P.E.R.C. NO. 77-36

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOARD OF EDUCATION OF THE BOROUGH
OF HADDONFIELD, CAMDEN COUNTY,
Respondent,

-and-

Docket No. CO-71

HADDONFIELD SUPPORTIVE STAFF
ASSOCIATION, a/w NEW JERSEY EDUCATION
ASSOCIATION,
Charging Party.

SYNOPSIS

In the absence of exceptions filed by either party, the Commission adopts the findings of fact and conclusions of law of the Hearing Examiner's Recommended Report and Decision in an unfair practice proceeding. The Supportive Staff Association alleged that the Board of Education had engaged in unfair practices by discriminatorily discharging William W. Smith, a custodial employee employed by the Board, because of that individual's exercise of his statutory right to help form, join and assist an employee organization. The Hearing Examiner found, and the Commission affirms, that the Association had not established by a preponderance of the evidence that any agent or representative of the Board had actual or constructive knowledge of organizational activities engaged in by Smith. The Hearing Examiner further found, and the Commission affirms, assuming arguendo that the Board did have knowledge of Smith's protected activities, that the Association had not demonstrated that the Board was either motivated in whole or in part by anti-union animus in discharging Smith. Therefore, the Complaint must be dismissed.

In this decision the Commission chose to adopt a two-fold standard to be applied to charges of employer discriminatory conduct in violation of N.J.S.A. 34:13A-5.4(a)(3). The Commission stated that a violation of N.J.S.A. 34:13A-5.4(a)(3) should be found if it is determined that a public employer's discriminatory acts were motivated in whole or in part by a desire to encourage or discourage an employee in the exercise of rights guaranteed by the Act or had the effect of so encouraging or discouraging employees in the exercise of those rights. The Commission further eluciated that the application of this two-fold standard will normally involve a preliminary showing by a Charging Party of two essential elements; specifically, there must be proof that the employee was exercising rights guaranteed to him by the Act, or that the employer believed he was exercising such rights, and proof that the public employer had knowledge, either actual or implied, of such activity.

P.E.R.C. NO. 77-36

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOARD OF EDUCATION OF THE BOROUGH OF HADDONFIELD, CAMDEN COUNTY,

Respondent,

-and-

Docket No. CO-71

HADDONFIELD SUPPORTIVE STAFF ASSOCIATION, a/w NEW JERSEY EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Charging Party, Goldberg, Simon and Selikoff, Esqs. (Mr. Joel S. Selikoff, of Counsel and Mr. Paul N. Gilbert, On the Brief)

For the Respondent, Capehart and Scatchard, Esqs. (Mr. Alan R. Schmoll, of Counsel and Mr. Bruce L. Harrison, On the Brief)

DECISION AND ORDER

An Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") on March 31, 1975, by the Haddonfield Supportive Staff Association, a/w New Jersey Education Association (the "Association"), and said Charge was amended by the filing of an Amended Charge on May 23, 1975. The Charge alleged that the Board of Education of the Borough of Haddonfield (the "Board") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 *et seq*. (the "Act"), in that the Board had discriminatorily discharged William W. Smith, a custodian employed by the Board because of Smith's exercise of his right to help form, join and assist an employee organization. It appearing that the allegations of this Charge, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on June 13, 1975.

Pursuant to the Complaint and Notice of Hearing, a plenary hearing was held before Stephen B. Hunter, Hearing Examiner of the Public Employment Relations Commission on July 21, 1975, September 12, 1975, October 30, 1975, November 24, 1975, and January 6, 1976, at which all parties were given an opportunity to present evidence, to examine and cross-examine witnesses, and to argue orally. Following the receipt of briefs by both parties[1/] and an analysis of the record, the Hearing Examiner issued his Recommended Report and Decision on December 10, 1976, which Report included findings of facts and conclusions of law and a proposed order. The original of the Report was filed with the Commission and copies were served upon all parties. A copy is attached hereto and made a part hereof.

Neither party has filed exceptions to the Hearing Examiner's Recommended Report and Decision. See N.J.A.C. 19:14-7.2.

Upon careful consideration of the entire record herein, the Commission adopts the findings of fact and conclusions of law rendered by the Hearing Examiner substantially for the reasons cited by him. Specifically, we find that, on the facts of this case, the Association has not met its burden of proof by a prepon-

1/ All briefs were filed by June 24, 1976.

derance of the evidence. N.J.S.A. 34:13A-5.4(c) and N.J.A.C. 19:14-6.8.

In reaching this conclusion we wish to specify the standard to be applied to charges of employer discriminatory conduct in violation of N.J.S.A. 34:13A-5.4(a)(3). There are four basic tests that have been put forth in various jurisdictions. Briefly, they may be summarized as follows 1) The "but for" test - The employer's action would not have occured but for the employee's exercise of his protected rights; 2) The "primary motivation" test - The public employer's action was primarily motivated by anti-union animus; 3) The "one of the motivating factors" test - The Respondent's actions were motivated in part by statutorily protected union activities engaged in by the alleged discriminatee, even if other motivating factors exist; 4) The "inherently destructive of employee rights" test - The employer's conduct is so inherently destructive of employee rights that the existence of an anti-union motivation as one of the factors in the decision may be presumed and need not be proved.[2/]

We have chosen to adopt a two-fold standard combining the latter two tests. A violation of N.J.S.A. 34:13A-5.4(a)(3) should be found if it is determined that a public employer's discriminatory acts were motivated in whole or in part by a desire to encourage or discourage an employee in the exercise of rights guaranteed by the Act or had the effect of so encouraging or discouraging employees in the exercise of those rights.

2/ These tests are more fully delineated in Stephen B. Hunter's Hearing Examiner's Recommended Report and Decision in City of Hackensack, H.E. No. 77-1, 2 NJPER ___ (1976).

Application of this two-fold standard will normally involve a preliminary showing by the Charging Party of two essential elements. There must be proof that the employee was exercising the rights guaranteed to him by the Act, or that the employer believed said employee was exercising such rights, and proof that the public employer had knowledge, either actual or implied, of such activity.

It is believed by the Commission that adoption of the above standard will best effectuate the Declaration of Policy section of the Act, incorporated in N.J.S.A. 34:13A-2, and the protected rights guaranteed by N.J.S.A. 34:13A-5.3.[3/] Discriminatory acts by employers, even if only partly motivated by an employee's union activities, or acts that would discourage exercise of such rights, would clearly tend to frustrate the express intent of the Act.

Furthermore, the two-fold test upholds the employer's legitimate prerogative to discharge, suspend or refuse to promote employees for reasons unrelated to union activities. The employer may take such action for any cause or no cause at all as long as it is not retaliatory. It is the Charging Party that must prove its case by a preponderance of the evidence.[4/]

3/ "Except as hereinafter provided, public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity..."

4/ See N.J.A.C. 19:14-6.8.

ORDER

For the reasons hereinbefore set forth, the Commission hereby adopts the Hearing Examiner's recommended Order and the instant Complaint is hereby dismissed in its entirety.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Forst and Parcells voted for this decision.
Commissioners Hipp and Hurwitz abstained.
Commissioner Hartnett was not present.

DATED: Trenton, New Jersey
January 26, 1977
ISSUED: January 27, 1977

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

In the Matter of

BOARD OF EDUCATION OF BOROUGH OF
HADDONFIELD, CAMDEN COUNTY,

Respondent,

-and-

Docket No. CO-71

HADDONFIELD SUPPORTIVE STAFF ASSOCIATION,
a/w NEW JERSEY EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Haddonfield Supportive Staff Association brought this action alleging that the Board of Education of the Borough of Haddonfield had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act by discriminatorily discharging William W. Smith, a custodian employed by the Board, because of Smith's exercise of his statutory right to form, join and assist any employee organization without fear of penalty or reprisal. The Hearing Examiner found in his Recommended Report and Decision that the Association had not established by a preponderance of the evidence that any agent or representative of the Board had actual or constructive knowledge of organizational activities engaged in by Smith. The Hearing Examiner further found, assuming arguendo that the Board did have knowledge of Smith's protected activities, that the Association had not demonstrated that the Board was either motivated in whole or in part by anti-union animus in discharging Smith. Accordingly, the Hearing Examiner recommended that the complaint be dismissed.

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 who 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 conclusions of law.

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

In the Matter of

BOARD OF EDUCATION OF BOROUGH OF
HADDONFIELD, CAMDEN COUNTY,

Respondent,

-and-

Docket No. CO-71

HADDONFIELD SUPPORTIVE STAFF ASSOCIATION,
a/w NEW JERSEY EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Charging Party
Goldberg, Simon and Selikoff, Esqs.
(Mr. Joel S. Selikoff, of Counsel and
Paul N. Gilbert, On the Brief)

For the Respondent
Capehart and Scatchard, Esqs.
(Mr. Alan R. Schmoll, of Counsel and
On the Brief and Bruce L. Harrison,
On the Brief)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") by the Haddonfield Supportive Staff Association, a/w New Jersey Education Association (the "Association") on March 31, 1975 and said charge was amended by the filing of an Amended Charge (the "Charge") on May 23, 1975. The Association alleged that the Board of Education of Borough of Haddonfield, Camden County (the "Board") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"), in that the Board had discriminatorily discharged William W. Smith, a custodian employed by the Board for approximately eleven and one-half years, because of Smith's exercise of his "right, freely and without fear of reprisal, to form, join and assist any employee organization ...";[1/] in this case the Association, the certified majority representative of all custodial and maintenance personnel

1/ N.J.S.A. 34:13A-5.3.

employed by the Board.[2/]

It appearing that the allegations of this charge, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on June 13, 1975, along with an Order Consolidating Cases that consolidated this charge with another Unfair Practice Charge /Docket No. CO-19/ that had been filed earlier by the Association against the Board. On July 16, 1975 the instant charge was severed, by formal order, from the Docket No. CO-19 matter in order to best effectuate the purposes of the Act and to accommodate the desires of the respective parties.[3/]

Pursuant to the Complaint and Notice of Hearing, hearings were held on July 21, 1975, September 12, 1975, October 30, 1975, November 24, 1975, and January 6, 1976 in Trenton, New Jersey at which time all parties were given an opportunity to examine witnesses, to present evidence and to argue orally. Briefs subsequently were submitted by all the parties to this instant proceeding, all of which were filed by June 24, 1976. Upon the entire record in this proceeding, the Hearing Examiner finds:

1. The Board of Education of Borough of Haddonfield, Camden County is a Public Employer within the meaning of the New Jersey Employer-Employee Relations Act, as amended, and is subject to its provisions.

2/ More specifically, the Association asserted that the actions of the Board violated N.J.S.A. 34:13A-5.4(a)(1) and (3).

These subsections prohibit employees, their representatives or agents from "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act... (and) (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

3/ In the Docket No. CO-19 matter the Association had alleged that the Board had discriminatorily discharged Wallace Hyman, a custodian employed by the Board, because of his membership in and activities on behalf of the Association. This matter was amicably resolved by the parties in accordance with a "Settlement Agreement" executed by representatives of the Board and the Association. Accordingly, the Association's request to withdraw the Docket No. CO-19 matter was approved on July 28, 1976 and the complaint which was issued thereon was dismissed.

2. The Haddonfield Supportive Staff Association, a/w New Jersey Education Association is an employee representative within the meaning of the New Jersey Employer-Employee Relations Act, as amended, and is subject to its provisions.

3. An Unfair Practice Charge having been filed with the Commission alleging that the Board of Education of Borough of Haddonfield, Camden County has engaged or is engaging in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, a question concerning alleged violations of the Act exists and this matter is appropriately before the Commission for determination.

MAIN ISSUE

Whether the Board's action in discharging William Smith was violative of N.J.S.A. 34:13A-5.4(a)(1) and (3)? More specifically, was the Board's decision to discharge Smith motivated by anti-union animus or based upon sound management judgment that Smith's poor work performance mandated his dismissal?

POSITION OF THE ASSOCIATION

The Association maintained that the Board's decision to terminate the employment of William Smith was not made on the basis of any valid business or economic purpose. The Association contended that the Board's decision was motivated by the desire to discourage union organizational activities by Smith and his fellow supportive staff personnel and as such was a discriminatory act proscribed by N.J.S.A. 34:13A-5.4(a)(1) and (3).

The Association, in support of its contentions, argued that testimony adduced at the hearings in this instant matter clearly showed that Smith was fired for the exercise of his right to freely form, join and assist an employee organization /the Association/ without fearing penalty or reprisal.

More specifically, the Association maintained that supervisory and managerial employees of the Board had actual knowledge of Smith's organizational activities on behalf of the Association, e.g. his distribution of authorization and designation cards to other custodial and maintenance employees and his later collection of said cards. In the alternative, the Association submitted that the small size of the custodial and maintenance unit in and of itself mandated the inference that the Board was aware of the identity of Association activists including Smith.

The Association proffered evidence that it contended established the anti-union animus of the Board with respect to the Association. The Association particularly emphasized that it was essentially uncontroverted that at least three custodial employees [including Smith], who were active in first organizing the negotiating unit, had their employment terminated by the Board, shortly before the Association filed its Petition for Certification of a Public Employee Representative with the Commission on March 4, 1975. It was pointed out that William Smith received his formal notice that his employment contract as custodian for the Board was terminated, effective March 7, 1975, on February 21, 1975, only ten days after the Association had requested, by letter, that the Board voluntarily recognize it as the majority representative for custodial and maintenance personnel. William Smith's name was included on a list of employees who had signed authorization and designation cards, on behalf of the Association, that was appended to the Association's letter requesting recognition.

The Association asserted that the Board's professed reason for terminating Smith in the middle of the school year [i.e. his poor work performance] was purely pretextual. In this regard the Association in a post hearing brief stated the following:

> A purported two year history of poor work does not suddenly require a termination three months before one's employment contract is to lapse, unless an emergent reason develops to compel an employer to release the individual prior to the end of the contract period... Why then, the notice of termination in late February? One need only refer back to Respondent's receipt of the second demand for recognition of February 11, 1975 and to the fact that if Smith were allowed to work until his contract expired, he would be able to vote in the election Respondent knew would be held before June 30, 1975. More importantly, his continued presence during an election campaign would surely strengthen the chances of an Association victory. Termination of the last of the three Association organizers [Smith] would effectively put fear and doubt into every remaining member of the supportive staff; could not the same thing happen to them if they professed support for the Association? There can be no other reasonable analysis of the evidence herein.

The Association submitted in part that the record established that Smith's immediate supervisor, Charles Golden, believed that Smith had done his work in a satisfactory manner at all times under his direction. The Association also emphasized that Smith had been employed by the Board for over eleven years, indicating that his work performance in the past had been satisfactory. The Association asserted that the above two facts and other considerations established the pretextual nature of the Board's announced reason for discharging Smith.

In reference to the standards to be applied by the Commission in dealing generally with "(a)(3)" discrimination cases, the Association proposed the following test:

> /A7n employer's act in discriminating with regard to hire or tenure of employment or any term or condition of employment would be violative of N.J.S.A. 34:13A-5.4 (a)(3) if (1) it was intended or motivated in whole or in part by a desire to encourage or discourage employees in the exercise of the right freely and without penalty or reprisal to join or assist any employee organization; or (2) had the effect of so encouraging or discouraging employees in the exercise of those rights.

The Association stated, however, that the application of even the most stringent standard to the instant matter /a primary motivation standard7 would mandate the finding that the Board had violated the Act by discharging Smith.

The Charging Party requested that the Commission issue an Order:

(1) Finding and Declaring that the Board had violated N.J.S.A. 34:13A-5.4(a)(1) and (3), thereby committing an Unfair Labor Practice by terminating William Smith;

(2) Directing the Board to reinstate William Smith to the position he last held on March 5, 1975, or one substantially similar thereto;

(3) Directing the Board to furnish William Smith with all requisite back pay from the date of discharge to the date of reinstatement, plus interest;

(4) For such other relief as is deemed necessary and appropriate.

POSITION OF THE BOARD

The Board asserted that the only reason for Smith's discharge was his consistently poor work performance that was documented by record testimony and exhibits that demonstrated that Smith's performance warranted dismissal.

More specifically, the Board submitted that the record established that Smith had been considered to be an unsatisfactory employee by certain school administrators, teachers, maintenance supervisors and students at least since 1969, and had been advised on numerous occasions in the past that his work needed considerable improvement. The Board further maintained that Smith had been specifically warned at a meeting held on January 9, 1975 that he would be dismissed if his work did not become satisfactory. The Board stated that Smith was thereafter terminated only after subsequent inspections of his work area showed that Smith's work, although slightly improved, was still totally unsatisfactory.

The Board admitted that there was no dispute that Smith was one of the custodians that was active as an NJEA organizer; however the Board contended that there was virtually no knowledge of this fact by supervisory personnel. The Board emphasized that the record established that only Charles Golden testified that he had personal knowledge of Smith's organizing activities. The Board submitted that the record was clear that Golden did not discuss Smith's union activities with any of the supervisory personnel or administrators who played an effective role in Smith's discharge. The Board pointed out that Golden himself did not recommend the discharge of Smith. The Board also argued that, contrary to the Charging Party's contentions, the NLRB's "small plant rule" was not applicable to the instant matter, in part because there was no proof proffered that a coordinated campaign was being conducted by the Board to learn the identity of the NJEA adherents among its employees.

With regard to the Charging Party's assertions that the Board's discharge of Smith was motivated by specific anti-union animus, the Board maintained that the record testimony revealed that Smith himself did not believe that his discharge was tied to his NJEA activities. The Board stated it had expressed no objection whatsoever to the NJEA representing the custodial staff; had never campaigned against the NJEA although the Board had earlier campaigned against the C.W.A. [the Communications Workers of America] when that organization attempted to organize the custodians; had never threatened any custodians on account of their activities on behalf of the NJEA; and had never directed anyone to learn the identity of those custodians active in the

NJEA organizing effort.

The Board concluded its post-hearing brief by asserting that, regardless of the standards to be applied by the Commission in its consideration of "(a)(3)" discrimination cases generally, no unfair practices had been proven by the Charging Party in the instant matter, inasmuch as no anti-union motivation had been established by the Charging Party. The Board therefore requested that the Complaint in this matter be dismissed.

DISCUSSION AND ANALYSIS

In the absence of any Commission decisions that had defined the standards by which to analyze allegations of an employer's discriminatory conduct in violation of N.J.S.A. 34:13A-5.4(a)(3), the undersigned in a recent decision,[4/] after analyzing apposite federal private sector and public sector judicial and administrative decisions, concluded that a two-fold standard should be applied to cases alleging violations of N.J.S.A. 34:13A-5.4(a)(3), in order to best effectuate the purposes of the Act. The undersigned submitted that a violation of §5.4(a)(3) should be found if it is determined that a public employer's discrimination "in regard to hire or tenure of employment or any term and condition of employment" (1) was motivated in whole or in part by a desire to encourage or discourage an employee in the exercise of the rights guaranteed to him by the Act that include "the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity"[5/] or (2) had the attendant effect of so encouraging or discouraging employees in the exercise of those protected rights.

The undersigned determined that it was axiomatic that, contrary to the mandate of the "Declaration of Policy" section of the Act,[6/] labor disputes would not normally be prevented or promptly settled nor would employer and employee strife be lessened if employers were permitted to discriminate against an individual for reason of that employee's exercise of a fundamental right protected under the Act. Even if an employer's discriminatory act was motivated

4/ In re City of Hackensack, H.E. No. 77-1, 2 NJPER 232 (1976).

5/ See N.J.S.A. 34:13A-5.3.

6/ See N.J.S.A. 34:13A-2.

only in part by an employee's union activities, the fact that a public employer relied upon this rationale to any extent, or that the attendant effect of the employer's actions would be to encourage or discourage the exercise of protected rights, would be violative of the clear mandate of the Act. The undersigned also submitted that this two-fold "motivation" and "effect" test also accommodated the legitimate prerogatives of a public employer to discharge, suspend or to otherwise discipline its employees, for example, for any cause or no cause at all, so long as these actions were not in retaliation for union activities or support, subject, of course, to compliance with any relevant contractual provisions negotiated between the parties.[7/]

An examination of the merits of the specific charge filed by the Association on behalf of William Smith, in light of the standards hereinbefore enunciated by which to analyze the allegations of the Board's discriminatory conduct in violation of N.J.S.A. 34:13A-5.4(a)(3), is now in order.

1. <u>SMITH'S PROTECTED UNION ACTIVITIES</u>

William Smith was employed as a custodian by the Board from the latter part of 1963 until March 6, 1975. The Association was certified by the Commission on May 6, 1975 as the exclusive representative of all non-supervisory custodial and maintenance personnel. The Association had filed its Petition for Certification with the Commission on March 4, 1975[8/] and the election that resulted in the certification of the Association was held on April 28, 1975.

The record reflects that on or about March 4, 1974 Smith and another custodial employee, Wallace Hyman, met with James George, an NJEA UniServ Field Representative, in his Moorestown, New Jersey office to discuss the possibility of receiving NJEA assistance in organizing the custodial and maintenance employees employed by the Board as an NJEA affiliate. George was initially referred to Wallace Hyman by a representative of the local teacher's association when George

7/ For a more detailed analysis of "the applicable law" in §5.4(a)(3) discrimination cases see <u>In re City of Hackensack</u>, <u>supra</u>, note 4, H.E. No. 77-1 at pages 14-19, 2 NJPER 232 at pages 236-237.

8/ This Petition for Certification was perfected on March 11, 1975 when an adequate showing of interest was submitted to the Commission agent processing that representation case.

asked whether he could be put in contact "with those people who seemed to be the powers within the custodial group."9/ Although Smith provided the transportation to George's NJEA office in Moorestown the record does not establish that George had had any contact with Smith prior to the March 4, 1974 meeting.

At the March 4, 1974 meeting George stated that organizational assistance would be forthcoming and then supplied Hyman and Smith with membership forms and authorization and designation cards. George instructed these men to first get other custodial and maintenance employees in the unit to sign the authorization and designation cards (hereinafter A and D cards) and forward same to the NJEA UniServ office in Moorestown. George also told Hyman and Smith to simply hold onto the membership forms when they were executed by the employees.

The Board did not dispute that Smith was thereafter involved in the distribution of certain A & D cards and membership forms to other custodial and maintenance employees for a period of several weeks after the March 4, 1974 meeting with George. The record establishes that Wallace Hyman and Smith would distribute these cards and forms to day shift employees that worked in the four schools within the school district an hour or so before Hyman and Smith began working their 3:00 p.m. to 11:00 p.m. custodial shift. At times Hyman and Smith would travel to the other schools in the district during the evening, while they were on their "lunch break" at 7:00 p.m., in order to distribute their organizational materials to custodial employees that worked on the night shift.10/

Hyman testified that Smith's car was used whenever Smith and he traveled to other schools during the course of their organizational activities. Hyman further testified that Smith and he would talk to the employees within the proposed unit about the organizational campaign and the advantages of affiliation with the NJEA.11/

9/ George testified that he had first found out that the Haddonfield custodial and maintenance employees were to vote in a representation election on February 28, 1974, to determine whether those employees wished to be represented for purposes of collective negotiations by the Communications Workers of America, AFL-CIO /C.W.A./, the day before that election.

George spoke to Wallace Hyman the day before the election involving the C.W.A. and then placed another call to Hyman after he had found out that the C.W.A. had lost that representation election. George arranged the March 4, 1974 meeting with Hyman to discuss organizing the custodial unit under the NJEA banner. (Transcript 7/21/75, pages 15-20)

10/ Transcript 7/21/75, pages 59-61, Transcript 9/12/75, page 165.

11/ Transcript 7/21/75, pages 59-60.

An examination of the record however reveals that Smith and Wallace Hyman were not the only individuals that were involved in the distribution and collection of A and D cards and membership forms. Wallace Hyman stated that A and D cards were left with Ellen Gaines who later became one of the officers of the Association. Hyman testified that Gaines gave out A and D cards at her school and apparently distributed some of these cards to Dorothy Miley and Joseph E. Lombardo, two other officers of the Association, who also passed out the A and D cards at their respective schools. Smith admitted that only about seven of the thirty-two or thirty-three employees within the unit signed A and D cards in front of him and returned those documents to him directly. Smith related that he had left some blank cards with Ellen Gaines that were later collected by Wallace Hyman who, along with his brother Donald Hyman, collected the remainder of the executed A and D cards from the various schools. Smith further testified that Donald Hyman was another custodial employee who was responsible for the distribution of the A and D cards. There is also testimony in the record that A and D cards were also distributed at a general organizational meeting, arranged by NJEA representatives, that was held at the UniServ office in Haddonfield.[12/] At this meeting most of the custodial and maintenance employees in attendance again signed A and D cards.[13/]

In summary, the record clearly establishes that, aside from Smith's attendance at the March 4, 1974 meeting with James George, Smith's involvement in the organizing of the custodial and maintenance unit was quite limited. Five other custodians [in a unit of only thirty-two or thirty-three employees] were identified as individuals who distributed A & D cards -- cards that were also distributed at an organizational meeting under NJEA auspices -- and Smith collected only seven of the A & D cards signed by the members.

The record testimony fails to establish that Smith was involved in other protected activities in the exercise of his rights guaranteed to him by the Act. Smith never held a position as one of the four officers in the Association.[14/] Smith was not one of the six or so custodians who allegedly collec-

12/ The custodians and maintenance workers were notified about this meeting in a letter from Wallace Hyman.

13/ Transcript 7/21/75, pages 96-97, Transcript 9/12/75, pages 166-167.

14/ Transcript 7/21/75, page 82.

tively angered the Superintendent of Schools by meeting with him in a series of sessions to "discuss" terms and conditions of employment, in the absence of a certified majority representative,15/ while the custodians were then in the process of formally organizing themselves, for the purpose of collective negotiations, as an NJEA affiliate.16/ It was the uncontroverted testimony of a Board witness, Robert Jordan, that he had been informed by other janitors that Smith never showed up at any of the Association's organizational meetings.17/

2. THE BOARD'S KNOWLEDGE OF SMITH'S PROTECTED ACTIVITIES

In its post-hearing brief the Association asserted that three supervisors employed by the Board, with the authority to hire, discharge or otherwise discipline maintenance and custodial workers, or the authority to effectively recommend these personnel actions vis-a-vis these employees, had actual knowledge of Smith's union activism. In this regard the Association referred to the record testimony of Alfred Schramm, the Superintendent of Buildings and Grounds; Robert Jordan, the Assistant Night Foreman during the latter part of Smith's employment by the Board; and Charles Golden, a Foreman who was Smith's immediate supervisor at the time that Smith's employment was terminated. The Association did not contend during the hearings in this instant matter or in its post-hearing brief that either Ben Schoellkopf, the Board's Secretary, or Dr. Chester Stroup, the Superintendent of Schools at the time of Smith's discharge, had any actual knowledge of Smith's organizational

15/ There were approximately four or five meetings attended by a team of custodians and maintenance personnel and the Superintendent of Schools during the period between February 28, 1974 /when the employees rejected representation by the C.W.A./ and May 7, 1974, when the Association requested that the Board voluntarily recognize it as the exclusive representative for the supportive staff.

16/ Superintendent of Schools Stroup testified that Smith may have been an alternate on the custodian's committee; however Wallace Hyman testified that Smith was not a party to that committee. /Transcript 7/21/75, page 81, Transcript 10/30/75, page 311/

17/ Transcript, 11/24/75, page 143.

activities.[18/] The Association also did not attempt to establish that any member of the Board itself had actual knowledge of Smith's union activities.

An examination of the record testimony cited by the Association in support of its contention that Alfred Schramm, Robert Jordan, and Charles Golden had actual knowledge of Smith's organizational activities is in order and will be discussed seriatim.

TESTIMONY OF ALFRED SCHRAMM

The Association referred to Schramm's testimony that he had learned from Joseph Lombardo, a custodian employed by the Board and the President of the Association at the time of Smith's dismissal, that certain unnamed employees were dissatisfied and were trying to form "some kind of organization" sometime during the fall of 1974, in sole support of the Association's assertion that Schramm was personally aware of Smith's organizational activities.[19/]

The undersigned, after a careful review of the entire record, concludes that there was no evidence that was elicited that supports the Association's contention that Schramm had actual knowledge of Smith's organizing activities on behalf of the Association.

TESTIMONY RELATING TO ROBERT JORDAN

At one point during the fifth and final day of hearing in this instant case Smith testified that on one occasion he had personally handed Jordan an A and D card, in the presence of Wallace Hyman, and had informed Jordan that he was involved in an effort to organize the custodial and maintenance employees. Smith later stated that Jordan returned this A and D card to him the next day

---

18/ Schoellkopf testified at one point in the record that Jim George, an NJEA UniServ Representative, may have informed him, prior to Smith's dismissal, that Smith had been actively organizing on behalf of the Association. However, nothing in George's own testimony on behalf of the Association indicated that George had informed, prior to Smith's discharge, any supervisor or administrator employed by the Board, including Schoellkopf, that Smith had been an active Association organizer. In any event the Association in its brief chose not to argue that Schoellkopf had actual knowledge of Smith's union activities. /Transcript 9/12/75, pages 290-291/

19/ Transcript 11/24/75, page 57.

and related that he /Jordan/ was not going to sign the card. Smith also affirmed that he was also present when Wallace Hyman later gave Jordan another A and D card for Jordan's examination.[20] The Association referred to this particular testimony in sole support of its contention that Jordan had actual knowledge of Smith's activities in organizing the Association.

The undersigned is unable however to credit Smith's statements that Jordan had actual knowledge of Smith's activities on behalf of the Association for several reasons. Smith himself related different versions of his involvement with Jordan in the distribution of A and D cards. During the second day of hearing Smith responded in the following fashion to a question posed to him on direct examination that in part asked him whether Jordan was aware of his organization activities, i.e. his distribution of A and D cards on behalf of the Association:

> A ...I gave Mr. Jordan two cards, that was for him and another lady, and he held, I don't know, a day or two. I don't know how long he kept it, and he signed it and gave it back to me. [21]

In comparing Smith's differing accounts of his involvement in the distribution of cards to Jordan the following questions, among others, are unanswered; Was Jordan given one or two A and D cards? Was Smith present on one or two occasions when Jordan was given A and D cards? How long did Jordan keep the A and D card(s)? Did Jordan sign the A and D card(s) or return it (or them) unsigned?

After careful consideration of the entire record, the undersigned finds that Jordan's testimony concerning Smith's "involvement" in the distribution of A and D cards in Jordan's presence was substantially more credible than Smith's testimony in this regard that was too confused and contradictory to be convincing.

Jordan testified that Wallace Hyman approached him about signing an A and D card on behalf of the Association. Jordan stated that although Smith was with Hyman at that time Smith specifically told Jordan that he didn't have

20/ Transcript 1/9/76, pages 22-23.

21/ Transcript 9/12/75, page 168.

anything to do with the organizing effort, after Hyman had attempted to persuade Jordan to join the Association. Jordan testified that Smith specifically stated the following: "How are people going to find out, I don't have anything to do with it." Jordan added that he never obtained any information subsequently that contradicted his initial impression that Smith was not actively involved in activities on behalf of the Association. Jordan also testified that he personally had never seen Smith distributing A and D cards.22/

TESTIMONY RELATING TO CHARLES GOLDEN

The Board did not contest the fact that Charles Golden, the custodial foreman and Smith's immediate supervisor, was aware that Smith was involved in the distribution of A and D cards. The record reveals that at least on one occasion Smith asked Golden's permission to go along with Wallace Hyman to other schools in the district for the purpose of distributing A and D cards.23/

The record clearly reflects however that Golden did not advise any other supervisor or administrator of his knowledge that Smith was apparently involved in some organizational activities on behalf of the Association.24/ Golden's testimony also establishes that he did not recommend that Smith be terminated nor did he approve of the personnel actions taken against Smith.

In summary the undersigned finds that the record is devoid of any proof that any of the supervisors or administrators who either counseled Smith's

22/ Transcript 11/24/75, pages 142-144. The only evidence proffered that differed from Jordan's testimony in this regard consisted of Smith's statements, previously referred to, which have not been credited by the undersigned for the reasons that have been enumerated herein.

23/ Golden testified that he had not actually seen Smith distribute A and D cards. Transcript, 9/12/75, pages 121-123, 168-169.

24/ Transcript, 9/12/75, page 146.

termination or approved of his dismissal had actual knowledge of Smith's organizational activities.

The Association in its post-hearing brief contended that the small size of the custodial unit in and of itself was reason to infer that the Board, through its representatives or agents, was aware of the identity of all union activists, including Smith. The Association asserted that this "small plant rule" was widely applied in the federal private sector by the National Labor Relations Board. With regard to this particular argument, the Association concluded the following in its post-hearing brief:

> Pursuant to this doctrine a reasonable inference of employer knowledge of employees' union activity can be made when there is a small employee contingent (footnote omitted), when the union is discussed by the employees in groups at their work sites (as was clearly the case here when Smith and the Hyman brothers distributed and collected the A and D cards) and when agents of the employer attempt to learn and in fact do learn of the identity of the union adherents (as stated above the hearing record revealed that Golden and Jordan were aware of this information). 25/

The Board, in reply to the Association's "small plant rule" argument, contended that the Association understated the requirements for application of that rule. The Board asserted that the requirements were as follows:

1. A small employee contingent
2. A relatively compact work area
3. A discussion by the employees of the union at the plant or work facility
4. The employer being aware of "unusual gatherings of the employees...as the election approached," and
5. "A coordinated campaign (being) conducted by (the employer) to learn the identity of the union adherents among its employees." Citing F.M.C. Corp., 50 LRRM 1176 (1962)

The Board concluded, that inasmuch as the record at best only permitted the finding that the requirements designated above as numbers 1, 3 and 4 were met, the "small plant rule" had no application in this instant matter.

25/ Association's 3/31/76 brief at page 10.

The undersigned, after careful consideration of the cases cited by the parties with reference to the "small plant rule," concludes that the requirements for the application of this rule are as set forth by the Board and further finds that this rule is not applicable to the instant situation. The Association proffered no evidence that the employees in the unit worked within a relatively compact work area. There was testimony in the record that there were four separate schools within the school district. Haddonfield Memorial High School itself /as one of the four schools/ was comprised of three floors, all of which represented work areas for certain of the unit's custodial and maintenance staff.[26/] In addition the undersigned concurs with the Board's argument that facts much more aggravated (in terms of employer misconduct) than those presented in the instant case are necessary to sustain an inference that an employer was constructively aware of the identity of union activists in an organizing campaign. The National Labor Relations Board in its decisions that have, in part, dealt with the concept of a "small plant rule" have generally required proof that a coordinated campaign was being conducted by the employer to learn the identity of union adherents among its employees before the Board would attribute knowledge of the names of union activists to the employer.[27/] The Association has not even contended in this instant case that the Board was involved in any coordinated effort to learn the identity of any Association organizers or supporters.

In summary, the undersigned does not find that the Association has established by a preponderance of the evidence that any agent or representative of the Board had actual or implied knowledge of organizational activities engaged in by William Smith.[28/] Inasmuch as the Association has not met the first element of its burden of proof -- specifically the Board's knowledge of Smith's organizational activities -- the Complaint in this instant matter may be dismissed in its entirety on this basis alone.

Even assuming arguendo that the Board did have knowledge of Smith's protected activities the undersigned finds that the record clearly establishes

---

26/ See Exhibit C-13.

27/ See, e.g. F.M.C. Corp. (Niagara Chemical Division) and District 50, United Mine Workers of America, 137 N.L.R.B. No. 40, 50 LRRM 1176 (1962).

28/ N.J.A.C. 19:14-6.8.

that the Board's announced reasons for terminating Smith were not pretextual. The undersigned further concludes that the Association has not demonstrated that the Board was either motivated in whole or in part by anti-union animus in discharging Smith. The concluding sections of this recommended report and decision are concerned with an examination of the above-mentioned findings.

ANALYSIS OF THE REASONS GIVEN BY THE BOARD AS TO WHY SMITH WAS DISCHARGED.

The Board in a letter dated February 21, 1975 from Ben Schoellkopf, the Board Secretary, to William Smith informed Smith that his dismissal was prompted by his unsatisfactory work performance and continuous complaints received over a period of 18 months regarding his poor daily work performance.[29/] During the course of the five days of hearing in this instant matter the Board introduced numerous exhibits into the record and elicited additional record testimony that documented, more specifically, the Board's assertions concerning Smith's poor work performance.

Written detailed complaints about Smith's poor work performance were prepared by (1) Donald Hart, a Principal at the Junior Central School in Haddonfield, dated December 22, 1971; (2) Elmer June, Principal of Haddonfield Memorial School, dated January 8, 1975; and (3) William Frantz, Coordinator of Physical Education, dated January 8, 1975.[30/]

Evidence was proffered that established that Smith had not reported to work on August 15, 16, 17 and 20, 1973 without calling in after having been on authorized vacation from August 1, 1973 to August 14, 1973. Smith was given a verbal reprimand and a warning of further disciplinary action for repeated

29/ Exhibit CH-4 -- The individual employment contracts executed between the Board and its custodial and maintenance employees provided in part the following:

> Either party reserves the right to terminate this contract with or without justification upon giving to the other two weeks' notice thereof, and upon said termination neither party shall have further liability to the other.

There were no collective negotiations agreements in effect between the Board and a certified or recognized majority representative at the time of Smith's discharge that may have modified the above-referenced provision contained within all individual employment contracts.

30/ Exhibits R-1, R-2 and R-21.

offenses when he returned to work. Smith later lost four days of pay upon the direction of the Superintendent of Schools as a result of this unauthorized absence.[31] Robert Jordan reported that Smith had departed his working station early without permission on March 12, 1974.[32] Smith was also reprimanded for taking a personal day off without permission on December 30, 1974.[33]

Alfred Schramm testified that he had inspected Smith's entire work area on numerous occasions in response to complaints that had been raised by individual teachers and administrators concerning Smith's inability to clean his work area satisfactorily. In addition to Schramm's record testimony, specific documentation was introduced into evidence by the Board that consisted of Schramm's notes concerning certain inspections of Smith's work area that were made contemporaneously with his inspections.[34] The undersigned fully credits Schramm's testimony that Smith's work area was consistently dirty and unsanitary whenever inspected and that the slight improvement that was evident in Smith's performance, after Smith was informed on or about January 10, 1975 that he would be discharged if his work did not become satisfactory, did not raise Smith's performance to a satisfactory level.

Aside from Schramm's testimony, two other Board witnesses, William Frantz, Coordinator of Health and Physical Education, and Robert Jordan, the Assistant Foreman at the time of Smith's discharge, testified that Smith's job performance was poor and that his attitude indicated his desire not to change his work habits. Frantz testified that he had drafted the aforementioned January 8, 1975 Memorandum to Schramm concerning the subject of unclean conditions in the High School boys' gymnasium and locker rooms -- areas that were to be cleaned by Smith -- as the result of his personal observations as well as complaints registered by the building's three physical education instructors and by individual students who complained about the unsanitary conditions that

31/ Exhibit R-6 and Transcript 9/12/75, pages 190-192, 204-205, Transcript 9/30/75, pages 364-365.

32/ Exhibit R-18.

33/ Exhibits R-3 and R-4.

34/ Exhibits R-19, R-20 and R-22.

existed in the gymnasium area. Frantz specifically referred to an incident involving Smith's failure to empty a full waste basket in the boys' locker room for a period of a week and a half. The waste basket was not emptied until a complaint was lodged.[35] Frantz also testified that plaster that had fallen onto the floor of his office was not swept away by Smith for at least two weeks despite his daily responsibilities in that particular area.[36]

Jordan testified that during the period between September, 1973 and March, 1975 he had inspected Smith's work area whenever the Foreman was absent. Jordan stated that Smith's work was "bad, neglected" and further affirmed that Smith performed as little work as possible and "didn't work, period, when he could get out of it." Jordan recalled that on one occasion he had told Smith that he knew that Smith had the ability to do all the work that he was assigned. Smith told him at that time that "he wasn't killing himself for nobody."[37]

The undersigned fully credits the testimony of Schramm, Frantz and Jordan concerning Smith's work performance. The undersigned does not credit the testimony of Charles Golden, a retired Foreman who was Smith's immediate supervisor at the time of Smith's discharge, concerning Smith's work.

Golden's testimony concerning Smith's work performance was largely unbelievable. Golden testified that he had socialized with Smith after work in the past and Golden also mentioned that he had been picked up and driven to work by Smith when Golden's car was disabled in an accident.[38] Golden's testimony evinced a strong bias on his part to gloss over Smith's shortcomings as an employee and to portray him as an exemplary employee in the face of considerable contradictory evidence.

Golden's testimony was often too evasive and contradictory to be convincing. At certain points in the record Golden stated that Smith did all the work assigned to him on a daily basis,[39] and added that he had informed Smith upon occasion that he was doing a good job.[40] Golden added that he had never received any complaints about Smith's performance prior to January 10,

35/ Transcript 9/12/75, pages 233-234.

36/ Transcript 9/12/75, page 235.

37/ Transcript 11/24/75, pages 135, 139, 140-141.

38/ Transcript 9/12/75, pages 115 and 161.

39/ Transcript 9/12/75, page 131.

40/ Transcript 9/12/75, pages 126, 145.

1975 when Smith was first informed that he would be dismissed if his work did not improve.[41] On the other hand, Golden admitted that he had told Smith in the past that his work ought to improve and that Smith "would go and try to make up for it." [42] Golden also testified at another point in the record that there had been complaints registered by certain individuals [including William Frantz, Alfred Schramm, and "the help" as Golden put it] about Smith's work. Golden specifically referred to a complaint that he had received from Frantz about Smith's poor performance apparently six or seven months before the aforementioned January 10, 1975 meeting, despite Golden's insistence that he had not received complaints about Smith prior to that date.[43] At the last day of hearing in this instant matter Golden admitted that he did not deny that Smith's assigned work area was untidy or dirty, especially during the basketball season.[44]

In summary, the undersigned does not find that the reasons proffered by the Board for its decision to discharge Smith were pretextual. In the final section of this recommended report and decision the undersigned will examine the specific evidence referred to by the Association in support of its allegation that the Board was motivated by anti-union animus in discharging Smith. As set forth earlier, the undersigned would find that the Act had been violated if it was established by a preponderance of the evidence that <u>one of the motivating factors</u> for the Board's decision to discharge Smith was that employee's union activities, no matter how many other valid reasons existed for the Board's decision.

ANALYSIS OF THE EVIDENCE REFERRED TO BY THE ASSOCIATION RELATING TO THE BOARD'S ALLEGED ANTI-UNION ANIMUS

1. The Association contended that the pretextual nature of the Board's

41/ Transcript 9/12/75, page 112, Transcript 1/9/76, page 45.
42/ Transcript 9/12/75, page 138.
43/ Transcript 9/12/75, pages 119-120, 129-130.
44/ Transcript 1/9/76, pages 49 and 53.

Golden argued that an additional custodian should have been assigned to Smith's work area, especially during basketball season, and further contended that Smith's area was untidy because of the Board's failure to provide additional personnel for Smith's heavily used work area. However the record clearly reflects that Smith's work area had always been handled by one man only and was maintained satisfactorily by custodians other than Smith.

announced reasons for discharging Smith mandated the inference that the real motive behind the Board's action was one that the Board desired to conceal -- an unlawful motive, i.e. to discourage its custodial employees from designating and selecting an exclusive representative for the purpose of collective negotiations.

For the reasons set forth in the preceding section of this decision, the undersigned does not find that the Board's announced reasons for discharging Smith were pretextual and I cannot infer that the Board was motivated, in whole or in part, by anti-union animus in terminating Smith's employment.

2. The Association contended that the actions of the Board in sending a letter and resolution to the Association dated May 16, 1974 (Exhibits CH-2A and CH-2B) denying the Association's request of May 7, 1974 (Exhibit CH-1) to be recognized at that time as the sole bargaining representative of the custodial and maintenance employees, established in part the Board's anti-union animus.

The undersigned concurs however with the Board's position that the Board had an absolute legal right at that time not to extend voluntary recognition to the Association. Section 19:11-1.15(a) of the Commission's Rules /N.J.S.A. 19:11-1.15(a)/ provides that, "Where there is no recognized or certified majority representative of the employees a petition for certification of public employee representative will be considered timely filed provided that there has been no valid election within the preceding 12 month period in the requested negotiating unit or any subdivision thereof." (emphasis added) A representation election had been conducted by the Commission on February 28, 1974 at which time the Board's custodial employees rejected representation by the C.W.A. The Board had a legal right, pursuant to the above-cited Commission rule, to refuse to extend voluntary recognition to the Association inasmuch as there had been a valid election conducted in the requested negotiating unit less than ten weeks before the Association requested recognition. The undersigned thus cannot infer any anti-union animus on the part of the Board from its conduct in refusing to recognize the Association under the circumstances in this case.

3. The Association referred to the refusal of the Board to immediately institute a dues checkoff for the Association when requested to do so by a number of the Board's custodial employees during the summer of 1974 in partial support of its charge against the Board in this instant matter. The Association contended that the Board, in choosing to ignore the explicit language contained within N.J.S.A. 52:14-15.9(e) mandating that dues checkoffs be instituted whenever requested, evinced its anti-union animus. The Board denied that its refusal to deduct union dues in the summer of 1974 for approximately two to three months represented evidence of anti-union animus on its part. The Board referred specifically to one of the exhibits it had introduced in evidence /Exhibit R-12/ in support of its assertion that it had acted upon the advice of counsel in refusing to immediately honor requests for dues deductions. The Board maintained that it was concerned that the Association would rely upon these dues deductions as sole proof of its majority status after the Commission's election bar expired.[45/] The Board asserted that it immediately began to withhold dues, as per the Association's request, as soon as it received assurances from an NJEA representative that it was the Association's intention to submit authorization and designation cards to establish its majority representation status when the election bar expired and that it was not the Association's intention to raise dues deductions as proof of its majority status.

The undersigned, after careful analysis of the correspondence exchanged between Board and Association representatives with regard to the dues deduction issue, does not find that the Board's conduct constituted evidence of anti-union animus. It is evident to the undersigned that the Board's representatives misunderstood its legal requirements under N.J.S.A. 52:14-15.9(e). The undersigned does not however conclude that the Board's expressed reservations about the applicability of this dues deduction statute, when faced with a request for

45/ The Superintendent of Schools, Chester Stroup, in a memorandum dated August 2, 1974 with regard to the dues deduction issue, stated that it was the Board's position at that time that it was not required to deduct dues for the Association unless and until it was duly certified as the majority representative of custodial employees. /Exhibit R-9/

voluntary recognition of a majority representative, were pretextual in nature. The undersigned thus cannot infer any anti-union animus on the part of the Board from its conduct relating to the institution of dues checkoffs.

4. The Association also referred to the testimony of Wallace Hyman in partial support of its contention that the Board was motivated by anti-union animus in its decision to discharge Smith. Hyman testified that he had had a conversation with the then Superintendent of Schools, Chester Stroup, in the fall of 1974, at which time he asked Stroup for certain documents relating to pay raise breakdowns that had been referred to during the course of the aforementioned informal meetings between Stroup and representatives of the custodians and maintenance men relating to terms and conditions of employment. Hyman testified that Stroup told him that "he didn't really like the idea of fellows going behind his back and organizing an association." The Association contended that Stroup's statements were indicative of the anti-union feelings of the Board's chief supervisory agent, a man who had authorized Smith's firing.

The undersigned, after careful consideration of the chronology of events leading up to Hyman's conversation with Stroup, does not find that Stroup's remarks evinced any anti-union hostility on Stroup's part. It is uncontroverted that Stroup had been approached by Charles Golden shortly after the custodial and maintenance employees had rejected representation by the C.W.A. Golden informed Stroup that the "janitors" desired to get together to form a group of their own so that they might have a direct relationship with the Superintendent and that Board for negotiations purposes. It was apparently understood that no formal recognition would be accorded to this janitorial group by the Board and that discussions rather than negotiations would take place with Stroup as the Board's representative. Stroup welcomed the suggestion that he meet with representatives of the custodians and maintenance men and thereafter met with these individuals on four separate occasions [including one Saturday morning session] at which times salaries and other working conditions were discussed. Stroup testified that good progress had been made in joint efforts to formulate a set of proposals that would then be submitted to the full Board. Stroup affirmed that his meetings with the custodians were terminated once the Board received the May, 1974 request that the NJEA be recognized as the exclusive majority representative for these employees. The undersigned fully credits Stroup's testimony that in his aforementioned conversation with Wallace Hyman he had simply expressed disappointment over the employees' refusal to extend him the courtesy of telling him, at the time that he was assisting them in the preparation of proposals on behalf of the custodians as an unaffiliated local organization, that they were seriously contemplating formal representation by another employee organization. There is no evidence in the record to support the Association's contentions that Stroup was "angered" generally by the custodians' efforts to affiliate with and become represented by the NJEA and that his subsequent comments to Hyman reflected his anti-union animus.

5. The Association also argued that the timing of Smith's discharge helped to establish the Board's anti-union animus. The Association stated that it was uncontroverted that Smith had received his two week termination notice ten days after the Association, in a letter dated February 11, 1975, had again requested that the Board grant it voluntary recognition. The Association maintained that the Board was aware that the Association would thereafter file a Petition for Certification with the Commission that would result in the holding of a representation election in March or April of 1975.[46/] The Association argued that the Board recognized that if Smith was permitted to work until his individual contract expired on June 30, 1975 he would be able to vote in the anticipated representation election. The Association added that the Board further realized that Smith's continued presence as a Board employee, as one of the original organizers of the Association, would surely strengthen the chances of an Association victory in said election. The Association concluded that the Board discharged Smith, shortly after they had fired the two Hyman brothers who also were involved in the organizational drive, to discourage the remaining employees from professing support for the Association.

46/ The election that resulted in the certification of the Association was actually held on April 28, 1975.

The undersigned, assuming arguendo again that the Association had met its burden in proving that the Board's representatives or agents had knowledge of Smith's organizational activities, does not concur with the Association that the timing of Smith's discharge was suspect. The undersigned fully credits the testimony of Alfred Schramm that he had determined to recommend the non-renewal of Smith's contract because of his poor work performance as early as February 7, 1974, approximately three months before the Association first sought recognition from the Board and three weeks before NJEA UniServ representative, Jim George, made his initial contact with Wallace Hyman relating to the organization of the custodial employees. In a memorandum, dated February 7, 1974 (Exhibit R-17), that was submitted to all Board members and high level school administrators Schramm stated, in apposite part, the following: "My recommendations are to let go some of the custodians at the expiration of their contract, June 30, 1974, and hire new personnel thereafter." (emphasis Schramm's) The undersigned credits Schramm's testimony that Smith was on the top of his list of people to let go and that he had communicated this fact to Arthur Cooper, the then Board Secretary. Schramm testified that he had been on the verge of quitting when the Superintendent and the Board failed to contact him thereafter to seek his specific personnel recommendations in closed session. The Board's inaction in this regard resulted in the issuance of another contract [for the 1974-75 school year] to Smith.

Schramm's actions during the fall of 1974 do not appear to be the actions of an individual intent upon discharging Smith for his union activities. It was uncontroverted that Schramm spoke to Golden during the fall of 1974, after receiving numerous complaints about Smith's work, in an unsuccessful effort to transfer Smith to another work area that was easier to maintain and to bring in another custodian who was more efficient to take care of the athletic facilities and contiguous areas that were not being properly serviced by Smith.[47/] I credit Schramm's testimony that he explored various alternatives to discharging Smith but was forced into recommending the immediate termination of his employment when complaints against Smith increased during the winter of 1974-75

47/ I credit Schramm's testimony that he decided not to transfer Smith inasmuch as Golden stated that Smith would be a "problem" wherever he worked.

and when Smith's work remained unsatisfactory after having been warned that he would be dismissed if his work did not reach a satisfactory level.

6. On its face the most disturbing evidence referred to by the Association in support of the Association's charges relates to the uncontroverted fact that Smith was discharged shortly after Wallace Hyman and his brother Donald were also fired by the Board. Although the undersigned has not found that Smith and the Hyman brothers were the only custodians that were active in organizing the unit, despite the Association's arguments to the contrary, it is evident that these three individuals all distributed some A and D cards during the Association's organizing campaign. It is also uncontroverted that Wallace Hyman was the custodian most conspicuously active in the organizing drive and an officer within the Association at the time of his dismissal.48/ Admittedly, therefore, the firing of Smith, effective March 7, 1975, within approximately two months of the discharges of the Hyman brothers, given the admitted knowledge of Board representatives that a Petition for Certification would be filed on behalf of the Association after the expiration of the relevant 12-month election bar period on February 28, 1975 with a representation election being conducted shortly thereafter, arouses some suspicion as to the Board's motivation in terminating the alleged discriminatee in this instant matter. However in the absence of any substantial evidence that Board representatives had knowledge of Smith's limited organizational activities, and on the basis of the entire record herein, the undersigned cannot conclude that the inference to be drawn from the timing of the three aforementioned discharges rises above the level of mere suspicion.49/ The undersigned concludes, for the reasons set forth hereinbefore, that the Association has not met its burden of proof in this instant matter, i.e. proving the allegations of the complaint by a preponderance of the evidence.

48/ It should be pointed out at this juncture that no unfair practice charges were ever filed on behalf of Donald Hyman that alleged that he had been discriminatorily discharged by the Board. See footnote 3 for a discussion of the disposition of the unfair practice charge that was filed by the Association on behalf of Wallace Hyman. [Docket No. CO-19]

49/ In the private sector the National Labor Relations Board has consistently determined that mere suspicion surrounding a discharge does not replace the need to prove by substantial evidence the existence of knowledge on an employer's part of the protected union activities of an alleged discriminatee. See e.g. <u>Lyn-Flex Industries, Inc</u>., 61 LRRM 1421 (1966).

ORDER

Accordingly, for the reasons set forth above, IT IS HEREBY ORDERED that the Complaint in this matter be dismissed in its entirety.

Stephen B. Hunter

Stephen B. Hunter
Hearing Examiner

DATED: Trenton, New Jersey
December 10, 1976