P.E.R.C. NO. 91-34

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

AFSCME, COUNCIL NO. 52, LOCAL NO. 888,

Respondent,

-and- Docket No. CI-H-90-06

ROBERT BRENNAN,

Charging Party.

RUTGERS, THE STATE UNIVERSITY,

Respondent,

-and- Docket No. CI-H-90-07

ROBERT BRENNAN,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants summary judgment for AFSCME, Council No. 52, Local 888 but denies a motion to dismiss filed by Rutgers, the State University of New Jersey in an unfair practice case initiated by Robert Brennan. The Commission grants AFSCME's motion for summary judgment because it does not believe that AFSCME's refusal to arbitrate the charging party's grievance seeking overtime equalization was arbitrary, discriminatory, or in bad faith. The Commission denies Rutgers' motion to dismiss because the allegations in the charge, standing alone, suggest a cause of action of discrimination for filing a grievance.

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STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

AFSCME, COUNCIL NO. 52, LOCAL NO. 888,

Respondent,

-and- Docket No. CI-H-90-06

ROBERT BRENNAN,

Charging Party.

RUTGERS, THE STATE UNIVERSITY,

Respondent,

-and- Docket No. CI-H-90-07

ROBERT BRENNAN,

Charging Party.

Appearances:

For the Respondent, AFSCME
Szaferman, Lakind, Blumstein, Watter & Blader, attorneys
(Sidney H. Lehmann, of counsel)

For the Respondent, Rutgers
Christine B. Mowry, Assistant Vice-President for Staff Affairs

For the Charging Party,
Purzycki & Gorney, attorneys
(Edward W. Gorney, of counsel)

DECISION AND ORDER

On July 14, 1989, Robert Brennan filed unfair practice charges against Rutgers, the State University and AFSCME, Council No. 52, Local 888. The charging party alleged that Rutgers violated

the New Jersey Employer-Employee Relations Act, specifically subsections 5.4(a)(3) and (5),[1/] by changing his title because he filed a grievance seeking equalization of overtime. The charging party alleged that AFSCME violated subsections 5.4(b)(1) and (3)[2/] of the Act, when, at a grievance hearing, its representative suggested to the employer that it change the charging party's title and when it refused to arbitrate the overtime grievance.

On December 11, 1988, a Consolidated Complaint and Notice of Hearing issued. On January 3, 1990, Rutgers filed its Answer denying it violated the Act. On January 23, AFSCME filed its Answer claiming it performed every duty owed to the charging party under the Act.

On March 2, 1990, AFSCME moved for summary judgment. On March 12 and 15, 1990, the charging party replied. The motion was referred to the Hearing Examiner who recommended dismissing the allegations against AFSCME. H.E. No. 90-47, 16 NJPER 333 (¶21138

1/ These subsections prohibit public employers, their representatives or agents from: "(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act;" and "(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ These subsections prohibit employee organizations, 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) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit."

1990). He found that the charging party failed to offer any evidence that AFSCME's actions were arbitrary, discriminatory or in bad faith.

On May 18, 1990, Rutgers moved to dismiss. It argued that assuming every allegation in the charge is true, the charging party has failed to allege facts sufficient to constitute an unfair practice. Specifically, it claims that the charging party has not alleged that Rutgers was hostile to the exercise of any rights guaranteed him under the Act. It further claims that the charging party lacks standing to allege that Rutgers refused to negotiate in good faith.[3/]

On June 5, 1990, the charging party filed a reply. He claims that Rutgers' motion is in effect a motion for summary judgment. He then argues that changing his title because he filed a grievance discouraged him in the exercise of his rights. He argues that the motion should be denied and the Hearing Examiner should determine whether in fact he requested the title change.[4/]

On August 2, 1990, the Hearing Examiner dismissed the allegations against Rutgers. H.E. No. 91-4, 16 NJPER ___ (¶_____

3/ Rutgers also claims that the allegation concerning a 1986 grievance is untimely and that the allegation of discrimination because he is a Vietnam veteran is outside our jurisdiction.

4/ The charging party also explained that the charge's reference to an earlier grievance was to show prior conduct and agreed that this is not the forum to adjudicate claims of discrimination against veterans.

1990). He found that Rutgers did not violate the Act during the processing of the charging party's overtime grievance.

On August 15, 1990, the charging party requested review. He contests certain findings of fact and urges that we reject the Hearing Examiner's determination.

On August 29, 1990, Rutgers filed a reply urging adoption of the Hearing Examiner's determination.

We begin with AFSCME's motion for summary judgment. We have reviewed the parties' submissions. The Hearing Examiner's findings of fact (H.E. 90-47 at 5-9) are generally accurate. For purposes of this motion, we incorporate them here with this modification. The charging party alleged that AFSCME, not he, requested a title change. We need not resolve this factual issue to decide this motion.

Summary judgment will be granted:

> If it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact andthe movant...is entitled to its requested relief as a matter of law....[N.J.A.C. 19:14-4.8(d)]

Even assuming that AFSCME suggested that his title be changed, we find that the undisputed facts support granting summary judgment for AFSCME. These facts show that the charging party was doing the work of a senior electrician/maintenance mechanic and had twice as many overtime hours as Dowd, the other high voltage electrician. Given these facts, we do not believe that AFSCME's refusal to arbitrate the charging party's grievance seeking overtime equalization was

arbitrary, discriminatory, or in bad faith. Belen v. Woodbridge Tp. Bd. of Ed., 142 N.J. Super. 486 (App. Div. 1976), citing Vaca v. Sipes, 386 U.S. 171 (1967).

We next address the employer's motion to dismiss. In Reider v. New Jersey Dept. of Transportation, 221 N.J. Super. 547 (App. Div. 1987), the Court articulated this standard:

> "the inquiry is confined to a consideration of the legal sufficiency of the alleged facts apparent on the face of the challenged claim." P. & J. Auto Body v. Miller, 72 N.J. Super 207, 211 (App. Div. 1962). The court may not consider anything other than whether the complaint states a cognizable cause of action. Ibid. For this purpose, "all facts alleged in the complaint and legitimate inferences drawn therefrom are deemed admitted." Smith v. City of Newark, 136 N.J. Super 107, 112 (App. Div. 1975). See also Heavner v. Uniroyal, Inc., 63 N.J. 130, 133 (1973); Polk v. Schwartz, 166 N.J. Super 292, 299 (App. Div. 1979). A complaint should not be dismissed under this rule where a cause of action is suggested by the facts and a theory of actionability may be articulated by way of amendment. Muniz v. United Hsps. Med. Ctr. Pres. Hsp., 153 N.J. Super 79, 82-83 (App. Div. 1977). However, a dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted. [Id. at 552]

Although the charging party has termed this a motion for summary judgment, we will only enlarge the scope of a motion to dismiss if the motion presents matters outside the pleadings.

> While the court has the power to enlarge the scope of said motion and treat the same as "one for summary judgment," this may be done only if on said motion "matters outside the pleading are presented." However, such matters must be presented by depositions, admissions or affidavits. They cannot be raised, without verification, in oral arguments of counsel or in briefs filed with the court. [P. & J Auto Body, 72 N.J. Super at 211]

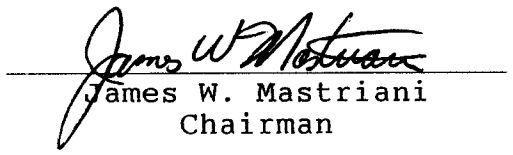
The parties have not presented any such depositions, admissions or affidavits so we will not convert that motion to dismiss into a motion for summary judgment.

We look then to the charge itself and determine whether a cause of action is suggested by the facts. Reider. We believe it is. The charging party filed a grievance protesting the employer's failure to equalize overtime. Allegedly as a result of his pursuing that grievance, the employer changed his job title and thereby effectively negated his ability to pursue his grievance. That allegation, standing alone, suggests a cause of action of discrimination for filing a grievance. The charging party may not be able to prove this allegation and the employer may have a legitimate defense. There are numerous factual allegations suggested by AFSCME's motion, the charging party's reply to that motion, and the charging party's brief in opposition to this motion. But these allegations are not properly before us. Should a motion for summary judgment be filed, any factual allegations relied on by either party must be supported by depositions, admissions or affidavits.

ORDER

AFSCME's motion for summary judgment is granted. Rutgers' motion to dismiss is denied.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Ruggiero, Smith and Wenzler voted in favor of this decision. None opposed. Commissioner Reid abstained from consideration.

DATED: Trenton, New Jersey
September 27, 1990
ISSUED: September 28, 1990

H.E. NO. 90-47

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

In the Matter of

AFSCME, COUNCIL NO. 52, LOCAL NO. 888,

Respondent,

-and- Docket No. CI-H-90-6

ROBERT BRENNAN,

Charging Party.

RUTGERS, THE STATE UNIVERSITY,

Respondent,

-and- Docket No. CI-H-90-7

ROBERT BRENNAN,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Motion for Summary Judgment filed by the Respondent AFSCME be granted for the reason that the Undisputed Findings of Fact establish beyond doubt that there are no genuine issues of material fact which require resolution at a plenary hearing and that AFSCME is entitled to judgment as a matter of law. The only conceivable theory upon which a violation could have been founded was a breach of the duty of fair representation, which did not obtain in this case. On the "record" the Charging Party had established only that AFSCME refused to take one of two grievances to arbitration. There were no undisputed facts adduced which indicated that AFSCME acted other than in good faith, without discriminatory intent or motivation and without arbitrariness.

The Respondent Rutgers failed to file a like Motion for Summary Judgment or a Motion to Dismiss. Therefore, the Charging Party's Unfair Practice Charge still pends against the Respondent Rutgers for disposition at a plenary hearing, which has been peremptorily scheduled.

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. 90-47

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

In the Matter of

AFSCME, COUNCIL NO. 52, LOCAL NO. 888,

Respondent,

-and- Docket No. CI-H-90-6

ROBERT BRENNAN,

Charging Party.

RUTGERS, THE STATE UNIVERSITY,

Respondent,

-and- Docket No. CI-H-90-7

ROBERT BRENNAN,

Charging Party.

Appearances:

For the Respondent, AFSCME
Szaferman, Lakind, Blumstein, Watter & Blader, Esqs.
(Sidney H. Lehmann, of counsel)

For the Respondent, Rutgers
(Christine B. Mowry, of counsel)

For the Charging Party,
Purzycki & Gorney, Esqs.
(Edward W. Gorney, of counsel)

HEARING EXAMINER'S DECISION ON
AFSCME'S MOTION FOR SUMMARY JUDGMENT

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on July 14, 1989, by Robert Brennan ("Charging Party" or "Brennan"") alleging that AFSCME, Council No. 52, Local No. 888 ("AFSCME") has engaged in

unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"), in that on June 23, 1989, one Julian Amkraut wrote a decision, stating that he had considered AFSCME's and Brennan's point concerning Brennan's job title and that this title was changed to "Senior Electrician/Maintenance Mechanic"; that Brennan had said nothing about changing his title but that AFSCME did and Brennan told AFSCME that this couldn't be done; that this is the third time that AFSCME has refused to proceed to arbitration; that Brennan's grievance was also for equalization of overtime in the High Voltage Electrician classification (HVE); that Brennan's grievance was answered by a title change so that he could not "grieve any more"; that Brennan has had the HVE title since 1984 and is senior to other HVE's in his classification; the junior HVE should have been reclassified "as per seniority"; all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(b)(1) and (3) of the Act.[1/]

Brennan also filed an Unfair Practice Charge with the Commission on July 14, 1989, alleging that Rutgers, The State University ("Rutgers") has engaged in unfair practices within the meaning of the Act, in that Brennan, a tenured employee who is also

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1/ These subsections prohibit employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit."

a Vietnam veteran, has been discriminated against by Rutgers "on this grievance" and, also, on a prior grievance where he was discharged and then reinstated with a suspension of five weeks; that Amkraut has circumvented the contract by not answering Brennan's grievance as filed, which was for the equalization of overtime in the HVE classification; that Amkraut, in avoiding the HVE issue, claimed that there was no discrepancy in the "Electrician's Work Unit," which has nothing to do with the HVE classification; that Amkraut changed Brennan's title from HVE to Senior Electrician; that the HVE title was a promotional opportunity, for which Brennan bid in 1984 and was promoted; that since that date Rutgers has hired another HVE who is junior to Brennan in seniority; and that if Amkraut wished to eliminate a job classification it must be that of the junior employee according to the contract; all of which is alleged to in violation of N.J.S.A. 34:13A-5.4(a)(3) and (5) of the Act.[2/]

It appearing that the allegations of the two Unfair Practice Charges, if true, may constitute unfair practices within the meaning of the Act, a Consolidated Complaint and Notice of

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2/ These subsections prohibit public employers, their representatives or agents from: "(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."

Hearing was issued on December 11, 1988. Rutgers filed its Answer on January 3, 1990, and AFSCME filed its Answer on January 23, 1990.

The Consolidated Complaint and Notice of Hearing originally scheduled hearing dates for January 23, 26 and 27, 1990, but these dates were adjourned to February 23, 26 and 27, 1990. On February 14, 1990, counsel for Brennan requested a further adjournment since Brennan had been assigned to jury duty, commencing February 22nd. The Hearing Examiner then adjourned the matter without date.

On March 2, 1990, AFSCME filed with the Chairman of the Commission a Motion for Summary Judgment, dated February 26, 1990. Brennan filed a Response to the Motion for Summary Judgment on March 12, 1990, which was supplemented by a letter filed March 15, 1990. On March 21st, the Chairman of the Commission referred AFSCME's Motion for Summary Judgment to the undersigned for disposition pursuant to N.J.A.C. 19:14-4.8.[3/]

Based upon (1) the allegations in Brennan's Unfair Practice Charge against AFSCME, (2) AFSCME's Motion for Summary Judgment [to which is annexed excerpts from the July 1, 1986 through June 30, 1989 collective negotiations agreement between AFSCME and Rutgers], (3) Brennan's original and supplemental Response[4/] and (4) the

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3/ It is noted that Rutgers has filed neither a corresponding Motion for Summary Judgment nor a Motion to Dismiss.

4/ Brennan's Response to AFSCME's Motion for Summary Judgment contains a detailed factual statement, including ten (10)

Footnote Continued on Next Page

administrative notice taken of certain facts previously found in H.E. No. 89-11, 14 NJPER 606 (¶19257 1988),[5/] which involved the same parties -- the Hearing Examiner now makes the following:

UNDISPUTED FINDINGS OF FACT

1. AFSCME, Council No. 52, Local No. 888 is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

2. Robert Brennan is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

3. Brennan has been employed by Rutgers since July 1979. He has been a High Voltage Electrician (HVE) since 1986 and is presently assigned to the College Avenue Campus. Dennis Dowd is also employed by Rutgers as an HVE and is presently assigned to the Kilmer Campus.

4. The assignment of overtime for Brennan and Dowd is controlled by Rutgers' Utility Department at the Kilmer Campus. Brennan, who is senior to Dowd, contends that Dowd receives an unfair amount of overtime compared to Brennan.

4/ Footnote Continued From Previous Page

relevant attachments, which expanded upon the holographic allegations in the Unfair Practice Charge against AFSCME. Since AFSCME did not provide corresponding factual detail in its Motion for Summary Judgment and has failed to object to Brennan's expansion upon his initial allegations, the Hearing Examiner will draw freely upon Brennan's Response in making his Undisputed Findings of Fact hereinafter.

5/ Adopted by the Commission: P.E.R.C. No. 89-71, 15 NJPER 71 (¶20027 1988).

5. On November 9, 1988, Brennan filed a grievance requesting equalization of overtime between the HVE's.[6/] On November 18th, John Milotis, the Electrical Foreman, denied Brennan's grievance on the ground that he had no control over HVE overtime.

6. Brennan's grievance was then taken to a STEP 2 grievance hearing and on January 31, 1989, Robert A. Bye, the Assistant Superintendent of Plant & Equipment, decided in writing that he could not resolve the grievance since Brennan was only performing the work of an Electrician/Maintenance Mechanic and not that of an HVE.

7. The grievance proceeded next to a STEP 3 hearing, which was held on June 14, 1989, before Julian S. Amkraut, the Associate Director of the Office of Employee Relations.[7/] On June 23, 1989, Amkraut denied the grievance because there was no "...disparity between Mr. Brennan's overtime and others in his unit, and that he has worked many more hours than Mr. Dowd..." In support of his denial, Amkraut noted that that Brennan's distribution of overtime was equitable in relation to other employees in his work unit and that Brennan's overtime hours were twice that of Dowd. In

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6/ Brennan's Response to the Motion for Summary Judgment states that the date of filing was November 19, 1988. However, this is incorrect since the attached grievance form indicates clearly that the date was "11/9/88."

7/ At both STEP 2 and STEP 3 Brennan was represented by the Local President of AFSCME (see attachments to Brennan's Response, supra).

addition, Amkraut concluded that he had considered the positions of AFSCME and Brennan concerning Brennan's job title and "...as such, Mr. Brennan's job title is to be changed to Senior Electrician/Maintenance Mechanic..."[8/]

8. On July 11, 1989, Richard Gollin, AFSCME's Associate Director, wrote to Brennan and advised him of AFSCME's decision that it would not process his grievance to arbitration.[9/]

9. On July 14, 1989, Brennan filed a second grievance, in which he sought under Article 7 [Seniority] to displace Dowd in the HVE classification based upon Brennan's greater classification seniority.[10/]

10. On July 26, 1989, a STEP 1 grievance hearing was held by Earl L. Smith, Jr., the Director of Facilities Maintenance Services, College Avenue Campus, where Brennan was present with an

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8/ Brennan's Response at page 2 fails to disclose that Amkraut set forth as part of AFSCME's position at the hearing the following: "...the Union and Mr. Brennan also stated that if Mr. Brennan was not being assigned High Voltage Electrical work, his title should be changed to one appropriate to his current assignments..." Thus, Amkraut's decision on June 23rd to change Brennan's job title, supra, was at the behest of AFSCME and Brennan. It was not the act of a volunteer.

9/ The statement in Brennan's Supplemental Response that one Richard Miller "...won a prior case concerning equalization of overtime between senior maintenance mechanics..." is by its terms too vague to support a conclusion herein.

10/ The Hearing Examiner cannot agree with the statement of this grievance as set forth in Brennan's Response at page 3 since the actual grievance does not by its terms "...object to the change in job title..." However, the Response does state accurately thereafter that Brennan claimed that he was entitled to "bump" Dowd on the basis of seniority.

AFSCME Shop Steward. Smith denied Brennan's grievance in writing on July 27, 1989, having concluded that Brennan had no "bumping" rights since such rights apply only "...in cases of layoffs or when someone is impacted by a layoff..." Smith also added that since Brennan was not "impacted by a layoff" he was not entitled to displace an employee (Dowd) in an existing position.

11. Brennan's second grievance then proceeded to a STEP 2 hearing on August 31, 1989, before Ronald H. Berger, the Director of Facilities Program Management. Brennan was represented by the Local President of AFSCME. Berger's written decision, denying Brennan's grievance, is dated September 5, 1989. Berger concluded that the provisions of Article 7 with respect to seniority were not applicable since there were no layoffs or recalls involved and, thus, Brennan had not been "...harmed or disadvantaged in any way by his change in job title..."[11/]

12. Finally, administrative notice is taken of the following facts as found [and here abridged] in paragraphs 14-18, 20, 21 of H.E. No. 89-11, supra [14 NJPER at 608-10]:

a. Brennan was terminated as of July 14, 1986 and a STEP 2 hearing was held on July 18, 1986 before Ronald H. Berger where, among others, Brennan and the Local President of AFSCME were present. Berger denied Brennan's grievance.

11/ This is consistent with the excerpts from the 1986-89 agreement between AFSCME and Rutgers, i.e., Article 7, "Seniority," supra.

b. Brennan's grievance, seeking reinstatement and backpay, was then processed by AFSCME to a STEP 3 hearing on July 30, 1986 before Christine B. Mowry. A Council 52 representative of AFSCME presented Brennan's case and Brennan testified on his own behalf.

c. In a decision by Mowry on August 8, 1986, she reviewed Brennan's past disciplinary history and concluded that he should be reinstated but without backpay.

d. Shortly after the STEP 3 hearing, Brennan asked the Local President of AFSCME to request arbitration of his "four-and-one-half week suspension."[12/] Richard Gollin, AFSCME's Associate Director, concluded that AFSCME would not arbitrate Brennan's grievance. Gollin's decision was based primarily upon the fact that the STEP 3 result was reasonable given Brennan's record and, further, that it was "bad labor relations to process meritless grievances..."

STANDARD APPLICABLE TO MOTION FOR SUMMARY JUDGMENT

The standard which the Commission utilizes in deciding whether or not to grant a motion for summary judgment is governed by N.J.A.C. 19:14-4.8(b), namely, "...If it appears from the pleadings, together with the briefs...and other documents filed, that there exists no genuine issue of material fact and the movant or

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12/ Apparently this quantum of discipline was imposed under the terms of Mowry's order of reinstatement without backpay on August 8, 1986.

cross-movant is entitled to its requested relief as a matter of law..." (emphasis supplied), summary judgment may be granted and the requested relief may be ordered. The Commission has, in many cases, followed the applicable New Jersey Civil Practice Rule (R.4:46-2) and a leading decision of the New Jersey Supreme Court in Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 73-75 (1954) in deciding motions for summary judgment under N.J.A.C. 19:14-4.8. Both the Civil Practice Rules and Judson apply the same standard.

"Material facts" are those which tend to establish the existence or non-existence of an element of the charge or of a defense that is derived from controlling substantive law. See Lilly, Introduction to the Law of Evidence [West Publishing Co., 2d ed. (1978) at p. 18] and McCormick on Evidence [West Publishing Co., 2d. ed. (1978) at p. 434].

But summary judgment is to be granted with extreme caution. The moving papers must be considered in the light most favorable to the opposing party, all doubts must be resolved against the movant, and the summary judgment procedure may not to be used as a substitute for a plenary hearing: State of N.J. (Human Services), P.E.R.C. No. 89-52, 14 NJPER 695 (¶19297 1988), citing Baer v. Sorbello, 177 N.J. Super. 182, 185 (App Div. 1981); and Essex Cty. Ed. Services Comm'n., 9 NJPER 19 (¶14009 1982).

ANALYSIS

Preliminarily, the Hearing Examiner has determined that the Undisputed Findings of Fact previously found leave no doubt whatsoever that there exists in this case "...no genuine issue of material fact..." Therefore, holding a plenary hearing would serve no useful purpose.

This conclusion is buttressed by the fact that AFSCME has expressed no objection to Brennan's amplification upon his Unfair Practice Charge either in his initial Response or in his Supplemental Response of March 15, 1990. Hence, Brennan's facts stand uncontradicted. Similarly, Brennan has not objected to AFSCME's reference to the findings made by Hearing Examiner Richard C. Gwin in the prior proceeding (H. E. No. 89-11, supra). Accordingly, this Hearing Examiner has taken administrative notice of certain of those facts.

The instant dispute is, thus, ripe for disposition under the Commission's standard for the disposition of motions for summary judgment. The Hearing Examiner finds and concludes that, based upon the present state of the record, AFSCME's Motion for Summary Judgment must be granted and that the Consolidated Complaint must be dismissed as to AFSCME. In so doing, the Hearing Examiner has viewed the moving papers in the light most favorable to Brennan and has given him the benefit of all favorable inferences. Further, the Hearing Examiner has resolved all doubts against AFSCME.

Brennan's charge focuses primarily on the refusal of AFSCME to have arbitrated his first grievance of November 9, 1988, where he

requested equalization of overtime between the HVE's. This grievance was denied at the first level because the Foreman claimed that he had no control over HVE overtime. It was next denied at STEP 2 because Brennan was only performing the work of an Electrician/Maintenance Mechanic and not that of an HVE. [See Undisputed Findings of Fact Nos. 5 & 6, supra]. This grievance was finally denied at the STEP 3 hearing because there was no disparity between Brennan's overtime and others in his unit and, further, that Brennan had worked twice as many overtime hours as Dowd, the other HVE involved. Further, Brennan's job title was changed from HVE to Senior Electrician/Maintenance Mechanic at the behest of AFSCME and Brennan at the hearing. [See Undisputed Finding of Fact No. 7, supra]. It was in this factual setting that Gollin on July 11, 1989, refused to process Brennan's November 1988 grievance to arbitration.[13/]

It is difficult to understand Brennan's complaint as to the processing of his second grievance, filed on July 14, 1989, in which he sought to "bump" Dowd in the HVE classification based upon Brennan's greater classification seniority. Leaving aside whether or not the contractual provisions of Article 7, "Seniority," provided a sufficient basis for Brennan to have prevailed, the grievance never went beyond STEP 2 of the grievance procedure.

13/ As previously found, Brennan was represented by the Local President of AFSCME at both STEP 2 and STEP 3 of the grievance procedure on his first grievance.

Brennan's complaint about his first grievance of November 9, 1988, pertained at least to the failure of AFSCME to have processed it to arbitration. This was the case in the prior proceeding (H.E. No. 89-11) where arbitration had been requested by Brennan and was denied by AFSCME. [See Undisputed Findings of Fact Nos. 9-12, supra].

It seems apparent to the Hearing Examiner that the complaints raised in Brennan's first and second grievances present issues that should more properly be directed to Rutgers, as Brennan's employer, rather than to AFSCME. AFSCME's obligation under our Act is to represent Brennan and other employees in the collective negotiations unit fairly and in good faith with respect to matters affecting their terms and conditions of employment, particularly, when they arise under the grievance procedure.

Therefore, this case is not about Commission decisions involving transfers between or among job titles such as National Park Board of Education, P.E.R.C. No. 87-102, 13 NJPER 194 (¶18082 1987) or Boro of Butler, P.E.R.C. No. 87-121, 13 NJPER 292 (¶18123 1987). Nor, is this case about the abolition of job titles followed by transfers to other job titles carrying a lower rate of compensation such as Rahway Valley Sewerage Authority, P.E.R.C. No. 89-37, 14 NJPER 654 (¶19275 1988). All of the factual situations adjudicated by the Commission in these and many other cases implicated the public employer and not the public employee representative. The complaints that Brennan may have (1) against

Amkraut's having changed his job classification (at AFSCME's and Brennan's behest), or (2) the way in which overtime was distributed between himself and Dowd or (3) his having been prevented from "bumping" Dowd on the basis of classification seniority, are matters between Brennan and Rutgers since they go to the employer-employee relationship.

The only legal basis upon which Brennan can successfully attack AFSCME's conduct herein is to demonstrate that it breached its duty of fair representation in the processing of Brennan's two grievances. As the above Undisputed Findings of Fact make clear, Brennan was fully and fairly represented through STEP 3 in his first grievance and through STEP 2 in his second grievance. Brennan's objection to AFSCME's representation derives solely from its failure to have pursued the first grievance to arbitration. The record offers no insight into the surrounding circumstances of AFSCME's refusal. All that appears is the date of AFSCME's refusal to do so, namely, July 11, 1989. This situation stands in stark contrast to that in the prior proceeding where it was found that Gollin refused to take Brennan's suspension to arbitration because (1) the result at STEP 3 was reasonable given Brennan's prior record and (2) that it would have been "bad labor relations" to process further a "meritless grievance." [See Finding of Fact No. 12d, supra].

This Hearing Examiner concurs with Hearing Examiner Gwin's analysis in the prior case and his statement of the law of the duty of fair representation. Beginning with the seminal case of Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967) the Supreme Court said:

> ...a breach of the statutory duty of fair representation occurs only when a union's conduct towards a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith. 386 U.S. at 190, 64 LRRM at 2376.

The Commission and New Jersey Courts have consistently applied the Vaca standard in deciding duty of fair representation cases: Saginario v. Attorney General, 87 N.J. 480 (1981); Fair Lawn Bd. of Ed., P.E.R.C. No. 84-138, 10 NJPER 351 (¶15163 1984); OPEIU Local 153 (Thomas Johnstone), P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983); City of Union City, P.E.R.C. No. 82-65, 8 NJPER 98 (¶13040 1982); New Jersey Turnpike Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979); and AFSCME Council No. 1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978).

The United States Supreme Court has also held that establishing a claim of a breach of the duty of fair representation, "...carries with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." Amalgamated Assoc. of Street, Electric Railway and Motor Coach Employees of America v. Lockridge, 403 U.S. 274, 301, 77 LRRM 2501, 2512 (1971). In Lockridge, the Court held that a union is not liable for mere errors in judgment if they were made honestly and in good faith.

Thus, while Vaca speaks in terms of arbitrary, discriminatory or bad faith conduct on the part of a union representative, Lockridge speaks further in terms of conduct that is intentional, severe and unrelated to legitimate union objectives.

Finally, and most importantly, Vaca also holds that the decision to refuse to arbitrate a grievance is not in and of itself evidence of a breach of the duty of fair representation. See also, New Jersey Turnpike Employees Union Local 194 and Rutgers, The State University et al. (Jennings), P.E.R.C. No. 88-130, 14 NJPER 414 (¶19166 1988).

Applying the above precedent to the instant record, this Hearing Examiner reaches the same result as Hearing Examiner Gwin in H.E. No. 89-11, namely, that AFSCME did not breach its duty of fair representation as to Brennan when it refused to take Brennan's first grievance to arbitration. It is true that in the proceeding before Hearing Examiner Gwin his decision was based upon the record made at a plenary hearing. However, as previously noted above, all of the facts in this case are undisputed and the Hearing Examiner has afforded Brennan all favorable inferences and has resolved all doubts against AFSCME.

* * * *

Based upon the Undisputed Facts as found on this record, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Respondent AFSCME did not violate N.J.S.A. 34:13A-5.4(b) or (3)[14/] when it refused to process the November 9,

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14/ The Charging Party has no standing to file a Charge against AFSCME based upon subsection (b)(3) of the Act, which pertains solely to a refusal by the majority representative to negotiate in good faith with the public employer: Camden Cty. Highway Dept., D.U.P. No. 84-32, 10 NJPER 399 (¶15185 1984).

1988 grievance of Robert Brennan to arbitration following an adverse decision at STEP 3 of the contractual grievance procedure; Brennan failed to offer any evidence that AFSCME acted in bad faith or with discriminatory motive or arbitrariness in its refusal.

2. The Unfair Practice Charge of Robert Brennan against the Respondent Rutgers has in no manner been adjudicated in the course of the disposition of AFSCME's Motion for Summary Judgment.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

That the Respondent AFSCME's Motion for Summary Judgment be granted and that the Consolidated Complaint be dismissed in its entirety against AFSCME.

HEARING EXAMINER'S ANCILLARY ORDER

Pursuant to the Consolidated Complaint still pending against Respondent Rutgers, a plenary hearing is hereby peremptorily scheduled at the Commission's office in Newark, New Jersey on June 26, 27 and 28, 1990, commencing at 10:00 a.m. on each date.

Alan R. Howe
Hearing Examiner

Dated: May 1, 1990
Trenton, New Jersey

H.E. NO. 91-4

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

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Respondent,

-and- Docket No. CI-H-90-7

ROBERT BRENNAN,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Rutgers did not violate Sections 5.4(a)(3) or (5) of the New Jersey Employer-Employee Relations Act by the conduct of its representatives during the processing of Brennan's overtime grievance under the grievance procedure between November 9, 1988 and June 23, 1989. In dismissing the Section 5.4((a)(3) allegation of the Complaint, the Hearing Examiner applied Bridgewater, finding no hostility or animus. Also, as to the Section 5.4(a)(5) allegation, the Hearing Examiner based his dismissal upon New Jersey Tpk. Authority and Jeffrey Beall, P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980) since AFSCME had previously been exonerated of any breach of the duty of fair representation (see H.E. No. 90-47, 16 NJPER 333 (¶21138 1990) and there was no proof of collusion between AFSCME and Rutgers in the processing of Brennan's grievance.

A Hearing Examiner's decision to dismiss is not a final administrative determination of the Public Employment Relations Commission. The Charging Party has ten days from the date of the decision to request review by the Commission or else the case is closed.

H.E. NO. 91-4

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

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Respondent,

-and- Docket No. CI-H-90-7

ROBERT BRENNAN,

Charging Party.

Appearances:

For the Respondent, Rutgers
(Christine B. Mowry, of counsel)

For the Charging Party,
Purzycki & Gorney, Esqs.
(Edward W. Gorney, of counsel)

HEARING EXAMINER'S DECISION ON RUTGERS' MOTION TO DISMISS

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on July 14, 1989, by Robert Brennan ("Charging Party" or "Brennan"") alleging that Rutgers, The State University ("Rutgers") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"), in that Brennan, a tenured employee who is also a Vietnam veteran, has been discriminated against by Rutgers because of his grievance, which was for the equalization of overtime in the HVE classification and, also, because of a prior grievance where he was discharged and then reinstated with a suspension of five weeks; that one Julian

Amkraut has circumvented the contract by not answering Brennan's grievance as filed; that Amkraut, in avoiding the HVE issue, claimed that there was no discrepancy in the "Electrician's Work Unit," which has nothing to do with the HVE classification; that Amkraut changed Brennan's title from HVE to Senior Electrician; that the HVE title was a promotional opportunity, for which Brennan bid in 1984 and was promoted; that since that date Rutgers has hired another HVE who is junior to Brennan in seniority; and that if Amkraut wished to eliminate a job classification it must be that of the junior employee according to the contract; all of which is alleged to in violation of N.J.S.A. 34:13A-5.4(a)(3) and (5) of the Act.[1/]

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Consolidated Complaint and Notice of Hearing was issued on December 11, 1989. Rutgers filed its Answer on January 3, 1990. The Notice of Hearing originally scheduled hearing dates for January 23, 26 and 27, 1990, but these dates were adjourned to February 23, 26 and 27, 1990. On February 14, 1990, counsel for Brennan requested a further adjournment since Brennan had been

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1/ These subsections prohibit public employers, their representatives or agents from: "(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."

assigned to jury duty, commencing February 22nd. The Hearing Examiner then adjourned the matter without date.

On March 2, 1990, AFSCME filed with the Commission a Motion for Summary Judgment, which was referred to the undersigned for disposition pursuant to N.J.A.C. 19:14-4.8. On May 1, 1990, this Motion was granted[2/] and the Complaint against AFSCME was dismissed.

On May 18, 1990, Rutgers filed with the Commission a Motion to Dismiss, which was also referred to the undersigned for disposition, this time in accordance with N.J.A.C. 19:14-4.2(a). Pursuant to this referral, the Hearing Examiner now makes the following:

UNDISPUTED FINDINGS OF FACT[3/]

1. Rutgers, The State University is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. Robert Brennan is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

3. Brennan has been employed by Rutgers since July 1979. He has been a High Voltage Electrician (HVE) since 1986 and is presently assigned to the College Avenue Campus. Dennis Dowd is

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2/ H.E. No. 90-47, 16 NJPER 333 (¶21138 1990).

3/ The following Undisputed Findings of Fact duplicate, in part, those found previously in H.E. No. 90-47, supra, paragraphs 9, 10, 11 and 12 in H.E. No. 90-47 have been omitted as irrelevant and extraneous to the issues raised herein.

also employed by Rutgers as an HVE and is presently assigned to the Kilmer Campus.

4. The assignment of overtime for Brennan and Dowd is controlled by Rutgers' Utility Department at the Kilmer Campus. Brennan, who is senior to Dowd, contends that Dowd receives an unfair amount of overtime compared to Brennan.

5. On November 9, 1988, Brennan filed a grievance requesting equalization of overtime between the HVE's. On November 18th, John Milotis, the Electrical Foreman, denied Brennan's grievance on the ground that he had no control over HVE overtime.

6. Brennan's grievance was then taken to a STEP 2 grievance hearing and on January 31, 1989, Robert A. Bye, the Assistant Superintendent of Plant & Equipment, decided in writing that he could not resolve the grievance since Brennan was only performing the work of an Electrician/Maintenance Mechanic and not that of an HVE.

7. The grievance proceeded next to a STEP 3 hearing, which was held on June 14, 1989, before Julian S. Amkraut, the Associate Director of the Office of Employee Relations. On June 23, 1989, Amkraut denied the grievance because there was no "...disparity between Mr. Brennan's overtime and others in his unit, and that he has worked many more hours than Mr. Dowd..." In support of his denial, Amkraut noted that that Brennan's distribution of overtime was equitable in relation to other employees in his work unit and that Brennan's overtime hours were twice that of Dowd. In

addition, Amkraut concluded that he had considered the positions of AFSCME and Brennan concerning Brennan's job title and "...as such, Mr. Brennan's job title is to be changed to Senior Electrician/Maintenance Mechanic..."

8. On July 11, 1989, Richard Gollin, AFSCME's Associate Director, wrote to Brennan and advised him of AFSCME's decision that it would not process his grievance to arbitration.

STANDARD APPLICABLE TO A MOTION TO DISMISS PRIOR TO HEARING

A motion to dismiss before hearing under N.J.A.C. 19:14-4.7 is similar to a motion to dismiss for failure to state a claim upon which relief can be granted under R.4:6-2(e). City of Margate, H.E. 89-23, 15 NJPER 166 (¶20070 1989). Alternatively, it is a motion for judgment on the pleadings, which raises solely issues of law and admits all facts properly pleaded by the opposing party. Reider v. State of New Jersey Dept. of Transp., 221 N.J. Super 547 (App. Div. 1987).

In Reider v. State of New Jersey Dept. of Transp., 221 N.J. Super. 547 (App. Div. 1987), the court stated:

> On a motion made pursuant to R. 4:6-2(e) "the inquiry is confined to a consideration of the legal sufficiency of the alleged facts apparent on the face of the challenged claim." P. & J. Auto Body v. Miller, 72 N.J. Super 207, 211 (App. Div. 1962). The court may not consider anything other than whether the complaint states a cognizable cause of action. Ibid. For this purpose, "all facts alleged in the complaint and legitimate inferences drawn therefrom are deemed admitted." Smith v. City of Newark, 136 N.J. Super 107, 112 (App. Div. 1975). See also Heavner v. Uniroyal, Inc., 63 N.J. 130, 133

> (1973); Polk v. Schwartz, 166 N.J. Super 292, 299 (App. Div. 1979). A complaint should not be dismissed under this rule where a cause of action is suggested by the facts and a theory of actionability may be articulated by way of amendment. Muniz v. United Hsps. Med. Ctr. Pres. Hsp., 153 N.J. Super 79, 82-83 (App. Div. 1977). However, a dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted.
>
> Reider, at 552.

In considering whether to grant a motion to dismiss a complaint for failure to state a claim upon which relief can be granted, i.e., judgment on the pleadings, the allegations in the complaint must be taken as true and the benefit of all favorable inferences from the allegations must be afforded the Charging Party. Wuethrich v. Delia, 134 N.J. Super. 400 (Law Div. 1975), aff'd 155 N.J. Super. 324 (App. Div. 1978); Sayreville B/E, H.E. No. 78-26, 4 NJPER 117 (¶4056 1978).[4/]

ANALYSIS

As noted in the above statement of the law on a motion to dismiss before hearing, the motion must necessarily raise only issues of law with all of the facts properly pleaded deemed as admitted. And, as noted in Reider v. State, "...a dismissal is

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4/ Compare New Jersey Turnpike, P.E.R.C. No. 79-81, 5 NJPER 197 (1979) where the Commission adopted the standard used by the New Jersey Supreme Court in Dolson v. Anastasia, 55 N.J. 2 (1959) for a motion to dismiss at the close of a charging party's case. That standard requires that the evidence (at least a scintilla) be viewed in a light most favorable to the party opposing the motion.

mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted..." (221 N.J. Super. at 552). The Hearing Examiner has concluded that the averments made by Brennan in his Unfair Practice Charge against Rutgers, when taken as true with all favorable inferences afforded Brennan, are, nevertheless, legally insufficient to support a finding that Rutgers has violated Sections 5.4(a)(3) and (5) of the Act as alleged. The reasons for this conclusion are as follows:

Re Section 5.4(a)(3) of the Act

In order to establish a violation of this subsection of the Act by Rutgers, Brennan must first make a sufficient showing to support an inference that his protected activity was a "substantial" or a "motivating" factor in Rutgers' decision to deny Brennan's grievance at Step 3 of the contractual grievance procedure on June 23, 1989. On that date Hearing Officer Amkraut found that there was no disparity between Brennan's overtime and that of others in his unit, Brennan having worked twice the number of hours of overtime as co-employee Dennis Dowd. Additionally, the Hearing Officer had concluded that Brennan's job title was to be changed from that of a High Voltage Electrician (HVE) to that of Senior Electrician/Maintenance Mechanic.

This initial burden upon Brennan derives from the decision of the Supreme Court of New Jersey in Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984). Assuming that this initial burden has been met by Brennan, Rutgers must then demonstrate that

the same action would have taken place even in the absence of Brennan's protected activity of having filed his overtime grievance (see 95 N.J. at 242).

In determining whether or not Brennan has met the Bridgewater test, the Hearing Examiner concludes, initially, that Brennan was engaged in protected activity in having filed his overtime grievance on November 9, 1988, and that Rutgers knew of this activity. However, Brennan has failed to establish that Rutgers by its conduct has manifested any hostility or anti-union animus toward Brennan in the course of his having had his grievance processed through the contractual grievance procedure (see 95 N.J. at 246). It is clear beyond peradventure of doubt that a close examination of the allegations in Brennan's unfair practice charge against Rutgers demonstrates that Rutgers' representatives in no way manifested hostility or anti-union animus toward Brennan. Therefore, Brennan's allegation that Rutgers violated Section 5.4(a)(3) of the Act must be dismissed.

Re Section 5.4(a)(5)

In an earlier case, involving Rutgers and AFSCME, [5/] allegations similar to those made by Brennan were heard by this Hearing Examiner. The allegation that Rutgers had violated Section 5.4(a)(5) was dismissed because Jennings, in that case, had failed

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5/ Rutgers, The State University and AFSCME, Council 52, Local 888 and David L. Jennings, H.E No. 88-48, 14 NJPER 290 (¶19108 1988), adopted P.E.R.C. No. 88-130, 14 NJPER 414 (¶19166 1988).

to offer any evidence of a breach of the duty of fair representation by AFSCME or of collusion between Rutgers and AFSCME with respect to AFSCME's refusal to process his grievance to binding arbitration.

This Hearing Examiner has previously found that AFSCME did not violate the Act by breaching its duty of fair representation to Brennan when it refused to proceed to arbitration on his behalf [see H.E. No. 90-47, supra]. As in the case of Jennings, the Hearing Examiner cites the Commission's decision in New Jersey Tpk. Authority & Jeffrey Beall, P.E.R.C. No, 81-64, 6 NJPER 560 (¶11284 1980) where the union had refused to take Beall's case to arbitration on the ground that there appeared to be little likelihood of success. Beall alleged collusion between the employer and the union in the latter's refusal to take his case to arbitration. The Commission found no evidence of collusion, noting that Beall was attempting to have the merits of his discharge grievance adjudicated as an unfair practice, i.e., that his discharge was not for just cause under the agreement.

The Commission also stated in Beall that under Section 5.3 of the Act only a majority representative may file an unfair practice charge, alleging a violation of Section of 5.4(a)(5), based upon a claimed breach of the collective agreement. Since Beall's charge amounted to exactly such a claim, the Commission stated: "As a general matter, we do not believe that an individual employee, in the absence of any allegations of collusion or unfair representation by the majority representative, can use the unfair practice forum to

litigate an alleged breach of a collective negotiations agreement unrelated to union activity..." (6 NJPER at 561).

Since Brennan's case under 5.4(a)(5) of the Act is no different than that of Jennings and Beall, Brennan's allegation that Rutgers violated Section 5.4(a)(5) of the Act must be dismissed.

* * * *

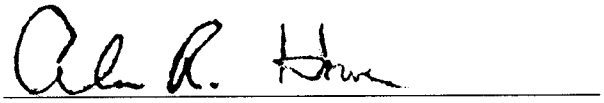
For all of the reasons above stated, the Hearing Examiner will grant the Motion to Dismiss filed by Rutgers in this proceeding and now makes the following:

CONCLUSIONS OF LAW

The Respondent Rutgers did not violate N.J.S.A. 34:13A-5.4(a)(3) or (5) by the conduct of its agents and representatives during the processing of Brennan's overtime grievance under the grievance procedure between November 9, 1988 through June 23, 1989.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission **ORDER** that the Complaint of Robert Brennan against Rutgers, The State University be and the same is hereby dismissed in its entirety.



Alan R. Howe
Hearing Examiner

Dated: August 2, 1990
Trenton, New Jersey