

P.E.R.C. NO. 90-56

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(WILLIAM PATERSON COLLEGE),

Respondent

-and-

Docket No. CO-H-88-280

COUNCIL OF NEW JERSEY STATE COLLEGE
LOCALS, NJSFT-AFT/AFL-CIO,

Charging Party

SYNOPSIS

The Public Employment Relations Commission finds that the State of New Jersey (William Paterson College) violated the New Jersey Employer-Employee Relations Act when the secretary of the Executive Committee of the College's Board of Directors and head of its personnel committee rebuked an employee for daring to file a grievance. The unfair practice charge was filed by the Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO.

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COUNCIL OF NEW JERSEY STATE
COLLEGE LOCALS, NJSFT-AFT/AFL-CIO,

Charging Party.

Appearances:

For the Respondent, Peter N. Perretti, Jr., Attorney
General (Melvin E. Mounts, Deputy Attorney General)

For the Charging Party, Bennett Muraskin, NJSFT-AFT Staff
Representative

DECISION AND ORDER

On April 29, 1988, the Council of New Jersey State College
Locals, NJSFT-AFT/AFL-CIO filed an unfair practice charge against
the State of New Jersey (William Paterson College). The charge
alleges that the employer violated subsection 5.4(a)(1) of the New
Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.,
when, at a March 21, 1988 meeting, College trustee James Kuhn
allegedly told Associate Professor Linda Dye she had no right to
file a grievance and added "How dare you file a grievance."

On August 3, 1988, a Complaint and Notice of Hearing
issued. On August 16, the employer filed an Answer denying that
Kuhn made the statements alleged.

On October 13 and 14, 1988, Hearing Examiner Lorraine Tesauro conducted a hearing. The parties examined witnesses, introduced exhibits, and filed post-hearing briefs.

On June 30, 1989, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 89-43, 15 NJPER 453 (¶20184 1989). She credited Kuhn's denial that he said anything about the right to file grievances. She did not make any findings about the allegation that Kuhn asked Dye how she dared to file a grievance.

On August 10, 1989, we dismissed that part of the Complaint alleging that Kuhn told Dye she had no right to file a grievance. P.E.R.C. No 90-10, 15 NJPER 507 (¶20210 1989). But we remanded that part alleging that Kuhn asked Dye how she dared to file a grievance. We asked for further findings and analysis.

On October 20, 1989, the Hearing Examiner issued a supplemental report. H.E. No. 90-17, 15 NJPER 613 (¶20255 1989). She concluded that Kuhn did not ask Dye how she dared to file a grievance. She therefore recommended dismissal of the Complaint.

On November 1, 1989, the Council filed exceptions. It asserts that the Hearing Examiner misanalyzed the evidence.

We must review the record independently. In re Maywood Bd. of Ed., 168 N.J. Super. 45, 61-62 (1979), certif. den. 81 N.J. 292 (1979). The Hearing Examiner's findings of fact do not rest on an evaluation of witness demeanor. They are also inaccurate in many respects and incomplete. Having studied the record, we make

these findings--divided into events before the March 21 meeting, testimony about that meeting, events after that meeting, and findings about that meeting based on the whole record.

Events Before the March 21 Meeting

The Council represents faculty members and certain other employees at the State Colleges (J-1). Linda Dye is an associate professor of movement science and leisure studies at William Paterson College (1T11). She is not a union officer, but is vice-president of the faculty senate (1T11, 1T13).

Faculty members must apply to their department for promotion. Each department's promotion committee makes recommendations to the All College Promotion Committee which makes recommendations to the president who gives the Board of Trustees a list of the candidates he recommends (1T44-1T46; 2T22).

On January 29, 1988, the All College Promotion Committee wrote Dye that it had recommended that she be promoted to full professor. It also recommended that six other associate professors be appointed full professors and that seven assistant professors be appointed associate professors (2T22).

On February 1, 1988, the president wrote Dye that he had rejected the recommendation to promote her. She got the letter the next day (CP-1). He also rejected two other recommendations. After substituting the names of three other faculty members, he submitted his list of 14 favorable recommendations to the Board (2T23).

On February 5, 1988, a group grievance was filed by Dye, the two other rejected candidates, and the Council (R-4). The

grievance alleged that the president had violated contractual procedures and in particular had not recognized the contractual definition of "scholarly achievements" or given reasons for the denials. It asked for reconsideration.

On February 8, 1988, Dye filed her own grievance (CP-1). The grievance accused the president of sex discrimination and not applying the same standards to her as he applied to others. The two other rejected candidates also filed grievances (1T25-1T26).

The president told the Board of Trustees about the group grievance, but not the individual grievances. (2T25). The Board knew the names of the three faculty members in the group grievance (2T44). The president established that Kuhn knew that Dye was named in the group grievance (2T53).^{1/}

Kuhn chaired the trustees' personnel committee (2T43-2T44).^{2/} The All College Promotion Committee appealed the promotion denials to the personnel committee. On February 8, the two committees met to discuss procedural issues (R-2; 2T107-2T108). That night the Board approved the president's recommendations (R-2).

^{1/} Kuhn equivocated, but admitted knowing that Dye, a well-known campus figure, had been rejected for promotion. He therefore presumed that she was named in the group grievance (2T104, 2T106-2T108).

^{2/} Kuhn is a professor of industrial relations at Columbia University's Graduate School of Business. He has published books on collective bargaining and grievance processing (2T68-2T69; R-5).

Campus controversy resulted (2T76). On February 23, the faculty senate resolved to adjourn participation in academic governance (R-2). The resolution asserted that the president and vice-president had changed the relationship with the promotion committee by narrowing "scholarly achievement" to publications. The senate's executive committee guaranteed that if the president took no action, the senate would be reconvened in early April to deliberate over calling for a no-confidence vote, continuing adjournment, or resuming governance (R-3; 1T62-1T63). Robert Bing, senate chairperson, forwarded the adjournment resolution to Russell Hawkins, Board chairperson (R-2). A possible no-confidence vote was discussed throughout the campus community (1T70).

Before the promotions controversy began, a March 21 meeting had been scheduled so that the trustees and senate representatives could discuss the idea of faculty representation on the Board. Despite the adjournment from governance, President Speert and Chairperson Hawkins decided to hold that meeting. Speert's secretary told Bing, who told his colleagues, that faculty representation was the only item on the agenda (1T15; 2T28). Kuhn was not told that (2T45; 2T78).

Testimony About The March 21 Meeting

These senate representatives attended: Chairperson Bing, Vice President Dye, Secretary Kenneth Pokrowski, and Executive Committee member Timothy Gerne. These administration representatives attended: President Speert and Vice President

Hamovitch. These Board representatives attended: Chairperson Hawkins, Vice Chairperson Sol Hoffman, and Secretary Kuhn (2T29). All but Pokrowski, Hamovitch and Hoffman testified.

Testimony of Linda Dye

After dinner, Hawkins summarized developments on the issue of faculty representation. The summary took 40 minutes (1T16-1T17).

Kuhn then said he didn't want to talk about faculty representation given the suspension of governance. Bing eventually responded that Kuhn did not know the faculty's side of the issue; Kuhn rejoined that he didn't want to know it. Kuhn said he was afraid the governance issue would get out of hand, like a dispute in 1974 which led to picketing trustees' homes (1T17-1T18).

Dye then said that the faculty was taking a more moderate position than picketing homes. Kuhn got very angry, straightened up, turned to Dye, interrupted her and said:

Listen here, young lady,^{3/} your idea of moderate and my idea of moderate are very different. Grievances have been filed. How dare you file grievances. [1T18]

Kuhn was red-faced and loud (1T19). Dye interjected that the meeting had been called to explore a single issue and a 45 minute discussion of alternative forms of faculty representation ensued. No one called Kuhn's comments improper during the meeting (1T37-1T38). The timing of the grievances was not discussed (1T20).

^{3/} Dye later testified Kuhn said "little lady," not "young lady" (1T23).

Testimony of Robert Bing

After dinner, Hawkins started a discussion of faculty representation (1T52). Kuhn said he was unwilling to discuss the matter since the faculty had irresponsibly adjourned from governance. No one responded (1T53). When Kuhn pressed the point, Bing said that faculty representation was the sole issue to be discussed (1T53-1T54). Bing said that Kuhn had heard only one side of the story; if the Board had faculty representation, he could hear the other side. Kuhn responded he wasn't interested: there was no other side to the story or excuse for withdrawing from governance (1T54). Kuhn couldn't understand why the faculty was so angry about the minor matter of promotions; he compared this situation with the picketing in 1974 and 1975 (1T54). Kuhn was angry, red in the face, and loud (1T55).

Dye tried to return the discussion to governance. Bing could not recall what she said specifically (1T55). Kuhn turned to her and asked her if she knew grievances had been filed. He then said: "I can't understand why grievances have been filed" and "Little lady, how dare you file a grievance" (1T55). Kuhn said nothing about the timing of any grievance (1T55-1T56). No one objected to his comments (1T71).

Speert showed Bing a note: "Kuhn is angry, change the subject." Bing shrugged (1T56). The discussion returned to faculty representation and lasted 40-45 minutes (1T57, 1T70).

Testimony of Timothy Gerne

After dinner, Gerne endorsed representation. Hawkins opposed the idea (2T5-2T6). Kuhn was "dead set" against it and "contemptuous" (2T14). Given the cross-conversation among so many people, Gerne did not remember when Kuhn declared his opposition or the sequence of events, but he did remember the substance of the discussion (2T13-2T14). Kuhn, while rustling papers, suddenly turned towards Dye, looked her in the eye and said: "Little lady, how dare you bring this small issue of your promotion. I don't want my house picketed by students like it was in 1974" (2T6). On cross-examination, Gerne testified Kuhn said: "Little lady, how dare you bring this small grievance." (2T17) Kuhn was angry and loud (2T7). No one objected to his comments (2T19). Gerne did not remember if Kuhn said anything about the timing of Dye's grievance: Gerne was in shock (2T8). The discussion returned to faculty representation, lasting maybe 45 minutes (2T8-2T9, 2T20). Gerne accused the executive committee of stonewalling (2T18).

Testimony of Arnold Speert

Hawkins stated that it was up to the faculty to propose a trustee representative (2T31). Kuhn then stated that since the faculty had abandoned governance, he no longer favored representation (2T32). Kuhn compared the situation to the 1974 picketing (2T33, 2T49). He spoke passionately and loudly (2T34). Bing responded and then Dye said that the suspension of governance was a mild step compared to a no-confidence vote (2T32).

Kuhn raised the grievance, very possibly addressing Dye directly (2T53-2T54). Speert could not recall exactly what Kuhn said to Dye (2T51, 2T54-2T55). Kuhn didn't believe "the filing of the grievance and the withdrawal from governance helped in terms of continuing discussions between the administration and the faculty" (2T35); he thought that the grievance was "a major matter" and that it was illogical to file a grievance or withdraw from governance over a minor thing like a promotional decision (2T48-2T49, 2T55-2T56). Speert did not hear Kuhn say anything improper (2T36) or tell Dye she should not have filed a grievance (2T55). Nor did he recall Kuhn referring to Dye as "little lady" (2T38) or a student trustee as a "little girl" (2T52).

Speert passed a note to Bing stating that Kuhn takes governance seriously and urging him to get the discussion back on track. Bing shrugged and returned the note (2T36). The discussion returned to faculty representation (2T36-2T37). Gerne accused the executive committee of stonewalling (2T37).

Testimony of James Kuhn

After dinner, Hawkins started the discussion of faculty representation. Bing explained the senate's approach. Hawkins, Hoffman, and Kuhn responded (2T79).

Kuhn was not sure of the sequence of comments (2T83). He said it was not appropriate to talk about extending governance when the faculty had withdrawn from governance (2T83). Kuhn was sorry to see the withdrawal; it reminded him of the adversarial relationship

when the faculty picketed the houses of other Board members (2T83, 2T115). Bing interjected that the meeting was called to discuss one issue; Kuhn rejoined that faculty representation and withdrawal from governance were inseparable (2T84). Someone--he's not sure who--responded that withdrawal was a more moderate action; he responded that withdrawal was not moderate at all (2T85).

Dye was sitting to Kuhn's immediate left.

"I asked her directly^{4/} why a grievance was filed at this time when a grievance--when a resolution, when it would make a resolution more difficult and she replied that the Union had to file the grievance, that it had to be filed--I forget exactly how she put it, that the grievance had to be filed because there was a limit on the time for filing. I said, well, I understand that, of course, but you can always get an extension, at least it's a usual practice to extend it...." (2T84-85).

Kuhn admitted being very angry about the governance issue (2T88). While he was not angry about the filing or substance of the grievance, he was angry at its timing (2T89, 2T102, 2T110).^{5/} The timing of the grievance was much discussed (2T102). Kuhn told Dye that the promotion issue was small compared to the withdrawal from governance (2T113).

^{4/} On cross-examination, Kuhn contradicted himself by testifying that he did not talk to Dye directly until she had responded to his question about the grievance (2T103).

^{5/} Kuhn did not object to the substance of the grievance since he believes strongly that promotions should not be a managerial prerogative (2T112).

Kuhn realized he had gotten very angry and had embarrassed his colleagues. The discussion returned to faculty representation and continued for 30-40 minutes (2T90). Kuhn worried that faculty representation might cause problems like those stemming from student representation (2T87). He couldn't recall the student trustee's name so he called her "that girl on the Board" (2T85-2T86).

Kuhn denied saying Dye had no right to file a grievance (2T88) or addressing Dye by any way other than her name (2T85). Kuhn clearly recalled calling the student trustee "that girl"; but he did not think he said "the other statement as charged or alleged." (2T114). He was not specifically asked about and did not specifically deny asking Dye how she dared to file a grievance.^{6/}

Testimony of Russell Hawkins

After dinner, he summarized the faculty representation issue and his position on it. Hoffman spoke, then Kuhn (2T120).

Kuhn said it was inconsistent to speak about more faculty involvement when faculty had withdrawn from governance; he recalled the previous picketing (2T121). Bing suggested that the meeting had been called to discuss a single topic (2T121). When someone said

^{6/} Three affidavits of witnesses (Dye, Bing, Gerne), an affidavit of a non-witness (Pokrowski), and an unsworn statement of another witness (Kuhn) were improperly admitted into evidence. An affidavit may not be introduced if its maker is available to testify, although it may be used to impeach a witness or establish an admission. See Lopez v. New Jersey Bell Tel. Co., 54 N.J. 129 (1969).

that picketing was less moderate than withdrawal, Kuhn rebuffed that point (2T122).

Kuhn brought up the grievance. He criticized its timing in juxtaposition to the withdrawal from governance. Hawkins did not see Kuhn direct these comments to anyone (2T123). When Dye noted the time pressure, Kuhn said she could have requested an extension (2T124). No one objected to Kuhn's comments. The discussion returned to faculty representation (2T128).

Hawkins did not recall if Kuhn addressed Dye by any other form than her name (2T124). He denied that Kuhn commented on the right to file a grievance (2T124). He did not testify about whether Kuhn made any comment about daring to file a grievance.

Events after the March 21 Meeting

The senate reconvened in April. After expressing no confidence in the president and vice-president, it resumed governance. A majority of the voting faculty, librarians and professional staff later expressed their confidence in the two officials (1T63-1T64).

On April 13, the president of the Council's local asked Speert to meet with him alone. He brought affidavits from the senate representatives at the March 21 meeting. The two presidents could not resolve the dispute (2T40-2T42).^{7/}

Kuhn drew up a response (R-6) to the affidavits. At the next Board meeting, he said that he wanted to apologize in public

^{7/} The substance of the settlement efforts is immaterial.

session to the student trustee and Dye. He could not remember if he called the student representative "that girl," but he wanted to apologize if he did (2T43, 2T129).^{8/} With regard to addressing Dye as "little lady," Kuhn said: "I do not believe I said that or I would so testify that I did not say that, but...if there was any way in which she heard that, I would certainly want to...apologize in public." (2T51, 2T95, 2T128-2T130). He did (2T95).

Findings About the March 21 Meeting
Based on the Whole Record

No one witness precisely recalled every event or the sequence of the conversational crossfire. Putting together the various accounts, we are reasonably confident that the meeting went along the following lines before Kuhn raised the grievance. After dinner, Hawkins summarized the issue of faculty representation. Kuhn passionately opposed discussing more faculty representation when there was no faculty governance. Bing reminded Kuhn that representation was the sole issue and added that Kuhn did not know the faculty's side of the governance story. Kuhn responded that he wasn't interested--there could be no other side or excuse for withdrawing from governance. Kuhn couldn't understand why the faculty was so angry about the "minor matter" of promotions; he worried about a return to an adversarial past. At this point, Dye told Kuhn that the faculty was taking a more moderate position than picketing homes.

^{8/} Contrast Kuhn's testimony at the hearing that his memory about making this statement was exceedingly clear (2T114).

We now come to the crux of the case. How did Kuhn respond?

Kuhn viewed the group grievance as a "major matter" and was visibly angry about it. He knew that Dye was a named party. He directly confronted Dye about it.^{9/}

What did Kuhn say when he confronted Dye? Two accounts compete. Either he reprimanded her for daring to file a grievance or he merely criticized the timing of the grievance. Based on the preponderance of the evidence, we believe he reprimanded her.^{10/}

Dye, Bing and Gerne all testified that Kuhn asked Dye how she dared to file a grievance. Their testimony accords on this central point.^{11/}

^{9/} We base this finding on the consistent testimony of Dye, Bing and Gerne; Speert's testimony that Kuhn raised the grievance issue and very possibly addressed Dye directly; and Kuhn's testimony on direct examination and admission in R-6 that he asked Dye directly why a grievance had been filed.

^{10/} We need not resolve the precise point of whether Kuhn called Dye "little lady" since we do not sit to decide allegations of sexual harassment and we are mainly concerned with the alleged reprimand for daring to file a grievance. We do note that Kuhn's denial is undercut by his calling the student trustee "that girl" at the same meeting and his odd apology to Dye later.

^{11/} There is a slight variation in phrasing in Gerne's testimony. He first testified that Kuhn referred to "the small issue of your promotion," but later substituted the phrase "small grievance". This variation is not as significant as Kuhn's equivocation about his knowledge of the group grievance or his contradicting himself about confronting Dye. We also note that Gerne did not describe the context of Kuhn's response in as much detail as Dye or Bing. His poor recollection about the context lessens his testimony's weight, but does not make his corroborative testimony about Kuhn's response incredible.

In response to specific questions, Kuhn, Speert and Hawkins specifically denied that Kuhn told Dye she did not have a right to file a grievance. They did not deny with equal clarity, specificity or vigor that Kuhn asked Dye how she dared to do so.

Kuhn explained that he objected solely to the grievance's timing. Dye and Bing specifically denied that the grievance's timing was raised; Gerne couldn't remember because he was in shock. Hawkins supported Kuhn's account, but Speert did not. Speert neither mentioned timing nor corroborated any of Kuhn's testimony about his conversation with Dye or others on this point. Speert testified instead that Kuhn was bothered by the challenge to the president's promotion decisions; but Kuhn testified that the substance of the grievance did not bother him at all. We also note that Kuhn's alleged concern about timing appears illogical. The group grievance was filed just three days after Dye learned her promotion had been rejected and almost three weeks before the faculty withdrew from governance. It does not appear, as Kuhn's version implies, that the grievance intensified an existing controversy over governance.

Under all the circumstances, we believe it is more likely that Kuhn vented his anger by reprimanding Dye than by merely criticizing the grievance's timing. We find as a fact that he asked Dye how she dared to file a grievance.

Analysis

Subsection 5.4(a)(1) prohibits a public employer and its representatives and agents from "interfering with, restraining or

coercing employees in the exercise of the rights guaranteed to them by this act." These rights include the right to file a grievance over employment conditions. N.J.S.A. 34:13A-5.3. An employer violates subsection 5.4(a)(1) if a representative's statement tends to interfere with an employee's right to grieve and lacks a legitimate and substantial business justification. Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd App. Div. Dkt. No. A-1642-82T2 (12/8/83); New Jersey Sports & Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979).

Kuhn was the secretary of the Board's executive committee and the head of its personnel committee. Viewed through a reasonable person's eyes, his rebuke would tend to chill the exercise of the right to file a grievance. When an employer representative angrily asks how an employee "dares" to take a protected action, the threat of retaliation surfaces. See Danish Creamery Ass'n, 265 NLRB 652, 112 LRRM 1105 (1983); Mark Twain Marine Ind., Inc. 254 NLRB 1095, 107 LRRM 1008 (1981). We do not question the legitimacy, the sincerity or the depth of Kuhn's views about governance. He is entitled to them and was free to express them. Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981). But he went beyond the line drawn by subsection 5.4(a)(1) when he rebuked Dye for daring to file a grievance.

ORDER

The State of New Jersey (William Paterson College), its representatives and agents are ordered to:

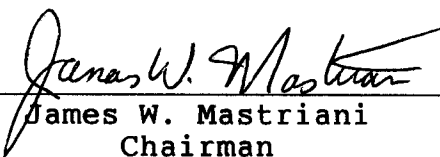
A. Cease and desist from interfering with, restraining or coercing employees in the exercise of the right to file grievances, particularly by asking employees how they dare to file grievances.

B. Take this 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.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Ruggiero and Smith voted in favor of this decision. Commissioner Wenzler voted against this decision.

DATED: Trenton, New Jersey
December 14, 1989
ISSUED: December 15, 1989

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 employees in the exercise of the right to file grievances, particularly by asking employees how they dare to file grievances.

Docket No. CO-H-88-280

State of New Jersey (William Paterson College)

(Public Employer)

Dated: _____

By: _____

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 Street, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

H.E. NO. 90-17

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

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Respondent,

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Docket No. CO-H-88-280

COUNCIL OF NEW JERSEY STATE COLLEGE
LOCALS, NJSFT-AFT/AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner, upon remand of H.E. 89-43, P.E.R.C. No. 90-10 makes supplemental findings of fact on the portion of the complaint alleging an independent violation of section 5.4(a)(1) of the Act. The Hearing Examiner concludes that the Respondent did not violate the Act with respect to certain comments of a member of the Board of Trustees which did not interfere with the employees' rights.

H.E. NO. 90-17

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LOCALS, NJSFT-AFT/AFL-CIO,

Charging Party.

Appearances:

For the Respondent, Hon. Peter Perretti, Attorney
General
(Melvin E. Mounts, D.A.G.)

For the Charging Party
Bennett Muraskin, NJSFT/AFT Staff Representative

HEARING EXAMINER'S RECOMMENDED
SUPPLEMENTAL REPORT AND DECISION ON REMAND

This Hearing Examiner issued the recommended report and decision on June 30, 1989 in which she recommended that the Commission dismiss the complaint of the charging party ("Council") (H.E. No. 89-43, 15 NJPER ____ (¶ _____ 1989). The Hearing Examiner credited James Kuhn's denial that he made any comment concerning the right to file grievances. Thereafter, on July 13, 1989, the Council filed exceptions to the Hearing Examiner's Recommended Report and Decision, supra. The Respondent ("State") did not file any subsequent position statements.

On August 18, 1989, the Commission issued its decision and dismissed a portion of the Complaint alleging the Board ("Board of Trustees") member said the professor had no right to file a grievance. However, the Commission requested that the Hearing Examiner review the recommendation and make a supplemental report concerning that portion of the complaint alleging that the Board member said "Little lady, how dare you file a grievance".

The Commission, in its remand to the Hearing Examiner, stated that this was done so that she might "... make findings and recommendations on these issues..." and that she "...should also make any supplemental findings of fact necessary to resolve the disputes identified in the exceptions and arguments presented by the charging party".

Based upon the pleadings, the record made during the days of hearing in this matter, the post hearing briefs of the parties, the exceptions of the charging party, which together constitute the entire record in this proceeding the hearing examiner makes the following:

SUPPLEMENTAL FINDINGS OF FACT^{1/}

6. Linda Dye testified that Kuhn said to her "Listen here, young lady, your idea of moderate and my idea of moderate are very

^{1/} The original findings of fact set forth in H.E. No. 89-43, supra. are incorporated by reference. For convenience, the paragraph numbers in these "Supplemental Findings" shall follow numerically the paragraph numbers in the original findings of fact.

different." (1T18). When asked again whether or not Kuhn made the remark, Dye testified:

"Q. I am asking then is it young lady or little lady.

A. Little lady."
(1T24)

7. Robert Bing testified that there were discussions concerning other issues at this meeting of March 21 (1T55). Specifically, a discussion concerning promotions. In an effort to bring the conversation back, Dye requested the governance issue be placed back on the table. Bing did not recall Dye's specific words, but testified that Kuhn's response "was in an angry tone and Kuhn continued to question 'Do you know that grievances have been filed in this matter? I can't understand why grievances have been filed in this matter and little lady, how dare you file a grievance in this matter.'" (1T55).

Bing further testified President Speert also observed that Kuhn was angry and Speert wrote Bing a note to change the subject (1T56). There were no further questions concerning Dye's grievance (1T57). Bing's testimony confirmed the issues for discussion were the no confidence vote for the President by the faculty and the governance issue of which Kuhn demonstrated a great deal of anger. When Bing was asked if anyone said anything concerning Kuhn's comment about the grievance as to its impropriety or that it should not have been said at the meeting, Bing responded "No." (1T71).

Bing testified that Kuhn was very adamant about placing a faculty member on the Board of Trustees while the faculty is withdrawn from governance (1T55). Bing testified that Kuhn brought up this issue at least three times before making any comment concerning grievances (1T53,54,55).

This corroborates Dye's testimony (1T38) when she asked about subsequent discussions to Kuhn's alleged comment. Both witnesses testified that there were no discussions immediately following Kuhn's alleged remark at the March 21 meeting (1T38).

8. Timothy Gerne, witness for the Charging Party, is a professor in the Department of Curriculum and Instruction at William Paterson College. He is a union member, but not a union officer (2T3,4).

Gerne's testimony is inaccurate and inconsistent. Primarily, he was not able to recall the comments concerning governance and Kuhn's remarks on the same issue, yet he allegedly vividly recalled Kuhn's alleged comment to Dye beginning with "little lady." (2T14,15)

Gerne testified there were discussions concerning faculty members being non-voting members on the Board of Trustees. He directed this discussion toward Russell Hawkins, Chairperson for the Board of Trustees, and noted that Kuhn did not state an opinion on this particular matter (2T6). However, Gerne made an observation concerning Kuhn's alleged remark:

[Kuhn] was rustling papers and then all of a sudden he turned. They [Dye & Kuhn] were on the same side of

the table Mr. Hoffman was between Professor Dye and Professor Kuhn and he looked her right in the eye and he said, 'Little lady, how dare you bring the small issue of your promotion. I don't want my house picketed by students like it was in 1974.' (2T6). He observed Kuhn looked distressed (2T7).

Gerne testified concerning the length of the meeting. He figured approximately "a couple of hours. They had lunch. It wasn't a brief meeting (2T9)." When he asked how long the meeting continued after Kuhn's alleged remarks about Dye's grievance, Gerne answered, "Not too long, not too long." (2T9).

On cross-examination, Gerne testified the group had dinner and then the meeting commenced and when asked how long after the meeting commenced did the question of grievance come up, Gerne testified, "Maybe 20 minutes, half an hour." (2T10). Gerne further testified on cross-examination that he did not recall Kuhn having made any comment about whether or not the Board should have a faculty representative before speaking to the grievance comment (2T11).

Gerne's account of the remark on direct examination elaborated on the "promotion and picketing" attached to Kuhn's comment about Dye's grievance (2T6,7).^{2/} Gerne testifies on cross examination that out of the blue and without provocation, Kuhn suddenly turned to Dye and started yelling about her grievance

^{2/} Kuhn's account of the alleged remark, "Little lady, how dare you bring this small grievance, you know, to this thing. I don't want to..." "I don't want my house picketed like in 1974." (2T17).

(2T13) and gave yet another version of Kuhn's comment by stating "he heard Kuhn say 'little lady, how dare you bring this small grievance ...'"(2T17).

Gerne did not recall Kuhn making any comments concerning a faculty member on the Board prior to Kuhn making the alleged comment to Dye (2T14). More importantly, Gerne was uncertain as to the sequence of events (2T14). It is unlikely that Kuhn made three different comments and more unlikely that three different accounts, by the same person, of an allegedly derogatory remark is able to withstand credibility. Gerne's testimony is inaccurate, inconsistent and the hearing examiner discredits it.

9. Arnold Speert is the President of William Paterson College. He makes only positive recommendations to the Board of Trustees for promotion of the faculty (2T22).

The All College Promotions Committee took exception to Speert's recommendations which eliminated three people (2T23). Consequently, the union filed a group grievance and then Dye filed an individual grievance (2T24). Speert did not tell the Board members at any time prior to the March 21 meeting that Dye filed an individual grievance (2T25).

Speert testified about several discussions concerning the suspension of governance and participation of faculty with the Board (2T32). Speert recalled Dye responding to the suspension of governance, "I don't remember the exact words, but a mild step, a mild expression and it was -- I think the comment was not as strong

as a vote of no confidence or something to that effect." (2T32). Speert testified Kuhn was concerned about the withdrawal from governance and made reference to the 1974-75 picketing (2T33).

Speert spoke to Kuhn's comments concerning the promotions grievance:

"In the course of Dr. Kuhn's -- in the course of discussing withdrawal from governance...he [Kuhn] talked about the adversarial role which the discussion was taking and how he felt it was not in the best interest of the faculty." (2T33)

Speert on direct examination recalled Kuhn's comments "with respect to the withdrawal from governance and the filing of the grievances came as a result of Dr. Dye's attempt to put the Faculty Senate's actions in perspective" (2T34). Speert observed Kuhn as being very "passionate" in his sentiment regarding the governance issue (2T34).

Speert testified that he did not hear Kuhn say anything improper to Dye or anyone else (2T36).

Speert did not recall Kuhn referring to Dye as a "little lady" (2T38); he does not recall Kuhn addressing whether or not Dye had a right to file a grievance. Speert testified Kuhn addressed whether the filing of the grievance in this particular situation was

beneficial to the open discussions between the administration and faculty in solving what he saw as a campus problem (2T38). ^{3/}

10. Kuhn recalled that the March 21 meeting addressed the board members' positions on the question of faculty representation on the Board of Trustees. Kuhn stressed the inappropriate timing of talking about extending the governance with the faculty at a time when the faculty had withdrawn from governance (2T83). Kuhn testified he thought it would be much more appropriate if the Board were to discuss such a matter when the faculty was actually governing in its usual way. He's uncertain as to what the sequence was when asked if someone took exception to what he said. He testified "he was sorry to see this kind of development because it reminded him very much what had happened some years before when he first came to the Board and his home was picketed (2T83)."

After the discussion with Bing concerning the governance issue, which Kuhn perceived as a very serious matter, Kuhn recalled turning to Dye, who was sitting to his left, and asking her directly

"why a grievance was filed at this
time 'when a grievance -- when a

^{3/} Speert testified he first learned of Kuhn's alleged remarks from Irwin Knack, the union president. Knack approached Speert concerning the statements that were made at the March 21 meeting (2T40) and Knack suggested it was important for them to meet. They arranged to meet that day.

Knack and Speert met, Knack showed Speert copies of four affidavits and told him of his intention to pursue an unfair labor practice against the Board. Speert offered to settle the matter by issuing a statement of employee's rights (2T41). Knack replied the only way this could be settled would be for the President to reverse his decision on three promotions that he denied (2T41).

resolution, when it would make a resolution more difficult' and she replied that the 'union had to file the grievance, that it had to be filed --' I forget exactly how she put it, that the grievance had to be filed because there was a limit on the time for filing. I said, 'Well, I understand that of course but you can always get an extension at least it's a usual practice to extend it.'" (2T84, 85).

Kuhn observed that no one made any comment concerning the action by the faculty in comparison to those events and Kuhn did not feel that withdrawing from governance was a moderate action. He did not at any time refer to Dye by any other form of address other than her name (2T85, 86).

Kuhn testified he was concerned about the complaint by Dye that he had called her "little woman." "I do not believe I said that or I would so testify that I did not say that but if I thought -- if there was any way in which she heard that that I would certainly want to apologize and apologize in public." (2T95).^{4/} On cross-examination when asked about the alleged remark at the March 21 meeting whether or not Kuhn directly confronted Dye with the fact she had filed a grievance, Kuhn's response was:

I don't believe I confronted her directly. I simply -- she was next to me. I was talking to the whole group...I was looking at the group and I said why was a grievance filed. I wasn't speaking to her directly but she responded. (2T103).

^{4/} Kuhn explained that he had referred to a student member of the Board as "that girl on the Board" (2T85,86).

Kuhn was certain he had no reason to address Dye any more than any of the others. He did not know she was named in a grievance. He presumed she was one of the persons in controversy on the promotions list. (2T104).

11. Russell Hawkins is Chairperson of the Board of Trustees at William Paterson College. This is his third year as chair (2T116, 117). Hawkins testified he started the meeting off by discussing the Board's position on whether or not faculty members should participate at the Board level and suggested ways that the Board could productively explore how the faculty could participate (2T120). Hawkins testified Kuhn was concerned about the faculty withdrawing from governance and Kuhn found this inconsistent.

Hawkins corroborated Kuhn's and Speert's testimony concerning the grievance (2T122,123). The witness commented on Kuhn's views that the timing of the meeting and the timing of the grievance "seemed to be in juxtaposition and his comments went to the timing of this item [grievance]" (2T123). Hawkins testified Kuhn's concern went to the timing of the grievance as it related to the governance issue (2T123).

Hawkins does not recall Kuhn making any comments about an individual's right to file a grievance, nor does he recall at any time during the meeting that Kuhn addressed Dye in any other way other than by her name (2T124).

SUPPLEMENTAL ANALYSIS

"The issue is whether a statement made by a member of the Board of Trustees of William Paterson College interfered, restrained and coerced employees in the exercise of their rights under Section 5.4(a)(1) of the Act." (LT5,6)

To determine if an (a)(1) violation took place, it is necessary to determine whether or not the alleged comment was made and then determine if it has interfered with an individual's rights as protected under the Act.

The Commission upon remand requested the Hearing Examiner make a supplemental finding and a specific and express finding as to whether or not Kuhn called Dye "little lady" and whether he asked her how she dared to file a grievance. Five witnesses testified throughout the hearing concerning Kuhn's comments.

The thrust of the union's argument is whether or not a specific statement was made and, if so, did it interfere with an individual's rights protected under the Act. The union relies on testimony of three witnesses whose testimony is not consistent and although they appear to be testifying as to exactly what was said, none of their testimony is corroborative. They all agree that Kuhn's comments were made in anger, but failed to view these comments in the proper context of the discussions concerning the faculty withdrawing from governance and faculty receiving a position on the Board of Trustees.

In reviewing the five witnesses' testimony, the three union witnesses obviously recalled the comment being made very vehemently

and in a very angry tone. However, neither witness qualifies the alleged comment. The union translates Kuhn's "passion" against a withdrawal from governance as a direct threat against one of its members and a denial of her promotion. They fail to realize that that sentiment was not directed toward Dye nor toward the rights guaranteed her under the Act. The Charging Party fails to provide substantially convincing testimony, by any of its witnesses, that the comment "little lady, how dare you file a grievance " was ever stated.

Dye and Bing both testified that Kuhn confronted her out of the clear blue sky and said "how dare you file a grievance" (1T18, 35). However, Dye and Bing could not agree on whether or not the comment was "young lady or little lady." (1T18, 35).

Bing's testimony is only partly credited. I discredit it on the fact that he and Dye are unable to agree as to what was said. First Bing testifies that the alleged remark began with "young lady" (1T18) and later, while still on direct examination, clarifies the comment to be "little lady." (1T24)

Gerne's testimony is inconsistent and is discredited. He contradicts himself throughout the testimony. I discredit Gerne's testimony based upon his own statement. First he is not able to recall any previous discussions concerning the governance issue and on cross examination he is uncertain as to the sequence of events. (2T14). Then he contradicts himself as to the length of the dinner discussion and the meeting (2T14,17).

Gerne claims Kuhn, without provocation, turned to Dye and said "little lady, how dare you bring this small issue of your promotion. I don't want my house picketed by students like it was in 1974." (2T6). Gerne is unable to remember exactly whether or not anything was said concerning Dye's grievance because he testified he was in shock from what Kuhn had said. He does not recall the length of the meeting after the alleged comment (2T8,9).

Gerne's testimony is credited on the fact that the meeting of March 21 took place and that Kuhn was angry in his sentiments.

By comparison the State's witnesses, President of the College, the Secretary of the Board of Trustees, Kuhn, and the Chairperson of the Board of Trustees all agree and corroborate Kuhn's testimony and that he was very angry concerning the discussion about faculty withdrawal from governance as it relates to appointing a faculty member to the Board of Trustees. However, neither of their testimony supports the allegation that Kuhn directly confronted Dye by calling her "little lady" and stated to her "how dare you file a grievance."

Speert's testimony, as well as Hawkins', corroborated Kuhn's testimony in that neither of them recall Kuhn making any derogatory remarks toward Dye nor recall Kuhn referring to Dye in any other way other than by her name.

They all concur that Kuhn was angry or "passionate", but that sentiment was not directed toward Dye nor did Kuhn refer to her as "a little lady" or "young lady" or "little woman." (2T83, 95).

I further credit Speert and Hawkins concerning Kuhn's remark. Both witnesses corroborated Kuhn's testimony that he did not remember making the comment. Neither witness observed Kuhn making the remark nor referring to Dye in any other way other than by her name (2T34,36,38). I find that Kuhn did not refer to Dye as "little lady" nor did he make the statement "how dare you file a grievance."

Subsection 5.4(a)(1) prohibits a public employer from "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act." A public employer violates subsection (a)(1) when its conduct tends to interfere with an employee's statutory right and lacks a legitimate and substantial 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 Authority, P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). It is not necessary for the charging party to prove an illegal motive in order to establish the independent violation of 5.4(a)(1) of the Act.

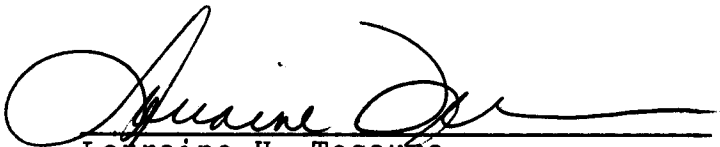
The Hearing Examiner finds and concludes that the statements in the Supplemental Findings of Fact support the State's position that the actions of one of its members did not in fact take place; therefore, there is no violation of 5.4(a)(1) of the Act. Based upon the entire record on remand and the Supplemental Findings of Fact made above, the Hearing Examiner makes the following:

SUPPLEMENTAL CONCLUSIONS OF LAW

1. The Respondent Board did not violate N.J.S.A.
34:13A-5.4(a)(1).

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER
that the Complaint be dismissed.


Lorraine H. Tesaufo
Hearing Examiner

Dated: October 20, 1989
Trenton, New Jersey