P.E.R.C. NO. 90-47

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY, (DEPARTMENT OF HUMAN SERVICES, DIVISION OF YOUTH & FAMILY SERVICES),

Respondent,

-and- Docket No. CO-H-88-135

LOCAL 195, IFPTE, AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the State of New Jersey (Department of Human Services, Division of Youth & Family Services) violated the New Jersey Employer-Employee Relations Act by denying an employee the right to union representation at a departmental termination hearing. The Commission finds that even if the employee representative's conduct was unacceptable the departmental hearing officer should have afforded the employee the option of choosing a replacement representative. The Complaint was based on an unfair practice charge filed by Local 195, IFPTE, AFL-CIO.

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Respondent,

-and- Docket No. CO-H-88-135

LOCAL 195, IFPTE, AFL-CIO,

Charging Party.

Appearances:

For the Respondent, Peter N. Peretti, Jr., Attorney General (Richard D. Fornaro, Deputy Attorney General)

For the Charging Party, Oxfeld, Cohen, Blunda, Friedman, LeVine & Brooks (Arnold S. Cohen, of counsel)

DECISION AND ORDER

On November 23, 1987, Local 195, IFPTE, AFL-CIO, filed an unfair practice charge against the State of New Jersey (Department of Human Services, Division of Youth & Family Services). The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (2) and (3),[1/] when a Division of Youth & Family

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

Services ("DYFS") hearing officer allegedly told an employee that Local 195's business manager could not represent him at his departmental termination hearing.

On February 22, 1988, a Complaint and Notice of Hearing issued. On March 4, 1988 the employer filed an Answer denying the allegations and asserting that it exercised its statutory authority in removing the business representative from the hearing.

On January 12 and 13, and February 21, 1989, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and introduced exhibits. They argued orally and filed post-hearing briefs.

On September 1, 1989, the Hearing Examiner issued his report and recommendations. H.E. No. 90-9, 15 NJPER 540 (¶20223 1989). He found that the employer violated subsection 5.4(a)(1) when its hearing officer ended the departmental hearing because of the alleged conduct of the business manager. He recommended that the employer be ordered to cease and desist from such illegal conduct and to post a notice of the violation. He rejected Local 195's argument that this was a Weingarten[2/] case because the employee had already been terminated and did not reasonably

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2/ In East Brunswick Bd. of Ed., P.E.R.C. No. 80-31, 5 NJPER 398 (¶10206 1979), aff'd in pert. part, App. Div. Dkt. No. A-280-79 (6/18/80), we held that an employer violated subsection 5.4(a)(1) when it denied an employee's request for union representation at an interview which the employee could reasonably believe might result in discipline. We relied on NLRB v. Weingarten, 420 U.S. 251 (1975).

apprehend that he would be disciplined as a result of information obtained during the hearing.

On September 29, 1989, the employer filed exceptions. It claims that it twice, in good faith, fulfilled its obligation to provide union representation at a departmental hearing, but that the conduct of the union's business manager caused the termination of the October 28 hearing. In addition, the employer argues that, if we find a violation, a posting will have little or no remedial effect; a specific reference to names and dates would not protect any interests that have "not been provided proper respect"; 60 days for posting is excessive, and any posting should be limited to the employee's former place of employment.

On October 4, 1989, Local 195 filed exceptions. It argues that Weingarten rights attach and that the employee is therefore entitled to back pay.

On October 17, 1989, after an extension of time, the employer filed a reply. It agrees that the employee was entitled to union representation at the departmental hearing, but argues that the hearing was not an "investigatory interview" under Weingarten and even if it were, there was no violation of Weingarten principles because DYFS did not proceed with the hearing after the employee decided not to participate without union representation.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 4-12) are accurate. We incorporate them here.[3/]

3/ We reject the employer's suggestion that the recommended decision concludes that insulting and obnoxious behavior is an

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In the absence of exceptions, we dismiss the subsection 5.4(a)(2) and (3) allegations. There is no evidence of pervasive employer control or manipulation of Local 195, see N. Brunswick Tp. Bd. of Ed., P.E.R.C. No. 80-122, 6 NJPER 193 (¶11095 1980), or hostility to the exercise of protected rights, see In re Bridgewater Tp., 95 N.J. 235 (1984).

The employer agrees that the employee was entitled to union representation at his departmental hearing. It contends, however, that the business manager's conduct at the October 28 hearing justified terminating that hearing. Local 195 contends that the business manager's conduct was forceful, but not improper, and that he was unjustifiably prevented from representing the employee. Alternatively, Local 195 contends that even if the business manager acted inappropriately, the employee was still not given the opportunity to be represented by a replacement representative.

We need not decide here whether the business manager's conduct was obstreperous or simply vigorous. In either event, we are convinced that the departmental hearing officer went too far when she denied the employee the right to any union representation. Even if the representative's conduct was unacceptable, she should

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> acceptable standard of conduct. The Hearing Examiner simply concluded that the departmental hearing officer should have offered the employee other options besides representing himself or terminating the hearing. We will not disturb the Hearing Examiner's explanation for the business manager's memory lapse.

have afforded the employee the option of choosing a replacement representative. Cf. Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122 (1978); Fairlawn Bd. of Ed., P.E.R.C. No. 84-138, 10 NJPER 351 (¶15163 1984) (majority representative's duty to represent unit employees fairly). In this case, we do not believe that the hearing officer's action was intended to interfere with the employee's right to union representation. We are convinced, however, that it interfered with his right to representation and lacked a legitimate and substantial business justification. N.J. Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550, 551 n.1 (¶10285 1979).

We are also convinced that the hearing officer's conduct did not violate Weingarten. Since East Brunswick, we have applied the Weingarten rule in cases where the employee (1) requests a representative and (2) has a reasonable belief, measured by objective standards, that the interview may result in discipline. Once an employee requests representation, the employer must grant that request or discontinue the interview. Dover Municipal Utilities Auth. P.E.R.C. No. 84-132, 10 NJPER 33 (¶15157 1984); see also Amoco Oil Co., 238 NLRB No. 84, 99 LRRM 1250 (1978); State of New Jersey (Dept. of Human Services), P.E.R.C. No. 89-16, 14 NJPER 563 (¶19236 1988). Assuming this employee was entitled to a union representative under Weingarten, the departmental hearing officer did not continue with the "interview" after the employee indicated he would not proceed without a representative. Thus, we reject Local 195's Weingarten analysis and its request for back pay.

Finally, we consider the remedy. No adverse action flowed from this violation.[4/] We believe a cease and desist order is sufficient to prevent any reoccurrences.

ORDER

The State of New Jersey (Department of Human Services, Division of Youth & Family Services) is ordered to:

A. Cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by the Act, particularly by denying an employee the right to union representation at a departmental termination hearing.

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

The remaining allegations in the Complaint are dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

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

DATED: November 20, 1989
Trenton, New Jersey
ISSUED: November 21, 1989

4/ The record does not support a finding that the employee would not have been terminated had the hearing continued or the employee been offered an replacement representative.

H.E. NO. 90-9

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

In the Matter of

STATE OF NEW JERSEY, DEPARTMENT
OF HUMAN SERVICES, DIVISION OF
YOUTH & FAMILY SERVICES,

Respondent,

-and- Docket No. CO-H-88-135

LOCAL 195, IFPTE, AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent State independently violated §5.4(a)(1) of the New Jersey Employer-Employee Relations Act when one of its Hearing Officers, who was conducting a departmental hearing for a terminated employee of DYFS, summarily terminated the hearing because of the alleged conduct of the Charging Party's representative at the hearing. The Hearing Officer, after hearing only a part of the Respondent's case for termination, and after a recess, offered the terminated employee only the option of representing himself or else the hearing would be terminated and a decision made on the record to that point. The Hearing Examiner cited the Commission's decision in Jackson Tp., P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988) where a hearing officer abruptly terminated a hearing because the union's representative was posing questions, which the hearing officer deemed were "beyond the scope of the facts."

The Hearing Examiner refused to adopt the theory of the Charging Party herein that this was a Weingarten case since the employee had already been terminated and was not in apprehension of discipline at his departmental hearing. Finally, the charge that the Respondent violated §5.4(a)(2) and (3) of the Act was dismissed for failure of proof.

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. 90-9

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

In the Matter of

STATE OF NEW JERSEY, DEPARTMENT OF HUMAN SERVICES, DIVISION OF YOUTH & FAMILY SERVICES,[1/]

Respondent,

-and-

Docket No. CO-H-88-135

LOCAL 195, IFPTE, AFL-CIO,[2/]

Charging Party.[3/]

Appearances:

For the Respondent, Hon. Peter N. Perretti, Jr., Attorney General (Richard D. Fornaro, D.A.G.)

For the Charging Party, Oxfeld, Cohen, Blunda, Friedman, LeVine & Brooks (Arnold S. Cohen, of counsel)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on November 23, 1987, by Local 195, IFPTE, AFL-CIO ("Charging Party" or "Local 195") alleging that the State of New Jersey, Department of Human Services, Division of Youth & Family Services ("Respondent," "State" or "DYFS") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A.

1/ As amended at the hearing.

2/ As amended at the hearing.

3/ As amended at the hearing.

34:13A-1 et seq. ("Act"), in that on October 28, 1987, the State, acting by and through Arlene Ceterski, a Hearing Officer for the Department of Human Services, illegally told Sammie Coleman, during his removal hearing, that he could not have Donald R. Philippi, the Business Manager for Local 195, act as his union representative; Ceterski told Coleman that he must obtain another representative or represent himself; DYFS had attempted to remove Coleman on prior occasions after he obtained a settlement against the State, as to which he is still owed over $1,000; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (2) and (3) of the Act.[4/]

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 February 22, 1988. Pursuant to the Complaint and Notice of Hearing, a hearings were held on January 12, January 13 and February 21, 1989, in Trenton, New Jersey,[5/] at which time the parties were given an

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4/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (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/ The delay in holding the hearing resulted from the State's motion to consolidate the instant unfair practice proceeding with a proceeding before the Merit System Board. However,

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opportunity to examine witnesses, present relevant evidence and argue orally. Extensive oral argument was presented by the parties with respect to the application of Weingarten[6/] and the appropriateness of a monetary remedy. The parties filed post-hearing briefs by May 11, 1989. The question of whether reply briefs would be filed remained in abeyance until June 13, 1989, when counsel advised the Hearing Examiner that no reply briefs would be filed.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the oral argument and post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

5/ Footnote Continued From Previous Page

this motion was denied by ALJ Edith Klinger on August 18, 1988, and her decision was affirmed by a Joint Order of the Merit System Board and the Commission on September 29 and October 4, 1988, respectively (P.E.R.C. No. 89-28, 14 NJPER 676 (¶19284 1988). It was there ordered, in part, that the Commission "...will make a final determination on the matter of the unfair practice charge (CO-H-88-135) limited to the allegations arising from the October 28, 1987 departmental hearing..." (emphasis supplied).

6/ See NLRB v. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975).

FINDINGS OF FACT

1. The State of New Jersey, Department of Human Services, Division of Youth & Family Services is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. Local 195, IFPTE, AFL-CIO is a public employee representative within the meaning of the Act as amended, and is subject to its provisions.

3. Sammie Coleman is a public employee within the meaning of the Act as amended, and is subject to its provisions.

4. The collective negotiations agreement between the parties, effective July 1, 1986 through June 30, 1989 (J-1) provides in Article VIII (G), entitled, "Departmental Hearing Procedures for Permanent Classified Employees," in part, as follows:

> ...The Department or Agency Head, or his designee, will convene a hearing within twenty (20) calendar days after receipt of such disciplinary appeal...The employee may be represented at such hearing by the appropriate union representative who is an employee and/or a non-employee union representative consistent with the representation provisions for Step 3 in paragraph one of the grievance procedure...(emphasis supplied) [J-1, p. 17].

5. On September 16, 1987, a Preliminary Notice of Disciplinary Action was sent to Coleman, a Maintenance Worker/Driver, with a hearing scheduled for October 14, 1987 (CP-1).[7/]

7/ Although extensive testimony was adduced by the parties as to what may or may not have transpired at the October 14, 1987 hearing, it is not within the scope of that part of the Joint

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6. Coleman had been employed as a Maintenance Worker/Driver at the DYFS Grandview Park Day Care Center (1 Tr 89; 2 Tr 85). DYFS had terminated Coleman's employment because of physical inability to perform duties (CP-1; 2 Tr 38, 78, 93-96, 128, 129; 3 Tr 20).

7. A departmental hearing was convened by DYFS on October 28, 1987, in Trenton, concerning Coleman's termination. Coleman, as a member of Local 195, was represented by Donald Philippi, the Business Manager of Local 195. [CP-1; 1 Tr 32, 33, 37; 2 Tr 30, 31, 135; 3 Tr 8, 13, 14]. William Baranick of the Regional Office of DYFS represented the Respondent (1 Tr 38).

8. The DYFS Hearing Officer was Arlene Ceterski, who convened the hearing at 10:00 a.m. (1 Tr 37; 2 Tr 30, 31, 44). The hearing began with the customary circulation of an attendance sheet (1 Tr 60; 2 Tr 32). Philippi appeared as Coleman's union representative (3 Tr 13, 14). While the attendance sheet was being circulated, Philippi: (1) asked the Hearing Officer if "we couldn't get started with the hearing"; (2) asked the Hearing Officer the spelling of her name despite its appearance on the attendance

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7/ Footnote Continued From Previous Page

Order, supra, dealing with the Commission's exercise of its jurisdiction. Thus, this evidence cannot be made the basis of substantive findings of fact or facts. However, reference to pre-October 28, 1987 events may be made by the Hearing Examiner, infra, as background in the same manner as in Local Lodge No. 1424, IAM (Bryan Mfg. Co.) v. NLRB, 362 U.S. 411, 45 LRRM 3212 (1960).

sheet;[8/] (3) questioned her qualifications as a Hearing Officer; and (4) questioned her position with DYFS and whether or not she worked in the Personnel Office. [2 Tr 33, 34; 3 Tr 14, 15]. Ceterski and Dykstra each testified that Philippi made the above comments to Ceterski [(1) to (4), supra] in a belligerent manner (2 Tr 34; 3 Tr 15). The Hearing Examiner credits this testimony of Ceterski and Dykstra based upon his appraisal of their respective demeanors and the essential failure of Philippi to have denied their testimony (1 Tr 37-40, 60-62; 3 Tr 56-60).[9/]

9. After this initial sparring, Philippi, who was seated next to Ceterski, allegedly "threw" the attendance sheet at Ceterski (2 Tr 34, 35, 62; 3 Tr 15, 45). The manner in which Philippi allegedly "threw" the attendance sheet at Ceterski was physically demonstrated by Respondent's witnesses at the hearing (2 Tr 62; 3 Tr 15, 45). Philippi flatly denied that he "threw" the attendance sheet at Ceterski (1 Tr 62, 63). The Hearing Examiner concludes from all of the evidence, including the physical demonstration, supra, that although Philippi's gesture in returning the attendance sheet to Ceterski may have been perceived by Ceterski and Dykstra as

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8/ Edgar Dykstra, an Acting Employee Relations Officer for DYFS, testified that when Ceterski initially mentioned her name, Philippi commented, "Can you spell that for me? I'm not a miracle worker." (3 Tr 14). Philippi admitted that he asked Ceterski her name but he did not recall asking her to spell her name (1 Tr 60).

9/ While Philippi admitted asking Ceterski her name, he testified that he had no recollection of asking her to spell it (1 Tr 60).

a "throw," it is found that Philippi's action was more likely an inoffensive "toss."

10. Ceterski next proceeded to read a preliminary procedural statement prior to receiving the proofs of the parties (1 Tr 63, 64; 2 Tr 35; 3 Tr 16, 17). According to Dykstra, Philippi, during the course of Ceterski's preliminary statement, asked "...what we were waiting for..." (3 Tr 15).[10/] Philippi then objected to Dykstra's being present (1 Tr 38, 39), and when Ceterski informed him that Dykstra would be permitted to remain, Philippi questioned her decision, stating, "...How many hearings have you held?" (3 Tr 18).[11/] Ceterski then stated that she did not want to hear any further argument since Dykstra was present only in a "training capacity" (1 Tr 38, 39; 2 Tr 35, 36; 3 Tr 15, 17, 18).[12/]

11. The case for the decision of DYFS to terminate Coleman was presented at the hearing through a single witness, Ruth Knoblauch, the Regional Supervisor of Day Care Centers, a position which she has held since about 1985 (2 Tr 84). Coleman had been employed at the Grandview Park Day Care Center and was, therefore, under the supervisory umbrella of Knoblauch (2 Tr 84, 85, 91).

10/ Philippi did not deny making this statement.

11/ Philippi did not deny making this statement.

12/ The Hearing Examiner finds Philippi to have been a voluble witness and, thus, cannot credit his denial that he made **no comments** whatsoever during Ceterski's preliminary statement (1 Tr 63).

Knoblauch testified both at the October 28th hearing and at the instant hearing that Coleman had been terminated from Grandview because he had been out of the Center for one year on sick leave injury, and that both his doctor and the Respondent's doctor had written letters stating that he either could work only on limited duty or that he could not work at all (2 Tr 93, 94). The documentary evidence submitted by DYFS in support of its decision to terminate Coleman consisted of several doctors' reports, Coleman's job description and an application for disability (2 Tr 38, 64, 65). Knoblauch did not appear as a medical witness nor did she offer any testimony as to Coleman's physical condition since she had made no observation of Coleman's performance on the job. [See 1 Tr 39, 40; 2 Tr 36, 38, 64-74, 78, 79, 90, 94, 95; 3 Tr 20, 21].

12. At the conclusion of DYFS' case in chief, Philippi commenced cross-examination of Knoblauch, in which he attempted to explore through the job description what duties DYFS claimed that Coleman was unable to perform (1 Tr 40, 41, 92, 93; 2 Tr 97; 3 Tr 21). Baranick joined with Ceterski in objecting to the relevance of many of Philippi's questions to Knoblauch since the case of DYFS against Coleman was essentially based upon documentary evidence (1 Tr 40-44; 2 Tr 39, 40, 96, 97; 3 Tr 21). Ceterski testified that on a number of occasions she objected to Philippi's questioning of Knoblauch "...because of his persistence, the harassment of the witness..." regarding the job description (2 Tr 39). At one point she asked him to explain to her why he was following a particular

line of questioning, to which Philippi responded that he could ask any questions that he wanted (2 Tr 39, 40). According to Ceterski, Philippi then asked her by what authority she could state what was or what was not relevant in "a belligerent tone of voice," which she perceived as questioning her right as a Hearing Officer (2 Tr 40, 41).[13/] Ceterski thereafter warned Philippi on several occasions that if his behavior continued she would have to terminate the hearing since she could not conduct a hearing "...in this atmosphere..." (2 Tr 41). According to Ceterski, one of her problems with Philippi was his attempt to introduce "...new evidence..." on cross-examination. Ceterski on several occasions told Philippi that this could not be done and that he could only cross-examine Knoblauch on the evidence presented by DYFS, adding that he could present his evidence after the conclusion of DYFS' case. At that point Philippi proceeded to another line of questioning. [2 Tr 42].[14/] Also, during the latter part of Philippi's cross-examination of Knoblauch he allegedly "threw" a document across the table to either Ceterski or Knoblauch.[15/]

13/ Philippi testified without contradiction that when Ceterski refused his attempt to ask certain questions during the cross-examination of Knoblauch, Ceterski's "...tone was very loud and abusive..." (1 Tr 43, 44).

14/ Dykstra corroborated Ceterski as to the conduct of Philippi on cross-examination of Knoblauch, adding that Philippi at one point asked Ceterski how many hearings she had conducted and "...What kind of a Hearing Officer are you?" (3 Tr 22).

15/ The Hearing Examiner makes the same finding as in Finding of Fact No. 9, supra, that Philippi's action was no more than an inoffensive "toss."

Ceterski's response was to call a recess "...because I could see that the witness was being harassed and Mr. Philippi was not responding to my directions and my right to make decisions..." (2 Tr 44; 43, 98).

13. The hearing on October 28th having commenced at 10:00 a.m., supra, Ceterski testified without contradiction that the recess she called commenced at about 10:55 a.m. and that following the recess the hearing was terminated at 11:10 a.m. (2 Tr 44, 45). The recess itself lasted approximately ten minutes. During the five minutes preceding the termination at 11:10 a.m., Ceterski informed Coleman that because of the disruptions in the hearing he had two options, one, to represent himself or, two, termination of the hearing, following which Ceterski would make a decision based upon the evidence previously presented [2 Tr 45]. Ceterski agreed that she offered Coleman only one option, namely, to represent himself (2 Tr 46; 1 Tr 70). Ceterski made her ruling in the presence of all who had attended the hearing and Coleman's response was that he did not want to represent himself (2 Tr 47, 103). Philippi testified credibly that he objected to the hearing being terminated (1 Tr 71; 2 Tr 47). Dykstra testified credibly that after the termination of the hearing Philippi turned to him and said, "This type of thing cannot be done," adding that he "...would file an unfair labor practice complaint..." (3 Tr 23).

14. By way of background under Bryan Mfg. Co., supra, a termination hearing had also been convened for Coleman on

October 14, 1987, before Hearing Officer Sean Conway, the Supervisor of Accounts Receivable for DYFS (2 Tr 133). Present for the parties were Dykstra, as the DYFS representative, Knoblauch, as the DYFS witness, Philippi representing Coleman,[16/] Coleman and a female friend of Coleman's (2 Tr 135). After Conway examined the attendance sheet, he noticed that Coleman's female friend had not signed in and he then questioned her as to who she was and why she had refrained from signing in (2 Tr 136, 137; 3 Tr 9). Conway then advised Coleman's female friend that she could not remain because it was not a public hearing and she left without incident (2 Tr 137; 3 Tr 10, 58). According to Conway, Philippi then stated to him that "...we have to tell that person (...Knoblauch) to get out of the room" (2 Tr 137). Philippi acknowledged that he asked Conway to remove Knoblauch from the room but as a properly sequestered witness (3 Tr 58, 59). Conway said to Philippi that he was not the Hearing Officer and that he, Conway, did not want him to continue interrupting the hearing. Philippi did not deny stating to Conway,

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16/ The Hearing Examiner has carefully considered the initial failure of Philippi to have recalled that he attended this hearing before Conway on behalf of Coleman but then did so recall on the third day of hearing, February 21, 1989 (3 Tr 62-69). Notwithstanding the Respondent's argument that Philippi's credibility as a witness was thereby destroyed, the Hearing Examiner is persuaded by the Charging Party's counter-argument that Philippi's lapse can be attributed to the fact that Philippi had been involved in many notices of hearing for Coleman (3 Tr 64) and, also, that no actual "hearing" occurred on October 14, 1987. The parties were present in the hearing room on preliminary matters for only ten or 15 minutes, infra.

"...you have no right to tell me to be quiet because the hearing isn't in effect yet..." (2 Tr 138; 3 Tr 10, 11). Conway's response was that if Philippi did not desist he would be directed to leave the hearing room, to which Philippi responded that "... it's an unfair labor practice..." (2 Tr 139). Conway testified that he then told Philippi that he had "...had enough..." and that Philippi must leave the hearing room. When Philippi refused, Conway testified without contradiction that he asked Coleman if he wanted "...to continue by himself or get someone else to represent him." (2 Tr 140; 3 Tr 12). When Coleman responded that he did not, Conway stated that the hearing was "cancelled" (2 Tr 140). Thus, the "hearing" ended after a lapse of about ten or fifteen minutes (3 Tr 9, 60).

15. DYFS issued a Final Notice of Disciplinary Action to Coleman on November 20, 1987, terminating his employment as a Maintenance Worker/Driver (CP-2).

DISCUSSION AND ANALYSIS

Preliminary Statement

Although the unfair practice charge in this case alleges a violation by the Respondent of §§5.4(a)(1), (2) and (3) of the Act, the case was tried, argued (3 Tr 70-85) and briefed by the Charging Party as an alleged §5.4(a)(1) violation under Weingarten,

supra,[17/] The Hearing Examiner must, nevertheless, initially decide whether or not the Charging Party has proven that the Respondent violated §§5.4(a)(2) and (3) of the Act.

The Allegations That The Respondent Violated §§5.4(a)(2) And (3) Of The Act Must Be Dismissed For Failure Of Proof.

In adjudicating an alleged violation of §5.4(a)(2) of the Act, the Commission has laid down a clear-cut rule for determining the type of activity in which a public employer must have engaged in order to have violated §5.4(a)(2) of the Act: North Brunswick Twp. Bd. of Ed., P.E.R.C. No. 80-122, 6 NJPER 193 (¶11095 1980). See also, Old Bridge Tp. Bd. of Ed., P.E.R.C. No. 87-3, 12 NJPER 599, 600 (¶17224 1986).[18/] In North Brunswick, the Commission said:

> With regard to the Board's alleged violation of section (a)(2), the Education Association has not presented any additional facts to support this allegation, other than the Board's refusing to negotiate with its chosen representatives. While the Board's conduct does, in a sense, "interfere" with the Education Association's ability to collectively negotiate, it does not constitute pervasive employer control or manipulation of the employee organization itself, which is the type of activity prohibited by section (a)(2). Duquesne University, [198 NLRB No. 117] 81 LRRM 1091 (1972)...Kurz-Kasch, Inc., [239 NLRB

17/ The Appellate Division approved the Commission's adoption of the Weingarten rule in East Brunswick Bd. of Ed. v. East Brunswick Ed. Assn., P.E.R.C. No. 80-31, 5 NJPER 398 (¶10206 1979), aff'd in part, rev'd in part App. Div. Dkt. No. A-280-79 (1980).

18/ "...To establish such a violation, it must be proved that such participation (by a supervisor in a union meeting) constitutes domination or interference with the formation, existence or administration of the employee organization..." (12 NJPER at 600).

> No. 107] 100 LRRM 1118 (1978)...(Emphasis supplied)(6 NJPER at 194, 195).

See, also, several decisions of the NLRB to the same effect, namely, that it is pervasive employer control or manipulation that is proscribed by §8(a)(2) of the NLRA, after which the §5.4(a)(2) of our Act is patterned: Deepdale General Hospital, 253 NLRB No. 92, 106 LRRM 1039 (1980); Homemaker Shops, Inc., 261 NLRB No. 50, 110 LRRM 1082 (1982); and Farmers Energy Corp., 266 NLRB No. 127, 113 LRRM 1037 (1983); Ona Corp., 285 NLRB No. 77, 128 LRRM 1013 (1987).

Plainly, there is no evidence whatever of pervasive control or manipulation of Local 195 by the Respondent State. The Hearing Examiner notes here that while Ceterski and Conway were confronted by a perceived problem with Philippi's representation of Coleman, the status of Local 195 as Coleman's collective negotiations representative was never called into question nor was Local 195 made the subject of pervasive State control or manipulation within the meaning of the above cases. Thus, the Hearing Examiner concludes that the Charging Party's allegation that the Respondent violated §5.4(a)(2) of the Act must be dismissed.

* * * *

If Local 195's allegation that the Respondent State violated §5.4(a)(3) of the Act is to be sustained, then it must satisfy the requisites laid down by the New Jersey Supreme Court in Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984). One of the three essential requisites is that the Charging

Party must prove that the Respondent State was hostile toward the exercise of protected activity, i.e. that the State manifested anti-union animus toward this exercise by Philippi on behalf of Coleman [95 N.J. at 246]. Further, the Court stated that the "Mere presence of anti-union animus is not enough..." It must be established that animus "...was a motivating force or a substantial reason for the employer's action..." In this case the question is whether Ceterski manifested anti-union animus toward Local 195, Philippi and/or Coleman at the October 28th administrative hearing on Coleman's termination.

The Hearing Examiner finds nothing in the instant record to support the conclusion that the Respondent through Ceterski (or Conway) manifested hostility or animus toward Local 195, Philippi or Coleman within the meaning of Bridgewater during the hearing on October 28, 1987. While it may be true that Ceterski overreacted to the manner in which Philippi represented Coleman, there was nothing in her deportment which would compel this Hearing Examiner to conclude that she was "hostile" to Philippi's exercise of protected activity on behalf of Coleman as that term has been construed in "(a)(3)" cases decided under Bridgewater.

Counsel for the Respondent also cites the "OAL Rules" [N.J.A.C. 1:1-1.1 et seq.] in arguing that Ceterski (and Conway) acted within the framework of the rules governing the conduct of administrative hearings and, thus, did not violate §5.4(a)(3) of the Act. The Hearing Examiner notes here that N.J.A.C. 1:1-14.7(a) &

(d) provides, in part, that the "judge shall...state the procedural rules for the hearing..." and that "Cross-examination...shall be conducted in a sequence and in a manner determined by the judge to expedite the hearing while ensuring a fair hearing..."[19/]

Having considered the Bridgewater requisites, supra, and the cited provisions of the OAL Rules, the Hearing Examiner reiterates that the action of Ceterski did not manifest the type of hostility and animus contemplated by Bridgewater.[20/].

There having been no hostility or anti-union animus manifested by the representatives of the Respondent toward Philippi and/or Coleman at the October 28, 1987 hearing, the allegation that the Respondent State violated §5.4(a)(3) of the Act must be dismissed.

The Respondent State Independently Violated §5.4(a)(1) Of The Act When Ceterski Summarily Terminated The Administrative Hearing On October 28, 1987.

As noted previously, this case was tried, argued and

19/ Further, the Respondent cites the rule that empowers the "presiding judge" to revoke the right of a non-lawyer to appear if "...the proceedings are being unreasonably disrupted or unduly delayed because of the non-lawyer's participation" [N.J.A.C. 1:1-5.5(e)(1)(iv)]. However, the Hearing Examiner finds that this provision has no application to the instant proceeding.

20/ Note, however, that while the conduct of Ceterski, acting pursuant to her authority under the provisions of the OAL Rules cited above, did not constitute a violation of §5.4(a)(3) of the Act, this conclusion does not necessarily insulate the Respondent from a finding that it violated §5.4(a)(1) of the Act, infra.

briefed by the Charging Party on the theory that the Respondent had violated the rights of Coleman, Philippi and Local 195 under Weingarten, supra. However, the State argues that the instant facts do not fit within the Weingarten framework since the administrative hearing of October 28, 1987,[21/] was not an "investigatory interview" within the meaning of Weingarten but rather was a departmental hearing, which followed the imposition of discipline on September 16, 1987 (see CP-1 and CP-2).

It cannot be gainsaid that Weingarten created a statutory right under Section 7 of the National Labor Relations Act to union representation by an employee at an "investigatory interview" in which the employee has a reasonable apprehension of discipline (88 LRRM at 2692, 2693). Since the decision of the Commission, as approved by the Appellate Division in East Brunswick, supra, it is clear that the law of Weingarten is also the law of this State in the public sector and is necessarily a right guaranteed by §5.4(a)(1) of the Act.[22/] The Commission noted in Dover, supra:

21/ It will be recalled that the Joint Order, supra, confines the Hearing Examiner's determination of the Unfair Practice Charge "...to the allegations arising from the October 28, 1987 departmental hearing." Thus, once again, the Hearing Examiner notes that the evidence adduced at the October 14th hearing is relevant only as background.

22/ Dover Municipal Utilities Authority, P.E.R.C. No. 84-132, 10 NJPER 333 (¶15157 1984) and Jackson Tp., P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988).

> Once the employee makes the request for representation, the employer has three options: (1) granting the employee's request for union representation; (2) discontinuing the interview; or (3) offering the employee a choice of continuing the interview unrepresented or having no interview. Weingarten, 88 LRRM at 2691...[10 NJPER at 340].

The Hearing Examiner must necessarily find and conclude that this case is not a Weingarten case for the simple reason that the departmental hearing of October 28, 1987, was not convened as an "investigatory interview"[23/] but rather it was convened to hear a timely appeal by Coleman from the imposition of discipline by the Preliminary Notice of September 16, 1987 (CP-1). Thus, Coleman could not have in any way been in apprehension of discipline. The discipline had already been imposed on September 16, 1987, and Coleman was merely exercising his right to appeal the decision of DYFS to terminate him pursuant to J-1, supra, and the applicable Civil Service law. Given this conclusive fact, the various arguments of the State as to the nuances which have arisen since Weingarten are interesting but of no relevance here.[24/]

The Hearing Examiner does not make light of the consequences, which flow from the Weingarten contention of the Charging Party. The Hearing Examiner agrees that if Coleman had been involved in an "investigatory interview" on October 28, 1987, within the meaning of Weingarten, then his rights thereunder would

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23/ Nor was the October 14th hearing before Conway an "investigatory interview."

24/ See Respondent's brief at pp. 21, 22.

have attached in all the aspects, including an arguable make-whole remedy under Kraft Food, Inc., 251 NLRB No. 6, 105 LRRM 1233 (1980)[25/] and Dover, supra, (10 NJPER at 340) [see Charging Party's brief at pp. 14-16].

* * * *

The Hearing Examiner has concluded that the Respondent independently violated §5.4(a)(1) of the Act by the conduct of Ceterski on October 28, 1987. Such a violation occurs when the actions of the agents or representatives of a public employer tend to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification: Jackson Tp., P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988), adopting H.E. No. 88-49, 14 NJPER 293, 303 (¶19109 1988); UMDNJ--Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); N.J. Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979); Gorman, Basic Text on Labor Law, at 132-34 (1976). Also, the Charging Party need not prove an illegal motive in order to establish this independent violation of §5.4(a)(1) of the Act: Morris, The Developing Labor Law, at 75-78 (2d ed. 1983).

25/ The NLRB has since overruled Kraft in Taracorp Industries, 273 NLRB No. 54, 117 LRRM 1497 (1984) with respect to reinstatement and back pay unless the discipline was imposed in retaliation for the exercise of Weingarten rights. In view of the instant conclusion that this is not a "Weingarten" case, there is no need to consider the appropriateness of a recommendation to the Commission as to whether it should continue to follow the Kraft decision regarding Weingarten remedies.

Notwithstanding, that the Hearing Examiner has concluded above that the Respondent did not violate §5.4(a)(3) of the Act by the conduct of Ceterski on October 28, 1987, it was noted that the Rules of the OAL do not necessarily insulate the Respondent from a finding that it violated §5.4(a)(1) of the Act (see fn. 20, supra).

The finding of an independent violation of §5.4(a)(1) is not predicated on Ceterski's conduct of the October 28th hearing per se nor the procedures which she followed until the point of her having called a recess at about 10:55 a.m. It appears clear that Ceterski's conduct of the hearing until the recess fell well within the authority and powers granted to her as a Hearing Officer under the OAL Rules, supra.

However, Ceterski, before returning from the recess at about 11:05 a.m., had decided to inform Coleman that because of the disruptions in the hearing she had only one option, namely, for him to represent himself. When he declined, Ceterski terminated the hearing as she had told Coleman she would, having stated earlier that if he declined then she would make a decision based upon the evidence previously presented (see Finding of Fact No. 13, supra).[26/]

Admittedly, Philippi's conduct in representing Coleman on October 28th may have been a little "rough around the edges" but it

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26/ Even Conway, at his hearing on October 14, 1987, offered Coleman two options, namely, "...to continue by himself or get someone else to represent him" (see Finding of Fact No. 14, supra; 2 Tr 140; 3 Tr 12).

did not, in the opinion of this Hearing Examiner, constitute a ground for Ceterski to summarily terminate the hearing in total derogation of Coleman's right to representation. Coleman had a right under the contract (J-1, p. 17) to representation by "...an appropriate union representative..." (see Finding of Fact No. 4, supra). Although Weingarten has not been deemed applicable in this case, supra, Coleman's "(a)(1)" representation rights were clearly violated by Ceterski in offering Coleman only the option of representing himself or the termination of the hearing.

The Hearing Examiner finds precedent for his conclusion that the Respondent has independently violated §5.4(a)(1) of the Act under Jackson Tp., supra. In that case the relevant facts, as found by the Hearing Examiner, involved a departmental hearing where the Union President (Kloiber) represented a police officer, who allegedly had failed to care properly for a department vehicle. The Public Safety Director, who conducted the hearing, terminated the hearing when Kloiber disagreed with the Director's statement that "...We're going beyond the scope of the facts..." The Director asserted that he had the right to end the questioning if it went "beyond the scope" and, after noting the appeal process, ended the hearing. [H.E. No. 88-49, 14 NJPER 293, 300 (¶19109 1988), see Finding of Fact No. 34].

The Hearing Examiner's recommendation that the Commission find that Jackson Tp. violated §5.4(a)(1) of the Act was adopted by the Commission, as was the Hearing Examiner's conclusion that the Director's action in terminating the hearing "...was both intended

to and did interfere with Kloiber's ability to provide... representation..." (14 NJPER at 304; 14 NJPER at 406). Finally, the Hearing Examiner in Jackson had stated the rule that a majority representative has a duty to represent fairly all unit employees, the clear implication of which was that a failure to provide such representation would subject the majority representative to a charge under our Act of the breach of the duty of fair representation. [See, e.g. Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967) and N.J. Tpk. Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979) and subsequent Commission decisions.]

Turning again briefly to the situation, which occurred at the conclusion of the hearing before Ceterski on October 28, 1987, the Hearing Examiner observes that Ceterski had a possible alternative to her summary decision to terminate the hearing when Coleman declined to represent himself. For example, Ceterski might have caucused alone with Philippi and Baranick and offered Philippi "one more chance" if he would have agreed to adhere to the method and manner by which she intended to continue to conduct the hearing without abridging Philippi's duty to provide Coleman with effective representation. However, Ceterski elected to pursue no alternative other than to offer Coleman the right to represent himself or terminate the hearing, following which she would issue a decision based on the record made to that point.

Accordingly, based upon the above facts and discussion, the Hearing Examiner will recommend that the Commission find that the Respondent independently violated §5.4(a)(1) of the Act when Hearing

Officer Arlene Ceterski summarily terminated Sammie Coleman's departmental hearing on October 28, 1987.[27/]

* * * *

Based upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Respondent State independently violated N.J.S.A. 34:13A-5.4(a)(1) when its Hearing Officer, Arlene Ceterski, summarily terminated the departmental hearing for Sammie Coleman on October 28, 1987, offering Coleman only the opportunity to represent himself.

2. The Respondent State did not violate N.J.S.A. 34:13A-5.4(a)(2) or (3) by the conduct of Arlene Ceterski at the departmental hearing on October 28, 1987.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent State cease and desist from:

27/ Although the Hearing Examiner has refrained from reference to Conway's hearing of October 14, 1987 since it was not included within the Joint Order, supra, it is noted, by way of background under Bryan, that had the Conway hearing been included within the scope of the Hearing Examiner's authority to hear and determine the instant dispute, a like recommendation of an independent violation of "(a)(1)" would have been made since the only distinction between the conduct of Ceterski and that of Conway was that Conway offered Coleman the opportunity to be represented by "someone else" whereas Ceterski did not offer that option.

1. Interfering with, restraining or coercing the employees of DYFS in the exercise of the rights guaranteed to them by the Act, particularly, by refraining from interfering with Donald Philippi in his representation of Sammie Coleman at his October 28, 1987 departmental hearing.

B. Take the following affirmative action:

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

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

C. That the allegations that the Respondent State violated N.J.S.A. 34:13A-5.4(a)(2) and (3) be dismissed in their entirety.

Alan R. Howe
Hearing Examiner

Dated: September 1, 1989
Trenton, New Jersey

Appendix "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce the employees of DYFS in the exercise of the rights guaranteed to them by the Act, particularly, by refraining from interfering with Donald Philippi in his representation of Sammie Coleman at his October 28, 1987 departmental hearing.

Docket No. CO-H-88-135

STATE OF NEW JERSEY, DEPARTMENT OF HUMAN SERVICES, DIVISION OF YOUTH & FAMILY SERVICES
(Public Employer)

Dated _____

By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.