P.E.R.C. NO. 88-72

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY (DEPARTMENT OF EDUCATION),

Respondent,

-and-

Docket No. CO-86-156-152

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the State of New Jersey (Department of Education) violated the New Jersey Employer-Employee Relations Act when the director of the department's Center for Occupational Education and Demonstration connected the reduction of vacation benefits to the filing of an earlier grievance. The Commission finds that this sent an unlawful signal to the employees: file a grievance and punishment will follow.

The Commission further, however, dismisses a complaint based on an unfair practice charge filed by CWA alleging that the State violated the Act when it unilaterally announced and implemented a new vacation policy which reduced vacation days for certain teachers at the Center for Occupational Education and Demonstration. The Commission finds that this change was in accordance with the parties' collective negotiations agreement.

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STATE OF NEW JERSEY (DEPARTMENT OF EDUCATION),

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-and- Docket No. CO-86-156-152

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party.

Appearances:

For the Respondent, Hon. Cary Edwards, Attorney General (Michael L. Diller, Deputy Attorney General)

For the Charging Party, Steven P. Weissman, Esq.

DECISION AND ORDER

On December 16, 1985, the Communications Workers of America, AFL-CIO ("CWA") filed an unfair practice charge. CWA alleges that the State violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (3) and (5),[1/] when it unilaterally announced and

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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. (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.

Footnote Continued on Next Page

implemented a new vacation policy which reduced vacation days for certain teachers at the Center for Occupational Education and Demonstration (COED). The charge further alleges that COED's director, when announcing the new policy, stated it was in retaliation for a CWA grievance.

On April 10, 1986, a Complaint and Notice of Hearing issued. On April 21, the State filed its Answer. The State admits that it issued a policy changing vacation benefits, but contends it had the right to do so under the parties' collective negotiations agreement. It denies the Complaint's remaining allegations.

On June 24 and 26, October 2 and 9, 1986, Hearing Examiner Marc F. Stuart conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

On June 30, 1987, the Hearing Examiner issued his report and recommended decision. H.E. No. 87-76, 13 NJPER 604 (¶18228 1987). He concluded that the change in vacation policy for unclassified instructors at COED did not violate the Act because it was authorized by the parties' collective negotiations agreement. However, he found that the Director's statements when he announced the policy violated subsection 5.4(a)(1).

1/ Footnote Continued From Previous Page

(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."

On August 3, 1987, after receiving an extension of time, CWA filed exceptions. It contends that the Hearing Examiner erred in finding the contract language clear on its face thereby allowing the State to reduce the number of vacation days.[2/] CWA asserts that the Hearing Examiner failed to review the entire contract article, instead relying on an isolated subparagraph. It contends that the contract prohibits unilateral changes in vacation benefits.

On August 5, 1987, after receiving an extension, the State filed its exceptions. It contends the Hearing Examiner erred in concluding that it violated subsection 5.4(a)(1) with regard to the manner in which COED's director conducted a meeting of instructors called to announce the vacation policy change.

We have reviewed the record. The Hearing Examiner's findings of fact (pp.3-11) are accurate. We adopt and incorporate them here. We add the following. In paragraph 4, Article XXIV should have been included in its entirety. That article states:

ARTICLE XXIV
VACATION LEAVE AND ADMINISTRATIVE LEAVE FOR UNCLASSIFIED EMPLOYEES

> In accordance with applicable rules, regulations, and policies, employees serving in the unclassified service shall have an option of selecting a policy of vacation leave and administrative leave as prescribed by the State for employees in the classified service or the policy of vacation leave and administrative leave for unclassified employees as determined to be appropriate by the Department Head. This option may be exercised not more than once on forms

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2/ It also requested oral argument. We deny that request.

furnished by the respective employee's Personnel Officer. The department policy in effect on the date of the signing of the Agreement shall not be changed without prior notice to and negotiations with the Union.

The provisions of the above paragraph shall not apply to employees whose work schedules are governed by the academic calendar.

Teachers serving in the unclassified service of 12-month assignments shall be entitled to vacation days equivalent to those employees in the classified service and shall also be entitled to holidays and personal leave days as set forth in this Agreement for the classified service. Such teachers employed prior to July 1, 1979 and having less than five (5) years service shall by exception be granted fourteen (14) vacation days in each full year of employment until their fifth anniversary.

The schedule as to utilization of this vacation and holiday leave shall be consistent with the academic calendar. However, requests for use of the balance of leave days, not determined by the academic calendar, shall be honored where practicable and operationally non-disruptive, and special attention shall be given to requests for such time off in the summer months.

Such 12-month teachers shall be granted not less than three (3) days of professional development time for work shops and other similar non-student contact activities, in addition to time provided by statute for the professional convention.

A program to schedule vacation time at each institution or agency will be established by the appropriate management official. Conflicts concerning the choice of dates when scheduling vacation will be resolved within the work unit on the basis of State seniority. For purposes of this article, an unclassified employee shall begin to accumulate State seniority from the date of initial hire with the State of New Jersey until there is a break in service.

> This provision does not apply to ten (10) month employees whose work schedules are governed by an academic calendar.

The legal principles governing this case are undisputed. The State changed the number of vacation days granted to COED teachers. This involved a mandatory subject of negotiations and the State did not negotiate prior to making the change. The State, therefore, violated the Act unless it can establish that it had the contractual right to make the change. E.g., Pascack Valley Bd. of Ed., P.E.R.C. No. 81-61, 6 NJPER 554, 555 (¶11280 1980).[3/] To establish such a contractual waiver, however, the agreement must clearly and unequivocably authorize the employer to make the change. E.g., Red Bank Reg. Ed. Ass'n v. Red Bank Reg. Bd. of Ed., 78 N.J. 122, 140 (1978). In State of New Jersey, P.E.R.C. No. 86-64, 11 NJPER 723 (¶16254 1985), we said:

> [I]n determining the existence of a waiver of statutory rights prescribing bargaining responsibilities, [we] will look to a variety of factors, including the precise wording of the relevant contractual clauses or agreements under consideration, the evidence of the negotiations that occurred leading up to the execution of the provisions that are being asserted as constituting a waiver, and the completeness of the clause or agreements, that are being scrutinized.

The Hearing Examiner found that the contract authorized the change. He relied solely on that portion of Article XXIV which

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3/ Once again, however, we simply point out that this case should have been deferred to binding arbitration. See Tp. of Pennsauken, P.E.R.C. No. 88-41, 14 NJPER ____ (¶ 1987).

provides that "teachers serving in the unclassified service of 12-month assignments shall be entitled to vacation days equivalent to those employees in the classified service and shall also be entitled to holidays and personal leave days as set forth in this Agreement for the classified service." He determined that equivalent means equal or the same (slip opinion at 12). Therefore, he concluded that COED teachers were to receive the same number of vacation days as the employees in the classified service. Because he determined that the contract language was clear, he declined to consider extrinsic evidence, such as negotiations history and past practice.

We agree with the Hearing Examiner that the third paragraph of Article XXIV establishes that unclassified "teachers" are to receive the same vacation schedule as employees in the classified service. But the entire Article must be considered. The key question presented is whether the first paragraph applies to these employees. If it does, they have the option of receiving what employees in the classified service receive or "the policy of vacation leave...for unclassified employees as determined to be appropriate by the Department Head." The latter option, if applicable, would support CWA's position because the Department of Education has a policy giving unclassified employees the option of receiving 22 vacation days. The key paragraph, therefore, is the second, which provides that "the provisions of the above paragraph shall not apply to employees whose work schedules are governed by

the academic calendar." The language supports the State's position: the teachers work schedules are governed by the academic calendar because they teach when school is in session. In addition, the third paragraph also indirectly supports this position. There would have been no need for this article if paragraph one was applicable to these teachers since they would have received that received by employees in the classified service by virtue of the first paragraph. The fourth paragraph, which refers to the third, assumes that these teachers are governed by the academic calendar. CWA, however, has strenuously argued that this clause only applies to ten-month teachers. Under this case's circumstances, we cannot agree. First, the clause is not so limited and does not distinguish between ten and twelve month employees. In contrast, the last paragraph of the same article provides that the preceding paragraph does not apply to "ten (10) month employees whose work schedules are governed by an academic calendar." The parties were thus aware of the distinction between ten and twelve month employees.

Under these circumstances, the prior practice cannot control the agreement's language. In this regard, we note that the practice was limited to those relatively few teachers at the Department of Education. The vast majority of teachers, in the other departments, did not receive that benefit.

Nor do we believe that the negotiations history supports CWA's position that paragraph 3 provided for a minimum level of benefits, other terms and conditions were to be unchanged and there

was no intent to reduce vacation benefits. Paragraph 2 had been in existence since 1977: the contractual vacation option had never been applicable to these teachers because their work schedule was always governed by the academic calendar. Again, the contrary practice cannot control over this language. The fact that a few teachers, out of the many teachers governed by the contract, received more due to the policy of one department does not mean that they were contractually entitled to receive them.

CWA also contends that the State is now estopped from asserting this contractual provision because employees had been in the past granted additional time. We find no merit to this argument. This doctrine is not applicable here because we find the contract controls. Contrary behavior is insufficient to set the contract aside. The policy was simply changed to conform to the collective negotiations agreement.

We also dismiss the subsection 5.4(a)(3) claim. The State was not motivated by anti-union animus when it changed the vacation policy. Even though the Director made statements that the change was motivated by the grievance, he was not responsible for the change. Rather, it was the State's Office of Employee Relations and there is no evidence it was illegally motivated. It was motivated by its interpretation of the collective negotiations agreement.

We agree with the Hearing Examiner that the Director's statements at the September 1985 meeting violated subsection 5.4(a)(1). Accepting the Hearing Exainer's credibility

determinations, the record establishes that the Director connected the reduction of vacation benefits to the filing of an earlier grievance. This sent an unlawful signal to the employees: file a grievance and punishment will follow. See Atlantic Comm. Coll., P.E.R.C. No. 87-33, 12 NJPER 764 (¶17291 1986), aff'd App. Dkt. No. A-1504-86T1 (7/8/87); Tp. of Mine Hill, P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); Mercer Cty., P.E.R.C. No. 86-33, 11 NJPER 589 (¶16207 1985) (employer has the right to aggressively state its position on matters concerning unionism, but can make its views known without making conscious overstatements that have the tendency to coerce employees from engaging in protected activities).

ORDER

The State of New Jersey (Department of Education) is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act through one of its agents, the Director of COED, who linked the employees exercise of protected activities, i.e. filing a grievance, to their reduction in vacation benefits, and made certain other statements which could reasonably interfere with the employees' exercise of protected activities.

B. Take the following affirmative action:

1. Post in all places where notices to employees are customarily posted at COED, copies of the attached notice marked as

Appendix "A." Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

2. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

C. The subsection 5.4(a)(3) and (5) allegations are dismissed in their entirety.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

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

DATED: Trenton, New Jersey
January 21, 1988
ISSUED: January 22, 1988

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing our employees in the exercise of the rights guaranteed to them by the Act through one of our agents, the Director of COED, who linked the employees' exercise of protected activities, i.e., filing a grievance, to their reduction in vacation benefits, and made certain other statements which could reasonably interfere with the employees' exercise of protected activities.

Docket No. CO-86-156-152 STATE OF NEW JERSEY (DEPARTMENT OF EDUCATION)
(Public Employer)

Dated _____ By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.

H.E. NO. 87-76

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

In the Matter of

STATE OF NEW JERSEY, DEPARTMENT
OF EDUCATION,

Respondent,

-and-

Docket No. CO-86-156-152

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent State of New Jersey violated §§5.4(a)(1) of the New Jersey Employer-Employee Relations Act when in September, 1985, the Director of COED, a facility within the State Department of Education, conducted a meeting of COED teaching instrctors and made statements which could reasonably interfere with the instructors exercise of protected activities.

The Hearing Examiner further recommends that the Public Employment Relations Commission find that the Respondent State of New Jersey did not violate §§5.4(a)(5), (3) or, derivatively, (1), when it unilaterally altered the vacation benefits of COED instructors in accordance with express provisions of the parties' collective negotiations agreement.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 87-76

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

In the Matter of

STATE OF NEW JERSEY, DEPARTMENT
OF EDUCATION,

Respondent,

-and- Docket No. CO-86-156-152

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Charging Party.

Appearances:

For the Respondent
Michael L. Diller, D.A.G.

For the Charging Party
Steven P. Weissman, Esq.

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On December 16, 1985, the Communications Workers of America ("CWA") filed unfair practices charges with the Public Employment Relations Commission. The CWA alleged that on or around September 16, 1985, the "instructors/teachers"[1/] at the Center for

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1/ There is some dispute between the parties as to which is the proper designation of the employees in question, although the CWA has stipulated that "for purposes of Article XXIV (J-1) the term, "teachers" emcompasses instructors," (see Charging Party's brief, page 12). In my report, I shall use the terms interchangeably, and no conclusions should be drawn from the use of either one or the other term.

Occupational Education and Demonstration (COED), a facility within the State Department of Education, would be unilaterally placed under a new vacation schedule resulting in a reduction of vacation days affecting approximately 75% of the instructors. The CWA alleged this to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (3) and (5)[2/]

Since the allegations of the charge, if true, might constitute unfair practices, a Complaint and Notice of Hearing was issued on April 10, 1986. On April 21, 1986, the State filed an Answer denying having committed any violations under the Act. An evidentiary hearing, at which the parties examined witnesses, presented evidence, and argued orally was conducted on June 24, June 26, October 2 and October 9, 1986. Following the granting of extensions, the CWA filed a post-hearing brief on January 27, 1987. The State filed its brief on February 6, 1987. Thereafter, the CWA filed a reply brief on February 17, 1987.

Upon the entire record, the Hearing Examiner makes the following:

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

FINDINGS OF FACT

1. The State of New Jersey, Department of Education is a public employer within the meaning of the Act (TA6).[3/]

2. The Communications Workers of America, AFL-CIO is a public employee representative within the meaning of the Act (TA7).

3. In late 1978 or early 1979, the NJCSA/NJSEA engaged in negotiations with the State, resulting in certain language, part of which forms the dispute in this matter, and which has remained substantially in the contract until this time (J-2, J-1). Under it, unclassified twelve-month teachers[4/] are "entitled to vacation days equivalent to those employees in the classified service," as set forth in Art. XXIII(G)(1) of the parties' 1983 agreement which was in effect at the time of these alleged unfair practices (J-1).[5/]

3/ Transcript designations are as follows: TA refers to the transcript dated June 24, 1986, TB refers to the transcript dated June 26, 1986, TC refers to the transcript dated October 2, 1986 and TD refers to the transcript dated October 9, 1986.

4/ There is no dispute, here, that the COED instructors/teachers at issue are unclassified, and are serving twelve-month assignments.

5/ Paragraph 2 of Art. XXIV specifically states that Paragraph 1, providing a vacation and administrative leave option to employees, does not apply to employees whose schedules are governed by the academic calendar. Instead, Paragraph 6 describes the scheduling arrangements for those personnel (J-1). However, 12-month unclassified teachers (instructors) are specificlaly governed by the provisions of paragraph 3 of Art. XXIV.

4. Thus, the language of the contract, which in 1985 was governed by Article XXIV of the 1983-86 Professional Unit agreement, applying to unclassified twelve-month teaching staff, states as follows:

> Teachers serving in the unclassified service of 12-month assignments shall be entitled to vacation days equivalent to those employees in the classified service and shall also be entitled to holidays and personal leave days as set forth in this agreement for the classified service. Such teachers employed prior to July 1, 1979 and having less than five (5) years service shall by exception be granted fourteen (14) vacation days in each full year of employment until their fifth anniversary.
>
> The schedule as to utilization of this vacation and holiday leave shall be consistent with the academic calendar. However, requests for use of the balance of leave days, not determined by the academic calendar, shall be honored where practicable and operationally non-disruptive, and special attention shall be given to requests for such time off in the summer months.
>
> Such 12-month teachers shall be granted not less than three (3) days of professional development time for work shops and other similar non-student contact activities, in addition to time provided by statutes for the professional convention [J-1].

Under paragraph (one) above unclassified teachers (instructors) serving 12-month assignments are to receive vacation benefits as set forth in Article XXIII, Section (G) as follows:

> a. One (1) working day of vacation for each month of employment during the first calendar year of employment.
>
> b. Twelve (12) working days of vacation from one (1) to five (5) years of service.
>
> c. Fifteen (15) working days of vacation from six (6) to twelve (12) years of service.

d. Twenty (20) working days of vacation from thirteen (13) to twenty (20) years of service.

e. Twenty-five (25) working days of vacation after the twentieth (20) year of service. [J-1]

Article XXIV gives certain unclassified twelve-month teachers more than the classified vacation leave where they were employed "prior to July 1, 1979" and had "less than five (5) years service." Under such conditions, these teachers would receive fourteen days rather than twelve days, as set forth in Civil Service rules and in Article XXIII-(G)(1)(b).

5. The State's policy, as applied to unclassified twelve-month teachers other than at COED, was the policy set forth in Article XXIV, paragraphs 3 through 6 (TB64-70; R-5). David Collins, Employee Relations Coordinator, produced a memorandum dated June 5, 1980, to all Employee Relations Coordinators in all the various State departments outlining the contract policy as negotiated for personnel in the 1979 agreement (R-5 pg. 3, para. IX; TB70; TC68-71). Collins testified that this was the policy at the Department of Corrections and Human Services where most State teaching (instructional) personnel worked, and where the issue of leave time had first led to negotiations with the CWA's predecessor (TB73). The CWA did not dispute this testimony. However, COED instructors historically received 22 vacation days as the policy was administered to them (TC114), and have since prior to 1979 (TB86), and until January 1, 1986, when the practice was changed (TC114-115).

6. A memorandum dated February 4, 1985 (R-1) from George T. Washington, Director of COED and the Newark Skills Center, ordered all COED staff, both classified and unclassified to use nine and one-half (9 1/2) vacation days when school was to be closed during the 1985 Easter and Christmas breaks (R-1). Thereafter, CWA Shop Steward, Robert Regan, filed a grievance on behalf of the COED instructors (CP-1).[6/] Regan attempted to present the grievance directly to Washington, but Washington declined to accept it (TA34; TC96, 129). Washington testified he refused the grievance because he felt it would be more productive for Regan to take it directly to the second step.[7/] Thereafter, a heated conversation ensued (TC97). Regan insisted that the union had a contractual right to file a grievance with the Director (TC125-126). Nevertheless, Washington continued to refuse to permit Regan to file the grievance (TC129). Washington told Regan he found it very difficult talking to him or his people, meaning union members (TC98).[8/] Washington

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6/ There is some disagreement as to whether or not the policy of requiring employees to use vacation time during Easter and Christmas recesses was new or had been followed in preceding years (see ex., TC 95); however, in his decision issued on July 12, 1985, the Commissioner of Education determined that this policy had been substantially in effect for approximately three years (CP-2, page 10).

7/ I do not credit this explanation and find instead that Regan's filing of a grievance with Washington, at step one, was appropriate despite any stated predisposition Washington may have had.

8/ This line of testimony is disputed by Washington to the extent that he (Washington) testified he'd not take any action, even

Footnote Continued on Next Page

also stated that if a union member was up on a roof about to jump he would turn his head the other way (TA38; TC98).[9/] Prior to this meeting with Regan, Washington had learned that CWA was circulating a petition criticizing Washington's February memorandum regarding the compulsory taking of vacation during the Easter and Christmas holidays (TC97). Additionally, Washington had received a phone call from Steven Bloustein, an administrator in the department's Trenton office, inquiring as to "what the hell Washington [was doing up there] (TC97)?" Bloustein told Washington he had been contacted by Regan, who indicated that Washington was intimidating staff members (TC97). Washington acknowledged that he "wasn't happy about" Bloustein's call and that if Regan had a problem, he should have dealt with Washington and not Bloustein (TC121). After receiving a call from Arthur Spangenberg, Coordinator of Employee Relations for

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8/ Footnote Continued From Previous Page

to help a union member for fear of being accused of intimidation (TC98). I do not credit this explanation, but instead, I find Washington's testimony to reflect the interpretation given it by the CWA, and I base this finding on the substantial and collective nature of the testimony provided by the charging party tending to support the existence of statements such as these from Washington.

9/ Again this testimony is given a different interpretation by Washington, who claims he meant that he is so sensitive to the union's claims of intimidation, that he would not become involved in a potential union situation, even to this extent. I do not credit Washington's explanation of this statement. I find, instead, that his statement is consistent with certain other statements and positions taken by Washington, and discussed in this paragraph 6, of the Statement of Facts section of this report.

the Department of Education, Washington accepted the vacation scheduling grievance (TC128-129). As one result of this grievance, Washington endured hostile cross-examination at a Department Hearing by Hettie Rosenstein, a local union officer (TC135-TC136). Although Washington disputed the hostility of the cross-examination, he admitted that he felt Rosenstein was "overly hostile" personally toward him (TC135).

7. In July 1985, the Commissioner of Education issued a decision on the dispute over the compulsory scheduling of vacation time during the Easter and Christmas recesses (CP-2). The decision noted that there appeared to be inconsistencies between the language of the contract as it pertained to instructors in the unclassified service of twelve-month assignments and the Department of Education's vacation-leave policy (CP-2). The Commissioner of Education recommended that management officials and CWA representatives meet to clarify any such inconsistencies (CP-2, p. 12; TC51). Upon receipt of the Commissioner's decision, Arthur Spangenberg, Coordinator of Employee Relations for the Department of Education, and management's representative in CWA's grievance before the Commissioner of Education, contacted David Collins, Employee Relations Coordinator and Spangenberg's direct supervisor (TC51, 68-69). After speaking with Frank Mason, Director of the Office of Employee Relations (TB68), Collins, through Richard M. Kaplan, Director of the Division of Direct Services, ordered that the vacation policy be altered for unclassified COED instructors,

serving twelve-month assignments (TB73, 87; TC69; CP-5). Neither OER nor Department representatives met with or notified CWA as to the intended reduction in benefits (CP-5).

8. The reduction in vacation benefits was first announced at a meeting of COED instructors called by Washington in September, 1985 (TA 48). Prior to the start of the meeting, a memorandum of explanation signed by Richard M. Kaplan, (CP-5), was circulated along with a cover sheet setting forth the vacation time which instructors would receive under the new policy (CP-6)(TB6, 58-59).[10/] Washington began the meeting by stating that he had some "good news" and some "bad news."[11/] However, the meeting which was attended by unclassified professionals, contained mainly "bad news" (TB9; TD60). Washington's characterization of some "good news" and some "bad news" was an apparent reference to Regan's July, 1985 memo to COED workers which began, "Some Good news and some bad news on the grievance" (R-8). Washington testified that Spangenberg had provided him with a copy of Regan's memorandum in July, 1985 (TC106-107). Washington stated to COED instructors that the

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10/ Washington testified that CP-6 was distributed at a later date, however, the majority of witnesses testified it was distributed at the September 1985 meeting; thus, I believe Washington was mistaken in this testimony.

11/ Washington denied using this language (TC-106); however, I find that he did, in fact, use it. I make this determination based on the cumulative nature of the testimony from several witnesses who stated that Washington used this language.

reduction in benefits was attributable to the filing of the vacation schedule grievance (TB6-7, 44, 54; TD60). Washington repeated this several times (TB21). Furthermore, Washington indicated that the union knew that such a result was likely (TB7, 44, 54; TD61). Washington pointed out that certain COED instructors, including Regan, "your CWA shop steward," would benefit from this policy change (TB8, 45; TD61), since senior employees would gain leave time by affording to them the classified service leave program (J1, Article XXIII(a)). Some employees at the Center did have sufficient service to benefit from the change (TC109-110).[12/] Washington also stated he had known of the discrepancy between the contract language and the department's vacation policy for three years (TB48, 59-60; TD61). Finally, Washington appeared to be smiling when he conveyed this news (TB46, 56; TD61). One witness testified that Washington was "the happiest I have ever seen him."[13/] Washington testified that he recognized that the staff would not be receiving good news and that he felt it was not an appropriate time to "clown around" (TC108).

9. Following the September, 1985 meeting, COED instructors became incensed with the union (TB10). At a work-site meeting

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12/ However, despite Washington's suggestions to the contrary, Regan had been on a union leave of absence since August and was not subject to department vacation policy (TA83).

13/ This line of testimony is generally disputed by Washington (see TC108-112); however, I do not credit his denial for the same reasons expressed in footnotes 8, 9 and 11 supra.

convened by CWA several weeks later to discuss the situation, COED instructors showed up with a hangman's noose with Regan's name inscribed on it (TA51, 118). There was no similar effigy of Washington, Kaplan or anyone else (TA118-119). One of the COED instructors testified that the employees were angry because Regan had urged the instructors to file the grievance without any apparent appreciation of any contract problem, and because "[they] had not been consulted prior to this meeting and this is why everyone wanted to know why this is the first time [they were] hearing about this matter" (TB21, 24).

10. The State and the CWA engaged in negotiations from approximately July 15, 1985 until January 1, 1986. The CWA placed on the table, a general demand to eliminate Article XXIV, and then continued to negotiate the 1986-89 Professional Unit Agreement. However, it later withdrew its demand with regard to Article XXIV (TD73-77). Thus, the same language that had previously been contained in the parties collective negotiations agreements was, once again, incorporated into the 1986-89 Agreement between the State and the CWA (TC11-TC12; TD77).

LEGAL ANALYSIS

The Communications Workers of America charge that the State of New Jersey Department of Education has violated subsections (a)(1), (3) and (5) of the Act.

(a)(5) Claim

The CWA alleges that the non-classified instructors at COED have historically and continuously received 22 vacation days (see Findings of Fact, Paragraph 5); and, continued to receive 22 days until January 1, 1986, when the State, through its Office of Employee Relations and Richard M. Kaplan, Director, Division of Direct Services, unilaterally reduced the number of vacation days. The State alleges it took its action in order to be in compliance with the provisions contained within the parties' contract.

The operative word in the first sentence of the third paragraph of both Article XXIV (J-1) and Article XX (J-2), is "equivalent." (See Findings of Fact, paragraph 4 for the text of this Article.) Webster's New Collegiate Dictionary, Copyright 1979 by G. & C. Merriam Co., provides six (6) alternative definitions for this word with none being that urged by the CWA--that the term "equivalent" in this context, provides a "floor" to the benefits enjoyed by unclassified instructors at COED. In fact, the one common characteristic of all of the six (6) definitions is equality or sameness. In this context it would dictate that unclassified employees in 12-month assignments are to receive the same number of vacation days as the employees in the classified service, despite CWA's arguments to the contrary and despite the testimony offered by one of their witnesses seeking to interpret the intent of this language, as first negotiated. The issue of the parties' intent and the resort to other interpretive contractual and/or handbook language should not arise unless the contract language is found to

be ambiguous on its face, and I find no such ambiguity. Alleged ambiguities in other contract provisions do not render the language of Article XXIV, paragraph 3 ambiguous. I therefore, reject the CWA's argument that this language is meant to be interpreted as a "floor," with respect to COED instructors/teachers,[14/] and conclude, instead, that it specifically provides for their vacation benefits, as set forth in Article XXIII(G)(J-1). The contract language in paragraph 3 expressly applies to unclassified teachers/instructors serving 12-month assignments, as is the case with the employees in question at COED. Therefore, notwithstanding that these employees have admittedly received 22 vacation days prior to January 1, 1986, I find that the change imposed by the State is consistent with the language in the parties' contract(s). (See, Art. XXIV, J-1; Art. XX, J-2)

Generally, a public employer meets its negotiations obligation when it acts pursuant to its collective agreement. Pascack Valley Bd. of Ed., P.E.R.C. No. 81-61, 6 NJPER 554, 555 (¶11280 1980); Randolph Tp. Bd. of Ed., P.E.R.C. No. 83-41, 8 NJPER 600 (¶13282 1982); Bound Brook Bd. of Ed., P.E.R.C. No. 83-11, 8 NJPER 439 (¶13207 1987). Conversely, the Commission will find a

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14/ The C.W.A. argues that the relevant contract provisions, the Employee Handbook, the Association's 1979 negotiations proposals, and the testimony of David Fox, Esquire, when viewed together, lead to the conclusion that the language contained in Article XXIV, Paragraph 3, is meant to be viewed as a "floor", with respect to COED vacation benefits.

contractual waiver of a majority representative's general right to negotiate, if the parties' collective agreement clearly and unequivocably authorizes the employer to make the pertinent changes. Red Bank Reg. Ed. Assn. v. Red Bank Reg. Bd. of Ed., 78 N.J. 122, 140 (1978); State of New Jersey, P.E.R.C. No. 77-40, 3 NJPER 78 (1977); Deptford Bd. of Ed., P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980), aff'd App. Dkt. No. A-1818-80T8 (5/24/82); Ramapo State College, P.E.R.C. No. 86-28, 11 NJPER 580 (¶16202 1985). Moreover, established practice considerations which are construed contrary to the express provisions of a collective agreement cannot be relied upon to change the clear meaning of the agreement. In Randolph Tp. School Board, P.E.R.C. No. 81-73, 7 NJPER 23 (¶12009 1980), the Commission held:

> It is not necessary to address any past practice...since the provision of the collective agreement controls over past practices where, as here, the mutual intent of the parties concerning work hours "can be discerned with no other guide than a simple reading of the pertinent language," citing New Brunswick Bd. of Ed., 4 NJPER 84 (¶4040 1978), Mot. for Recon. denied, 4 NJPER 156 (¶4073 1978). [7 NJPER at 24]

Thus, having determined the contract language to be unambiguous and to pertain to the employees in question, I conclude that the State's unilateral implementation of the applicable contractual provisions on January 1, 1986, did not constitute a unilateral change in terms and conditions of employment, and I find no (a)(5) violation. See, also, N.J. Sports and Expo. Auth., H.E. No. 87-71, 13 NJPER ____ (¶_____ 1987).

(a)(1) and (3) Claim

The CWA alleges that the State's failure to notify the CWA of the intended unilateral change and the manner in which the change was announced violated subsection 5.4(a)(1) and (3).

Bridgewater and Bridgewater Publ Works Ass'n, P.E.R.C. No. 82-3, 7 NJPER 434 (¶12193 1981), mot. for recon. den. P.E.R.C. No. 82-36, 7 NJPER 600 (¶12267 1981), aff'd App. Div. Dkt. No. A-859-81T2, aff'd 95 N.J. 235 (1984), articulates the governing legal standards for considering allegations of discriminatory personnel actions in violation of subsections 5.4(a)(1) and (3) of the Act. The charging party must first establish a prima facie case that his or her protected activity was a substantial or motivating factor in the disputed personnel decision. In some cases, that prima facie case may be made out by direct evidence of anti-union motivation; in other cases that case may be made out by circumstantial evidence that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile towards the exercise of protected activity. Id. at 246. If the charging party establishes a prima facie case, the burden shifts to the employer to prove, as an affirmative defense and by a preponderance of the evidence, that the action occurred for legitimate business reasons and not in retaliation for the protected activity. Ultimately, the factfinder must resolve any conflicting proofs. We also emphasize that these standards must be applied to the facts and their interrelationship in each particular case.

Applying the Bridgewater test to the facts of the instant matter, I conclude that the employees, some of whom were affected by the January 1, 1986, change in vacation days, were engaged in protected activities by virtue of their filing of a grievance over their Director's requiring them to take 9 1/2 vacation days during Easter and Christmas of 1985, rather than at any time of the year. Since the grievance was presented directly to the Director, I conclude that he had clear knowledge of his employees' engagement in protected activities. However, the action to alter the number of vacation days of these employees from the number they had been receiving to what they are entitled to under the applicable provisions of the parties' collective negotiations agreement, came from the Office of Employee Relations through the Division of Direct Services. There is nothing in the record which might even suggest that such a determination was urged or occasioned by the Director's hostility to the exercise of the employees' protected activities. Instead, the January 1, 1986 change appears to have been made as a result of a series of circumstances beginning with the issuance of a decision by the Commissioner of Education in which the apparent conflict between the number of vacation days currently being received by unclassified employees at COED, and the provisions of the parties' collective negotiations agreement, was noted. Thus, apparently as a result of this statement of this conflict, Arthur Spangenberg, management's representative in the CWA grievance, became aware of the discrepancy between the contract and the

practice at COED; and, through Spangenberg, the Office of Employee Relations was made aware of it, and the January 1, 1986 change is what resulted. Thus, even assuming the COED Director was hostile toward the employees' engagement in protected activities, this hostility cannot be imputed to the Office of Employee Relations, or the Division of Director Services and the record reveals no independent showing of hostility on the part of either office. I can find no link in the record between the Director's alleged hostility toward his employees' protected activities, and OER's reduction in their vacation benefits. Thus, I conclude that the Bridgewater test is not satisfied and I find no violations of (a)(3) and (1).

The CWA asserts that even if there is no violation of subsections (a)(3) and (1) under Bridgewater, the Commission has adopted the NLRB's "inherently destructive" standard in evaluating 5.4(a)(3) violations. The CWA asserts that this inherently destructive standard is enunciated in City of Hackensack v. Winner, P.E.R.C. No. 77-49, 3 NJPER 143 (1977), rev'd on other grounds, 162 N.J. Super. 1 (App. Div. 1978), aff'd as mod. 82 N.J. 1 (1980), in which the Commission, referring to its decision in Haddonfield Boro (Camden Cty.) Bd. of Ed., P.E.R.C. No. 77-36, 3 NJPER 71 (1977), upheld the "inherently destructive" standard in an (a)(3) context by finding a violation

> ...if the Charging Party can prove either that anti-union animus was one of the motivating factors for the discriminatory conduct or that the effect of the employer's actions was "inherently destructive" of

> rights guaranteed to employees by the Act. Preliminarily, the Charging Party must prove that the employee was engaging in protected activities and the employer knew or thought he knew of such activities.
>
> * * *
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> ...Once an inherently destructive act has been established, then an improper motive on the part of the employer may be presumed; however, this presumption may be rebutted by evidence that the employer was not motivated by anti-union animus, and did have legitimate reasons for his acts. [3 NJPER at 144][footnote omitted] .

Thus, assuming that the first two parts of the test are satisfied, I believe the employer successfully rebuts the "inherently destructive" test by virtue of the fact that there is no evidence in the record that either the Office of Employee Relations or the Division of Direct Services was motivated by union animus; and, they did, in fact, have an independent and legitimate reason for their actions -- contract compliance. Therefore, I conclude there cannot be any finding of an a(3) violation under the "inherently destructive standard" as adopted by the Commission in City of Hackensack v. Winner and Haddonfield Boro (Camden Cty. Bd. of Ed., supra.

However, I find an independent violation of §(a)(1) based upon the Director's statements and conduct at the September, 1985 meeting of COED instructors.[15/] I find that the Director announced the change in the number of vacation days; characterized

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15/ This finding is further supported, although not directly relied upon, by other statements and positions taken by the Director at times other than the September 1985, meeting of COED instructors. (See Finding of Fact, par. 6.)

it as some "good news" and some "bad news"; however, the vast majority of employees affected and present at the meeting would see reductions in vacation benefits; thus, I believe the characterization to be an attempt at sarcasm. I further find cumulative witness testimony indicating that the Director smiled and appeared to be pleased when he made this announcement, and that this was not necessarily characteristic of his usual demeanor; that the Director pointed out that certain employees, notably, their own shop steward would benefit from this change; that the Director stated he and others had known of this discrepancy for years; and, that the Director linked in the employees filing of a grievance with this reduction in vacation benefits. Therefore, the obvious message to the employees is that the exercise of their protected activities (i.e. the filing of a grievance) has resulted in this loss of vacation benefits. Moreover, lest there be any doubt as to how Washington's statements and demeanor at the September, 1985 meeting were taken by the COED instructors in attendance, the record reveals that they clearly became incensed at the union following Washington's statement.[16/]

16/ I recognize that their loss of vacation benefits could also have incensed them; however, in that event, I'd assume there'd be more of an overt reaction against the employer, when, in fact, the only one symbolically hung in effigy was Robert Regan, CWA shop steward, and not Washington, Kaplan or any other representative of their employer (see Finding of Facts, par. 9, supra).

In NLRB v Corning Glass Works, 204 F.2nd 422 (1st Cir. 1953), 32 LRRM 2136 (1953), the Court interpreted the free speech provision of the National Labor Relations Act as follows:

> ...[T]he constitution of the United States protects an employer with respect to the oral expression of his views on labor matters provided his expressions fall short of restraint or coercion [citation omitted]... §8(c) of the Act...protects an employer with respect to like expressions in written, printed, graphic or visual form, provided his expressions contain "no threat of reprisal or force or promise of benefit." [32 LRRM at 2139]

The U.S. Supreme Court adopted that same language in the NLRB v Gissel Packing Co., 395 U.S. 575, 618, 71 LRRM 2481 (1969), when it said:

> "...[A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal, or force or promise of benefit." [71 LRRM at 2497]

Although this specific language in section 8(c) in the NLRA is not present in our Act, the Commission, through the adoption of two hearing examiners' recommendations, has adopted the 8(c) standard in New Jersey.[17/] City of Camden, P.E.R.C. 82-103, 8

17/ See, Lullo v. Intern. Assoc. of Fire Fighters, 55 N.J. 409 (1970), and Galloway Twp. Bd. of Ed. v. Galloway Twp. Assn. of Educational Secretaries, 78 N.J. 1 (1978), to support the adoption of the NLRA, as a model utilized by New Jersey. In Galloway the N.J. Supreme Court reasoned that our Act was based upon the NLRA and, accordingly,

> "...[T]he absence of specific phraseology in a statute

Footnote Continued on Next Page

NJPER 309 (¶ 13137 1982) adopting H.E. No. 82-34, 8 NJPER 181 (¶ 13078 1982); Rutgers, The State University, P.E.R.C. No. 83-136, 9 NJPER 276 (¶ 14127 1983), adopting H.E. No. 83-26, 9 NJPER 177 (¶ 14083 1983)(both finding no violation in the absence of any threat of reprisal or promise of benefit).

In Black Horse Pike Regional Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502, (¶12223 1981), the Commission held:

> A public employer is within its rights to comment upon those activities or attitudes of an employee representative which it believes are inconsistent with good labor relations, which includes the effective delivery of governmental services, just as the employee representative has the right to criticize those actions of the employer which it believes are inconsistent with that goal. However,...the employer must be careful to differentiate between the employee's status as the employee representative and the individual's coincidental status as an employee of that employer [citations omitted].
>
> When an employee is engaged in protected activity the employee and the employer are equals advocating respective positions, one is not the subordinate of the other. If either acts in an inappropriate manner or advocates positions which the other finds irresponsible, criticism may be appropriate and even legal action, as threatened here, may be initiated to halt or remedy the other's actions. However, as in this case, where the employee's conduct as a representative is unrelated to his or her performance as an employee, the employer cannot express its dissatisfaction by exercising its power over the individual's employment.

* * *

17/ Footnote Continued From Previous Page

> may...be attributable to a legislative determination that more general language is sufficient to include a particular matter within the purview of the statute without the necessity of further elaboration. [78 N.J. at 15]

> The Board may criticize employee representatives for their conduct. However, it cannot use its power as employer to convert that criticism into discipline or other adverse action against the individual as an employee when the conduct objected to is unrelated to that individual's performance as an employee. To permit this to occur would be to condone conduct by an employer which would discourage employees from engaging in organizational activity. [7 NJPER at 503-504; citations omitted].

Even in the absence of the actual implementation of any act of reprisal, however, "[w]hen the employer, its representative or agent threatens an employee with dismissal in a deliberate attempt to restrain the employee's participation in protected activity, subsection 5.4(a)(1) is violated, and this is so regardless of whether the threatened employee is actually intimidated. Commercial Township Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550, 552 (¶ 13253 1982), aff'd App. Div. Dkt. No. A-1642-82T2 (12/8/83). Thus, it is the tendency of an employer's conduct to interfere with the exercise of employee rights that is the controlling element of a subsection 5.4(a)(1) violation, City of Hackensack, P.E.R.C. No. 78-71, 4 NJPER 190 (¶ 4096 1978), aff'd App. Div. Dkt. No. A-3562-77 (3/5/79), and where an employer's action interferes with concerted activity but does not involve an actual act of reprisal, it may be challenged only under subsection (a)(1). R. Gorman, Basic Text on Labor Law, at 337 (1976).

In Township of Mine Hill, P.E.R.C. No. 86-145, 12 NJPER 526 (¶ 17197 1986), the Commission held that where the Township, through the actions of its agent the Mayor, threatened retaliation and introduced an ordinance to reduce the number of sergeants in the

police department, and where no legitimate and substantial business justification was offered therefor; and, where this action followed a threat by the mayor during contract negotiations that if the PBA went to arbitration the police department would suffer cuts in the budget, a finding of an (a)(1) violation was appropriate. However, no (a)(3) violation could be found as alleged, since these threats were never carried out. Township of Mine Hill, supra. See also, Paterson Bd. of Ed., P.E.R.C. No. 87-108, 13 NJPER 265 (¶18109 1987).

Thus, under the applicable caselaw, I conclude that the statements made by Washington to the COED instructors/teachers at the September 1985, meeting, some of whom had been engaged in protected activities and all of whom were included within CWA's class-action grievance, had a reasonable tendency to interfere with the exercise of these employees' rights and, as such, constitute a violation of 5.4(a)(1).

Upon the foregoing and upon the entire record in this case the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. Respondent State of New Jersey violated N.J.S.A. 34:13A-5.4(a)(1) of the Act, when, its agent, George T. Washington, Director of COED, conducted a meeting, in September 1985, of instructors, and made statements as described above which could reasonably interfere with the employees' exercise of their protected activities.

2. Respondent State of New Jersey did not violate N.J.S.A. 34:13A-5.4(a)(3) or (5) or derivatively (a)(1), when on January 1, 1986, it altered the number of vacation days accorded to unclassified instructors at COED, in direct contradiction with previous policy, but in accordance with the terms of the parties' collective negotiations agreements.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent State cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act through one of its agents, the Director of COED, who linked the employees exercise of protected activities, i.e. filing a grievance, to their reduction in vacation benefits, and made certain other statements which could reasonably interfere with the employees' exercise of protected activities.

B. That the Respondent State take the following affirmative action:

1. Post in all places where notices to employees are customarily posted at COED, copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

C. That the subsection 5.4(a)(3) and (5) allegations be dismissed in their entirety.

Marc F. Stuart
Hearing Examiner

Dated: June 30, 1987
Trenton, New Jersey