P.E.R.C. NO. 85-12

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

OCEAN COUNTY COLLEGE,

Respondent,

-and- Docket No. CI-83-52-117

GINA ALVEN, TERESA CORBETT,
DAILY M. SMITH & EFFIE T. CLARK,

Charging Parties.

SYNOPSIS

The Public Employment Relations Commission holds that Ocean County College violated the New Jersey Employer-Employee Relations Act when, after assuming a contract to provide instructional services at Fort Dix, it refused to hire three employees of the previous contractor who had engaged in organizational and other protected activity. The Commission holds that the College did not commit an unfair practice when it did not hire a fourth employee. The Commission specifically finds that with respect to the first three employees, but not the fourth, the College refused to hire them because of their protected activities and that, with respect to the first three employees, the College would have hired them absent their protected activities. The Commission also rejects the College's contention that applicants for employment are not entitled to the guarantees of the New Jersey Employer-Employee Relations Act against anti-union discrimination.

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Appearances:
For the Respondent, Berry, Kagan, Privetera & Sahradnik, Esqs. (Seymour J. Kagan, Of Counsel)

For the Charging Parties, Sterns, Herbert & Weinroth, Esqs. (Michael J. Herbert, Of Counsel and Linda K. Stern, On the Brief)

DECISION AND ORDER

On March 18, 1983, Gina Alven, Teresa Corbett, Daily M. Smith and Effie T. Clark filed an unfair practice charge against Ocean County College ("College") with the Public Employment Relations Commission. They alleged that the College violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), in particular subsections 5.4(a)(1) and (3),[1/] when it refused to hire them. They specifically alleged that in September, 1982, the College replaced Johnson and Wales College ("J&W") as the provider of educational services at Fort Dix, that they had worked for J&W and had engaged in organizational and

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

other protected activity at that time, and that the College had refused to hire them because of this protected activity.

On June 29, 1983, the Director of Unfair Practices issued a Complaint and Notice of Hearing. The College filed an Answer admitting it refused to hire the charging parties, but denying that it did so because of their organizational and other protected activity.

On October 25 and 26, 1983, and January 6, 1984, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses, introduced exhibits, argued orally and filed post-hearing briefs.

On June 11, 1984, the Hearing Examiner issued his report and recommended decision. H.E. No. 84-64, 10 NJPER ___ (¶_____ 1984) (copy attached). With respect to Alven, Smith, and Clark, he found that their protected activities motivated the College's decision not to hire them and that the College would have hired them absent these activities; he thus concluded that the College violated subsections 5.4(a)(1) and (3) of the Act. With respect to Corbett, he found that the College had no knowledge of her protected activity; he thus concluded that the College did not violate subsections 5.4(a)(1) and (3) of the Act. As a remedy, he recommended an order requiring the College to pay Alven, Smith and Clark back pay for the hours they would have been employed from October 1, 1982 through September 30, 1983,[2/] together with interest; and to post a notice of the violations

2/ The Hearing Examiner recommended that any back pay obligation terminate on September 30, 1983 because the College's Fort Dix contract was not renewed.

found and the remedial actions ordered.

On June 22, 1984, the College filed exceptions and an accompanying brief. It contends that the Commission lacks jurisdiction over the dispute because the charging parties are allegedly not "public employees" as defined in the Act. It also asserts that the Hearing Examiner erred in finding that Smith and Clark engaged in protected activity; that the College knew of Alven's protected activity; that these employees' protected activities were a "substantial" or "motivating" factor in the College's decision not to hire them; and that the College had not met its burden of proving that they would not have been hired absent their protected activity.

On July 2, 1984, the charging parties filed a brief in response to the College's exceptions. They have not filed their own exceptions.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 5-8) are accurate, except as supplemented and modified in the footnote below. With those exceptions, we adopt and incorporate them here.[3/]

3/ The Hearing Examiner did not refer to testimony concerning evaluations of applicants the Director of Special Programs, John Riismandel, received from Sgt. Ortiz, First Sergeant of the English as Second Language ("E.S.L.") Program at Fort Dix. Ortiz apparently had charge of soldiers who were taught E.S.L. by Alven, Smith, and Corbett while they were employed by Johnson & Wales College ("J&W") in 1981-82. According to Riismandel, Ortiz came to his office on or about September 28, 1982 to make recommendations on applicants for E.S.L. teaching positions with the College, which had been awarded the teaching contract beginning October 1, 1982. Riismandel testified that Ortiz did not recommend Alven for a position because she was "difficult to get along with" and had "fraternized" with army personnel. The (Continued)

We first address the College's contention that Alven, Smith, and Clark were not entitled to the protection of the New Jersey Employer-Employee Relations Act because they had not yet been hired by a public employer. The College specifically argues that N.J.S.A. 34:13A-3(d)'s definition of "employee"[4/] only includes persons "holding" a position in the services of a public employer and that these employees were not "holding" public employee positions at the time the College refused to hire them. We disagree.

3/ (Continued) Hearing Examiner refused to allow Riismandel to testify further about his conversations with Ortiz because fraternization was a collateral matter and no allegation of it or of Ortiz's comments appeared in Riismandel's memorandum of October 6, 1982 (R-2) to Asst. Dean Cargile stating his reasons for not hiring Alven, Smith, Clark and Corbett.

With respect to finding of fact no 8, Riismandel asked McKeever about all J&W employees. With respect to finding of fact no. 8, n. 5, Smith, Clark and other J&W employees on August 19, 1982 signed a letter addressed to the Administrator of Purchasing and Contracting Office at Fort Dix requesting answers to a series of questions concerning equal pay and benefits, wages, maintenance of supplies and evaluations of J&W employees. With respect to finding no. 11d, at the September 29, 1982 interview Riismandel also asked Clark if she wanted to apply for another position at the College.

4/ This subsection provides: "(d) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer unless this Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of or in connection with any current labor dispute or because of any unfair labor practice and who has not obtained any other regular and substantially equivalent employment. This term, however, shall not include any individual taking the place of any employee whose work has ceased as aforesaid, nor shall it include any individual employed by his parent or spouse, or in the domestic service of any person in the home of the employer, or employed by any company owning or operating a railroad or railway express subect to the provisions of the Railway Labor Act. This term shall include any public employee, i.e., any person holding a position, by appointment or contract, or employment in the service of a public employer, except elected officials, members of boards and commissions, managerial executives and confidential employees.

At the outset of our analysis, we observe that N.J.S.A. 34:13A-3(d) defines employee as including "any employee," regardless of whether working in the private or public sector. Thus, we hold that the charging parties, who were working for a private employer at the time they sought to continue their same jobs with a new employer, the College, were employees within that definition."

Further, section 5.4(a)(3) of the New Jersey Employer-Employee Relations Act specifically prohibits public employers from "...discriminating in regard to hire...to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act." That statutory command replicates the statutory command of section 8(a)(3) of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. §158(a)(3), which governs labor relations in the private sector. That section prohibits private employers from discriminating "...in regard to hire...to encourage or discourage membership in any labor organization."[5/] The New Jersey Supreme Court has directed us to use the experience and

5/ 29 U.S.C. §152(s) defines employee as follows: "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

adjudications under the LMRA as appropriate guides in considering unfair practice charges because the language and intent of the Act and the LMRA are substantially the same. In re Township of Bridgewater and Bridgewater Public Works Association, 95 N.J. 235, 240 (1984); Galloway Tp. Bd. of Ed. v. Galloway Tp. Assn. of Ed. Sec., 78 N.J. 19 (1978). As the Hearing Examiner found (pp. 8-10), the authorities under the LMRA are clear and unanimous that potential as well as present employees are entitled to the Act's protections. See Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); NLRB v. Mt. Desert Island Hosp., 695 F.2d 634, 112 LRRM 2118 (1st Cir. 1982); Wyman-Gordon Co. v. NLRB, 654 F.2d 134, 108 LRRM 2085 (1st Cir. 1981); Osteopathic Hosp. Founders Assn. v. NLRB, 618 F.2d 633 ____ LRRM ____ (10th Cir. 1980); NLRB v. Bausch & Lomb, Inc., 526 F.2d 817, 90 LRRM 3217 (2nd Cir. 1975); Reliance Ins. Co. v. NLRB, 415 F.1 72 LRRM 2143 (8th Cir. 1969); Atlantic Maintenance Co. v. NLRB, 305 F.2d 604, _____ LRRM _____ (3rd Cir. 1962); Time-O-Matic, Inc. v. NLRB, 264 F.2d 96, 43 LRRM 2661 (7th Cir. 1959). No reasonable distinction can be made between the LMRA and our Act with regard to the right of job applicants to be free from anti-union discrimination. Accordingly, we will follow the LMRA precedents in our interpretation of the protections of subsection 5.4(a)(3).

We next consider whether the College discriminatorily refused to hire the charging parties because of their protected activities. In In re Township of Bridgewater and Bridgewater Public Works Ass'n, 95 N.J. 235 (1983), the Supreme Court articulated the standards for considering such questions.

> ...the employee must make a prima facie showing sufficient to support the inference that the protected union conduct was a motivating factor or a substantial factor in the employer's decision. 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. [NLRB v. Transportation Management, ___ U.S. at ___, 113 LRRM 2851 (1983)]. Once that prima facie case is established, however, the burden shifts to the employer to demonstrate by a preponderance of evidence that the same action would have taken place even in the absence of the protected activity. Id. This shifting of proof does not relieve the charging party of proving the elements of the violation but merely requires the employer to prove an affirmative defense.
> Id. at ___.

We first discuss whether the charging parties proved that their protected activities were a substantial or motivating factor in the College's decision not to hire them along with the 50 or more other J&W employees it hired. The charging parties must specifically establish that they engaged in protected activity; the College knew of this activity; and the College was hostile toward the exercise of protected rights. Bridgewater. Based upon our review of the record, we conclude that Alven, Smith and Clark met this burden, but that Corbett did not.

On August 19, 1982, Smith, Clark and three other J&W employees signed a letter addressed to the Fort Dix Contracting Office Administrator which raised issues concerning the staff's terms and conditions of employment. For example, the letter asserted the staff's concerns about wages, equal employment opportunities and equal pay, health insurance, evaluations, and coercion during interviews with individual employees concerning salaries and benefits. The sending of this letter, which registers

complaints about fundamental terms and conditions of employment, is clearly protected activity. See NLRB v. Mount Desert Island Hospital, supra. Riismandel testified that he received a copy of this letter, that he had reservations about hiring those employees who signed it, that he was concerned that it was sent, and that he did not recommend any of the five signers of this letter, including Smith and Clark, for employment. Riismandel did, however, recommend for employment all other applicants besides the signers of this letter and the other charging parties who had previously worked for J&W. Accordingly, we conclude that charging parties Smith and Clark have established that the College, through Riismandel, knew of their protected activity and was hostile towards it, and that this hostility played a substantial role in his recommendation that they not be hired.[6/]

With respect to Alven, she distributed authorization cards at Fort Dix in April 1982, held an organizational meeting there for NJEA in July, and scheduled another meeting for September. Maureen McKeever, J&W's Director of the Fort Dix Education Center, learned of this organizational activity and relayed this information to James Lyle who held a position comparable to Director of Special Programs for J&W. Lyle was upset and directed McKeever to find out more concerning the organizing efforts. Riismandel subsequently phoned Lyle for evaluations of J&W employees applying for positions with the College and specifically asked him about Alven and the J&W employees who signed the August 19, 1982 letter.

6/ We also note that Smith attempted to negotiate a higher salary with Riismandel at her employment interview based on her 12 years of experience, but Riismandel told her the salary was not negotiable.

In September 1982, Riismandel asked McKeever for evaluations of ESL teacher applicants for J&W's staff. She informed him that J&W employees were trying to organize a union. They also reviewed each employee's job performance and McKeever then told Riismandel that Alven had an "attitude" problem and that Smith had a "personality conflict" problem. Riismandel used the information received from McKeever to refuse to recommend Alven and the signers of the August 19, 1982 letter for employment. Under all these circumstances, and remembering that the College hired all of J&W's employees who applied for jobs besides the charging parties, we do not find credible McKeever's and Riismandel's denial that they specifically discussed Alven in connection with NJEA's organizational efforts nor do we find credible Riismandel's denial that her organizational activity contributed to his decision not to recommend her for employment.[7/] Accordingly, we conclude that Alven has established that the College, through Riismandel, knew of her protected activity and was hostile towards it and that this hostility played a substantial role in his recommendation that she not be hired.

With respect to Corbett, we agree with the Hearing Examiner that she did not prove that the College knew of any protected activity on her part.[8/] Accordingly, we dismiss that portion of the Complaint alleging that the College violated subsections 5.4(a)(1) and (3) when it refused to hire her.

We next consider whether the College has proved that it

7/ Like Smith, Alven requested a higher salary than Riismandel was willing to offer.

8/ Corbett, like Alven, Smith, and Clark, did sign an authorization card on behalf of NJEA, but there is insufficient evidence that College officials were aware of this fact.

still would not have hired Smith, Clark, and Alven even if they had not engaged in any protected activity. Based upon Riismandel's recommendations, the College hired all of J&W's former employees who applied except the four charging parties. Smith, Clark, and Alven all had unblemished work records during their respective tenures of 12 years, one month, and four years. With respect to Smith specifically, Riismandel told her that he did not recommend her for employment because of her "attitude and personality," but the only specific "evidence" of this "attitude" or "personality" problem in the record appears to be her signature on the letter complaining about working conditions at Fort Dix. Accordingly, we hold that the College has not proved by a preponderance of the evidence that it would have refused to employ Smith if she had not signed the letter.[9/] With respect to Clark specifically, Riismandel told Clark that she was not hired because the College found a more qualified candidate. In fact, however, Clark's replacement possessed only an undergraduate degree while Clark had a Master's degree and the College did not produce any evidence elaborating upon the alleged differences in qualifications; accordingly, we hold that the College has not proved by a preponderance of the evidence that it would have refused to employ Clark absent her protected activity.[10/] With respect to Alven

9/ Riismandel did not tell Smith that he could not recommend her for employment because of two misspellings on her application and a possible discrepancy concerning how often -- never or occasionally -- she was absent from work because of sickness. Even if we assume that these reasons may have contributed to his recommendation, we are not persuaded that Riismandel would not have recommended her for hiring absent her protected activity.

10/ We specifically do not believe that Riismandel would have refused to recommend Clark, absent her protected activity, based on a few minor grammatical errors in one extensive lesson plan.

specifically, Riismandel conceded that her qualifications and education were excellent and recommended that she not be hired solely because of "attitude" and personality." Riismandel refused to elaborate upon this reason when Alven requested him to do so. It appears to us, based upon our review of the record, that Riismandel found Alven's "attitude" and "personality" wanting because of her organizational activities. Accordingly, we hold that the College has not proved by a preponderance of the evidence that it would have refused to employ Alven if she had not tried to organize employees at Fort Dix.

ORDER

Ocean County College is ORDERED TO:

A. Cease and desist from:

1. discriminating in regard to hiring by refusing to hire job applicants because of the exercise of rights guaranteed by the New Jersey Employer-Employee Relations Act;

2. interfering with, restraining, or coercing its employees in the exercise of rights guaranteed to them by the New Jersey Employer-Employee Relations Act.

B. Take the following affirmative action:

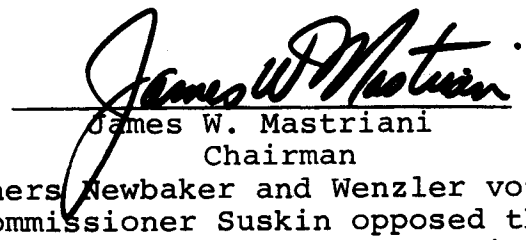
1. Forthwith pay to Gina Alven, Daily M. Smith and Effie T. Clark wages that they would have earned if employed by the College at Fort Dix from October 1, 1982 through September 30, 1983, and interest of 12% per annum added to the amount due on October 1, 1983 to the date of payment; and

2. Notify the Commission in writing within twenty (20) days of receipt of this Order what steps Respondent has

taken to comply herewith.

That portion of the Complaint alleging that the College violated subsections 5.4(a)(1) and (3) when it refused to hire Teresa Corbett is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Newbaker and Wenzler voted in favor of this decision. Commissioner Suskin opposed the decision. Commissioner Butch and Hipp abstained. Commissioner Graves was not present.

DATED: Trenton, New Jersey
August 15, 1984
ISSUED: August 16, 1984

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

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-and-

Docket No. CI-83-52-117

GINA ALVEN, TERESA CORBETT
DAILY M. SMITH & EFFIE T. CLARK,

Charging Parties.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent violated Subsections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act when it failed to hire Gina Alven, Daily M. Smith and Effie T. Clark, who had formerly worked for a private sector college at Fort Dix. The Hearing Examiner found that the Respondent had been discriminatorily motivated when it refused to hire the three individuals on account of their having engaged in protected activities under the Act. Alven had been openly active in organizing employees into a union while working for the private sector college and this activity became known to the Respondent. Smith and Clark had, in addition to signing authorization cards for the union, each signed a letter complaining about working conditions at Fort Dix and the Respondent learned that Smith and Clark had signed this letter, which the Respondent acknowledged influenced its hiring decision as to Smith and Clark. The fourth individual, Teresa Corbett had only signed an authorization card and knowledge of this could not be imputed to the Respondent.

Inasmuch as the Respondent was the contractor at Fort Dix for only one year back pay only was awarded to Alven, Smith and Clark with interest at 12% per annum. No back pay was awarded for Corbett.

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 conclusion of law.

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Appearances:

For Ocean County College
Berry, Kagan, Privetera & Sahradnik, Esqs.
(Seymour J. Kagan, Esq.)

For the Charging Parties
Sterns, Herbert & Weinroth, Esqs.
(Michael J. Herbert, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on March 18, 1983 by Gina Alven, Teresa Corbett, Daily M. Smith and Effie T. Clark (hereinafter the "Charging Parties," "Alven," "Corbett," "Smith" or "Clark") alleging that Ocean County College (hereinafter the "Respondent" or 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"), in that in September 1982, after the College received a contract from the Department of the Army to provide instructional services at Fort Dix, thereby replacing Johnson & Wales College (hereinafter "J & W") as the contractor, it failed to hire the Charging Parties on September 29, 1982, all of whom had had satisfactory work records with J & W, and all of whom had been active in organizing into a collective negotiations unit to be affiliated with the N.J.E.A. at or around the time that J & W lost its contract with the Department of the Army, all of which was alleged

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

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on June 29, 1983. Pursuant to the Complaint and Notice of Hearing, hearings were held on October 25 and 26, 1983 and January 6, 1984[2/] in Trenton, New Jersey, at which time the parties were given an opportunity to examine witnesses, present evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by May 11, 1984.[3/]

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

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

FINDINGS OF FACT

1. Ocean County College is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. Johnson & Wales College is not a public employer within the meaning of the Act, as amended, and is not subject to its provisions.

3. Gina Alven, Teresa Corbett, Daily M. Smith and Effie T. Clark are individuals whose status as public employees within the meaning of the Act, as amended, is the major issue in this proceeding. All four individuals were employees of J & W at all times material hereto (see infra).

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.
"(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/ The delay in commencement of the hearing on October 25, 1983 was due to the resignation of the original Hearing Examiner assigned to the case, Joan Kane Josephson. The instant Hearing Examiner was assigned the case on October 4, 1983.

3/ The delay in the filing of briefs was due to extremely late transcript.

4. The educational qualifications and employment history of the Charging Parties at Fort Dix are as follows:

a. Alven has a B.A. in Theater Arts and English, a Master's Degree in Education and English Education and has received three credits toward a Doctorate in Education. In addition, she has participated in post-secondary education with respect to English as a second language (ESL) at Trenton State College. Alven was hired by the Army in July 1978 as a Military Occupation Specialist. She continued in the employ of the Army until January 1979 and was supervised by Maurice Williams. Alven taught English conversation, English grammar and various military subjects. In January 1979 Burlington County College was awarded a contract by the Army to provide educational services to Fort Dix personnel. Alven was hired by the College to serve as an ESL instructor. In addition to teaching, Alven participated in the development of a new curriculum, which involved a combination of military subjects and English. In October 1981 J & W became the contractor. Alven continued to serve as an ESL instructor and was supervised by Maureen McKeever. This employment continued through September 1982 when J & W lost the contract, which was awarded to the Respondent as of October 1, 1982.

b. Smith, who has a B.A. in English and Sociology, was first employed by the Army in January 1970 as a Reading and Basic Skills teacher. She served in this position until Burlington County College was awarded the contract at Fort Dix in 1979 when she became an ESL instructor. The record does not indicate whether the ESL instructor position continued during the period of the J & W contract but, in any event, Smith was employed by J & W and worked under the supervision of McKeever through September 1982.

c. Corbett was employed at Fort Dix for three years, serving primarily as an ESL instructor. She has a B.A. in Foreign Languages and a certificate to teach Spanish. She was also involved in developing the ESL curriculum with Alven,

supra.

d. Clark has a B.S. in Social Studies and an M.A.T. degree in Education and was first employed at Fort Dix on August 6, 1982 as a Basic Skills Instructor and became a substitute teacher in the ESL program.

5. In the Spring of 1982 Alven contacted an N.J.E.A. Representative, Jerry Veldof, regarding the establishment of an affiliate at Fort Dix. Alven was provided with authorization cards, which she distributed to approximately 30 to 35 employees of J & W. Copies of 14 authorization cards were introduced in evidence, all but one having been signed in April 1982 (CP-1 to CP-5). Alven was plainly the most active employee in the unionization of J & W employees. She held an organizational meeting in July 1982 and had scheduled a second meeting for September 29, 1982. Although the time frame is not clearly delineated by the testimony, the Hearing Examiner finds as a fact that McKeever, the supervisor of the J & W employees at Fort Dix, supra, was aware of the organizational activities of Alven and others,[4/] and viewed their efforts adversely (1 Tr. 75, 76). McKeever testified that she learned of the union organization campaign from other teachers, and that this information included the names of those active, one being Alven (3 Tr. 44). McKeever passed this information, including names, to James Lyle, the Director of the Reading Institute of J & W in Rhode Island, who was upset over the information given him (3 Tr. 45). Lyle advised McKeever not to discuss it but to listen and obtain any additional information (3 Tr. 45). McKeever received the same advice from the attorney for J & W.

6. The Respondent learned that it had been awarded the contract to provide instructional services at Fort Dix on September 22, 1982, beginning October 1st. John Riismandel, the Director of Special Programs for the Respondent, was placed

4/ The Charging Parties admitted that they did not discuss unionization with McKeever, McKeever's knowledge having been obtained independently, infra. Further, none of the Charging Parties had any conversation with representatives of the Respondent during the course of seeking employment with the Respondent. (1 Tr. 58, 94, 95, 118, 119, 121, 136).

in charge of hiring the necessary personnel. After consulting with Assistant Dean C.B. Cargile, Jr., who instructed him regarding hiring under the Respondent's rules and regulations, Riismandel made arrangements to meet on September 24th with J & W personnel at Fort Dix to discuss the transition. Advertisments were placed in the local papers on September 25 and 26, 1982 (CP-6).

7. On September 24th Riismandel first met McKeever, who provided him with information regarding J & W employees in accordance with instructions from Lyle, her superior. In this connection, Riismandel asked McKeever to supply him with a brief professional assessment of the work performance of each applicant currently employed by J & W. Also on September 24th, McKeever introduced Riismandel to the J & W employees. Riismandel discussed the transition, including rates of pay for each job title and said that the pay was not negotiable. Applications for employment with the Respondent were circulated.

8. Thereafter, but prior to the hiring decisions, Riismandel again met with McKeever and specifically asked her opinion regarding Alven and Smith.[5/] While McKeever did not discuss Alven's competency as a teacher, she recommended that Alven not be hired because of her "attitude" (3 Tr. 9). As to Smith, McKeever recommended against hiring her based upon "personality conflicts" with no comment having been made about her competency as a teacher (3 Tr. 9).

9. On September 27, 1982, after receiving many telephone calls in response to the advertisements, Riismandel began interviewing that afternoon with the intention of first hiring J & W employees. Approximately 200 applications were received and Riismandel personally spoke to over 100 individuals on September 27th and September 28th.

5/ Riismandel acknowledged that McKeever had informed him of the union organizational campaign during the hiring process (2 Tr. 92). Also, prior to the hiring decisions, Riismandel was informed of a letter dated August 19, 1982 to the Army, which set forth complaints regarding staff working conditions at Fort Dix , which was signed, inter alia, by Smith and Clark (R-4). Riismandel acknowledged further that the mere fact that the letter had been sent influenced his hiring decision as to the signers of R-4, two of whom were Smith and Clark (3 Tr. 26, 27).

10. Riismandel ultimately recommended to Dean Cargile and Dean Wilmot Oliver that 50 to 55 of the J & W employees, who sought employment with the Respondent, be hired, the only execptions being Alven, Corbett, Smith and Clark. Among those hired were nine of the signers of the authorization cards (CP-5). Cargile and Oliver accepted all of the recommendations by Riismandel.

11. The factual findings regarding the interviewing of the Charging Parties by Riismandel, and their ultimate rejection for employment with the Respondent, are as follows:

a. Alven was interviewed by Riismandel on September 27, 1982, at which time she completed the application form (R-1) and spoke with him for five or ten minutes. Riismandel inquired only as to the length of time she had been working with the program. Riismandel testified that his impressions, after the interview, were that Alven was qualified on paper but did not appear to be professional in appearance or manner, nor did she appear to be paying attention to him. On September 28th, after many interviews, Riismandel discussed his recommendations for hire with Dean Oliver and recommended that Alven not be hired because of her personality and attitude. Oliver agreed. On the next day, September 29th, Riismandel met for the second time with Alven and informed her that she would not be hired due to her attitude and personality. He refused to elaborate when requested to do so. He further advised Alven that he had inquired about her of certain persons at Fort Dix but would not reveal their names. Alven stated that she felt that the Respondent utilized a poor hiring system, to which Riismandel responded without explication that "the College didn't want to be involved in any problems" (1 Tr. 52). The Hearing Examiner does not credit Riismandel's testimony that by "problems" he was referring to problems that the College would face if he disclosed confidential information or if he further explained to Alven why she was not hired (2 Tr. 90). This testimony of Riismandel strikes the Hearing Examiner as make-weight and after the fact.

b. Smith received an application on September 27th and completed it rather quickly because she had been advised that it had to be submitted that day. She requested a salary of $9.00 per hour based on her twelve years of experience but, when she asked Riismandel about it, he advised her that the salary offer of $8.00 per hour was not negotiable. The application (CP-8) contained several misspelled words and a possible misrepresentation that she had lost no time from work on account of illness when in fact she had lost a day from time to time. Although Riismandel made reference to the application, and the way in which it was completed, as a basis for rejecting Smith, his reasons given to her were her attitude and personality (1 Tr. 84; 2 Tr. 102, 103). When Smith mentioned her qualifications Riismandel agreed that he could not question these because of her twelve years of experience. As found in footnote 5, supra, Smith was one of the signers of Exhibit R-4, which Riismandel considered in his hiring recommendation as to Smith.

c. According to Riismandel, Corbett seemed very lethargic during her interview. When Riismandel informed Corbett that she would not be hired at a meeting with her on September 29, 1982, Corbett questioned his decision. Riismandel explained that others who were more qualified had applied for the position and added that "there are other reasons, but it's really complicated" (1 Tr. 115). Corbett testified without contradiction that the person who replaced her had no experience in adult education or with bi-lingual programs.

d. Riismandel considered a lesson plan in evaluating Clark's suitability for employment (R-5). He testified that certain grammatical errors concerned him because she was teaching basic skills. Clark was informed by Riismandel on September 29th that she was not being hired because someone more qualified had been found. Clark later ascertained that the person who replaced her possessed only an undergraduate degree while Clark had a Master's Degree.

e. In addition to speaking to McKeever about Alven and Smith, supra, Riismandel spoke to Lyle of J & W, who was McKeever's superior. Lyle recommended

that Alven and Smith not be hired for the same reasons that McKeever had supplied, i.e., attitude and personality. Because of this information regarding attitude and personality, Riismandel felt that the competency of Alven and Smith was irrelevant (3 Tr. 33).

f. Riismandel also spoke to Lyle about the signers of Exhibit R-4, supra, stating that he, Riismandel, had serious reservations regarding the signers. Lyle concurred. The mere sending of the letter concerned Riismandel (3 Tr. 22).

DISCUSSION AND ANALYSIS

A Public Employer Under The Act Commits An Unfair Practice In Violation Of Subsections(a)(1) And (3) If Its Actions In Refusing To Hire Applicants Formerly Employed By An Employer In The Private Sector Are Discriminatorily Motivated

The Hearing Examiner finds that the cases previously decided by the Commission, and cited by the Charging Parties, are not applicable to a resolution of the employment status of the Charging Parties since all dealt with individuals who had at least some prior claim of employment in the public sector in the State of New Jersey. Therefore, the Hearing Examiner will not discuss these cases further.

What the Hearing Examiner does find pertinent are the private sector cases cited by the Charging Parties and discussed in briefs filed by each party.

Our Supreme Court has made it clear that the Commission may look to the Federal model in developing precedent in the public sector in New Jersey: Lullo v. International Association of Firefighters, 55 N.J. 409 (1970) and Galloway Township Board of Education v. Galloway Township Association of Ed. Secretaries, 78 N.J. 1, 9 (1978).

A good starting point is the relatively recent case, NLRB v. Mt. Desert Island Hospital, 695 F. 2d 634, 112 LLRM 2118 (1st Cir. 1982), which dealt with the failure of the employer to rehire a former employee who, after complaining about working conditions, had resigned of his own accord. When he reapplied for employment a year later he was not hired. The Court, citing Phelps Dodge Corp. v. NLRB, 313 U.S. 177

(1941), noted that the Court there found that the NLRA applies to applicants as well as employees already hired and that applicants were protected from discrimination by prospective employers under Section 8 (a) (3). The Court then cited: Time-O-Matic, Inc. v. NLRB, 264 F. 2d 96, 43 LRRM 2661 (7th Cir. 1959) where a foreman told prospective employees that non-membership in a union was a condition of employment; Wyman-Gordon Co. v. NLRB, 654 F. 2d 134, 108 LRRM 2085 (1st Cir. 1981) where an applicant was interrogated regarding his prior union activities; and Reliance Insurance Cos. v. NLRB, 415 F. 2d 1, 72 LRRM 2143 (8th Cir. 1969) which held that an applicant may not be discriminated against on account of his views on protected activity and that the applicant is treated as an employee under the NLRA.

Finally, in NLRB v. Bausch & Lomb, Inc., 526 F. 2d 817, 90 LRRM 3217 (2nd Cir. 1975) the employer there had acquired a building from another employer, which had employed four employees in its boiler room. Bausch & Lomb hired only one of the four employees, that employee being a supervisor. The NLRB found that Bausch & Lomb's refusal to hire the other three boiler room employees was based upon their union membership. The Court agreed. Plainly, this case among all others, supra, most closely fits the facts in the instant case inasmuch as the three employees involved in Bausch & Lomb had never had an employment relationship with it and were obviously qualified for employment since they had worked for the prior employer in the same capacity.

Based on the foregoing authorities, in particular, Bausch & Lomb, supra, the Hearing Examiner concludes without difficulty that the Charging Parties herein are, for the purposes of this proceeding, public employees within the meaning of the Act. Finding of Fact No. 4, supra, makes clear that each one of the Charging Parties has the necessary qualifications and employment experience to have been hired by the Respondent if the Respondent utilized objective criteria in its hiring decision as to each of the four individuals. Clearly, the Charging Parties were as qualified for employment with the Respondent as were the three boiler room employees in Bausch &

Lomb, having previously worked in the positions for which they applied.

The next question, and the ultimate question, is whether or not the Charging Parties have prevailed on their proofs under the applicable test, namely, that enunciated by the New Jersey Supreme Court in February of this year: Bridgewater Township v. Bridgewater Public Works Association, 95 N.J. 235 (1984). Under the test set forth therein the Charging Party in "dual motive" cases must meet the "causation test" first enunciated by the National Labor Relation Board in Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980). Wright Line was adopted by the United States Supreme Court in NLRB v. Transportation Management Corp., ___ U.S. ___, 113 LRRM 2857 (1983) and this decision was specifically referred to by the New Jersey Supreme Court in Bridgewater.

The test involves the following requisites in assessing employer motivation (1) the Charging Parties must make a prima facie showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the Respondent's decision not to hire and (2) once this is established, the Respondent has the burden of demonstrating that the same hiring decision would have taken place even in the absence of protected activity. The first part of the foregoing test, supra, also involves proof by the Charging Parties that the Respondent had knowledge of their protected activity: Bridgewater, supra.

The Hearing Examiner first addresses the element of employer knowledge of the protected activity engaged in by the Charging Parties.[6/] Clearly, Alven's activity in distributing authorization cards for signature among 30 to 35 employees of J & W in April of 1982 and scheduling meetings was protected and, further, became known to McKeever. McKeever learned explictly the name of Alven as an employee active in the unionization of J & W employees. McKeever acknowledged that she learned of the union organization campaign from other teachers, and that this information included the names of those active, one being Alven. Even if this were not so, knowledge of

6/ See Finding of Fact No. 5, supra.

Alven's protected activity may be imputed to J & W under the NLRB's "small plant" doctrine: Wiese Plow Welding Co., 123 NLRB 616, 43 LRRM 1495 (1959).[7/] McKeever passed this information on to her supervisor, James Lyle, who instructed her to listen and obtain any additional information. McKeever received the same advice from the attorney for J & W.

All of the foregoing is found in Finding of Fact No. 5, supra, and clearly shows that J & W had direct knowledge regarding the activity of Alven. Further, this information, which must have referred to Alven by name, was passed on by McKeever to Riismandel, who acknowledged that McKeever had informed him of the union organizational campaign during the hiring process (2 Tr. 92). Riismandel testified that his response was "I don't care," which the Hearing Examiner does not credit, based on what transpired between Riismandel, McKeever and Lyle, and the interviews with the Charging Parties, supra.

There is no direct evidence that Smith, Corbett or Clark participated in the organizational campaign as did Alven, namely by circulating authorization cards, scheduling meetings, etc. However, in addition to signing authorization cards for the union, Smith and Clark signed the August 19, 1982 letter to the Army, which set forth complaints regarding working conditions at Fort Dix (R-4). Riismandel had direct knowledge of who signed the letter and indicated that it influenced his hiring decision as to the signers, two of whom were Smith and Clark. The sending of the August 19th letter was a protected activity: North Brunswick Township Board of Education, P.E.R.C. No. 79-14, 4 NJPER 451 (footnote 16) 1978 . Thus the Respondent had direct knowledge of the protected activity engaged in by Smith and Clark.[8/]

7/ The Hearing Examiner also draws an inference that the Respondent knew of Alven's organizational activities: NLRB v. Nevada Consolidated Copper Corp., 316 U.S. 105, 106-07, 10 LRRM 607 (1942).

8/ The evidence regarding the Respondent's knowledge of Corbett's protected activity is insufficient to support a finding of knowledge inasmuch as she did not sign R-4, and knowledge of Corbett's signing an authorization card cannot be imputed to the Respondent.

Closely related to ascertaining the Respondent's knowledge of protected activity is the question of whether or not the Charging Parties have made a prima facie showing sufficient to support an inference that their protected activity was a "substantial" or a "motivating" factor in the Respondent's decision not to hire them in September 1982. Again, the Hearing Examiner will consider each of the four Charging Parties seriatim.

The Hearing Examiner concludes that the proofs as to Alven clearly support an inference that her protected activity was a "substantial" or a "motivating" factor in the College's decision not to hire her. The nature and scope of her protected activity has been delineated above. McKeever and Lyle each had knowledge of Alven's activity in unionizing J & W employees. This knowledge was communicated to Riismandel who, notwithstanding the competence of Alven as an instructor, elected to follow the recommendation of McKeever and Lyle that Alven not be hired by the College because of her "attitude" (3 Tr. 9). The Hearing Examiner has no doubt that, in the context of the hiring process, given Alven's known exercise of protected activity, the use of the term "attitude" as a reason not to hire her smacks clearly of retaliation and discriminatory motivation. Thus, the Hearing Examiner concludes that Alven's protected activity was a "substantial" or a "motivating" factor in the College's decision not to hire Alven.

The same essential reasoning applies to Smith, whose protected activity, in addition to signing an authorization card, was the signing of the letter of August 19, 1982 (R-4, supra). Riismandel acknowledged that the mere fact that this letter had been sent influenced his hiring decision as to the signers of R-4, two of whom were Smith and Clark (3 Tr. 26, 27). Again, as in the case of Alven, McKeever had recommended to Rissmandel against hiring Smith based upon "personality conflicts" (3 Tr. 9). Smith's competency as a teacher was never an issue in the hiring decision. The term "personality conflicts" as a reason not to hire Smith smacks of pretext and indicates to the Hearing Examiner a discriminatory motivation on the part of the

Respondent in refusing to hire Smith. The evidence as to Smith clearly supports an inference that her protected activity was a "substantial" or a "motivating" factor in the College's decision not to hire Smith.

Further, the Hearing Examiner reaches a like conclusion as to Clark, who, in addition to signing an authorization card, signed the August 19th letter to the Army (R-4). As in the case of Smith, Riismandel acknowledged that the mere fact that the letter had been sent influenced his hiring decision as to the signers, one being Clark. As previously found, the signing and sending of R-4 constituted protected activity, of which the Respondent had knowledge. The Hearing Examiner has no doubt that the evidence regarding Clark is sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the College's decision not to hire Clark.

The case of Corbett has essentially been disposed of previously, inasmuch as the Hearing Examiner has found that the Respondent had no knowledge of any protected activity engaged in by Corbett. Thus, the evidence as to Corbett is not sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the College's decision not to hire her.

There remains only for consideration the question of whether or not the Respondent has established by a preponderance of the evidence that it would not have hired Alven, Smith and Clark even in the absence of their protected activity. The Hearing Examiner concludes that the Respondent has failed to meet this burden as to each of these three individuals.

What has been said before regarding the reasons advanced by the Respondent for not hiring Alven and Smith on account of "attitude" and "personality conflicts," respectively, applies equally here. The Hearing Examiner has found that the use of these reasons, "attitude" and "personality conflicts," was pretextual. As previously found in Findings of Fact Nos. 4a and 4b, supra, Alven and Smith were clearly qualified

for the positions that they had been employed in by the Army for many years; since July 1978 in the case of Alven and since January 1970 in the case of Smith. They had been employed by several contractors with no criticism of their job performance having been made, at least on this record and yet suddenly "attitude" and "personality conflicts" problems arise when the Respondent comes on the scene in September 1982. It just flies in the face of logic to accept the stated reasons as the true reasons for their not being hired by the College. It is concluded that the exercise of protected activity was the real reason for their not being hired by the Respondent.

While Clark had only worked for J & W since August 6, 1982, her qualifications appear to have been adequate (see Finding of Fact No. 4d, supra). The Hearing Examiner cannot accept Riismandel's reason for not hiring Clark, namely, that someone more qualified had been found, particularly since Clark testified without contradiction that the person who replaced her possesed only an under-graduate degree while she had a Master's Degree. It will be recalled that Clark was a signer of the August 19th letter (R-4) and that Riismandel testified that the mere fact that the letter was sent influenced his hiring decision as to the signers, one of whom was Clark (3 Tr. 26, 27). The Hearing Examiner again concludes, in the case of Clark, that the Respondent's defense as to why it did not hire Clark is pretextual.

Finally, the Hearing Examiner has considered the fact that the College has collective negotiations relationships with the N.J.E.A. in four other units. This fact does not weigh heavily in the Respondent's favor with respect to Alven, Smith and Clark inasmuch as it may well be argued that the College was not interested in having one more collective negotiations unit at Fort Dix.

* * * *

Accordingly, the Hearing Examiner finds and concludes that the Respondent violated Subsections(a)(1) and (3) of the Act when it refused to hire Alven, Smith and Clark in September 1982 but, however, the Respondent did not violate the Act when it refused to hire Corbett.

The Respondent was not the successful bidder for the contract at Fort Dix for the year commencing October 1, 1983. Accordingly, an award of back pay for Alven, Smith and Clark will be limited to the 12-month period from October 1, 1982 through September 30, 1983. The rate of $8.00 per hour will be incorporated into the back pay award. Finally, interest at the rate of 12% annum will be awarded but will be calculated on basis of 6% per annum on gross earnings for the year October 1, 1982 through September 30, 1983 in order to account for the accrual of earnings over the 12-month period, and at the rate of 12% per annum since October 1, 1983.

* * * *

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

CONCLUSIONS OF LAW

1. The Respondent violated N.J.S.A. 34:13A-5.4(a)(1) and (3) when it failed to hire Gina Alven, Daily M. Smith and Effie T. Clark in September 1982.

2. The Respondent did not violate N.J.S.A. 34:13A-5.4(a)(1) and (3) when it failed to hire Teresa Corbett in September 1982.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by failing to hire employees such as Gina Alven, Daily M. Smith and Effie T. Clark on account of their engaging in protected activities.

2. 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 the Act, particularly, by failing to hire employees such as Gina Alven, Daily M. Smith and Effie T. Clark on account of their engaging in protected activities.

B. That the Respondent take the following affirmative action:

1. Forthwith make payment to Gina Alven, Daily M. Smith and Effie T. Clark of the wages that they would have earned if employed by the Respondent at Fort Dix from October 1, 1982 through September 30, 1983. Said wages are to be calculated on the basis of $8.00 per hour for each and every hour that Gina Alven, Daily M. Smith and Effie T. Clark would have worked, based on a comparison with other employees of the Respondent at Fort Dix like situated. Interest at the rate of 12% per annum shall be added to the foregoing back wages and calculated as follows: interest at the rate of 6% per annum shall be added to the gross wages due for the one-year period October 1, 1982 through September 30, 1983; and interest at the rate of 12% per annum shall be added to the monies due as of October 1, 1983 to the date of payment.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the Commission, shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to insure that such notices are not altered, defaced or covered by other materials.

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

Hearing Examiner
Alan R. Howe

Dated: June 11, 1984
Trenton, New Jersey

H.E. NO. 84-64 APPENDIX "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly, by failing to hire employees such as Gina Alven, Daily M. Smith and Effie T. Clark on account of their engaging in protected activities.

WE WILL NOT discriminate 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 the Act, particularly, by failing to hire employees such as Gina Alven, Daily M. Smith and Effie T. Clark on account of their engaging in protected activities.

WE WILL forthwith make payment to Gina Alven, Daily M. Smith and Effie T. Clark of the wages that they would have earned if employed by us at Fort Dix from October 1, 1982 through September 30, 1983. Said wages are to be calculated on the basis of $8.00 per hour for each and every hour that Gina Alven,Daily M. Smith and Effie T. Clark would have worked, based on a comparison with our other employees at Fort Dix like situated. Interest at the rate of 12% per annum shall be added to the foregoing back wages and calculated as follows: interest at the rate of 6% per annum shall be added to the gross wages due for the one-year period October 1, 1982 through September 30, 1983; and interest at the rate of 12% per annum shall be added to the gross wages due from October 1, 1983 to the date of payment.

OCEAN COUNTY COLLEGE
(Public Employer)

Dated _____ By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780