

P.E.R.C. NO. 78-55

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Respondent,

-and-

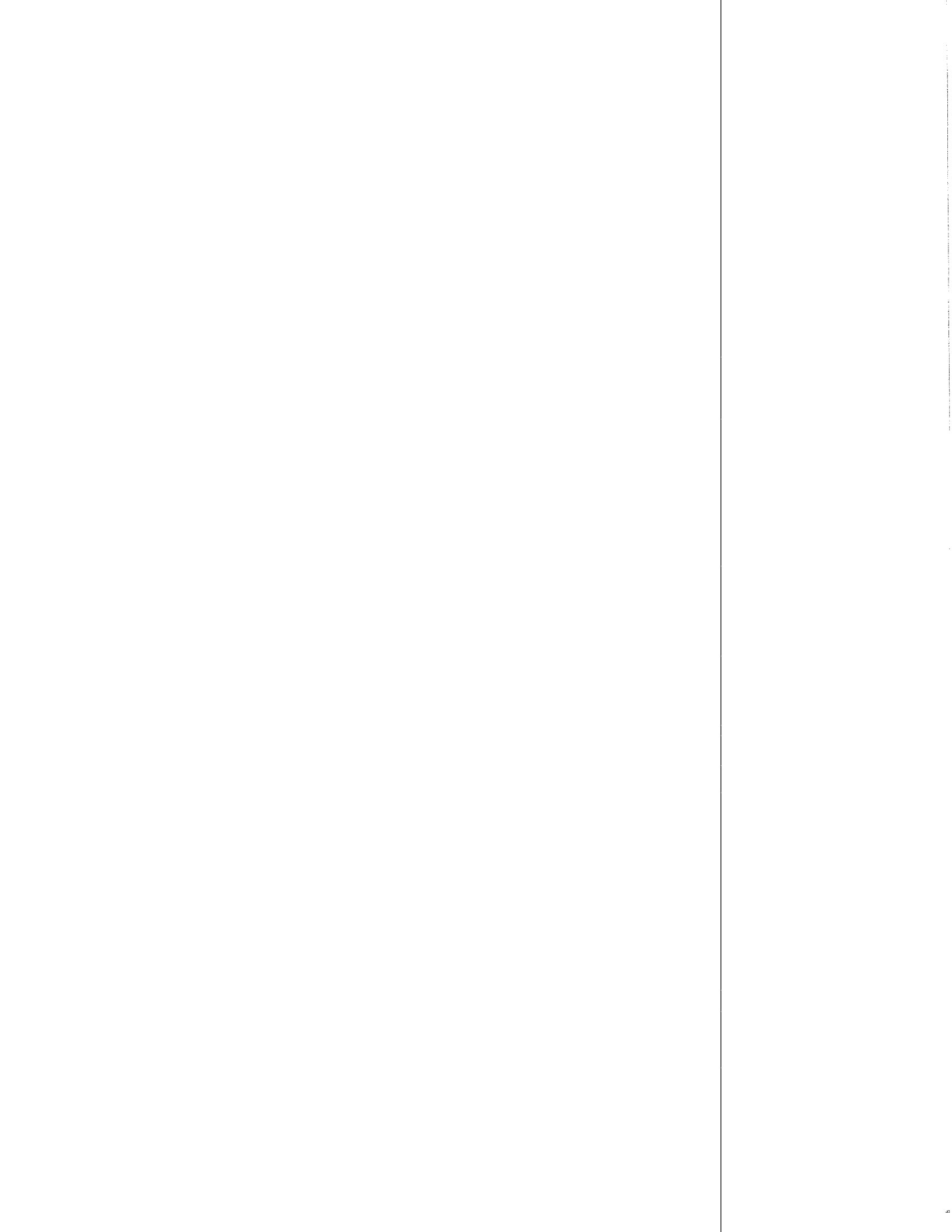
Docket No. CO-76-322-64

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

Charging Party.

SYNOPSIS

The Commission dismisses an Unfair Practice Charge brought by the Council against the State alleging that Milton Horowitz was not reappointed - and thereby granted tenure - because of his union activities. Based on the Hearing Examiner's uncontested finding that the President of Ramapo College was completely without bias in recommending that Horowitz not be tenured, and the record evidence revealing that the College Board of Trustees independently investigated the possibility of animus motivating other negative recommendations, the Commission reverses the Hearing Examiner's conclusion that the process was impermissibly tainted. Accepting, arguendo, the Hearing Examiner's findings that Horowitz's supervisor and the College Vice-President for Academic Affairs were motivated by anti-union animus in recommending non-appointment, the actions of the President and the Board being free from impropriety sufficiently attenuated any taint that may have existed.



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

Charging Party.

Appearances:

For the Respondent, John Degnan, Attorney General
(Mr. Guy S. Michael, of Counsel; Mr. Melvin E.
Mounts, on the Brief)

For the Charging Party, Thomas M. Wirth, Staff
Representative

DECISION AND ORDER

On June 7, 1976, the Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO ("Council" or "Union") filed an Unfair Practice Charge with the Public Employment Relations Commission alleging that the State of New Jersey ("State"), acting by and through the Trustees and Administrators at Ramapo College of New Jersey ("College"), had violated the New Jersey Employer-Employee Relations Act ("Act"). The College's failure to reappoint Milton Horowitz for 1976-77, thereby denying him tenure, was alleged to have been discrimination against Horowitz to discourage him in the exercise of the rights guaranteed by the Act in N.J.S.A. 34:13A-5.4 (a) (1), (2) and (3).

A Complaint and Notice of Hearing was issued on December 8, 1976, and a hearing was held in Newark before Commission Hearing

Examiner Robert T. Snyder on January 20, January 21, February 17, February 18, April 4, April 12 and April 27, 1977. Both parties had the opportunity to examine and cross-examine witnesses, present evidence and argue orally. Briefs were submitted by August 8, 1977 and the Hearing Examiner issued his Recommended Report and Decision on November 30, 1977.^{1/}

The record in this case indicates that Horowitz was first employed by the College on July 1, 1971. He was appointed as an Assistant Professor at the Learning Center of Ramapo, a position he retained through the 1975-76 school year. During his last year of employment, the College denied his request for reappointment with tenure.

The reappointment procedure at the College involves numerous steps with several committees and individuals involved. The action of these bodies regarding Horowitz's request for reappointment is set forth sequentially: the Learning Center Tenure Committee unanimously recommended that Horowitz be reappointed and given tenure; the Unit Council of the Learning Center approved that recommendation; the Director of the Learning Center, Robert Christopher, wrote to the All College Tenure Committee that he did not support the recommendation of the Unit Council; the All Center Tenure Committee initially recommended against tenure for Horowitz but, pursuant to an appeal procedure invoked by Horowitz, reversed itself subsequently and did recommend tenure; the College's President

^{1/} H.E. No. 78-16, 3 NJPER 397 (1977). A copy is appended hereto and made a part hereof.

George Potter, and Vice-President for Academic Affairs, John Cassidy, informed Horowitz that they did not endorse the All College Tenure Committee's recommendation that Horowitz be granted tenure; Horowitz met with Cassidy and Potter and several union members in an effort to persuade Cassidy and Potter to change their recommendations; the Personnel Policies Committee of the College's Board of Trustees indicated to Horowitz that the preliminary decision of that body was to reject the All College Tenure Committee's recommendation that tenure be granted to Horowitz; a hearing was held before a joint meeting of the All College Tenure Committee and the Personnel Policies Committee at which Horowitz appeared accompanied by a union representative. Ultimately, Horowitz was informed that the Board of Trustees had decided not to reappoint him.

Horowitz, in addition to his teaching and other professional responsibilities, was active in the union, having been involved with the formation of the local in 1972-73 and becoming the local's Vice-President in the fall of 1973. In February 1974, he became chairman of the grievance committee and in that capacity he processes numerous grievances at all steps of the grievance procedure. In this capacity and others including his role of at-large faculty representative to the College Senate, he had frequent contact with various College administrators. Some of these situations were contentious and adversarial.

The Council contends that ill feeling generated by his vigorous presentation of cases on behalf of grievants was at least

partially the cause for his being denied tenure. Tensions did exist between Horowitz and Christopher which the Hearing Examiner found were related to Horowitz's union activity and resulted in Christopher's unfavorable recommendation.

Moreover, the Hearing Examiner also found that Vice-President Cassidy harbored general antipathy for unions in a campus setting, relying on a speech made by Cassidy at a College "Wrap Up Conference". From this, the Hearing Examiner concluded that Cassidy's negative recommendation was also based on motives which are improper under the Act.

Contrary to the above findings in regard to Christopher and Cassidy, the Hearing Examiner found President George Potter to be a "striking witness" with "sympathy for the goals and functions of the labor movement". More importantly, he found that:

President Potter's negative recommendation to the trustees on Horowitz's tenure application was solely and genuinely based on his application of the criteria relating to scholarly achievement and his skepticism that Horowitz would be able to complete degree requirements within a reasonable time frame. 2/

It is undisputed that there are four criteria for evaluation of faculty for tenure and that a candidate had to satisfy all four criteria for reappointment with tenure. One of the requirements was scholarly achievement which included a terminal degree. In the case of the Learning Center in which Horowitz was employed, that was a Master's degree. Some exceptions had been made to this

2/ H.E. No. 78-16 at p. 35.

requirement in the past.^{3/}

At the time of the decision not to reappoint Horowitz, he had not completed all of the credits needed for his Master's degree and would have had to earn an "A" in the remaining courses to have a sufficiently high overall average to be awarded the degree. In addition, he had previously failed two of the three necessary comprehensive examinations. As testified by Vice-President Cassidy without rebuttal, Horowitz's advisor at Montclair State College told Cassidy that Horowitz was not likely to get the degree, which information was passed on to other steps in the procedure and formed part of the basis for the decision not to grant tenure.

Even without the terminal degree or an equivalent, other faculty members had been approved for tenure. However, in these other cases the College had been advised that the people in question would imminently be getting their degrees in time for the start of the school year in which they would be tenured. This is completely different from the information received when the possibility of Horowitz' obtaining his degree was investigated. Beyond that, some of the people who had been reappointed without yet having obtained the terminal degree did not in fact get these degrees. President Potter indicated that the College was tired of

^{3/} The requirement for a terminal degree is not absolute. The relevant portion of the collective bargaining agreement provides that, "Faculty members who do not possess an appropriate terminal degree or its equivalent may be offered reappointment conferring tenure under unusual circumstances when judged by the College's Board of Trustees as being in the best interests of the College."

being "burned" on that score.

Subsequent to Potter's negative recommendation, Horowitz was called by Alexander Esparra, a member of the Board of Trustees. Esparra was aware of Horowitz's union activities and wanted to know if Horowitz believed that his activism played a part in the recommendation not to reappoint him. Horowitz did recount his differences with Christopher but did not take advantage of the opportunity to put his complaints in writing as suggested by Esparra. After talking to Horowitz, Esparra also discussed the situation with Christopher. Having investigated the matter on his own, and after learning of the lack of a terminal degree, Esparra testified that he was satisfied with the proposed nonappointment.

At a hearing before the Board of Trustees, Trustee Mytelka questioned Horowitz extensively about his relationship with Christopher to see if there was animus that had played a part in Christopher's action. Taken together, the actions of Esparra and Mytelka indicate to the Commission that the Trustees were aware of a possible taint in the process and looked into it before taking action. No evidence was introduced to show that the Board was motivated by union animus other than the taint which carried over from Christopher and Cassidy.

While admittedly the Board's independent questioning establishes that they were aware of Horowitz' union activity, the Charging Party introduced no evidence to even suggest that their investigation was not prompted by a good faith desire to learn the

truth rather than any attempt to cover up their real motivation. The burden of proof is on the Charging Party to establish such an improper purpose.

It was the Hearing Examiner's conclusion that the State had violated N.J.S.A. 34:13A-5.4(a)(1) and (3) in that the Learning Center Unit Director, Robert Christopher, and the Vice-President for Academic Affairs, John Cassidy, were found to harbor union animus which played a part in their recommendations not to reappoint Horowitz, and these recommendations, which were carried on up throughout the entire reappointment process, were found to have tainted that process impermissibly.

Exceptions were filed by the State on January 11, 1978 and the Council filed a response on January 31, 1978. Pursuant to a request by the State, oral argument was granted, and it was heard by the Commission on February 16, 1978. By letter dated February 27, 1978, the Council requested additional oral argument. The Council contends in the letter that the present status of Horowitz regarding his degree is not relevant to a Commission decision. We agree. Our decision is based solely on record evidence. The request for additional argument is therefore denied. The State's exceptions were voluminous and most challenged credibility judgments and findings of fact made by the Hearing Examiner. Because we believe this case turns on certain other findings of fact made by the Hearing Examiner which are undisputed, we shall not reach the above exceptions in this decision.

The Council asserts that Horowitz was not reappointed,

at least in part, because of the frictions he generated in his role as a union representative and that the College discriminated against him because of his assertion of statutorily protected activities. The Council argues that the entire reappointment process was tainted by virtue of the union animus harbored by Christopher and Cassidy.

On the other hand, the College contends that the recommendations of the President and the decision of the Trustees not to grant tenure were based on Horowitz' lack of a Master's degree and their judgment that he neither had the equivalent of the degree nor the imminent likelihood of receiving one. In addition, the College challenges the Hearing Examiner's findings regarding Christopher and Cassidy.

As expressed in In re Hackensack, P.E.R.C. No. 77-49, 3 NJPER 143 (1977), Appeal pending, App. Div. Docket No. A-2546-76 and In re Haddonfield, P.E.R.C. No. 77-36, 3 NJPER 31 (1977), a violation of N.J.S.A. 34:13A-5.4(a)(3) will be found when union animus based on employer knowledge of protected activity is "one of the motivating factors" for an employer action detrimental to an employee's terms and conditions of employment. Herein, the actual decision maker was the Board of Trustees and there is no evidence that any Board members had improper motives. The highest level recommendation, and it would seem natural the most influential one, came from President Potter and he too had been found completely free of impropriety. Reliance for the refusal to reappoint Horowitz was placed on failure to meet an objective standard required of the

faculty, and there is no convincing showing that there was any discrimination in the application of that standard and the possible exceptions to it which had benefited other faculty members.

In reaching his conclusion that a violation of the Act had been committed, the Hearing Examiner, while stating that he could not be sure of the extent to which Christopher's and Cassidy's motivations were serious factors, determined that "the intrusion of such factors at all in the evaluation process violates the Commission's standards." We do not agree. The Board was not rubber stamping recommendations made below but rather functioned as an independent decision maker. Witness the personal initiative of Esparra and the inquiry by Mytelka. Denial of re-appointment was set forth as being solely due to the lack of a degree, and given the uncontroverted facts attesting to the unlikelihood of its being obtained, the employer's stated reasons cannot be found to be "pretextual" as in the Hackensack case, supra.

Even assuming, arguendo, that both Christopher and Cassidy were guilty of improper motivation, the taint in the process to which the Hearing Examiner refers was sufficiently attenuated by the time the actual decision was made.^{4/} It is the Hearing Examiner's own conclusion, stated in the strongest terms, that Potter

^{4/} The employer has produced sufficient evidence to establish to the Commission's satisfaction that even assuming that Christopher's and Cassidy's adverse recommendations were motivated in whole or in part by union animus, the President and the Board based their decision entirely on reasons unrelated to Horowitz's protected activities.

was acting for permissible, objective reasons relating to the lack of a degree. Nothing said by Christopher or Cassidy in any way affects the bald fact that Horowitz lacked a Master's degree. Where we must specifically contradict the Hearing Examiner as to the facts is in his statement that it was at least as possible for Horowitz to have earned his degree as it was for the teachers previously tenured without a terminal degree or equivalence. No evidence was presented to rebut Cassidy's testimony as to the slim chances of Horowitz' getting his Master's degree as opposed to the reported imminence in the other cases. Additionally, Horowitz admitted that he knew of the requirement of a terminal degree long before he came up for tenure, and Potter had reminded him of that need. Moreover, a showing that the Board had not necessarily exempted people from the degree requirement in a consistent fashion would not, in itself, establish that the failure to exempt Horowitz was due to an impermissible reason.

We wish to make clear that there may be some situations in which improper acts of subordinates could render the ultimate action of the employer illegal under the Act. That might even occur when an employer acts in complete ignorance of discriminatory animus existing among its agents, absent which he would act differently. This is not one of these situations. The Board acted on valid, independent grounds which could not be changed by improper recommendations, as did Potter, whose intervening place in the process breaks whatever chain of illegal motivation might have existed. In any event, the Board was not ignorant of the clashes

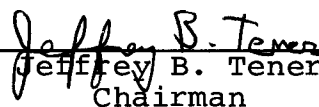
going on, and did not act because of them. In fact, it satisfied itself that it was basing its decision on valid considerations. We cannot accept the Council's position advanced at oral argument that the Board should have held full-blown hearings on the Horowitz-Christopher relationship. No such burden is implied in our Haddonfield and Hackensack decisions and we see no compelling reason for imposing it now.

ORDER

Based upon the above discussion and our independent review of the record and our consideration of the oral argument,

IT IS HEREBY ORDERED that the complaint herein be dismissed in its entirety.

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Hartnett, Hurwitz and Parcels voted for this decision. Commissioner Forst voted against this decision. Commissioner Hipp abstained.

DATED: Trenton, New Jersey
March 16, 1978
ISSUED: March 20, 1978

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

In the Matter of

STATE OF NEW JERSEY,

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-and-

Docket No. CO-76-322-64

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

Charging Party.

SYNOPSIS

A Commission Hearing Examiner issues his Recommended Report and Decision in an unfair practice proceeding. The Complaint alleges that the Respondent, acting through the Board of Trustees of Ramapo College of New Jersey, one of the eight State Colleges, discriminatorily denied a faculty member reappointment with tenure because of conduct protected by the Act in violation of N.J.S.A. 34:13A-5.4(a)(1) and (a)(3). The College's refusal to reappoint the faculty member, Milton Horowitz, for the 1976-77 academic years is also alleged to have interfered with the existence and administration of the Charging Party, the exclusive negotiations representative for faculty and certain professional staff employed at the State College.

The Hearing Examiner finds that Horowitz, the union grievance chairman at the College, had engaged in protected activity, known to the Respondent, and that the recommendations that he not be granted tenure made by his unit director and the academic Vice President were motivated by animus because of his union activities. As these discriminatorily motivated recommendations were found to have entered into the deliberations of the Board of Trustees regarding his reappointment with tenure, the Examiner concludes that the tenure review process in this case had been tainted and that the Respondent had thus violated the sections of the Act prohibiting discrimination in employment to discourage employees in the exercise of the rights guaranteed by the Act and interference with, restraint or coercion of employees in the exercise of such rights. The Examiner recommended dismissal of the portion of the Complaint alleging interference with the existence or administration of the Charging Party for lack of proof.

The Hearing Examiner recommends that the Commission order the Respondent to cease and desist from engaging in such conduct, and affirmatively, offer to Horowitz his former faculty position for the 1978-1979 academic year,

during which the College shall re-evaluate his tenure qualifications, de novo, excluding the two administrators whose recommendations were found to have tainted the process, and substituting for them an ad hoc committee of faculty and administration, continuing otherwise the pre-existing tenure review process and procedure. The Examiner also recommends that the Respondent post notices, supplied by the Commission, whereby its employees will be notified of the Respondent's corrective actions; and to notify the Commission in writing of the steps taken to comply with its order.

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.

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LOCALS, NJSFT-AFT/AFL-CIO,

Charging Party.

Appearances:

For the Respondent, William F. Hyland, Esq.
Attorney General (Guy S. Michael, Esq.
Deputy Attorney General, Of Counsel)

For the Charging Party, Thomas H. Wirth,
Staff Representative

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

Statement of the Case

An Unfair Practice Charge filed with the Public Employment Relations Commission ("Commission") on June 7, 1976 by the Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO ("Council" or "Union") on behalf of Milton Horowitz ("Horowitz"), alleged that the State of New Jersey ("State" or "Respondent"), acting by and through the Trustees and Administrators of Ramapo College of New Jersey ("College" or "Ramapo") had engaged in and was engaging in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et. seq. (the "Act"). Specifically, the Council alleged that by refusing to reappoint Horowitz for the 1976-77 academic year, thereby denying him tenure, Respondent interfered with, restrained and coerced Horowitz in the exercise of the rights guaranteed him by the Act, interfered with the existence and administration of the Council, an employee organization, and discriminated against Horowitz in regard to tenure of employment to discourage

him in the exercise of the rights guaranteed to him by the Act, in violation of N.J.S.A. 34:13A-5.4(a)(1), (2) and (3). ^{1/}

It appearing that the allegations of this charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on December 8, 1976. By way of Answer, Respondent, by its attorney, filed on December 20, 1976, a Statement of Position, previously filed by it with the Commission in response to the charge prior to issuance of the Complaint, which denied the conclusionary allegations of violation of the Act. This Answer was supplemented at the opening of hearing by oral responses made on the record specifically admitting or denying each allegation set forth in the Complaint. Hearing was held before the undersigned on January 20, January 21, February 17, February 18, April 4, April 17, and April 27, 1977. All parties were given full opportunity to introduce relevant evidence, to examine and cross-examine witnesses and to file briefs. Post hearing briefs were submitted by the Respondent on August 4, 1977 and by the Charging Party on August 8, 1977 and have been carefully considered.

Upon the entire record in the case and from my observation of the witnesses and their demeanor I make the following:

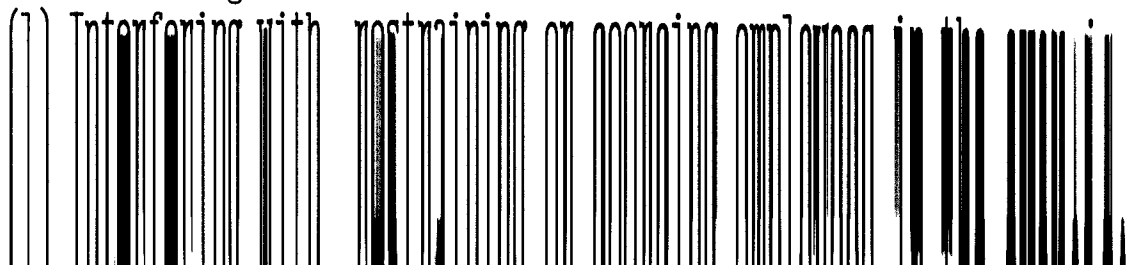
FINDINGS OF FACT

I. The Alleged Unfair Practices

A. Background

Ramapo is one of the two most recently established of the eight New Jersey State Colleges, having been founded in 1969 and commenced instruction for

^{1/} These sub-sections prohibit the following conduct by public employers, their representatives or agents:



students in 1971. It awards a Bachelor's degree upon successful completion of a prescribed four year course of study. Among the new faculty was Milton Horowitz who was employed by the College on July 1, 1971, at first under an Education Opportunity Program, a consortium among Fairleigh Dickinson University, Ramapo, Tom Brock College and William Paterson College, established to acclimate students to college environment, and, then, sometime in August, 1971, at the Learning Center of Ramapo ("Center"). The Center was established to aid those students who enter the College with deficiencies in math or english, and in addition, it provides instruction in reading and writing skills to assist students majoring in subject areas other than english to achieve a certain level of linguistic proficiency.

Horowitz remained employed as an Assistant Professor of Mathematics in the Center until the completion of the 1975-76 school year. During his last year of employment, in December, 1975, Ramapo College denied his request for reappointment with tenure.

Prior to Horowitz's employment by Ramapo, on February 5, 1971, the State signed an agreement recognizing the Association of New Jersey State College Faculties, Inc. ("Association"), as the collective negotiation agent for a statewide unit comprising the faculty and certain professional staff employed at each of the State Colleges. The parties thereto entered an agreement covering the period July 1, 1970 to June 30, 1972, later extended for one year. By an amendment to the agreement dated June 18, 1971, its terms were applied, with certain limitations, to Ramapo College and Stockton State College. Although the amendment also contemplated a further meeting to discuss implementation of the contract specific to the individual campuses, no written agreement was ever signed or implemented relating thereto and no faculty association was ever formed nor grievance ever processed at Ramapo under the general agreement.

Thereafter, on June 12, 1972, the Ramapo Federation of College Teachers filed a petition with the Commission in Docket No. RO-470 seeking a unit of faculty and certain professional staff limited to the College. On July 1, 1972, the American Federation of Teachers, AFL-CIO ("Federation" or "AFT") issued a charter to the Ramapo Federation of College Teachers as AFT Local No. 2274. In a consolidated proceeding involving the said petition and others, the Commission, by decision and direction of election dated November 30, 1972, P.E.R.C. No. 72, dismissed the said petition and certain others and sustained another petition filed by the Federation seeking a unit among faculty and certain professional staff at all eight State Colleges, a position with which the intervenor association and State agreed, and found such a unit appropriate. As a result of the subsequent election conducted pursuant thereto on December 14 and 15, 1972, the newly formed Council, representing all Federation affiliates at the State Colleges, including Local No. 2274 at Ramapo, on February 23, 1973 was certified as the exclusive representative for the purpose of collective negotiations in a unit including faculty and certain professional staff at the eight State Colleges of New Jersey. ^{2/}

Thereafter, on February 22, 1974, the Council and the State entered a collective negotiating agreement in the described unit, for a term commencing on that date and continuing until June 30, 1976. ^{3/} The agreement included a grievance procedure in Article VII containing three formal steps with unresolved grievances culminating at Step 4 in either binding, or advisory non-binding arbitration, depending upon the nature of the grievance as defined. The grievance could be alleged

^{2/} The parties stipulated and I find that the Council is a representative of employees for the purposes of collective negotiations within the meaning of N.J.S.A. 34:13A-3(3). It was also stipulated and I find that the State of New Jersey and Ramapo College are public employers within the meaning of the Act.

^{3/} In a subsequent representation proceeding, upon petition filed by the Association, in which the Council, as incumbent, and the New Jersey State College Council-AAUP, intervened, Docket No. RO-76-50, the Council was again certified by the Commission on December 19, 1975, as exclusive representative of the employees of the eight New Jersey State Colleges in the same unit.

by an employee or the union. 4/

B. Protected Activities

During school year, 1972-73, his second year of employment at Ramapo, Horowitz became involved with the formation of a local AFT unit on the Ramapo campus. He started working for the AFT by attempting to get faculty members to support that organization as opposed to the Association. Subsequently, in the fall of 1973, following the Council's certification the prior February, Horowitz became vice president of AFT Local 2274 ("Local" or "Union") and along with the two other Local representatives, met weekly with the President of Ramapo, George Potter, in an effort to establish local negotiations in the framework of the multi-college negotiations then underway. President Potter insisted the meetings be kept informal since the formal negotiations were being conducted at the State wide level involving all eight Colleges in the unit. At the same time, in the absence of any effective grievance procedure at Ramapo, Horowitz undertook to assist an aggrieved faculty member denied reappointment in the Fall of 1973 by instituting an appeal process under Title 18A, the Education Statute. This was Horowitz's first experience with grievance procedures. Subsequently, upon the signing of the State-Council contract in February of 1974, Horowitz became chairman of the grievance committee, a committee effectively staffed by himself alone. This role brought him in frequent contact with the College administration, in processing grievances, representing grievants and the union at hearings on the various steps of the grie-

4/ At Step 1, the written grievance was presented formally to the dean or appropriate Vice President and a discussion was held within 5 calendar days of filing with a written decision to follow within 5 calendar days. At Step 2, the unresolved grievance was submitted to the College President who heard the matter within 7 calendar days of its receipt with a written decision to follow within 7 days of conclusion of hearing. Step 3 involved an appeal to the State Chancellor of Higher Education upon the written record, with an option for a further hearing to be conducted by his designee within 10 days of receipt of the grievance and a written decision to be rendered within 10 days of close of hearing.

vance procedure, ^{5/} testifying on behalf of grievants, and attending meetings as a voting member of the grievance committee of the Council made up of grievance charimen of the eight Colleges, which body voted on those grievances to be pursued to arbitration.

To assist it in making final personnel decisions in the area of appointment, reappointment, promotion and reappointment with tenure of faculty members, by 1974, perhaps earlier, the College's Board of Trustees had established a Personnel Policies Committee ("P.P.C"). That Committee met periodically and made recommendations to the Board of Trustees on such personnel matters. It included among its members, three Trustees, President Potter, Vice President for Academic Affairs Dr. John Robert Cassidy, and meetings were attended and participated in by non-voting faculty and student representatives, and, on occasion, other Trustees and members of the College staff and administration. Horowitz, in addition to his selection as Vice President and Grievance Chairman of the Local, had, by his second year, been serving as an at-large faculty representative to the College Senate, a deliberative, apparently advisory, body made up of faculty, student and administration representatives. When the Board of Trustees determined to permit faculty representation at its P.P.C. meetings, Horowitz was elected as the Senate's representative, thus the faculty representative to the Committee. Horowitz served as faculty representative during academic year 1974-1975 and ceased his participation in July, 1975, under circumstances which will be discussed, infra.

Shortly after the Council and State executed their agreement on February 22, 1974, Horowitz handled his first grievance. Horowitz charged sex discrimination on behalf of a faculty member, Bette Fallon, who maintained she should have been hired at a higher step in the salary guide. While a grievance was filed on

^{5/} At Steps 1 and 2, Dr. Arthur Jacobs, College Vice President, Administration and Finance, who was responsible for the College's personnel and labor relations functions, among others, represented the College as designee for the dean, appropriate Vice President and President. At Step 3, Mr. Jacobs represented the College at hearings at which a designee of the Chancellor presided.

May 16, 1974, Horowitz arranged to meet with President Potter on June 5, 1974 to forstall further processing. Although Potter agreed to investigate the matter and consult with Vice President Cassidy and respond, no response was received and the grievance was processed through a Step 3 hearing, held on October 27, 1974 and an arbitration hearing in March, 1975.

In August, 1974, Robert Christopher, previously Associate Professor of Literature at Pennsylvania State University, was newly employed as Director of the Center, and, in that capacity, became Horowitz's immediate supervisor. In September, 1974, Horowitz had informed Christopher that because of a prior commitment he would be late to Wednesday morning meetings of the Center Unit Council, an advisory body within each unit or department of the College made up of its faculty and containing student representation which advised similarly composed All College committees on various personnel matters. According to Horowitz, Christopher agreed to this arrangement. Sometime during October, 1974, Horowitz failed to appear at a Center Unit Council meeting at which he had been scheduled to make a report on deliberations of another College body of which he was a member. Christopher, according to faculty member Elsa Nunez Wormack, after learning that Horowitz was than attending a union meeting or grievance hearing, commented to the other Unit Council members present that he felt Horowitz had a responsibility to the unit and that he was spending more time as a union representative than as a faculty member of the Center.

In mid-October, 1974, Horowitz and another faculty member, Fran Shapiro, met with Unit Director Christopher in order to seek restoration to the employee, following an illness during which her teaching load lessened, of extra teaching credits for which extra compensation is paid. During the meeting, Horowitz testified that after agreeing to give Shapiro the credits Christopher began to berate her for using up the overload credits (which apparently had been distributed to other teachers), so many of which were available each semester for the unit as a whole.

Horowitz objected that Christopher was trying to make Shapiro feel guilty for using the credits, that Christopher had no right to blame the employee for using up the credits when they belonged to the unit as a whole and if he had any complaint to make it should be voiced to the unit at a Council meeting.

During a Board of Trustee's Personnel Policies Committee meeting held on November 12, 1974, the question of the fifth year reappointment of a Dr. Elovitz, a faculty member, for the succeeding 1975-76 academic year, came up for discussion. ^{6/} According to Horowitz, Dr. Potter recommended that Elovitz not be reappointed. Horowitz asked why and Potter responded that Elovitz was "lackluster" and Cassidy commented about Elovitz's uncriticalness. Horowitz then testified he objected to these remarks as having nothing to do with the criteria upon which he should be evaluated and added that there would be a possible grievance if such comments were to continue. According to Horowitz, President Potter then said "let him grieve."

On November 13, 1974, Horowitz filed a second grievance on behalf of Shapiro, claiming that she had been improperly charged sick leave under the contract for days ill other than those on which she had been assigned teaching duties.

From November 18, to November 27, 1974, faculty members of the College struck over a dispute involving negotiations for salaries and fringe benefits provided for under a reopener for the 1975-76 academic year. As a result of information learned from Elsa Wormack on the picket line of a conversation she had recently had with Christopher concerning himself and having in mind that Christopher had crossed

^{6/} On October 31, 1974, the Center Unit Council's Personnel Policies Committee recommended Horowitz's reappointment for his fifth year to Director Christopher, noting, in part, Horowitz's consistently high student and faculty evaluations relating to his effective teaching and his role, through participation in Unit Council and All College Committees, in working to clarify the goals of the unit in relation to the general goals of the College. On November 6, 1974, Christopher enthusiastically sponsored the unit's recommendation that Horowitz be reappointed,

the picket line, Horowitz left the line and went to see Christopher in his office. Horowitz testified he told Christopher he didn't understand why the Unit Director was out to get him because he, Horowitz, had been in attendance at Unit Council meetings and had made Christopher aware of the fact in September that he would be late to these meetings. Horowitz said if Christopher had anything to say to him, he should say it to him directly and not talk about him behind his back. Horowitz also invited Christopher to come down to the picket line and demonstrate his role as a faculty advocate.

According to Horowitz, Christopher said he had forgotten that Horowitz had raised the question in September of his lateness to meetings and he would bring any matters involving Horowitz to him personally. Christopher also agreed to come to the picket line and subsequently did so.

On December 9, 1974, Horowitz's presence and participation as faculty representative to the P.P.C. came under attack from the College administration, apparently for the first time. A question involving non-renewal of librarians due to the fiscal crisis had previously arisen. At a P.P.C. meeting held on December 7 Horowitz had asked when the material on librarians would be raised. The Chairman, apparently Board of Trustees member William McKay, indicated the matter was an administrative decision not subject to discussion and it did not come up again. Two days later, Horowitz who had been acting as union liaison to the librarians, received word from librarian Paula Schwartz of a meeting to be held that day which she had been requested to attend by both Vice President Cassidy and Library Director Norma Yuch regarding her reappointment. Horowitz attended after checking with the local president. According to Horowitz, when Cassidy arrived he expressed surprise at Horowitz's presence. He said Horowitz had no right to be there because it was not a union matter and added there was a very serious problem in his role as a member of the P.P.C. and his position as grievance chairman. Horowitz responded that this was not a proper forum for that discussion, and if Cassidy had any questions

about any conflict of interests, he should consult after the meeting and take up the business at hand. Cassidy proceeded to inform Schwartz she would not be re-appointed. Subsequently, the union filed a grievance for Schwartz and Horowitz represented her.

With respect to another grievance filed for an Adele Panzer, disputing a requirement that a doctor's note was required for sick leave after the 10th day, Horowitz testified both at a 3rd step and arbitration hearing that Dr. Jacobs had first advised him that he had found in Panzer's favor and then reversed himself, informing Horowitz that he had been ordered by the State to hold the hearings to protect managerial prerogatives.

At a P.P.C. meeting on February 5, 1975, Horowitz continued to protest certain College personnel decisions, this time, a policy which Horowitz learned at the meeting, to reserve 10% of all faculty lines as non-tenured.

Although Horowitz referred to a decision on a grievance filed at William Paterson College and objected further on the grounds that no State statute authorized the designation, the Board Chairman and President Potter both stated they were going to reserve the non-tenured lines.

Again, on February 26, 1975 at another P.P.C. meeting, Horowitz voiced objection to a condition attached to the promotion of Bette Fallon to Assistant Professor proposed by President Potter that she complete her Ph. D. degree requirements by August 31. Horowitz relied on a contract provision precluding a Ph.D. achievement requirement for faculty employed prior to signing of the contract (Art. XV B.2). When a discussion commenced regarding the status of Fallon's earlier filed grievance, Horowitz objected strenuously that the P.P.C. was an inappropriate forum for such discussion, to which President Potter readily agreed. However, after Potter again recommended Fallon's conditional promotion, and Horowitz again objected, Potter became angry and said, "well, if you insist on this, I will not recommend Fallon for promotion," and Fallon's application was voted down by the Board. Miss

Fallon subsequently filed another grievance in March, and Horowitz testified as to the events of the February 26, 1974 P.P.C. meeting at the subsequent Step 1 hearing. Vice President Jacobs, who presided, noted that Horowitz was privy to information he had no access to and he would have to check with the other people Horowitz had named.

Also, on February 26, 1975, the P.P.C. took up a letter claim by a Miss Carol Hovanek that she had been wrongfully under-hired as Assistant Professor and should be promoted to Associate. President Potter noted that Hovanek had a "class A case of sexual discrimination" and he recommended she be promoted to Associate Professor outside of normal channels. This was subsequently done. At Fallon's arbitration hearing on her first grievance, on March 21, 1975, Horowitz testified to statements made about Fallon by her unit director, a Dr. Radest, at an earlier P.P.C. meeting.

On or about March 19, 1975, Horowitz went to see President Potter to attempt to convince him to change his views on Fallon and recommend her for promotion without condition. President Potter said he could not make such a recommendation and that a grievance would have to be filed.

At a continuation of a Step 3 hearing, April 2, 1975, on Shapiro's grievance claiming improper charging of sick leave, Center Director Christopher appeared and testified for the College. During Shapiro's subsequent testimony, Horowitz successfully objected to Christopher's cross-examining the witness on the grounds he had been called to give testimony only.

On April 3, Diane Levenberg, a Center faculty member hired earlier in the semester, advised Horowitz that she was interested in learning about the status of her reappointment, having failed to obtain satisfaction from meeting with Unit Director Christopher with respect to agreements made when she was hired. When Horowitz learned she had not yet received a letter of reappointment he advised her to arrange a meeting with President Potter and bring someone with her. Horowitz acceded to

Levenberg's request that he attend. Later that day, President Potter's Executive Assistant, Mrs. Estelle Rogol, telephoned Horowitz and told him that he was not welcome in the President's office on any matters dealing with any grievance issues of any kind and if he insisted on attending the meeting with Diane Levenberg and President Potter it would be cancelled. Horowitz did not attend and Levenberg saw President Potter alone.

Potter then notified Levenberg in writing of her non-renewal and on April 4, 1975, Horowitz filed a grievance on her behalf claiming contractual violations of untimely notice of non-renewal and failure to provide a current and applicable written statement. Further, Horowitz advised Levenberg to take a look at her personal file. Upon receipt of advice from the Personnel Office that she didn't have one, Horowitz referred her to Christopher. Apparently, Horowitz also then filed another grievance on Levenberg's behalf charging the absence of a personal file. ^{1/}

On the afternoon of April 10, 1975, during a conversation relating to Center matters, according to Horowitz, Christopher informed him that he was concerned about his getting tenure if he were to continue his work with the Union. When pressed on cross-examination about this conversation, Horowitz testified as follows:

"Q. Did Mr. Christopher ever talk to you about your union activity?

A. Yes.

Q. When did he do that?

A. There was a conversation on April 10th.

Q. And what did he say?

A. He said that he was concerned about my tenure because of my union activity.

Q. Why? What about your union activity concerned him?

A. I'm sorry, repeat the question.

Q. What about your union activity concerned him?

A. That I was making myself too visible to the administration, too much hostility through grievance processing.

Q. Is that what he said?

A. I believe he did say something of that nature. I cannot recall the exact words. I don't believe I testified to that earlier.

Q. You didn't testify to what, to the fact that he said that?

A. That's correct.

Q. If you didn't say that, why did you --

A. I'm just saying you asked me what his concern was about my tenure in the union activity.

Q. How do you know that was his concern if he didn't say that?

A. I'm saying that -- see, I cannot recall the entire conversation specifically and so it's just, you know, the recollection.

Now, I know for a fact certain things were said. There were other things that were said, but I cannot testify to the exact words. But there was an indication from Dr. Christopher that I was making myself very unpopular with the administration.

Q. Did he indicate that verbally?

A. Yes, but I can't recall the exact words.

Q. And it was an unpopularity because of your union activity?

A. Yes. "

In response to a further question as to his reaction when informed by Christopher that the Administration was against him because of his union activity, Horowitz testified he informed Christopher that everybody has to do what they have to do, what they feel is important.

Horowitz further denied that the reference to union activity had anything to do with his failure to spend time on a research project previously assigned him by Christopher in lieu of teaching a 3 credit course for which there had been insuf-

ficient enrollment. That project will be discussed, infra.

On April 24, 1975, at a 3rd step grievance hearing for librarian Paula Schwartz, whose contract had not been renewed, Horowitz testified as to the College's alleged cavalier attitude toward librarian contract rights on non-renewal expressed at the December P.P.C. meeting.

At a final Center Unit Council meeting on June 4, 1975, Christopher informed Horowitz that he had removed certain documents from Diane Levenberg's file to check their relevance. Horowitz testified he responded that Levenberg had a right to put anything in the file she saw fit under the contract and he, Christopher, had no right to any material whatsoever. Christopher said he would have to check with the administration. Horowitz then said Christopher should return the material to the file. Subsequently, Christopher informed Horowitz that he had replaced the material after checking with Jack Waldman, College Director of Academic Planning and Administration, who had approved the return. During this period, Levenberg's reappointment was still in process of consideration by the various reviewing bodies prior to decision by the Trustees.

On July 2, 1975, during the summer session, Horowitz agreed to sit in on a budget meeting in Vice President Cassidy's office until the late arrival of Carol Hovanek who, in turn, had agreed to substitute for Center faculty member Don Fucci. As Horowitz entered the meeting, Cassidy said to him, "What are you doing here?" Present were Jack Waldman and faculty representatives from each unit of the College. Horowitz said he was filling in for Don Fucci. Cassidy continued to question Horowitz, asking the whereabouts of Fucci. According to Horowitz, Cassidy appeared to be agitated. When Horowitz explained Fucci had asked "~~Hovanek~~" to sit in for him and should be late and asked him to fill in until she could arrive, Cassidy jumped up and left the room, and Horowitz heard him tell his secretary to get Hovanek in here immediately. The meeting commenced with a discussion of budget cuts and faculty lines but as soon as Hovanek arrived, within ten minutes, Cassidy turned to Horowitz and told him he could

leave now. Horowitz did so.

On July 14, 1975, Horowitz received a telephone message to call President Potter's office. Horowitz called and Rogol answered and told him the President said he was not to attend any more P.P.C. meetings, that the President decided there was a conflict of interest and he was no longer welcome at the meetings. Horowitz became upset and informed Rogol that Potter should have called him into his office to talk to him and should not have made a unilateral decision without consulting him. Horowitz did attend the July 16, 1975 meeting of the Committee. He remained outside the room while a discussion took place as to whether he could be allowed to attend. Horowitz was then allowed to enter after a decision had been made to permit him to attend and the discussion turned to other matters. Then on July 17, 1975, a 3rd Step hearing on Fallon's grievance protesting denial of promotion was held. Horowitz testified as to the events surrounding the P.P.C. recommendation rejecting Fallon's promotion which took place at its February 26 meeting.

After completion of summer session later that month, Horowitz did not return to the College until September. By this time, the faculty senate, which had elected Horowitz as its representative to the P.P.C., had become defunct. On his inquiry as to whether he would continue to attend Committee meetings, Mrs. Rogol informed him that the Board of Trustees was preparing new rules regarding attendance of faculty representatives. At a Board of Trustees meeting held September 3, 1975, the minutes noted that in discussions concerning faculty representation on Board committees, it was acknowledged that difficulties arise when an active member or officer of the Union is also a member of the Board's P.P.C. On Motion made and seconded it was unanimously approved as Board policy that 1. minutes be kept by the committees, and these minutes will constitute the only report of actions by the committees; 2. faculty membership on a committee be rotated annually; 3. confidentiality on individual cases be observed. The second policy resulted in Horowitz's exclusion from further participation.

Horowitz did not attend any further P.P.C. meetings as a faculty representa-

tive. Subsequently, he also learned from Mrs. Rogol that since the Senate was defunct and faculty had attended as a courtesy, there would no longer be any need for faculty representation.

On October 24, 1975, at a 3rd Step grievance hearing on a claim of Carol Hovanek's that she should have received a step jump on the guide when she was promoted to Associate Professor, Horowitz testified to President Potter's statement made at the February 26 P.P.C. meeting acknowledging sex-discrimination against Hovanek.

C. Tenure Application

In the Fall of 1975, Horowitz, then entering his fifth consecutive academic year, made application for tenure. ^{8/}

Under established procedure, faculty members at Ramapo who are eligible for tenure consideration are judged on the basis of four criteria. The Center Tenure Committee, "due to the special requirements and functions of the Learning Center" had, in September, 1975, established its own guidelines and procedures for tenure consideration which differ in certain emphasis, but not in basic criteria from those described in an All College Handbook for Professional Staff prepared for 1975-76. ^{9/} Both procedures use the same four criteria for evaluation: 1) effective teaching; 2) scholarly achievement; 3) contribution to college and community and 4) professional responsibility. A candidate has to satisfy all four criteria for reappointment with tenure.

With respect to the scholarly achievement criteria, which became significant in Horowitz's case, the All College Handbook noted that "This criterion refers to satisfactory progress towards the completion of terminal degree requirements in various fields and to participation in post doctoral and/or other study or research program."

^{8/} Horowitz, pursuant to N.J.S.A. 18A:60-12 (L. 1973, c. 163, sect. 7) had elected to seek tenure after teaching five consecutive academic years (N.J.S.A. 18A:60-8).

^{9/} While never formally approved by the College Administration, Vice President Cassidy was aware of the Center guidelines and such unit criteria were being reviewed to assure their consistency with the All College documents.

It concludes that personal research or creative work which enables a teacher to significantly broaden scope or content of courses or offer new courses is considered a scholarly achievement. The Center's guideline contains a greater emphasis on educational contributions leading to new programs or new courses. However, the contract in effect in 1975-76 provided in Article XV Section B.4 that "Faculty members who do not possess an appropriate terminal degree or its equivalent may be offered reappointment conferring tenure under unusual circumstances when judged by the College's Board of Trustees as being in the best interests of the College."^{10/} Thus, while effective teaching in the Center came to have somewhat greater weight in the eyes of Center faculty and others in evaluating teachers for tenure, nonetheless, teaching effectiveness could not substitute as satisfaction for any of the other three criteria, including scholarly achievement.

In 1975-76, ^{11/} the terminal degree in the Learning Center, in contrast to the Ph.D. requirement elsewhere, was the Master's degree. This lesser requirement recognized at the time the Center's greater interest in retaining teachers with special experience or ability in teaching remedial work and meeting the needs of students with deficiencies in english or math rather than those who had achieved the highest academic rank.

Horowitz's tenure application followed the prescribed procedures. Following meetings held in September and October, 1975, the Center Tenure Committee voted unanimously to recommend Horowitz and three other candidates, including Elsa Wormack, for

^{10/} Over the years the College has granted tenure to at least nine teachers who had not achieved the terminal degree but who had achieved its equivalent at the time of the tenure determination. Over the same period, at least four teachers were granted tenure who had neither gained the terminal degree nor attained its equivalent.

^{11/} In the Fall of 1976 the Board of Trustees determined that with respect to newly hired faculty, the Ph.D. would be the applicable terminal degree in the Center. This decision was based, at least in part, upon then favorable economic conditions in the academic sphere, making available academically better qualified teachers.

tenure. The Committee's recommendations were then presented to the Unit Council of the Center which discussed and also approved the requests. In addition to evaluating the candidates, material consulted included the personnel file, computer analyses of student evaluations and student comments, reports of classroom visitations by peers and director, letters from colleagues, statements from directors of special programs and program and course proposals and curriculum materials submitted by the candidate.

On October 15, 1975, a 3½ page typewritten recommendation on behalf of Horowitz analyzing and applying the four criteria to his work in the College, was forwarded by the Center Tenure Committee to the All College Tenure Committee. In it, the Center Committee quoted various highly complementary student evaluations, noted Horowitz's extensive contributions to college and community, including "his most time-consuming contribution" as chairman of the grievance committee "defending the rights of his colleagues." With respect to scholarly achievement, the Center Committee commented that there was no degree requirement until the prior year when the Center clarified the issue by stating that a Masters was considered a terminal degree. The Committee then urged that despite the present requirement, Horowitz had established equivalency, both through his completion of twenty-nine graduate credits in his field and his reputation as teacher of mathematics in the College. Along with this recommendation Christopher sent his own letter, as Director of the Learning Center, in which he stated that "given the absence of the Masters Degree and the less than satisfactory record of academic participating in the unit, I cannot support the unit's recommendation that Mr. Horowitz be granted reappointment with tenure." Christopher had reference here to Horowitz's failure to submit a report "assessing the Center's math program and its relationship to the College's mathematics examination and graduation requirement."^{12/}

On October 30, Christopher and Horowitz had words over an evaluation Horowitz had prepared following an observation of Christopher in his teaching role, an observation which the Unit Council had determined would apply to the director as to any other teacher. Christopher had initially expressed surprise, even anger according to Horowitz, at Horowitz's substitution as observer for another teacher on October 23. Horowitz had believed Christopher was informed of the switch which he had sought to avoid observing the same teachers for the third time. At their meeting Christopher refused to sign the evaluation, accusing Horowitz of being vindictive in response to Christopher's negative memo on his tenure application. Horowitz viewed the observation as a very fair one. However, as a consequence of this exchange, in which both expressed anger, he never submitted the report of his observation for Christopher's file.

On November 3, 1975, Horowitz wrote a memo to the All College Tenure Committee responding to Christopher's negative recommendation. In it, Horowitz disputed Christopher's characterization of him as the Unit's "senior mathematician," noting Professor John Rossi had been in charge of the Center's math program since 1973 in his capacity as Program Coordinator. Thus, argued Horowitz, he could hardly be claimed to have failed to provide academic leadership and guidance when that responsibility was clearly the coordinator's. Further, Horowitz noted Christopher's failure to refer to his completion of 29 of the 32 credits necessary for the Master's Degree (all in mathematics) and that when hired, he had a Bachelor's Degree plus 2 credits. Finally, Horowitz expressed his feeling that the tone of Christopher's letter lacked the objectivity necessary for an evaluation and asked the All College Committee to judge whether he had equivalency for a terminal degree and had fulfilled professional responsibilities.

Subsequently, on Saturday, November 15, 1975 when Horowitz was at the Center teaching a class, he received a letter dated November 13, from Ed Cody, Chairman of the All College Tenure Committee, informing him that the Committee had not approved his application for reappointment with tenure. Later that morning, Christopher came

into Horowitz's office and the following conversation took place, according to Horowitz:

"I showed him the letter and he read it and he said that I should have expected this, that I had spent much too much time in my union activities, that I had placed -- I had made a hostile relationship between us and that because of my grievance work -- I said to him that -- I pointed out to him that I had no personal animosity towards him, that I was able to separate the functions of the two roles, that is between my activities as grievance representative and grievance chairman and between my own personal feelings about the individuals concerned. Then he said that he could not do that and he said that I did not cover myself and the unit would miss my teaching expertise. I asked him if he could put that in writing and he said he could not."

On November 17, 1975, Horowitz received the report of the All College Tenure Committee specifying the reasons why it did not recommend Horowitz for tenure. It was the assessment of the Committee that there were deficiencies in the area of scholarly achievement of such a degree as to indicate a lack of an acceptable level of competence, since Horowitz did not possess an M.A., the terminal degree in the Learning Center, and neither was he able adequately to establish equivalency. ^{13/}

Horowitz took advantage of the appeal procedure and brought an appeal before the All College Tenure Committee on November 25, 1975. Horowitz and others on his behalf spoke in support of his application before the Committee. On November 26, the Committee reversed its decision. It noted the testimony of Jack Roth, Associate Professor of Mathematics in the School of Theoretical and Applied Science ("T & AS") who attested to Horowitz's capability to perform at a competent scholarly level and statements of a number of students. It also referred to Horowitz's construction of the initial Center math program and his design of all the math courses currently offered by

^{13/} As to Christopher's claim that Horowitz lacked professional responsibility, the Committee disagreed. While the Committee noted evidence of lack of effort in failing to produce even some measure of work in his assignment to assess the Center's math program, in spite of Horowitz's claim of confusing and vague objectives, it concluded that Horowitz's overall record had shown he had adequately fulfilled his professional responsibilities. This view did not differ materially from President Potter's ultimate assessment after Horowitz had belatedly submitted a report on the assignment in December, 1975, that while a superior report could reflect on and enhance scholarly achievement, a mediocre one would not detract from the other evidence submitted to fulfill that criteria and, in any event, the fact of its late submission would not adversely reflect on professional responsibility.

the Center and of a course in pre-calculus he was planning to teach in T & AS in the spring. Finally, the Committee noted Horowitz's completion of 29 credits, all in math, although not required by the program, towards his Master's and completion of one part of a three part comprehensive requirement, Senior Algebra. Based upon this evidence, coupled with his outstanding teaching effectiveness and considerable contributions to College and community, the Committee recommended reappointment with tenure. Nevertheless, in a letter dated November 26, 1975, Horowitz was informed that President Potter and Vice President Cassidy were unable to endorse the Committee's recommendation that he be granted tenure status at Ramapo. The next body to consider the matter would be the P.P.C. of the Board of Trustees, which would make a recommendation to the full Board where the final decision rested.

On November 29, 1975, Horowitz received a phone call at home from Alexander Esparra, a member of the Board of Trustees. Esparra, who testified, indicated he was troubled by the fact that Horowitz's recommendations, including peer and student evaluations, were all good and yet he was being recommended for denial of tenure. Esparra, a member of the Board since 1973, had been a Trustee member of the P.P.C. and Chairman of its Personnel Committee, during Horowitz's representative attendance at Committee meetings on behalf of faculty. He therefore was aware, as he stated, that Horowitz had been an "outspoken" person who "created an awful lot of input" at P.P.C. meetings and was very influential among the Trustees in attendance. Esparra was aware also at this time of Horowitz's function as union grievance chairman. Thus, Esparra's concern was that Horowitz's union and related activities may be influencing his non-reappointment. In Esparra's words, "I called him to sort of clear my mind that such a good instructor, good evaluations, so on and so forth, is not being retained at the College." According to Horowitz, Esparra said he was curious as to why Horowitz was not being granted tenure, why the College would be releasing a proven and effective teacher. He said he was concerned about some things that had been said in P.P.C. meetings. He thought there were indications that there was hostility between Christopher and Horowitz.

witz and he wanted to understand, from Horowitz's point of view, what these frictions were and his relationship with Christopher. He felt that there was a gross miscarriage of justice in some way and wanted more information to help clarify the circumstances. Horowitz related the various incidents during which he and Christopher had had words, including the various incidents previously related in this report. The conversation concluded with Esparra requesting Horowitz to prepare a letter documenting incidents of hostility, to keep the matter confidential, and advising he would get back to Horowitz to let him know when to forward it. Horowitz testified he never heard from Esparra again, and so never sent the letter.

On December 1, 1975 pursuant to an invitation extended by Dr. Cassidy in his letter of November 26, 1975, Horowitz attended a meeting in President Potter's office to convince President Potter and Vice President Cassidy to change their recommendation. Mr. Horowitz was accompanied by Les Wormack, unit faculty Union member, and Clark Everling, Union President. At this meeting, in response to Horowitz's inquiry as to why he was being released, President Potter responded that his not having the Master's Degree was the prime factor. Horowitz then asked if he had his Master's Degree would there be any other reasons for the denial of reappointment with tenure. To this, Cassidy responded affirmatively, citing Horowitz's failure to complete the three credit writing assignment in timely fashion.

On December 4, 1975, Horowitz received a registered letter from President Potter advising him of the preliminary decision of the P.P.C. of the Board of Trustees to reject the favorable recommendation received from the All College Tenure Committee regarding his request for reappointment with tenure. The letter also mentioned that Horowitz could request a hearing before a joint meeting of the All College Committee and P.P.C. to speak in support of his request for reappointment with tenure. Horowitz confirmed acceptance of a hearing which was held on December 10, 1975. Horowitz was accompanied again by Les Wormack. Horowitz in presenting his case was questioned extensively by Board Member Mytelka on the issue of hostility between Horowitz and Dr.

Christopher. Wormack also made a presentation on Horowitz's behalf. 11/

On December 11, 1975, Horowitz was informed in a certified letter from President Potter that at its meeting on the evening of December 10 the Board of Trustees had decided not to approve his reappointment for the 1976-77 academic year.

Elsa Wormack testified that in December of 1975, shortly after Horowitz was denied tenure, she had a conversation with Jack Waldman, Assistant to the Vice President, concerning four letters of reappointment sent to faculty members employed at the Learning Center. Two of the letters, those sent to Peter Schechner and Les Wormack, her husband, had stipulations or conditions that these members of the unit complete their doctorate while the other two letters contained no such stipulation.

The two members of the unit whose letters did not contain the stipulation were not enrolled in doctorate studies, Messrs. Schechner and Wormack were. Mrs. Wormack wanted to know the reason for the disparity. Waldman, who had not seen the letters before Wormack brought them to his attention, had them brought to him and he read them. Wormack testified that Waldman then stated in response that Peter Schechner had picketed a Board of Trustee meeting at which pickets had engaged in rock throwing. He also mentioned that Les Wormack had gone to speak in behalf of Milton Horowitz; he then said, "You know, Elsa, it was an open and shut case." Subsequently, both men were tenured after they had seen the President and Vice President of the College and had the stipulation removed from their letters.

Subsequently, on January 9, 1976, Clark Everling, President of the local union, informed Vice President Jacobs that a grievance was being filed on Horowitz's behalf.

On January 26, 1976, Horowitz formally requested from President Potter all the reasons he was being denied reappointment with tenure. In an inter-office memorandum dated February 5, 1976 Potter stated, "You were not reappointed because you have not demonstrated significant scholarly achievement."

11/ A group of faculty members and students picketed outside this meeting and a later meeting of the Board of Trustees, on behalf of Horowitz and other faculty members.

A 1st step grievance hearing was held on January 23, 1976, at which Everling submitted a statement on Horowitz's behalf. The hearing was continued and adjourned to February 5 to provide Jacobs an opportunity to check out Everling's statements. In a January 23 memo to President Potter, ^{15/} Jacobs noted two points which bothered him. The first concerned Horowitz's initial appointment as Assistant Professor with only a B.A. Degree and few, if any, credits towards a Master's - below the qualifications of either a terminal degree or substantial progress toward it which, as Jacobs observed, the original union contract had required at the time of Horowitz's hire. The second was the fact Cassidy had informed him the only reason he was not reappointed was his lack of a Master's Degree. Jacobs asked if this was the only reason and noted that the College's case would be much stronger if other reasons could be relied upon.

On February 10, 1976, Horowitz was informed by Vice President Jacobs that his grievance was being denied "because it is groundless." Among other contract claims dismissed by Jacob in the memo was one alleging discrimination and reprisal because Horowitz had been an active member of the AFT. The union chose not to pursue the grievance further, the last step of which provided for advisory and non-binding arbitration.

On June 7, 1976, the instant charge was filed and at the completion of the 1975-76 academic year later that month, Horowitz was terminated, failing to have been

^{15/} This memo was produced following a ruling by the undersigned denying a motion by Respondent to quash a subpoena calling for its production. The petition to quash, the answer thereto and the oral ruling have been made a part of the record at Respondent's request pursuant to then Section 19:16-2.4 of the Commission's Rules, since amended, effective August 2, 1977, now appearing without change as Sect. 19:15-2.4 (N.J.A.C. 19:15-2.4). Respondent claimed a privilege for the document as an element in the deliberative process of administrative officials engaged in an activity - grievance processing - specifically encouraged by Act of the legislature or, alternatively, as an attorney's work product protected under the attorney-client privilege. In the absence of any statutory authority and when weighed against the State policy favoring full disclosure in the interest of justice, see State v. Briley, 53 N.J. 498, 506, (1969), and State v. Singleton, 137 N.J. Super. 436 (Law Div. 1975), and absent an investigation undertaken by an attorney as part of any litigation then pending between the parties, see Metalsalts Corp. v. Weiss, 76 N.J. Super. 291 (Chanc. Div. 1962), these contentions were rejected.

renewed with tenure.

In October, 1976, Elsa Wormack had a conversation with Christopher. She asked him if Horowitz's union activities had interfered with his performance as a faculty member of the unit. Christopher answered in the affirmative, adding that he believed that at that time and he still did. Wormack then told Christopher she was coming here to testify and what she was going to say and that she wanted to be honest and he said that he appreciated that.

D. Allegations of Animus

The Council also introduced certain evidence seeking to establish a general attitude of anti-union animus on the part of the College administration which, it is asserted, colored the College's consideration of the tenure application of the union's grievance chairman. Among these submissions were the following.

On January 30, 1974, Vice President Cassidy issued a memorandum to the Directors of the Academic Units relating to the procedures for taking attendance in the event of a strike, noting, "I am sorry that the kind of adversarial climate created by collective bargaining situations makes it necessary for us to assume our role as managers ^{16/}...in this situation the kind of hierarchical relations which we try to avoid will be strictly followed."

In another incident during the period preceding the strike, it appears that Cassidy had been instrumental in a precipitate removal of one Paul Adams as Director of Professional Institutes because he had called a meeting off-campus of the Directors to discuss their dual role as Administrators and faculty members in the event of a strike and in the light of Cassidy's January 30 memo. This meeting was held after a pledge had been given to Cassidy that any Directors meeting would be held in his pre-

^{16/} The unit placement of Director of Learning Center, among other titles is a subject

sence. When the Local Union President learned of Adam's removal as Director, Cassidy and Potter were invited to attend a previously scheduled union meeting. In the course of this meeting, which both attended, Cassidy characterized the Directors meeting as "Clandestine" and a violation of trust. The union urged reconsideration of the dismissal arguing that Cassidy had no right to prohibit individuals meeting on an association basis off-campus to discuss any matters deemed important to them. As a result of the meeting, Adams was reinstated as Director at the time. His faculty status had been unaffected.

On June 5, 1975, Vice President Cassidy spoke as a member of a panel including Directors and teachers at a Wrap Up Conference arranged by the College's Unit Directors and to which all professional staff and selected students had been invited to attend by formal memo from President Potter. Proposed topics of the panel discussion referred to in the Directors' minutes included "Contract versus the intellectual society..or..Contractarian versus Humanitarian societies." Cassidy's name headed the list of suggested panelists. The final program notes the panel topic as "RAMAPO... CONTRACT AND COMMUNITY SOCIETY - WHAT IT MEANS TO BE A FACULTY MEMBER AT RAMAPO - PROFESSIONAL RESPONSIBILITIES AT RAMAPO." In his prepared remarks, Cassidy referred to the "imposition of a foreign model such as that of labor-management on an eggshell delicate complex of mutual arrangements which depend more than anything upon mutual trust." Cassidy also stated the following:

"I personally do not think that the trade union model in its present form fits a professional group, whether teachers, doctors, or lawyers... The teacher's skills are uniquely related to the intellectual and personal development -- essential needs -- of the student client, and therefore imply the need for a perpetual upgrading of skills, a professional obligation to extend patience, personal energy, and time, and the not uncommon subjugation of one's personal self interests to the needs of the student -- all of these to a degree not found in the typical trade.

I view with alarm the increasing tendency on this campus to impose the labor-management collective bargaining model, essentially one of hostility, back from the state to the local level; for example, the introduction of consciously dilatory grievances which, to no one's profit, tie up energies and time, or the reflex challenge to admini-

strative actions which remain unexamined by the challenger.

This college is keenly dependent upon a high level of trust and openness among colleagues. The fragile understanding between a near-egalitarian faculty-student group and administrators who bear final responsibility could not in its present form survive an intensity of such efforts." (Emphasis added).

Cassidy acknowledged on the witness stand that his remarks were intended to cause the faculty to reflect upon whether grievances brought forward should be for issues liable to be sustained, in other words to induce the union to exercise greater care in pursuing grievances because of a belief that time and energy of all concerned were being taken up in areas which are "predictably fruitless." Nonetheless, Cassidy was unable to specify any grievances he would define as dilatory.

This restrictive view of the grievance process was, in the union's view, reinforced as a College attitude in a letter from Jacobs to Richard Hale, Assistant Chancellor, Dept. of Higher Education, dated June 18, 1976, which comprised part of the initial Answer of the Respondent. There, Jacobs reported that President Potter's negative reaction to Horowitz's claims of contract violation made at P.P.C. meetings reflected the fact that "Horowitz's interpretation of the agreement was almost invariably incorrect, as has been amply demonstrated by the union's lack of success in processing grievances alleging the violations which Mr. Horowitz claimed occurred." Again, Jacobs further notes that Cassidy's "remark about 'consciously dilatory grievances' reflects the simple fact that very few of the grievances filed during this period had sufficient basis of fact to be upheld."

The Union reacted to Cassidy's remarks by protesting them and demanding an apology in a letter from Council President Marcoantonio Lacatena to President Potter. After Frank Mason, Director of the Governor's Office of Labor Relations called President Potter and expressed concern about State level relations with the Council, Jacobs, and not Cassidy or Potter, replied on June 16, 1975, stating that "...Cassidy...was expressing his own personal opinion, ^{17/} which he has every right to do" and denied

^{17/} The only reference to the personal nature of the speech appears in the beginning of the paragraph mid-way through the presentation, previously quoted at page 26, supra.

coercion. When Lacatena continued to protest the matter, Potter finally replied on June 19, 1975, denying that Cassidy's remarks were intended to restrain employees in the exercise of their rights under law, reiterating that they were intended as personal observations and concluding, "We are sorry if you and other members of the union misinterpreted these comments."

Reference has previously been made to a 9 day strike by the union on the Ramapo campus in November, 1974. At the February 5, 1975 meeting of the P.P.C., the retention of Clark Everling, later Union President and Chairman of its strike committee, came up for consideration. According to Horowitz, President Potter characterized him as doctrinaire and Vice President Cassidy said he considered Everling a rabble rouser. Cassidy made reference to an allegedly extremely inflammatory remark made by Everling at a teach-in conducted by faculty members prior to the strike the previous November. At the teach-in, sponsored in part by the student government, Everling spoke to issues involved in the dispute with the State and why the Council was prepared to strike. He asked students to support the strike, not attend classes and join the picket line. According to Everling, in response to a question from a student who expressed concern about staying out while he was in a work study project from which he received a salary, he advised those students that they should stay out if at all possible, but if they couldn't stay out they should come in. Everling had also advised the attendees that while the state-wide AFT did not pay strike benefits, a strike support fund had been formed from contributions received from the Bergen County AFL-CIO and the United Auto Workers Local 906. Everling had learned after the teach-in that in a document circulated by the Dean of Students it had been alleged that work study students had been promised money. Everling immediately vigorously denied this claim to the Dean's office and on the witness stand.

Two other incidents involved Everling. At a meeting with Vice President Jacobs, in June, 1975, shortly after he became Local President, at which he asked Jacobs for a copy of the College budget, Jacobs said he understood that Everling had been making irresponsible statements in a union meeting. Jacobs then refused to dis-

close the source of his information. Everling warned Jacobs against any surveillance of union meetings and told him he was in error if he relied upon such sources. Late in September, 1975 an informal meeting was called by Everling, and attended by Gerald Horne, Local Treasurer, Jacobs and an assistant to Jack Waldman on a grievance filed by the Local on August 28 claiming a unilateral revision of Academic Personnel Policies in violation of the contract. ^{18/} Everling had previously asked the College officials not to use the 1975 College Handbook in the making of personnel decisions because of the union's claim that it was not in force and the Local would have an automatic grievance on any denial of reappointment or promotion or any other personnel action. At the meeting the subject of College tenure policies came up. At this point, according to Everling, Jacobs, speaking to Everling and Horne, said, "Oh, by the way, when are you fellows up for tenure?" Everling asked him whether his question was designed to intimidate them or what. Jacobs said it was just his curiosity. Mr. Horne, who testified, corroborated Everling's attribution of the inquiry to Jacobs.

E. Respondent's Witnesses and Defenses and Analysis

Each of the witnesses alleged to have made discriminatory statements about Horowitz or coercive remarks about the union took the stand on behalf of the State. In certain instances, where such testimony corroborated or buttressed the Charging Party it has already been discussed. Respondent witnesses' testimony denying or otherwise disputing statements attributed to them will now be reviewed.

Christopher denied that he had disparaged Fran Shapiro's right to overload credits or sick leave or that he objected to Horowitz coming late to Unit Council meetings. He did admit voicing concern about Horowitz's not carrying his share of responsibilities at a meeting which Horowitz failed to attend late in the semester.

^{18/} This alleged unilateral revision of personnel policies and procedures is also one allegation of refusal to negotiate contained in a separate unfair practice charge filed by the Council on March 21, 1977, on which Complaint issued May 11, 1977 in Docket No. 77-277-120. That proceeding is presently pending while the parties have agreed to engage in discussions without prejudice to legal positions to determine whether a mutual resolution of the dispute may be achieved.

Christopher did not deny commenting about Horowitz's union activities at the time, only that he had made any threatening statement. As far as the discussion in his office during the strike, Christopher did not respond to Horowitz's claim that he had said he had forgotten giving permission to Horowitz to be late to Council meetings and agreed to bring anything involving Horowitz to him personally. Christopher did not deny talking with Horowitz from time to time about the importance of completing the requirements for the Master's degree but did deny that he made any mention of Horowitz's union involements.

On the Levenberg dispute, Christopher as witness did not respond to Horowitz's complaint to him that certain material was missing from an employee's file. He did corroborate Horowitz that he checked with Waldman as to whether certain prior student evaluations of Levenberg at another institution should be in her file, and added that only after a successful union grievance did he take Levenberg's file from his own office to the personnel office.

As to the November 15, 1975 Saturday talk with Horowitz, Christopher recalls it lasted a good hour. Again, he specifically denied that he made any mention of union activities, leaving open whether he responded to Horowitz's raising the subject matter with him. He denied even discussing the appropriateness of time Horowitz had given to various aspects of his employment, but did recall an extended discussion about the question of Horowitz's degree. However, Christopher failed to relate what was said about the degree and finally, he failed to recall whether even Horowitz had raised the question of his union activities.

Christopher testified in detail as to Horowitz's assignment of a research project in lieu of teaching a 3.3 credit course. According to the memos Christopher wrote to Horowitz, it appears likely that the scope and nature of the assignment was somewhat elusive. For example, not until September, 1975, a year after the assignment, did Christopher describe it in writing as involving, in part, an assessment of the College's graduation requirement for math proficiency. In any event, as President Potter did not believe Horowitz's handling of the project reflected on scholarly achievement and did

not rely on any alleged failure of professional responsibility, contrary to Christopher, as a reason for Horowitz's nonrenewal, I will similarly discount Christopher's negative recommendation in this regard.

Christopher did admit being "taken aback" by Horowitz's disclosure he would review Christopher's teaching performance. He also agreed he refused to sign Horowitz's evaluation of him, finding bias in a description of the class he taught in remedial english as "perfunctory."

Finally, Christopher does not recall any conversation with Horowitz, much less one in November, 1975, discussing a distinction of roles between union representative and faculty member. Nor did he recall Elsa Wormack asking him later, after Horowitz was denied tenure, whether he had ever or still believed Horowitz's union activities interfered with his performance as a faculty member.

On cross-examination, Christopher indicated he would not have brought attention to Horowitz's union activities at a Council meeting, further, that he was not acquainted with his activities as union advocate or privy to the time he spent at them. The former statement directly contradicts Wormack's testimony, and the latter is contrary not only to both Horowitz and Wormack's corroboration but also completely disregards the five separate occasions when Christopher admitted involvement with Horowitz on grievances or failed to deny his involvement. I do not credit Christopher's denials of the conversations and views attributed to him by Horowitz and Wormack and, where he asserts lack of recollection I have also credited Wormack's and Horowitz's testimony relating to these events, including the meetings of November, 1974, April 10 and November 15, 1975 with Horowitz and the November and December, 1974 conversations with Wormack.

I also conclude that upon the basis of the evidence in the record, including the College's relationship with its unit directors, the responsibilities of Christopher and the evidence of his effective recommendation and input on the issue of Horowitz's retention and in his direction of, and work assignments to, faculty members in the unit,

~~in his capacity as Learning Center Director, Christopher was most certainly a supervisor within the meaning of the Act.~~

Jack Waldman denied ever telling Elsa Wormack that Les Wormack, her husband, was in disfavor for testifying for Milton Horowitz. He did indicate that at the time, some discussion took place on an informal basis regarding Horowitz's tenure application. He admitted being curious as to Les Wormack's appearance on behalf of Horowitz at the joint All College and P.P.C. hearing in view of past concern by his colleagues as to his input in program and curriculum of the Center. When pressed on cross-examination Waldman also admitted he may have referred to Horowitz's case as "open and shut" in the context of a discussion of the College's letter to Les Wormack and his participation in Horowitz's appeal.

Waldman at first testified that Elsa Wormack had brought up her husband's representation of Horowitz, then changed his testimony to state that he didn't remember who first brought up the matter. He noted that in speaking with Elsa he was doing so as a colleague and friend with whom he had worked very closely on programs. I found Waldman evasive and contradictory as a witness and do not credit his denial of the conversation with Wormack. Significantly, Waldman, as Assistant to Vice President Cassidy, coordinated the work of Cassidy's office, particularly personnel policies and practices.

Waldman corroborated Esparra's expression of concern for possible hostility in Horowitz's case at the December, 1975 Board of Trustees executive session when, as Horowitz's tenure was considered, Board member Esparra put the question to Vice President Cassidy whether in fact Christopher's recommendation as Horowitz's Director had been based on some sort of conflict of personalities with Horowitz. He did not recall Cassidy's response.

Vice President Cassidy testified at length to his dealing with Horowitz and expressions of opinion regarding the union and its agents. Cassidy did not deny that

Paula Schwartz. Cassidy admitted he sought to discourage Horowitz's presence on the grounds of his 'conflict of interest' ^{19/} at the Shapiro conference where she was advised of her non-reappointment. Cassidy further admitted he spoke negatively of Everling at the P.P.C. because of "misleading" responses to students at the November 1974 teach-in but denies using the phrase "rabble rouser."

In spite of Cassidy's admission of knowledge of each grievance processed by the Local and of Horowitz's alleged conflict of interest in processing them, Cassidy nonetheless denied more than once any knowledge of Horowitz's union status as grievance chairman or responsibility for processing grievances until this hearing, a position I cannot credit. He admitted having characterized certain grievances brought by the union as "consciously dilatory", intending thereby to cause the union to be more selective in pursuing them. Cassidy's responses to the claim of his alleged expressions of anxiety at Horowitz's attendance at a budget meeting as second alternate unit delegate were unsatisfactory. He did not recall any agitated reaction on his part to Horowitz's presence, or any immediate attempts to locate Hovanek, whether in fact Hovanek who Horowitz had replaced initially had ever attended a prior meeting, or whether he sought Horowitz's exclusion on Hovanek's belated arrival. I conclude that Cassidy harbored discriminatory sentiment toward Horowitz and that this attitude was also reflected in his Assistant Waldman's references to Les Wormack's tenure diffi-

^{19/} I conclude that Horowitz engaged in protected activity within the meaning of N.J.S.A. 34:13A-5.3 by his attempts to protect and advance employee and contractual interests at P.P.C. meetings, in his appearances at personnel meetings held between the President or Vice President and different faculty members prior to filing formal grievances and in his use at the grievance stage of information obtained at P.P.C. meetings he attended as faculty representative. Horowitz had been selected for this position and thus his appearances at the time he was a known grievance chairman were made with the full approval of the Trustees and Administration. Having been thrust onto the P.P.C., it was only natural for Horowitz to seek opportunities to circumscribe managerial prerogatives and advance employee work protections. While the results of Horowitz's non-voting membership were, indeed, unfortunate, and placed him in an irreconcilable position of conflict, see, e.g. Adelphi University, 195 NLRB 639 (1972) and quarterly Report of the General Counsel of the National Labor Relations Board, 89 Labor Relations Reporter 200 (1975) - the clash of Horowitz's collegial roles as managerial advisor on the P.P.C. and as an employee fostering union contractual positions cannot remove from Horowitz the protections of the Act when he sought to advance the employee and union interests on such occasions. The fact remains, however, that Horowitz's dual functioning served to harden, in particular, Cassidy's attitude toward him.

culties as being related to Wormack's appearance for Horowitz at the December 1975 tenure appeal.

Cassidy, as did Potter, testified that in his review of tenure applications, besides studying the various unit and college recommendations, he spoke with the candidate and consulted the unit director.

As to the various teachers who lacked the terminal degree but who were granted tenure in the Board of Trustees discretion, it was Respondent's position that each of them had some extraordinary record of achievement which was deemed an equivalence, such as publications, research, writing, or other outstanding experience in their respective fields. With respect to those four faculty members who lacked the equivalent, it was admitted that the College's expectation that the terminal degree would be achieved timely was not and still has not been fulfilled. On these occasions then, tenure was thus granted and neither the degree nor its equivalent was satisfied.

In Horowitz's case, both Cassidy and Potter stressed the importance of fulfilling the criteria of scholarly achievement, even where the other three were completely satisfied and, as to one or two criteria, satisfied with outstanding quality. Horowitz had failed two comprehensive examinations, he was just shy of a "B" average so required "A" grades on his remaining 3 credits of course work to complete his Master's qualifications. According to the College's top Administrators, as nothing in his record indicated an outstanding equivalent, Horowitz had thus failed to satisfy the scholarly criteria and, accordingly, could not be tenured. Potter, in particular, referred to the College's unsatisfactory experience with the four teachers tenured in the absence of the degree or equivalent as coloring his reaction to Horowitz's degree difficulties.

President Potter made a striking witness for the College. His background and service as President from the College's founding show a dedicated educator with sympathy for the goals and functions of the labor movement. His establishment of a labor studies program, headed by Everling, and his willingness to add a so-called

radical teacher to its staff apparently against the strongly expressed opposition of senior faculty at Rutgers University manifests a leader of courage and conviction. I am convinced that, just as Potter testified, he remained independent of, and uninfluenced by, Vice President Cassidy's ~~antithetical~~ views on College unionization, expressed most forcefully at the June, 1975 College Wrap Up, in evaluating program, policies and tenure applications. Even here, however, Horowitz's strongly expressed views and activities had some impact, insufficient, however, in my view, to establish a discriminatory motivation toward Horowitz. Thus, Potter failed to respond directly to questions concerning his Assistant Rogol's instructions to Horowitz on two occasions. Instead, President Potter noted in reply "If...there is a grievance meeting in my office, obviously, he would be present." This response, while recognizing strict compliance with contract provisions governing grievance processing, adknnowledged a certain avoidance of Horowitz in other than a strictly formal grievance setting. Particularly in the absence of Rogol's testimony, apparently available but not called by Respondent, I conclude that President Potter did have his Assistant contact Horowitz and inform him he was no longer welcome on grievance matters in his office and to cease attending P.P.C. meetings. Nonetheless, I conclude that President Potter's negative recommendation to the Trustees on Horowitz's tenure application was solely and genuinely based on his application of the criteria relating to scholarly achievement and his skepticism that Horowitz would be able to complete degree requirements within a reasonable time frame. This conclusion does not preclude the possibility that in **weighing** both Christopher's and Cassidy's recommendations, including Christopher's report of ~~friction with Horowitz~~, Potter may not have been sufficiently probing or discriminating in ferreting out the actual hostility towards Horowitz's exercise of protected activities which motivated them.

The testimony regarding Jacobs' statements may be said to evince a strong negative attitude to an employee, such as Everling, who asserted strong views and positions contesting College policies and procedure claimed to impinge on faculty terms and conditions of employment. While Jacobs denied the remarks attributed to him, I credit

Everling and Horne. As in all other instances of alleged coercive remarks, no independent (a)(1) violation is asserted. Neither is Jacobs found to have played a role in consideration of Horowitz's status, only in the consideration of his grievance. Yet Jacobs' expressions as to Everling's tenure and remarks made at a union meeting, just as Cassidy's speech and remarks about Everling, provide a setting in which to weigh the College's consideration of Horowitz's tenure application.

I find Horowitz to have testified in a straight forward and forthright manner. At no time did Horowitz, in my view, embellish his testimony to strengthen his case. Not until pressed on cross-examination did Horowitz clarify the ambiguities inherent in Christopher's remarks to him on April 10, 1975 regarding his union activity. The clarification established that Christopher was not so much concerned with the degree to which Horowitz's union activities limited his time for scholarly and unit work, as he was with the degree to which Horowitz had exposed himself as an adversary to the College administration in his role as union advocate. The latter, rather frank discussion between them on November 15, 1975, which Christopher could hardly recall, brought home Christopher's inability to distinguish Horowitz's union advocacy from his faculty role. Horowitz's grievance work had made their relationship a hostile one, not Horowitz's evaluation of Christopher's class which, I conclude, came at a point when Christopher's relations with Horowitz, after a year spent at the College as unit director, were already tense.

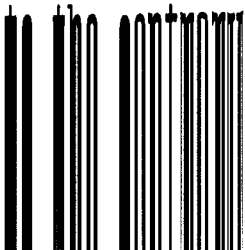
The foregoing discussion establish bases for my conclusions that Christopher, and Cassidy, in part, considered Horowitz's union role in their evaluation of his tenure application^{19a/}, but they do not alone warrant a finding of discrimination in the renewal process. That process is a complex one, originating in recommendations within the unit, continuing up through various levels finally to the President's recommendation to the Trustees and culminating in the Trustees' determination. Certain additional evidence, already discussed, supply missing links in the process, establishing a nexus

19a/I am not persuaded by Respondent's argument that since the College tenured and continued to employ on its faculty past Local officials, it thus could not have discriminated against Horowitz in the tenure process. The nature of the protected activities of the other faculty members was not established on the record. The nature and extent of Horowitz's activities as sole grievance processor for the Local was so established. It appeared that upon Horowitz's resignation from this role during his last year, the only employee available to assume the function among all College faculty members of the Local was its President, Everling. The hostility his union activities aroused among College Administrators has been previously recounted.

between Christopher's recommendations and the Trustees' determination. ^{20/} Christopher's memo written in response to the unit's recommendation contains no reference to any hostility toward Horowitz. Yet Trustee Esparra in reading material and preparing for P.P.C. and Board Consideration of the tenure request somehow became aware of the Christopher-Horowitz friction. ^{21/} In his testimony he refers to an earlier P.P.C. meeting as his source. In any event, Christopher's attitude toward Horowitz had made its way up the line, and whether outwardly acknowledged as union related or not, had become a subject of discussion on Horowitz's tenure consideration at the highest College level. Not only was Esparra concerned, but another Trustee, Mr. Mytelka, openly raised the question of hostility between Horowitz and his Director at the joint appeal hearing which had been accorded Horowitz. Given such circumstances I cannot avoid the conclusion that Christopher's union based hostility, whether openly acknowledged or not, as well as Cassidy's, became factors in consideration of Horowitz's tenure application at the Trustee level, and thus tainted the review process in violation of the Act. The extent to which Christopher's and even Cassidy's motivations became serious factors in weighing Horowitz's status is unclear. Yet, the intrusion of such factors at all in the evaluation process violates the Commission's standards. ^{22/} One can only speculate on the result had Esparra's interrogation of Christopher uncovered the true basis for the Director's attitude toward Horowitz. Would Esparra, a Trustee with strong opinions against the claimed necessity for a five year probationary period, have been able to convince Mytelka and two other Trustees that Horowitz, with highest ratings from his students and peers for teaching effectiveness, deserved consideration to counter animus

^{20/} See In re Laurel Springs Board of Education and Mary Becken, P.E.R.C. No. 78-4 (1977).

^{21/} In this connection, I conclude that Esparra was in error when, at one point, in his testimony he implied that he only learned of the friction during his telephone call to Horowitz. The thrust of his other testimony and that of other witnesses is all



flowing from his union role? Would five Trustees ^{23/} under such circumstances have accorded independent weight to the possibility which admittedly existed at the time for Horowitz to have completed his Master's requirements by the following Fall, upon satisfactory completion of two parts of the comprehensive examination and 3 credits with an A average - a result at ~~least possible fulfillment~~ ^{existing in} at the time the four teachers lacking terminal degrees or equivalence were tenured? The fact is that such tainting cannot be measured, and the conclusion here reached is that it must be expunged.

The Commission has held that the test to be applied in determining whether a violation of (a)(3) has occurred in these circumstances ^{24/} is not whether "but for" the employee's exercise of his protected rights the employer's action would not have occurred, but rather, whether in light of the employee's protected conduct and the employer's knowledge, the employee's statutorily protected union activities ~~was~~ one of the motivating factors. In re Board of Education of the Borough of Haddonfield, Camden County, P.E.R.C. No. 77-36, 3 NJPER 71 (1977). The reasoning of a recent U.S. Supreme Court determination, in Mt. Healthy City School District Bd. of Ed. v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 691 GERR 24 (1977), is relied upon by Respondent in its brief to reach a different conclusion. There, in spite of evidence of constitutionally protected exercise of free speech, which the Federal District Court found and the Circuit Court affirmed played a substantial part in the school board's decision not to renew, the Supreme Court, per Rehnquist, Associate Justice, reaching a contrary result, remanded the proceeding and held that where the employer can show by a preponderance of the evidence that it would have reached the same deci-

^{23/} See N.J.S.A. 18A:64-3; 18A:60-8.

^{24/} The second test adopted by the Commission - whether employer conduct is inherently

sion as to the employee's reemployment even in the absence of the protected conduct, the employee's claim must fail. The right asserted here flows from the language of the Act protecting public employees in the exercise of certain conduct, N.J.S.A. 34:13A-5.4. The Commission, in the exercise of its exclusive statutory authority to prohibit unfair practices, N.J.S.A. 34:13A-5.4(c), has applied certain reasonable standards, discussed above, to determine whether employer conduct violates those protections. Mt. Healthy involves the determination of rights and remedies flowing directly from the Federal Constitution. As it is the Commission's standards which I must apply herein, I conclude that the result in Mt. Healthy is inapplicable, even assuming arguendo, one could sustain the College's non-renewal of Horowitz absent the tainting of the renewal process. Upon the basis of the foregoing findings of fact and the entire record in this case, I make the following recommended:

Conclusions of Law

1. By permitting its Unit Director's discriminatorily motivated recommendation, whether oral or written, and its Vice President's at least partially discriminatorily motivated recommendation, to become part of the evaluation process at the highest levels of the College Administration and before its Board of Trustees in determining Milton Horowitz's renewal with tenure application, the Ramapo College of New Jersey, and thus the State of New Jersey, has discriminated in regard to hire and tenure of employment to discourage its employees in the exercise of the rights guaranteed to them by the Act, and has thus engaged in, and is engaging in, unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(3).

2. By interfering with, restraining and coercing its employees in the exercise of the rights guaranteed to them by the Act, the Respondent has engaged in and is engaging in unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(1).

3. The Respondent, by the conduct described in paragraph 1, above, has not engaged in unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(2).

The Remedy

Having found that the Respondent has engaged in, and is engaging in unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(1) and (3), I will recommend that Respondent cease and desist therefrom and take certain affirmative action. As I find that certain improprieties occurred in the decision-making process on Horowitz's tenure application during his final probationary year, I will recommend that Horowitz be offered reinstatement without tenure ^{25/} for a reasonable period of time sufficient to enable the College to re-evaluate Horowitz's tenure qualifications de novo ^{26/} in accordance with the prescribed procedures and applying its known and acknowledged criteria in effect during Horowitz's last year of employment, ^{27/} but without the intrusion of any discriminatory motivation based upon his past union activities. ^{28/} Accordingly, I will also recommend that both Learning Center Unit Director Christopher and Vice President for Academic Affairs Cassidy be excluded from participation on a re-evaluation of Horowitz's tenure application. In their place, I recommend that the College and Council jointly establish an ad hoc committee, ^{29/} consisting of equal numbers of

^{25/} Having concluded that Horowitz shall not be reinstated under such circumstances that an issue could arise whether, upon commencement of employment at the beginning of the sixth academic year (see N.J.S.A. 18A:60-8), he has thereby achieved tenure, this Report does not determine the question raised by Respondent in its brief that the Commission lacks authority to determine tenure or tenure qualifications.

^{26/} In accordance with the normal contract provision, and in order to avoid hardship to the College and to Horowitz, the reinstatement shall be for a period encompassing the next succeeding academic year, 1978-1979.

^{27/} The terminal degree applicable to Horowitz's reevaluation shall be the Master's and not the Ph. D.

^{28/} See Danvers School Comm. v. Tyman, 94 LRRM 3182 (Mass., 1977); Dennis Yarmouth Sch. Comm. v. Teachers, 94 LRRM 3187 (Mass., 1977); W. Bridgewater School Comm. v. Teachers, 94 LRRM 3189 (Mass., 1977); Bd. of Ed., Bellmore Merrick Central High School District v. Bellmore Merrick Teachers, 39 N.Y. 2d 167, 92 LRRM 2244 (1976); Bd. of Ed. of Chautaugua Central School District v. Chautaugua Central School Teachers, 41 A.D. 2d 47 (1973).

^{29/} See Opinion and Award of Arbitrator Daniel House In the Matter of the Arbitration between Council of New Jersey State College Locals, NJSFT-AFT, AFL-CIO and State of New Jersey, Dept. of Higher Education, Stockton State College, to which reference is made in State v. Council, ___ N.J. Super ___ (App. Div. 10/6/77), pet. for certif. pending, Docket No. 15152.

faculty members within the negotiations unit, and administration personnel, who, by agreement generally or for this purpose, are deemed managerial executives excluded from the unit, which committee shall review and recommend on Horowitz's tenure application prior to its consideration by the College President. Neither Director of Academic Planning and Administration Waldman nor Vice President of Administration/Finance Jacobs may participate on such committee. In all other respects the College's tenure procedures and tenure process shall be followed. As Horowitz is being reinstated to renew and complete his period of probation pending a de novo reconsideration of his tenure application, I conclude that no make whole remedy is appropriate, and, accordingly, I will not recommend that he receive any back pay, even assuming that he has suffered any loss of earnings during the period of time since the College terminated him as an employee. 30/

Recommended Order

Upon the basis of the foregoing recommended Findings of Fact, Conclusions of Law, and Remedy it is recommended that the State of New Jersey, shall

1. Cease and desist from:

- (a) Discouraging its employees in the exercise of the rights guaranteed to them by this Act by discriminating in regard to hire or tenure of employment or any term or condition of employment.
- (b) Interfering with, restraining or coercing its employees, in any like or related manner, in the exercise of the right guaranteed to them by this Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

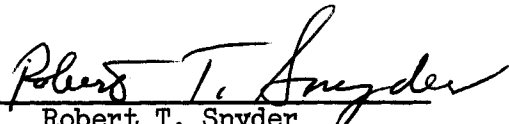
- (a) Offer to Milton Horowitz reinstatement, without tenure, to his former position as Assistant Professor of Mathematics, Learning Center of Ramapo College of New Jersey for the 1978-1979 academic year, during which the College shall re-evaluate

30/ Horowitz earned \$15,100 as a high school teacher in academic year 1976-1977. Had he remained employed by the College the same year as Assistant Professor, his earnings would have been \$15,130.87. Since the record closed prior to commencement of the 1977-1978 academic year, it contains no evidence as to Horowitz's earnings in the current year. These earnings figures are apart from the Council's claim that Horowitz suffered loss of wages during the 1976 and 1977 summer sessions.

Horowitz's tenure qualifications de novo in accordance with the prescribed procedures and acknowledged criteria in effect during his last year of employment, excluding from the renewal process Director of the Learning Center Robert Christopher and Vice President For Academic Affairs Dr. John Robert Cassidy and substituting therefore an ad hoc committee of faculty and administrators to be jointly established by the Council and College in accordance with the Remedy section of this Report; in all other respects the then existing tenure review process shall remain in full force and effect.

- (b) Post immediately, in plain sight, at the Ramapo College Administration Offices located at Mahwah, N.J. and at the faculty lounge area and at all places where notices to its faculty members are customarily posted, copies of the attached notice marked Appendix "A." Copies of said notice on forms to be provided by the Director of Unfair Practice Proceedings of the Public Employment Relations Commission, shall, after being duly signed by Respondent's representative be posted by Respondent immediately upon receipt thereof, and maintained by it for a ~~period of at least sixty (60) consecutive days~~ thereafter in conspicuous places including all places where notices to its aforesaid employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced or covered by any other material.
- (c) Notify the Commission, in writing, within twenty (20) days of receipt of the Commission's Order, what steps the said Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the portion of the Complaint alleging that the State of New Jersey engaged in violation of N.J.S.A. 34:13A-5.4(a)(2) with regard to Milton Horowitz's non-renewal with tenure of employment be dismissed in its entirety.


Robert T. Snyder
Hearing Examiner

DATED: Newark, New Jersey
November 30, 1977

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 discriminate in regard to hire or tenure of employment or any term or condition of employment of any employee to discourage our employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act that includes the right to form, join and assist any employee organization without fear of penalty or reprisal.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act.

WE WILL offer Milton Horowitz reinstatement, without tenure, to his former position with us as Assistant Professor of Mathematics, Learning Center, Ramapo College of New Jersey, for the 1978-1979 academic year, during which we shall re-evaluate de novo his tenure qualifications in accordance with the prescribed procedures and acknowledged criteria in effect during his last year of employment, excluding the Unit Director and Vice President of Academic Affairs from the review process and substituting therefore an ad hoc committee to be jointly established by the Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO and Ramapo College of New Jersey, all other pre-existing tenure procedures and process to remain in full force and effect.

STATE OF NEW JERSEY

(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 Jeffrey B. Tener, Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780