P.E.R.C. NO. 81-6

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SALEM CITY BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-80-43-38

SALEM CITY SUPPORTIVE STAFF ASSOCIATION, INC.,

Charging Party.

SYNOPSIS

The Commission in a decision and order in an unfair practice proceeding orders that the granting of the Board of Education's motion to dismiss be reversed on both grounds of the complaint and orders that the instant matter be remanded to the Hearing Examiner to continue the hearing.

The Hearing Examiner had granted the Motion of the Respondent Board to dismiss the Association's charge of unfair practices, which alleged violations of Subsections 5.4(a)(1), (2), (3) and (5) of the New Jersey Employer-Employee Relations Act, on the ground that the Association failed to prove a prima facie case against the Respondent Board with respect to: (1) the Board's alleged unilateral change in the work year and work days of certain of its aides on June 13, 1979 because the Association was not then validly recognized as the exclusive majority representative for aides under the Act and Rules of the Public Employment Relations Commission; and (2) the Board's sending of a letter on March 7, 1979 to certain of its employees, who were not then represented by the Association, which requested that the said employees execute a new authorization form for the deduction of dues, which the Board thereafter did not enforce.

In reversing the Hearing Examiner, the Commission concluded that the Hearing Examiner, in his decision, relied heavily on the fact that the Supportive Staff Association had not complied with the formal requirements for recognition as set forth in the Commission's rules. Moreover, the Commission concludes that there were relevant issues of fact yet to be resolved in the proceeding and that the dismissal of the complaint in its entirety was not warranted.

In remanding the matter back to the Hearing Examiner for further proceedings, the Commission did emphasize that the remand was not intended to indicate that the Commission had reached any conclusion concerning the ultimate merits of the Association's unfair practice charges.

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SALEM CITY BOARD OF EDUCATION,

Respondent,

- and - Docket No. CO-80-43-38

SALEM CITY SUPPORTIVE STAFF ASSOCIATION, INC.

Charging Party.

Appearances:

For Respondent, William C. Horner, Esq.

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

DECISION AND ORDER

The Salem City Supportive Staff Association, Inc. ("Association") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") alleging that the Salem City Board of Education ("Board") had violated the New Jersey Employer-Employee Relations Act ("Act") by unilaterally changing the work year and work days of certain employees whom the Association claims to represent. It was further alleged that the Board separately violated the Act by circulation of a memorandum to some employees regarding their representation and dues deductions.

A complaint and Notice of Hearing was issued, and a hearing convened before Hearing Examiner Alan R. Howe. At the conclusion of the Charging Party's case, a motion to dismiss was made by the Board. By written decision, the Hearing Examiner granted that

motion and dismissed all aspects of the case. H.E. No. 80-42, 6 NJPER ___ (¶ 1980). A copy is appended hereto and made a part hereof. Pursuant to N.J.A.C. 19:14-4.7 the Association has filed a timely request for review by the Commission, to which the Board has responded in opposition.

It is undisputed that the Board had recognized the Association as representative of a unit of secretarial and clerical employees. In its contract proposal, the Association included a recognition clause defining the unit as all non-certificated employees with a few specified exceptions.[1/] At a meeting of the parties the Board agreed to have a neutral third party determine majority status as to the additional employees sought. George Hill, the designated neutral party, separately determined by a card check that a majority of custodial supervisors, maintenance employees and aides desired representation by the Association but not cafeteria employees. These results were certified to the Board on June 4, 1979. A meeting between the parties for that date was cancelled by the Board. On June 19 the Board informed the Association of Hill's findings. While refusing to recognize the unit sought, asserting it was inappropriate, the Board did propose that the aides only be added to the unit. This was rejected by the Association.[2/]

1/ The exclusions included non-supervisory custodial employees and transport personnel and two confidential secretaries.
2/ The Association did concede that cafeteria employees should not be in the unit.

In the interim between the results having been certified by Hill and the June 19th meeting, the Board unilaterally reduced the work year of Frances Vanneman, library aide, from 12 to 10 months and reduced the work day of four aides from 7 to 6 hours with an accompanying reduction in pay. This action forms count one of the unfair practice charge.

In granting the motion to dismiss this count, the Hearing Examiner relied heavily on the fact that the parties had never complied with the formal requirements for recognition as set forth in the Commission's rules, N.J.A.C. 19:11-3.1. The Hearing Examiner applied the standard enunciated by the Commission for deciding such motions[3/] and apparently found that since no evidence existed to show that requirements for a recognition had been followed, no obligation to negotiate on recognition could exist. We believe that the Hearing Examiner placed too much emphasis on the formal requirements for a recognition, and therefore, erred in granting the motion to dismiss.

N.J.A.C. 19:11-3.1 appears in the chapter of the Commission's rules on procedures for resolving disputes over representation questions. N.J.A.C. 19:11-2.8(b) refers to the 12-month insulated period granted an employee representative which has successfully achieved the status of certified or recognized majority representative. That rule refers to N.J.A.C. 19:11-3.1 as setting forth the requirements which must be met for a recognition

3/ See New Jersey Turnpike Authority, P.E.R.C. No. 79-81, 5 NJPER 197 (¶10112 1979).

which will be accorded this 12-month election bar privilege. These same preconditions do not necessarily have to be met before a negotiations obligation arises between a public employer and an employee organization which does represent a majority of the employees in an appropriate unit. Such an organization may have the right to negotiate but only so long as it can satisfy the employer that it represents a majority of the employees in the unit.

We agree with the Charging Party that private sector precedent may usefully be consulted, especially since the Hearing Examiner rejected it solely due to his view of the binding nature of the Commission's rules as noted, supra. The United States Supreme Court has declared in Linden Lumber Div., Sumner & Co. v. NLRB, 419 U.S. 301, 87 LRRM 3236 (1974) that absent unfair labor practices impairing the electoral process,[4/] an employer has no duty to recognize a union with authorization cards purporting to represent a majority of employees, nor need the employer institute NLRB procedures, a burden resting on the union. Specifically reserved was the issue of whether an employer must abide by an agreement to have majority status determined by other means. The NLRB in Snow & Sons, 134 NLRB 709, 49 LRRM 1228 (1961), enf'd 308 F.2d 687, 51 LRRM 2199 (2nd Cir. 1962) and Idaho Pacific Steel Warehouse Co., 227 NLRB No. 50, 94 LRRM 1135

4/ See NLRB v. Gissel Packing Co., 395 U.S. 575, 71 LRRM 2481 (1969).

(1976) has held that such an agreement is binding. Unless the United States Supreme Court should ultimately reject Snow we believe it represents the proper approach to this problem, and that case may be relevant to the facts herein.

Manalapan-Englishtown Reg. Bd Ed, P.E.R.C. No. 78-24, 3 NJPER 380 (1977) is not inconsistent with the above. Therein we held that an employer need not negotiate where there is an appropriate unit dispute. In the Hearing Examiner's report appears reference to the Association's evidence that the Board did not challenge the appropriateness of the unit until June 19.[5/] It therefore appears that there are issues of fact yet to be resolved and that dismissal of this count was not warranted. By no means do we intimate any conclusion as to whether an unfair practice was committed.

Count two concerned a memorandum of March 7, 1979 reading in relevant part:

> "...It is my understanding that the local association to which you intend to give your dues is the Salem City Supportive Staff Association. With regard to this matter, I would like to make the following points.

5/ H.E. 80-42, p. 5, n. 12. We do note that the memorandum which is the subject of count two did somewhat raise this point, and was dated March 7.

"1. In reviewing your job responsibilities, I do not see similarities between them and the responsibilities of the people covered by the above-mentioned organization. This does not preclude, of course, your right to pay dues to this organization.

"2. The Salem City Supportive Staff Association, at this point, is the sole bargaining agent only for those people who were recognized as members of the organization by the Board of Education.

"3. The payroll department will deduct your dues, but it must be understood by you that this action in no way indicates that the Board of Education recognizes the Salem City Supportive Staff Association as your bargaining agent.

"If you still wish to have your dues deducted from your pay, please fill in the appropriate place below and return the bottom portion of this memo to my office by March 14, 1979..." (emphasis supplied)

Vanneman, the aide whose work year was reduced, refused to sign her copy of the memo -- which was sent only to some staff members -- but her dues were still deducted as they had been since she earlier signed an "automatic payroll deduction form."

The Hearing Examiner in his report considered only the content of the memorandum on its face, and concluded that it did not per se violate either §5.4(a)(1) or (a)(2). We find that the letter, while not inherently violative of the Act, must be considered within the overall context of events. Testimony was given that the Association was in the midst of organizing the employees it sought to add. Further, the Hearing Examiner refused to allow the Association to present testimony as to whether any of the employees receiving the memorandum were under any misconceptions as to whether they were represented by the Association. That evidence does appear to be relevant. Again, we are not saying that an unfair

practice was committed, but we do believe that the evidence must be evaluated to see if the letter in its entire fact context could withstand a motion.

Accordingly, the Commission reverses the granting of the motion to dismiss on both counts and remands the matter to the Hearing Examiner for further proceedings in accordance with this decision.

ORDER

IT IS HEREBY ORDERED that the granting of the respondent's motion to dismiss is reversed on both counts of the complaint, and the matter is remanded to the Hearing Examiner to continue the hearing.

BY ORDER OF THE COMMISSION

BY: Jeffrey B. Tener
JEFFREY B. TENER
Chairman

Chairman Tener, Commissioners Graves and Hartnett voted for this decision. Commissioners Hipp, Newbaker and Parcells abstained.

DATED: July 10, 1980
Trenton, New Jersey
ISSUED: July 14, 1980

H. E. No. 80-42

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

In the Matter of

SALEM CITY BOARD OF EDUCATION,

Respondent,

- and -

Docket No. CO-80-43-38

SALEM CITY SUPPORTIVE STAFF
ASSOCIATION, INC.,

Charging Party.

SYNOPSIS

A Hearing Examiner grants the Motion of the Respondent Board to dismiss the Association's charge of unfair practices, which alleged violations of Subsections 5.4(a)(1),(2),(3) and (5) of the New Jersey Employer-Employee Relations Act, on the ground that the Association failed to prove a prima facie case against the Respondent Board with respect to: (1) the Board's alleged unilateral change in the work year and work days of certain of its aides on June 13, 1979 because the Association was not then validly recognized as the exclusive majority representative for aides under the Act and Rules of the Public Employment Relations Commission; and (2) the Board's sending of a letter on March 7, 1979 to certain of its employees, who were not then represented by the Association, which requested that the said employees execute a new authorization form for the deduction of dues, which the Board thereafter did not enforce.

A Hearing Examiner's granting of a Motion to Dismiss is subject to appeal to the Public Employment Relations Commission pursuant to its rules.

H. E. No. 80-42

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

In the Matter of

SALEM CITY BOARD OF EDUCATION,

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Docket No. CO-80-43-38

SALEM CITY SUPPORTIVE STAFF
ASSOCIATION, INC.,

Charging Party.

Appearances:

For the Salem City Board of Education
William C. Horner, Esq.

For the Salem City Supportive Staff Association, Inc.
Selikoff & Cohen, Esqs.
(Steven R. Cohen, Esq.)

DECISION ON MOTION TO DISMISS AND ORDER

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on September 5, 1979 [1/] by the Salem City Supportive Staff Association, Inc. (hereinafter the "Charging Party" or the "Association"), alleging that the Salem City Board of Education (hereinafter the "Respondent" or 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. (hereinafter the "Act"), in that the Respondent had, inter alia, on June 13, 1979 unilaterally altered the work year and work days of certain Aides without negotiations with the Charging Party, which claimed to represent the Aides in a unit including all non-confidential secretarial and clerical employees, all of which was alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1),(3) and (5) of the Act.[1a/] Additionally, the Charging Party alleged that the Respondent had on March 7, 1979

1/ The Charging Party's attempt to amend its charge at the hearing on February 20, 1980, infra, was denied on the ground of timeliness (1 Tr. 11, 12). The operative date in the amendment was January 20, 1979. N.J.S.A. 34:13A-5.4(c) establishes a six-month statutory period of limitations on the filing of an Unfair Practice Charge.

1a/ This is referred to by the Association as Count One.

circulated a memo to certain employees indicating that they should not become members of the Charging Party nor authorize dues to be deducted from their pay because of the lack of similarity between their jobs and that of employees then represented by the Charging Party, which was further alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1) and (2) of the Act. 2/

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 November 30, 1979. Pursuant to the said Notice of Hearing, hearings were held on February 20 and 21, 1980 3/ in Trenton, New Jersey, at which the Charging Party was given an opportunity to examine witnesses and present relevant evidence. At the conclusion of the Charging Party's case on February 21, 1980, counsel for the Respondent made an oral Motion to Dismiss and the arguments of the parties were placed upon the record (2 Tr. 102-129). Supplemental written argument from counsel for both parties was received by March 10, 1980. 3a/

An Unfair Practice Charge having been filed with the Commission, and a Motion to Dismiss having been made by the Respondent, and, after consideration of the oral and written argument of the parties, the matter of the Motion to Dismiss is appropriately before the Hearing Examiner for determination.

Upon the record to date, namely, the presentation of the Charging Party's case, the Hearing Examiner makes the following:

2/ This is referred to by the Association as Count Two. Subsection 5.4(a) prohibits public employers, their representatives and agents from:

"(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.

"(2) Dominating or interfering with the formation, existence or administration of any employee organization.

"(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act.

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

3/ The hearing was originally scheduled to commence on January 21, 24 and 25, 1980 but, at the request of counsel for the Charging Party, due to a scheduling conflict, the hearing was rescheduled to the first mutually available dates.

3a/However, the complete transcript was not received until March 24, 1980.

FINDINGS OF FACT [4]

1. The Salem City Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Salem City Supportive Staff Association, Inc., is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. The Association's existence commenced with its incorporation in the Fall of 1978 and, at all times material hereto, it has been affiliated with the New Jersey Education Association (hereinafter "NJEA").

4. The Respondent Board's first knowledge of the existence of the Association was by receipt of a letter dated October 25, 1978, in which the Association demanded recognition for a unit of the Board's secretarial and clerical employees. This request for recognition was granted by the Board on December 14, 1978 (J-1). [5] Thereafter, the Board complied with all pertinent rules and regulations of the Commission with respect to validating recognition under the Act.

5. Notwithstanding that the Charging Party's two principal witnesses [6] testified on direct examination that the Association did not on January 20, 1979 represent a majority of the Board's "non-certificated employees," [7] the Association on that date submitted to the Board's Superintendent, Frank J. Napoli, a pro-

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[4] In making these findings the Hearing Examiner is guided by Commission decisions in Township of North Bergen, P.E.R.C. No. 78-28, 4 NJPER 15 (1977) and New Jersey Turnpike Authority, et al., P.E.R.C. No. 79-81, 5 NJPER 197 (1979).

[5] It was stipulated that the grant of recognition excluded confidential employees and that the reference in J-1 to recognition of "New Jersey Education Association" was intended to mean recognition of the Association herein. (1 Tr. 13,14).

[6] Charles E. Battersby, an NJEA Negotiations Consultant, and Beverly Booth, the President of the Association.

[7] In addition to the secretarial and clerical employees, for whom the Board had recognized the Association on December 14, 1978, supra, it was stipulated that "non-certificated employees" also embraced the supervisors of custodians, maintenance employees, aides and cafeteria personnel (1 Tr. 15,16; 2 Tr. 7). Battersby and Booth both testified that the Association was in the process of organizing the foregoing employees whom it did not then represent. It was also stipulated that the Board has a contractual collective negotiations relationship with the Salem City Teachers Association, which is in no way connected with the Charging Party herein, except that both are affiliated with the NJEA (2 Tr. 92,93).

posed collective negotiations agreement, Article 1 of which provided for recognition of the Association as "the bargaining agent...for non-certificated employees of the Board excluding the Secretary to the Superintendent and the Secretary to the Business Manager and custodial and transportation personnel" (J-2, p. 2). 8/

6. Booth testified on direct examination that the Superintendent was "upset" by Article 1 of J-2, supra, because of the fact that the Association "...had unilaterally...extended the groups that were to be covered" (2 Tr. 54). This position of the Superintendent is documented in letters to Booth and Battersby dated May 1, 1979 (see CP-2 and CP-5 in response to CP-4 and CP-1).

7. On May 29, 1979 representatives of the Board met with representatives of the Association, including Battersby and Booth, and the meeting focused on the recognition clause sought by the Association (J-2, Article 1, supra). Following a Board caucus, its spokesman, Dr. James Powell, advised the Association representatives present that the Board would agree to have a neutral third party make a determination of the Association's majority status with respect to the additional non-certificated personnel whom the Association sought to represent. 9/ The Association agreed to the Board's suggestion of George Hill as the neutral third party, who would certify the results to the parties. (1 Tr. 16, 17; 2 Tr. 15-20, 40-43, 59-62, 86, 87). 10/

8. After being advised of his selection (CP-6), Hill, on June 4, 1979, checked the Association's authorization cards against the Board's payroll list and made separate determinations as follows: the Association represented a majority of the supervisors of custodians, the maintenance employees, and the aides; but the Association did not represent a majority of the cafeteria personnel since no

8/ It was further stipulated that the Board has a contractual collective negotiations relationship with the International Federation of Professional and Technical Engineers, AFL-CIO, which includes a unit of all custodians and custodian bus drivers (1 Tr. 24, 25).

9/ See footnote 7, supra.

10/ Express note is made of the fact that neither Battersby nor Booth could testify convincingly that any representative of the Board stated at the meeting of May 29, 1979 that recognition of the Association's proposed unit (J-2, Article 1, supra,) would necessarily result from Hill's "card check" and certification (compare 2 Tr. 17, 41, 61 with 2 Tr. 43, 44, 86, 87). It is also noted that a further meeting of the parties on June 4, 1979 to discuss the matter of recognition was cancelled by the Board (2 Tr. 20, 22, 67).

authorization cards had been submitted (1 Tr. 17-19). [11]

9. It was stipulated that on June 19, 1979 the Board at a meeting with the Association refused to recognize the Association's proposed expanded unit for all "non-certificated personnel," supra, contending that it would not be an appropriate unit because of the lack of a community of interest and because it included both supervisory and non-supervisory personnel. However, the Board did propose on that date that the previously recognized unit of secretarial and clerical employees be expanded to include the aides only. The Association rejected this proposal of the Board, stating that it would acknowledge that cafeteria personnel should not be included since they had evidenced no interest in the Association. (See 1 Tr. 22-24; see also 2 Tr. 26, 72, 73). [12] Booth testified that Battersby indicated at the conclusion of the June 19, 1979 meeting that if necessary a petition for unit clarification would be filed with "PERC" (2 Tr. 74, 87-89). [13]

10. It was stipulated that the Board on June 13, 1979 reduced the work year of one library aide (Frances Vanneman) from 12 months to 10 months [14] and also reduced the work day of four aides from seven to six hours per day with pro-rata reductions in compensation. These changes were to become effective with the school year commencing July 1, 1979. (1 Tr. 19-21). Battersby and Booth learned of the Board's action on June 14, 1979 and at the June 19, 1979 meeting, supra, Battersby indicated to Dr. James Powell that the Board's action of June 13th was a possible unfair practice on the ground that the Board should have discussed the changes in work year and hours with the Association (2 Tr. 23-25, 69, 70).

11. It was stipulated that on March 7, 1979 a letter on the letterhead of the Office of the Assistant Superintendent, John D. McGovern, was addressed to "Staff Members" on the subject of "Dues Deductions," and that this letter was sent only to

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11/ Hill certified the results on June 4, 1979 although the Association did not learn of this fact until June 19, 1979 (2 Tr. 22, 68).

12/ Battersby testified that the question of the appropriateness of the Association's proposed unit first arose on June 19, 1979 (2 Tr. 21, 22).

13/ Battersby also testified that "going to...PERC" was a possible course of action (2 Tr. 27). It was stipulated that no petition of any kind had been filed by the Association with the Commission since December 14, 1978 (1 Tr. 24).

14/ All other library aides had previously been 10-month employees.

"certain or some staff members," as is apparent from the portions hereinafter quoted (see 1 Tr. 25, 26 and J-3). The aforesaid letter provides, in pertinent part, as follows:

> "...It is my understanding that the local association to which you intend to give your dues is the Salem City Supportive Staff Association. With regard to this matter, I would like to make the following points.
>
> "1. In reviewing your job responsibilities, I do not see similarities between them and the responsibilities of the people covered by the above mentioned organization. This does not preclude, of course, your right to pay dues to this organization.
>
> "2. The Salem City Supportive Staff Association, at this point, is the sole bargaining agent only for those people who were recognized as members of the organization by the Board of Education.
>
> "3. The payroll department will deduct your dues, but it must be understood by you that this action in no way indicates that the Board of Education recognizes the Salem City Supportive Staff Association as your bargaining agent.
>
> "If you still wish to have your dues deducted from your pay, please fill in the appropriate place below and return the bottom portion of this memo to my office by March 14, 1979..." (Emphasis supplied).

12. Charging Party witness Frances Vanneman, a library aide, [15/] testified that she has been a member of the Association since October 1978 and received a copy of the McGovern letter regarding "dues deductions" on Maroh 7, 1979. She indicated to Battersby that she was "upset" by the letter since she had already signed an "automatic payroll deduction" form and did not understand why she had to sign another form. Vanneman testified that she did not sign J-3 as requested by McGovern on the advice of Battersby and that her dues were still deducted by the Board thereafter. (See 2 Tr. 94, 95).

THE ISSUE

Has the Charging Party presented a prima facie case of violations of the Act by the Respondent Board as alleged?

15/ Vanneman was previously referred to in Finding of Fact No. 10, supra.

DISCUSSION AND ANALYSIS

The Applicable Standard on a Motion To Dismiss

The Commission in New Jersey Turnpike Authority, et al., [16] amplified upon the standard that it had enunciated in Township of North Bergen, [17] with respect to the applicable standard on a Motion to Dismiss made at the conclusion of the charging party's case. The Commission there restated that it utilizes the standard set forth by the New Jersey Supreme Court in Dolson v. Anastasia, 55 N.J. 2 (1969). The Commission observed that:

> "...Therein the Court declared that when ruling on a motion for involuntary dismissal (at the close of the plaintiff's case) the trial court is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion' (emphasis added). Unlike a number of other jurisdictions, New Jersey Courts have consistently held that before a motion for involuntary dismissal will be granted the moving party must demonstrate that not even a scintilla of evidence exists to support the plaintiff's case. Thus, while the process does not involve the actual weighing of evidence...some consideration of the worth of the evidence presented may be necessary. This is particularly true in the administrative context where evidence, which would ordinarily be ruled inadmissible by a trial court may, under In re Application of Howard Savings Bank, 143 N.J. Super. 1 (App. Div. 1976), be allowed in at an administrative hearing..." (5 NJPER at 198) [18] (Emphasis supplied).

Having set forth the applicable standard on a Motion to Dismiss, the Hearing Examiner now turns to consideration of the evidence stipulated to and presented by the Charging Party with respect to the Respondent's alleged violations of the Act.

Respondent's Motion To Dismiss Count One Of The Unfair Practice Charge Is Granted

The gravamen of Count One of the Association's charge is that on June 13, 1979 the Respondent Board, without notice to the Association, unilaterally reduced

16/ See footnote 4, supra.

17/ See footnote 4, supra.

18/ The Commission then proceeded to consider the matter of the weight to be given hearsay evidence, which is not significantly involved in the instant case.

the work year and work day of five of its aides, which action occurred after the Association had requested recognition as the majority representative for a unit including all aides, and after the Respondent had agreed to a neutral third party verifying the Association's majority status. The foregoing was alleged to be a violation of Subsections (a)(1),(3) and (5) of the Act. (See C-1).

The Hearing Examiner finds and concludes that the Respondent, under the above enunciated standard, has demonstrated "...that not even a scintilla of evidence exists to support..." the Charging Party's case under Count One.

As the above Findings of Fact make clear, the Association had not as of June 13, 1979 been validly recognized by the Board as the exclusive majority representative for the aides in an appropriate unit as provided for in the rules of the Commission: N.J.A.C. 19:11-3.1(a) and (b). It is first noted that, in conformity with the Commission rules, the Board granted recognition to the Association as exclusive representative for the Board's secretarial and clerical employees on December 14, 1978 (Finding of Fact No. 4, supra). Following this grant of recognition by the Board, the Association, beginning on January 20, 1979, attempted to expand its unit to include all "non-certificated personnel," including the aides, notwithstanding that the Association's majority status was not established until June 4, 1979 when George Hill made a "card check," which determined, inter alia, that the Association represented a majority of the aides (Findings of Fact Nos. 5-8, supra).

Even if the Hearing Examiner was convinced by the Charging Party's evidence that the Board had on May 29, 1979 agreed to recognize the Association following Hill's card check and certification (see footnote 10, supra), the record is devoid of any evidence whatsoever that a valid recognition of the Association had been effectuated with respect to the aides prior to June 13, 1979. In fact, the Association did not learn of Hill's certification of the aides' majority status until June 19, 1979 (footnote 11, supra).

At the meeting of the parties on June 19, 1979, the Board, after initially refusing to recognize the Association's proposed expanded unit for all "non-certificated personnel" on the ground that it would not be an appropriate unit, [19/] did propose to include the aides in the previously recognized unit of secretarial and

19/ Battersby acknowledged that the question of the appropriateness of the Association's proposed unit first arose on June 19, 1979 (footnote 12, supra).

clerical employees. 20/ Further, following the Association's rejection of the Board's proposal to include the aides in the previously recognized secretarial and clerical unit,Battersby indicated that, if necessary, a petition for unit clarification would be filed with "PERC" (Finding of Fact No. 9, supra).

The Respondent, both at the hearing and in its letter memorandum of March 4, 1980, has cited the Commission's decision in Manalapan-Englishtown Regional Board of Education, P.E.R.C. No. 78-24, 3 NJPER 380 (1977) while the Charging Party has cited decisions of the Federal courts and the National Labor Relations Board in the private sector in its letter memorandum of March 7, 1980 (pp. 2, 3). The Hearing Examiner concludes that the Charging Party's reference to private sector cases is inapposite due to the significant difference in the manner in which valid recognition is effectuated under the National Labor Relations Act and the manner in which such recognition is effectuated under our Act and Rules, supra.

Even assuming arguendo that the parties' meeting of June 19, 1979 occurred prior to June 13, 1979, the date on which the Board unilaterally changed the work year and work day of certain of its aides, the Hearing Examiner's conclusion herein would not change inasmuch as the Commission made clear in Manalapan-Englishtown, supra, that:

> "...A public employer is only required to negotiate with a majority representative of employees in an appropriate unit and...if there is a dispute regarding the appropriateness of a unit, there are procedures available to a party seeking to add employees to an existing unit..." (3 NJPER at 382) (Emphasis by the Commission).

In conclusion, with respect to Count One, the Charging Party has failed to adduce a scintilla of evidence that the Respondent violated Subsection (a)(5) of the Act by its conduct on June 13, 1979, supra. The Charging Party does not urge an independent violation of Subsection (a)(1) of the Act, hence, any violation by the Respondent would have to be derivative. Finally, the Charging Party does not contend that any evidence was adduced, which would support a Subsection

20/ The Charging Party's argument that the Commission has registered approval of broad-based units for school employees fails to meet the issue presented, namely, whether a valid recognition of the Association as the majority representative of the aides had been effectuated by June 13, 1979. Had such recognition been effectuated by that date, the Hearing Examiner would have had no problem in finding that the inclusion of the aides with the secretarial and clerical employees constituted an appropriate unit.

(a)(3) violation of the Act. [21] Thus, the Respondent's Motion to Dismiss Count One is granted.

The Respondent's Motion To Dismiss Count Two Of The Unfair Practice Charge Is Granted

The thrust of Count Two is that the Respondent independently violated Subsection (a)(1) of the Act by virtue of the John D. McGovern letter of March 7, 1979 regarding "dues deductions," the Charging Party alleging in connection therewith that the effect of the letter was to interfere with, restrain and coerce the aides in their right to join the Association and authorize dues to be deducted from their pay (See C-1). It is further alleged that Subsection (a)(2) of the Act was also violated by the McGovern letter, in that the letter on its face constitutes domination or interference with "the formation, existence or administration of any employee organization."

The Hearing Examiner must again determine whether or not the Respondent has met the burden of demonstrating "...that not even a scintilla of evidence exists to support..." the Charging Party's case under Count Two.

The Hearing Examiner first considers whether or not the Charging Party's evidence establishes a prima facie independent violation of Subsection (a)(1) of the Act. The most recent restatement of the Commission's standard for such a violation is found in New Jersey Sports and Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550 (1979) where the Commission said in footnote 1 therein:

> "...It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or to coerce an employee in the exercise of rights guaranteed by the Act, provided that the actions taken lack a legitimate and substantial business justification..." (5 NJPER at 551)(Emphasis supplied).

An examination of the March 7, 1979 McGovern letter [22] discloses that the Respondent initially stated its opinion that there was a lack of similarity in job responsibilities between the recipients of the letter, such as Frances Vanneman, whom at that point were not part of a unit represented by the Associa-

21/ Under the line of decisions beginning with Haddonfield Borough Board of Education, P.E.R.C. No. 77-36, 3 NJPER 71 (1977) anti-union animus must be established as one of the motivating factors in the public employer's conduct.

22/ See J-3 and Finding of Fact No. 11, supra.

tion and recognized by the Board, [23] and those "people covered by" the Association. The letter stressed the right of the recipients to pay dues to the Association and that the payroll department would deduct such dues. Finally, the letter made clear the Board's position that, as of that date, deduction of dues "...in no way indicates that the Board...recognizes the...Association as your bargaining agent..." It is also noted that, notwithstanding Vanneman's failure to sign J-3, as requested, her dues were still deducted by the Board thereafter (Finding of Fact No. 12, supra).

The Hearing Examiner is fully satisfied that the McGovern letter on its face discloses a "legitimate and substantial business justification" on the part of the Respondent in communicating truthfully with those of its employees, who were not then represented by the Association in a recognized appropriate unit, regarding "dues deductions." Also, the letter in no way tended to interfere with, restrain or coerce the employee recipients in the exercise of the rights guaranteed to them by the Act, i.e., joining the Association or authorizing dues deductions. Any doubt regarding the dues deduction aspect was vitiated by the Respondent's subsequent deduction of Vanneman's dues without her signing J-3 as requested.

The Hearing Examiner concludes finally that J-3 could not reasonably be construed as constituting domination or interference with the formation, existence or administration of the Association under Subsection (a)(2) of the Act. As noted previously, the letter made truthful representations with respect to the representative status of the Association as of March 7, 1979. It also clearly stated the right of the employees to pay dues to the Association and stated that the payroll department would deduct dues, which it did without receipt of an additional signed authorization in the case of Vanneman, supra.

Thus, the Charging Party having failed to adduce a scintilla of evidence that the Respondent violated Subsections(a)(1) and (2) of the Act, the Respondent's Motion to Dismiss Count Two is granted.

* * * *

Based upon all of the foregoing, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

The Charging Party having failed to present a prima facie case of violations by the Respondent Board of N.J.S.A. 34:13A-5.4(a)(1),(2),(3) and (5) the

23/ See Findings of Fact Nos. 6 and 7, supra.

Respondent's Motion to Dismiss is granted in all respects.

ORDER

It is hereby ORDERED that the Complaint be dismissed in its entirety.

Dated: April 25, 1980
Trenton, New Jersey

Alan R. Howe
Hearing Examiner