P.E.R.C. NO. 2003-5

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

IRVINGTON BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CI-H-2001-8

GWENDOLYN E. SMITH,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Irvington Board of Education violated the New Jersey Employer-Employee Relations Act when it repudiated a 1999 agreement settling a previous unfair practice charge. Gwendolyn E. Smith filed an unfair practice charge against the Board alleging that it failed to comply with the settlement agreement, particularly by giving negative references, even though it agreed not to, and is blocking her from obtaining or keeping a job.

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

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In the Matter of

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-and- Docket No. CI-H-2001-8

GWENDOLYN E. SMITH,

Charging Party.

Appearances:

For the Respondent, Hunt, Hamlin & Ridley, attorneys (Raymond L. Hamlin, of counsel)

For the Charging Party, Gwendolyn E. Smith, pro se

DECISION

On August 2, 2000, Gwendolyn Smith filed an unfair practice charge against the Irvington Board of Education. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (4), (5) and (7),[1/] by failing to comply

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1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (5) Refusing to negotiate in good faith with a majority representative

Footnote Continued on Next Page

with the terms of a June 1999 agreement settling a prior unfair practice charge (CI-98-92). In particular, Smith alleges that the Board is giving negative references, even though it agreed not to, and is blocking her from obtaining or keeping a job.

On May 4, 2001, a Complaint and Notice of Hearing issued with respect to the alleged violations of 5.4a(1) and (4) only. On May 8, the Board filed an Answer denying that it violated the Act.

On August 23 and October 18, 2001, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses and introduced exhibits. They argued orally and filed post-hearing briefs.

On April 3, 2002, the Hearing Examiner issued his report and recommendations. H.E. No. 2002-13, 28 NJPER 210 (¶33072 2002). He concluded that the Board violated 5.4a(1), but not a(4) by failing to comply fully with the settlement agreement. That agreement provides that the Board will provide a neutral letter of employment reference in response to any appropriate inquiry

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1/ Footnote Continued From Previous Page

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. (7) Violating any of the rules and regulations established by the commission." The charge also asserted that the employer violated 5.4b(1), (3), and (5) and 5.5. These provisions, however, address the obligations of majority representatives, not employers.

(paragraph 5); the superintendent's office will complete Smith's substitute teacher application and forward it to the County Superintendent (paragraph 6); six months from the execution of the agreement, the Board will remove four performance evaluations from Smith's personnel file (paragraph 7); seven months from the execution of the agreement, the Board will submit a letter to Smith indicating that the evaluations were removed from the file; and Smith may examine her personnel file given adequate notice and a mutually convenient appointment. In particular, the Hearing Examiner found that the Board was obligated to give a "neutral response" to any employment inquiry and that at least one Board employee gave a negative oral response to an employment inquiry, thereby violating the spirit of paragraph 5. He found that the Board's superintendent failed to sign Smith's application for a substitute teacher certification, thereby repudiating paragraph 6. And he found that the Board did not remove the evaluation documents from Smith's personnel file and submit a letter to Smith indicating it had done so, thereby repudiating paragraphs 8 and 9. The report states that the Hearing Examiner believed that the Board failed to comply with the settlement agreement out of its dislike for Smith. By way of remedy, the Hearing Examiner recommended that the Board be ordered to comply with all provisions of the agreement that it has not already complied with and, in particular, to provide a neutral letter of reference and neutral oral, e-mail or written responses to all employment

inquiries; provide notice that it has removed the evaluation documents from her personnel file; continue to give Smith access to her personnel file; and post a notice of its violation.

On May 6, 2002, the Board filed exceptions. With respect to paragraph 5, the Board argues that the Hearing Examiner improperly inferred that the language of the paragraph was broader than written and that there was no evidence that the Board had failed to provide a neutral reference, written or oral, to any employer inquiry.

With respect to paragraph 6, the Board argues that the settlement agreement did not require it to maintain a copy of the signature showing that the substitute teaching certificate was executed. It further argues that there was no documentation from the County superintendent indicating that the Board superintendent's signature was still needed.

With respect to paragraph 8, the Board contends that the agreed-upon items were removed. It acknowledges that it did not provide notice of removal of the items pursuant to paragraph 9.

Finally, the Board argues that the record does not support the Hearing Examiner's finding that the Board did not like Smith.

On May 20, 2002, Smith filed an answering brief. She argues that numerous requests for references were received and she was labeled a troublemaker; she has attached documents to her brief related to the renewal of her substitute certificate; when

she went to Board counsel's office to review her personnel file, nothing had been removed; and the Board acknowledges that it breached the agreement by not notifying her that the documents had been removed from her personnel file.

We have reviewed the record. We adopt the Hearing Examiner's undisputed findings of fact (H.E. at 3-11).

N.J.S.A. 34:13A-5.4a(1) prohibits a public employer from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act. Repudiation of an agreement settling an unfair practice charge violates 5.4a(1) -- we cannot allow a charging party's right to file and pursue an unfair practice charge to be circumvented by a bad faith refusal to honor the clear terms of a settlement agreement. City of Asbury Park, P.E.R.C. No. 2002-73, 27 NJPER ___ (¶_____ 2002).

A finding of repudiation is appropriate because the Board took no action to comply with the settlement agreement. For example, the superintendent did not sign Smith's application for her substitute certification.2/ Further, the Board failed to remove four performance evaluations from Smith's personnel file

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2/ The Hearing Examiner's inference that the application was submitted but not signed is not undermined because the agreement did not require the Board to maintain a copy of the signature showing that the document had been executed.

until after the first day of hearing and even when it removed them, it still did not send Smith the required notice.3/

By way of remedy, we will order the Board to stop repudiating the settlement agreement, to provide Smith with a letter indicating that it removed the evaluations from her personnel file, and to post a notice of its violation.4/

In the absence of exceptions, we dismiss the remaining allegations in the Complaint.

ORDER

The Irvington Board of Education is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by repudiating an agreement settling an unfair practice charge filed by Gwendolyn E. Smith (CI-98-92).

3/ We will not infer, however, that a negative comment to Smith's friend constitutes a repudiation of an agreement that the Board provide a neutral letter of employment reference. Nor is there any legally competent evidence of any inquiry seeking a reference or of any notice to the Board that Smith wanted to see her personnel file.

4/ Given our determination, it is not necessary to consider the Board's exception to the Hearing Examiner's finding that the Board did not like Smith.

B. Take this action:

1. Provide Smith with a letter verifying that we have removed the performance evaluations listed in paragraph 7 of the settlement agreement.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and 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.

3. Within twenty (20) days of receipt of this decision, notify the Chair of the Commission of the steps the Respondent has taken to comply with this order.

The remaining allegations in the Complaint are dismissed.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Katz, McGlynn, Muscato and Ricci voted in favor of this decisions. None opposed. Commissioner Sandman was not present.

DATED: July 25, 2002
Trenton, New Jersey
ISSUED: July 26, 2002

NOTICE TO 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 employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, particularly by repudiating an agreement settling an unfair practice charge filed by Gwendolyn E. Smith (CI-98-92).

WE WILL provide Smith with a letter verifying that we have removed the performance evaluations listed in paragraph 7 of the settlement agreement.

CI-H-2001-8
Docket No.

IRVINGTON BOARD OF EDUCATION
(Public Employer)

Date: _____ By: _____

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 Street, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

d:\percdocs\notice 10/93

H.E. NO. 2002-13

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

In the Matter of

IRVINGTON BOARD OF EDUCATION,

Respondent,

-and- Docket No. CI-H-2001-8

GWENDOLYN E. SMITH,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends the Commission find that the Irvington Board of Education violated the New Jersey Employer-Employee Relations Act by failing to comply with and repudiating a settlement agreement in a prior unfair practice case. The Hearing Examiner recommended compliance with that agreement to the extent possible and the posting of a notice, but rejected the charging party's request for damages.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. NO. 2002-13

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

In the Matter of

IRVINGTON BOARD OF EDUCATION,

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-and- Docket No. CI-H-2001-8

GWENDOLYN E. SMITH,

Charging Party.

Appearances:

For the Respondent, Hunt, Hamlin & Ridley, attorneys (Raymond L. Hamlin, of counsel)

For the Charging Party, Gwendolyn E. Smith, pro se

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On August 2, 2000, Gwendolyn Smith (Charging Party), filed an unfair practice charge with the New Jersey Public Employment Relations Commission, which she amended on February 5, 2001, alleging that the Irvington Board of Education (Board) violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.4a(1), (4), (5) and (7)[1/];

1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given

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5.4b(1), (3) and (5)[2]; and 5.5[3] (Act). Smith alleged that the Board did not comply with an agreement of June 1999; was still giving negative references/comments to employee inquiries about her although it had agreed otherwise; was blocking her from obtaining or keeping a job; and, that it did not negotiate in good faith and continued to harass and taunt her. The Charging Party sought: "$250,000.00 for damages, loss of wages, mental and physical strain," and for "jobs that [she] could have [allegedly] obtained."

Procedural History

This case actually concerned the Board's alleged failure to comply with or repudiation of the settlement agreement reached in a prior unfair practice charge between the parties, Docket No.

1/ Footnote Continued From Previous Page

any information or testimony under 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. (7) Violating any of the rules and regulations established by the commission."

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

3/ This section concerns representation fees in lieu of dues.

CI-98-92. That agreement required the Board to take certain action discussed later.

By letter of March 31, 2001, the Charging Party requested that the instant charge be construed as a motion to reopen her prior charge, and that the instant charge then be closed and the Charging Party be allowed to proceed to hearing on the prior charge. By letter of May 4, 2001 accompanying the complaint herein, the Director of Unfair Practices denied that request/motion. The prior charge was not reopened and the Director limited the allegations in the instant complaint.

A Complaint and Notice of Hearing (C-1) issued in this case on May 4, 2001 only with respect to the 5.4a(1) and (4) allegations. The Board filed an Answer on May 8, 2001 (C-2) denying its actions violated the Act.

Hearings were held on August 23 and October 18, 2001.[4/] Both parties filed post hearing briefs, the last of which was received on March 27, 2002.

Based upon the entire record, I make the following:

Findings of Fact

1. Factual Background - At various times during the 1997-1998 academic year (and perhaps prior years), Smith worked as a per diem substitute teacher for the Board. On June 5, 1998, she filed an unfair practice charge, Docket No. CI-98-92, against the

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4/ The transcripts will be referred to as 1T and 2T, respectively.

Board which was amended on June 25, 1998, alleging a variety of issues, including that the Board (allegedly) took certain action against her because she filed a complaint and attempted to organize substitute teachers. That charge alleges her last day of employment with the Board was May 12, 1998.

A complaint was issued regarding CI-98-92 on October 28, 1998. A hearing was convened in that matter on May 17, 1999. The Charging Party amended her charge at that time alleging that the Board refused to renew her license for substitute teaching. The hearing was conducted that day, the Charging Party presented her case and the Board moved to dismiss. The hearing examiner granted the motion regarding the allegation the Board took action against her because she filed a complaint, but denied the motion regarding her attempt to organize employees.

Those same parties reconvened on July 21, 1999 and entered into an agreement to resolve the underlying remaining charge which resulted in a withdrawal of that charge. That agreement, C-3, included a non-admission clause and contained the following relevant paragraphs.5/

> 4. In lieu of proceeding further with the litigation of this unfair practice charge, the above-captioned parties have agreed to resolve this matter by entering into this Agreement for Resolution of Dispute. The parties' entry into this Agreement is neither an admission by the Respondent that its conduct constituted unfair

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5/ Pursuant to N.J.A.C. 19:14-6.6, I took administrative notice of the pertinent facts from CI-98-92.

practices nor an acknowledgment by Charging Party that no unfair practices occurred herein. Rather, this Agreement constitutes solely a mechanism for the resolution of this unfair practice charge; it may not be used as an admission against interest, except in a proceeding to enforce this Agreement.

5. The Board agrees to provide a neutral letter of employment reference in response to any appropriate inquiry concerning Ms. Smith's employment by the Irvington Board of Education. (At a minimum, the letter shall verify the length of employment and the position in which Ms. Smith was employed.)

6. Ms. Smith shall complete and present to the Irvington Superintendent of Schools an Application for County Substitute Certification (renewal). Accompanying this application shall be a photocopy of Ms. Smith's original Substitute Certification and a check covering the $50 fee for the application. The Irvington Superintendent's Office shall complete the application and forward same to the County Superintendent.

7. This Agreement does not obligate the Irvington Board of Education to place Ms. Smith on their substitute list or to employ Ms. Smith as a substitute teacher.

8. In six months from the date of the execution of this Agreement, the Board shall remove from Ms. Smith's personnel file the documents enumerated below: (1) Performance evaluation by Wells dated January 8, 1998; (2) Performance evaluation by Washington dated March 19, 1998; (3) Performance evaluation by Cummings dated March 1998; (4) Performance evaluation by Vargas dated May 7, 1998; and all other documents which are the subject of this proceeding.

9. In seven months from the date of the execution of this Agreement, the Board's counsel or other appropriate Board official, shall submit a letter to Ms. Smith (copy to Commission Hearing Examiner Tadduni) indicating that the above-referenced documents were removed from Ms. Smith's personnel files.

10. Ms. Smith shall be free to examine her personnel file at the Irvington Board of Education, so long as adequate notice is given and a mutually convenient appointment is established.

11. In view of the foregoing agreements, Charging Party hereby withdraws the above-captioned unfair practice charge.

At the instant hearing on October 18, 2001, the Charging Party moved to amend the above agreement (C-3) by requiring the Board to remove and destroy every document in her personnel file (2T10-2T12). The Board opposed the motion (2T12-2T13). I denied the motion finding that only the parties had the authority to amend C-3, their own agreement (2T14-2T15).

2. Ms. Smith last substituted for the Board in May 1998. While working in Irvington, Ms. Smith was only a per diem substitute teacher, she was not full time, and she earned $75 per day (1T41). From October 1998 through June 2001, Smith was predominantly employed by the NIA Private School except for a few breaks in the spring and summer (1T38-1T40, 1T75-1T79), and she was reemployed for the 2001-2002 academic year (1T39, 1T86). She also worked for A.C.E. Academy for a short time in July 1999 (1T35), and in May and June 2000 (2T34-2T35).

3. Paragraphs 5, 6, 8 and 9 of C-3 required specific action by the Board. Paragraph 5 required a neutral letter be provided in response to employment inquiries regarding the Charging Party. Dr. Ernest Smith (no relation to the Charging Party) became the Board's superintendent on July 1, 1999, just a few weeks before

C-3 was reached (2T16-2T17). He did not participate in the settlement but he was aware of it, and he knew that if the Board received an inquiry regarding the Charging Party's work history he was to provide a letter verifying her employment and giving her starting and completion date. He would not have provided any information regarding her performance (2T21).

However, Dr. Smith did not develop a neutral employment letter regarding the Charging Party. He, personally, was never contacted by potential employers regarding Ms. Smith, and he was not aware whether any other Board official was contacted regarding Ms. Smith (1T31; 2T21-2T22).

Whether Superintendent Smith was aware of employment contacts on behalf of the Charging Party or not, Ms. Smith testified that she applied to the school districts in Orange, Newark and East Orange in 2000 but was denied jobs in those locations because of negative remarks about her allegedly given by someone in Irvington (1T60; R-1). But Ms. Smith had no records to show she applied in those locations nor records she was rejected (1T61-1T63), nor did she know the name of or call as a witness here the personnel officer from Orange whom she claimed said that Irvington had given negative information regarding her employment (1T64-1T65). Consequently, I cannot rely on that part of Ms. Smith's testimony.

Alif Muhammad, the principal of the NIA Private School that hired Ms. Smith as a teacher after she left Irvington testified that prior to October 1998--which was before C-3 was consummated--he

called Irvington regarding Ms. Smith and concluded "they didn't feel too good about her at the time" (1T75). While I credit that part of Muhammad's testimony, since the negative information he received about Smith at that time occurred before C-3 was reached, I cannot rely on it to find the Board acted improperly after July 21, 1999.

Muhammad, nevertheless, hired Smith as a teacher. Muhammad also testified that in September 2000 he was aware Ms. Smith was being considered for jobs in Orange and Newark. He testified that Ms. Smith "showed me a piece of paper" saying Newark had offered her a contract making $40,000 a year (1T77). He knew that Ms. Smith had been offered a contract in Newark which was subsequently withdrawn, but he did not know why it was withdrawn, and he was unaware of any offer in Orange (1T76-1T77, 1T82). Muhammad further testified about a telephone conversation he had with someone from Newark inquiring about Ms. Smith. He claimed that "Newark" person told him she heard negative things about Ms. Smith from Irvington but he did not name a particular person and said that it was not from the superintendent (1T81-1T82).

I credit most of Mr. Muhammad's testimony, specifically that he heard negative remarks about Ms. Smith in the fall of 1998, and knew that she was considering jobs in both Orange and Newark but did not know why she did not receive jobs in those locations. I cannot, however, rely on Muhammad's testimony that someone from Newark heard negative remarks about Ms. Smith from Irvington. That testimony is at least double hearsay and without the "Newark" person

testifying personally, it is inherently unreliable. Similarly, I cannot infer from Muhammad's testimony that Ms. Smith was offered a job for $40,000. Muhammad said Smith had shown him that information on "a piece of paper", but Smith did not offer any written evidence of such an offer, nor did she testify she received such an offer.

In her letter of November 21, 2000 (R-1), Ms. Smith said that the Board's secretary, "Sharon":

> ...was instructed to take my file out of the active file and put it in inactive file. The file was to be labeled Trouble Maker.

I cannot credit R-1 because "Sharon" did not testify at this hearing and I cannot rely on Ms. Smith's second hand explanation for how Sharon was instructed. But Vanessa Bivins testified that when she accompanied Ms. Smith to the Board offices to view her personnel file the Board secretary named "Sharon" said it was a non-active file and she referred to Ms. Smith as a "trouble maker" (1T87-1T88, 1T90). I credit that testimony and infer therefrom that a Board employee made negative remarks to Bivins regarding Smith's employment.

Paragraph 6 of C-3 required the superintendent to sign Ms. Smith's application for her substitute certification. Ms. Smith prepared the application for substitute certification, R-3, on August 7, 1999. She delivered the document and application fee to the Board's attorney (1T28). By letter of August 24, 1999 (R-2), the Board's attorney notified Dr. Smith to sign the form and return it to Ms. Smith.

R-2 provides:

> Enclosed please find the information which we discussed regarding the above captioned matter. As discussed, you should sign the space marked for Superintendent and return the signed form back to Ms. Smith. Her address is on the attached Money Order.
>
> If you have any questions please feel free to contact this office.

Dr. Smith recalled receiving R-2 but not specifically R-3. He explained it was his normal practice to sign such forms and send them back, but he could not remember the Charging Party's actual application (2T19-2T20).

Ultimately, Dr. Smith did not sign R-3, his signature is not on that document, and Ms. Smith never received her substitute certification (1T52-1T53, 1T56, 1T69). After failing to obtain her substitute certification, however, Ms. Smith learned how to obtain her regular teacher certification and subsequently received it sometime in the year 2000 (1T30, 1T59).

Paragraph 8 of C-3 required the Board to remove specific performance evaluations from Ms. Smith's personnel file by approximately January 21, 2000. The Board failed to comply with that requirement (1T31, 1T69; 2T8-2T9). In fact, the Board did not remove the specified evaluations in C-3 until Ms. Smith met with the Board's attorney between the first and second days of this hearing (late August or in September 2001) at which time the specified documents were removed (2T5-2T6, 2T8-2T9).

Paragraph 9 of C-3 required the Board to notify Ms. Smith and the hearing examiner from CI-98-92 in writing by approximately February 21, 2000 that the evaluation documents listed in paragraph 8 of C-3 were removed from Ms. Smith's personnel file. The Board both failed to remove the documents by the scheduled time, and failed to send the confirming letter as required by C-3, para. 9 (1T70). Additionally, no letter was sent after the documents were finally removed in the summer of 2001. The Board offered no plausible explanation for failing to comply with paragraphs 8 and 9.

Paragraph 10 of C-3 gave Ms. Smith the opportunity to examine her personnel file provided she gave adequate notice. Subsequent to the signing of C-3, Ms. Smith went to the Board offices to review her personnel file. She had not called ahead, made an appointment or given any notice as required by C-3 (1T66-1T68). She was denied the opportunity to review her file at that time (1T31, 1T70). There was no evidence that she was denied access to her file when notice was provided.

ANALYSIS

The issue in this case is whether the Board failed to comply with, ignored or repudiated the terms of Exhibit C-3, the parties settlement agreement from CI-98-92. The process that leads to such agreements is a vital component of the overall manner by which the Commission handles unfair practice cases. One of the fundamental objectives of the Act is to achieve labor peace, and the Commission has historically encouraged the voluntary resolution of

disputes as one of the most effective ways to achieve such peace. The written settlement agreement or memorandum of agreement is the most common form of memorializing the voluntary resolution of a dispute. The Commission has held that the violation or repudiation of such agreements violates the Act. Red Bank Bd. Ed., P.E.R.C. No. 87-39, 12 NJPER 802 (¶17305 1986). To hold otherwise would undermine one of the most successful methods to achieve labor peace, inevitably resulting in an increase in litigation which would dampen the relationships the Act sought to rehabilitate.

The facts in this case show the Board failed to comply with certain obligations it had agreed to in C-3. In that agreement Ms. Smith, in paragraph 7, surrendered any opportunity she may have had to be employed by the Board as a substitute teacher, and in paragraph 11 she withdrew her charge in CI-98-92, thereby waiving her right to pursue that matter to a formal decision, all in exchange for the Board taking certain specific action. The Board failed to comply with the action it was obligated to take in paragraphs 5, 6, 8 and 9 of C-3, particularly repudiating paragraphs 6, 8 and 9.

In paragraph 5, the Board agreed to provide "a neutral letter" to any inquiry regarding Smith's Board employment. I infer from the language in that paragraph that the Board's obligation was broader than the mere terminology in C-3.. I believe the Board was obligated to give "a neutral response" to any employment inquiry regarding Smith, whether in oral, e-mail or letter form. While the

evidence shows that Dr. Smith was unaware of any employment inquiries and, therefore, he did not produce a letter or make any remarks to anyone about Ms. Smith, the record also shows that some inquiries were made and at least one Board employee gave a negative oral response regarding Ms. Smith's prior employment. That response violated the spirit of C-3, but the Charging Party did not show by a preponderance of the evidence that she was denied any jobs due to the Board's behavior.

As a result of paragraph 6 of C-3, the Board's superintendent was obligated to sign Ms. Smith's application for her substitute certification. He never did. Even if it was an oversight, the superintendent's failure to sign repudiated the parties agreement thereby violating the Act.

Paragraph 8 of C-3 required the Board to remove specific evaluation documents from Ms. Smith's personnel file within six months of July 21, 1999, and paragraph 9 required the Board to submit a letter to Ms. Smith and the former hearing examiner that those documents listed in paragraph 8 had been removed. The Board did not comply with paragraph 8 within the time provided in C-3, and it never sent the letter it agreed to in paragraph 9. Since the Board offered no defense to its failure to comply with paragraphs 8 and 9 of C-3, I can only infer it intentionally ignored those requirements thereby repudiating the parties agreement.

The Board's failure to comply with the above obligations in C-3 violated 5.4a(1) of the Act because it had the tendency to

interfere with Ms. Smith's exercise of protected rights. She was entitled to the best of her agreement. However, I am not finding that the Board's action also violated 5.4a(4) of the Act. There was no showing that the Board failed to comply with the above stated paragraphs in C-3 because Ms. Smith filed and pursued the instant or prior unfair practice charges. I believe the Board failed to comply with C-3 out of its dislike for Smith.

REMEDY

In her charge and post hearing brief, Ms. Smith sought $250,000.00 for damages, loss of wages, mental and physical strain and for jobs she was allegedly denied. But it was explained to her both before and during the hearing that the Commission does not have the authority to issue punitive damages, or awards for pain and suffering. The Commission is empowered to issue "make whole remedies", remedies which make "affected employees whole for their losses sustained by reason of the commission of an unfair practice...." Galloway Twp. Bd. Ed. v. Galloway Twp. Ass'n of Educ. Sec., 78 N.J. 1, 16 (1978); see also Hunterdon County, 116 N.J 322, 15 NJPER 570 (20235 1989).

A make whole remedy can include a back pay award for actual losses sustained where a charging party proves by a preponderance of the evidence that the respondent's actions caused the loss, and the evidence shows the amount of the loss. Here, the Charging Party asks for $250,000 but there is no evidence in this record that Ms. Smith suffered any such loss. The only monetary figure presented in

the record was $40,000, which allegedly was the salary the Newark Board of Education may have offered to Ms. Smith. But the Charging Party did not produce evidence in this case from the Newark Board of Education that she was actually offered a job, and would have received $40,000 per year, nor did the evidence establish that the Irvington Board--or someone therefrom--was responsible for her not receiving such an appointment. Even Mr. Muhammad did not know why Ms. Smith did not receive a contract from Newark. Consequently, I have no basis to recommend a monetary remedy.6/

The remedy in this case on its face is simple, the Board must comply with all of the provisions of the settlement agreement in CI-98-92. But the events that have occurred between the time C-3 was signed on July 21, 1999 and the end of this hearing have complicated the result.

The Board must still comply with Paragraph 5 of C-3 and produce a neutral letter of reference that it will have on file to be used in response to employment inquiries regarding Ms. Smith. In addition, however, in keeping with the spirit of paragraph 5, the Board is also required to advise all of its main office and personnel employees and any other employee provided with such knowledge, that they can only give neutral oral, e-mail or written responses to all employment inquiries regarding Ms. Smith.

6/ If there were a monetary remedy it would be the salary Smith would have received minus the salary she was receiving at the private school(s). It would never have approached $250,000.

The Charging Party is no longer seeking a substitute certification, she now has a regular teacher certification, thus, there is no point in the superintendent signing exhibit R-3 (the application for a substitute certificate) as required by paragraph 6 of C-3. Similarly, since the Board has removed from Ms. Smith's personnel file the four evaluation documents required by Paragraph 8 of C-3, no further action need be taken regarding that paragraph. Despite the Board's stipulation on the record that those documents were removed, however, the Board should still be required to provide the notice of compliance with paragraph 8 above as provided by paragraph 9 of C-3.

Additionally, the Board must continue to give Ms. Smith access to her personnel file as provided by Paragraph 10 of C-3.

Finally, I recommend the posting of a notice in this case where main office and personnel employees at Irvington will see it.

Accordingly, based upon the above findings and analysis, I make the following:

CONCLUSIONS OF LAW

The Board violated 5.4a(1) but not a(4) of the Act by failing to fully comply with the terms of the settlement agreement entered into between the parties in CI-98-92.

RECOMMENDATION

I recommend the Commission ORDER:

A. That the Irvington Board of Education cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to fully comply with and repudiating a settlement agreement with former Board per diem substitute teacher Gwendolyn E. Smith.

2. Engaging in conduct which has the tendency to interfere with, restrain or coerce its employees from engaging in conduct protected by the Act, particularly by failing to fully comply with a settlement agreement entered into with former Board per diem substitute teacher Gwendolyn E. Smith as evidenced by:

a.) failing to provide neutral responses to employment inquiries regarding Ms. Smith,

b.) failing to sign Ms. Smith's application for substitute certification,

c.) failing to remove evaluation documents from Ms. Smith's personnel file within a specific time period, and

d.) failing to notify the Charging Party and the Commission's hearing examiner of its actions,

B. That the Board take the following action:

1. Direct all Board main office and personnel employees and any other relevant Board employee(s) that they shall only provide neutral oral, e-mail or written responses to any inquiry concerning Ms. Smith's Board employment.

2. Within twenty (20) days of the Commission's decision, the Board must:

a. Produce for the Commission's review with a copy to the Charging Party a neutral letter of employment reference to be used in response to any appropriate inquiry concerning Ms. Smith's employment with the Board.

b. Provide Ms. Smith and the Commission with a letter verifying it has removed the performance evaluations listed in Paragraph 8 of C-3 from Ms. Smith's personnel file, and that those evaluations will not be placed back into her file.

3. Provide Ms. Smith with access to her personnel file as provided in Paragraph 10 of C-3.

4. Post in all places where notices to employees are customarily posted, but particularly where it can be seen by Board main office and personnel employees, 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.

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

C. That the 5.4a(4) allegation be dismissed.

Arnold H. Zudick
Senior Hearing Examiner

Dated: April 3, 2002
Trenton, New Jersey

RECOMMENDED

NOTICE TO 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 employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to fully comply with or repudiating a settlement agreement with former Board per diem substitute teacher Gwendolyn E. Smith as evidenced by: failing to provide neutral responses to employment inquiries regarding Ms. Smith; failing to sign Ms. Smith's application for substitute certification; failing to remove certain documents from Ms. Smith's personnel file within a specific time period; and failing to notify the Charging Party and the Commission's hearing examiner of its actions,

WE WILL cease and desist from engaging in conduct which has the tendency to interfere with, restrain or coerce its employees from engaging in conduct protected by the Act, particularly by failing to fully comply with a settlement agreement entered into with former Board per diem substitute teacher Gwendolyn E. Smith.

WE WILL within twenty (20) days of the Commission's decision:

a. produce a neutral letter of employment reference for the Commission with a copy for Ms. Smith to be used in response to any appropriate inquiry concerning Ms. Smith's employment by the Board.

b. provide Ms. Smith and the Commission with a letter verifying we have removed the performance evaluations listed in the Agreement of Resolution (C-3) from Ms. Smith's personnel file, and agree that those evaluations will not be placed back into her file.

WE WILL direct all Board main office and personnel employees and any other relevant Board employee(s) that they shall only provide neutral oral, e-mail or written responses to any inquiry concerning Ms. Smith's Board employment.

WE WILL provide Ms. Smith with access to her personnel file as provided in the Agreement of Resolution.

Docket No. _____ _____
(Public Employer)

Date: _____ By: _____

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 Street, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"