-discharge allegations by Kodytek that the College violated Subsections (a)(1) and (3) of the Act.

OCTOBER 1981 THROUGH MAY 5, 1982 DISCUSSION

The Hearing Examiner has grouped his factual findings (Nos. 33-50) under a heading "Events Leading Up To Discharge." The

decision to them group then in this manner was based upon the allegations in the last amended Unfair Practice Charge filed by Kodytek on October 18, 1982 (C-8). Included among the allegations, it is stated that Kodytek was discharged because of her having filed grievances protesting negative evaluations on and after October 1981.

It is first noted that the grievance activity of Kodytek during this period was solely on her own behalf and not that of others. There were six grievances filed between February 17 and May 5, 1982. Three of the grievances were in response to negative evaluations (P-60, P-61 & P-62) and a fourth grievance protested her discharge (P-63). All of these four grievances were denied at the third step. Additionally, Kodytek filed two grievances, one involving a request for fifteen minutes pay for a denial of a break and a second one involving pay for a five-day suspension (P-58 & P-59). Of considerable interest is the fact that these two grievances were sustained and Kodytek was awarded the pay requested. Thus, it cannot be argued that the College cavalierly rejected all of Kodytek's grievances out of hand without considering their merits.

Kodytek acknowledged that she had requested the AFT to have her various grievances taken to arbitration, but that these requests were denied by the AFT. Stoy, a successor president to Kodytek, explained the mechanism for processing cases to arbitration, stating that if the grievance is not deemed meritorious by the organization, then it is not arbitrated (8 Tr 13).

The record clearly indicates that Kodytek's job performance worsened day-by-day and month-by-month on and after October 1981 when

she had worked as Leeb's secretary for approximately two months. As noted previously, Leeb evaluated Kodytek on October 19, 1981, and the evaluation was less than satisfactory. He criticized her attitude toward the work environment and her aversion to getting down to a task coupled with her requiring a considerable amount of supervision. Kodytek never responded to the evaluation on the merits but instead attacked Leeb as a "henchman" (Finding of Fact No. 34, supra).

On January 6, 1982, Leeb again evaluated Kodytek in accordance with Article 36 of J-2, concluding that Kodytek had not improved and that if she did not do so, he would be forced to recommend disciplinary action (P-45). Kodytek's response was to engage in name-calling coupled with a refusal to sign the evaluation, notwithstanding Article 36 of J-2. When threatened with discipline, she ultimately signed the evaluation on March 15, 1982 (Finding of Fact No. 36, supra). Stoy stated that the refusal of an employee to sign an evaluation would constitute insubordination. Kodytek continued to generate friction between herself, Leeb and Conklin through February 1982 (Findings of Fact Nos. 38-40, supra). A charge of insubordination surfaced in connection with Kodytek's failure to produce a worklog in February 1982 and on February 26, 1982, Leeb made an additional evaluation of Kodytek in which he found the quality of her work occasionally satisfactory and the amount of work entirely inadequate (P-46). In his concluding paragraph, Leeb stated that since he was not sure that the evaluation would have any more

impact on Kodytek than the previous ones, he was recommending a suspension for five days. As noted previously, Kodytek successfully grieved the suspension and was awarded five days pay. The evaluation itself was unsuccessfully grieved by Kodytek on April 7, 1982 (P-61). Also, on April 16, 1982, Leeb again evaluated Kodytek in substantially the same manner as he had done on February 26th. Leeb again recommended discipline.

It is noted that neither of Kodytek's successors as president of AFT, Stoy or Lichtfus, felt that they had ever received a negative evaluation because of their activities on behalf of the AFT. Lichtfus stated that it is not uncommon for an employee whom the College feels is doing substandard work to receive multiple evaluations. (Finding of Fact No. 46, supra.)

On April 23, 1982, Jones sent Kodytek a letter advising her that she was being dismissed as of May 7, 1982 and setting forth detailed reasons for the decision (P-57).

Again applying the Bridgewater test, the Hearing Examiner concludes that even assuming that Kodytek has satisfied the first part of the test -- that her grievance activities since February 17, 1982, were a "substantial" or "motivating" factor in the College's decision to discharge her in April 1982 -- the College has clearly proved by a preponderance of the evidence that its action in discharging her would have taken place even in the absence of her protected grievance activity. As is apparent from the above recital of excerpts from Findings of Fact Nos. 33 through 50, Kodytek was her

own worst enemy vis-a-vis her continued employment with the College. It is apparent that she was unable to take constructive criticism and that she was a disruptive influence as the secretary to Leeb, all of which plainly affected her ability to produce a satisfactory quantity of work. Every supervisor noted that the quality of her work was, for the most part, good but that the quantity of work was inadequate. It appears that she carried an unwarranted chip on her shoulder as indicated by her unwillingness to discuss critical evaluations with Leeb, her unwillingness to accept direction, i.e., the production of the worklogs in February, and her perception that her only recourse upon receipt of an evaluation with which she disagreed was to file a grievance. When corrective discipline failed to achieve its intended result, the College felt compelled to discharge her.

Accordingly, the Hearing Examiner will recommend dismissal of the allegations in the last amended Unfair Practice Charge (C-8) that the College violated Subsections (a)(1) and (3) of the Act when it discharged Kodytek effective May 7, 1982.

The AFT Did Not Violate Subsections (b)(1) And (3) Of The Act By The Filing Of Unfair Practice Charges Against The College In 1981 --

Findings of Fact Nos. 5-10, supra, disclose that the Unfair Practice Charge by the College against the AFT derives from the AFT having filed a charge on May 4, 1981 (Docket No. CO-81-338). There the AFT had objected to the College supporting a group called Professional Secretaries International and requested that the College

cease and desist therefrom. Thereafter, there was some confusion when Conklin first discontinued support, and then when Kodytek complained that the unit members were incensed, Conklin offered to continue support of the Professional Secretaries Association. The plot thickened when the AFT counsel expressed outrage at Conklin having communicated directly with unit members and the scenario ended with the College filing its Unfair Practice Charge, which made reference to the AFT's Charge having been filed in the midst of negotiations for a successor agreement.

When viewed in the context of all the events that had transpired prior to this proceeding, the charge by the College, the facts of which are clearly undisputed, simply does not stand up to scrutiny.

While the Hearing Examiner can find no relevant commission or federal sector precedent, he is of the view that the public policy of the Act would be undermined if public employee organizations as well as public employers and public employees were not free to file charges of unfair practices when events appeared to them to so warrant. N.J.A.C. 19:14-1.1 of the Commission's regulations provides, in effect, that a charge may be filed by any public employee organization, public employer or public employee or their representative without limitation. The merits of the charge are, of course, something to be later determined.

With regard to this issue, several events had developed simultaneously at different levels within the College. The AFT's

response to these developments -- its filing of a charge -- is not at all unusual in the labor-management relations context. While its (the AFT) filing of the charge may be argued by the College to have been unwise or unwarranted, it was neither outrageous nor vicious nor false. The filing of this charge hardly appears to support the College's general theory of the case that it was part of a pattern of harassment calculated to intimidate the College during negotiations. Thus, the Hearing Examiner concludes that the AFT did not violate Subsections (b)(1) and (3) of the Act when it filed an Unfair Practice Charge against the College on May 4, 1981, supra. Dismissal of the allegations in the College's charge will be recommended hereinafter.

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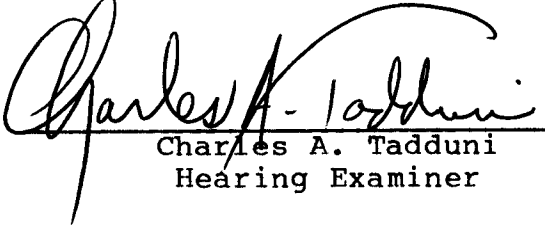
Based upon the entire record in this case and upon the foregoing recitation of facts and law and analysis, the Hearing Examiner makes the following determinations and recommendations.

CONCLUSIONS OF LAW

1. The College did not violate N.J.S.A. 34:13A-5.4(a)(1), (2), (3) or (4) by its conduct in having negatively evaluated Dorothy B. Kodytek and ultimately discharging her effective May 7, 1982.
2. The AFT did not violate N.J.S.A. 34:13A-5.4(b)(1) and (3) when it filed an Unfair Practice Charge on May 4, 1981.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the consolidated Complaint and all Unfair Practices Charges be dismissed in their entirety.


Charles A. Tadduni
Hearing Examiner

DATED: April 26, 1985
Trenton, New Jersey