P.E.R.C. NO. 86-27

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter Of

STATE OF NEW JERSEY, OFFICE
OF EMPLOYEE RELATIONS,
THOMAS EDISON STATE COLLEGE,

Respondent,

-and-

Docket No. CO-84-152-79

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

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that Thomas Edison State College did not violate the New Jersey Employer-Employee Relations Act when it failed to offer a multi-year employment contract to Arthur Rosenfeld, Local President of the New Jersey State Federation of Teachers-AFT/AFL-CIO, the majority representative of the College, placed critical memoranda in Susan Firedman's personnel file and turned down her request for an adjustment of her summer work schedule. Applying the In re Bridgewater Twp., 95 N.J. 235 (1984) test enunciated by the Supreme Court, the Commission finds that the College demonstrated that it would have taken these actions even absent their protected activity. Accordingly, the Commission dismisses these aspects of the Complaint.

The Commission further holds, however, that the College violated the Act when it held individual meetings with grievants without the presence of the Union.

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

Charging Party.

Appearances:

For the Respondent
Hon. Irwin I Kimmelman, Attorney General
(Melvin E. Mounts, Deputy Attorney General)

For the Charging Party
Dr. Thomas Wirth, Staff Representative
Sauer, Boyle, Dwyer & Canellis
(John J. Janasie, On the Exceptions)

DECISION AND ORDER

On December 7, 1983, December 21, 1983, January 7, 1984 and April 17, 1984, the Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO, (Council) filed an unfair practice charge and amended charges against the State of New Jersey, Office of Employeee Relations Thomas A. Edison State College, ("College") with the

Public Employment Relations Commission (Commission). The charge, as amended alleged that the Respondent had violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et. seq. ("Act"), specifically subsections 5.4 (a)(1), (3) and (4),[1/] when, through various members of the College administration, it: failed to offer a multi-year employment contract to Arthur Rosenfeld, the President of the Council's Local at the College; placed critical memoranda in the file of Susan Friedman and turned down Friedman's request for an adjustment of her summer work schedule; attempted to bypass and undermine the Council by insisting that employees filing grievances meet with the administration before utilizing the grievance procedure, by compelling employees to attend such "pre-grievance" meetings, by making statements to employees and Council representatives that too much time was being spent on union matters and by placing restrictions and reporting requirements on employee and non-employee Council representatives when conducting union

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

business on the campus. All these actions were alleged to have interfered with, restrained or coerced employees in the exercise of the rights guaranteed by the Act and to have been taken in retaliation against the exercise of protected activity by the affected employees. The actions taken against Friedman were also alleged to have been in retaliation against her testimony in the unfair practice proceeding.

On January 26, 1984, the Administrator of Unfair Practice Proceedings issued a Complaint and Notice of Hearing. On February 8, 1984 and April 27, 1984 the College filed its Answer and Answer to Amendment. A hearing consisting of nine days of testimony [2/] was conducted by Commission Hearing Examiner Marc F. Stuart. The parties examined witnessess, introduced exhibits and filed post-hearing briefs.

On November 2, 1984, Hearing Examiner Stuart issued his report and recommended decision. H.E. No. 85-20, 10 NJPER 653 (¶15316 1984). In his report the Hearing Examiner found that the College had proven sufficient business justification even assuming *prima facie* cases establishing discrimination in response to the

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2/ Testimony was taken on March, 27, 29, 30, May 1, 8, 10, 15, 16 and 31, 1984 in Trenton New Jersey. References to the transcript are by letter; Transcript A for the first day of hearing through Transcript I for the last.

exercise of protected activity with respect to the actions taken against Rosenfeld and Friedman. He concluded that the College had neither violated subsections 5.4(a)(1) and (3) with respect to both employees nor did it violate subsection 5.4(a)(4) with respect to Friedman. The Hearing Examiner also concluded that the required-attendance meetings conducted by the College Administration regarding employee grievances and the other events and comments concerning grievance processing and the activies of the union were not violative of the Act. He recommended that the Complaint be dismissed in its entirety.

On December 7, 1984, after receiving an extension of time, the Council filed exceptions. It contends that the Hearing Examiner erred in fully crediting the College's witnesses, that the College management's credibility should have been "assessed more rigorously" and that the report "lacks sufficient determinations as to credibility."

We have reviewed the record. The Hearing Examiner's findings of fact are accurate (pp. 3-25). We adopt and incorporate them here. We specifically adopt his credibility determinations. See, e.g., City of East Orange, P.E.R.C. No. 84-70, 10 NJPER 28, 30 n. 3 (¶15017 1983).

We first consider whether the College violated the Act when it did not renew Arthur Rosenfeld's employment contract for the 1983-1984 school year.

In re Bridgewater Twp., 95 N.J. 235 (1984) sets forth the standard to determine whether an employer has illegally discriminated against an employee in retaliation for union activity:

> ...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. Transportation Management, supra. __ U.S. ___, 103 S.Ct. at 2474, 76 L.Ed.2d at 675. 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. at 242]

Here, there is an absence of direct evidence of anti-union motivation for the non-renewal. Given this absence, to establish a prima facie case, the charging party must show (1) that the employee engaged in protected activity; (2) that the employer had knowledge of this activity; and (3) that the employer was hostile toward the exercise of protected rights. Bridgewater, supra at 246; In re Gattoni, P.E.R.C. No. 81-32, 6 NJPER 443, 444 (¶11227 1980); In re North Warren Regional Board of Education, P.E.R.C. No. 79-9, 4 NJPER 417 (¶4187 1978). Applying these standards, we hold that the charging party established a prima facie case. First, it is clear and undisputed that Rosenfeld engaged in protected activity and that

the College had knowledge of these activities. He was President of the local union and was actively involved in both negotiations and grievances. The closer question presented is whether the charging party was hostile towards these protected activities. Based upon our review of the record,[3/] we hold that Rosenfeld has established the existence of such hostility. This hostility is inferred from the following: (1) the timing of the non-renewal: he had engaged in substantial protected activity in the period just prior to the recommendation that he be dismissed; (2) he was the only person ever rejected for a multi-year contract even though he had received generally good recommendations during this employment with the College; (3) the College failed to follow the contractually agreed upon procedure when it evaluated Rosenfeld.

We now consider whether the College met its burden of demonstrating by a "preponderance of th evidence that the same action would have taken place even in the absence of the protected activity." In re Bridgewater Tp., 95 N.J. 235, 242 (1984). We hold, in agreement with the Hearing Examiner, that the College met its burden. Central to our finding is the plain fact, which is

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3/ Thus, we specifically disagree with the Hearing Examiner's conclusion (at 26) that "the undersigned does not find adequate support in the record for the conclusion that the College was hostile toward the protected activity."

virtually undisputed from the record, that Rosenfeld's performance in the Portfolio Assessment Department was unsatisfactory. He received a poor evaluation from Simosko based upon his job performance in this Department. There is substantial evidence to support this poor evaluation. In fact, not only did he perform his duties poorly, he failed to perform several of his assignments and failed to supply information requested from this supervisor. Although Simosko expressed dissatisfaction to Rosenfeld, he did not improve his performance. In fact, he did not even acknowledge any deficiency in his work. In view of this failure, his supervisor was required to complete the assignments. What the Hearing Examiner said concerning Rosenfeld's performance is worthy of repetition:

> ...assuming arguendo the Charging Party had made out an adequate showing of the College's hostility toward Rosenfeld's protected activities, the record is replete with credible evidence of adequate business justification for the Rosenfeld dismissal. Were he retained, Rosenfeld would have been entitled, by law, to a multi-year contract. His duties would have been in the area of Portfolio Assessment. He had already received an unsatisfactory evaluation which was based upon his work in that department. His unsatisfactory evaluation, although covering a period of only three to four months, was well documented in the record. Additionally, the record contained uncontroverted testimony that Rosenfeld never acknowledged that any problems existed with his work; thus, the College was hard pressed to find justification for offering him continued employment absent some basis for believing that what they had evaluated as unsatisfactory performance would improve. The

> undersigned is not persuaded by testimony that Simosko was hostile toward time spent, by Rosenfeld, on union matters. Simosko specifically denied this, and there is no evidence whatsoever that she ever attempted to prevent Rosenfeld from engaging in union activities, or even that she would have wished to, except possibly to the extent that his job responsibilities were suffering for lack of time in which to complete them. Nor is the undersigned persuaded by evidence attempting to establish lack of proper notice and/or actual words indicating the contemplation of an unsatisfactory evaluation. On the contrary, the record establishes that Rosenfeld was confronted, by his supervisor, with nearly constant direction and comments of a somewhat critical nature which should have provided adequate notice that his performance was considered unsatisfactory. Furthermore, despite the brief evaluation period, had Rosenfeld any intention of attempting to modify his performance, such could have been adequately manifested, even in this relatively brief amount of time. Were such a showing to have been made by the Council, the College's burden would necessarily have increased and assuming they had still pursued Rosenfeld's non-reappointment, their assertion of adequate business justification might have been viewed as being somewhat pretextual. However, such was not the case. Accordingly, the undersigned finds adequate business justification for the College's decision, by a preponderance of the evidence, and, hence, no unfair practice in the Rosenfeld dismissal.
> [10 NJPER at 659]

Given Rosenfeld's performance, we believe the College met its burden. In this regard, we note that an important factor in the prima facie case is that Rosenfeld had generally received good evaluations. But, the importance of this factor has been substantially rebutted since the good evaluations received were in

his prior position. In his new position which he would have continued were he to have received a multi-year contract, his performance was unsatisfactory.

We next consider whether the College's issuance of a critical memorandum to Susan Friedman and denial of her request for an adjustment of her summer work schedule violated the Act. We conclude that a prima facie violation of both subsections 5.4(a)(3) and (a)(4) has been established with respect to both McKeefery's memo of January 23, 1984, and Ice's denial of the work schedule adjustment. Friedman engaged in protected activity under both subsections by, respectively, filing grievances and giving information[4/] which resulted in the filing of the original unfair practice charge. The timing of McKeefery's memo, which chronicled events occurring 10 months previously and the College's deviation from its prior practice of altering Friedman's summer work hours [a "term and condition of employment" within the meaning of subsection (a)(3)], is sufficient to infer hostility to Friedman's protected activity.

However, the prima facie case proven by the Council is not particulary strong and is overcome by the evidence produced by the

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4/ We do not conclude that McKeefery and Ice were aware that Friedman would be a witness when they issued the memos. Thus, we do base a _prima facie_ violation of subsection 5.4(a)(4) on her giving of information, not testimony.

College which establishes that all these actions against Friedman had a valid basis which had nothing to do with protected activity.

The evidence adduced concerning the College's justification for issuing the memos critical of Friedman and for denying her request for an altered work schedule is discussed at pages 15-18 of the hearing examiner's report. Based upon that discussion we find that Friedman's tendency to make disparaging or disloyal remarks about the College to public gatherings was a longstanding problem which Friedman herself acknowleded and was trying to correct. We find that McKeefery's memo, despite its questionable timing, was an accurate portrayal of the two incidents and was a justifiable description and/or reprimand of Friedman's conduct on those occasions. Ice's memo concerned comments made at a meeting of academics, rather than the public *per se*. However, given Ice's concern about the public image of the College we find that the memo was generated by his desire for good public relations and was not made in response to either the grievances or the unfair practice proceedings. Moreover, Ice's memo concerns the same problem with Friedman's performance which was identified in McKeefery's earlier memo and her face to face discussions with Friedman (i.e. inappropriate remarks). We also find that the College had an appropriate business reason for denying the request for an altered work schedule. Friedman had received substantial leeway in this

regard in prior years including an outright leave of absence in 1983 to complete work on her dissertation. Ice's statements that the workload would be heavy in the summer were not contradicted[5/] and we find they provide an independent basis for denying the request which had nothing to do with Friedman's exercise of protected activity. Moreover, there was no evidence adduced to show that the College's treatment of Friedman in this regard was different from other similarly situated employees.

Accordingly, we hold that the College did not violate the Act with respect to its actions concerning Susan Friedman and we adopt the Hearing Examiner's recommendation to dismiss that portion of the Complaint.

Alleged Intereference with Grievance Processing

The unfair practice charge alleges that several statements and actions of various members of the College's administration concerning the presentation and processing of grievances violated the Act. These actions included a meeting convened by Ice on November 7, 1983 at the direction of Pruitt among all employees who were part of a group grievance challenging evaluations made by

5/ Although Friedman may have worked the same quantity of hours we credit testimony which cited the College's need for her presence all five days of the week to help handle telephone inquiries from students (TG:24-1 to 25-6)

McKeefery (hereinafter the "McKeefery grievance"); a series of meetings held as a follow-up to the November 7, 1983 session at which time each grievant individually met with Ice and McKeefery; statements made by College Vice-President Michael Scheiring to union representatives during grievance and other meetings in which he used mild profanity and expressed displeasure at being required to respond to grievances; a statement by Ice to union representative Barbara Hoerner at the November 7, 1983 meeting that she was making it difficult for him to get to his staff except through the union and that employees with grievances should first go the the College before having the union intervene in the matter.

Initially we observe that none of the allegations contend that any employee represented by the Union has suffered "discrimination in regard to hire or tenure or any term or condition of employment," with respect to the the above-recited incidents. Thus there is no basis for any finding that these actions are violative of subsection 5.4(a)(3). The issue is whether these actions, either together or individually, tended to interfere with, restrain or coerce employees in the exercise of rights guaranteed by the Act in violation of subsection 5.4(a)(1).

We first consider the comments of Vice-President Michael Scheiring to union representatives Hoerner and Rosenfeld. We credit

Hoerner and Rosenfeld's versions of the testimony concerning Scheiring's use of epithets and profanity to Hoerner and Rosenfeld and Scheiring's comment to the latter on November 16, 1983 that he wished we didn't have to handle "All these damn grievances." Taking these incidents either individually or together we are unable to conclude that they tended to interfere with, restrain or coerce College employees in their attempts to use the grievance procedure. We concur with the Hearing Examiner's analysis with regard to these comments and actions of Scheiring and agree that they are within the necessarily liberal bounds of permissible comment when public employers and the representatives of public employees are dealing with highly charged issues. See e.g. Ridgefield Park, P.E.R.C. No. 84-152, 10 NJPER 437 (¶15195). We thus find that these actions did not violate subsection 5.4(a)(1).

Of the group and individual meetings held after the McKeefery grievance was filed on November 3, 1983, we find that only the separate meetings held between November 7 and 15, 1983, between Ice and McKeefery on the one hand, and each individual employee affected by the McKeefery grievance on the other, violated the Act. However, the November 7, 1983 meeting in which all employees affected by the grievance were present, with Barbara Hoerner, the AFT staff representative in attendance, did not violate the Act. There are significant differences between the November 7 meeting and the individual conferences that followed.

We first note the following facts concerning these meetings:

1. Article VII.D.1 of the contract (Quoted at H.E. No. 85-20, p. 34) gives the College President the option of compelling an employee to meet any College official to attempt to resolve the employee's grievance informally, "where the nature of the grievance suggests that it would be appropriate."

2. Article VII. D.1 of the agreement is preceeded by Article VII A.1 which reads:

> 1. The following procedure, which may be initiated by the employee and/or the UNION acting as his or her representative shall be the exclusive means of seeking adjustment and settling grievances (except as provided in Article XII). (emphasis supplied)

3. The McKeefery grievance was initiated on November 3, 1983 in a letter to Pruitt from Hoerner on Union stationary (CP-16). It was amended the next day in the same manner (CP-17).

4. On November 4, 1983 Pruitt sent out a memo to each of the employees affected by the grievance. He did not send a copy to Hoerner. The memo (CP-18) cited Article VII. D of the contract and stated that each of the individuals was required to attend a meeting on Monday, November 7, 1983 with McKeefery and Ice at a time and place to be named.

5. Rosenfeld was one of the grievants and he called Hoerner on November 5, 1983 and told her about the memo (TA:38-23 to 39-4).

6. Hoerner went to the College on the morning of November 7, 1983 to deliver the union's response (CP-19) which took the position that the grievance was a Union grievance and that the proposed meeting would be improper. The letter requested that Pruitt or his designee meet with Hoerner before conducting the meeting. After Hoerner and Pruitt met in the latter's office and debated the character of the grievance, and the applicability of Article VII.D.1., Hoerner asked for and received permission from Pruitt to attend the meeting.

7. This meeting was convened a short time later with McKeefery and Ice representing the College and the six grievants and Hoerner present for the Union. By all accounts there was little discussion on the substance of the grievance (evaluations by McKeefery).

8. During the November 7, 1983 meeting Ice said to Hoerner that she was making it difficult for him to get to his employees except through the Union. (TA:46-19 to 23). Ice's version of what was said differs somewhat (TF:47-6 to 49-5). We find that Ice did express frustration at having to go through the Union with respect to the problems that his staff might be having.

9. Between November 7, 1983 and November 15, 1983 each grievant was summoned to a meeting with Ice and McKeefery. These meetings were purportedly held by the administrators to "improve

communications" among the College's staff, according to the testimony of Ice and McKeefery. The minutes of an Academic Council meeting of November 15, 1983 (CP-43) contain a summary of these individual meetings.

> 5. Grievances and Follow-Up by Vice-President's (Ice's) Office.
> The Vice President reported on his individual meetings with each person involved in the McKeefery grievance. The basic concerns involved communications, using grievances for personal gripes, the need to plan and carry out a divisional retreat.
> (emphasis supplied)

10. These meetings were held without notice to AFT.

11. While we credit the testimony of McKeefery and Ice that the meetings were held to improve communications, we find that no other members of the College staff were summoned to such meetings, which were held while the grievance was pending and immediately following the President's attempts to informally resolve the grievance by invoking Article VII.D.1 of the contract.

Based upon these findings we determine that the College violated subsection 5.4(a)(1) of the Act. The individual meetings held by McKeefery and Ice with the McKeefery grievants unlawfully bypassed the union in the processing of grievances. We also find that compelling an employee to attend such a meeting, immediately after filing a grievance, has a tendency to dissuade employees from

using the grievance procedure, and thus interferes with a right which is guaranteed public employees by Section 5.3 of the Act and by Art. I. Par. 19 of the New Jersey Constitution of 1947. These provisions read in their pertinent parts:

Section 5.3

> Representatives designated or selected by public employees for the purpose of collective negotiation by the majority of the employees in a unit appropriate for such purposes or by the majority of the employees voting in an election conducted by the commission as authorized by this act shall be the exclusive representatives for collective negotiation concerning the terms and conditions of employment of the employees in such unit. Nothing herein shall be construed to prevent any official from meeting with an employee organization for the purpose of hearing the views and requests of its members in such unit so long as (a) the majority representative is informed of the meeting; (b) any changes or modifications in terms and conditions of employment are made only through negotiation with the majority representative; and (c) a minority organization shall not present or process grievances.

Article I, Paragraph 19

> * * * Persons in public employment shall have the right to organize, present to and make known to the State, or to any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing.

The Supreme Court, in Red Bank Regional Education Association v. Red Bank Regional High School Board of Ed. 78 N.J.

122 (1978) explored the consitutional and statutory rights of public employees to have grievances presented by their majority representative. The Court made several determinations, including: (1) An employee has the choice of presenting a grievance personally or through his majority representative. 78 N.J. at 137, n.5.; (2) The majority representative has the right to initiate organizational grievances on behalf of the employees affected and such right is not waivable through a negotiated agreement, Id at 141.; (3) Where a majority representative has been chosen, such organization is the sole chosen representative for the purposes of the presentation of their grievances to their public employer. Id. at 135, emphasis added.

Because Hoerner was present at the meeting held on November, 7, 1983, we do not find that the convening of that meeting, pursuant to the section of the agreement cited by Pruitt violated the Act.[6/] The subsequent meetings, however, were attempts to adjust the grievance without the union present and violated the Act. Despite McKeefery and Ice's testimony that the meetings were held to improve communications (CP-43), we find that these individual meetings were a follow-up to the McKeefery grievance. Moreover, regardless of the actual content of the

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6/ Our analysis of this meeting would be different if the Union (i.e. Hoerner) was barred from the meeting, nothwithstanding the language of Article VII D.1.

discussions in these individual meetings, their timing alone makes them coercive and amounts to an attempt by the College to bypass the Union. The meetings were held immediately after the Union had filed a grievance affecting several individuals. The meetings were held with only the individuals involved in the grievance facing their immediate supervisor and her supervisor in a 1 on 2 situation without the presence of the union which was not informed of these meetings even though the union filed the grievance which precipatated the conferences. The Hearing Examiner's reliance on the portion of Section 5.3 allowing public employer representatives to hear the views of employees is misplaced. The meetings between the employees and their supervisors (McKeefery and Ice) were involuntary. They were not initiated by the employees for the purpose of presenting the employer with employee "views". Since the grievance had already been initiated by the Union through Staff representative Hoerner and since the President had already tried unsuccessfully to settle the grievance by holding a meeting pursuant to Article VII D. 1. the additional follow-up meetings were an unlawful attempt to bypass the union. We find that when an employee is compelled to meet alone and without representation with two supervisors immediately after a grievance is filed by the union on his behalf, such action tends to interfere with employee freedom to pursue rights guaranteed by the Act (the filing of grievances).

The holding of these meetings also interfered with the Union's right, recognized by the Supreme Court in Red Bank to initiate and process grievances on behalf of all employees in the negotiating unit. The Court in Red Bank emphasized that the purpose of the Act would be frustrated if employees were required to pursue grievances without the aid of their majority representative.

> Permitting a public employer to require individual action at the critical moment when vindication of employee rights is at stake would surely 'short circuit' the system of collectivity the Legislature sought to promote in the Act and weaken its benefits. An employee who views the potential consequences of presenting a grievance in his own name with great trepidation would be forced to endure a possible violation of his rights without redress if he is unable to have that grievance presented through his majority representative. Requiring an individual to put himself on the line as the sole means of initiating a grievance is inherently contrary to the very concept of collectivity and would, if sanctioned, bring about a 'prejudicial dilution' of the basic right to organize secrued by the Constitution.
> 78 N.J. at 138.

That the College overstepped its authority in attempting to deal directly with employees is also shown by its concern with determining whether or not all employees affected were fully supportive of the McKeefery grievances filed by the Union. See Pruitt's testimony (TG:129-21 to 130-9) [7/]. The Court in Red Bank

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7/ Pruitt testified that four employees disavowed the McKeefery grievance. This disavowal apparently came after they attended the individual meetings with Ice and McKeefery, meetings we find inherently coercive.

firmly established that the employer has no right to make such an inquiry.

> Nevertheless, it is important to note that the question of consensual initiation of any organizational grievance would not be a legitimate matter of concern for the public employer. Its obligation to accept organizational grievances is not conditioned on verficiation that the affected employee has consented to the filing of the grievance. So far as it is concerned, all organizational grievances are consensual. The Board has argued before us that a public employer has a valid interest in ensuring that its employees are not being coerced by their majority representative. The short answer to that contention is that the Legislature has chosen to assign responsibility for the prevention of such possibly unlawful conduct to PERC, not to the public employer.
> 78 N.J. at 142.

Thus we conclude that although the November 7, 1983 meeting called by the President pursuant to Article VII. D.1. was not violative of the Act, because the Union was allowed to be present during such meeting, we find that the subsequent attempts by the College to "follow-up" on the grievances at meetings with its representatives and each of the employees named in the grievance, without the presence of the union's designated representative (Hoerner) violated subsection 5.4(a)(1) of the Act in two ways. Such meetings were and are inherently coercive and can interfere with the willingness of employees to utilize a negotiated grievance procedure

and, the administration unlawfully bypassed the union which had a right, rooted in the Act and the Constitution and recognized by the Supreme Court in Red Bank, to initiate, present and process the McKeefery grievance as an organizational grievance.[8/] We will order the Respondent to cease and desist from such activity.

ORDER

The State of New Jersey, Office of Employee Relations, Thomas Edison State College is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by this Act, particularly by (1) requiring employees who are affected by or named in grievances filed by the employees' majority representative to attend individual meetings with their supervisors and/or other

8/ The latter action would also be violative of subsection (a)(5) of the Act which prohibits public employers, their representatives or agents from "...refusing to process grievances presented by the majority representative." See Red Bank, supra., 78 N.J. at 139. However, since that subsection was not charged and the bypassing of the union by holding individual meetings was later rectified by the processing of the McKeefery grievance in accordance with the negotiated procedure, a 5.4(a)(5) violation would be largely technical and would not carry any additional remedial relief than that needed to remedy the violation of subsection 5.4(a)(1).

College administrators and (2) by failing to notify the union of such individual meetings.

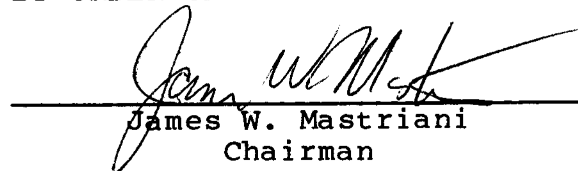
B. Take the following affirmative action:

1. 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 by the Respondent upon receipt thereof, and after being signed by Respondent's representative, said notice shall be maintained for a period of at least (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced or covered by other materials.

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

The remaining allegations of the Complaint are dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

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

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

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 cease and desist from interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by this Act, particularly by (1) requiring employees who are affected by or named in grievances filed by the employees' majority representative to attend individual meetings with their supervisors and/or other College administrators and (2) by failing to notify the union of such individual meetings.

STATE OF NEW JERSEY, OFFICE OF EMPLOYEE RELATIONS, THOMAS EDISON STATE 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 the Public Employment Relations Commission, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

H. E. No. 85-20

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

In the Matter of

STATE OF NEW JERSEY, OFFICE
OF EMPLOYEE RELATIONS,
THOMAS A. EDISON STATE COLLEGE,

Respondent,

-and-

Docket No. CO-84-152-79

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

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the Respondent did not violate subsections (a)(1), (a)(3) and (a)(4) of the New Jersey Employer-Employee Relations Act when it refused to offer the Local President of the Charging Party a multi-year contract, and also when it took personnel actions, of a disciplinary nature, against another union member. Respondent adequately demonstrated, by a preponderance of the evidence, legitimate business justification for both actions taken within the meaning of In re Bridgewater Tp., 95 N.J. 235 (1984).

Additionally, neither Respondent's holding of a meeting between aggrieved individuals and Respondent's agents for purposes of airing differences and establishing better communications, nor remarks made by one of Respondent's agents during grievance proceedings, rise to the level of a violation of the Act. The former constitutes accepted practice under the Labor Management Relations Act, the New Jersey Employer-Employee Relations Act, the parties' collective negotiations agreement, and the Supreme Court's ruling in Red Bank Regional Education Association v. Red Bank Regional High School Board of Education, 78 N.J. 122 (1978). The latter constitutes permissible criticism under In re Ridgefield Park Board of Education, 10 NJPER 229 (¶15115 1984).

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.

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

In the Matter of

STATE OF NEW JERSEY, OFFICE
OF EMPLOYEE RELATIONS,
THOMAS A. EDISON STATE COLLEGE,

Respondent,

-and-

Docket No. CO-84-152-79

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

Charging Party.

Appearances:

For the Respondent
Hon. Irwin I. Kimmelman, Attorney General
(Melvin E. Mounts, D.A.G.)

For the Charging Party
Dr. Thomas Wirth, Staff Representative

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on December 7, 1983, by the Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO ("Council") alleging that the State of New Jersey, Office of Employee Relations, Thomas A. Edison State College (the "College") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act") (C-1). [1] Thereafter on December 21, 1983, and January 17, 1984, the Council filed amendments to the original charge (C-1). The Council has alleged that the College committed a violation of the Act by virtue of its decision not to offer Arthur Rosenfeld, the Local

1/ Exhibit designations are as follows: "CP" refers to Charging Party's exhibits; "R" refers to Respondent's exhibits; "C" refers to Commission exhibits, and "J" refers to joint exhibits.

President, a multi-year contract effective July 1, 1984; by certain actions taken by Dean McKeefery, Vice President Ice and President Pruitt, separately and/or as a continuing course of conduct, which allegedly were intended to undermine the Council and, as such, were violative of the Act; by the conduct of Vice President Sheiring taken separately and/or as a continuing course of conduct, which allegedly was similarly intended to undermine the Council and, thus, was violative of the Act; and, by way of amendment to the Unfair Practice Charge filed April 17, 1984, that certain actions taken by the College against one Susan Friedman, a Council member, were retaliatory in nature and hence violative of the Act, all of which was alleged to be in violation of N.J.S.A. 34:13A-5.4 (a)(1), (3) and (4),[2/] (C-1; C-3). The College filed answers to the charge and amendments alleging that the Council failed to state an an unfair practice upon which relief could be granted, and further alleging that the recommendations for Rosenfeld's non-reappointment were based upon legitimate business reasons and were not in retaliation for any protected activity, and that the memoranda regarding the actions taken with respect to Susan Friedman were entirely appropriate and proper communications between various College officials and Friedman concerning aspects of her employment, were completely unrelated to Friedman's testimony in the instant case and were, in no way, violative of the Act (C-2; C-4).

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; (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; (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.

A Complaint and Notice of Hearing was issued on January 26, 1984, based upon a finding that the allegations of the Unfair Practice Charge could constitute unfair practices within the meaning of the Act. The hearing in this matter was held on March 27, March 29, March 30, May 1, May 8, May 10, May 15, May 16 and May 31, 1984 in Trenton, New Jersey. The parties were given the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally.

The College filed a post-hearing brief which was received on June 25, 1984. All copies of the Council's post-hearing brief in this matter were received by June 26, 1984. Thereafter, the Council filed a reply brief on July 2, 1984, and the College, likewise, filed a reply brief on July 3, 1984.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act exists, and after hearing, and after consideration of the post-hearing briefs, 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. Thomas A. Edison State College is a public employer within the meaning of the Act and is subject to its provisions (TA 8).[3/]

2. The Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO is a public employee representative within the meaning of the Act and is subject to its provisions (TA 8-9).

3/ Transcript designations are as follows: TA refers to the transcript of March 27, 1984, TB March 29, TC March 30, TD May 1, TE May 8, TF May 10, TG May 15, TH May 16 and TI May 31.

Arthur Rosenfeld

3. Arthur Rosenfeld has been employed at Edison State College since July, 1979, was the Local's first president, and has been Local President for the two years immediately preceding the hearing in this matter (TA 57). The local unit consists of 27 members (TI 19).

The change in organization that occasioned the establishment of a separate Portfolio Assessment (Advisement) Department, and Rosenfeld's eventual transfer to that department, came about as a result of planning and discussion sessions, of which Rosenfeld was a part, and with which he was in agreement (TB 19). Additionally, a task force constituted for the purpose of reviewing college services and functions recommended that the Portfolio Development function be transferred to the Testing and Assessment Office, and that a coordinator and two advisors be assigned thereto (TC 34-35, 37). The purpose of this was so that portfolio development could be accomplished by one office for each student from the beginning to the end of the student's entire program (TC 38). Rosenfeld actually became aware of the reassignment of staff in this regard in mid June of 1983 (TB 20); however, he was generally aware that this change was to be made as of the early spring of 1983 (TB 22-23).

Prior to Rosenfeld's reassignment, Human Services, the area which Rosenfeld formerly coordinated, had been experiencing a decline in student enrollment (TB 26). The decision to transfer Rosenfeld and Dennis Bakewicz to Portfolio Assessment was based on: (1) Their complementary backgrounds--Rosenfeld in Human Services and Bakewicz in Science; (2) Human Services enrollment was declining;

(3) Rosenfeld himself had recommended that this change in organization and procedure be made (TC 40-41). Rosenfeld was actually reassigned as Coordinator of Portfolio Assessment in early July, 1983 (TC 43). Rosenfeld was personally ambivalent about his transfer to Portfolio Assessment (TA 58-65; TA 72; TB 28).

Prior to Rosenfeld's reassignment, Diane Gruenberg explored with Dean McKeefery (Rosenfeld's former supervisor) the possibility of her coordinating the new Portfolio Assessment Program, but since Gruenberg was already the coordinator of the Liberal Arts Program, the largest degree program, McKeefery felt it would be difficult to move her (TE 95-96). McKeefery indicated that Rosenfeld was selected because of his experience in coordinating a degree program, because Rosenfeld's background complemented that of Dennis Bakewicz, and because Human Services was experiencing a gradual decrease in enrollment due, in part, to the recent unavailability of federal funding in that area (TE 101). President Pruitt testified in a similar manner (TG 95-96). Dean McKeefery testified that in discussions she held with Rosenfeld, Rosenfeld did not indicate that he thought the decision to transfer him was in any way improper or unfair (TE 104-105).

During a meeting between McKeefery and Susan Friedman, another member of the unit, Friedman indicated to McKeefery that she thought the new position in Portfolio Assessment should have been posted and that the union might grieve the fact that this had not been done, but McKeefery indicated they had checked and did not believe posting was necessary because there was actually no new position available (TE 106-107; TF 14). President Pruitt testified that,

pursuant to a request from Rosenfeld, he made a thorough review of the decision to transfer Rosenfeld and concluded that the decision had been made carefully and logically, and that the College's needs would have to outweigh the individual's preference in this regard (TG 98-99).

Under the law Rosenfeld was eligible for reappointment to a multi-year contract as of June 30, 1984 (TA 72). The evaluation process for the multi-year contract ran from July 1, 1983 through September 30, 1984 [4/] (TC 59; TC 63; CP-12), beginning roughly at the time Rosenfeld was transferred from his position as Coordinator of Human Services to Coordinator of Portfolio Assessment (CP-12).

On August 25, 1983, Rosenfeld testified he met with his new supervisor Susan Simosko, to discuss her concern over the amount of time he was spending on union matters which was interfering with his work (TA 79-81). Simosko is director of Testing and Assessment at the College (TC 33). Rosenfeld felt his responsibilities as Association President necessitated this expenditure of time, that the time spent was not excessive, and that, in any event, he would endeavor to notify her in advance of these meetings (TA 79-81). Rosenfeld testified that Simosko also expressed concern to him about his attitude toward his new job as Coordinator of Portfolio Assessment, and Rosenfeld's response was that he would still wish that the decision to place him in that job be reviewed (TA 81). Rosenfeld testified that Simosko did not indicate at the August 1983 meeting that her concerns might result in his non-reappointment (TA 82).

4/ There is some inconsistency in the record as to whether the Simosko evaluation of Rosenfeld covered a three-month period or a four-month period; however, the former interpretation appears to be more consistent with other evidence contained in the record.

Simosko had pointed out to Rosenfeld by way of discussion, prior to their August 25th meeting, that by August 1983 it was important to start focusing on workshops and recordkeeping (TB 69). By late August 1983, Simosko had expressed her concern to Rosenfeld about his progress on the recordkeeping and workshop aspects of his job (TC 44). Rosenfeld responded he was too busy advising students to devote much time to recordkeeping and workshops (TC 45). Simosko responded that she and the other members of the department were available to help him (TC 46). On August 25th and thereafter, Simosko requested weekly statistics from Rosenfeld and Dennis Bakewicz (TC 51). She got them from Bakewicz but not from Rosenfeld until October 26th (TC 51; TC 68). At the end of August, Simosko requested that Rosenfeld complete three tasks prior to leaving for vacation; however, he did not comply with her request (TC 48). On August 30, 1983, Simosko wrote Rosenfeld a memo regarding portfolio development and assessment recordkeeping, asking for certain information by September 9th or 11th which, in fact, was not received during the entire month of September (TC 49-50). Throughout the summer, Simosko had received several complaints from students about Rosenfeld not being at his desk and not returning phone calls (TD 101). After asking Rosenfeld to let her (Simosko) know when he was going to be away from his desk, Rosenfeld continued to let her know when he would be away for a day or more, but failed to let her, or anyone else, know when he would be away from his desk for shorter periods of time, and where he would be (TC 50). On cross-examination Rosenfeld testified that Simosko had expressed concern to him over time spent out of the office and over time spent on union matters (TB

32). Rosenfeld further testified on cross that there were secretaries who could have been told of his whereabouts (TB 32;TB 34), but that, although he tried to notify someone, he did not always do so (TB 35). Rosenfeld testified on rebuttal that the time spent away from his desk was used for legitimate business purposes and that ten percent of it was used for union business; however, he also testified that he was available to be reached by phone, although he did not indicate how (TH 42-43).

Simosko requested several times, from Rosenfeld, materials to prepare for portfolio development workshops; however, those materials were not provided to her, and the tasks assigned in that regard were not performed (TC 51). On September 1, 1983 Simosko wrote a memo to Rosenfeld spelling out in detail all steps required to commence a workshop series beginning at the end of September, and soliciting the necessary materials (TC 52). Simosko did not get the material she requested in a timely manner and ended up doing some of the work herself (TC 53). Rosenfeld failed to follow Simosko's instructions to set up a meeting with a resource person at another college who was experienced in portfolio assessment policy and practices (TC 54).

Beginning September 1, 1983, Simosko began informing Vice President Ice (Vice President of Academic Affairs since July 1, 1983 (TF 37)), of the problems she was encountering with regard to Rosenfeld (TC 54-55). On September 13, and previously in discussions with Rosenfeld, Simosko requested, by memo of Rosenfeld by September 20th, statistics for Vice President Ice for the first quarterly report of 1983. These statistics were received piecemeal

and late (TC 55-56), probably at the end of October (TC 72). Simosko wrote a September 23rd memo to Rosenfeld requesting the previously requested workshop materials which she did not receive, but which Rosenfeld told her she would have eventually (TC 56-57). Simosko wrote a September 23rd memo to Rosenfeld requesting that he track down two lost portfolios, to which she received no response until nearly the end of October,1983. Rosenfeld's response was that he would do it but that he had not been responsible for misplacing them (TC 57). 5/

Simosko testified she first learned it would be necessary for her to evaluate Rosenfeld sometime during the second half of September, 1983 (TB 79; TC 58). CP-30, a September 1983 memo from Vice President Ice to Susan Simosko, indicated that Ice wanted to be able to make a consistent recommendation to President Pruitt regarding Arthur Rosenfeld (TC 60). Simosko interpreted that to mean that Ice wanted to know what her evaluation of Rosenfeld was, and that it had been done according to the new format and requirements which Ice wished consistently followed by all (TC 60-61; TE 10). Ice testified that his use of the word "consistent" was meant to ensure that all supervisors using the new format apply the same criteria to each staff member's evaluation (TF 52). Simosko and Rosenfeld met several times to establish the procedure for Rosenfeld's evaluation which was agreed to by both parties (TC 64-66). Neither Ice nor any other administrator told Simosko how she should rate Rosenfeld, nor did Ice tell Simosko how he would rate Rosenfeld (TC 61-62; TE 10).

5/ The record is unclear as to whether or not the task was ever performed and, if so, by whom.

Rosenfeld met with Simosko on October 6, 1983, whereupon Simosko gave Rosenfeld a draft of a negative evaluation of his work (TA 86). Rosenfeld expressed surprise over the evaluation (TA 86). Thereafter, Rosenfeld met twice with Simosko to discuss the draft evaluation (TA 86-88). Simosko explained how she had arrived at her decision. Problems were discussed and Rosenfeld felt that the air had been somewhat cleared (TA 88). On October 24, or 27, 1983, Rosenfeld was given the final version of his evaluation (TA 89; TC 67, TC 69), recommending against offering Rosenfeld a multi-year contract (TD 114-115).

In an October 6, 1983, memo from Simosko to the record with a blind carbon copy to Ice, Simosko indicated she had problems with Rosenfeld's, Bakewicz's and Maris Cutting's handling of "the file," "recordkeeping" and "workshops" (TC 62-63). Simosko testified that she began sending to Ice blind carbon copies, as opposed to regular carbon copies of memos to Rosenfeld, because at that point, at least, Ice was merely monitoring her supervision of her staff which did not involve individual members of her staff per se (TC 75). Simosko did not place copies of her blind carbon copies to Ice regarding Rosenfeld in Rosenfeld's personnel file because they were largely memos regarding Simosko's work as a supervisor, and she had not yet viewed Rosenfeld's problems in terms of a negative evaluation of his work (TB 83).

Simosko testified on cross-examination that she felt sure that repeated expressions of dissatisfaction to Rosenfeld over Rosenfeld's work were sufficient notice to him that the continuation of these problems could lead to a negative evaluation (TC 77-78). Rosenfeld testified that he received no prior indication that the

documents contained in CP-13 (documents in support of the Rosenfeld evaluation) were going to be put into his personnel file or form any basis for an adverse personnel action (TA 82). Simosko testified on cross-examination that she did not comply with the requirement to show Rosenfeld his evaluation, along with all relevant evaluations and materials upon which a recommendation was made <u>at least five working days prior to meeting with him</u>, because she was not aware of that particular provision; however, she indicated Rosenfeld had received the contents of this material within the time prescribed (TC 83-84). Simosko testified on re-cross that if she had confronted Rosenfeld and told him his negative work could result in his non-reappointment, his work might have improved, but that she did not believe in threats and she felt she had made her dissatisfaction with his work abundantly clear to him in other ways (TD 98).

In her own self-evaluation Simosko characterized the work of her office as beginning to run smoothly by October 15th with many of the problems resolved (TD 117); however, upon later redirect Simosko explained that she had meant that due to her extra efforts and also those of her secretarial staff, Joan Fernandez and Dennis Bakewicz, basic services had begun to be provided more consistently (TE 3-4). Simosko testified she believed Rosenfeld fully understood Simosko's ongoing criticisms of his work to be her way of expressing her dissatisfaction with it (TE 14-15). Simosko testified that although Rosenfeld disputed many of her criticisms of him in his written response to her evaluation, she believed all her criticisms of his work were well justified (TE 19-29).

Dean McKeefery testified that she also evaluated Rosenfeld for the period he was under her supervision (CP-14), but since he was no longer under her supervision, she did not think it appropriate to make a recommendation for reappointment (TE 143-144). [6/] Vice President Ice testified that Simosko's evaluation would have to determine Rosenfeld's receipt or not of a multi-year contract offer because Simosko's department was where Rosenfeld's future employment would be (TF 99).

In meeting with Vice President Ice to discuss Simosko's negative evaluation of him, Rosenfeld indicated that he felt June 1, through September 30,[7/] was too short a period of time to base a negative evaluation on, and Ice indicated he wished he had more time (TF 60-61). Maris Cutting testified that Susan Simosko told her that she (Simosko) did not want to do the evaluation of Rosenfeld, but was told she had to do it (TH 37).

Vice President Ice testified that although he did not send a written copy of his negative evaluation of Rosenfeld to President Pruitt, Rosenfeld knew what his recommendation was and in any event, once they realized that the proper procedure had not been followed, Pruitt withdrew any decision, the record was presented to Rosenfeld for Rosenfeld's response and Pruitt made his decision anew (TF 109-110). President Pruitt testified that once Ice told him he had not provided a copy to Rosenfeld he (Pruitt) withdrew his recommendation, invited Rosenfeld to review his (Rosen-

6/ Rosenfeld received a satisfactory evaluation from McKeefery for the first part of this evaluation year, as well as for previous years under her supervision.

7/ See footnote #4.

feld's) file to see that he was familiar with everything in it, and respond with supplemental materials if he wished to (TG 89-91). Thereafter Pruitt reviewed all and came to the same conclusion (TG 91). Pruitt testified that a grievance was filed over this error; however, the grievance was resolved amicably by the remedial actions he took and by making further concessions about the Rosenfeld matter (TG 89-91).

President Pruitt testified that following Ice's meeting with Rosenfeld in which Ice told Rosenfeld he (Ice) had reviewed all the relevant materials and would not recommend Rosenfeld for a multi-year contract, Ice received a phone call from the President of the State Council of the AFT who said Ice was "trying to take down one of our soldiers and that if you [Ice] attempt it, it will mean war [TG 80]."

Pruitt testified that he believes it imperative to advise an employee when his performance is unsatisfactory in order to give the employee an opportunity to correct his deficiencies, and upon reviewing Rosenfeld's personnel file, he found Rosenfeld was given ample notice of deficiencies by way of several memos from Simosko to Rosenfeld, and that Rosenfeld failed to correct the problems (TG 112-117). Pruitt testified that he did not believe Rosenfeld's problems were due to any lack of skills, or inadequate training, as Rosenfeld had been performing most of these same responsibilities satisfactorily in his previous capacity as a degree coordinator. Pruitt further testified that one of his strongest reasons for deciding not to offer Rosenfeld a multi-year contract was that Rosenfeld, in all his statements and responses, did not

acknowledge that his performance had been anything less than flawless, thus Pruitt felt there could be no prospect for improved performance (TG 119-120; TG 124). Pruitt testified that he did consider Rosenfeld's previous four years of satisfactory performance and in fact, that is what made his decision so difficult, but that his final decision was based, in large part, on Rosenfeld's failure to acknowledge any difficulties -- hence Pruitt's expectation of no change in Rosenfeld's future performance (TG 122-123; TG 124). Pruitt further testified that, had Rosenfeld acknowledged a problem and indicated a desire to improve, the final outcome probably would have been different (TG 125). Diane Gruenberg testified that Pruitt had also indicated this to her during a conversation they had at a February 3, 1984 meeting (following the filing of the charge in this matter) (TB 10-13).

Pruitt testified on redirect that despite Rosenfeld's suggestion that his work couldn't be inadequate when the volume of his office was greater than anticipated, he (Pruitt) felt this was not a proper analogy because the volume was generated by the Advisement Center, and in any event the volume from workshops, which Pruitt felt was more closely attributable to Rosenfeld's efforts, was considerably down (TH 8-10).

Vice President Ice testified that in reviewing Rosenfeld's self-evaluation he noted what he interpreted as Rosenfeld's commendable work on his doctoral dissertation research, and also in his capacity as AFT Local President, but felt Rosenfeld could have engaged in other activities as well (TI 4-7).

The parties stipulated that four individuals who filed grievances also had their contracts renewed, although only two

filed grievances earlier in time than the renewal date of their contracts (TI 12-15). Additionally, four staff members were re-appointed while holding Union positions (TI 16). The parties further stipulated that Rosenfeld was the only unit member yet denied a multi-year contract since the first multi-year contracts were awarded in 1977-78 (TI 16-17).

Susan Friedman

At a March 22, 1983, meeting of radiology technologists attended by Susan Friedman, a member of the unit who later took over Rosenfeld's function as Coordinator of Human Services, and Nancy Norville, the Director of Admissions, Friedman testified that she attempted to field questions and comments posed by two members of the audience who had had previous negative experiences at the College and were somewhat critical of the College (TD 7-10). Additionally, at an October 15, 1983, program planning workshop Friedman testified she told her supervisor, Dean McKeefery, that the students McKeefery sought to help were "all applied science and technology students," apparently implying that McKeefery was not capable of helping them (TD 11-12). Thereafter, according to Friedman, McKeefery met twice with Friedman concerning the March 22, 1983, incident (TD 13).

Nancy Norville, Director of Admissions, who accompanied Friedman to the March 22, 1983, meeting of radiology technologists testified that Friedman, in an attempt to deal with questions of a critical nature posed by certain members of the audience, indicated that the TECEP examination program is under review by the program's

director, that many times she advised the Director of Testing to revise the examination program but to her knowledge he did not know what he was doing, and that despite close proximity the staff at the College did not communicate with one another and each didn't know what the other was doing (TE 38). Norville testified that Friedman said, in response to another question, that the College's use of different people to evaluate credentials and documents led to further problems because of the individual differences in the people doing the evaluating (TE 40). Norville further testified that Friedman, while shaking her finger at the audience in a condescending manner, indicated that another problem of the advisement aspect is that the College continually changes its procedures and does not appear to know what procedures are best (TE 42). In response to yet another audience question, Norville testified that Friedman stated that in one program only 25 people had enrolled since the program's inception, implying that something must be wrong with the program (TE 44). Norville further testified that when she confronted Friedman with her concern over what she interpreted as Friedman's tactlessness and negativeness, and when she indicated that the occurrence necessitated placing something in Friedman's personnel file, Friedman seemed genuinely sorry, but never indicated that Norville had been inaccurate or unfair in her comments and criticisms (TE 49-50).

Dean McKeefery testified that, as Friedman's supervisor, she spoke to Friedman following the meeting of radiology technologists and indicated to Friedman how negative she felt Friedman's remarks were taken, and she suggested three ways in which Friedman might attempt to correct this recurring problem, and that Friedman

understood her comments and was receptive to them (TE 60-65). McKeefery testified that this was but one of several discussions she had had with Friedman about this problem and that Friedman had later indicated to McKeefery that she had implemented some of McKeefery's suggestions (TE 64-66). At a second meeting between McKeefery and Friedman, McKeefery indicated to Friedman that she had discussed the matter with Dr. Pruitt and that he wanted her (Friedman) to continue to be able to speak to the public but also that he wanted her to learn better communications skills (TE 67-68). Friedman again appeared sorry for what had happened and did not indicate that she felt McKeefery had been, in any way, in error (TE 69).

With regard to the October 15, 1983, incident, McKeefery testified that Friedman implied to the Applied Science and Technology students that McKeefery could not help them because McKeefery didn't know anything about the program (TE 71). At a November 2, 1983, meeting between Friedman and McKeefery, Friedman indicated to McKeefery that she was aware that she had said the wrong thing and that she should not have said it (TE 74). They then again discussed how Friedman could try to work this problem out (TE 74). Friedman seemed very receptive, and thereafter, Friedman indicated her thanks to McKeefery in a written memo prepared during the month of January, 1984 (TE 75). Subsequently, pursuant to her discussion with Friedman in November, 1983, and after advising Friedman that she would do so, McKeefery prepared a written summary of these two events for Friedman's personnel file (TE 76-77; CP-34). McKeefery testified that the time lapse from November 2, 1983 to January 23,

1984, when her memo was completed, was due to their mutual unavailability due to vacations, sickness, holidays, etc., and otherwise busy schedules (TE 78-79; TE 133). McKeefery testified that she reviewed the memo with Friedman, Friedman did not seem surprised, nor did Friedman indicate that McKeefery had been inaccurate or unfair (TE 80-81). However, McKeefery testified that Friedman probably did indicate that she would respond to the McKeefery memo (TE 82). McKeefery testified on cross-examination that although she probably saw the unfair practice charge prior to completing the revised draft of her memo for Friedman's personnel file, the revised draft was not substantively altered from the initial draft which was completed prior to the filing of the charge (TE 135).

On cross-examination Friedman testified that her tendency to make comments that were likely to be perceived negatively had been a long-term problem, the subject of an ongoing dialogue between Friedman and McKeefery and had affected previous evaluations (TD 31-32). Additionally, Friedman testified that she had been working together with McKeefery to try to reduce her tendency to make comments which were susceptible to negative interpretation (TD 32-33). Thereafter, Friedman testified on cross-examination that despite her allegation that McKeefery quoted her (Friedman's) statement to the Applied Science and Technology students incorrectly in her (McKeefery's) memo to Friedman's personnel file, and despite that Friedman had the opportunity to and did respond to the McKeefery memo, also for her personnel file, Friedman testified she never indicated that McKeefery's quote of her words had been in error because she (Friedman) considered the incident to be "trivial" (TD 33-35).

Following the McKeefery memo to Friedman's personnel file and Friedman's responding memo to McKeefery, Friedman requested to alter her schedule during the summer months to work four ten-hour days a week rather than five eight-hour days, in order to allow her more time to finish her doctoral dissertation (TD 13-15). Friedman had made the same request more than once previously and each time it had been granted (TD 15-16).

Vice President Ice testified that he denied Friedman's request for a four-day,ten-hour workweek from April 30, 1984, through September 30, 1984, to complete her dissertation because she had already been granted two such schedules as well as a two-month educational leave, she had come to the College with all her doctoral requirements completed except her dissertation and had had much time to complete it, and, lastly, the time period she requested to work four days instead of five would be a very busy one during which she would be needed five days a week (TF 64-65; TG 24-25).

On cross-examination Friedman testified that at the point she came to the College in 1979, she had completed all requirements for her doctorate except her dissertation, which she has since been working on, and has, in the past, received four-day summer schedules to enable her to complete her dissertation (TD 42-43). Friedman testified that she also requested and was granted a two-month paid educational leave in March and April of 1983 for degree completion purposes, and at the time estimated she would complete her degree by September, 1983 (TD 43-44; TD 46; R-3). Friedman testified on re-direct that her new duties in the Human Services area increased her workload and contributed to her failure to complete her disserta-

tion as estimated (TB 51).

At a March 16, 1984, meeting of the Academic Council, in response to an observation that the person in charge of the Human Services Degree Program (Friedman) has no background in Human Services, Friedman replied that she was the Human Services Coordinator and that she had a background in Applied Science but not in Human Services (TD 20). Pursuant to this exchange the Academic Council recommended that the area be reviewed (TD 22).

Dean McKeefery testified that she had met with Friedman once or twice a month for several months to assist her to understand her new responsibilities in the Human Services concentration occasioned by Rosenfeld's transfer to Portfolio Assessment, and indicated to Friedman that Rosenfeld would be available to assist her if necessary (TE 107-108; TF 15). Vice President Ice testified that he did not feel it necessary for the Coordinator of the Bachelor of Science Degree in Human Services to be a degree specialist in every area because technical questions could be referred to others -- what was necessary instead was the ability to coordinate all the various programs (TF 72-75). Ice testified credibly that he prepared a memo to Susan Friedman's personnel file based on her remarks to the Academic Council without knowing when Friedman would be testifying in this matter, and delivered it to her 12 days after meeting with her to discuss the matter (TF 80-81). Ice testified in response to Friedman's response to his March 28th memo to her that he did not agree that he was ordering her to withhold the facts from the Academic Council -- instead he was under the impression that the Academic Council was supposed to be

acting upon recommendations that had been delineated by the various bodies (TF 80-81).

Rosenfeld testified on rebuttal that he believed that the Academic Council was interested in looking into Friedman's allegation that the Human Services Degree Coordinator had no background in Human Services, but that Ice and Dr. Peck of the Academic Council felt it should be dealt with through the Academic Affairs Staff and; moreover, they felt it was not all that significant in light of the College's systems and procedures (TH 51-52).

Dennis Bakewicz testified that he was told by two colleagues, one of them David Oakley, that a member of the administration had seen fit to advise them of the amendment to the unfair practice charge dealing with Susan Friedman (TD 58-59). Oakley testified that he was given this information by Dennis Strechenwald in Strechenwald's capacity as Oakley's close personal friend, not in his capacity as a member of the College's administration distributing confidential information about union matters in an effort to undermine the union. Furthermore, Oakley never indicated the information came from the College administration (TG 54; TI 11).

Anti-Union Attitude Generally

Barbara Hoerner, an AFT staff representative, testified that upon filing a grievance against the College on behalf of all personnel who are evaluated by Dean McKeefery, President Pruitt insisted on meeting with the affected individuals instead of with the union on the affected individuals' behalf; however, Pruitt invited Hoerner to attend as well as the Local President, who was also one

of the individual grievants (TA 38-44). President Pruitt cited Art. VII,Section D, of the contract as providing the authority to meet informally with aggrieved individuals to try to resolve their disputes (TG 71). According to Horner's testimony, Pruitt indicated that all this was consistent with his open-door policy of discussing problems and grievances, and that he (Pruitt) wanted the employees to come to him before any grievances were filed (TA 45-47). Similarly, Hoerner testified that Vice President Ice stated he wanted the opportunity for resolution before things became adversarial (i.e. grievances); however, Ice testified that he indicated that staff were not required to come to him prior to filing grievances (TA 47; TF 44; TF 51).

President Pruitt testified that the purpose of the meeting held pursuant to Art. VII,Section D, was frustrated by Barbara Hoerner who spoke for the aggrieved individuals and refused to permit the administration to address them directly (TG 75-76). As a result Vice President Ice met with each of the aggrieved individuals solely to try to ascertain what was causing the alleged communication problem first identified by Diane Gruenberg (TG 76-77). Pruitt testified,without contradiction,that Ice did not address the grievance with any of the involved staff members during their individual meetings with him (Ice)(TG 76-77).

Pruitt testified that his reason for attempting to bring these aggrieved persons (see CP-16) together was partially to correct what he believed to be a breakdown in communications due to the fact that the grievance alleged that Dean McKeefery indicated nobody could receive an outstanding rating and he was in physical

possession of an outstanding rating just completed by Dean McKeefery (TG 132-133). Furthermore, Pruitt testified, without contradiction, that four of the six members of this class grievance had disavowed the grievance to him (TG 128-129).

McKeefery testified that the individual meetings were not held to discuss the grievances, but rather to explain ways in which the staff and administration could work together to accomplish their mutual objectives (TE 118-119). Vice President Ice also indicated that he was interested in discussing communications problems that the department had been experiencing, and not any individual grievances (TC 7; TF 46; TG 41-42).

Hoerner further testified that at a particular grievance hearing, Vice President Sheiring, Vice President of Finance Administration and Union Liason (TF 18-19), said to the Association President, "What the hell do you mean?" (TA 49). On cross-examination, however, it appeared that Vice President Sheiring's use of the word "hell" was said out of frustration during Sheiring's attempt to have Rosenfeld commit himself as to whether his self-evaluation was a final form or a draft form (TF 28). Additionally Sheiring testified that what he said in response to whether Rosenfeld's self-evaluation was in draft or final form was, "What the hell way is it, Arthur?" (TF 28).

According to testimony by Hoerner, at Rosenfeld's Step 2 grievance hearing, Vice President Sheiring said to Horner "I don't give a shit what you think." (TA 52). Sheiring's use of the expletive "shit," however, apparently was connected to Horner's repeated interruptions of him while he was speaking at Rosenfeld's grievance

hearing, and Horner's refusal to allow Sheiring to conduct the questioning (TA 55-56; TF 31). Finally, Hoerner testified that Sheiring apologized to her for the use of the expletive "shit" (TF 31).

According to Hoerner's testimony, Vice President Sheiring asked to be notified in advance of union meetings because too much time was being spent on union matters (TA 50-51).

Sheiring testified that he only asked to be notified of College-wide union meetings so that the College's various operations would not be disrupted (TF 24). Sheiring testified that he did not indicate that employees were spending too much time on union and other non-College business (TF 24). Sheiring denied having said Hoerner should notify him of any impending visits and, in fact, he testified she never has, either before or since (TF 26).

Rosenfeld testified on rebuttal that Vice President Sheiring indicated to Hoerner that if she were coming to the College for a scheduled meeting she did not have to get permission to talk to others while there, but if she were coming specifically to meet the staff, the College wanted to be notified in advance (TH 41).

According to testimony from Rosenfeld, Sheiring, in attempting to schedule hearings for each of the grievants under the supervision of Dean McKeefery, referred to "all these damn grievances, I wish we didn't have to handle them" (TA 72; TB 28). Sheiring denied having made this statement (TF 21). Rosenfeld testified on cross-examination, however, that Vice President Sheiring never refused to handle any grievances presented to him (TB 28).

Moreover, Sheiring testified, without contradiction, that although the previously mentioned grievances were filed September 19, 1983, the Step 1 hearings were scheduled for November 4th and another date around

the same time, despite that the contract provided for hearings within ten days, as a result of the mutual consent of the College and the Council to schedule them this way (TF 34-35).

LEGAL ANALYSIS

The legal analysis of the issues presented in this case can be divided into two major areas: (1) The non-reappointment of Arthur Rosenfeld and disciplinary actions taken against Susan Friedman in retaliation for protected activities; and (2) Acts committed and remarks made generally by President Pruitt, Vice President Ice and Vice President Sheiring forming the basis of activities and/or patterns of activity which were intended to undermine the Council.

Rosenfeld Discharge and Friedman Personnel Action

With regard to the first of the two major areas addressed by this charge and its subsequent amendment -- that of the Rosenfeld discharge and the Friedman personnel action, the Supreme Court's decision in *In re Bridgewater Tp.*, 95 *N.J.* 235 (1984), provides the controlling precedent. Thus, under *Bridgewater*, a charging party must establish that anti-union animus was a substantial or motivating factor in an employer's action. The Charging Party may meet this burden through direct evidence or through circumstantial evidence showing: (1) the employee has engaged in protected activity; (2) the employer had knowledge of such activity; and (3) the employer was hostile toward the protected activity. The latter showing can be inferred from such factors as timing,

disparate treatment, a deviation from previous methods for handling disciplinary matters, etc. Assuming the Charging Party establishes that the protected activity was a substantial or motivating factor in the employer's decision, the burden shifts to the employer to go forward and establish by a preponderance of the evidence that the action occurred for legitimate business reasons and not in retaliation for protected activity. Assuming the Charging Party shows that the protected activity substantially motivated the employer's action, but the employer shows the action would have occurred anyway in the ordinary course of business, no unfair practice has been committed and the complaint must be dismissed. See also, East Orange Public Library v. Taliaferro, 180 N.J. Super. 155 (App. Div. 1981); In re Black Horse Pike Regional Board of Education, P.E.R.C. No. 83-73, 9 NJPER 36 (¶14017 1982); In re Commercial Township Board of Education, P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd App. Div. A-1642-82T2 (12/8/83).

Initially, the undersigned determines that the College demonstrated adequate business justification for its decision to transfer Rosenfeld to the new Portfolio Assessment Department. Applying the elements of the Bridgewater analysis to the facts surrounding the Rosenfeld dismissal, the undersigned concludes that the record indicates that Rosenfeld, as Local President, had engaged in protected activity. Moreover, the undersigned finds that the College had ample knowledge of such protected activity. However, the undersigned does not find adequate support in the record for the conclusion that the College was hostile toward the protected activity. Although Rosenfeld had been employed at the

College since July, 1979, and, until the Simosko evaluation, had always received good evaluations, and although the Simosko evaluation only covered a period of three or four months, the record clearly indicates that Rosenfeld's continued employment, would he have been offered a multi-year contract, would be in the area of Portfolio Assessment, the area in which he received an unsatisfactory evaluation, and not as Coordinator of the Human Services Program, where he previously received satisfactory evaluations. Thus, although the timing and the length of the period leading to the eventual unsatisfactory evaluation might otherwise be considered somewhat suspect, the undersigned believes the above-stated factors to constitute an adequate and credible rationale for the employer's action, as opposed to evidence of a latent hostility toward Rosenfeld's protected activity.

However, assuming arguendo the Charging Party had made out an adequate showing of the College's hostility toward Rosenfeld's protected activities, the record is replete with credible evidence of adequate business justification for the Rosenfeld dismissal. Were he retained, Rosenfeld would have been entitled, by law, to a multi-year contract. His duties would have been in the area of Portfolio Assessment. He had already received an unsatisfactory evaluation which was based upon his work in that department. His unsatisfactory evaluation, although covering a period of only three to four months, was well documented in the record. Additionally, the record contained uncontroverted testimony that Rosenfeld never acknowledged that any problems existed with his work; thus, the College was hard pressed to find justification for offering him

continued employment absent some basis for believing that what they had evaluated as unsatisfactory performance would improve. The undersigned is not persuaded by testimony that Simosko was hostile toward time spent, by Rosenfeld, on union matters. Simosko specifically denied this, and there is no evidence whatsoever that she ever attempted to prevent Rosenfeld from engaging in union activities, or even that she would have wished to, except possibly to the extent that his job responsibilities were suffering for lack of time in which to complete them. Nor is the undersigned persuaded by evidence attempting to establish lack of proper notice and/or actual words indicating the contemplation of an unsatisfactory evaluation. On the contrary, the record establishes that Rosenfeld was confronted, by his supervisor, with nearly constant direction and comments of a somewhat critical nature which should have provided adequate notice that his performance was considered unsatisfactory. Furthermore, despite the brief evaluation period, had Rosenfeld any intention of attempting to modify his performance, such could have been adequately manifested, even in this relatively brief amount of time. Were such a showing to have been made by the Council, the College's burden would necessarily have increased, and assuming they had still pursued Rosenfeld's non-reappointment, their assertion of adequate business justification might have been viewed as being somewhat pretextual. However, such was not the case. Accordingly, the undersigned finds adequate business justification for the College's decision, by a preponderance of the evidence, and, hence, no unfair practice in the Rosenfeld dismissal.

With regard to the personnel actions taken against Susan Friedman, there is support in the record for the conclusion that

Friedman had been, at least, a moderately vocal member of the Council. Furthermore, certain members of the College's administration appeared to have knowledge of Friedman's protected activities, although this aspect of the Bridgewater test is not as well-documented in the record as in the case of Rosenfeld's union activities as Local President. However, again, the record, at most, contains a very sketchy showing of the College's hostility toward Friedman's protected activity. With regard to the reprimand placed in Friedman's personnel file involving two instances in which she had made what the College perceived to be derogatory remarks about the College, the Council attempted to establish suspicious timing as being indicative of the College's hostility toward Friedman's protected activity. Thus, the Council established that despite the fact that the underlying events occurred in March and October of 1983, the written reprimand was not placed in Friedman's personnel file until January, 1984, following the filing of the original charge in this matter in which it had been alleged that Friedman had been a target of the College's anti-union animus, and after which time the College allegedly knew that Friedman would be a witness in this matter.

However, assuming that the timing of the placement of the reprimand in Friedman's personnel file adequately demonstrated the College's hostility toward Friedman's protected activities, the record contains ample legitimate business reasons for the College's personnel action. Thus, the record indicates that Friedman had a fairly long history of making such disparaging remarks and comments, and she had been working together with her supervisor, Dean McKeefery, in a longstanding effort to reduce her tendency to make such remarks.

Whenever confronted by a supervisor for having made such remarks, Friedman always appeared, at least initially, to acknowledge having made them and to have regretted their negative interpretation despite that Friedman did not always acknowledge that such had been her intent. Occasionally Friedman had a slightly different recollection of the exact wording of the particular remarks; however, until the filing of the amendment to the instant charge, Friedman never indicated that she felt any actions taken by any of the College's administrators in this regard were, in any way, unfair or suspect. In fact, Friedman generally seemed to be grateful for the assistance she felt McKeefery and others were giving her in this area. Finally, the record indicates that although the occurrences forming the basis for the written reprimand actually took place in March and October of 1983, Friedman met with her supervisor, McKeefery, in November of 1983, shortly after the second incident. At that meeting McKeefery indicated to Friedman that she was preparing a memorandum for Friedman's personnel file involving both incidents. Thereafter, McKeefery testified without contradiction that she prepared a draft memorandum in November, prior to the filing of the charge in the instant matter; however, due to frequent holidays, vacations, illness, other business requiring McKeefery's attention, which events were not disputed, and also due to McKeefery's decision to prepare the memo without any secretarial assistance based on what she perceived to be its sensitivity, Friedman did not receive the final draft until January, 1984. Thus, there appears to be both ample logic to and by, a preponderance of the evidence, adequate business justification for the Friedman personnel action.

Finally, the Council alleges that the College's decision

not to grant Friedman's request to alter her work schedule during the summer months of 1984 to a four, ten-hour day schedule, rather than a five, eight-hour day schedule, was in retaliation for Friedman's protected activity. Again, however, the record contains adequate evidence of a valid business justification for the College's decision. It was shown that Friedman's request, which was made in order to complete her doctoral dissertation, had already been granted twice previously, she had also previously been granted a two-month educational leave for this purpose, she had come to the College with all requirements completed except her dissertation and had already had a great deal of time in which to complete it, and lastly, the precise time period she requested to work a four-day schedule as opposed to a five-day schedule was expected to be a very busy one for the College and the administration felt she would be needed five days a week during that period. Thus, the undersigned finds no actionable violation in either the personnel action taken against Friedman or the decision not to grant her request for a four-day schedule during the summer of 1984.

In its amendment involving the Friedman personnel action, the Council alleges a violation of §5.4(a)(4) as well as (a)(1) and (a)(3) of the Act. Subsection (a)(4) prohibits public employers, their representatives or agents from "discharging or otherwise discriminating against any employee because he has signed and filed an affidavit, petition or complaint or given any information or testimony under this Act." In In re Randolph Township Board of Education, P.E.R.C. No. 82-119, 8 NJPER 365 (¶13167 1982), aff'd App. Div. No. A-5077-81T2 (6/24/83), the Commission found a subsection 5.4(a)(4) violation in a case where an employer demoted an

employee based solely upon the filing of a charge by the employee's collective negotiations representative. However, in Randolph, supra, the employer did not attempt to assert concurrent business justification for its action. Here, having made, by a preponderance of the evidence, a showing of a business justification for its personnel action,both with regard to Rosenfeld and Friedman, under either Bridgewater, supra, or Randolph, supra, it would then be incumbent upon the charging party to demonstrate that the asserted business justification was pretextual in nature. The undersigned does not believe that such a showing was adequately made. Thus, under both Bridgewater, supra, and Randolph, supra, the undersigned finds no violation of the Act.

Activities and Remarks Generally--Individually and/or Collectively

The record indicates that there are basically two areas which fall within this section: (1) President Pruitt's decision and Vice President Ice's participation in the holding of meetings of all personnel under the supervision and control of Dean McKeefery and (2) Vice President Sheiring's remarks and comments at grievance proceedings.

(1) With regard to the first of the above two areas, the Council appears to be alleging that the College's decision to meet with the individuals under Dean McKeefery's supervision and control was actually the College's veiled attempt to undermine the workings of the Council's grievance procedure. Since the PERC Act was modeled after the Labor Management Relations Act, ("LMRA"), 29 U.S.C.A. §§141-187, the latter Act can provide appropriate guidance in determining questions not otherwise clearly settled within our

own body of law. In re Bridgewater Tp, 95 N.J. supra, at 240. Accordingly, Section 9(a) of the Labor Management Relations Act provides:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment. [emphasis added]

Similarly, N.J.S.A. 34:13A-5.3 provides in pertinent part:

> Nothing herein shall be construed to prevent any official from meeting with an employee organization for the purpose of hearing the views and requests of its members in such units so long as (a) the majority representative is informed of the meeting; (b) any changes or modifications in terms and conditions of employment are made only through negotiation with the majority representative; and (c) a minority organization shall not present or process grievances.

Although the language quoted from the PERC Act has particular applicability in a situation involving two or more competing unions, the right of an individual generally to have his or her grievances redressed is explicit under the New Jersey Constitution, Article 1, Paragraph 18. Additionally, since the PERC Act is modeled after the LMRA, the latter of which specifically addresses the right of individuals to present grievances, and in light of the basic constitutional guarantee, it can reasonably be inferred that the use

of the term employee organization in §5.3, referring ostensibly to a minority employee organization, can be interpreted to encompass individuals acting in their own behalf. Accord, Red Bank Regional Education Association v. Red Bank Regional High School Board of Education, 78 N.J. 122, 135-136 (1978). Thus, the language from §5.3 also bears significantly on the facts in the instant matter.

The record contains evidence indicating an attempt to encourage better communication between the College and its employees. There was credible testimony presented by both Vice President Ice and Dean McKeefery that the primary purpose of the group meeting and subsequent individual meetings was to improve, what at least one staff member had characterized as poor communication between staff and administration, and not necessarily an attempt to adjust or even discuss the grievance per se. 8/ Additionally, President Pruitt testified that, pursuant to Art. VII, Section D of the contract, he was empowered to meet to attempt to resolve grievances prior to their formal processing. Art. VII, Section D (see J-1 and J-2) provides in pertinent part:

> Where the nature of the grievance suggests that it would be appropriate, the grievant may be required by the President or his or her designee to meet any involved official of the College in an effort to resolve the grievances informally.

Thus, President Pruitt's decision appears to have violated neither the contract, the PERC act, nor the dictates of the LMRA by which we are guided. With regard to the LMRA there has been no allegation that any adjustment or proposed adjust-

8/ The undersigned notes that President Pruitt's testimony partially contradicts that of Ice and McKeefery insofar as Pruitt testified that one of the purposes of the meeting was to resolve the issues leading up to the filing of the grievance; however, in light of relevant legal precedents and applicable contract provisions, the undersigned does not find this apparent contradiction to be controlling.

ment would have been inconsistent with the terms of the applicable collective negotiations agreement. The record indicates that both the Local President and Barbara Hoerner, an AFT Staff Representative, were provided the opportunity to be present. Similarly, with regard to N.J.S.A. 34:13A-5.3, it is clear that representatives of the majority representative were informed of the group meeting, [9/] that no changes or modifications of any kind were made absent negotiation with the majority representative, and that no minority organization or individuals sought to process grievances in competition with the majority representative. Thus, the undersigned finds no actionable violation arising out of the meetings described above.

(2) With regard to the alleged remarks of Vice President Sheiring at grievance proceedings, two of the Association's witnesses testified that Sheiring used profanity on two occasions, once in a mild form and once again in a more objectionable form; however, there was also credible testimony in the record that both instances were, at least, partially provoked, both by representatives of the Council and by the circumstances surrounding the events. Moreover, there is some contradiction in the testimony as to exactly what was said, and there was additional testimony that Sheiring later apologized for the use of one of the remarks viewed as objectionable by the Council. However, assuming the remarks were made in accordance with the recollection of the Council's witness, provocation and apologies notwithstanding, in In re

9/ The record is unclear as to whether representatives of the majority representative were informed of the subsequent meetings; however, no finding on this second issue is necessary to the disposition herein, as the testimony indicates,without contradiction, that the grievance was not proposed as a topic for the individual meetings, nor was it discussed.

Ridgefield Park Board of Education, P.E.R.C. No. 84-152, 10 NJPER 437 (¶15195 1984), the Commission held absent specific threats, changes in terms and conditions of employment, or an intent to undermine the exclusive majority representative, heated remarks made between employers and employees in their capacity as representatives of management and labor, as opposed to the employer-employee relationship, constitute permissible criticism and discussion. See also In re Black Horse Pike Regional Board of Education, P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981). The undersigned finds that the criteria enumerated in Ridgefield Park, supra, and the circumstances under which they are meant to apply, are applicable here. Thus, the undersigned does not find Sheiring's remarks to be actionable in the context in which they were made.

Additionally, Sheiring is alleged to have referred derogatorily to grievances filed by Association members, and there was testimony indicating that he expressed his desire not to have to handle them; however, Sheiring himself denied making this remark, and in light of his testimony, and other related testimony and credibility determinations, I credit Sheiring's testimony in this regard. Moreover, the record indicates, without contradicition, that Sheiring did, in fact, fully process all grievances presented to him. Thus, again under a Ridgefield Park analysis, the undersigned does not believe these alleged remarks by Sheiring rise to the level of a violation of the Act.

Accordingly, the undersigned recommends that the allegations that the College violated subsections (a)(1), (a)(3) and (a)(4) of the Act be dismissed.

RECOMMENDED ORDER

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

Marc F. Stuart
Hearing Examiner

Dated: November 2, 1984
Trenton, New Jersey