

STATE OF NEWJERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

DEPTFORD BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-77-226-47

DEPTFORD EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

In an unfair practice proceeding the Commission affirms a Hearing Examiner's finding that the action of the Deptford Board of Education in hiring a teacher as a part-time employee without fringe benefits to do the type of work that had previously been performed by full-time teachers with full benefits was a violation of N.J.S.A. 34:13A-5.4(a)(1) and (5). Relying on prior decisions, In re New Brunswick Board of Education, P.E.R.C. No. 78-46, 4 NJPER 84 (¶4073 1978), Galloway Twp. Board of Education v. Galloway Twp. Ass'n of Educational Secys, 78 N.J. 1, 17-20 (1978) and In re State of New Jersey, P.E.R.C. No. 77-40, 3 NJPER 78 (1977), PERC holds that the Board's action constituted a unilateral reduction in the salary and benefits of an already existing teaching position. The Board was ordered to make the employee whole by placing her at the salary level she would have attained had the Board not altered the salary of her position as well as pay her the monies she would have earned as a full-time teacher for the one school year she was part-time.

The Commission does accept an exception filed by the Board of Education that a portion of the Hearing Examiner's Recommended Order was too broad.

STATE OF NEW JERSEY
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In the Matter of

DEPTFORD BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-77-226-47

DEPTFORD EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Capehart & Scatchard, P.A.
(Alan R. Schmoll, of Counsel)

For the Charging Party, Eugene J. Sharp, NJEA
UniServ Representative

DECISION AND ORDER

On February 22, 1977 the Deptford Education Association (the "Association") filed an Unfair Practice Charge with the Public Employment Relations Commission alleging that the Deptford Board of Education (the "Board") had engaged in an unfair practice within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"). Specifically, the Association alleges that the Board violated N.J.S.A. 34:13A-5.4 (a) (1) and (5)^{1/} when, in October 1976, the Board hired one

^{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 appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

Judith Clee as a part time teacher for the 1976-1977 school year at the rate of \$5.00 per hour with no fringe benefits.^{2/}

It appearing that the allegations of the Charge, if true, might constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on January 7, 1980.^{3/} Pursuant to the Complaint and Notice of Hearing, a hearing was held on April 30, 1980, before Edmund G. Gerber, Hearing Examiner of the Commission, at which time the parties were given the opportunity to examine witnesses, present relevant evidence and argue orally. The Board did not introduce any witnesses and, accordingly, the testimony of the Association witnesses stands uncontroverted and, therefore, is not in dispute.

Post-hearing briefs were submitted by the parties and on October 6, 1980, the Hearing Examiner issued his Recommended Report and Decision, which included Findings of Fact and Conclusions of Law and a Recommended Order. The original of the Report was filed with the Commission and copies were served upon all parties. H.E. No. 81-13, 6 NJPER ____ (¶ ____ 1980). A copy is attached hereto and made a part hereof.

Exceptions to the Hearing Examiner's Recommended Report

^{2/} Judith Clee was given her current position as a full time teacher in September, 1977.

^{3/} The long delay between the filing of the charge and the issuance of the Complaint was apparently due to the fact that the matter had appeared to have been settled by the parties. However by letter dated November 21, 1979 the Association advised the Commission that this apparent settlement had not been successful and requested that the charge, which had never been withdrawn or dismissed be considered for complaint. While such a lengthy delay is extremely unusual, and normally would not be tolerated, the Board interposed no objection to the further processing of the charge at that time.

and Decision were filed by the Board. Upon careful consideration of the entire record herein, the Commission adopts the findings of fact and conclusions of law rendered by the Hearing Examiner, substantially for the reasons cited by him.

Initially the Commission finds that the Board, hired Ms. Clee as a teacher on a part time basis and without fringe benefits to do the type of work that had previously been performed by full time teachers with full benefits. The evidence in the record establishes that Ms. Clee performed the functions of an "itinerant teacher" in the district. These were supplementary teachers assigned to the Board's special services program. An "itinerant teacher" traveled to different schools within the district and would provide supplementary instruction to the same five or six students each day. It is uncontroverted in the record that prior to June 1976 all itinerant teachers were full-time teachers who received all the compensation and benefits of full-time staff set forth in the parties' collective negotiations agreement. Moreover, the language of the recognition clause of that agreement would cover the position of "itinerant teacher". It is also clear from the record that Ms. Clee in 1976-77 performed all the duties and maintained the same workload as had full-time "itinerant teachers". In September 1977 Ms. Clee was given her current position as a

full-time staff teacher for emotionally disturbed children.^{4/}

The Hearing Examiner found and we agree that the Board's conduct in 1976-77 toward Ms. Clee was nothing more than a unilateral reduction in the salary and benefits of the position of "itinerant teacher". Its alleged conversion of the position from full-time to part-time was a change in name only to camouflage its attempt to get the work performance for less money. Had it taken the same action with respect to an individual who had held the position in 1975-76, the violation would be clear. See In re New Brunswick Board of Education, P.E.R.C. No. 78-46, (¶4043 1978).

It is no less clear because a new employee filled the position. As the Supreme Court noted in Galloway Township Board of Education v. Galloway Township Ass'n of Educ. Secys, 78 N.J. 1, 17-20 (1978), a majority representative is the exclusive representative of the job titles in the unit, not just the specific employees who held those positions when the representative was certified or recognized. The Board was not free to unilaterally alter the salary structure for the position of "itinerant teacher" simply because a new employee was hired for the position.

^{4/} Therefore despite the delay discussed in footnote 3, supra, the remedy sought involves only the difference in compensation between a full-time and part-time teacher for the 1976-77 school year, plus the difference between the full-time salary she earned in each succeeding year and the full-time salary she would have earned in those years had she been full-time in 1976-77, e.g. the additional increment, if any, for the added year of full-time service.

The Board, in its post-hearing brief and exceptions, argued that, among other things, the Board was under no duty to negotiate over Ms. Clee's status and therefore could not be guilty of an unfair practice because of Article II D of the Collective Bargaining Agreement between the parties contained language that amounted to, in the Board's opinion, a "clear and unequivocal waiver" by the Association of its ability to require negotiations during the life of the agreement pursuant to In re State of New Jersey, P.E.R.C. No. 77-40, 3 NJPER 78 (1977).

The Board's argument misconstrues the nature of the unfair practice it committed by its actions. As discussed above, the essence of its violation does not stem from its failure to negotiate the salary for a newly created position of part-time "itinerant teacher". Rather the violation was its unilateral alteration of the salary structure and benefits of the existing position of "itinerant teacher". The significance of the evidence in the record is that it establishes that Ms. Clee filled no new position. The change from full-time to part-time was semantic only and could not justify the Board's conduct.

Moreover, the Commission finds the Board's argument with respect to the effect of the "zipper clause" to be without merit even if it did apply to these facts. The Hearing Examiner was correct in his interpretation of State of New Jersey, supra, wherein the "clear and unequivocal waiver test" was modified to

allow the trier of fact to look at a variety of factors, such as the history of negotiations over the disputed contract provision, to determine if, in fact, there was a waiver of the right to negotiate.

In the instant case, as noted by the Hearing Examiner, there was no evidence offered by the Board to support its position that Article II-D is a "clear and unequivocal waiver" that should be mechanically applied to the present dispute.

For the foregoing reasons, the Commission finds that the Board violated §§(a)(1) and (5) of the Act in altering the salary schedule for the teaching duties performed by Ms. Clee during the 1976-1977 school year.

The Board, in its Exception number 7, objects, in the alternative, to the language in the first paragraph of the Notice proposed by the Hearing Examiner as being too broad. We agree with the Board that the language is in fact too broad and find the following language for the first paragraph of the "Notice to All Employees" more appropriate:

WE WILL cease and desist from unilaterally altering the salary for the full-time position of itinerant teacher held by Judith Clee for the 1976-77 school year under the collective negotiations contract with the Deptford Education Association.

ORDER

Based upon the above, IT IS HEREBY ORDERED THAT:

A. The Board cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally altering the negotiated salary for the position of full time "itinerant teacher" under the collective negotiations contract with the Deptford Education Association.

B. The Board take the following affirmative action:

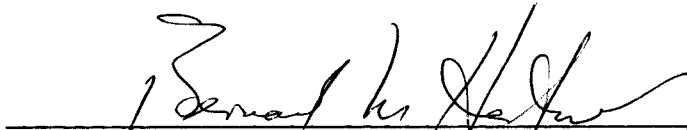
1. Forthwith make Judith Clee whole by placing her at the salary level she would have been had the Board not altered the salary of itinerant teacher.

2. Forthwith make payment to Judith Clee of all monies she would have earned as a full time teacher for the school years 1976-1977, 1977-1978, 1978-1979 and 1979-1980 under the appropriate collective negotiations agreements in force during the respective school years.

3. Forthwith, post at all places where notices to employees are customarily posted, 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 a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to ensure that such notices are not altered, defaced or covered by other material.

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

BY ORDER OF THE COMMISSION

A handwritten signature in black ink, appearing to read "Bernard M. Hartnett", is written over a horizontal line. The signature is fluid and cursive.

Bernard M. Hartnett
Acting Chairman

Acting Chairman Hartnett, Commissioners Graves and Parcells voted in favor of this decision. None opposed. Commissioners Hipp and Newbaker abstained.

DATED: Trenton, New Jersey

December 10, 1980

ISSUED: December 11, 1980

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 unilaterally altering the salary for the full-time position of itinerant teacher held by Judith Clee in the 1976-77 school year under the collective negotiations contract with the Deptford Education Association.

WE WILL make whole Judith Clee who served in a position covered under the collective negotiations contract but did not receive the appropriate salary pursuant to that agreement.

DEPTFORD BOARD 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,
429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

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

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-and-

Docket No. CO-77-226-47

DEPTFORD EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

In a Hearing Examiner's Recommended Report and Decision, the hearer found that the Deptford Board hired Judith Clee as a part-time special education teacher when, in fact, the work she performed was identical to the work performed by full-time special education teachers. It was recommended by the hearer that the Public Employment Relations Commission find that the Board violated the Public Employer-Employee Relations Act when it failed to pay Judith Clee the salary of a full-time special education teacher.

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.

STATE OF NEW JERSEY
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Appearances:

For the Respondent
Capehart & Scatchard P.A.
(Alan R. Schmoll, Esq.)

For the Charging Party
Eugene J. Sharp, UniServ Rep., NJEA

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") on February 22, 1977, by the Deptford Education Association ("Association") alleging that in October of 1976 the Deptford Township Board of Education ("Board") hired Judith Clee ^{1/} as a part-time supplementary teacher at the rate of \$5 per hour with no fringe benefits. The work performed by Clee was identical with that done by full-time supplementary teachers who enjoyed similar salary, fringe benefits and work rules as other district teachers. It was claimed that this act constituted an unfair practice within the meaning of the New Jersey Employer-Employee

^{1/} The charge then stated two persons in this situation, but the entire record shows only Judith Clee.

Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"). ^{2/}

It appearing that the allegations of the charge, if true, might constitute an unfair practice within the meaning of the Act, a Complaint and Notice of hearing was issued on January 7, 1980, and a hearing was held on April 30, 1980, in Trenton, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Both parties filed post-hearing briefs by July 24, 1980.

The Board did not introduce any witnesses and accordingly the testimony of the Association witnesses stand uncontroverted and, therefore, is not in dispute.

The Association and Board were parties to a collective negotiations agreement which ran from September of 1975 through June of 1978.

The contract contained a recognition clause which includes "all fully certified personnel under contract and employed by the Board and so assigned as an employee who teaches students directly and includes special area and learning disability teacher consultants."

Clee testified that she started working with students on November 15, 1972, as a part-time teacher at the rate of \$5 an hour. She had six students from three schools assigned to her and she taught five hours a day. Clee did all her preparation work as well as sum-

^{2/} It was specifically alleged that the Board violated §5.4(a)(1) and (5) of the Act. These subsections provide in pertinent part that employers, their representatives or agents are prohibited 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."

maries of evaluations on her own time. In addition, she was asked to, and did, attend team summaries, staff meetings, summary meetings and conferences with teachers and principals. Clee was at school an hour ahead of time each day for contact with teachers, guidance counsellors and parents. All of this extra work never appeared on her vouchers for she was told that she would only be paid for a maximum of five hours a day. During the 1976-1977 school year Clee never received any of the benefits received by the full-time teaching staff.

Frank Cirrancione is Director of Special Services for the Board and has served in that position since July of 1972. He is familiar with the special or "itinerant" teachers and their functions. Prior to June of 1976 all itinerant teachers were full-time teachers, averaged five or six students a day and taught five hours a day. The itinerant teachers would travel to the different schools within the district and would teach the same students each day. In the 1973-1974 school year Cirrancione prepared a manual for the superintendent of schools on the tasks of supplementary instruction. Cirrancione testified that Clee performed all the duties laid out in the manual.

Linda Blackwell testified that she is a member of the child study team employed as a social worker and was familiar with the work of itinerant or supplementary teachers. Blackwell could observe no difference with the work of Clee from the work of previous supplementary teachers.

In September of 1977 Clee was given her current position as a full-time staff teachers for emotionally disturbed children.

Blackwell testified that she was president of the Associ-

ation and chief negotiator of the contract, the Board made no attempt to negotiate reclassification of the position of itinerant teacher from part time to full time. There was some testimony that the Board instituted a reassignment of other itinerant teachers. They were permanently assigned to one school. It is clear however that when they hired Clee the Board did not eliminate the position of itinerant teacher.

This case is similar to New Brunswick Board of Education and New Brunswick Education Assn., P.E.R.C. No. 78-46, 4 NJPER 84 (¶4073, 1978), wherein the New Brunswick Board of Education reduced the work year of employees from eleven months to ten months and then offered these same employees one month of "summer work" doing substantially the same work they had done in years past under their eleven-month contracts at substantially less salary. The board simply sought to eliminate the established salary practice. It was held the board "could not eliminate a salary practice without first negotiating the issue." Here the Respondent Board did not eliminate the position of itinerant teacher in anything but name. Rather the Board only altered the salary structure. See also Hackettstown Bd. of Education and Hackettstown Ed. Association, P.E.R.C. No. 80-139, 6 NJPER (¶ , 1980), Piscataway Twp. Bd. of Education v. Piscataway Principals Assn., 164 N.J. Super. 98 (App. Div. 1978).

The Board raised several arguments in its defense. First they argued that they were under no duty to negotiate over Clee's status and therefore could not be guilty of an unfair practice because Article II D of the labor Agreement between the parties (Exhibit J-1) provides that,

During the term of the Agreement, neither party shall be required to negotiate with respect to any matter, whether or not covered by this Agreement, and whether or not within the knowledge contemplation of either or both of the parties at the time they negotiated or executed this Agreement.

It is argued that "this language constitutes a clear and unequivocal waiver by the Association of its ability to require negotiations during the life of the agreement pursuant to State of New Jersey and Local 195, IFPTE and Local 518 SEIU, P.E.R.C. No. 77-40, 3 NJPER 78 (1977).

Although State of New Jersey is controlling, the Board's proposed application of it is incorrect. The "clear and unequivocal waiver" test, first propounded by the NLRB, was used to reject zipper clauses, such as Article II-D, which waive a union's right to bargain over a particular subject not specifically referred to in a labor agreement. ^{3/}

As noted in State of New Jersey, supra, the NLRB has modified the clear and unequivocal waiver test. In the Hearing Examiner's analysis in State of New Jersey, H.E. No. 77-6, 2 NJPER 332 (1976) which was expressly adopted by the Commission, the NLBR modifications were discussed:

In recent decisions the National Labor Relations Board has taken the position that while in some situations, the rule of "clear and unequivocal" waiver may be a realistic, practical appraisal

^{3/} See The Bunker Hill Co., 208 NLRB 27, 85 LRRM 1264 (1973), modified 210 NLRB 343, 86 LRRM 1157 (1974); Convol-Ohio, Inc., 202 NLRB 85, 82 LRRM 170 (1973); Southern Materials Co., 198 NLRB 257, 80 LRRM 1606 (1972). To be a clear and unequivocal waiver there must be specific language in the waiver clause that deals with the subject at hand.

of a bargain reached between an employer and a union, in other situations it may not be. The NLRB has stated that in determining the existence of a waiver of statutory rights prescribing bargaining responsibilities the NLRB 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, as an "integration" /to determine the applicability of the parol evidence rule/. Although certain members of the NLRB have interpreted the consideration of the above-mentioned factors as a clear rejection of the "clear and unequivocal" rule, it is clear to the undersigned that the NLRB has merely clarified the "clear and unequivocal" standard to reflect the...concern that its waiver rule was being applied in too mechanical a fashion, without regard for the bargaining postures, proposals and agreements of the parties. (Citations omitted.)

In the case at hand there was no evidence in the record concerning the original application or meaning of Article II-2. Accordingly the Board's argument that Article II-2 is controlling is rejected.

The Board argues that only the Commissioner of Education has the right to determine whether Cleo was a teaching staff member within the meaning of N.J.S.A. 18A-1 et seq.,^{4/} a statute outside the area of the Commission's expertise. Simply put, in Board of Education of Bernards Township v. Bernards Township Education Association, 79 N.J. 311 (1979), the Supreme Court held that "P.E.R.C.'s primary jurisdiction does extend to controversies involving asserted conflicts

^{4/} In making this argument the Board states a hypothetical which relies on issues of fact, law and remedy that are not a part of this case. Accordingly that hypothetical will not be recounted here.

between the New Jersey Employer-Employee Relations Act and other statutory schemes" at 317.

It is also argued that since the meetings between the Association and the Board failed to resolve the outstanding issues and since the Association did not invoke the mediation and fact-finding processes, the Board was free to implement a unilateral change and alter the regular full-time position of itinerant special education teacher to that of part-time teacher. In Rutgers, The State University, P.E.R.C. No. 80-110, 6 NJPER (¶11086, 1980) and City of Jersey City, P.E.R.C. No. 77-58, 3 NJPER 123 (1977), the Commission held that, "If the employer demonstrates an honest desire to reach an agreement, uses the impasse resolution procedures of the Commission and still the parties cannot reach an agreement, the employer does not commit an unfair practice by unilaterally implementing its last best offer made during negotiations.

Nothing of the sort happened here. The alteration of the salary structure occurred without any negotiations. Under the cases, any changes in terms and conditions of employment are to be negotiated before they are established.

Accordingly, it is recommended that the Commission find that in altering the salary schedule of the position of itinerant teacher the Deptford Township Board of Education violated §(a)(5) directly and §(a)(1) derivatively of the Act.

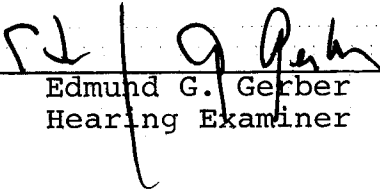
IT IS FURTHER RECOMMENDED that the Commission ORDER that the Board make whole Judith Clee who held the position of itinerant teacher. To do so the Board must reimburse Judith Clee the salary

she would have earned if the Board did not alter the salary of itinerant teacher under the then existing salary. That is, the salary listed on the appropriate first step of the 1976-1977 salary guide of the contract, as adjusted for Clee's November 13, 1976, starting date, less all salary actually paid to Clee during the 1976-1977 school year. Further, in September 1977 Clee was placed on the first step of the salary guide when under the terms of the contract, she should have been on the second step of the guide since she rightfully belonged on the first step the year before. Accordingly the Board must increase Clee's position on the salary guide by one step and further compensate Clee for the one-step salary difference for the school years 1977-1978, 1978-1979 and 1979-1980.

Further, post at all places where notices to employees are customarily posted, 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 a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to ensure that such notices are not altered, defaced or covered by other material;

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

That the allegations in the Complaint that the Respondent violated §§5.4(a)(2) and (4) of the Act be dismissed in their entirety.


Edmund G. Gerber
Hearing Examiner

DATED: October 6, 1980
Trenton, New Jersey

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT refuse to negotiate in good faith concerning the proposed alteration of the salary for any position covered under a collective negotiations contract.

WE WILL make whole Judith Clee who served in a position covered under the collective negotiations contract but did not receive the appropriate salary pursuant to that agreement.

DEPTFORD BOARD 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 Chairman, Public Employment Relations Commission, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.