P.E.R.C. NO. 98-144

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matters of

CAMDEN BOARD OF EDUCATION,

Respondent,

-and- Docket No. CI-H-94-75

SARA T. DAVIS,

Charging Party.

CAMDEN ADMINISTRATORS' COUNCIL,

Respondent,

-and- Docket No. CI-H-94-76

SARA T. DAVIS,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Consolidated Complaint against the Camden Board of Education and the Camden Administrators' Council. The Complaint was based on unfair practice charges filed by Sara T. Davis alleging that the respondents violated the New Jersey Employer-Employee Relations Act. The charge against the Council alleges that it breached its duty of fair representation to Davis by agreeing in collective negotiations to decrease her salary, allegedly in collusion with the Board, in order to retaliate against her, a former Camden Education Association president, for her protected activity while she was head of the union representing teachers. The charge against the Board alleges that it violated the Act by negotiating in bad faith and reaching an agreement with the Council to lower Davis' salary in retaliation for her protected activities as CEA President. The Commission concludes that no unfair practice was committed by either respondent and that the charging party failed to meet her burden of proof under any of the standards applicable to various alleged violations of the Act.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Charging Party.

Appearances:

For the Respondent Board, Murray, Murray & Corrigan, attorneys (Karen A. Murray, of counsel)

For the Respondent Association, Tomar, Simonoff, Adourian & O'Brien, attorneys (Mary L. Crangle, of counsel)

For the Charging Party, Balk, Oxfeld, Mandell & Cohen, attorneys (Arnold S. Cohen, of counsel)

DECISION

On May 18, June 3, and October 21, 1994, Sara Davis, an administrator employed by the Camden Board of Education and a member of a collective negotiations unit represented by the Camden Administrators' Council, filed and amended separate unfair practice charges against the Board and Council alleging they had

violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. The Hearing Examiner found that the charges, amended charges, and attached narratives, allege that the Council breached its duty of fair representation to Davis by agreeing in collective negotiations to decrease her salary, allegedly in collusion with the Board, in order to retaliate against her, a former Camden Education Association (CEA) president, for her protected activity while she was head of the union representing teachers. The Board allegedly violated the Act by negotiating in bad faith and reaching an agreement with the Council to lower her salary in retaliation for her protected activities as CEA President. These actions allegedly violated N.J.S.A. 34:13A-5.4a(1),(3),(5), and (7),[1/] and N.J.S.A. 34:13A-5.4b(1),(3) and (5).[2/]

1/ These provisions prohibit public employers, their representatives or agents from: (1)Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; and (3) discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit...; (7) Violating any of the rules and regulations established by the commission.

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

On February 9, 1995, an order consolidating the charges and a Complaint and Notice of Hearing issued.3/ The Board and Council filed timely Answers to the Complaint. Both denied having violated the Act.

On July 8 and 9, 1996, Hearing Examiner Elizabeth J. McGoldrick conducted a hearing. The parties examined witnesses and introduced exhibits. They argued orally and filed post-hearing briefs.

On January 6, 1998, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 98-19, 24 NJPER 97 (¶29050 1998). She found that the respondents did not collude in negotiations to lower Davis' salary; the Council did not breach its duty of fair representation; the Board did not negotiate in bad faith; and neither the Board nor the Council discriminated against Davis in retaliation for her protected activity while CEA president.

On January 20, 1998, the charging party filed a one paragraph letter stating that the letter, together with her post-hearing brief, constituted exceptions to H.E. No. 98-19. On January 22 and January 26, respectively, the Board and the Association objected that the charging party's exceptions did not conform to N.J.A.C. 19:14-7.3 and should be disregarded. The

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3/ The Board sought and, on October 19, 1995, was denied special permission to appeal from the issuance of the Complaint. P.E.R.C. No. 96-26, 21 NJPER 396 (¶26237 1995).

Board also asked that if the charging party's brief is considered, its own post-hearing submission should be considered in response to the exceptions.

The resubmission of a post-hearing brief does not constitute valid exceptions. Camden Bd. of Ed., P.E.R.C. No. 79-40, 5 NJPER 43 (¶10028 1979). We nevertheless elect to consider the matter further. See N.J.A.C. 19:14-8.1(b).

We have reviewed the record and find that the Hearing Examiner's findings of fact are accurate. We adopt them, in the absence of specific exceptions.4/

We also agree that the Hearing Examiner properly concluded that no unfair practice was committed by either respondent. The charging party failed to meet her burden of proof under any of the standards applicable to the various alleged violations of the Act, both pleaded and unpleaded, considered in the Hearing Examiner's report. The charging party's receipt of a salary of $51,965 beginning in December 15, 1993 was part of the Council's effort, achieved through negotiations with the Board, to eliminate all "off-guide" salaries. Other unit members besides the charging party were at the top of their guides and they also received salaries below those implemented in the beginning of the school year when estimated increments were paid, but above the salaries they had received the year before.

4/ We correct a typographical error in finding 3 to reflect that the time period should be 1985 to 1990.

There was no evidence of either Board-Council collusion or hostility toward the charging party's activities while CEA president.

ORDER

The Consolidated Complaint is dismissed.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Finn, Klagholz, Ricci and Wenzler voted in favor of this decision. Commissioner Boose abstained from consideration.

DATED: May 27, 1998
Trenton, New Jersey
ISSUED: May 28, 1998

H.E. NO. 98-19

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SARA T. DAVIS,

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SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission dismiss unfair practice charges against the Camden Board of Education and the Camden Administrators' Council filed by Administrative Assistant Sara T. Davis. The Hearing Examiner finds that the Board and Council did not collude to lower Davis' salary in the course of negotiations for a successor agreement. The Hearing Examiner finds that the Council did not breach its duty of fair representation by acting in an arbitrary, discriminatory or bad faith manner towards Davis.

The Hearing Examiner finds that the Board did not negotiate in bad faith to reduce Davis's salary. She further finds that neither the Board nor the Council discriminated towards Davis in retaliation for her prior protected activity.

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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent, Murray, Murray & Corrigan, attorneys
(Karen A. Murray, of counsel)

For the Respondent, Tomar, Simonoff, Adourian & O'Brien, attorneys
(Mary L. Crangle, of counsel)

For the Charging Party, Balk, Oxfeld, Mandell & Cohen, attorneys
(Arnold S. Cohen, of counsel)

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On May 18, June 3, and October 21, 1994, Sara Davis, an administrator employed by the Camden Board of Education and

represented by the Camden Administrators' Council, filed unfair practice charges with the Public Employment Relations Commission against both the Council and Board. The charge against the Council alleges that the Council breached its duty of fair representation to Davis by decreasing her salary through collective negotiations. Davis further alleges that the Board colluded with the Council by agreeing to the salary reduction. These actions allegedly violate the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4(a)(7), and 5.4(b)(3) and (5)[1/] Although not pled, the narrative part of the charge asserts that the actions of the Council and Board were retaliatory for Davis' prior activity on behalf of the Camden Education Association ("CEA"). If proven true, such retaliation would constitute violations of subsections 5.4(a)(1),(3), and 5.4(b)(1) of the Act.[2/] Finally, although not specifically pled, Davis

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1/ These subsections and paragraphs prohibit public employers, their representatives or agents from: (7) Violating any of the rules and regulations established by the commission; and prohibit employee organizations, their representatives or agents from: (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit; and, (5) Violating any of the rules and regulations established by the commission.

2/ These subsections prohibit public employers, their representatives or agents from: (1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; and (3)

Footnote Continued on Next Page

also alleges that the Board "violated the Act by negotiating in bad faith"(C-1).[3/] The Act prohibits public employers from: "Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit..." at N.J.S.A. 34:13A-5.4(a)(5).

On February 9, 1995, the Director of Unfair Practices issued a Consolidated Complaint and Notice of Hearing. The Board and Council filed timely Answers to the Complaint. Both denied having violated the Act. On May 26, 1995, the Board requested special permission to appeal the Complaint and filed a Motion to Dismiss. On October 19, 1995, the Commission denied the Board's Motion, and referred the matter to me for Hearing.

Hearings were conducted on July 8 and 9, 1996.[4/] All

2/ Footnote Continued From Previous Page

discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act. Section 5.4(b)(1) prohibits employee organizations, their representatives or agents from: (1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act.

3/ Exhibits received in evidence marked as "C" refer to Commission exhibits, those marked "CP" refer to Charging Party exhibits, those marked "RC" refer to Respondent Council's exhibits and those marked "RB" refer to Respondent Board's exhibits. Transcript citations 1T- refers to the transcript developed on July 8, 1996 and 2T- refers to the transcript developed on July 9, 1996.

4/ Hearings were postponed for a long period because of Charging Party's serious illness.

parties filed timely post-hearing briefs.

Upon the record, I make the following:

FINDINGS OF FACT

1. Sara Davis was employed by the Board as a teacher from 1969 to 1991, when she became an administrative assistant, and member of the Council's negotiations unit of administrators (1T11). Davis has a bachelor's degree. The Council represents 150 principals, directors, coordinators, supervisors, the dean of students, assistant principals and chief attendance officers (CP-2). The Board and Council are parties to a series of collective negotiations agreements, which contain separate salary guides for each of the above titles. As of June 30, 1993, Davis was above the top step of the guide for her title--ten-month administrative assistant, bachelor's degree.

2. During her tenure as a teacher, Davis was an active member of the CEA, the majority representative of the teachers' unit (1T11-1T12). She was its full-time president from 1985 to 1990, and vice president and building representative prior to 1985 (1T13-1T14). During the period that Davis was an active member, the CEA successfully negotiated salary increases which resulted in teachers' salaries that were higher than some administrators' salaries (1T20-1T21).

3. Davis also processed grievances for the CEA, including several resulting in reinstatement of several teachers

(1T27-1T29, 1T117-1T118). During her five years as president of the CEA, Davis presented eight teacher nonrenewal cases per year to the Board (1T117-1T119). Between 1985 and 1980, Davis brought grievances against Patricia Cook, principal at the Morgan Village Middle School. These concerned the number and length of staff meetings at schools, the implementation of a "perfect attendance program" (early dismissal for teachers with perfect attendance in the prior month), and Cook's right to withhold paychecks from teachers who failed to submit timely reports (1T17-1T20, 1T19-1T23, 1T81, 1T87, 1T89).5/ Davis and Cook informally discussed these issues but did not resolve them. Eventually, the issues were resolved at the superintendent's level (1T18-1T20, 1T84-1T85, 1T89, 2T40). Cook showed her staff the Superintendent's memo dated October 29, 1990, which directed principals to post each month which non-staff meeting days were available for early dismissal under the perfect attendance provision (2T154).

4. Davis and Cook were also acquainted through an educational sorority (1T116). They occasionally discussed the salary differentials between teachers and administrators at these meetings (1T22-1T24, 1T90-1T91, 1T94-1T95, 2T160-2T163). Cook

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5/ Initially, Davis characterized these disputes as solely between the CEA and Cook; however, I find that the CEA's problem with the perfect attendance program occurred in several schools. At the time that program was implemented, September 1990, Davis was no longer CEA president (2T36-2T37, 2T12-2T13).

disapproved that certain teachers were paid higher rates than administrators (2T164). Cook also complained to Davis that the contractual perfect attendance incentive interfered with her ability to control the schedule of meetings at her school (1T21, 1T91-1T92). Although Davis never brought a formal complaint about Cook, she ceased attending sorority meetings because she felt Cook was harassing her by expressing her disapproval at meetings (1T24, 1T117). Cook characterized these discussions as cordial and not harassing (2T164-2T165).

5. From 1975 to 1990, Claudia Cream was a teacher and member of the CEA. (1T25, 1T97, 2T55-2T56). In 1990, Cream became assistant principal at the Lincoln School (1T98-1T99, 2T55). As CEA president, Davis filed a grievance against Cream, which was eventually withdrawn.6/ At all times, the interactions between Davis and Cook and Cream were professional and respectful (1T101, 2T164).

6. Both Cream and Cook were members of the Council's negotiations team for the 1993-96 successor agreement (1T27, 2T152-2T153, 2T59). During their attendance at team meetings, no conversations about Davis occurred (2T61).

7. Davis' annual salary rate changed twice between June 1993 and December 1993, as follows:

6/ Davis testified that Cream also disapproved that teachers were paid more than administrators, but Cream denied having the conversation with Davis (1T102-1T103, 2T58, 2T63). I credit Cream's testimony because Davis' recall of the conversation was very vague (1T103).

June 30:	$51,190
September 1:	$52,700
December 15:	$51,965

(CP-2, CP-3, 1T29, 1T67, 1T150-1T151, 2T229-2T231)

8. The agreement between the Board and Council expired on June 30, 1993, but as of that date the parties had not completed negotiations over a new agreement (1T30). They negotiated temporary increases pending the establishment of a salary guide (1T30).

9. The Board and Council knew that the law required that employees paid on a salary guide be paid an increment even if their representatives were in negotiations (2T129). In the past, eligible unit members had received increments during negotiations (2T129).

10. The Board proposed that the Council waive the payment of increments because so many in the unit were being paid off the guide, including Davis, but the Council rejected this proposal (2T129). The Board then asked for counterproposals since it was difficult to calculate appropriate increments because no one's salary corresponded to the salary guides in existence at the time (2T130).

11. In July 1993, the Council proposed and the Board agreed to pay increments to all unit members, even those who, like Davis, were at the top step and were not eligible to receive increments. Increments were calculated on the basis of an average amount according to title. Davis' increment was $1,330 per year (2T210-2T211, RC-3, 2T130-2T131). When the interim increment schedule was developed, no salary guides were developed and no individual salaries listed (2T133-2T134). As of September 1, 1993,

Davis' annual salary was increased to $52,700 per year (1T29). Since Davis is a ten-month employee, her "interim" salary was effective upon her return from the summer break.

12. The agreement as to increments was meant to be an interim measure, not binding on negotiations. The development of new guides and negotiations for higher salaries superceded the interim measure (2T224). Increments were paid to all unit members on a prorated basis until the contract was settled (2T131).

13. The Council's Executive Board prepared for 1993-96 negotiations by mapping out a process for soliciting members' ideas and concerns, and developing proposals to present to the Board (2T93).

14. A survey was distributed to all 150 unit members; surveys were returned and discussed by the committee (2T94). Members were invited to be on the negotiating committee by attending the three or four meetings held to develop proposals (2T95-2T96). Davis submitted a 5-page list of proposals to Council President Malcolm Adler (1T31-1T32, 1T107, CP-1). Adler received Davis' written recommendations and presented them to the committee (1T32, 1T107-1T108, 2T97). Adler selected seven members to be on the negotiations team who had shown an interest in participating; director of staff development, elementary principal, high school administrative assistant, supervisor of the bilingual program, elementary school administrative assistant, middle school principal and an assistant principal (2T96-2T97). Davis did not participate

on the Council's negotiations team in 1993 (1T61-1T64). Davis did not see the Council's proposals prior to their submission to the Board (1T64).

15. Negotiations began in January 1993 and concluded in November 1993 (2T98). There were about 12 sessions (2T98-2T99). Davis was never specifically discussed at any of the joint meetings with the Board or in any of the Council's separate caucuses (2T99). During all of the negotiations, neither Adler, Council Treasurer Elaine Cathers nor Patricia Cook heard any conversation about any individual's salary, including Davis (2T170, 2T133, 2T221). All discussions focused on positions and placements on the guides (2T133).

16. The Council had several goals in negotiations: first, to place everyone on a step on a salary guide so that unit members could predict future increases and have meaningful guides (2T182-1T183). The second was to correct inequities among administrators' salaries - to insure that experienced administrators received more than beginners, and to insure that administrators who were supervisors received more than the teachers they supervised (2T183-2T184). Third, the Council wanted to reduce the number of steps on the guide so that unit members could advance to the maximum as soon as possible (2T120, 2T185-2T186).

17. The Council's members felt strongly about correcting the fact that teachers' salaries exceeded administrators' salaries. Adler believes the situation of teachers earning more than

administrators began in the late 1980s, when Webster became Superintendent, rather than because of Davis' efforts for the CEA (2T111-2T112). They proposed a ratio of 1.25 administrators' to teachers' salaries (2T109-2T110, 2T184-2T185). The Board rejected the idea of a ratio keyed to teachers' salaries (2T114, 2T184-2T185). So the Council developed guides around the total compensation offered (2T114-2T115).

18. The Board and Council agreed to across-the-board increases of seven percent, seven percent, and seven and one-quarter percent over the three years of the new agreement. These percentage increases were then distributed across the guides (2T187). The Council prepared salary guides by creating a fictional salary guide from '92-'93 base salaries, and then applying the appropriate percentage increases (2T187, 2T234). The Board provided a scattergram, which was verified and used as a basis for the guides (2T188).

19. The formula used to develop the final guides began with the highest and lowest paid individuals in each category to determine the top and bottom steps of each guide (2T115-2T116, 2T135, 2T143). The lowest salary in a guide was subtracted from the highest, and then a calculation was made so that there were 14 intervals between those salaries, to obtain the increment between each step (2T188-2T189). The parties agreed to a 15-step guide (2T126). Davis was the highest paid employee on her guide. Her salary became the top of the fictional guide for ten-month, bachelor's degree administrative assistants.

20. The guides also reflected differentials among 10 and 12-month employees, advanced degrees and the hierarchy of titles (2T190-2T193). Consideration was given for promotional adjustments (2T196). Thus, there were several built-in relationships among guides (2T190-2T197).

21. In placing individuals on steps on the guides, the Council decided that if one's salary was $100 or more above a step, he was placed on the higher step (2T200). Cathers testified that the Council really did not want members to lose money, but if they were less than $100 different from the higher step, then they remained at the lower step (2T200-2T201). There were five who were placed on a lower step (2T201, 2T209).

22. The cost to the unit of making this initial placement was 1.5 percent of the total package, which came out of the first year's seven percent increase (2T201).

23. The team put all the calculations into a computer program, produced a spread sheet, and then it became apparent that those at the top of their guides would receive lower increases and that these same employees were not entitled to increments (2T202-2T203). So the Council proposed a larger step increase between steps 14 and 15, but the Board rejected this proposal (2T203-2T204).

24. There were seven members who were placed at the top step, like Davis (2T120, 2T126, RC-2, 2T210-2T211). The Board notified the Council that six or seven unit members were paid

increments mistakenly, based on the final ratified agreement, but overpaid amounts would not be recouped (2T132, 2T136). There were six other unit members in exactly the same situation as Davis, who were placed on step 15, who had received the interim increment, and whose salaries exceeded the dollar amount they were to receive in the first year of the agreement (2T222-2T223).

25. On about November 15, 1993, the Council and Board finalized their agreement, and, effective December 15, 1993, Davis' salary became $51,965 per year (CP-2, CP-3, 1T151).

26. Neither the Council nor the Board, in agreeing to the final salary guides, "decided" that six or seven employees should have their salaries reduced from the interim increment level (2T145). There was no discussion about who would be on what step (2T148).

27. The Council's ratification meeting was held on November 18, 1993. There were opportunities for members to ask questions and raise concerns. Adler was not aware of anyone who was ignored or not responded to in this meeting (2T99-2T100).7/ The vote was two-thirds in favor of accepting the proposed contract terms and one-third against (2T100). Ninety members attended (2T100). Salary guides were not provided (2T102-2T103). Individual

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7/ Davis testified that she tried to ask questions about her salary at the Council's meeting but was never recognized, but I do not credit this testimony (1T136). Adler, Cathers and Cream all testified credibly that no one's questions were ignored, and Davis admitted on cross examination that she did ask questions which were answered (1T161).

data sheets were distributed and Davis received hers (CP-4, 1T37, 1T113, 2T102-2T103). After the meeting, Davis called Adler about her personal data sheet and salary. Adler referred her to Cathers, who had prepared the individual data sheets (2T101, 2T102, 2T217). Cathers explained the process by which Davis' salary was determined to Davis on the phone, but Davis was not satisfied and felt Cathers' explanation "did not make sense" (1T113-1T114, 2T218-2T219).

28. Davis had heard that other Council also members experienced salary decreases in December 1993, as a result of negotiations (1T44).[8/] In November 1993, Davis attempted to attend a closed Board meeting, but was only able to attend the public meeting (1T44). Davis publicly presented her position on the new salary guide and its effect on her salary (1T44). Her position was that she had not been brought up on charges and, therefore, the Board could not lawfully reduce her salary (1T45). The Board did not reply to Davis then or later (1T45). Davis also requested documentation from the Board concerning salary guides for the agreement and spoke to Board President Elaine Bey, Vice-President Althea Wright, Member Riggs and Superintendent Arnold Webster about her salary ((1T122-1T123, 1T124). She also sent a letter to President Bey, but received no response (1T125).

8/ Davis later testified that she "guessed" that these others received less but really did not know exactly what their situations were (1T77-1T78).

29. Davis believed that members of the Council's negotiations team fared well in negotiations relative to other unit members, but the evidence does not support this belief (1T46, RC-2).9/

30. The Council could have proposed that the six employees be red-circled and have their salaries maintained but did not do so (2T146-2T147). Red circling, which may have required the Council's team to develop individualized salaries, and may have meant that everyone would not be on a step of the guides, was contrary to the goal of having everyone's salary on a guide, and to the method used by the Council to develop the guides (i.e. no individualized salaries) (2T147-2T148).

9/ Davis stated that she reviewed the effect of the new guide on all unit members' salaries; that Adler and Cook received increases of over $10,000, that Lynn Johnson, another team member, received over $8,000; Elaine Cathers received over $6,000; and Claudia Cream received over $9,000 (1T48-1T49). Davis did not produce the payroll figures to support the above numbers; she stated she had been permitted to view payroll records in the Board's payroll office on which she based these assertions (1T51-1T52). I do not credit this testimony, other than as to Davis' perception of the facts. Respondent Council submitted RC-2 into evidence, a chart containing exact salaries for each unit member, including their '92-'93 base salaries and all increases through the end of the '93-'96 agreement. This document shows that the percentage increases (on base salary) during the first contract year vary among all 147 unit members from 1.25 percent to 16.53 percent; the average increase was 5.79 percent. The named members of the Council's team received 5.05 percent (Cathers); 5.44 percent (Johnson); 6.19 percent (Adler); 6.38 percent (Cook); and 7.49 percent (Cream). Thus, the Council's team members did not fare appreciably better than other unit members. The first year's increases vary because of adjustments necessary to place each employee on a step on a guide, and to reduce the number of steps. In the second and third years almost everyone, including Davis, received 5.50 and 5.35 percent increases.

31. No unit member received less salary then they had in 1992-93 (2T133). Everyone, including Davis, received an increase over their 1992-93 salary. The agreement was retroactive to July 1, 1993.

32. The Council's team did not notify the membership that there would be members whose final salaries for 93-93 would be less than their interim increment at a general membership meeting held in September. The team was not aware of the problem until it surfaced when final guides were developed in October-November 1993 (2T238-2T240).

ANALYSIS

The issue presented by this case is whether the Board and Council violated the Act in November 1993, when they negotiated a salary rate of $51,965 for Sara Davis for school year 1993-94. Davis claims that the Council breached its duty of fair representation to her by negotiating a lower salary for her; by negotiating higher raises for negotiations team members; by its arbitrary method of developing the salary guide for her title; and by refusing to answer her questions at a ratification meeting. Davis claims that the Board negotiated in bad faith by agreeing to the lower salary and arbitrary salary guide, and discriminated against her by negotiating a lower salary in retaliation for her prior protected activity on behalf of the CEA. By these actions, both respondents are alleged to have interfered or coerced Davis in her exercise of protected activity.

For the reasons stated below, I conclude that the Charging Party did not prove, by a preponderance of the evidence, that the Council breached its duty of fair representation, that the Board negotiated in bad faith, or that either respondent interfered with or coerced Davis in the exercise of protected activity. I further conclude that Davis did not prove that the Council or Board acted in retaliation for her prior activism for the CEA.

The 5.4(b)(1) Allegation

The standards to be applied to an allegation of a breach of the duty of fair representation begin with the Act. N.J.S.A. 34:13A-5.3 provides, in relevant part:

> A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership.

However, a majority representative has broad power to negotiate unit members terms and conditions of employment. A breach of the duty occurs only when a representative's conduct toward a unit member is "arbitrary, discriminatory, or in bad faith." OPEIU, Local 153, P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983); Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976)("Belen"), citing Vaca v. Sipes, 386 U.S. 171 (1967). In Belen the Appellate Division stated:

> ...[T]he mere fact that a negotiated agreement results, as it did here, in a detriment to one group of employees does not establish a breach of duty by the union. The realities of labor-management

> relations which underlie this rule of law were expressed in Ford Motor Co. v. Huffman, 345 U.S. 330, 73 S. Ct. 681, 97 L.Ed. 1048 (1953)("Huffman"), where the Court wrote:
>
> ...The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in servicing the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion....[at 337-338, 73 S. Ct. at 686]
> 142 N.J. Super. at 490-491.

Absent clear evidence of bad faith, arbitrary conduct or invidious discrimination, an employee organization may make compromises which adversely affect some members of a negotiations unit, while benefiting other members.[10/] However, it is important to stress "...that all the facts of each case must be scrutinized to determine whether a breach has been proven; there are no bright line tests." City of Union City, P.E.R.C. No. 82-65, 8 NJPER 98, 99-100 (¶13040 1982). In Union City, the Commission further stated:

> While a breach of the duty does not rise from mere disparities in wage increases or decreases, see, Belen ... a breach does exist when...the exclusive representative makes a deliberate decision in bad faith to cause a unit member economic harm. An employee representative which lacks any reason, besides the desire to punish, for its refusal to seek a compensation increase for a certain position per force operates outside the wide range of reasonableness. (Emphasis added)
> [Id. at 100]

10/ See also, Humphrey v. Moore, 375 U.S. 335 (1964); Hamilton Tp. Ed. Ass'n, P.E.R.C. No. 79-20, 4 NJPER 476 (¶4215 1978); Jersey City, P.E.R.C. No. 87-56, 12 NJPER 853 (¶17329 1986); AFT Local 481, P.E.R.C. No. 87-16, 12 NJPER 734 (¶17274 1986); Bridgewater Raritan Ed. Ass'n., D.U.P. No. 86-7, 12 NJPER 239 (¶17100 1986) and Lawrence Tp. PBA Local 119, P.E.R.C. No. 84-76, 10 NJPER 41 (¶15023 1983).

In July 1993, the Board and Council negotiated a temporary interim increment to be paid to all members, pending the completion of negotiations for a successor agreement. As a result of the interim increment, Davis' salary from September to December 1993 was $52,700, and, effective December 1993, as a result of negotiations, Davis' salary became $51,965. Thus, Davis experienced a salary reduction. In fact, Davis' overall 1993-94 salary was higher than her 1992-93 salary (see finding no. 13). No unit member received less in the '93-94 school year than in '92-'93. After December 1993, Davis' annual salary ($51,965) was less than it was as of September 1993 ($52,700), but higher than her annual rate for 1992-93 (2T133). She only received the $52,700 per annum rate for three and one-half months. Davis is not paid during July and August; thus, to obtain her monthly rate, one can divide her annual rate by ten (2T70). The monthly rate for a ten-month employee receiving $52,700 per year is $5270. Three and one-half months at $5,270 is $18,445 ($5270 x 3.5=18,445). The monthly rate for a ten-month employee receiving $51,965 per year is $5196. The remainder of Davis' ten months' salary for school year 1993-94 --six and one half months-- at a monthly rate of $5196 is $33,774 ($5196 x 6.5=33,774). Thus, Davis' total salary for school year 1993-1994 is the sum of $18,445 and $33,774, or, $52,219. This total annual salary is greater than both her school year 1992-93 salary ($51,190) and her final salary guide rate for school year 1993-94 (51,965).

Even if I found that Davis' salary was reduced, Davis has not shown that she was discriminated against or singled out for adverse treatment. Six other unit members also received lower salaries when the guides were developed. Davis, like these other employees, was the highest paid employee in her job category--ten-month administrative assistant, bachelor's degree. The decisions to grant interim increments, and then use '92-'93 rates as the base guides, led to lower salaries for top-step employees. Nothing in the record indicates that discriminatory intent caused the reductions. Based on the above, I conclude that the Council did not discriminate against Davis.

The record does not support a finding of arbitrary conduct toward Davis. The law required that eligible employees paid on a salary guide be paid an increment even if their representatives were in negotiations, and in the past, eligible unit members had received increments during negotiations. The Board had proposed that the Council waive the payment of increments, but the Council rejected this proposal. The Council proposed average increments, and, as a compromise, the Board agreed to pay <u>all</u> unit members the temporary average increment, even those at or above the top step. These increments were to be superceded by final salary guides. Having been at the top of her category and above the top step of the 92-93 guide, Davis was technically not entitled to an increment in September 1993.

The Council explained that its negotiations strategies were driven by members' concerns about equitable and meaningful salary guides and fairness between their salaries and those of teachers. The Council wanted salary guides with fewer steps which reflected differences based on workyear, advanced degrees and promotions. A rational method of developing guides was followed. Placement of all employees on guides and reducing the number of steps from 20 to 15 cost the unit 1.5 percent of the total package offered by the Board, which came out of the first year's seven percent. The Council proposed a larger increase for those moving from step 14 to step 15, but the Board rejected this. Nothing in these negotiations goals or compromises is arbitrary. Davis has not proven that the Council's conduct toward her or any other member was arbitrary.

Davis claimed that negotiations team members took "good care" of themselves in negotiations, impliedly at the expense of others, but did not produce any credible evidence to support the claim. Almost everyone received the same percentage increases in the last two years of the agreement (5.50 and 5.35 percent), and in the first contract year, team members' increases were around the average for the unit, 5.78 percent. The greater variation in percentage increases during the first year was due to the placement of each member on a guide step and the reduction from 25 to 15 steps in each guide. As Union City instructs, wage disparities alone are not per se violations of the duty of fair representation.

The Council could have proposed that Davis be red-circled and have her salary maintained, but did not. Red-circling, which may have resulted in off-guide salaries, was contrary to the goal of having everyone's salary on a guide.

The evidence Charging Party introduced regarding the personal attitudes of negotiations team members is unpersuasive as proof of bad faith. Davis did not rebut the testimony of Adler, Cathers or Cook that no one specifically discussed her (or any other unit member) during the development of salary guides, proposals or in any negotiations meetings with the Board. I do not conclude, as Davis alleged, that the members of the Council's negotiations team were unresponsive or resentful toward her. Davis has not carried the burden of showing that the Council made "a deliberate decision in bad faith," or acted arbitrarily or discriminatorily toward her in negotiating her apparently lower salary.

The 5.4(a)(3) Allegation

In re Bridgewater Tp., 95 N.J. 235 (1984) articulates the standards to be applied to analyze claims that an employer discriminated against an employee because of protected activity. Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the

employer was hostile toward the exercise of the protected rights. Id. at 246.

If the employer did not present any evidence of a motive not illegal under our Act, or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that union animus was a motivating or substantial reason for the personnel action.

Davis had engaged in protected activity on the CEA's behalf, and I infer that the Board was aware of her activity. However, Davis has not demonstrated that the Board was hostile to her prior advocacy for the CEA. Davis stated that no one from the Board responded to her objection to having her salary lowered. I do not infer hostility from this silence. The Board was engaged in collective negotiations and had a duty to negotiate with the Council on the issue of salaries, rather than with individuals.[11/] There

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11/ The Board did not present any witnesses at the Hearing.

is no other evidence from which to infer that any Board representative was hostile toward Davis. Nor has she shown, by a preponderance of the evidence, that she was singled out for adverse treatment by the Board. Six other employees were in the same situation as Davis. Accordingly, Davis has not proven that the Board discriminated against her because of her protected activity.

The 5.4(a)(1) Allegation

The Act at section 5.3 provides that:

> ...public employees shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity.

Any interference with those rights violates the Act. A public employer independently violates section 5.4(a)(1) of the Act if its actions tend to interfere with an employee's statutory rights and lack a legitimate and substantial business justification.12/

Here, there is no factual basis for concluding that the Board's actions tended to interfere with Davis' protected rights. Davis was permitted to address the Board, but it must be recognized that the Board, at the time, was engaged in collective negotiations and owed a duty of good faith negotiations to the Council over the

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12/ See, New Jersey College of Medicine and Dentistry, P.E.R.C. No 79-11, 4 NJPER 421, 422 (¶4189 1978); N.J. Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550, 551 (Note 1) (¶10285 1979); Jackson Tp., P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988); UMDNJ-Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987); and, Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986).

issue of Davis' salary.[13/] Accordingly, Davis has not proved that the Board's failure to respond to her directly constituted interference or coercion with rights guaranteed to her under the Act.

The 5.4(a)(5) Allegation

In most instances only a majority representative has standing to raise the claim that a public employer has refused to negotiate in good faith. An unfair practice charge filed against an employer by an individual employee must be grounded on a claim that the majority representative, either alone or in collusion with the employer, violated the duty of fair representation. Since the facts in this case do not support the allegation that the Council violated its duty, Davis' claims of collusion and bad faith negotiations by the Board must fail. Accordingly, I decline to find that the Board violated its duty of good faith negotiations and recommend that this part of the charge be dismissed.

The 5.4(a)(7) and 5.4(b)(5) Allegations

Charging Party has not shown what "rule or regulation established by the Commission" has been violated by either Respondent. Accordingly, I recommend that these allegations be dismissed.

13/ While not argued in Charging Party's post-hearing brief, any claim Davis is making concerning a right under the Education tenure laws is outside of the Hearing Examiner's jurisdiction. See, Belen (Appellate Division finds dispute over whether salary reduction violated N.J.S.A. 18A:6-10, should be litigated before Commissioner of Education).

CONCLUSIONS OF LAW

The Camden Administrators Council did not breach its duty of fair representation or violate N.J.S.A. 34:13A-5.4(b)(1) or (5) by negotiating a salary guide which resulted in a salary of $51,965 for Administrative Assistant Sara Davis in November 1993.

The Camden Board of Education did not violate N.J.S.A. 34:13A-5.4(a)(1), (3), (5) or (7) by negotiating a salary guide which resulted in a salary of $51,965 for Administrative Assistant Sara Davis in November 1993.

RECOMMENDATION

I recommend that the Commission **ORDER** that the Complaint be dismissed.

Elizabeth J. McGoldrick
Hearing Examiner

Dated: January 6, 1998
Trenton, New Jersey