P.E.R.C. NO. 86-68

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION,

Respondent,

-AND-

Docket No. CO-82-190-137

EDUCATIONAL SERVICES TEACHERS ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Educational Services Teachers Association against the Essex County Educational Services Commission. The charge had alleged the County violated the Act when it refused to negotiate with the Association. The Commission holds, in agreement with the Hearing Examiner, that the County had no legal obligation to the Association because it had a good faith doubt that it was the majority representative of the employees at the time the negotiations demand was made.

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EDUCATIONAL SERVICES TEACHERS ASSOCIATION,

Charging Party.

Appearances:
For the Respondent, Petit-Clair & Graves, Esquires (Edward F. Petit-Clair, of Counsel)

For the Charging Party, Greenberg, Kelley & Prior, Esquires (James F. Schwerin, of Counsel)

DECISION AND ORDER

On February 1, 1982, the Educational Services Teachers Association ("Association") filed an unfair practice charge against the Essex County Educational Services Commission ("County"). The charge alleged that the County violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), specifically subsections 5.4(a)(1) and (5),[1/] when, on

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; and (5) Refusing to negotiate in good faith with a majority representative of employees in an

(Footnote continued on next page)

October 26, 1981, it refused to negotiate over a contract with the Association.

On June 7, 1982, the Director of Unfair Practices issued a Complaint. The County filed an Answer in which it asserted it had lawfully and totally eliminated its workforce on July 1, 1980 and that no negotiations unit existed at the time the County refused to negotiate. The County further contended that a pending Commissioner of Education proceeding involving the legality of that reduction in force and the rights of affected teachers was significant in determining whether the County had an obligation to negotiate with the Association.

On June 15, 1982, prior to the filing of the County's Answer, the Association filed a Motion for Summary Judgment with a supporting brief. On July 12, 1982, the County filed a response. The Chairman referred the motion to Hearing Examiner Alan R. Howe.

On July 28, 1982, the Hearing Examiner granted summary judgment, H.E. No. 83-2, 8 NJPER 498 (¶13231 1982). Finding no material issues of fact, he concluded that the County had violated the Act when it failed to negotiate with the Association and ordered it to negotiate in good faith. He further found that the County had unilaterally changed the terms and conditions of employment of its

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(Footnote continued from previous page)
appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

teachers and ordered the County to compensate them, effective September 1981, at the annual salary in effect prior to July 1, 1980.

On November 18, 1982, the Commission reversed and remanded the case for a hearing. P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982). In part, we noted the pendency of a Commissioner of Education proceeding involving the teachers' claims they had been improperly terminated and concluded that "we are reluctant to decide summarily this case with virtually no knowledge of that proceeding."

On January 17, 1983, Hearing Examiner Howe conducted a hearing. The Charging Party, however, presented no witnesses. Rather, it rested on the facts admitted by Respondent in its Answer. Respondent then moved to dismiss. Following oral argument, the Hearing Examiner reserved decision pending outcome of the proceeding before the Commissioner of Education.

On August 15, 1984, Administrative Law Judge Stephen G. Weiss issued an initial decision dismissing the Association's petition challenging the Board's decision to terminate its teachers. He concluded that the Board acted in good faith and that the teachers had no right to be rehired. On October 9, 1984, and February 6, 1985, respectively, the Commissioner of Education and State Board of Education affirmed.

On March 4, 1985, the Hearing Examiner granted the Board's motion to dismiss. H.E. No. 85-31, 11 NJPER ___ (¶_____ 1985) (copy attached). Relying on Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 58 LRRM 2657 (1965) and NLRB v. AAA Electric, Inc.,

472 F.2d 444, 82 LRRM 2326 (6th Cir. 1973), he held that the County had no obligation to negotiate with the Association since the elimination of its workforce in July 1980 resulted in the Association's loss of majority representative status for purposes of negotiations 16 months later. He further ruled that the Association's October 22, 1981 demand for negotiations did not obligate the County to resume negotiations since the County did not employ any teachers until October 30, 1981 and therefore the Association was not the majority representative at that time.

On March 14, 1985, the Association appealed. It contends that the elimination of the work force was illegal and therefore the Hearing Examiner erred in finding that the County had no duty to negotiate with the Association.

We have reviewed the record. The Hearing Examiner's findings of fact (pps. 3-7) are accurate. We adopt and incorporate them here.

The applicable standard in ruling on such motions is set forth in New Jersey Turnpike Authority, P.E.R.C. No. 79-81, 5 NJPER 197 (1979):

> ...the Commission utilizes the standard set forth by the New Jersey Supreme Court in Polson v. Anastasia, 55 N.J. 2 (1959). Therein the Court declared that when ruling on a motion for involuntary dismissal the trial court "is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion" (emphasis added). Unlike a number of other jurisdictions, New Jersey Courts have consistently held that before a motion for involuntary dismissal will be

> granted the moving party must demonstrate that not even a scintilla of evidence exists to support plaintiff's case. Thus, while the process does not involve the actual weighing of evidence (as that concept is traditionally understood) some consideration of the worth of the evidence presented may be necessary. [Id. at 198.]

N.J.S.A. 34:13A-5.4(a)(5) makes it an unfair practice for public employers to..."refus[e] 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...". The County voluntarily recognized the Association as the majority representative of its 103 teachers;[2/] negotiations commenced, but no contract was reached. The County totally eliminated its work force in 1980 and did not resume educational services until 16 months later. Shortly before the County hired teachers and resumed services, the Association demanded to negotiate once again. Given the County's conceded refusal to negotiate, the issue here is whether the Association was still the "majority representative" of these employees in October 1981 when the Association demanded negotiations, despite the intervening 16 month period when the County had subcontracted its educational services

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2/ Such voluntary recognition is, of course, valid even in the absence of certification of election results by the Commission. N.J.A.C. 19:11-3.1. Salem City Board of Ed., P.E.R.C. No. 81-6, 6 NJPER 371 (¶11190 1980). See also New Jersey Transit Bus Operations, Inc., P.E.R.C. No. 86-21, 11 NJPER 520 (¶16182 1985); Atlantic County Sewerage Authority, P.E.R.C. No. 81-91, 7 NJPER 99 (¶12041 1981).

and had not employed any teachers. Thus, this case requires us to determine when an incumbent majority representative loses its status and whether this one did.

In Atlantic County Sewerage Authority, P.E.R.C. No. 81-91, 7 NJPER 99 (¶12041 1981), mot. for recon. den. P.E.R.C. No. 81-111, 7 NJPER 162 (¶12072 1980), aff'd App. Div. Dkt. No. A-3252-80 (1/27/83), we impliedly held that an employer may not revoke its recognition of a majority representative for a reasonable period and may not revoke recognition thereafter unless it proves a good faith doubt of the union's continuing majority status. We now adopt and amplify upon that standard.[3/]

1. A union enjoys an irrebutable presumption of continuing majority status for one year after its certification or formal recognition.

2. A union which secures majority status through informal recognition by the employer is entitled to an irrebutable presumption of continued majority support "for a reasonable time."

3. After these periods elapse, it continues to be presumed that the union has majority status, but this presumption is now rebuttable by the following: (1) that at the time of the refusal to negotiate the union in fact no longer enjoyed majority representative status; or (2) that the employer's refusal was predicated on a good-faith and reasonably grounded doubt of the union's continued majority status and

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3/ Preliminarily, we note that the Supreme Court has held that the experiences and adjudications under the Labor Management Relations Act, 29 U.S.C. §141 et seq., our federal counterpart, are appropriate guides in determining unfair labor practices because the language, content and purposes of our Act and the LMRA are substantially the same. In re Bridgewater, 95 N.J. 235, 240-241 (1984); Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Educ. Sec., 78 N.J. 1, 9 (1978).

> raised in a context free of employer unfair labor practices.

Celanese Corp. of America, 95 NLRB 664, 672, 28 LRRM 1362 (1951) cited with approval in NLRB v. Burns Security Services, 406 U.S. 272, 279 n.3, 80 LRRM 2225 (1972). See generally, Morris, The Developing Labor Law (2d ed. 1983) at 540-549; Gorman, Basic Text on Labor Law (1976) at 108-116.

Applying these standards to all the circumstances of this case (and mindful that we are required to view the evidence in a light most favorable to the charging party), we are not persuaded that the County violated any negotiations obligation when it refused the Association's negotiations demand. All unit members represented by the Association were terminated in July 1980 and thereafter the County employed no teachers for 16 months. Thus, for this period of time, the Association did not enjoy majority status. Further, this termination was not tainted by unfair practices. Indeed, the Commissioner and the State Board have just upheld the validity of these terminations and concluded that the laid-off teachers had no rights to be rehired. Further, at the time negotiations were demanded, the County had not yet hired any teachers. Thus, the record does not establish that the Association still enjoyed majority status at that time. Even if we assume, moreover, that the Association's demand was continuous,[4/] it is evident that during

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4/ The legal validity of this assumption is uncertain, e.g., Pre-Engineered Bldg. Prod., 228 NLRB No. 70, 96 LRRM 1170, 1171 (1977)). Compare NLRB v. Fall River Dyeing & Furnishing, __ F.2d. __, 120 LRRM 2825 (1st Cir. 1985). The critical date for determining the union's majority status is generally the date the employer receives the negotiations request.

this entire time, the County must have had a good faith doubt of the Association's continued majority status. New employees were later hired, but the record is devoid of any indication that they desired the Association to represent them or that the Association had previously represented them. Thus, it would require speculation to find that the Board did not doubt the Association's majority status or that a majority of the employees later hired wanted the Association's representation. Finally, we believe this result is consistent with the strong policy of the Act favoring employee free choice in determining what, if any, employee organization should represent employees. N.J.S.A. 34:13A-5.3. We conclude, under the instant circumstances, that the preferred mechanism is a Commission authorized election.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Suskin and Wenzler voted in favor of this decision. Commissioner Graves was opposed. Commissioner Hipp abstained.

DATED: Trenton, New Jersey
November 18, 1985
ISSUED: November 19, 1985

H.E. No. 85-31

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

In the Matter of

ESSEX COUNTY EDUCATIONAL SERVICES
COMMISSION,

Respondent,

-and-

Docket No. CO-82-190-137

EDUCATIONAL SERVICES TEACHERS ASSOCIATION,

Charging Party.

Synopsis

A Hearing Examiner of the Public Employment Relations Commission grants the Respondent's Motion to Dismiss. The Charging Party's Complaint on the grounds that there is not a scintilla of evidence that the Respondent violated subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when on July 1, 1980, for economic reasons, the Respondent terminated all of the 103 teachers in the collective negotiations unit represented by the Charging Party. The Hearing Examiner acted on the basis of Federal precedent, which recognizes the right of an employer to cease operations completely without regard to its motivation. In a related Commissioner of Education proceeding involving the same parties, it was determined that the Respondent's decision to cease totally its operations was valid and that the teachers involved were given proper notice under Title 18A. Also, the Commissioner of Education found that the Respondent did not act in "bad faith." Finally, when the Respondent resumed operations 16 months later, the Charging Party failed to make a valid demand for collective negotiations or recognition at a time when the Respondent had teachers in its employ.

A Hearing Examiner's decision granting a Motion to Dismiss is not a final administrative determination of the Public Employment Relations Commission. The Charging Party has ten (10) days from the date of the decision to request review by the Commission or else the case is closed.

H.E. No. 85-31

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

In the Matter of

ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION,

Respondent,

-and-

Docket No. CO-82-190-137

EDUCATIONAL SERVICES TEACHERS ASSOCIATION,

Charging Party.

Appearances:

For the Respondent
Petit-Clair & Graves, Esqs.
(Edward F. Petit-Clair, Esq.)

For the Charging Party
Greenberg, Kelley & Prior, Esqs.
(James F. Schwerin, Esq.)

DECISION AND ORDER ON RESPONDENT'S MOTION TO DISMISS

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on February 1, 1982 by the Educational Services Teachers Association (hereinafter the "Charging Party" or the "Association") alleging that the Essex County Educational Services Commission (hereinafter the "Respondent") has engaged 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. (hereinafter the "Act"), in that the Respondent employed teaching personnel pursuant to Title 18A for the 1979-80 school year and on December 19, 1979 it formally recognized the Association as the exclusive representative for its teachers; by resolution on July 1, 1980 the Respondent terminated the employment of all teachers represented by the Association and immediately thereafter subcontracted its teaching services for the 1980-81 school year; as a result of legal proceedings instituted by the Association the Appellate Division on October 15, 1981 held that the Respondent had no authority to subcontract its teaching services, which also voided a second subcontract for the

1981-82 school year; on October 22, 1981 the Association demanded that the Respondent renew collective negotiations and on October 26, 1981 the Respondent notified the Association that it would not enter into collective negotiations on the ground that a prior Unfair Practice Charge was pending under Docket No. CO-81-69 and that, thus, a demand for negotiations was premature; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act. 1/

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on June 7, 1982. 2/ Thereafter, on June 15, 1982 , prior to the filing by the Respondent of its Answer, the Charging Party filed a Motion for Summary Judgment with a supporting brief. On June 25, 1982 the Respondent filed its Answer on the merits. The Respondent filed its response to the Motion for Summary Judgment on July 12, 1982.

Pursuant to N.J.A.C. 19:14-4.8(a), the Chairman of the Commission referred the Charging Party's Motion for Summary Judgment to the instant Hearing Examiner under date of July 21, 1982. The Hearing Examiner issued his Decision and Order on the Charging Party's Motion for Summary Judgment on July 28, 1982, in which he granted the Charging Party's Motion for Summary Judgment: H.E. No. 83-2, 8 NJPER 498.

Thereafter, the Respondent filed exceptions and the Commission on November 18,

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1/ These Subsections prohibit public employers, their representatives or agents from:

"(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.

"(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, or refusing to process grievances presented by the majority representative."

2/ On June 3, 1982 the Commission's Director of Unfair Practices refused to issue a Complaint as to Docket No. CO-81-69, which charge had alleged a violation of the Act by the Respondent by not negotiating with the Association its decision to subcontract. The Director acted on two grounds, namely, that a decision to subcontract was a managerial prerogative and because of his decision to issue a Complaint in the instant case on the same date "...litigation of the first charge is not warranted and duplicative of other proceedings..." DUP No. 82-36, 8 NJPER 354 (1982).

1982 reversed the Hearing Examiner's grant of summary judgment and remanded the matter for hearing and for further proceedings consistent with the Commission's decision: P.E.R.C. No. 83-65, 9 NJPER 19.

Following a prehearing conference on December 7, 1982, four hearing dates were scheduled. On the first day, January 17, 1983, the Charging Party presented no witnesses and elected to stand on the admitted facts in the Complaint and Answer, following which the Respondent orally made a Motion to Dismiss (Tr. 15). After oral argument the Hearing Examiner reserved decision pending the outcome of a Title 18A proceeding involving the same parties before the Commissioner of Education: OAL Docket No. EDU 1666-82, to be explicated more fully hearinafter.[3/]

SUMMARY OF THE TITLE 18A PROCEEDINGS

The Commissioner of Education proceedings date back to 1980 and involve the effort of the Association to secure reemployment rights for the 103 teachers who were terminated by the Respondent effective July 1, 1980 after having been employed since September 1979.

On April 10, 1982 Chief ALJ Howard H. Kestin entered a prehearing order in which he framed the issue before him as including the employment or reemployment rights of 103 teachers under Title 18A, who were employed by the Respondent in 1979-80: were they properly terminated and do they have rights of reemployment and, if so, what are their tenure and pension rights?

On June 23, 1982 Chief Judge Kestin denied the Respondent's for Motion for Summary Judgment and permitted the Association ("Petitioner") to move for Partial Summary Judgment.

3/ During the oral argument on January 17, 1983, the parties confirmed that the OAL proceeding involved the issue of the validity of the 100% termination of teachers as of July 1, 1980. The Hearing Examiner sua sponte decided to reserve decision since the instant case might turn one way or the other, depending upon whether there were teachers with employment or reemployment rights at the time of the Association's demand to negotiate on October 22, 1981 (Tr. 34-38).

On January 26, 1984 Chief Judge Kestin granted the Association's Motion for Partial Summary Judgment, concluding that the Commissioner of Education had the authority to provide a remedy, based on his perception of fairness and equity since "educational services commissions" are a part of the State Department of Education. Thus, the Respondent's acts were subject to the supervisory jurisdiction of the Commissioner of Education. Further, Chief Judge Kestin concluded that the Respondent's teachers, who were terminated July 1, 1980 "... are recognized as having, in principle, rights of employment, reemployment, tenure accumulation, and pension membership..."

Following the filing of exceptions with the Commissoner of Education by the Respondent, the Commissioner on March 22, 1984 reversed Chief Judge Kestin, rejecting his conclusion that educational services commissions are creations of the State Board of Education. Thus, the Commissioner is not authorized to overturn actions of an educational services commission. The Commissioner remanded the matter to OAL for a full and immediate hearing on the merits.

ALJ Stephen G. Weiss issued an Initial Decision on August 15, 1984, after hearing, in which he concluded that the Respondent's action in terminating the employment of its teaching staff on July 1, 1980, and the contracting out to a third party, "...was not shown by petitioner (Association) to have been the product of bad faith..." The ALJ had also stated that the subcontracting was "...neither arbitrary, capricious, unreasonable nor otherwise the product of some malicious effort to deprive any teachers employed by it of their lawful rights..."

On October 9, 1984 the Commissioner of Education issued his Decision on Remand, in which he affirmed the findings and conclusions of ALJ Weiss. He accepted the ALJ's conclusion that the Respondent had not acted in "bad faith," but then considered the Association's additional contention that the terminated teachers had not received proper notice in April, May and July, 1980 pursuant to N.J.S.A. 18A:27-10-12, inclusive. These provisions refer to notice to non-tenured teaching staff, which the Commissioner

concluded had been satisfied, notwithstanding that some of the original notices issued after April 30, 1980. The Association's appeal was "dismissed with prejudice."

Finally, on February 6, 1985, the State Board of Education issued a decision affirming the Commissioner for the reasons expressed by him.

* * * *

Following the February 6th decision of the State Board of Education, supra, the Hearing Examiner advised counsel for the parties on February 14, 1985 that he would proceed to adjudicate Respondent's Motion to Dismiss and would not await any further possible appeal by the Charging Party.

* * * *

The Hearing Examiner makes the following Findings of Fact for the purpose of adjudicating the Respondent's Motion to Dismiss, which findings are based upon the Complaint and Answer, a stipulation of counsel on January 17, 1983, and the relevant findings in the Commissioner of Education proceeding, supra:

1. The Essex County Educational Services Commission is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Educational Services Teachers Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. The Respondent is an educational body organized pursuant to N.J.S.A. 18A:6-52, and for the 1979-80 school year it employed 103 teachers for the delivery of direct services to non-public school children pursuant to N.J.S.A. 18A:46A-1 et seq. and N.J.S.A. 18A:46-19.1 et seq.

4. In the Fall of 1979 the President of the Association requested in writing that the Respondent recognize it as the exclusive negotiating representative for its teachers and on December 13, 1979 the Respondent formally recognized the Association.

5. The Respondent on April 25, 1980 notified 61 of its teachers that they

would not be offered employment for the following year pursuant to N.J.S.A. 18A:27-10b.

6. Between May 21 and June 24, 1980 the Respondent received notice that the Attorney General was of the opinion that it could not lawfully borrow money and, as a result, the Respondent on July 1, 1980 adopted a resolution effecting a total reduction in force as to the remaining teachers represented by the Association pursuant to N.J.S.A. 18A:28-9.

7. The teaching services that were to have been provided by the Respondent for the 1980-81 school year were thereafter subcontracted to a private employer, Education & Training Consultants, Inc., which provided the said services for the 1980-81 school year.

8. In December 1980 the Charging Party instituted legal proceedings in the Superior Court, Chancery Division, Essex County, alleging that the subcontracting by the Respondent was ultra vires.

9. On October 15, 1981, the Appellate Division, reversing the Superior Court, held that the Respondent's subcontracting of services was ultra vires.

10. The Respondent had entered into a second subcontract for the 1981-82 school year with Remedial Education & Diagnostic Services, Inc. ("READS") to provide teaching services.[4/]

11. On October 22, 1981 counsel for the Charging Party requested in writing of counsel for the Respondent that it continue collective negotiations.

12. On October 26, 1981 counsel for the Respondent declined the demand for negotiations as being premature in view of the pendency of an earlier Unfair Practice Charge, which had been filed by the Charging Party on September 18, 1980 and docketed as CO-81-69 (see footnote 2, supra).

13. It was stipulated at the hearing on January 17, 1983 that after the Appellate Division decision of October 15, 1981, the Respondent hired its first teacher

4/ Although the Respondent does not admit in its Answer the Charging Party's allegation that it dishonored the contract with READS, the Appellate Division decision, supra, would clearly appear to cover READS as well as Education & Training Consultants, Inc.

in or around October 30, 1981 (Tr. 51).

14. As found in the Commissioner of Education proceeding, supra, the Commissioner held that the 103 teachers of the Respondent, who were terminated on or before July 1, 1980, were given proper notice under Title 18A, and further, that the Respondent had not acted in "bad faith" when it adopted its termination resolution on July 1, 1980. Additionally, the initial subcontract in 1980 was found to be legal and did not "deprive any teachers... of their lawful rights."

DISCUSSION AND ANALYSIS

The Applicable Standard on a Motion To Dismiss

The Commission in New Jersey Turnpike Authority, et al., P.E.R.C. No. 79-81, 5 NJPER 197 (1979) amplified upon the standard that it had enunciated in Township of North Bergen, P.E.R.C. No. 78-29, 4 NJPER 15 (1977) with respect to the applicable standard on a Motion to Dismiss made at the conclusion of the Charging Party's case. The Commission there restated that it utilizes the standard set forth by the New Jersey Supreme Court in Dolson v. Anastasia, 55 N.J. 2 (1969). The Commission observed that:

> "...Therein the Court declared that when ruling on a motion for involuntary dismissal (at the close of the plaintiff's case) the trial court 'is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion' (emphasis added). Unlike a number of other jurisdictions, New Jersey Courts have consistently held that before a motion for involuntary dismissal will be granted the moving party must demonstrate that not even a scintilla of evidence exists to support the plaintiff's case. Thus, while the process does not involve the actual weighing of evidence... some consideration of the worth of the evidence presented may be necessary. This is particularly true in the administrative context where evidence, which would ordinarily be ruled inadmissible by a trial court may, under In re Application of Howard Savings Bank, 143 N.J. Super. 1 (App. Div. 1976), be allowed in at an administrative hearing..." (5 NJPER at 198) (Emphasis supplied).

Having set forth the applicable standard on a Motion to Dismiss at the conclusion of the Charging Party's case, the Hearing Examiner now turns to

the evidence presented by the Charging Party in light of the above standard.

The Respondent's Motion To Dismiss Is Granted

Clearly, the factual situation presented in this case is unique among cases filed with the Commission since there is no applicable Commission precedent. Thus, resort must be had to the decisions of the Federal Courts and National Labor Relations Board, the propriety of which has been recognized by the New Jersey Supreme Court most recently in Bridgewater Township v. Bridgewater Public Works Association, 95 N.J. 235, 240, 241 (1984).

When the Association was voluntarily recognized as the exclusive representative of the Respondent's teachers in December 1979, that recognition created a rebuttable presumption of continuing majority status: NLRB v. Carilli, 648 F. 2d 1206, 1214, 107 LRRM 2961, 2968 (9th Cir. 1981). In order to overcome this presumption, an employer, in the normal situation, bears the burden of establishing a reasonable good faith doubt of continuing majority support: Zim's Foodliner, Inc. v. NLRB, 495 F. 2d 1131, 85 LRRM 3019, 3024 (7th Cir. 1974). The reason that the Hearing Examiner used the phrase "in the normal situation" is that this case does not involve the normal situation since the Respondent validly terminated all of its 103 teachers as of July 1, 1980 and thereafter did not again employ any teachers until October 30, 1981. Additionally, as found by the Commissioner of Education, supra, the Respondent did not act in "bad faith" vis-a-vis the Association at that time. Thus, there was a hiatus of 16 months during which no teachers were employed by the Respondent.

It is true, as contended by the Charging Party, that the Respondent counsel's letter of October 26, 1981 did not allege a loss of majority support by the Association, coupled with a good faith doubt as a basis for declining to enter into negotiations, nor did counsel assert that Respondent had employed no teachers as of that date. Instead, counsel referred to the earlier Unfair Practice Charge, then still pending, indicating that negotiations would be premature.

In concluding that the Charging Party's evidence of an alleged violation of Subsection (a)(5) of the Act is less than a scintilla, the Hearing Examiner first cites Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 58 LRRM 2657 (1965). This case was decided on an alleged violation of Section 8(a)(3) of the National Labor Relations Act, which is analogous to Subsection (a)(3) of our Act. Although a Section 8(a)(5) violation was alleged in Darlington, it was not involved in the decision. There were two aspects of the decision, the first involving the complete closing of its operation by an employer, and the second involving a partial closing. It is the complete closing aspect that the Hearing Examiner considers in view of what occurred herein on July 1, 1980. There the Supreme Court stated:

> "...We hold here only that when an employer closes his entire business, even if the liquidation is motivated by vindictiveness towards the union, such action is not an unfair labor practice..." (58 LRRM at 2661).

The Court also said that: "...The closing of an entire business, even though discriminatory, ends the employer-employee relationship; the force of such a closing is entirely spent as to that business when termination of the enterprise takes place" (58 LRRM at 2661) (Emphasis supplied).

Another Federal Court of Appeals case, which is pertinent to the factual situation herein is NLRB v. AAA Electric, Inc., 472 F.2d 444, 82 LRRM 2326 (6th Cir. 1973). This case involved the effect to be given to a prehire agreement under Section 8(f) of the NLRA, which permits construction industry employers and unions to enter into an agreement before the employer has hired any employees. Employer A, the predecessor to AAA Electric, had not formally recognized the union when it entered into a prehire agreement whereby the union would supply it with qualified employees. Over a considerable period, Employer A's employees engaged in a slowdown, as a result of which Employer A terminated all of its employees. AAA Electric, the successor to

Employer A, hired some of A's employees. The Court, in disagreeing with an NLRB finding of violation, inter alia, of Section 8(a)(5), found that there had been no formal recognition of the union by Employer A and that AAA Electric, as a successor employer, was not obligated to bargain: Davenport Insulation Co., 184 NLRB No. 114, 74 LRRM 1726 (1970).

Although AAA Electric is distinguishable from the instant case inasmuch as the Association herein was voluntarily recognized, the Court in AAA Electric also assumed arguendo that even if the Section 8(f) prehire agreement was construed as having granted recognition to the union (by Employer A), "...the valid economic termination of all of the employees nevertheless would result in the loss of the recognition. There is no duty to bargain with a Union representing employees who were validly discharged." (82 LRRM at 2329) (Emphasis supplied).

The Hearing Examiner finds the cases of Darlington and AAA Electric highly persuasive and supportive of the Hearing Examiner's conclusion that given the valid termination of the Respondent's 103 teachers as of July 1, 1980, and the fact that it did not resume its operation until in or around October 30, 1981, the Association lost its majority status as the exclusive representative of the Respondent's teachers. Recall that in Darlington the Supreme Court stated that a total closing "...ends the employer-employee relationship..." and that in AAA Electric the Court stated that a valid economic termination of all employees "...would result in the loss of the recognition..."

The Hearing Examiner notes that the Charging Party in a reply letter brief, dated September 10, 1982, stated that it agreed that the Respondent was not a "successor employer to READS" but rather "...is more properly characterized as an employer which ceased operations and then resumed at a later date..." (p. 5). Thus, the Charging

Party has acknowledged that the Respondent ceased its operations on July 1, 1980 and did not resume operations again until a "later date," which, on the instant record, would be on or about October 30, 1981.

The cases cited by the Charging Party, which involve a temporary closing by an employer in order to avoid or defeat the union, have no application to the instant case. Here we are presented with a valid 100% termination of operations and a resumption 16 months later, all of which is untainted by any anti-union animus or illegal conduct on the part of the Respondent. Compare: NLRB v. Southern Plasma Corp., 626 F.2d 1287 (5th Cir. 1980) and HLH Products, etc. v. NLRB, 396 F.2d 270 (7th Cir. 1968).

Also, there is not involved in this case any action or conduct by the Respondent, which operated to undermine or defeat the Association's majority status. Thus, the cited case of NLRB v. Alterman Transport Lines, Inc., 587 F.2d 212, 228 (5th Cir. 1979) has no application.

Further, the cases cited by the Charging Party, which involve extensive turnover of employees, are not germane since those employers had continuity of operation: Pioneer Inn Associates v. NLRB, 578 F.2d 835 (9th Cir. 1978) and NLRB v. Washington Manor, Inc., 519 F.2d 750 (6th Cir. 1975).

Both parties cite for different reasons the New Jersey Supreme Court decision in Galloway Township Board of Education v. Galloway Township Association of Educational Secretries, 78 N.J. 1 (1978). It will be recalled that in that case the collective negotiations unit consisted of seven secretaries and the Association was the majority representative. During negotiations six of the seven secretaries separated from employment with the Board. The vacancies created were filled by new employees, the Court stating: "...Thus, the job titles which were included in the negotiating unit

represented by the Association continue to exist, although different employees hold the jobs at present..." (78 N.J. at 17). No representation proceeding had been initiated to oust the Association even though the certification year long since expired.

The Board in Galloway, supra, had persuaded the Appellate Division that the resignation of the six secretaries was tantamount to a dissolution of the Association and that the case was moot. The Supreme Court reversed, concluding that the fact that six of the seven original employees in the unit were no longer employed was not conclusive of the dissolution of the employee organization. The Court clearly took cognizance of the fact that although six employees were replaced, a unit of seven employees continued to exist, notwithstanding the change in the identity of the employees. Thus, at all times, there was continuity of employees in job titles that had existed since the Association's certification.

Plainly, the facts in Galloway clearly distinguish the situation there from that of the case at bar. Unlike Galloway, the 103 teachers employed by the Respondent were terminated as of July 1, 1980 and no employees or job classifications continued in the recognized collective negotiations unit.

The next issue to be considered is the effect of the October 22, 1981 request of counsel for the Charging Party to the Respondent that it continue collective negotiations, and the response of counsel for the Respondent on October 26, 1981 declining to do so. On neither date had the Respondent employed any teachers, the first teacher not having been hired until in or around October 30, 1981. The Charging Party, in a Brief dated August 25, 1982, states that once the Respondent began hiring employees it "...ended the last possibility of a legitimate defense to a duty to negotiate, and the fact that the demand (October 22, 1981) may have preceded the first

effective steps taken to put bodies into teaching positions should not be accorded any significance..." (pp. 7, 8).

Unfortunately for the Charging Party, the Hearing Examiner perceives that the time relationship between a demand for recognition and the achieving of majority status is critical and cannot be disregarded. In the discussion which follows, the Hearing Examiner construes the Charging Party's written request for negotiations on October 22, 1981 as tantamount to a demand for recognition given the total cessation of operations by the Respondent as of July 1, 1980.

In NLRB v. Arkansas Grain Corp., 390 F.2d 824, 67 LRRM 2773 (8th Cir. 1968) a union, in an initial organizing situation, made a demand for recognition on January 27, 1966, at a time when it lacked a majority, having only 35 authorization cards out of a total of 73 employees. The union again, on February 1st, made a second demand for recognition when it had 36 authorization cards, still lacking a majority. In its second demand the union indicated its willingness to submit to a card check and stated that its request for recognition should be treated as a "continuing demand." On February 3rd, the union received its 37th authorization card, giving it a bare majority but there was no further demand made for recognition. By February 7th, three more employees had signed cards, bringing the total number of authorization cards to 40. The NLRB, on the theory of "continuing demand for recognition," found a violation of Section 8(a)(5) when the employer refused to bargain. In denying enforcement, the Court held that the employer did not refuse to recognize and bargain with the union since the union did not represent a majority at the time of the demand for recognition. The Court said: "...Absent a majority representation, the Union's demands were meaningless and therefore ineffective to form a basis upon which to predicate an unlawful refusal to bargain....An employer's motivations behind his refusal to bargain become relevant only if in fact a majority representation does exist..." (67 LRRM at 2776) (Emphasis supplied).

The Hearing Examiner concludes that Arkansas Grain affords a sufficient basis to reject the Charging Party's contention that even though there were no teachers employed by the Respondent when the Charging Party made its demand for negotiations (recognition) that fact "...should not be accorded any significance..." The Hearing Examiner believes that the absence of teachers in the Respondent's employ on October 22nd is legally significant. In so concluding, the Hearing Examiner has considered and rejects the reasoning of a case cited by the Charging Party, which involves the timing of demands for recognition: NLRB v. Barney's Supercenter, Inc., 296 F.2d 91, 49 LRRM 2100 (3rd Cir. 1961).

In Barney's, the union obtained 10 authorization cards out of a total employee complement of 26 and made a demand for recognition on May 26, 1958. The employer begged time to speak to his associates before action could be taken. On June 6th the union secured five additionally cards for a total of 15, which constituted only a bare majority since the employer had increased its work force to 29 employees on that date. On the same date, June 6th, the union spoke to various officials of the employer and recognition was not granted (also, there was no separate demand on that date). Thereafter, on June 15th, 17 employees voted to strike. The employer argued that it did not refuse to bargain since the union failed to make an unequivocal independent bargaining demand after receiving majority status. The union had only offered a card check, which was rejected. The Court held that a request to bargain need not follow a specific form so long as there is clear communication and the employer understands that a demand is being made. The Court considered the fact that the union had made its initial request for recognition before it had obtained a majority, and that "...such a request, although invalid when made, certainly would be of significance in interpreting the acts of the parties once majority status is achieved." (49 LRRM at 2102). The Court went on to note that the June 15th strike was a factor indicating that the employer clearly knew that a majority of its employees were requesting bargaining.

* * * *

In conclusion, the Hearing Examiner recapitulates that the basis for his granting the Respondent's Motion To Dismiss is that there is not a scintilla of evidence that the Respondent was illegally motivated when, due to the opinion of the Attorney General that it could not lawfully borrow money, it adopted a resolution on July 1, 1980 effecting a total reduction in force of its 103 teachers represented by the Association (see Finding of Fact No. 6, supra). The Commissioner of Education proceeding determined that the 103 teachers Riffed by the Respondent were given proper notice under Title 18A, that the Respondent did not act in "bad faith" and that the subcontracting out in July 1980 was legal and did not deprive any teachers of their lawful rights (see Finding of Fact No. 14, supra). Further, the Respondent had no teachers in its employ when the Charging Party made a demand for collective negotiations on October 22, 1981 (see Findings of Fact Nos. 11 and 13, supra). Thus, the demand of the Charging Party was invalid and of no effect.

Thus, upon the facts established by the pleadings, the pertinent facts established in the Commissioner of Education proceeding, and the stipulation of counsel that the first teacher was not hired until in or around October 30, 1981, the Hearing Examiner makes the following:

ORDER

Upon the record heretofore made, the Hearing Examiner grants the Respondent's Motion To Dismiss and the Complaint is dismissed in its entirety.

Alan R. Howe
Hearing Examiner

DATED: March 4, 1985
Trenton, New Jersey