P.E.R.C. NO. 89-99

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

INTERNATIONAL UNION OF ELECTRONIC,
ELECTRICAL, SALARIED MACHINE &
FURNITURE WORKERS, AFL-CIO, LOCAL 440,

Respondent,

-and- Docket No. CI-H-88-91

MAPLE THOMPSON,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a complaint based on an unfair practic charge filed by Maple Thompson against the International Union of Electronic, Electrical, Salaried Machine & Furniture Workers, AFL-CIO, Local 440. The charge alleges that Local 440 discriminatorily caused Thompson's employer, Camden County College, to post a notice allowing unit employees to bid for Thompson's position since it had been upgraded. In the absence of exceptions, the Commission adopts the recommendation of the Hearing Examiner that the Complaint be dismissed.

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-and- Docket No. CI-H-88-91

MAPLE THOMPSON,

Charging Party.

Appearances:

For the Respondent, Tomar, Seliger, Simonoff, Adourian & O'Brien, Esqs. (Howard S. Simonoff, of counsel)

For the Charging Party, Robert Thompson

DECISION AND ORDER

On June 28, 1988, Maple Thompson ("charging party") filed an unfair practice charge against the International Union of Electronic, Electrical, Salaried Machine & Furniture Workers, AFL-CIO, Local 440 ("Local 440"). The charge alleges that Local 440 violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(b)(1), (3) and (5),[1/] by discriminatorily causing Thompson's employer, Camden

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1/ These subsections prohibit employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit and (5) Violating any of the rules and regulations established by the commission."

County College, to post a notice allowing unit employees to bid for Thompson's position since it had been upgraded.

On August 8, 1988, a Complaint and Notice of Hearing issued. On August 19, Local 440 filed its Answer.[2/] It claims it insisted on a posting because it was in the best interest of the negotiations unit.

On November 1, 1988, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses, introduced exhibits and argued orally. They did not file post-hearing briefs.

On January 31, 1989, the Hearing Examiner recommended the Complaint's dismissal. H.E. No. 89-20, 15 NJPER ___ (¶ 1989). He found that Local 440's actions were not arbitrary, discriminatory or taken in bad faith. The posting was consistent with the contract and gave all unit members the opportunity to bid on the upgraded position.

The Hearing Examiner served his report on the parties and informed them that exceptions were due February 14, 1989. Neither party filed exceptions or requested an extension of time.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-11) are accurate. We incorporate them

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2/ It relied, in part, on an earlier statement of position.

here. In the absence of exceptions, we adopt the recommendation that the Complaint be dismissed.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Reid, Ruggiero and Smith voted in favor of this decision. None opposed. Commissioners Bertolino and Wenzler were not present.

DATED: Trenton, New Jersey
March 9, 1989
ISSUED: March 10, 1989

H.E. NO. 89-20

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

In the Matter of

INTERNATIONAL UNION OF ELECTRONIC,
ELECTRICAL, SALARIED MACHINE &
FURNITURE WORKERS, AFL-CIO, LOCAL 440,

Respondent,

-and- Docket No. CI-H-88-91

MAPLE THOMPSON,

Charging Party.

## SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the International Union of Electronic, Electrical, Salaried Machine & Furniture Workers, Local 440, did not violate the New Jersey Employer-Employee Relations Act by the way in which it handled and required the posting of an upgrade of the Upward Bound secretarial position employed at Camden County College. The Hearing Examiner found that Local 440 did not violate its duty of fair representation to the Charging Party by requiring the College to post the upgrade of the position she held thereby exposing her to being bumped from that position.

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. 89-20

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

In the Matter of

INTERNATIONAL UNION OF ELECTRONIC,
ELECTRICAL, SALARIED MACHINE &
FURNITURE WORKERS, AFL-CIO, LOCAL 440,

Respondent,

-and- Docket No. CI-H-88-91

MAPLE THOMPSON,

Charging Party.

Appearances:

For the Respondent, Tomar, Seliger, Simonoff, Adourian & O'Brien, Esqs. (Howard S. Simonoff, of counsel)

For the Charging Party, Robert Thompson

## HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (Commission) on June 28, 1988 by Maple Thompson (Charging Party or Thompson) alleging that the International Union of Electronic, Electrical, Salaried Machine & Furniture Workers, Local 440 (Union) violated subsections 5.4(b)(1), (3) and (5) of the New Jersey Employer-Employee Relations

Act, N.J.S.A. 34:13A-1 et seq. (Act).[1/] The Charging Party alleged that the Union discriminated against her by causing her employer, Camden County College (College), to abandon an attempt to upgrade her secretarial position.

A Complaint and Notice of Hearing (C-1) was issued on August 8, 1988. The Union filed an Answer (C-2) on August 19, 1988 denying that it violated the Act. The Union, relying on its July 13, 1988 statement of position, alleged that it insisted on a posting to upgrade Thompson's position because a posting was in the best interest of the negotiations unit.

A hearing was conducted on November 1, 1988.[2/] Both parties had the opportunity to call, examine and cross-examine witnesses, present documents, argue orally, and submit post-hearing briefs.[3/] The transcript was received on December 15, 1988. Post-hearings briefs were due by January 3, 1989. None were filed.

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1/ These subsections prohibit employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. (5) Violating any of the rules and regulations established by the commission."

2/ The transcript will be referred to as "T."

3/ The Charging Party was represented at the hearing by her husband who is not an attorney. As such, I treated the Charging Party as proceeding pro se, and fully advised her of her rights, responsibilities and the procedures that exist in Commission hearings (T5-T7).

Based upon the entire record, I make the following:

## Findings of Fact

1. Thompson has been employed by the College for approximately ten years. In 1983 she began working in her current position as secretary in the Upward Bound program. In 1983 the title was funded at level "C" (T27). In 1985 Thompson learned that the College's 1984-85 budget provided Level "B" funding for the Upward Bound secretarial position, but she continued to fill that position at level "C." (T28-T30). Thompson discussed the funding level with Jackie Thomas, the Director of Upward Bound, and the funding level was thereafter returned to level "C." (T31-T32, T34-T36). Between 1983 and early 1986, Thompson had no discussions regarding an upgrade of her position (T77).

In 1986 and 1987 Thompson spoke with Dr. McLaughlin, Dean of Student Development, and Margo Venable, the new Upward Bound Director, about upgrading her position to Level "B" or "A". Both McLaughlin and Venable were in favor of upgrading the position and told Thompson that her position would be upgraded (T48-T54; T77-T80). Thompson has received exceptional evaluations from her supervisors (CP-2, CP-3, T47).

By the fall of 1987, Thompson's position had not been upgraded. Prior to that time, Thompson had no contact with the Union about an upgrade of her position. She neither complained to the Union that it did not happen nor filed a grievance over the matter (T80-T81; T90-T91).

2. The College and Union have been parties to collective negotiations agreements covering all secretarial titles, including Thompson's, for approximately twelve years (T143). During that time the parties have negotiated six or seven collective agreements (T143). The 1985-88 collective agreement (J-1) contained the following pertinent Article.

> Article XXXI - Promotions and Posting of Vacancies
>
> Section 1
>
> It is the policy and intention of the College to upgrade its employees. Job vacancies on permanent or new positions will be posted for a period of not less than three (3), but not more than five (5) working days exclusively within the College for the information of the employees. The posting will include, but not be limited to, a general summary of the major duties expected of the position, as well as the salary.
>
> Section 2
>
> Posted positions will be filled, from those applying by the most senior employee who has the necessary ability and aptitude to perform the required duties of the job. If an employee of the College does not apply for the posted vacancy, or if an employee's test results do not show evidence of the required qualifications, the Personnel Office will then advertise the position external to the College.
>
> Section 3
>
> The College recognizes that in making promotions, consideration shall be given first to the ability and aptitude of an employee to perform the job in question; and second, to the length of the employee's continuous service. However, it is understood that if all other variables are equal, seniority shall prevail in the final selection process.
>
> Section 4
>
> Where possible and practical, the College may use tests to assist in determining an employee's aptitude

> and abilities. The final form and content of such test shall be mutually agreed upon by a joint union-management committee. The administration and grading of tests will be the responsibly of the Personnel Office. Twice each year there will be a test for the three (3) secretary positions above the "C" Secretary level. Tests with passing scores will be kept on file for future openings. Applicants may avail themselves of the opportunity to examine their individual test after it has been graded.

Article 31 of J-1 appears as Article 32 in the 1988-91 collective agreement (J-2). Sections 1, 2 and 3 were unchanged. Sec. 4 included the same prior language and a new sentence regarding shorthand.[4/]

Consistent with Articles 31 and 32 of J-1 and J-2, respectively, the longstanding practice between the College and Union has been to post all upgrades as vacancies for bidding (T143). Despite that practice and the contract language, there was one upgrade during their long relationship that was completed without a posting or bidding. In June 1984, Lucille Graziano was upgraded to an "A" secretary (CP-4, T137-T138). This was the only known incident where a position was upgraded without bidding. The Union had simply made a mistake and the upgrading slipped through, but no grievance was filed (T138, T151-T152). Thompson was not involved in or affected by that incident.

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4/ The new sentence added to Sec. 4 of Art. 32 is as follows:

> "Shorthand will not be a mandatory component of the secretarial advancement test unless specifically required and/or utilized by the prospective immediate supervisor."

That sentence is not pertinent to a decision in this matter.

In accordance with Sec. 4, Art. 31 of J-1, the Charging Party, by letter of October 30, 1986 (CP-7), explained to Dean Wilhelm that she was interested in taking the secretary's test for positions above Level "C" and asked to be advised of test dates. The Union President, Helen Albright, received a copy of that letter. No test was given prior to 1986, and none was given in response to CP-7. (T66-T68).

3. In the fall of 1987 the Union was preparing for negotiations with the College to replace J-1. To assist them in negotiations the Union circulated a questionnaire among unit members seeking their proposals. (T120). One of the items that Thompson listed on her questionnaire was an upgrade of the Upward Bound secretarial position (T81-T82). This was the first time Thompson had told the Union she was interested in having her position upgraded (T82).

By letter of January 20, 1988 (R-1), Union Area Coordinator, Arthur Dorst, sent local Union President Helen Albright summaries of the survey results (T119).

Dorst had reviewed the questionnaires and was concerned that some employees were seeking to have their individual jobs upgraded outside the contractual posting procedure (T120). Dorst noted in R-1 that:

> There were several requests for departmental seniority to be applied for promotions in the secretarial unit. We presently enjoy the strongest seniority provisions that could be negotiated. Going

> to departmental seniority would severely impair the rights of a majority of our members and have the potential of manipulating our present job posting procedure.

By that language Dorst was expressing his concern that upgrading positions without posting could diminish the rights of the employees in the overall unit as opposed to helping specific individuals (T120).

Just prior to the negotiations leading to J-2, the Union gave the College a list of its proposals (R-2). Those proposals included a demand that faculty secretaries be upgraded, and a specific demand that the Upward Bound secretary be returned to level "B." (T121-T122). During negotiations the Union's negotiating team explained that any upgrades had to be posted in accordance with the parties' collective agreement (T123, T127). Prior to those negotiations the Union's negotiations team had discussed among themselves the need for posting. They discussed the possibility that a secretary with more seniority than Thompson could bid on and bump her from that position forcing her to exercise her own bumping rights to obtain another position (T128). The Union's negotiations team also believed that Thompson was reluctant to test for a higher level position (T105-T106; T128). The College rejected the demand to upgrade the faculty secretaries, but agreed to upgrade and post the Upward Bound secretarial position (T103, T124, T127-T129).

After the College agreed to upgrade and post the Upward Bound position, Shirley Simmers, a Union shop steward and member of the Union negotiations team, with the consent of Dorst and the

remainder of the Union's negotiations team, withdrew the proposal to upgrade and post that position (T104-T105; T128-T129). Simmers withdrew that proposal because the upgrade had to be posted; she believed that Thompson was reluctant to take a test; and because a posting would allow other people to apply for the position and expose Thompson to being bumped (T105; T127-T129).[5/]

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5/ Both Simmers and Dorst testified that the proposal to upgrade the Upward Bound secretarial position was withdrawn because they believed Thompson was reluctant to take a test should that possibility arise, and because the posting would expose Thompson to the possibility of being bumped from her position (T105, T127-T129). Thompson, however, testified that Simmers told her (Thompson) that she (Simmers) turned down the job because Dorst wanted the job posted and wanted the job for his wife (T55; T83-T84). Dorst testified that he only mentioned his wife as an example of someone who could bid on the Upward Bound position (T131), and Simmers denied telling Thompson that she (Simmers) knew that Dorst wanted the job for his wife, and further testified that Dorst did not say that he wanted the job for his wife (T106). Dorst denied saying that he knew that someone wanted the job, he testified that he said that there may be people who want the job (T155). I credit Dorst and Simmers. I cannot credit Thompson's double hearsay testimony about what Simmers allegedly told Thompson what Dorst allegedly said. Thompson was not present when Dorst made remarks about his wife. Simmers corroborated Dorst's testimony that he mentioned his wife only as an example of someone who could bid on Thompson's position if posted (T106-T107). Several other members of the Union's negotiations team were present at the time Dorst made remarks regarding his wife, but the Charging Party did not offer any other witness to rebut Simmers or Dorst. Thus, Thompson's hearsay testimony regarding what Dorst allegedly said is not legally reliable to prove the truth of the matter asserted.

Furthermore, although Thompson denied that her taking a test was the problem leading to the Union's withdrawal of the proposal to upgrade the Upward Bound position, she admitted that she did not like taking tests, and could not recall whether she discussed with Simmers her reluctance to take tests (T115-T117). Since Simmers was certain that Thompson told her (Simmers) that she (Thompson) was reluctant to take tests (T106-T107), I credit Simmers testimony on that issue.

After that proposal was withdrawn from negotiations, the parties broke for lunch. During their lunch caucus, the Union negotiations team again discussed the ramifications of posting or not posting positions. Dorst, using his wife as an example, explained that his wife, who had held the Upward Bound secretarial position prior to Thompson, but who has held a level "B" position in administration for several years since then, had more seniority than Thompson and "theoretically" could be a candidate for an upgraded Upward Bound position (T131-T132; T106-T107).6/

4. In April 1988, after negotiations were completed, Thompson telephoned Simmers and asked about the proposal to upgrade the Upward Bound position (T82, T105). During that conversation, Simmers told Thompson that she (Simmers) took that proposal off the table because:

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6/ Thompson testified that Simmers told her that Dorst said that he wanted the job posted because he knew someone who wanted the job, and that Simmers said that he wanted the job for his wife (T55, T83). Simmers testified that she did not tell Thompson that she knew that Dorst was talking about his wife, and further testified that Dorst never said his wife wanted the job (T105-T107). Both Simmers and Dorst testified that Dorst mentioned his wife only as an example (T106-t107, T131-T132). For the same reasons expressed in Note 5, supra, I cannot credit Thompson's testimony. It is hearsay, double hearsay and unreliable. Thus, I credit Simmers and Dorst.

Thompson also testified that just prior to the hearing in this matter, Charles Wilson, the new President of the local Union, told her that Dorst said (presumably to Wilson) "he did say that but that it was a joke." (T61). I do not credit that testimony to prove what, if anything, Dorst said to Wilson. Once again, this was double hearsay and cannot be relied upon to prove the truth of the matter asserted. Wilson was not called to testify, and there is no explanation what specific statements or conversations the word "that" refers to.

> ...it was going to be posted and that she [Thompson] had indicated to me that she [Thompson] was reluctant to take the test, and any time a job is posted it's at risk for people to apply for it. (T105).7/

After her telephone conversation with Simmers, Thompson decided she wanted to "leave" the Union. She wrote a letter to Albright informing her of that decision. Subsequently, Thompson received several telephone calls from Union officials asking her to meet with them and explain what happened. Thompson refused such a meeting and was then asked to change the wording in the letter, but she would not (T58). The letter was not offered for evidence.

On June 1, 1988, the College and Union signed J-2, which did not contain an agreement to upgrade Thompson's position. On June 28, 1988 Thompson filed her Charge against the Union.

5. In July 1988 Dorst decided that, even though the Union had withdrawn its proposal to upgrade and post the Upward Bound secretarial position, he would ask the College to accept the proposal since the duties included in that position deserved to be at a "B" level (T133-T134). By letter of July 20, 1988 (R-3), Dorst asked Dean Wilhelm to consider upgrading that position and post it

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7/ Thompson testified that during that telephone conversation Simmers allegedly told her (Thompson) that but for Dorst, she (Thompson) would have been upgraded to a "B" level (T55, T84). Thompson further testified that during that conversation that Simmers allegedly told her what Dorst allegedly said about wanting the upgraded position for his wife. For the reasons discussed in Notes 5 and 6, supra, I do not credit Thompson's testimony. I credit Simmer's recollection of what she (Simmers) told Thompson.

in accordance with J-2.[8/] (T135). The College agreed with the Union's request to upgrade and post the Upward Bound position. It posted the upgrade on July 27, 1988 (CP-6).[9/]

Two people bid for the upgraded Upward Bound position, Thompson and Janice Harris (T70, T136). Dorst's wife did not bid on the position. Harris has more seniority than Thompson. Neither Harris nor Thompson has been tested for the position (T74, T94, T96, T136). Thompson is not precluded from being selected for the position because she has not taken a test (T96). As of the close of hearing, the College had not filled the position (T136).[10/]

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8/ In R-3 Dorst also asked Dean Wilhelm to consider a new procedure for testing employees for upgraded or vacant secretarial positions. The Union wanted the College to pre-qualify employees for future job openings by offering tests at specific times of the year to avoid testing employees only when jobs became available.

9/ The posting language contained in CP-6 showed that a "B" secretary position was available in the Upward Bound office. It did not explain whether it was an upgrade or a new or vacant position. The Charging Party offered CP-5 to show that the College has posted other jobs where the posting clearly shows that it was an upgrade of an existing position. Since there is no evidence that the Union was at all involved in choosing the language that was contained in CP-6, I draw no unfavorable inference against the Union for the language in that posting.

10/ On direct examination Thompson testified that Dean Wilhelm told her (Thompson) that Janice Harris told him (Dean) that she (Harris) did not want the upgraded Upward Bound position, she (Harris) just did not want to see Thompson get that position (T73). I do not credit Thompson's testimony to prove what Harris allegedly said to Wilhelm. The Charging Party did not call either Wilhelm or Harris to testify as to those alleged remarks. I explained on the record that Thompson's testimony as to what Harris told Wilhelm, none of which was in Thompson's presence, was double hearsay and unreliable to prove the truth of the matter asserted (T72-T73).

## Analysis

The Union did not violate the Act or discriminate against Thompson by the way in which it handled the upgrade for the Upward Bound position. The Union was not under any legal obligation to agree to an upgrade of that position without a posting. In fact, a plain reading of both Article 31, Sec. 1 of J-1 and Article 32, Sec. 1 of J-2, requires that job vacancies for permanent or new positions be posted. The upgrade of the Upward Bound position was a vacancy in a permanent position. Thus, the Union acted appropriately by insisting that the upgrade be handled consistent with the collective agreement.

Although the Union legally had the discretion during negotiations to negotiate for an upgrade of a specific individual without a posting, its primary responsibility is to the entire negotiations unit. Normally it is safer for a union to exercise its duty of fair representation by taking action that is for the betterment of the unit as a whole although one or more individual employees may be adversely affected. A union is not required to represent one or all unit members to their complete satisfaction. Ford Motor Co. v. Hoffman, 345 U.S. 330, 337-338 (1953); Belen v. Woodbridge Tp. Bd.Ed., 142 N.J. Super. 486, 491 (App. Div. 1976)(Belen); New Jersey Tpk Auth., P.E.R.C. No. 88-61, 14 NJPER 111

(¶19041 1988) affirming H.E. No. 88-23, 14 NJPER 5, 11 (¶19002 1987).[11/]

The standards for determining whether a union violated its duty of fair representation were established by the United States Supreme Court in Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967)(Vaca). The Court in Vaca held that:

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

In fact, the United States Supreme Court also held that to establish a claim of a breach of the duty of fair representation:

> ...carries with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives. Amalgamated Assoc.of Street, Electric Railway and Motor Coach Employees of America v. Lockridge, 403 U.S. 274, 301, 77 LRRM 2501, 2512 (1971).

The Commission and the New Jersey courts have consistently embraced the Vaca standards in adjudicating fair representation cases. See, e.g., Saginario v. Attorney General, 87 N.J. 480 (1981); Belen; In re Board of Chosen Freeholders of Middlesex County, P.E.R.C. No. 81-62, 6 NJPER 555 (¶11281 1980), aff'd App. Div. Dkt. No. A-1455-80 (April 1, 1982), pet. for certif. den. (6/16/82)("Middlesex County"); New Jersey Turnpike Employees Union

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11/ See also Ruzicka v. General Motors, 523 F.2d 306, 309-10, 90 LRRM 2497, rehearing den. 528 F.2d 912, 91 LRRM 3054 (6th Cir. 1975); Farmer v. ARA Services, Inc., 108 LRRM 2145 (6th Cir. 1981).

Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979)("Local 194"); In re AFSCME Council No. 1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978).

In Belen a group of employees represented within the negotiations unit objected to parts of a negotiated agreement. The Court held:

> ...the mere fact that a negotiated agreement results, as it did here, in a detriment to one group of employees did not establish a breach of duty by the union. The realities of labor-management relations which underlie this rule of law were expressed in Ford Motor Co. v. Hoffman, 345 U.S. 330 (1953), where the court wrote:
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> > Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. A major responsibility of negotiators is to weigh the relative advantages and disadvantages of differing proposals.
> >
> > Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.
> > [at 337-338]

142 N.J. Super. at 491.

The Union's actions here were not arbitrary, discriminatory or in bad faith. The reliable evidence shows that Dorst did not

have an unlawful or discriminatory ulterior motive for requiring the College to post the upgraded Upward Bound position. Thompson's hearsay and double hearsay testimony, though admissible in administrative hearings, N.J.A.C. 1:1-15.5, was not reliable to prove her case. There was no residuum of legal or competent evidence to corroborate her testimony. Although the New Jersey Supreme Court in Weston v. State, 60 N.J. 36 (1972) held that hearsay is admissible in administrative hearings it also restricted its use in making the ultimate findings of fact. The Court held:

> ...[I]n our State as well as in many other jurisdictions the rule is that a fact finding or a legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it. 60 N.J. at 51.12/

While the posting may be detrimental to Thompson and force her to bump into another position, it is consistent with the contractual language, and gives all unit members the opportunity to bid on the

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12/ One of the elements present in Weston v. State that contributed to the establishment of the "Residuum Rule" was the unavailability and/or lack of identity of those speakers whose statements formed the basis of the hearsay testimony. Where those speakers are available for testimony and cross-examination the hearsay testimony of what they said may be more reliable. See Howard Savings Bank, 143 N.J. Super. 1 (App. Div. 1976). Here, although both Simmers and Dorst testified and were cross-examined, their testimony did not corroborate Thompson's version of the facts; rather, they corroborated each other. Thus, I found their testimony to be more reliable.

position which is the fairest way to represent the whole unit. Accordingly, the 5.4(b)(1) allegation should be dismissed.

The 5.4(b)(3) allegation should be dismissed for the reasons above, and because there was no evidence that the Union failed to negotiate in good faith with the College.[13/]

The 5.4(b)(5) allegation should be dismissed because the Charging Party did not allege or prove that the Union violated any Commission rule or regulation.

Based upon the above facts and analysis, I make the following:

## Recommendation

I recommend that the Complaint be dismissed.

Arnold H. Zudick
Hearing Examiner

Dated: January 31, 1989
Trenton, New Jersey

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13/ Charges by individuals alleging violations of 5.4(a)(5) and/or 5.4(b)(3) of the Act are not normally complaintable. See, Paterson Bd.Ed. and Paterson Ed.Assn. v. Hilliard, App. Div. Dkt. No. A-2783-79 (2/19/81); Borough of Palisades Park, D.U.P. No. 78-1, 3 NJPER 238 (1977); Plumstead Tp. Bd.Ed., D.U.P. No. 78-4, 3 NJPER 335 (1977); Bergen County Community Action Program, Inc., D.U.P. No. 78-9, 4 NJPER 136 (¶4063 1978).