

P.E.R.C. NO. 86-94

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BERGEN COUNTY BOARD OF EDUCATION  
OF VOCATIONAL SCHOOLS,

Respondent,

-and-

Docket No. CO-83-74-65

BERGEN COUNTY VOCATIONAL TECHNICAL  
EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a complaint based on an unfair practice charge that the Bergen County Vocational Technical Education Association filed against the Bergen County Board of Education of Vocational Schools. The charge alleged the Board violated the New Jersey Employer-Employee Relations Act when it withheld the salary increment of the Association's president. The Commission finds, in agreement with the Hearing Examiner, that the increment was withheld because of the employee's poor work performance. The Commission also finds the increment withholding was proper under education law.

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Docket No. CO-83-74-65

BERGEN COUNTY VOCATIONAL TECHNICAL  
EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Smith, Don, Alampi & Scalo, Esqs.  
(Carmine R. Alampi, of Counsel)

For the Charging Party, Schneider, Cohen & Solomon, Esqs.  
(Bruce D. Leder, of Counsel)

DECISION AND ORDER

On September 24, 1982, the Bergen County Vocational Technical Education Association ("Association") filed an unfair practice charge against the Bergen County Board of Education of Vocational Schools ("Board"). The charge alleged that the Board violated subsections 5.4(a)(1), (3) and (5)<sup>1/</sup> of the New Jersey

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<sup>1/</sup> 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; and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it withheld the 1982-83 salary increments of Henry S. Cummings, allegedly because of his activity as the Association's president.<sup>2/</sup>

On January 24, 1983, a Complaint and Notice of Hearing issued. On February 4, 1983 the Board filed its Answer. It alleged that Cummings' poor job performance and refusal to cooperate in educational endeavors motivated the increment withholding.

On April 29, May 19, 20, 25, and 26, October 24, and November 30, 1983, Hearing Examiner Edmund G. Gerber conducted hearings. The parties examined witnesses and introduced exhibits. They filed post-hearing briefs by April 2, 1984.

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1/ Footnote Continued From Previous Page

terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative.

2/ The charge had also alleged that the increments of two other Association officers were discriminatorily withheld, but these allegations were later withdrawn. The Association's president and these two officers also filed petitions with the Commissioner of Education repeating their allegations that their increments were discriminatorily withheld because of anti-union animus. Administrative Law Judge Ward R. Young then determined that the Commissioner of Education had the predominant interest and should issue a single decision disposing of all issues. The Commissioner of Education declined to review Judge Young's order. On February 17, 1983, we reversed it. We held, applying the principles set forth in City of Hackensack v. Winner, 82 N.J. 1 (1980) and Hinfey v. Matawan Reg. Bd. of Educ., 77 N.J. 514 (1978), that we had the predominant interest since anti-union animus was the sole reason alleged in either proceeding and that we would therefore consolidate the Complaint and petition and issue the final administrative decision. Boon v. Bergen Cty. Voc. School Systems, P.E.R.C. No. 83-117, 9 NJPER 164 (¶14078 1983), application for leave to appeal denied.

On September 11, 1985, the Hearing Examiner recommended the Complaint's dismissal. H.E. No. 86-11, 11 NJPER \_\_\_\_\_ (¶ \_\_\_\_\_ 1985) (copy attached). Applying In re Bridgewater Twp., 95 N.J. 235 (1984) ("Bridgewater"), he found that the Association had failed to prove that Cummings' protected activity was a substantial or motivating factor in the withholding and that the Board had proved it would have withheld his increments in any event.

On November 26, 1985, after having received extensions of time with the Board's consent, the Association filed exceptions. It asserts that it proved that Cummings' protected activity was a substantial or motivating factor in the withholding and that the Board did not prove it would have withheld his increments absent that illegal motivation.

On December 24, 1985, the Board filed a letter supporting the Hearing Examiner's recommendations.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-8) are essentially accurate. With the following additions, we incorporate them here.

In April 1982, Cummings wrote a letter to the Acting Commissioner of Education criticizing the Board for allegedly hurting "...the morale and educational processes of our community." He asked that an investigator be appointed. In a later letter he repeated his allegations and added an allegation that the Board had allowed some faculty to be late and to have more time for curriculum development than others.

Cummings' increments were withheld at the June 28, 1982 Board meeting. At that meeting, Cummings asked to speak about the proposed increment withholding; despite an official Board policy affording a right to a hearing before a withholding, the Board refused to allow him to speak. According to the assistant superintendent, the Board was not aware of this policy because the superintendent and he did not bring it to their attention. Also, five grievances were considered at this meeting; Cummings filed one personally and two organizationally.

Finally, attendance records for those teachers on duty in the attendance office were not systematically kept. One other teacher, Robert Tamagny, was occasionally late by a minute or two, but this lateness was considered to be within the teachers' grace period for getting to their next assignment. Cummings, by contrast, was habitually later, often beyond (and far beyond) the grace period.

Bridgewater articulates the governing legal standards for considering allegations of discriminatory personnel actions in violation of subsections 5.4(a)(1) and (3) of the Act. The charging party must first establish a prima facie case that his or her protected activity was a substantial or motivating factor in the disputed personnel decision. In some cases, that prima facie case may be made out by direct evidence of anti-union motivation; in other cases that case may be made out by circumstantial evidence that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile towards the exercise

of protected activity. Id. at 246. If the charging party establishes a prima facie case, the burden shifts to the employer to prove, as an affirmative defense and by a preponderance of the evidence, that the action occurred for legitimate business reasons and not in retaliation for the protected activity. Ultimately, the factfinder must resolve any conflicting proofs. We also emphasize that these standards must be applied to the facts and their interrelationship in each particular case.

We believe the Association established that Cummings' protected activity was a substantial or motivating factor in the increment withholdings. Cummings' protected activity was extensive and known; the only disputed issue is whether there was sufficient evidence of hostility to establish a prima facie case. We find there was sufficient circumstantial evidence to raise a question concerning the legality of the Board's motivation. The refusal to allow Cummings to speak at the June 28 meeting, despite a Board policy conferring that right, is disturbing. See Bridgewater. So are the shared timing between Cummings' personal and organizational pressing of grievances and the increment withholding and the fact that three of the four teachers whose increments were withheld were Association officers. Under all these circumstances, we conclude that the Association adduced sufficient circumstantial evidence of hostility and therefore established a prima facie case.

We believe, however, that the Board proved it would have withheld Cummings' increment even absent his protected activity.

Cummings had an extensive track record of lateness and missed duty periods, a record which persisted after repeated warnings. Our review of the record shows that Cummings' attendance and tardiness record stands alone in the frequency and severity of its deficiencies. The Hearing Examiner credited the testimony of Board members and administrators that this record motivated the withholding. See also Blackhorse Pike Reg. Bd. of Ed., P.E.R.C. No. 83-73, 9 NJPER 36 (¶14017 1985). The Board's evidence is direct, credible and compelling and far outweighs the Association's circumstantial evidence of illegal motivation. Accordingly, we will dismiss the Complaint.

We next consider the petition which Cummings filed with the Commissioner of Education. While ordinarily we would not consider the propriety of an increment withholding absent discrimination under subsection 5.4(a)(3), we do so because of our earlier order consolidating the unfair practice charge and petition for a single administrative decision consistent with Hackensack and Hinfey.<sup>3/</sup>

Kopera v. Bd. of Ed. of Town of W. Orange, 60 N.J. Super. 288 (App. Div. 1960) sets the standard for determining the propriety of an increment withholding under education law:

...action of the local board which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by illegal motives.  
Id. at 294.

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<sup>3/</sup> The Hearing Examiner should have considered this issue.

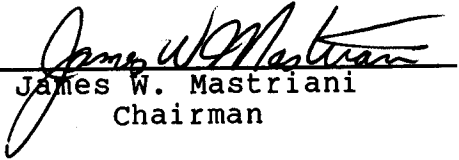
Under education law, persistent tardiness or absenteeism is a reasonable basis for an increment withholding. Burns v. School Dist. of City of Newark, State Bd. of Ed. #33-84 (Oct. 26, 1984).

Applying the Kopera standard and education case law to the facts of this record, we believe the Commissioner would sustain this withholding.

ORDER

The Complaint and the petition are dismissed.

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Johnson, Smith and Wenzler voted in favor of this decision. Commissioner Reid abstained. Commissioners Hipp and Horan were not present.

DATED: Trenton, New Jersey  
February 19, 1986  
ISSUED: February 20, 1986



H.E. NO. 86-11

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

In the Matter of

BERGEN COUNTY BOARD OF EDUCATION  
OF VOCATIONAL SCHOOLS,

Respondent,

-and-

Docket No. CO-83-74-65

BERGEN COUNTY VOCATIONAL  
TECHNICAL EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Board did not violate §§5.4(a)(1), (3) and (5) of the New Jersey Employer-Employee Relations Act when on June 28, 1982 it voted to withhold the annual salary increment of Henry S. Cummings, the President of the Association since 1979. The Association failed to prove any hostility toward Cummings' exercise of protected activity, which is required under Bridgewater and the Board proved overwhelmingly that Cummings had engaged in a pattern of lateness for non-instructional duties between September 1981 and June 1982.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 86-11

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

In the Matter of

BERGEN COUNTY BOARD OF EDUCATION  
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-and-

Docket No. CO-83-74-65

BERGEN COUNTY VOCATIONAL  
TECHNICAL EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent

Greenberg & Covitz, Esqs.

(Morton R. Covitz, Esq. and John C. McGlade, Esq.)

For the Charging Party

Schneider, Cohen & Solomon, Esqs.

(Bruce D. Leder, Esq.)

HEARING EXAMINER'S  
RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on September 24, 1982, by the Bergen County Vocational Technical Education Association (hereinafter the "Charging Party" or the "Association") alleging that the Bergen County Board of Education of Vocational Schools (hereinafter the "Respondent" or the "Board") has engaged in unfair practices within the meaning of the New Jersey

Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that the Board improperly withheld the annual salary increment of three of its teachers: Henry S. Cummings; William Boon; and Ricardo Vivona for the 1982-83 school year; all of whom hold positions in the Association and are active in the filing of grievances and the policing of the collective negotiations agreement. The Association alleges that the Board's denial of the increments was motivated by anti-union animus and, thus, violates §§5.4(a)(1), (3) and (5) of the Act.<sup>1/</sup>

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 January 24, 1983. On February 4, 1983 the Board filed its Answer, contending that the withholding of the increments was unrelated to the individual employees' protected activities and that the withholding was directly related to their poor performance as teachers and their refusal to cooperate with the Board with regard to educational endeavors.

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<sup>1/</sup> 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; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

Pursuant to the Complaint and Notice of Hearing, hearings were held on April 27, May 19, May 20, May 25, May 26, October 24 and November 30, 1983 in Newark, New Jersey, at which time the parties were given an opportunity to present relevant evidence, examine witnesses and argue orally. The parties waived oral argument and filed post-hearing briefs by April 2, 1984.

On June 25, 1984, the Association withdrew the charges of unfair practices filed on behalf of Boon and Vivona. Thus, the only issue remaining for determination involves the allegations with respect to Cummings.

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 for determination.

Upon the entire record, I make the following:

FINDINGS OF FACT

1. The Bergen County Board of Education of Vocational Schools is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Bergen County Vocational Technical Education Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. Henry S. Cummings was hired by the Board as a science teacher in September 1967 and is a public employee within the

meaning of the Act. He has been a member of the Association since September 1967 and became its president in 1979, a position which he has continued to hold to date. (1 Tr. 11, 12).

4. In addition to participating in collective negotiations on behalf of the Association,<sup>2/</sup> Cummings has been active in the filing of grievances on behalf of himself and others; 12 grievances having been filed in the 1980-81 school year and 25 grievances having been filed in the 1981-82 school year. (1 Tr. 19-21). Cummings filed a grievance on behalf of himself on February 22, 1982, involving a request by the Board to revise and correct course outlines and program objectives, which grievance was processed through the grievance procedure and was denied by the Board at a meeting on June 28, 1982 (CP-2, 1 Tr. 23-31).

5. Cummings' activities on behalf of the Association have been openly engaged in and are well known to the Respondent and its representatives, namely, Anthony Miller, the Assistant Superintendent for Personnel and Instructional Programs, Bonnie Marmor, the High School Principal, and Albert Gasior, the High School Vice-Principal. Miller and Marmor regularly participate in the grievance procedure where Cummings is involved as a member of the Grievance Committee (e.g. 1 Tr. 21, 28).

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<sup>2/</sup> Negotiations were held on a fringe benefit reopener on April 19, 1982 and June 2, 1982, in which Cummings participated and these negotiations resulted in an addendum, which was approved by the Board in June 1982 (R-26; 4 Tr. 19, 20, 23, 24).

6. On June 22, 1982 Miller sent Cummings a letter, advising him that the Board would, at its meeting on June 28, 1982, "...receive recommendations of its administrative staff regarding your employment status in the District..." (CP-6). Cummings acknowledged receipt of CP-6 and attended the June 28th Board meeting where the Superintendent, S. Fong, recommended that the increment of Cummings for the 1982-83 school year be withheld (1 Tr. 54, 55). This recommendation of the Superintendent had been preceded by a written recommendation by Marmor on March 10, 1982 that Cummings' increment be withheld (CP-19; 4 Tr. 107). In response, the Board adopted a resolution directing that Cummings' increment be withheld as recommended, enumerating as the grounds the fact that Cummings had refused to report to assigned duty on at least two occasions and had been consistently late in reporting to his assigned duty and, finally, refusing to give a written explanation for latenesses as requested by the Vice-Principal (CP-1).

7. Gasior, at the direction of Marmor, was responsible for scheduling non-instructional assignments for teachers and was in a position to observe Cummings on a regular basis since his, Gasior's, office is next to the attendance office where most of the instances of lateness occurred (6 Tr. 116-118). As early as October 1, 1981, Cummings failed to appear for assigned detention duty and was reprimanded by Gasior on October 2nd (R-32 & R-33). Between October 6 and December 3, 1982, Cummings was late to attendance office duty on five occasions and Cummings either did not recall or acknowledged that these instances occurred (R-30; 1 Tr. 112,

114-116). Additionally, Cummings was late for attendance office duty between February 25 and March 5, 1982 on seven occasions, which Cummings acknowledged as true (R-30; 1 Tr. 118-120). Gasior gave Marmor two memos, recording all of the above latenesses, on March 5, 1982 (R-27 & R-28; 4 Tr. 89-94). Memos regarding the foregoing instances of lateness were given to Cummings by Gasior on February 26, March 1 and March 2, 1982, in which an explanation was requested (R-31). Marmor reported to Superintendent Fong on Cummings' latenesses under date of March 10, 1982 (R-31) and, on the same date, as previously found, Marmor recommended to the Superintendent that Cummings' increment be withheld for the 1982-83 school year (CP-19; 4 Tr. 107 & 5 Tr. 5).

8. Cummings testified that there was a "grace period" in reporting for non-instructional duty and, while this is acknowledged by the Respondent, Marmor testified without contradiction that the grace period was not to exceed two minutes (5 Tr. 9). In support of her recommendation that Cummings be denied an increment for the 1982-83 school year, Marmor sent Superintendent Fong a memo on June 23, 1982, in which she set forth a complete recapitulation of the pattern of Cummings' latenesses or absences from non-instructional duty between September 9, 1981 and June 22, 1982, most of which concerned latenesses but several absences were included (R-37). Marmor's memo indicates that Cummings was late for non-instructional duty on more than 40 occasions. Cummings admitted that he was at least eight minutes late everyday in June 1982 except for June 21st and June 22nd (1 Tr. 121). Cummings also admitted that he did not

comply with the directive from Gasior to be on time for non-instructional duty (1 Tr. 122, 123). A Charging Party witness, Robert D. Tamagny, a Building Representative and a member of the Association's Grievance Committee, testified that Cummings was "late often" and that Cummings was reminded of his obligation "to report on time" (3 Tr. 135, 137).

9. Two of the three principal witnesses for the Respondent, Miller and Marmor, testified credibly, consistently and without contradiction that there was no hostility manifested toward Cummings in the 1982 negotiations, nor was any hostility manifested because of Cummings' participation in the processing of Association grievances, filed either by him or others, and that there was no intention on the part of the Board to punish Cummings for participating in union activities (4 Tr. 20, 28, 32, 108, 109). Miller testified credibly that in his capacity as a negotiator on behalf of the Board he got along well with Cummings, and that he was convinced there were sound reasons to withhold Cummings' increment on the basis of lateness even though it might place a strain on future relations with the Association (4 Tr. 64-67). The two members of the Board who testified, David Adler and Richard Onorevale, stated that their knowledge of Cummings' involvement in the union had no affect on the decision to withhold his increment in June 1982 (7 Tr. 11, 36).

10. The Board both heard Cummings' grievance and denied his increment at the same meeting on June 28, 1982. Altogether



the Board heard five grievances that night, it denied two, granted two others and denied the fifth grievance in part (see CP-5). (See Findings of Fact 4 and 6 above).

#### DISCUSSION AND ANALYSIS

The New Jersey Supreme Court in Bridgewater Twp. v. Bridgewater Public Works Assoc., 95 N.J. 235 (1984) adopted the Wright Line test which establishes the following requisites 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 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 added that the protected activity engaged in must have been known by the employer and, also, it must be established that the employer was hostile towards the exercise of the protected activity (95 N.J. at 246).

Based upon the instant record, I conclude that the Charging Party has failed to meet the first part of the Bridgewater test, namely, the Charging Party has not made a prima facie showing sufficient to support an inference that protected activity was a substantial or a motivating factor in the Respondent Board's decision to withhold the increment of Cummings.

It cannot be gainsaid that Cummings has engaged in the exercise of protected activity. He has been the President of the

Association since 1979. He has actively participated in collective negotiations, as recently as the Spring of 1982, and has filed and processed numerous grievances in the 1980-81 and 1981-82 school years. The Board was clearly aware of this at its meeting on June 28, 1982 where grievances were heard, one of which being Cummings' own grievance. Miller and Marmor knew of his grievance activity. Additionally, Miller had negotiated with Cummings on the fringe benefit reopener in the Spring of 1982. Thus, the Association has met the burden of establishing prima facie that Cummings was engaged in protected activity and that there was ample employer knowledge of this activity.

However, Bridgewater also requires that employer hostility towards the exercise of protected activity be established. Here there is no direct evidence of hostility. Nevertheless such hostility may be inferred if it can be shown there is a nexus or causal connection between the exercise of Cummings' protected activities and the Respondent Board's conduct in withholding his increment for the 1982-83 school year. Cummings' exercise of protected activity and the Board's review of the five grievances on the same date that it denied Cumming's increment are both evidentiary of such a causal connection. However, given the clear and un rebutted evidence supporting the Board's proffered reason for denying Cummings' increment, the Association failed to establish that requisite nexus.

Even assuming that the Association had met the first part of the Bridgewater test, supra, and made its prima facie showing, I

would be constrained to conclude that the Respondent Board has established by a preponderance of the evidence that its action in withholding Cummings' increment would have taken place even in the absence of protected activity. (See second part of Bridgewater test, supra). The record evidence is overwhelming that Cummings, for whatever reason, embarked upon a course of conduct, beginning in October 1981 and continuing through June 1982, wherein he repeatedly reported late for non-instructional duty (see Findings of Fact Nos. 7 & 8, supra). Cummings ignored warnings to correct his pattern of latenesses. In the face of this, Marmor was completely justified in recommending to Superintendent Fong that Cummings' increment be withheld (CP-19 and R-37). The Superintendent ultimately followed her recommendation by recommending that the Board do so.

Thus, no matter how this record is analyzed under Bridgewater, the result is the same in that the Charging Party has failed in its burden of proof and the Board has sustained its burden of proof.

No evidence was adduced indicating a violation by the Respondent of §(a)(5) of the Act. I recommend dismissal of this allegation.

Based on all of the foregoing, I recommend that the alleged violations by the Respondent Board of §§(a)(1), (3) and (5) of the Act be dismissed.

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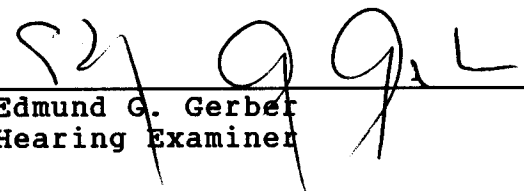
Upon the foregoing, and upon the entire record in this case, I make the following:

CONCLUSION OF LAW

The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(1), (3) or (5) when it voted to withhold the salary increment of Henry S. Cummings at its meeting on June 28, 1982.

RECOMMENDED ORDER

I recommend that the Commission ORDER that the Complaint be dismissed in its entirety.

  
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Edmund G. Gerber  
Hearing Examiner

Dated: September 11, 1985  
Trenton, New Jersey