P.E.R.C. NO. 82-16

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOARD OF EDUCATION OF THE CAMDEN COUNTY VOCATIONAL TECHNICAL SCHOOL,

Respondent,

-and-

Docket No. CO-80-120-85

CAM-VOC ASSOCIATION,

Charging Party.

SYNOPSIS

The Commission, adopting the recommendation of a Hearing Examiner, determines that the Board of Education of the Camden County Vocational Technical School violated N.J.S.A. 34:13A-5.4(a)(1) when it twice refused requests from a Cam-Voc Association member for representation by the Association at two investigatory meetings conducted by the Board's agents, where the member reasonably believed that disciplinary actions might result therefrom. The Commission finds the member had no contractual right to representation in this situation, deferring to an arbitrator's award interpreting the parties' contract and therefore dismissed the alleged violation of N.J.S.A. 34:13A-5.4(a)(5). Nonetheless, the Commission finds that the member's right to representation in the above situation exists independent of the contract, and may only be waived by the member. Therefore, to the extent that the arbitrator's award would lead to a result which would negate a right provided the employee through the Act, the award would not be deferred to, and the Board's actions were found to constitute an unfair practice within the meaning of N.J.S.A. 34:13A-5.4(a)(6).

The Commission orders the Board to cease and desist from such conduct, but allows a letter of reprimand by the Board to remain in the member's personnel file. In so ruling, the Commission finds that the letter was not based on information gained at the improper investigatory meetings, but rather was based on information gained from outside sources.

P.E.R.C. NO. 82-16

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOARD OF EDUCATION OF THE CAMDEN COUNTY VOCATIONAL TECHNICAL SCHOOL,

Respondent,

-and-

Docket No. CO-80-120-85

CAM-VOC ASSOCIATION,

Charging Party.

Appearances:
For the Respondent, Davis & Reberkenny, Esqs.
(Robert F. Blomquist, of Counsel)

For the Charging Party, Selikoff & Cohen, P.A.
(Steven R. Cohen, of Counsel)

DECISION AND ORDER

An Unfair Practice Charge was filed with the Public Employment Relations Commission on November 9, 1979 by the Cam-Voc Association (the "Association") alleging that the Board of Education of the Camden County Vocational Technical School (the "Board") 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. (the "Act"). The Association alleged that the Board twice refused requests from an Association member for representation by the Association at two investigatory meetings conducted by the Board's agents, where the member reasonably believed that disciplinary actions might result, which refusal was alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5).[1/]

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. (5) Refusing to negotiate in good faith with a majority (Continued)

It appearing that the allegations of the charge, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued by the Director of Unfair Practices on April 10, 1980. Pursuant to the Director's order, hearings were held on May 15 and May 16, 1980 at the Commission's offices in Trenton, New Jersey before Commission Hearing Examiner Edmund G. Gerber. At these hearings, the parties were given opportunities to examine witnesses, present relevant evidence and argue orally. Briefs were submitted by the parties by October 23, 1980.

The Hearing Examiner's Recommended Report and Decision, H.E. No. 81-38, 7 NJPER ____ (¶____ 1981), a copy of which is attached hereto and made a part hereof, was issued on April 15, 1981. Exceptions to the report were filed by the Association on April 23, 1981, by the Board on April 28, 1981 and a response thereto was filed by the Association on May 6, 1981. The case is now properly before the Commission for determination.

The case arose when the mother of a student at the school complained both orally and in writing to the Principal about one teacher's alleged comments to her son. The Principal investigated the parent's charges and then had a meeting with both the parent and the teacher present. There was no testimony in the record that the teacher requested representation at this meeting. The Principal then investigated the matter further.

Following this further investigation the teacher was

1/ (Continued) representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

summoned to a meeting on June 18, 1979 at which both the Principal and the Superintendent of Schools were present. When informed of who was attending, the teacher requested that she be permitted to have an Association officer, who was present, represent her interests. This request was denied, and she attended the meeting alone. On September 19, 1979, the teacher was again advised to attend a meeting, this time with the Principal, the Superintendent and the parent. The teacher this time requested the presence of the Association president on her behalf but this request was also denied. Approximately a month later, a formal letter of reprimand from the Superintendent was placed in the teacher's permanent file concerning the incident. The Association then filed the instant unfair practice charge.[2/]

In its post-hearing brief to the Hearing Examiner the Board for the first time raised the question of deferral to arbitration. It was in this way that the Association had filed both a grievance under the contract and the instant unfair practice charge. The arbitrator heard the grievance in March 1980 and issued his opinion and award on May 29, 1980, only two weeks after the Hearing Examiner conducted the instant hearing. The arbitrator found that the contract provided only a right to representation when a teacher called before the Board, not before the Superintendent, and therefore rejected the grievance. The Board asked the Hearing Examiner to defer to this award.[3/]

2/ The Association did not contest the accuracy of the Board's investigation of the appropriateness of the discipline opposed in this unfair practice proceeding. It limited its presentation to its argument that the teacher's right to have an Association member present at these meetings was violated.

3/ It may be that both parties were waiting to see the arbitrator's decision before bringing it to the Hearing Examiner's

(Continued)

In his report the Hearing Examiner concluded that the Board did not violate N.J.S.A. 34:13A-5.4(a)(5) when it refused the Association member's request for representation because the contract between the Association and the Board did not guarantee this right. In making this determination, the Hearing Examiner deferred to the arbitrator's decision rendered pursuant to the parties' negotiated grievance procedure. However, the Hearing Examiner did conclude that the Board violated N.J.S.A. 34:13A-5.4(a)(1) when it refused the Association member's request for representation because the individual's right to such representation flows from the Act and cannot be negotiated away by an employee representative. In making this determination, the Hearing Examiner disagreed with the arbitrator's conclusion that the member was not entitled to greater protection under the law than under the contract.[4/] Accordingly, the Hearing Examiner recommended that the Commission should not defer to that portion of the arbitrator's decision.

3/ (Continued) attention. However, we would note that such a practice is inconsistent with the spirit if not the letter of the Supreme Court's decision in Hackensack v. Winner, et al, 82 N.J. 1 (1980), as well as a negation of this Commission's policy of deferring unfair practices to the parties' own dispute resolution procedures, i.e., binding arbitration, where appropriate. See State of New Jersey (Stockton State College, P.E.R.C. No. 77-31, 3 NJPER 61 (1977). Obviously, the Commission cannot consider the advisability of deferral or take other steps to minimize the potential for duplicative hearings and/or inconsistent results from the two proceedings if it is not advised of the existence of a pending arbitration. In the instant case, it appears that both parties are equally at fault.

4/ In making this finding that the individual was not entitled to greater protection under the law, the arbitrator apparently only considered Education Law statutes cited to him by the Association. He considered this in connection with a clause in the contract guaranteeing the teachers their rights under law.

The Board excepts to the Hearing Examiner's finding that the Commission should not defer to a portion of the arbitrator's decision. The Board also excepts to the Hearing Examiner's conclusion of law that the Association member's right to representation exists independent of the contract; in the alternative, the Board argues that the member's right was explicitly and knowingly waived.

The Association also urges several exceptions to the Hearing Examiner's Recommended Report and Decision. First, the Association excepts to the Hearing Examiner's finding that N.J.S.A. 34:13A-5.4(a)(1) was only violated on one occasion, and argues that two such violations occurred. The Association also excepts to the Hearing Examiner's recommendation that the Commission dismiss that portion of the unfair practice charge which alleged a violation of N.J.S.A. 34:13A-5.4(a)(5). Finally, the Association excepts to the Hearing Examiner's recommended remedial order.

Turning first to the Board's exceptions, we find that the Hearing Examiner correctly applied the Commission's policies for post-arbitration deferral as announced in State of New Jersey (Stockton State College), P.E.R.C. No. 77-31, 3 NJPER 61 (1977). If the Hearing Examiner's determination that the Association member's right to representation exists independent of the contract is correct, then the Commission would have to overturn that portion of the arbitrator's decision which states that the law provides no greater protection to the member than does the contract. If the Act guarantees the Association member's right to representation in the factual situation herein, then the arbitrator's decision is repugnant to the Act.

We find the Hearing Examiner has correctly applied both

New Jersey public sector and federal private sector precedent in making his determination that the Association member's right to representation exists independent of the contract herein. In NLRB v. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975), the U.S. Supreme Court held that a private employee is entitled to the presence of his union representative at an investigatory interview which the employee reasonably believes may result in discipline. This private sector decision was specifically adopted to cover public employees in New Jersey by the Commission in East Brunswick Board of Education, P.E.R.C. No. 80-31, 5 NJPER 398 (¶10206 1979), aff'd in part, rev'd in part App. Div. Docket No. A-280-79 decided 6/18/80.[5/] Subsequent private sector case law indicates that this right is an employee's right and may only be invoked by the employee and not by the employee representative. See, e.g., Appalachian Power Company, 253 NLRB No. 135, 106 LRRM 1041 (1980); Kohl's Food Company, 249 NLRB No. 13, 104 LRRM 1063 (1980); Super Valu Xenia v. NLRB ____, F.2d ____, 106 LRRM 3718 (6th CA. 1980).

This case squarely presents the question of whether or not the Weingarten right, which cannot be invoked by an employee representative, could nonetheless be waived by an employee representative through a collectively negotiated agreement. NLRB case law on the subject is not decisive; to date, the Board has never specifically addressed this question. Instead, in each case where it was raised, the Board has found that the clear and unequivocal waiver test required for a waiver of statutory rights has not been

5/ It must be emphasized that the right applies only to situations where the employee reasonably expects that discipline may result. It does not apply to the numerous meetings which can occur between an employee and its employer's representative to discuss the various concern of the enterprise.

met.[6/] See, e.g., New York Telephone, 219 NLRB No. 136 (1975); Prudential Insurance Company, 254 NLRB No. 20, 106 LRRM 1118 (1981); Georgia Power Company, 238 NLRB 572, 99 LRRM 1574 (1978). In all of these cases the Board has addressed the question of the waiver of Weingarten rights "assuming they could be waived,"[7/] without ever deciding whether or not Weingarten rights could be waived by an employee representative. However, in the most thorough treatment given to this topic by an NLRB Administrative Law Judge to date in Georgia Power Company, supra at 575, the ALJ suggested that:

> "...a right so seriously regarded by the Supreme Court and the Board simply cannot be waived, much like the employee right to use of factory bulletin boards cannot be waived, as declared by the Supreme Court in NLRB v. Magnavox Co. of Tennessee, 415 U.S. 322 (1974) reversing 474 F.2d 1269 (Ca. 6, 1973) and aff. 195 NLRB 265 (1972).
>
> The reasoning is comparable: to permit employees to be stripped of such a right by agreement of a Union could subject them (and perhaps particularly the minority of employees also represented by the Union, under the statutory scheme, who did not and do not opt for such representation) to the mercies of a Union with which they are less than happy or which may not, in violation of its most basic fiduciary responsibilities, desire to represent them in disciplinary interviews. It would seem that the right of an employee to representation, particularly in connection with saving his job, is ordinarily far more fundamental than his right or access to a bulletin board which roused the high Court's concern in Magnavox....[footnotes omitted]

6/ In the instant case the arbitrator found that the change in language in the relevant contract clause from the 1975-77 contract to the 1977-79 agreement, as discussed in the Hearing Examiner's report, was dispositive evidence of the parties' intended meaning of the relevant contract clause. The Hearing Examiner deferred to his interpretation of the contract, as do we.

7/ Prudential Insurance Company, supra, at 105 LRRM 1161.

We find the reasoning in Georgia Power to be most persuasive. Our Act specifically provides that majority representatives "shall be responsible for representing the interest of all such [public] employees without discrimination and without regard to employee organization membership." N.J.S.A. 34:13A5.3. Moreover, the New Jersey State Constitution, Article I, Section 19 provides: "...persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing."

These constitutional and statutory rights of public employees, as well as the similarities between the National Labor Relations Act and the New Jersey Employer-Employee Relations Act, led us to adopt the Weingarten rule for public employees in New Jersey in East Brunswick, supra. These rights belong to the employees and not to the employee representatives and as such can only be waived by an individual public employee. In this regard, our ruling today is consistent with the holding of our Supreme Court in Red Bank Regional Education Association v. Red Bank Regional High School Board of Education, 78 N.J. 122 (1978) in which the Court held that §5.3 of our Act guaranteed employees the right to have grievances initiated by the majority representative and that this right could not be waived by the majority representative. 8/

8/ In Red Bank, the Supreme Court stated:

> "The principle of collectivity, the advantages of which we discussed extensively in Lullo, in public employment labor relations is at the heart of the legislative scheme. Indeed we have noted that Art. I, para. 19 is itself 'oriented toward collectivity.' Lullo, supra, 55 N.J. at 420. We too find inconceivable the suggestion that the Legislature intended to limit

(Continued)

Therefore, we adopt the Hearing Examiner's finding that the Association member's right to representation at an investigatory meeting where the member reasonably believes that he or she may be disciplined exists independent of the contract between the employer and the employee organization. We also adopt the Hearing Examiner's conclusion that the portion of the arbitrator's decision which would allow a negotiated agreement to supersede this statutory and constitutional right of public employees is repugnant to the Act and should not be deferred to pursuant to Stockton, supra. Accordingly, the Board's exceptions to the Hearing Examiner's report are found to be without merit.

Turning to the exceptions of the Association to the Hearing Examiner's Recommended Report and Decision, we agree that

8/ organized public employees' enjoyment of the salutary effects of collective representation - the 'commonly known means of giving potency and practical effect to the guaranteed right to organize,' Id., at 421 - only in the negotiations context. We have observed that [t]he legislative aim in writing [N.J.S.A. 34:13A-5.3] was to aid, not to hinder, public employees in their relationship with their employers. [Id., at 429]

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....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 secured by the Constitution." 78 N.J. at 138.

The same analysis applies to confronting one's employer alone in the face of an accusation which the employee has reason to believe will result in discipline. The desire to have a representative present for support and guidance in such situations is one of the most common reasons employees join labor organizations.

the Hearing Examiner erred in finding that N.J.S.A. 34:13A-5.4(a)(1) was only violated on one occasion. The record indicates that investigatory meetings where the Association member reasonably believed that she might be disciplined occurred on both June 18 and September 19, 1979. We therefore adopt the Hearing Examiner's conclusion that a violation of (a)(1) occurred and also determine that the violation occurred on the two separate occasions where requests for representation were made by the Association member.[9/]

We are not persuaded by the other two exceptions to the Hearing Examiner's Report made by the Association. As discussed above, an arbitrator's decision will be deferred to by the Commission unless the arbitrator reaches a result which is repugnant to the Act. Stockton, supra. The arbitrator's conclusion that the parties negotiated a change in Article VI(c) of their negotiated agreement is well supported in both his decision and in the record in this matter.[10/] Accordingly, we adopt the Hearing Examiner's finding and dismiss that portion of the unfair practice charge which alleges a violation of N.J.S.A. 34:13A-5.4(a)(5).

Finally, we reject the Association's claim that the Hearing Examiner erred in failing to order the removal of a disciplinary letter from the Association member's file. The record indicates that the Board relied upon information from sources outside of the meetings in question (in particular verbal and written complaints

9/ This error to the extent it was one appears to be no more than the use of the singular when the plural may have been intended.

10/ The fact that the parties actually sought to have the Hearing Examiner interpret the contract at a point in time when they were awaiting an arbitrator's award on the same language and issue only reemphasizes the point made in footnote 3 supra.

from a student's parent and information from students themselves) in making its decision to place the disciplinary letter in the Association member's file. While the investigatory meetings in question concerned the conduct ultimately reprimanded in the disciplinary letter, the record indicates that the letter was not based on information gained at these meetings. Properly applying the standard adopted by the NLRB in Kraft Foods, 251 NLRB 6, 105 LRRM 1233 (1980), the Hearing Examiner ordered the Borough to cease and desist from such conduct but did not order the removal of the disciplinary letter from the Association member's file and we adopt that remedy.

ORDER

The Board of Education of the Camden County Vocational Technical School shall:

A. Cease and desist from interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act by refusing to permit employees to have Association representatives at investigatory interviews.

B. Post at all places where notices to employees are customarily posted copies of the attached notice marked as Appendix "A". Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon receipt thereof, and, after being signed by the Respondent's authorized representative, shall be maintained by it for a period of at least sixty (60) consecutive

days thereafter. Reasonable steps shall be taken by the Respondent to ensure that such notices are not altered, defaced or covered by other material.

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

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hartnett, Graves, Parcells and Suskin voted in favor of this decision. None opposed. Commissioners Hipp and Newbaker abstained.

DATED: Trenton, New Jersey
July 21, 1981
ISSUED: July 22, 1981

"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 our employees in the exercise of the rights guaranteed to them by the Act by refusing to permit employees to have Association representative present at investigatory interviews which the employee reasonably believes my result in discipline.

BOARD OF EDUCATION OF THE CAMDEN COUNTY VOCATIONAL TECHNICAL SCHOOL

_____
(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. 81-38

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

In the Matter of

BOARD OF EDUCATION OF THE CAMDEN
COUNTY VOCATIONAL TECHNICAL SCHOOL,

Respondent,

-and-

Docket No. CO-80-120-85

CAM-VOC ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner finds that the Camden County Vocational Technical School violated the Public Employer-Employee Relations Act when it declined to allow a union representative at an employee's investigatory interview when the employee reasonably expected that she might be disciplined on the basis of information gathered in the interview. The Hearing Examiner recommended that the Commission not order the rescission of the discipline in question since the employer did not rely on any facts obtained during the illegal interview in reaching its decision to so discipline. It is noted that the same issue was the subject of an arbitration wherein the arbitrator did not find there was a right to representation under the contract. The Hearing Examiner found, however, that the right to representation exists independently of the contract.

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

H. E. No. 81-38

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

In the Matter of

BOARD OF EDUCATION OF THE CAMDEN
COUNTY VOCATIONAL TECHNICAL SCHOOL,

Respondent,

-and-

Docket No. CO-80-120-85

CAM-VOC ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Davis & Reberkenny, Esqs.
(Robert F. Blomquist, Esq.)

For the Charging Party, Selikoff & Cohen, P.A.
(Steven R. Cohen, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed by the Cam-Voc Association (Association or Charging Party) against the Board of Education of the Camden County Vocational Technical School (Board or Respondent) on November 9, 1979, alleging that Patricia Atkinson Becky was required to attend two investigatory interviews conducted by the Board's agents. She reasonably believed that disciplinary action may result therefrom and requested representation by the Charging Party. Said requests were refused but the meetings were continued. It is alleged that the Board's conduct constitutes a violation of the New Jersey Employer-Employee Relations Act, as

amended, N.J.S.A. 34:13A-1 et seq. (the Act), specifically § 5.4 (a)(1) and (5). 1/

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on April 10, 1980. Pursuant to the Complaint and Notice of Hearing, hearings were held on May 15 and 16, 1980, at the Commission's offices in Trenton, New Jersey. Both parties were given the opportunity to present evidence, examine and cross-examine witnesses, argue orally and present briefs. Both parties filed briefs which were received by October 23, 1980.

The Association and Board are parties to a collective negotiations agreement entered into on April 13, 1978.

Patricia Atkinson Becky was a teacher with the Camden County Vocational Technical School. The mother of one of her students complained to Richard Haldeman, the principal of the school, about Becky's alleged comments to her son.

The principal, after an initial investigation into the charges, had a meeting with both Becky and Evans present. There is no testimony in the record to establish that Becky asked for representation at this meeting. After further investigation into the incident by Haldeman, he interviewed students about the incident.

Becky was called into another meeting which was attended

1/ These subsections provide in pertinent part that public employers, their representatives or agents are prohibited from: "(1) interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act; (5) refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

by both Haldeman and the Superintendent of Schools, Donald Springle. Becky consulted Charles Lucas, an officer in the Association, and informed him of the meeting. Both Lucas and Becky believed that the meeting might involve a question of discipline. Accordingly, Lucas agreed to accompany her to the meeting as her Association representative.

Prior to the start of the meeting Becky informed Springle that she wished to be represented by Lucas. Springle denied her request for representation and the meeting proceeded.

As a consequence of the incident Becky received a letter of reprimand which was placed in her personnel file.

The Association alleges that Springle's refusal to allow a union representative at his meeting with Becky is violative of the Commission's decision in East Brunswick Bd. of Ed., P.E.R.C. No. 80-31, 5 NJPER 398 (¶10206, 1979), aff'd, in part, rev'd, in part, App. Div. Docket No. A-280-79, decided 6/18/80. In East Brunswick, the Commission adopted the rule of NLRB v. Weingarten Inc., 88 LRRM 2689, 420 U.S. 251 (1975) that an employee is entitled to the presence of his (or her) union representative at an interview which the employee reasonably fears may result in his (or her) discipline.

The Appellate Division reversed the Commission on the facts of East Brunswick but stated:

> Although Weingarten involved the interpretation of the National Labor Relations Act (NLRA), 61 Stat. 136, 29 U.S.C.A. §141 et seq., the sections of the federal statute construed by the United States Supreme Court are almost identical to those enacted by our Legislature. Lullo v. Intern. Assoc. of Fire Fighters, 55 N.J. 409,

> 429 (1970). This similarity is not a coincidence since our Legislature used the federal scheme as a model in enacting the provisions of our statute. Galloway Twp. Bd. of Ed. v. Galloway Twp. Ass'n of Ed. Sec., 78 N.J. 1, 9 (1978); Lullo, above 55 N.J. at 424. Consequently, the experience and adjudications under the NLRA are appropriate guides for interpreting the unfair practice provisions of the New Jersey public employment statutory scheme. Galloway Twp. Bd. of Ed. v. Galloway Twp Ed. Assn., 78 N.J. 25, 46 (1978); Lullo, above, 55 N.J. at 424. Slip Op at 6-7.

It is therefore apparent that the Commission's adoption of the Weingarten rule is appropriate.

The Respondent argued that even if the Weingarten rule is applicable, which they dispute, the facts of the case were already the subject of an arbitration proceeding.[2/] Accordingly, it is urged the Commission should defer to the arbitrator's decision.[3/]

The 1975-77 agreement between the Board and the Association contained a Teachers' Rights Article VI which provided, in part:

> C. Except for the conferences provided in Article X (evaluations) hereof, whenever any teacher is required to appear before the superintendent or division head, Board or any committee, member, representative or agent thereof concerning any matter which would adversely affect the continuation of that teacher in his office, position, or employment or his total salary then the teacher shall be given prior written notice of the reasons for such meeting or interview and shall be entitled to have a representative of the Association present to advise him or her and represent him or her during

2/ AAA #1839-0849-790.

3/ It is noted that neither side raised the subject of this arbitration prior to or during the hearing. It was first raised in the Board's post-hearing brief.

> such meeting or interview. Any suspension of a teacher pending the filing of charges with the Commissioner of Education shall be with pay.

The same provision of the current contract, however, provide that

> C. Except for the conferences provided in Article X [evaluations] hereof, whenever any teacher is required to appear before the Board of Education or any committee or member thereof concerning any matter which could adversely affect the continuation of the teacher in his office, position or employment or the salary or increments pertaining thereto, then the teacher shall be given prior written notice for the reasons for such meeting or interview and shall be entitled to have a person of his own choosing present to advise and represent him during such meeting or interview.

The arbitrator considered the change in the contract language and held that the Board conduct complied with the current contract language and denied the grievance.

In State of New Jersey (Stockton State College), P.E.R.C. No. 77-31, 3 NJPER 62 (1977), the Commission adopted the standards for post-arbitration deferral enunciated by the NLRB in Spielberg Mfg. Co., 112 NLRB 1080, 36 LRRM 1152 (1955). Under Stockton an arbitrator's award will be overturned only when the arbitration procedure has reached a result which is repugnant to the Act. 4/ The arbitrator's finding that the parties did negotiate a change in the contract language is rational and pursuant to Stockton, should be followed. Accordingly I will recommend the Commission dismiss

4/ There are two other tests under Stockton concerning promptness and fairness and regularity in the arbitration procedure but these standards are not in issue here.

the § 5.4(a)(5) allegation of the Complaint.

The arbitrator's decision states that Becky was not entitled to greater protection under the law than the contract. This is not correct. The New Jersey Supreme Court in Red Bank Regional Education Assoc. v. Red Bank Regional H.S. Board of Education, 6 N.J. (1978) held that terms and conditions of public employment set by statute cannot be negotiated away and exist independently of the contract.

Here, the right to representation exists independently of the contract and flows from the statute and not the contract. See, East Brunswick, supra. As in Red Bank, the language of the contract is not controlling. See also Appalachian Power Co., NLRB (1980), 106 LRRM 1041, where the NLRB held that rights enunciated in Weingarten are rights of individual employees and do not run to the union representative and therefore can be invoked only by individual employees.

To the extent that the arbitrator incorrectly interpreted the law, his decision must be considered repugnant [5/] to the Act and the Commission should not defer to that portion of his decision.

Therefore Springle's refusal to permit an Association representative in the meeting with Becky constitutes a violation of 34:13A-5.3(a)(1) regardless of the language of the collective negotiations contract.

However, as the Board points out, even if a Weingarten-

5/ Black's Law Dictionary, West Publishing Co., St. Paul, Minn. (1951), defines repugnant as "that which is contrary to what was stated before."

type violation is found by the Commission, the letter of discipline still should not be removed from Becky's personnel file. In Kraft Foods, 251 NLRB No. 6 (1980) and Coyne Cylinder Co., 251 NLRB No. 198 (1980), the NLRB did not order the retraction of discipline where the discipline was imposed on the basis of information obtained prior to an unlawful interview rather than information obtained at the interview itself.

In the instant case,Evans, the parent who complained about Becky, wrote and talked to Haldeman, the school principal, before any action was taken. Further, Becky had a preliminary meeting with Haldeman and Evans at which time Becky did not ask for representation. Haldeman asked for each side's position as to what happened. Further, Haldeman interviewed students who were present at the incident. At the interview with Springle, Becky denied any wrongdoing.

It is clear that the Board had gathered all the information used in their decision to discipline Becky prior to the unlawful interview. Accordingly, the appropriate remedy here is only a cease and desist order and not the removal of the disciplinary letter from Becky's personnel file.

Conclusions of Law

1) The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(5) for the reasons stated above.

2) The Respondent Board did violate N.J.S.A. 34:13A-5.4(a)(1) for the reasons stated above.

Recommended Order

The Hearing Examiner recommends the Commission ORDER

A. That the Respondent Board cease and desist from interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act by refusing to permit employees to have Association representatives at investigatory interviews.

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

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

Edmund G. Gerber
Hearing Examiner

DATED: April 15, 1981
Trenton, New Jersey

Recommended Posting
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 our employees in the exercise of the rights guaranteed to them by the Act by refusing to permit our employees to have Association representatives at investigatory interviews.

BOARD OF EDUCATION OF THE CAMDEN COUNTY VOCATIONAL TECHNICAL SCHOOL
(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 James Mastriani, Chairman, Public Employment Relations Commission, 429 E. State State Street, Trenton, New Jersey 08608 Telephone (609) 292-9830.