P.E.R.C. NO. 85-77

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY, DEPARTMENT OF HIGHER EDUCATION,

Respondent,

- and -

Docket No. CO-81-22-45

NEW JERSEY CIVIL SERVICE ASSOCIATION, MERCER COUNCIL #4, and LOCAL 1040, COMMUNICATIONS WORKERS OF AMERICA, Successor to Mercer Council #4,

Charging Parties.

SYNOPSIS

The Public Employment Relations Commission holds that Kean College violated the New Jersey Employer-Employee Relations Act when it reduced the hours of work of certain part-time employees at Kean College from 20 to 15 per week. The Commission finds that this reduction was in unlawful retaliation against employees filing a petition with the Governor's Task Force protesting the lack of fringe benefits.

The Commission further finds, however, that the reduction in hours did not violate the employer's obligation to negotiate with the majority representative since the employees in question were not included within the recognition clause negotiated by the parties.

The Commission declined to rule on the legality of an earlier reduction in hours since it was not properly pleaded.

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Appearances:

For the Respondent, Irwin I. Kimmelman, Attorney General
(Michael L. Diller, Deputy Attorney General, of counsel)

For the Charging Party, Reitman, Parsonnet, Maisel & Duggan
(Sidney Reitman and Bennet Zurofsky, of Counsel)

DECISION AND ORDER

On July 25, 1980, the New Jersey Civil Service Association, Mercer Council #4 ("Council #4) filed an unfair practice charge against the State of New Jersey, Department of Higher Education ("State"). Council #4 alleged that the State violated subsections 5.4(a)(1) and (5) [1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). Specifically, the charge, in its entirety, alleged that:

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."

> During the second week in July, 1980, permanent part time employees at Kean College of New Jersey represented by contractual agreement by N.J.C.S.A.-S.E.A. in the professional and clerical units were notified their work hours would be cut from 20 hours to 15 hours.
>
> This was an arbitrary and capricious act on the part of the College, and in violation of present agreement between the State of New Jersey and New Jersey C.S.A.-S.E.A. which stipulates that changes in working conditions must be negotiated.

On November 10, 1981, the Director of Unfair Practices issued a Complaint and Notice of Hearing.

Subsequently, on February 5, 1982, both the charging party and the charge were amended. "New Jersey Civil Service Association, Mercer Council #4 and Local 1040, CWA, Successor to said Mercer Council #4" ("CWA") was amended as charging party. The charge was amended to allege that Kean College, in violation of subsection 5.4(a)(3) of the Act, [2/] reduced work hours in retaliation for the part-time employees' protest to the Task Force on Human Relations that they were not receiving benefits due them under the then existing collective negotiations agreement between the State and New Jersey Civil Service Association ("NJCSA")/New Jersey State Employees Association ("NJSEA"), the former majority representative.

On November 23, 1981 and February 23, 1982, the State filed its Answer. The State asserted the charge was untimely and that the charging party lacked standing to file the charge because:

2/ This subsection prohibits public employers, their representatives or agents from: "(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."

(1) the individual filing the charge was not an authorized representative of the majority representative of the negotiations unit; and (2) the employees allegedly retaliated against were "special services" employees and therefore outside of the negotiations unit. Further, the Answer asserted that the reduction in hours was caused by legitimate budgetary considerations and that the Civil Service Commission was the proper forum to determine the employees' status.

On June 28, 29, July 1, August 16, September 7, October 28 and 29, November 19, and December 7, 8, and 9, 1982, Chief Hearing Examiner Edmund G. Gerber conducted hearings. The parties examined witnesses, presented exhibits and entered into stipulations. The record then closed and the parties filed post-hearing briefs.

On April 16, 1984, the Hearing Examiner issued his report and recommended decision. H.E. No. 84-54, 10 NJPER 237 (¶15118 1984). First, he found that the charging party, as amended, had standing to litigate this action. He then found that the College violated subsections 5.4(a)(1) and (5) when it unilaterally reduced the work week of certain of its part-time employees to 20 hours in February 1980 and to 15 hours in July 1980. He further found that this reduction violated subsections 5.4(a)(1) and (3) because it was made in retaliation against an employee petitioning the Governor's Task Force on Human Relations and against public protest that part-time employees were not receiving benefits contractually due them. Accordingly, he ordered the

College to cease (1) interfering with employees in the exercise of rights guaranteed to them by the Act; (2) discriminating in regards to terms and conditions of employment to discourage them in the exercise of such rights; and (3) refusing to negotiate in good faith with the majority representative by unilaterally reducing weekly hours of employees. He further ordered the College to take the following affirmative action: (1) offer to restore the weekly work schedule of all part-time employees who had worked 20 hours or more per week prior to the February and July 1980 workweek reductions; (2) reimburse these employees for the loss in salary suffered as a result of the February and July reductions in hours; (3) provide these employees the cash value of the fringe benefits they would have been entitled to had their hours not been reduced in February and July 1980; (4) provide these employees the benefits they were contractually entitled to and petition Civil Service to classify their positions as provisional; (5) negotiate with the majority representative prior to the implementation of further reductions; and (6) post a notice setting forth the foregoing order.

On May 22, 1984, after receiving extensions of time, the State filed its exceptions. It asserts the Hearing Examiner erred in:

> (1) considering the reduction in hours which occurred in February 1980 since that was not alleged in the charge or the amendments and providing a remedy for those employees that did not sign the petition filed with the Governor's Task Force;
>
> (2) finding that the part-time employees in question were members of the bargaining unit represented by C.W.A. or its predecessor, NJCSA/

NJSEA and its affiliates;

(3) finding that the charge was timely filed since C.W.A. did not become the majority representative until after the statute of limitations had run and did not have derivative standing before then because the charge was not originally filed by the majority representative;

(4) finding that the reduction in hours was made in retaliation against employees for filing a petition with the Governor's Task Force on Human Relations protesting the lack of fringe benefits.

(5) incorrectly applying Civil Service law.

On June 22, 1984, CWA filed its response urging adoption of the Hearing Examiner's findings of fact and conclusions of law.

On November 1, 1984, the Commission heard oral argument.

The parties disagree as to the ultimate conclusions to be found. For instance, they disagree as to whether the employees in question are members of the negotiations unit now represented by CWA; whether the charging party or its successor has standing to file this charge; whether the charge was originally filed by an authorized representative; and whether the reduction in hours was in retaliation for the petition filed with the Governor's Task Force on Human Relations. However, with respect to the basic facts from which these ultimate conclusions are to be derived, there is little disagreement. We will set forth these basic facts in detail grouped in the following categories: (1) employment histories of part-time workers at Kean College; (2) the reductions in work hours; and (3) the representation history pertinent to this dispute.

Until 1980, certain part-time clerical and professional employees at Kean College consistently worked 20 hours or more per

week. These employees were hired as "special services" employees, but, as will be discussed in detail later, it is undisputed that this classification was not in fact proper.

Abby Demel commenced employment with Kean College as a part-time professional administrative assistant to Marta Westman, assistant registrar, in the registrar's office in September 1978 following her graduation from the College. At her interview for employment, she was advised that this was a permanent position, and that her duties would require her to work a minimum of 20 hours per week throughout the year. She was warned not to take the position if she was only interested in temporary employment. Her duties were substantially similar to those of an Administrative Assistant III, a Civil Service title. She continued to work 20 hours per week until September 1980.

Shirley Dunst commenced working at Kean College in November 1975 as a clerk in the registar's office. Her job duties were substantially similar to the Civil Service title of clerk. She worked 25 hours per week until February 1980 when her hours were reduced to 20 per week.

Jean Lee commenced working as a clerk in 1976. At first, she worked only sporadically, but in February 1977, she commenced regular part-time employment for 24 hours a week (six hours per day, four days a week). She was advised this was a permanent part-time position. Her duties were substantially similar to the Civil Service title of clerk.

Joan Veale is a part-time clerical employee at Kean College. She commenced employment in January 1977 on a temporary basis, but soon worked 30 hours per week as a regular permanent employee.

Later, at her request, her hours were reduced to 22 1/2 per week. Her job duties are substantially similar to the Civil Service classification of clerk.

Edna Alexander commenced employment with Kean College in September 1979 as clerk in the records department of the registrar's office. She performs duties substantially equivalent to the Civil Service description of clerk. At the commencement of her employment, she was advised that this was a permanent position. She thus worked 24 hours a week regularly until her hours were reduced to 20 in February 1980.

Cecille Frank commenced employment with Kean College in 1976 as a part-time secretary. It was understood that this would be a permanent position. Later, she changed positions. Now, her duties are substantially equivalent to the Civil Service title of clerk-stenographer. She worked 30 hours per week until February 1980 when her hours were reduced to 20.

These employees, and other part-time employees, were paid hourly and did not receive any fringe benefits. Abby Demel protested this situation by filing a petition, signed by several other part-time employees, with the Governor's Task Force on January 9, 1980. She forwarded a copy of the petition to the College's president. Demel also spoke at Task Force hearings in January 1980. Prior to speaking, Demel advised Evelyn Babey, the Registrar, of her intention. Babey responded that she could speak, but that Babey did not believe it would "do any good; if anything, it might make things worse." Westman also advised her against speaking since "it might make matters worse." Babey also said that if the College were required to pay benefits, it might

have to terminate these employees because of the expense involved.

Immediately after Demel's appearance, Barbara Taylor, the supervisor of records, was apprehensive about the consequences of the speech and told Demel that she "hoped that things would not get worse."

In February 1980, shortly after Demel's appearance, the hours of the College's part-time employees were reduced to a maximum of 20 hours per week. Subsequently, Babey advised Demel that the College could not afford to pay part-timers benefits and that if it were required to do so it would make more sense to terminate such employees. Babey later had a dispute with Demel regarding working on Sunday but not being eligible for overtime. Babey advised Demel that she should look elsewhere for work since she was unhappy.

In July 1980, the College notified its part-time employees that it intended to reduce their hours to 15 per week. Westman told Demel that "[Demel] had made matters worse and because of what [she] had been doing, the hours were being cut." In response to a question concerning how the work would be done, Babey responded that more part-time employees would be hired.

In September 1980, the hours of the part-time employees were, in fact, reduced to 15 per week.[3/] On October 26, 1980, the College confirmed, in writing, that because of "fiscal

3/ The Hearing Examiner's report, in its discussion of both liability and remedy, confuses the notice of the proposed reductions given in July 1980 with the actual reductions made in the Fall of 1980.

cutbacks in appropriations," part-time employees would not be permitted to work more than 15 hours per week. In addition, cutbacks were made in the purchase of library books, equipment, travel, and adjunct expenditures. The officials involved in reducing the hours did not know how much money would be saved by this measure, nor was a study instituted to determine the amount of savings. New part-timers were hired after this policy was initiated, however.

In toto, the College employs slightly over 200 part-time employees, most of whom worked more than 20 hours per week until February 1980. Prior to this date, the College had stated that part-time employees were not to work more than 20 hours per week, but had never enforced that intention. In 1978, for example, the College's personnel officer reminded supervisors that part-time employees should not work more than 20 hours per week. This memorandum was issued several months after part-time employees petitioned the registrar for certain fringe benefits. Nevertheless, many part-time employees, with the College's knowledge and acquiescence, continued to exceed this limitation.

On April 26, 1973, the Commission certified the New Jersey Civil Service Association ("CSA") and the New Jersey State Employees Association ("SEA") as the joint majority representative ("NJCSA/NJSEA") of the State's administrative and clerical employees. On June 10, 1975, the Commission certified NJCSA/NJSEA as the joint majority representative of the State's professional employees. Originally, only full-time employees were covered by the recognition clause in the respective agreements between the State and the NJCSA/NJSEA. Thus, in the 1974-1976 agreement

covering the Administrative and Clerical Services Unit, the recognition clause, in pertinent part, included "...all full time permanent and provisional employees of the State of New Jersey...listed by job classifications in Appendix 1." Subsequently, in June 1976, the State and the majority representative expanded the recognition clause in the Administrative and Clerical Services Unit to provide, in pertinent part:

> The recognition Article of the Agreement between the parties shall be deemed to include all permanent part-time employees who are regularly scheduled to work twenty (20) or more hours per week and who are included in the classifications listed in the Appendix to the Agreement.

Later, the State and the majority representative inserted this more specific wording in the recognition clause.

> 2. a. Included are all full-time permanent, classified and provisional employees and all permanent full-time ten (10) month employees (classified, unclassified and provisional) and permanent part-time employees (classified, unclassified and provisional) who are employed a minimum of twenty (20) hours per week and who are included in the classifications listed in Appendix II.
>
> 15. Permanent part-time employee - means an employee whose regular hours of duty are less than the regular and normal workweek as indicated in the Compensation Plan for that class title or agency but are at least twenty (20) hours per week and whose services are required without interruption for a period of more than six (6) months or for recurring periods aggregating more than six (6) months in any twelve (12) month period. Employees in this category may be classified, permanent or provisional, or unclassified, depending upon title and status of appointment.

The principal rationale in expanding the unit was that employees who had a "continuity of employment" exhibited an interest in State employment demonstrating a "community of interest" with

the other employees sufficient to warrant inclusion in the negotiations unit. 4/ The factor employed to determine continuity of employment was whether employees had achieved permanency in a Civil Service approved title. 5/ Employees who were employed sporadically depending upon the level of work were not intended to be included. 6/

NJCSA is a statewide organization, made up of several councils. The largest council -- and the one with, by far, the most State employees -- was Mercer Council #4. In administering the contract, CSA, of course, was obligated to act in concert with

4/ We specifically disagree with the Hearing Examiner's conclusion that the Director of the Office of Employee Relations's testimony constituted inadmissible parol evidence. His testimony concerning negotiations history was relevant to help clarify the recognition clause, and, furthermore, was consistent with that clause's wording.

5/ Provisional and unclassified employees were also included.

6/ Four unfair practice charges and four clarification of unit petitions have been filed by the current majority representative regarding unit inclusion. In CU-84-89, CWA seeks to clarify the Administrative and Clerical Unit to include 1000 Intermittent Claims Takers. In CU-84-90, CWA seeks to clarify the Professional Unit to cover 200 Intermittent Claims Examiners. In CU-84-94, CWA seeks to clarify the Administrative and Clerical Unit to include 5000 hourly employees. In CU-84-95, CWA seeks to clarify the Professional Unit to include 1000 hourly employees. In CO-84-281, CO-84-280, CO-84-296 and CO-84-297, CWA is alleging the State violated the Act in refusing to apply contract coverage to these employees. These petitions and charges further allege that the employees perform bargaining unit work, and work more than 20 hours a week in positions that have existed for at least six months.

SEA.[7] Individual employees, however, could choose which organization would represent them in disputes affecting their individual terms and conditions of employment, and the other organization would not become involved. The State was aware of and did not object to this procedure. Policy issues affecting the entire unit, by contrast, would be handled jointly and would be referred to the joint representative's attorney, David Fox. Moreover, it had been the unwritten practice for Fox to file unfair practice charges on behalf of the joint representative.

On April 10, 1980, CSA requested the State to grant Kathleen King a leave of absence to engage in union activity. The request was granted. King commenced employment with CSA, specifically with Council #4.[8] King was also a member of SEA and had served as a member of its Board of Directors. While on leave, King was responsibile for administering the contracts between the State and NJCSA/NJSEA. It was not customary for CSA to consult with

7/ In 1973, the Appellate Division, in upholding the eligibility of NJCSA/NJSEA to participate jointly in a Commission election, said:

> Should the election result in the selection of C.S.A. and S.E.A. as the joint collective bargaining representative, both organizations will be under the affirmative obligation to those whom they represent to jointly agree upon and to pursue a single, unified policy and position on all issues. And neither the Public Employment Relations Commission nor any other body or agency may today justifiably foretell that this obligation cannot or will not be discharged with the utmost fidelity. If the day should arise when that obligation is not being so fulfilled, a remedy both satisfactory and sufficient will be at hand. AFSCME, AFL-CIO v. PERC, et al., Docket No. A-986-72 (App. Div. 2/27/73) at p. 3.

8/ In February 1980, Council #4, the largest council affiliated with CSA, also affiliated with CWA, Local 1040. Because of CSA's budgetary difficulties, it delegated to Council #4 the administration of the collective negotiations agreements. King was paid by CWA. Almost all State employee members of CSA were members of Council #4.

SEA regarding these actions. The State, prior to 1981, had dealt with King as a CSA representative. She was a shop steward for NJCSA/NJSEA designated by SEA until October 1979, when she transferred to a different unit. Subsequent to the grant of her leave of absence, CSA, on January 7, 1981, advised the State that Kathleen King was a field representative for CSA.

In the summer of 1979, Demel became aware of the agreement between the State and NJCSA/NJSEA. She had not been advised of the contract at the commencement of her employment. She read the contract and believed her employment was covered under the recognition clause. She contacted an SEA business representative who advised that she was a member of the unit and could join the union. She inquired regarding her benefits. The business representative contacted the College which responded that she was not entitled to benefits since she was classified as a "special services" employee. He did not pursue Demel's claim following this notification. Demel spoke to other part-time College employees and filed the petition with the Task Force. Following Demel's argument with Babey, she contacted an attorney and subsequently met with King, who filed the charge. King forwarded a copy of the charge to William Hoyer, Executive Director of both Council #4 and CSA. Hoyer approved of the filing, sent the charge to Fox and consulted with him about it. Fox did not object to its filing,[9/] although he did believe that it could have been worded

9/ In fact, both CSA and SEA had taken the stated position that "special services" employees should be covered under the contract and entitled to fringe benefits. They had proposed during negotiations expanding the recognition clause to include such employees, but these proposals had been rejected by the State and subsequently dropped by the union.

better and that it should be held in abeyance for future processing.

We first consider the State's contention that the charge should be dismissed because Council #4 allegedly did not have standing to file it. The State argues that only the majority representative has standing to file a charge concerning a refusal to negotiate in violation of subsection 5.4(a)(5), and that therefore only NJCSA/NJSEA could file the charge. Therefore, it asserts that neither the original charging party, Council #4, nor the current majority representative, CWA, as Council #4's successor, has standing concerning the refusal to negotiate charge filed in July 1980. We disagree.

N.J.A.C. 19:14-1.1 provides:

> A charge that any public employer or public employee organization has engaged or is engaging in any unfair practice listed in subsections (a) and (b) of N.J.S.A. 34:13A-5.4 may be filed by any public employer, public employee, public employee organization, or their representative.

There is no dispute that Council #4 and CWA are labor organizations within the meaning of the Act. See also, N.J.S.A. 34:13A-5.4(c). (The Commission has unfair labor practice jurisdiction "whenever it is charged that anyone has engaged or is engaging in any such unfair practice.") Accordingly, the issue is not whether a local -- Council #4 -- of one of the joint bargaining representatives had the procedural right under our statute to file an unfair practice charge. Of course, it did. Rather, the issue is substantive. A public employer only violates 5.4(a)(5) when it refuses to negotiate in good faith with a majority represen-

tative.[10/] Thus, individual employees and minority organizations do not have standing to litigate such a charge because the exclusive right to negotiate is vested in the majority representative. See, e.g., New Jersey Turnpike Authority, P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980); Newark Board of Education, D.U.P. No. 84-7, 9 NJPER 555 (¶14230 1983). See also, Red Bank Regional Education Ass'n v. Red Bank Reg. High School Board of Education, 78 N.J. 122, 138-139 (1978); Lullo v. Intern Assoc. of Fire Fighters, 55 N.J. 409 (1970). As we said in New Jersey Turnpike Authority (citing State of New York and Frank S. Robinson, et al., PERB Case No. U-4537, 13 PERB 3105 (¶3063 1980)):

> ...a charge must allege a violation of a right of the Charging Party protected by the statute. Since the right to negotiate is that of the majority representative, not an individual employee or even a group of individual employees, only the majority representative may charge the employer with a violation of the duty to negotiate. [Id. at 561, n. 7]

Thus, in the foregoing cases, standing was not denied because the majority representative was not technically named as charging party. Rather, it was because the charging party was neither authorized to act nor acted on behalf of the majority representative, and therefore, it could not establish a violation of 5.4(a)(5) as a matter of law. Indeed, in those cases, the interests of the charging party and majority representative were adverse.

These factors are not present here. To the contrary, Council #4 acted on behalf of the joint majority representative

10/ The unilateral reduction in work hours, if proved, would violate subsection 5.4(a)(5). Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48 (1978).

and with its authorization. Council #4 was the largest local of its affiliate CSA,[11/] one of the joint representatives. CSA had delegated to Council #4 authority to administer the contract; the charge pertained to the administration of the contract since it involved coverage of part-time employees under the recognition clause. CSA's Executive Director approved the filing of the charge, and submitted it to the attorney for CSA/SEA who did not object.[12/] Indeed, SEA had consistently endorsed the charge's allegation that part-time employees were within the negotiations unit represented by CSA/SEA. Under all these circumstances, we conclude that Council #4 had standing to press a charge alleging that the unilateral reduction in hours violated the employer's duty to negotiate in good faith with NJCSA/NJSEA.[13/] See, East Ramapo Central School District and Beatrice Kalin, Case No. U.3347 (¶12-3121, 3216 New York PERB) ((a)(5) charge not dismissed even though not brought in name of majority representative because, among other things, testimony of official supported charge). Contrast, New Jersey Civil Service Association, P.E.R.C. No. 81-

11/ It also became affiliated, in February 1980, with the Communications Workers of America.

12/ The attorney for CSA/SEA did not testify. The uncontradicted testimony of CSA's Executive Director (who also held the same position with Council #4) was that the attorney received a copy of the charge and did not object to the filing.

13/ We stress that this is not a case where the charge accuses the employer of refusing to negotiate with someone besides the majority representative; the charge identified NJCSA/NJSEA as the majority representative and Council #4 acted on that representative's behalf rather than that of a minority organization. We also conclude that King was authorized to file the charge on behalf of the joint representative.

94, 7 NJPER 105 (¶12044 1981) (election will not be blocked by unfair practice charge which one of two joint representatives explicitly disavows).

The State also claims that the charge's retaliation claim was not timely filed. The State notes that this claim was not raised until the charge was amended -- 20 months after the employees were notified in July 1980 that their hours would be reduced to 15 and 17 months after the actual reduction. Therefore, it argues that the claim was not filed within the six month statute of limitations. N.J.S.A. 34:13A-5.3(c); Kaczmarek v. New Jersey Turnpike Authority, 77 N.J. 324 (1978). We disagree.

In July 1980, Council #4 filed a timely charge alleging that the employer unilaterally and illegally reduced the work hours of part-time employees to 15 hours per week.[14/] In February 1982, CWA, the successor to Council #4, amended the charge to specify that this reduction in hours was illegally motivated by a desire to retaliate for Demel's petition and testimony before the Task Force. Under New Jersey rules and case law, we believe the amendment relates back to the original charge and should be considered timely.

R. 4:9-3 provides:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading; but the court, in addition to its power to allow amendments may, upon terms, permit the statement of a new or different claim or defense in the pleading. An amendment changing the party against whom a claim is asserted relates back if

14/ The employees were notified of the planned reduction in July. It actually occurred in Fall 1980.

> the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

In the leading case interpreting this rule, our Supreme Court, in Harr v. Allstate Insurance Co., 54 N.J. 287 (1969), said:

> The rule should be liberally construed. Its thrust is directed not toward technical pleading niceties, but rather to the underlying conduct, transaction or occurrence giving rise to some right of action or defense. When a period of limitation has expired, it is only a distinctly new or different claim or defense that is barred. Where the amendment constitutes the same matter more fully or differently laid, or the gist of the action or the basic subject of the controversy remains the same, it should be readily allowed and the doctrine of relation back applied.
> [Id. at 299]

In this case, the amendment does not allege a distinctly new or different claim. To the contrary, it relates to the same matter -- an allegedly illegal reduction in hours. Given this relation, we believe the amendment is timely. See also, Mercer County Community College, H.E. No. 83-24, 9 NJPER 169 (¶14080 1983)[15/]

We next consider the State's exception that the Chief Hearing Examiner erred in finding that the February 1980 reduction of

15/ We also note that this finding is consistent with NLRB adjudications. The timely filing of a charge tolls the time limitation of section 10(b) of the Labor-Management Relations Act, 29 U.S.C. §151, et seq., as to matters subsequently alleged in an amended charge which are similar to and arise out of the same course of conduct as initially alleged. See, Michigan Consolidated Gas Co., 261 NLRB 555, 110 LRRM 1105 (1982). Indeed, the NLRB has specifically held that amendments alleging an (a)(3) violation, as here, may relate back to an original charge alleging an (a)(5) violation. Pankratz Forest Industries, 269 NLRB. No. 10, 115 LRRM 1240, 1244 (1984).

hours of part-time employees to 20 hours per week violated the Act. The State contends that the charge and amendments pertained only to the Fall 1980 reduction. We agree.

N.J.S.A. 34:13A-5.4(c) provides:

> The commission shall have exclusive power as hereinafter provided to prevent anyone from engaging in any unfair practice listed in subsections a. and b. above. Whenever it is charged that anyone has engaged or is engaging in any such unfair practice, the commission, or any designated agent thereof, shall have authority to issue and cause to be served upon such party a complaint stating the specific unfair practice charged and including a notice of hearing containing the date and place of hearing before the commission or any designated agent thereof; provided that no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the 6 months period shall be computed from the day he was no longer so prevented.
> (emphasis added)

Ordinarily, we will only consider allegations of unfair practices that are specifically pleaded in an unfair practice charge or an amendment. There is, however, a very narrow exception to this rule for allegations of unfair practices that the parties, without objection, fully and fairly try. Commercial Township Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd App. Div. Docket No. A-1642-82T2 (12/8/83)

In the instant case, neither the charge nor the amendment made any allegations concerning the February 1980 reduction in hours. We specifically disagree with the charging party's assertion that the amendment can be fairly read to encompass the February 1980 reduction; that amendment speaks only of the July 1980 notification that hours would be reduced. Further, the State has objected to consideration of the February 1980 reduction as an unfair practice. Under such

circumstances, we do not believe these allegations should have been considered. In effect, the charging party is seeking to re-amend its charge after one amendment and eleven days of hearing. We do not deem it to be in the "interest of justice" to permit such a late amendment. See Green Constr., 271 NLRB No. 217, 117 LRRM 1156 (1984) (amendment of complaint not permitted where sought seven months after hearing). Accordingly, we reject the Hearing Examiner's conclusion that the February 1980 reduction violated the Act and also his remedial recommendations concerning that reduction.[16/]

We now consider the principal defense. The employer asserts that the employees are not members of the contractually defined negotiations unit and therefore the employer cannot be found to have refused to negotiate with the majority representative regarding their terms and conditions of employment. We agree.

The recognition clause provides:

> 2. a. Included are all full-time permanent, classified and provisional employees and all permanent full-time ten (10) month employees (classified, unclassified and provisional) and permanent part-time employees (classified, unclassified and provisional) who are employed a minimum of twenty (20) hours per week and who are included in the classifications listed in Appendix II.

16/ We distinguish between considering unpleaded allegations as constituting an unfair practice in themselves and considering unpleaded allegations as background evidence relevant to other properly pleaded allegations of unfair practices. Local No. 1424, International Ass'n of Machinists v. National Labor Relations Board, 362 U.S. 411, 45 LRRM 3213 (1960).

> 15. Permanent part-time employee - means an employee whose regular hours of duty are less than the regular and normal workweek as indicated in the Compensation Plan for that class title or agency but are at least twenty (20) hours per week and whose services are required without interruption for a period of more than six (6) months or for recurring periods aggregating more than six (6) months in any twelve (12) month period. Employees in this category may be classified, permanent or provisional, or unclassified, depending upon title and status of appointment.

We base our conclusion that the State did not violate its negotiations obligations on the plain language of this recognition clause, the clause's negotiations history and the parties' behavior in interpreting this clause.

While the six employees[17/] did establish that they had worked at least 20 hours a week, had been employed steadily for at least six months and had duties substantially similar to job classifications contained in the unit, these elements are not enough to warrant inclusion under the definition contained in the recognition clause. Under the clause's plain language,[18/] only employees

17/ We are concerned here only with the employees who established that their work was included within the classifications contained in the contract's appendix. With respect to the other employees involved, there simply is no evidence that would enable us to find that their work was included in the contract's job classifications. Given this, it cannot be said that the State violated its negotiations obligation with respect to these employees. The charging party did not meet its burden of establishing that these employees were covered by the recognition clause.

18/ Even if the clause were not plain, the evidence adduced at hearing is consistent with our finding that these employees were not intended to be included in the negotiations unit. The uncontradicted testimony of the Director of the State's Office of Employee Relations was that status in the Civil Service system was

(continued)

who have attained "permanent," "classified," "unclassified," or "provisional" status in the Civil Service system are included in the negotiations unit. These employees had not attained such status and are, therefore, not included. We disagree with the Hearing Examiner's conclusion that the instant employees were "provisional". He based this conclusion on N.J.A.C. 4:1-14-5, which provides:

> No temporary appointment shall extend beyond six months in State service nor four months in local services. Should a temporary position not be terminated at the expiration of such respective periods, the position shall be considered a permanent position and the Department of Civil Service shall act to fill such position in accordance with these rules concerning permanent positions.

18/ (continued)
the objective mechanism for determining unit inclusion. Although the majority representative had proposed to expand the unit to include other part-time employees such as the ones in question here, these demands had been consistently rejected by the State and subsequently dropped by NJCSA/NJSEA. Moreover, the inaction of NJCSA/ NJSEA subsequent to adopting the recognition clause is consistent with finding that these employees were not intended to be included. The recognition clause was extended to include part-time employees within Civil Service classifications on June 3, 1976. If NJCSA/NJSEA had believed this recognition clause embraced the hourly part-time employees at Kean College, it presumably would have taken prompt and formal action to secure their unit status and contractual rights. It did not. For example, NJCSA/NJSEA's inaction is graphically illustrated by the following. The employees in this proceeding commenced employment as early as 1975, yet the majority representative made no claim to include these employees in the unit until the filing of the charge in 1980. Indeed, Demel contacted the business representative for SEA, one of the joint majority representatives, in 1979. He went to Kean's personnel department who advised him that Demel was a "special services" employee and therefore was not eligible for inclusion in the contract or fringe benefits. Although Demel asked SEA to pursue the claim, it did not. Accordingly, we conclude that these hourly employees are not in the negotiations unit and that the State did not have an obligation to negotiate before Kean College reduced their hours.

His predicate for this conclusion was that the employees were "temporary" within the meaning of Civil Service law. We must disagree. N.J.S.A. 11:11-1 sets forth the procedure for employing "temporary" positions and appointments to such positions:

> The appointing authority shall, when by reason of pressure of work he determines that an extra position in the classified service must be established for a period of not more than six months, notify the chief examiner and secretary of that fact stating the cause therefor, the probable length of time such position will be required and the duties the appointee is to perform. The chief examiner and secretary shall thereupon make such investigation as he deems necessary to satisfy himself as to whether the extra position must, in fact, be established and if he finds that it must, he shall with the approval of the commission, issue the certificate provided by section 11:7-5 of this title and shall thereupon authorize the appointment of a qualified person with or without competitive tests. Temporary appointment to extra positions shall be made, as far as practicable, following certification from re-employment and employment lists. No such appointment shall be authorized for a period exceeding three months or renewed more than once within a fiscal year.
> [See also, N.J.A.C. 4:1-14.3]

These procedures were not met here. The appointing authority did not notify Civil Service of such positions, no investigation was made, nor was any authorization granted. Moreover, as was testified to by Joseph W. DiLascio, Director of Classification and Compensation for the Civil Service Commission, "the temporary position would have to come through the budget bureau for the position creating process..." That was not done here. Accordingly, we cannot find that these employees were "temporary" within the meaning of Civil Service law. Therefore, the Hearing Examiner's reliance on N.J.A.C. 4:1-14.5 to conclude that they possessed "provisional" status was misplaced under these circumstances.

In reaching this result, we are cognizant that the instant employees were improperly employed in the "special services" category. Civil Service Memorandum #34-83 provides:

> Special Services may be used for projects of a short term or to address peak work loads or temporary backlogs.
>
> A Special Services request may be considered valid when:
>
> 1. The project or program is of short duration and employment is on an intermittent or part-time basis; or
>
> 2. A project of long duration which will employ numerous people, each for varying short periods of time on an irregular basis; or
>
> 3. Situations exist which require employment of individuals for fixed but short duration in work for which the Department of Civil Service has indicated it is not feasible to establish specific class titles.

It is undisputed that these employees performed duties in excess of what would be considered valid under this category. However, as just stated, that abuse does not mean that they were "temporary" employees under Civil Service or were converted to provisional under N.J.A.C. 4:1-14.5. The Hearing Examiner incorrectly concluded that N.J.A.C. 4:1-14.5 was applied by the Civil Service Commission in its decision In the Matter of Bus Drivers, Department of Human Services (December 9, 1980). Rather, that case holds that bus drivers could not be considered "special services" employees and instead were entitled to be reclassified as permanent part-time employees. Those bus drivers worked more than 20 hours per week on a permanent basis. While that case is relevant to the extent that it establishes that these employees

might also upon appropriate application be found eligible for a Civil Service approved title, it does not establish, as a matter of law, that these employees are automatically entitled to Civil Service status. Thus, the Hearing Examiner, based on the foregoing, went too far in concluding that the employees had established the absolute right to be converted to "provisional" status in the Civil Service system. Again, temporary positions must be approved by Civil Service with a specific adoption of a budgeted salary line. Special service positions, by contrast, are neither approved nor budgeted.

The most that has been established by the charging party is that they might be eligible for a Civil Service approved title in the future. But there is no indication from the record that Civil Service and the Treasury would have approved these positions in an appropriate classification had one been applied for. Beyond that, the Legislature has clearly vested in Civil Service the authority to make such determinations. Conversely, we have no such authority. We reject CWA's claim that the employees' performance of negotiations unit work per se entitles them to placement in the unit under the existing recognition clause. The parties' agreement clearly contemplated that this factor, by itself, would be insufficient to warrant inclusion. We do not believe that the negotiations history which lead to the adoption of the recognition clause contemplated that the many employees doing work in the "special services" category or who were otherwise doing negotiations unit work but not serving in approved Civil Service titles would be embraced by the recognition clause. Instead, the parties agreed to a more limited guideline for

inclusion, namely, that an employee must serve in a Civil Service approved title to be included. In reaching this result, we are not saying that these employees are ineligible for representation in the future. In fact, if they obtained appropriate Civil Service classifications, it is apparent that they then would be included in the parties' recognition clause. Alternatively, a representation petition could be filed concerning these and other regular hourly part-time employees and a determination could then be made about their representation rights and status.

Accordingly, we hold that the State's actions in unilaterally reducing the hours of the six employees did not violate its negotiations obligation to the charging party since it was not the majority representative of these employees.

We now consider whether the employer unlawfully retaliated against Demel and other part-time employees when it reduced their workweek from 20 to 15 hours. We believe it did.[19/]

19/ Our determination that these employees do not come within the recognition clause does not affect our analysis concerning the violation of N.J.S.A. 34:13A-5.4(a)(3). The protection of that section extends to public employees who are not yet organized, Borough of Teterboro, P.E.R.C. No. 83-137, 9 NJPER 278 (¶14128 1982), aff'd App. Div. Docket No. A-4735-82 (1984), to applicants for public employment, Ocean County College, P.E.R.C. No. 85-12, 10 NJPER 502 (¶15230 1984), appeal pending, and even to those public employees who are without organizational rights under our Act because of their managerial or confidential status where employer discrimination is made in retaliation for providing testimony against the employer or is part of an employer's overall plan to discourage non-exempt employees from exercising rights guaranteed by the Act. Cf. Empire Gas, 254 NLRB 626, 106 LRRM 1163 (1981). Protection of public employees' efforts to make known grievances and concerns to the employer is not dependent upon the existence of a unit appropriate to the employee's job title. Even before the Act was passed in 1968, public employees enjoyed such rights by virtue of our State Constitution, Art. I, Para. 19.

In In re Bridgewater Tp., 95 N.J. 235 (1984), the Supreme Court, affirming the Commission's determination that an employee had been illegally transferred and demoted, articulated the following standards for determining whether an employer had illegally discriminated:

> ...[T]he employee must make a prima facie showing sufficient to support the inference that the protected union conduct was a motivating factor or a substantial factor in the employer's decision. Mere presence of anti-union animus is not enough. The employee must establish that the anti-union animus was a motivating force or a substantial reason for the employer's action. [NLRB v. Transportation Management, ___ U.S. at ___, 113 LRRM 2857 (1983)]. Once that prima facie case is established, however, the burden shifts to the employer to demonstrate by a preponderance of evidence that the same action would have taken place even in the absence of the protected activity. Id. This shifting of proof does not relieve the charging party of proving the elements of the violation but merely requires the employer to prove an affirmative defense.
> Id. at 242 (footnote omitted)

A prima facie case is established by showing (1) that the employee engaged in protected activity; (2) that the employer knew of this activity and (3) that the employer was hostile toward the exercise of the protected rights. Id. at 246; Dover Municipal Utilities Authority, P.E.R.C. No. 84-132, 10 NJPER 333, 338 (¶15157 1984); In re Gattoni, P.E.R.C. No. 81-32, 6 NJPER 443 (11227 1980).

Here, the charging party has established the elements of a prima facie case. First, the filing of the petition with the Governor's Task Force constituted protected activity. E.g., Laurel Springs Board of Education, P.E.R.C. No. 78-4, 3 NJPER 228 (1977) The College's management employees knew of the petition and were hostile to the assertion of such right. This hostility

was graphically evidenced by Babey's assertion that part-time employees might have to be terminated if they were to be deemed eligible for benefits and the other supervisors' statements that things would get worse in the event Demel spoke to the Task Force.

In agreement with the Hearing Examiner, we do not believe the employer established that the reduction in hours was for legitimate business reasons. The direct evidence is to the contrary. Demel's uncontradicted testimony was that in July 1980 Westman told her that "Demel had made matters worse and because of what I had been doing, the hours would be cut." Indeed, we agree with the Hearing Examiner that the clear inference is that the hours were reduced to 15 in an attempt to defeat these employees' claims to contractual coverage. Further, little fiscal planning was evident regarding this decision. No calculation was made to determine the amount of money to be saved. The hours had never been reduced before under other fiscal difficulties. 20/ Nor were any other reductions made from the full-time work force. 21/ In light of the strong prima facie case established, we

20/ In addition, the timing of the February 1980 reduction, following hard on the heels of Demel's petition and properly considered as background evidence, suggests an intent to retaliate. In this regard, this is not a situation where the College was unaware that employees were working more than 20 hours and responded only when Demel's petition brought it to their attention. To the contrary, the College was aware that employees were working more than 20 hours, but did nothing until Demel protested publicly the lack of benefits. The subsequent reduction, we believe, merely carried out more effectively what the first reduction was designed to achieve: the elimination of a claim to contractual coverage based on the number of hours worked. Hours had been reduced to 20 in February 1980, but that all parties concede, was not because of fiscal reasons.

21/ Such reductions would have saved more money since, at the time the reductions were being made, the part-time employees were not receiving fringe benefits and certainly were not being paid at a higher rate than full-time employees.

simply cannot accept the employer's proffered justification. Accordingly, we conclude that the College violated subsection 5.4(a)(3) when, in retaliation for protected activity, it cut the hours of its part-time employees concerning the Fall 1980 reduction in hours because we have found no obligation to negotiate with respect to that reduction.

We now consider the appropriate remedy. We will eliminate some portions of the recommended order and affirm others. We have already held that the Hearing Examiner should not have held the February, 1980 reduction in hours to violate the Act because it was not alleged in either the charge or its amendment. Accordingly, we eliminate that portion of the recommended remedy. In addition, we eliminate that portion of the order pertaining to the (a)(5) violation.

We reject, however, the State's claim that the remedy should be limited to "only to those employees who were part of the petition filed with the Governor's Task Force in January 1980." The retaliatory reduction in hours, although aimed at Demel and the other signatories of the petition, affected all other part-time employees, that had been working 20 hours. Therefore, it is necessary to make them whole since, as the record reveals, the reduction in hours of all employees was an integral part of an overall plan to discourage any employees from engaging in protected activity. Dover Township MUA, supra, 10 NJPER at 339. See, generally, The Developing Labor Law (2d. ed. 1983) at 106.[22/]

22/ We note, however, that this restoration of hours is required because of the retaliation, not because these employees were within the negotiations unit.

ORDER

The Public Employment Relations Commission orders that Kean College:

I. Cease and desist from:

A. Interfering with, restraining or coercing its employees in the exercise of rights guaranteed to them by the Act, particularly by reducing the hours of work of its part-time employees in retaliation against employees engaging in protected activity in filing a petition with the Governor's Task Force on Human Relations.

B. Discriminating in regard to hire or tenure of employment or any term or condition of employment to discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by reducing their hours of work in retaliation against employees engaging in protected activity in filing a petition with the Governor's Task Force on Human Relations.

II. Take the following affirmative action:

A. Forthwith restore to 20 the hours of work per week of part-time employees whose workweek was adversely affected by the Fall, 1980 reduction of hours;

B. Make the part-time employees whole for lost wages, less interim earnings, with interest at the rate of 12% per annum from the Fall, 1980 reduction of hours.

C. Post in 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 at least sixty (60) consecutive days. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced or covered by other materials; and

D. 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

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Newbaker, Suskin and Wenzler voted in favor of this decision. Commissioners Graves and Hipp were opposed.

DATED: Trenton, New Jersey
January 22, 1985
ISSUED: January 22, 1985

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 NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly by reducing the hours of work of our part-time employees in retaliation against employees engaging in protected activity in filing a petition with the Governor's Task Force on Human Relations.

WE WILL NOT discriminate in regard to hire or tenure of employment or any term or condition of employment to discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by reducing their hours of work in retaliation against employees engaging in protected activity in filing a petition with the Governor's Task Force on Human Relations.

WE WILL forthwith restore to 20 the hours of work per week of part-time employees whose workweek was adversely affected by the Fall, 1980 reduction of hours.

WE WILL make the part-time employees whole for lost wages, less interim earnings, with interest at the rate of 12% per annum from the Fall, 1980 reduction of hours.

STATE OF NEW JERSEY
DEPARTMENT OF HIGHER 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.

H.E. No. 84-54

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

In the Matter of

STATE OF NEW JERSEY,
DEPARTMENT OF HIGHER EDUCATION,

Respondent,

-and-

Docket No. CO-81-22-45

NEW JERSEY CIVIL SERVICE
ASSOCIATION, MERCER COUNCIL #4,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the Department of Higher Education committed an unfair practice when it unilaterally and without negotiations reduced the working hours of certain part-time employees. Said employees were considered and paid as part-time hourly employees by the College and received none of the benefits in the pertinent CWA--State contracts. It was found that these employees, having worked more than 20 hours a week continuously for more than a 6 month period, were in fact permanent part-time employees under the contract and were entitled to the benefits thereunder. It was further found that the College reduced the hours of said employees in order to remove these employees from the protection of the contract when an employee, Abbey Demel, publicly protested the College's refusal to provide fringe benefits for these employees. Even though the College considered these employees under the title of Special Services it was determined that pursuant to Civil Service rules they should be considered provisional and accordingly within the contractual units. The Hearing Examiner recommends that the Commission find that the Division of Education violated §5.4(a)(1), (3) and (5).

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. 84-54

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

In the Matter of

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Respondent,

-and-

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NEW JERSEY CIVIL SERVICE
ASSOCIATION, MERCER COUNCIL #4,

Charging Party.

Appearances:

For the Respondent
Irwin Kimmelman, Attorney General
(Michael L. Diller, D.A.G.)

For the Charging Party
Reitman, Parsonnet, Maisel & Duggan
(Sidney Reitman and Bennet Zurofsky, of Counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On July 25, 1980, New Jersey Civil Service Association, Mercer Council #4, ("Mercer Council #4") filed an unfair practice charge with the Public Employment Relations Commission ("Commission") alleging that the State of New Jersey, through the Department of Higher Education engaged in an unfair practice within the meaning of N.J.S.A. 34:13A-5.4(a) Subsections (1) and (5) [1/] when, "during the second week of July, 1980, permanent part-time employees at Kean College of New Jersey represented by contractual agreement by NJCSA, SEA in the pro-

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

fessional and clerical units, were notified their work hours would be cut from 20 hours to 15 hours." This was alleged to be an arbitrary and capricious act on the part of the College and in violation of the then existing agreement between the State of New Jersey and New Jersey Civil Service Association and State Employees Association (CSA/SEA) "which stipulates that changes in working conditions must be negotiated."

On February 5, 1982, the charge was amended and the charging party was identified as New Jersey Civil Service Association, Mercer Council #4 and Local 1040, Communications Workers of America (CWA), successor to said Mercer Council #4.

The amendment expanded the allegations of the original charge in alleging that, commencing in or about November, 1979, Abby Demel and other employees protested to representatives of Kean College and the State of New Jersey that the regular part-time employees work 20 hours per week or more were not receiving the benefits enumerated in the then current contracts between NJCSA/NJSEA and the State of New Jersey.

"In January 1980, Demel appeared before a special Task Force on Human Relations appointed by the Governor to urge that said part-time employees be accorded all of the benefits provided by said collective agreement during the spring of 1980 and thereafter, Demel and other part-time employees continued to press for contractual benefits by communicating with officers of Kean College and the State of New Jersey."

"In July of 1980 Demel and all other part-time employees working 20 hours per week or more were notified that their hours would be reduced to no more than 15 hours a week."

It was further alleged that this reduction was in retaliation for the efforts and demands of Demel and other part-timers to receive benefits under the contract and the charge alleged the State of New Jersey violated §5.4(a)(3) of the Act. 2/

It appearing that the allegations of the charge, if true, might constitute unfair practices within the meaning of the Act, the Director of Unfair Practices issued a Complaint and Notice of Hearing on November 10, 1981.

On February 23, 1982, the State of New Jersey filed its answer. Although it admitted that Abby Demel and other part-time workers at Kean College were notified their hours were reduced to 15 hours a week, it was claimed that this reduction was for budgetary reasons and not for any unlawful motivation. Further, it was alleged that the employees were casual employees and were not covered by the contract.

The State further raised several affirmative defenses, specifically, the charging party had no standing to bring this action, the charge was filed out of time and P.E.R.C. has no jurisdiction. to decide this matter.

Hearings were held on June 28 and 29, July 1, August 16, September 7, October 28 and 29, November 19 and December 7, 8, and 9, 1982 at which time the parties were given an opportunity to present

2/ This subsection prohibits public employers, their representatives or agents from: "(3) Discriminating in regard to hire or tenure of any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act."

evidence, examine and cross-examine witnesses and argue orally. Both parties filed post-hearing briefs and supplemental documents, the last of which was received by October 7, 1983.

At the formal hearings, the State moved to dismiss the complaint on the same grounds as stated in the affirmative defenses. The motions were denied, but the arguments have been raised in the State's brief. Accordingly, these issues will be disposed of prior to addressing the substance of the union's allegations.

The State argues that only the designated majority representative can bring a §(a)(5) charge against an employer. When the instant charge was filed the majority representative was a joint rep-representative, NJCSA/SEA, yet the charge was brought in the name of Mercer Council #4 only. Further, the complaint was litigated in the name of Local 1040, CWA, who is not the current majority representative. The current representative is the national CWA.

In regards to NJSEA/NJCSA's standing as majority representative, the Appellate Division, in an unreported decision, AFSCME v PERC, App. Div. Docket No. A-989-72 (1973) held, as to NJCSA/NJSEA's status, "both organizations will be under an affirmative obligation to those whom they represent to jointly agree upon, and to pursue a single, unified policy and position on all issues."

In following this holding, the Commission in State of New Jersey, P.E.R.C. No. 81-94, 7 NJPER 105, 107 (¶ 12044 1981) held that one of these two Associations acting on its own does not carry the authority of the designated majority representative.

Further, at the hearing, Genevieve McMenamen, who was President of NJCSA at the time the initial charge was filed, testified that David Fox as Attorney for the joint organization was the only person authorized by the NJCSA to file unfair practice charges with PERC and he was directed to confer with both parties prior to the filing of such charges.

The Commission, in departing from National Labor Relations Board precedent, has placed restrictions on who may bring a §5.4(a)(5) charge against an employer. 3/

The Commission held in N.J. Turnpike Authority & Jeffrey Beall, P.E.R.C. No. 81-84, 6 NJPER 560 (¶ 11284 1980) that individual employees cannot challenge the interpretation of an agreement arrived at by the employer and majority representative in the processing of a grievance, provided that the interpretation was arrived at in good faith. Also, In re Township of Cherry Hill & FOP Cherry Hill Lodge 28, D.U.P. No. 81-18, 7 NJPER 286 (¶ 12128 1981) and In re Council of N.J. State College Locals, D.U.P. 81-8, 6 NJPER 531 (¶ 11271 198) the Director of Unfair Practices found a minority organization has no standing to bring a §5.4(a)(5) charge where there is no companion charge against the majority representative claiming a violation of the duty of fair representation.

The thrust of these cases is that it is disruptive of labor

3/ The National Labor Relations Board has no such restrictions. R. and R. Sec. 102.9, Agency Personnel, an individual, an employer, or a labor organization may file a charge alleging unfair labor practices. NLRB Breswell Mts. Freight Lines, 209 F2d 622, 33 LRRM 24, 59 (CA 5 1952) NLRB v. Pennsylvania Greyhound Lines, 303 U.S. 261, 2 LRRM 599 (1938).

peace for a minority association to contest the conduct of the employer in negotiations. Only the majority representative can judge the employer's conduct in negotiations and ultimately challenge same in an unfair practice charge.

Here, however, the procedural history of this matter demonstrates the majority union has clearly adopted the instant action. The charging party is no adversarial, minority party but rather it is an instrument of the majority representative.

On January 29, 1980, the Director of Representation, Carl Kurtzman, wrote to Robert Yeager of Mercer Council #4 and Michael Diller, Deputy Attorney General, State of New Jersey, relating that the State questioned the standing of the Mercer Council #4 to bring the instant charges. The certified majority representative for the unit in question was the joint association. Yet, the joint representatives had taken different positions on a question concerning representation of State employees then before the Commission. Accordingly, the instant charge, (along with several others) was held in abeyance pending the disposition of said representation proceeding.

In April of 1981, the CWA, through Larry Cohen, a national representative, requested that the Commission proceed with the instant charge. The request was denied, for, at that time, the CWA was not yet certified for all the disputed units. Cohen again wrote to the Commission in July of 1981, several weeks after the CWA became certified for all the disputed units, and again requested that the Commission process the instant matter. The complaint was ultimately issued on

November 10, 1981. The position of the majority representative was made manifest. The CWA has, at a minimum, adopted this charge and, under the circumstances, the respondent employer has no basis to challenge the standing of CWA Local 1040 to bring this charge. The charge as originally filed by Mercer Council #4 may have been defective, but during this same time the State was challenging the majority status of CSA/SEA itself as the joint majority representative. (See State of New Jersey, supra.) Therefore, the Commission, through the Director of Unfair Practices, declined to process the charge until the question concerning representation was resolved. As soon as this issue was resolved, i.e. CWA won the State representation election, the CWA adopted the charge and any defects in the charge were cured.

In a similar manner, the State's argument that the charge is untimely must fall. §5.4(c) provides that "no complaint shall issue based upon any unfair practices occurring more than 6 months prior to the filing of the charge, unless the person aggrieved thereby was prevented from filing such charge, in which event the 6 month period shall be computed from the day he was no longer so prevented." The State Supreme Court in Kaczmarek v. N.J. Turnpike Authority, 77 N.J. 329 (1978) found that this rule is a simple statute of limitation and not a jurisdictional prerequisite. The legislature, by its very choice of expression evinced a purpose to permit equitable considerations be brought to bear in applying the sixth month rule.

In the instant case, the original charge, although not perfected, satisfied the intent of the statutory purpose, that is, to compel the exercise of a right of action within a reasonable time so

that the opposing party has a fair opportunity to defend the charges. NLRB v. Laborers Union Local 264, 529 F2d 778, 17 LRRM 2209 (CA, 1976). 4/

The State argues, however, that the contract language upon which the instant charge was brought (see below) existed more than six months prior to the bringing of the instant charge. Therefore the action should be barred by the 6 month statute of limitation. It is noted, however, that, for as long as an employee continues to be denied rights under the Act when an employer refuses to negotiate concerning terms and conditions of employment with the majority representative, or otherwise alter terms and conditions of employment, that employer commits a continuing violation and the 6 month statute of limitation will not run against such an unfair practice. Local 1424 v. I.A.M. NLRB (Bryon MFS), 362 U.S. 411, 45 LRRM 1312 (1960).

Here, not only has the union alleged a continuing violation but the action taken against Demel itself falls within the six month period. Accordingly, this action should not be barred by the operation of the six month limitation.

Finally, the State argues that the issues presented are questions for Civil Service and P.E.R.C. has no jurisdiction to hear them. This argument is misplaced. As the State Supreme Court stated in Bernard Tp. Bd. of Ed. v. Bernard Tp. Ed. Assn, 79 N.J. 311, 316 (1979)

> In carrying out its duties, PERC will at times be required to interpret statutes other than the Employer-Employee Relations Act. Indeed, in no other way could that body implement our holding in State Supervisory Employees that the terms of a

4/ The National Labor Relations Act, upon which the P.E.R.C. Act is based, has the same six month statute of limitation.

> collective agreement cannot contravene a specific legislative enactment. To therefore hold that PERC is ousted of jurisdiction in any controversy involving an asserted conflict between a collective agreement and a statute not part of the Employer-Employee Relations Act would deprive our courts of that body's expertise in a large class of scope of negotiations disputes.
> [79 N J. at 316-317]

See also, Hunterdon Central High School Bd. of Ed. v. Hunterdon Central High School Teachers Assn., 174 N.J. super 468, (App. Div. 1980). It is clear that PERC has the authority to make determinations as to Civil Service laws which are necessary to resolve the issues in this case.

. . . .

The July 1, 1979 to June 30, 1981 contracts between the State and NJCSA/SEA for the Professional and Administrative-Clerical Units, provide, at Article I, A (2 a): "Included are all full-time permanent, classified, unclassified and provisional employees and all permanent full-time ten (10) month employees (classified, unclassied and provisional) and permanent part-time employees (classified, unclassified and provisional) who are employed a minimum of (20) hours per week and who are included in the classification listed in Appendix II.)" 5/ This same language is in the State-CWA contracts in these units.

Abby Demel, currently President of Local 1031 of the CWA, 6/ is a full time employee of the Local. Prior to her holding office in Local 1031, Demel was an employee of Kean College, a part of the State College system. Some of the College's employees are within the Pro-

5/ There are hundreds of classifications listed in Appendix II in the Administrative & Clerical contract and approximately one hundred fifty in the Professional unit.

6/ Local 1031 consists of employees in the nine State Colleges in the Department of Higher Education.

fessional and Administrative and Clerical units covered by the above mentioned contract.

In August of 1978, Demel was a student at Kean College and was due to graduate from the College in February of 1979. She was looking for a job and while visiting the College Placement Office came upon a notice that the Registrar's Office at the College was looking for an Administrative Assistant to work 20 hours a week, to be paid at an hourly rate.

Demel went for an interview at the Registrar's Office and her qualifications were discussed. Demel spoke with the Assistant Registrar, Marta Westman. Westman expressed concern Demel might take the position as a temporary measure while looking for a permanent full-time teaching position. Demel explained that her speciality was teaching theatre but she had not been able to find work and had given up on the idea of finding a full-time teaching position. Further Demel already had another part-time job that would dove-tail with the position at Kean College. Westman specified that the position would be a regular, steady, 12 month, 20 hour a week position. Demel then met with the Registrar, Evelyn Babey, who stated that she wanted someone who was going to be permanent and cautioned Demel not to take the position if she was either thinking of getting a full-time teaching position or if she was just using it as a stop gap, and that she would be working a minimum of 20 hours a week.

Demel worked for two years at the College for a minimum of 20 hours per week (except on those weeks when Demel requested leave time).

Demel's duties matched the job description of an Administrative Assistant position which is listed in Appendix I of the professional unit contract.

Demel received none of the fringe benefits enumerated in the contracts, such as health insurance, sick leave, vacation leave, time and a half for overtime, etc.

In November of 1979, Demel became a member of the State Employees Association (SEA) and dues were deducted by the College from her salary.

Demel became aware of a Governor's Task Force on Human Relations. Demel planned to make a presentation to the Task Force wherein she would state that part-time employees at the College were denied benefits they were entitled to under the contracts. Babey told Demel she could appear and speak if she wanted to but she didn't think it was going to do any good, if anything it might make things worse. Babey also stated that if the State could not save money by having part-timers who do not receive fringe benefits, there would be no point in having part-time employees and the State might very well get rid of them.

Demel circulated a petition around the College which demanded that part-timers be given the benefits due them under the contracts. She served a copy of her petition upon Nathan Weiss, President of the College.

Demel spoke before the Task Force on January 9, 1980 and expressed her belief that part-time employees at the College were wrongfully denied contractual benefits.

Barbara Taylor, the Supervisor of Records in the Registrar's Office, and a supervisor of Demel, was excited and happy that Demel had appeared and made the speech but was concerned that the hours of part-timers would be cut.

In February of 1980 all part-time employees at the College had their hours cut to 20 hours a week.

Between February and July of 1980, Demel had several conversations with Babey. On one occasion Babey stated that it made no sense for the College to use part-time employees if the College had to pay for fringe benefits. First, the College could not afford to pay these benefits and it would make more sense under those circumstances to staff full-time employees. Demel also talked with Babey about her working on Sundays during graduation exercises. Demel stated that it didn't seem right to her to give up a Sunday and work at her normal hourly rate. Babey appeared agitated and said "obviously Demel was very unhappy and maybe (she) would be better off seeking employment elsewhere". Demel asked if she was being terminated. Babey said no but she should start thinking about looking elsewhere because Demel was so unhappy there.

In July of 1980, Mrs. Babey convened a meeting in her office with eight or nine part-time employees from the Records Department. Babey stated that due to budget cuts, the hours of part-time employees were going to be cut to 15 hours a week. Demel asked how the work was going to get done; Babey said the College can hire more people at 15 hours a week. Demel then asked how the college could save money by hiring more 15 hours a week people but Babey did not respond.

At this time all part-time employees, including Demel, were reduced to 15 hours a week.

Judy Dunst worked as a clerk in the Registrar's Office from November 1975 to April 1981 in the Records Department of the Registrar's Office. When she was first hired, Barbara Taylor, the Assistant Registrar, told her she was looking for someone to work at least 25 hours a week. Dunst was told she could work 4 days a week as long as she worked one evening a week and a minimum of 25 hours a week. Further, Taylor wanted someone who was willing to work throughout the summer and asked her not to take the job if she would not work through the summer. Dunst received no benefits but was told, and believed, her position was permanent, part-time. For the five and a half years that Dunst was employed, she worked steadily and was never sent home even when work was slow.

The office employed both part-time and full-time clerks. There was no difference between the work done by the part-timers and full-timers. Dunst's duties matched the duties listed in the State of New Jersey Civil Service Job Description for a clerk. The job title Clerk is included in Appendix II of the Administrative and Clerical Contract between CWA and the State of New Jersey.

Jean Lee worked in the Registrar's Office for three years at 24 hours a week on a full year schedule.

Joan Veale for several years worked in the Registrar's Office in excess of 20 hours a week on a 12 month basis. 7/

7/ Veale initially worked as temporary replacement for a secretary out on extended sick leave; upon return of the regular secretary she was offered a job on a regular basis for 30 hours a week. Subsequently Veale asked that her hours be reduced to 22 1/2. This was agreed to by her supervisor.

Edna Alexander worked 24 hours a week in the Registrar's Office in what the College called a steady job, from September of 1979 until February of 1980.

Cecille Frank worked as a part-time secretary in the Registrar's office from 9:00 a.m. to 3:00 p.m. five days a week since March 1976 on a 12 month basis.

Lee, Veale, Alexander and Frank all performed duties which correspond to job titles listed in Appendix II of the contract, i.e. Clerks and/or Clerk Stenographers, yet none of them received the benefits under the contract and all these employees had their hours cut to 20 hours a week in Feburary of 1980 and again reduced to 15 hours a week in July of 1980.

In addition to the employees mentioned above, evidence was introduced at the hearing that there were other part-time employees at the College who may have worked in excess of 20 hours a week for more than six months, but the evidence is inconclusive and no affirmative finding of fact can be made as to other employees.

After Demel sent a copy of her speech to the Governor's Task Force along with a companion petition to College President Weiss, Weiss in turn sent this material to Charles Kimmet, the Assistant Vice-President for Administration of the College. Kimmet met with Edward Callaghan, the Director of Business Services for Kean College. The two agreed that the College policy of using part-time employees for a maximum of 20 hours a week had been violated at the institution. It was apparent that many part-timers were working more than 20 hours a week. They agreed that steps would have to be taken to bring the

part-time situation in line with the College policy. Callaghan admitted that the first time the College administration took any steps to put this policy into effect was following Demel's petition.

It was decided that approximately six of the hourly employees were moved to full-time positions. However, it was never ascertained how many hourly employees worked 20 hours or more at the institution.

Callaghan and Kimmet testified that the decision to reduce the number of hours the part-timers were working was made strictly for economics.

Kimmet testified that cutting the hours of part-time people to 20 hours or less would save approximately 20% on their salaries. In fact, no calculations were ever done concerning the amount of work part-timers did or whether more part-timers would have to be added to make up the work that could not be done. When the part-time hours were cut to 15 hours, there was no study done as to any savings for the College nor were any restrictions placed on the area supervisors limiting hiring new part-timers. Once part-timers were limited to 15 hours a week, area supervisors were free to hire people if there was a need and the funds were available, but supervisors had to get prior approval to assign work to experienced people if they were to work 20 or more hours a week.

The undersigned cannot accept the implication of testimony of Kimmet and Callaghan that the College administration was unaware that part-timers worked 20 hours a week or more prior to seeing Demel's petition.

Robert Cedeno, a Personnel Law Officer I for Kean College, testified that an earlier petition was circulated in 1978, before

Demel was an employee, which stated: "We the permanent part-time clerical employees of Kean College who have worked for a period of 12 months and 25 hours per week..." requested the benefits enumerated in the Administration and Clerical Contract. The petition in 1978 was not circulated outside the College Administration. Therefore the College did not have to take action. In fact, the issues raised within the petition were disposed of by Cedeno in a way that guaranteed that these employees would not receive any benefits under the contract, (or under Civil Service regulations) Cedeno contacted a technician in Civil Service and simply asked if "Special Service" employees are entitled to fringe benefits (Special Service employees are temporary employees who are hired for a period of less than six months -- clearly this six month criterion did not apply to the petition signers -- see below). Naturally, the Civil Service technician replied that Special Service employees were not entitled to such benefits. Cedeno then informed the part-time employees that a Civil Service technician stated that they were ineligible for benefits. Cedeno never described the work history of the employees involved to the technician at Civil Service who only answered the abstract question asked by Cedeno.

It is interesting to note that as Dunst testified until the part-time hours were reduced in 1980, no one in the College ever referred to her or any part-timer as a "Special Service" employee.

Frank Mason, Director of the Office of Employee Relations, testified as to the history of the negotiations which included permanent part-time employees in the unit.

The initial 1974-1975 contract between the State and CSA-SEA in both the Professional, and Administrative and Clerical Units did not include permanent part-time employees in the recognition clause.

However, in June 1976 there was a subsequent side bar letter of agreement entered into between the State and CSA/SEA, signed by Frank Mason, Director of the Office of Employee Relations and David Fox, Attorney for CSA-SEA, in which it was agreed that all permanent part-time employees in the Administrative and Clerical Service unit "who are regularly scheduled to work twenty (20) or more hours per week and who are included in the classification listed in the Appendix to the Agreement" shall be deemed to be included in recognition clause of the contract. 8/

David Fox, the spokesman for the Association, originally wanted to increase the scope of the recognition clause to include "intermittent claims takers" (Department of Labor temporary employees who are called once or twice a month to work). These employees are hired on the basis of the relatively fluctuating demand in unemployment compensation offices. They are recalled every month for short periods but have no permanency. These employees were never admitted into the unit. Mason testified that Fox agreed the recognition was limited to employees who had achieved permanency in the competitive Civil Service and in the contract of November 1976, the recognition clause provides:

> 2. a. Included are all full-time permanent, unclassified and provisional employees and all permanent full-time ten (10) month employees (classified and unclassified) and permanent part-time employees who are employed a minimum of twenty (20) hours per week and who are included in the classifications listed in Appendix I. (emphasis supplied)

8/ This agreement provides, among other things, that disputes concerning whether part-time employees are eligible for coverage under any provision of the contract, or the terms and conditions of the coverage are deemed to be outside the grievance procedure contained in the contract.

However, further in Article I at C(15), the definition of permanent, part-time employee states: "Employees in this category may be classified permanent or provisional or unclassified, depending upon title and stature of appointment."

It is also noted that in the July 1979 contract the recognition clause was changed to the current language:

> 2. a. Included are all full-time permanent, classified, unclassified and provisional employees and all permanent full-time ten (10) month employees (classified, unclassified and provisional) and permanent, part-time employees (classified, unclassified and provisional) who are employed a minimum of twenty (20) hours per week and who are included in the classifications listed in Appendix II.

In this regard Mason's testimony is inconsistent with the clear language in the contracts that unclassified and provisional part-time employees are included in the contract, for provisional employees do not have permanency in the competitive service.

Mason's testimony here constitutes parol evidence. The Courts and the Commission have frequently held that parol evidence is admissible only as an aid in interpreting an agreement, but not to change the clear meaning of the words. See Casriel v King, 2 N.J. 45 (1949); Atlantic Northern Airlines Inc. v. Schwimmer, 12 N.J. 293 (1953); In re Twp. of Vernon, P.E.R.C. No. 84-41,9 NJPER 655 (¶ 14283 1983); In re Borough of Bergenfield, P.E.R.C. No. 82-1, 7 NJPER 34 (¶ 12014 1980, and In re Raritan Twp. v. M.U.A. P.E.R.C. No. 84-94, 10 NJPER 147 (¶ 15072 1984).

The Appellate Division recently upheld the Commission's rejection of an employer's attempt to invoke parol evidence in support of its positon. See Cherry Hill Bd. of Ed. v. Cherry Hill Assoc. School

Admin., App. Div. Docket No. A-26-82T2, December 23, 1983.

By operation of law all parole evidence which is contrary to the contractual language must be rejected. Accordingly, the term permanent part-time in the contract is not limited to those employees in the competitive classified service.

Stuart Reichman of the Office of Employee Relations testified that in December of 1979, the State and Fox entered into a side bar agreement that the CSA/SEA could seek a clarification of unit petition with PERC concerning part-time workers. Such petitions were filed with the Commission for the Administrative and Clerical Unit and the Professional Unit, Docket Numbers CU-80-11 and CU-89-12. However, these petitions related to hourly employees, including intermittent claims takers and those employees who work less than 20 hours per week. 9/ and concern employees with vastly different employment histories from the employees in the instant proceeding.

Similarly, Reichman also testified that in the 1981 negotiation, the C.W.A. included a demand that the part-time minimum of 20 hours a week be excluded from the recognition clause so part-time employees working less than twenty hours a week would be included in the unit. This demand was ultimately abandoned. This testimony does not shed any light on the issue at hand; the employees in the instant matter all worked in excess of 20 hours a week. Moreover, Reichman admitted that Kean College employees were not discussed during negotiations.

The State did argue in its brief that these part-time employees are temporary "Special Service" employees that is part-time hourly and

9/ Note-if the parties have any question concerning said CU cases, inquiry should be made to the Commission's Administrator of Representation.

are not included in the contracts.

According to Joseph DiLascio, Director of Classification and Compensation for the Department of Civil Service for the State of New Jersey, the term "special services" and "part-time hourly" are not defined anywhere in the Civil Service law.

Classified positions are "line item positions" created either by the Legislative's annual budget appropriations or through the Office of the Budget and Accounting on the basis of power delegated by the Legislature to the Governor and then subsequently delegated to Budget and Accounting.

Classified, unclassified and provisional employees all fill classified positions and are hired into the position created by that budget line item and are paid out of an account that is set up for that position; that is, individuals are paid out of a particular line account.

Special Service, part-time hourly employees on the other hand are typically paid on a supplemental pay-roll. For each pay period, the appointing authority sends a payroll proof with the names of people on it who were paid the last time in that particular payroll and that particular account.

The employees in question have been paid in the same manner as Special Service employees. The State argues that, therefore, these part-timers are Special Service employees.

However, the Rules of Civil Service at N.J.A.C. 4:1-14-5 provide:

> Renewal of temporary appointment
> No temporary appointment shall extend beyond six months in State service nor four months in local services. Should a temporary position not be

> terminated at the expiration of such respective periods, the position shall be considered a permanent position and the Department of Civil Service shall act to fill such position in accordance with these rules concerning permanent positions.

And, In the Matter of Bus Drivers, Department of Human Services, an unreported Administrative appeal before the State of New Jersey Civil Service Commission, this rule was applied. Certain employees, hired to work 20 hours a week as Bus Drivers,were considered "Special Service Employees." As a result of a Civil Service investigation it was determined that the Bus Drivers were working more than 20 hours per week; however, supervisors then requested the Bus Drivers to limit their hours, and compensation for time worked in excess of 20 hours was postponed and paid in periods when employees worked less than 20 hours a week. The Department of Human Services argued that keeping the employees as Special Service employees without benefits is the most economical and efficient manner of transporting clients and to consider these employees as regular part-time employees would greatly increase costs since they would be entitled to sick, vacation and holiday benefits.

The Civil Service Commission found that the "bus drivers are hired on a regular part-time basis and cannot be considered as Special Service." These positons were converted to regular part-time positions and given permanent status in the non-competitive division. The Commission also stated: "In determining whether positions should be allocated to the classified service or Special Service, financial impact may not be considered."

Further, DiLascio, who was called by the State, testified that, the Civil Service rules speak to the issue of the length of time

that a position may be temporary, which is 6 months, as opposed to the length of time that a person may serve in it. As far as the Civil Service Department is concerned, if an employee is hired in a temporary position, and the position is extended beyond 6 months, then the employee status becomes provisional, at which point in time the position is then subject to certain classifications from the eligible roster. The position that exists beyond 6 months is considered to be one to which a permanent appointment may be made. After 6 months in a temporary position, under Civil Service rules, the employee who occupied that position is termed a provisional employee and the position itself becomes a permanent position although the position may be referred to as a temporary one by the employer.

The evidence is ample and uncontroverted that the employees in the instant case functioned as permanent part-time employees for years. They have performed functions listed in the job classification of Appendix II of the contracts and must be included in their respective units and are entitled to the benefits of the respective collective bargaining contract.

The State has argued that if it is found that their employees are permanent part-time, then the appointing authority would have to terminate such employees or employ them solely on a casual or intermittent basis. In fact the State would have no right to so act. As Civil Service has held, intermittent employees can only be used in certain situations.

On June 23, 1983 the Civil Service Administration issued Memorandum #34-83 to serve as a guide for the establishment of Special Service positions:

> Special Services may be used for projects of a short term or to address peak work loads or

temporary backlogs.

A Special Services request may be considered valid when:

1. The project or program is of short duration and employment is on an intermittent or part-time basis; or

2. A project of long duration which will employ numerous people, each for varying short periods of time on an irregular basis; or

3. Situations exist which require employment of individuals for fixed but short duration in work for which the Department of Civil Service has indicated it is not feasible to establish specific class titles.

The employment histories here do not come close to meeting these guidelines.

Further, pursuant to Galloway Twp. Bd. of Ed. v. Galloway Twp. Ed. Assoc., 78 N.J. 1 (1978), the union represents not only the employees; it represents the positions as well. Having found that the positions in question are within the units, the State would be obligated to provide benefits for the employees in those units no matter how often it attempts to replace these employees.

The College only acted when, through the action of Demel, the part-timers grievances went beyond the College's confines. It cannot be persuasively argued that the College did not know that employees worked in excess of 20 hours, for there was the 1978 petition testified to by Cedeno in which the same issues were brought to the attention of the College administration.

However, the College administration took no action until Demel brought the issue of fringe benefits before the public. Then the College took immediate action in the form of the February 1980 directive limiting

part-timers to twenty hours per week. It is hereby infered from the totality of the facts, that the College apparently discovered that reducing all part-timers to twenty hours a week did not take part-timers out of the contractual units. Therefore in July 1980 the College further reduced these employees to 15 hours a week to remove them from the unit.

Contrary to the testimony of the College officials, these actions were not taken for reasons of economic austerity. Admittedly, avoiding contractual benefits to the part-timers constitutes a cost savings. But these actions were not taken with the idea of reducing man-hours or otherwise effectuating any reductions in service. For supervisors at the College remained free to hire additional part-timers at 15 hours per week if work could not be done at existing manning levels. As Kimmel and Callaghan testified the action was taken when Demel took this issue public.

The College clearly took its actions in retaliation for Demel's publicizing the College's failure to abide by the terms of the collective negotiations agreement when she testified before the Governor's Task Force. As stated by the Commission in Laural Springs Bd. of Ed. and Mary Becken, P.E.R.C. No. 78-4, 3 NJPER 228, public employees are protected in activities designed to inform the public of their view of a particular issue. Such action is akin to the filing of a grievance. Since the Task Force invited testimony as to public sector employment this was a proper forum for Demel to express her and her fellow workers' greivances.

The College and, therefore the State's action in cutting the hours of all part-time employees back to twenty and then fifteen a week interfered with the exercise of rights guaranteed to the part-time hourly employee by this Act in violation of §5.4(a)(1).

In Twp. of Bridgewater and Bridgewater Public Work Assn., 95 N.J. 235 (1984) the Supreme Court adopted the NLRB Wright Line test in finding §5.4(a)(3) violation, see Wright Line, 251 NLRB 1083, 1984-85 (1980), NLRB v. Transportation Management Corp., ___ U.S. _____ 76 L.Ed. 2d, 667, 674-75 (1983). This test provides that the employee must make a prima facie showing sufficient to support the inference that the protected conduct was a motivating factor or a substantial factor in the employer's decision. The employee must establish that retaliation for protected activity was a motivating force or a substantial reason for the employer's action. Once that prima facie case is established, however, the burden shifts to the employer to demonstrate by a preponderance of evidence that the same action would have taken place even in the absence of the protected activity. This shifting of proof does not relieve the charging party of proving the elements of the violation but merely requires the employer to prove an affirmative defense.

Here, the reduction of the hours of part-timers was in direct response to Demel's exercise of protected rights. The College, and therefore the State, discriminated in regard to a term or condition of employment to discourage employees in the exercise of rights guaranteed by the Act.

The State was unable to demonstrate that the hours of the part-timers would have been reduced in the absence of the protected activity. Its actions were directly and causally related to Demel's protected activity. The State violated §5.4(a)(3) when it reduced the hours of the part-time employees.

Finally, the State violated §5.4(a)(5). As had been discussed, infra, Abby Demel, Judy Dunst, Joan Veale, Edna Alexander and Cecille Frank all worked over 20 hours a week for more than six months and all are, by definition, included in the recognition clause of the contract, yet none of them were granted the benefits which were due them by rights under the contract. The State argument that they are "Special Service" employees and therefore not under the contract will not prevail.

Deptford Bd. of Ed., P.E.R.C. No. 81-78, 7 NJPER 35 (¶ 12015 1981) affmd. App. Div. No. A 1818-08 T8 (5-24-82) held that a conversion of a position from full-time to part-time was a change in name only to camouflage an attempt to get the work performance for less money. Such conduct is violative of §5.4(a)(5).

Even though the five employees may have legitimately been hired as Special Service hourly part-time employees, their positions by operation of Civil Service Rule N.J.A.C. 4:1-14-5 transferred the positions held by these five women into positions entitled to the protection of the contract. As testified to by DiLacasio, after being employed for six months as temporary employees, their status was converted to that of provisional employees, and the provisional classification is included in the recognition clauses of the contracts.

When the College attempted to avoid the negotiated obligation for these employees by reducing their hours to take them out of the

unit (and therefore the contract's protection), the State effectively unilaterally altered the terms and conditions of employment of these five employees [10/] and violated (a)(5). See Galloway Twp. Bd. of Ed. and Galloway Twp. Ed. Assoc., supra. In re Sayreville Bd. of Ed., P.E.R.C. No. 83-12, 9 NJPER 139 (¶ 14066 1983).

Recommended Order

The Hearing Examiner hereby recommends that the Commission ORDER:

A. That Kean College, a College within the Department of Higher Education of the State of New Jersey cease and desist from:

Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, from discriminating in regards to a term and condition of employment to discourage employees in the exercise of the rights guaranteed to them by the Act and refusing to negotiate in good faith with the union concerning the terms and conditions of employment of employees by unilaterally reducing to weekly hours of its employees in order to avoid providing negotiated contractual benefits.

B. That Kean College take the following affirmative action:

1. Immediately offer to all part-time employees who were working 20 hours or more per week for six months or more to restore their weekly work schedule in effect at the College immediately

10/ This action may have constituted a violation to other employees, but these five were the only ones which the CWA proved were regular part-timers who worked more than 20 hours a week over six months.

prior to the Collegewide February 1980 work week reduction. *

2. Reimburse to all employees the difference between the salaries they earned at the College and what they would have earned had their hours not been reduced in February and again in July of 1980 by the College wide reduction that were discussed infra. *

3. Provide to all so affected employees the equivalent cash value of all fringe benefits to which they otherwise would have been entitled had those employees' hours not been reduced in February and/or July of 1980. The computation of this dollar amount shall be computed from January 25, 1980, that is from six months prior to the filing of the original complaint in this action, in compliance with the Act's six month statute of limitation. *

4. Provide to said employees all benefits enumerated in the appropriate contractual benefits and petition Civil Service to classify the position affected by this Order as provisional positions. Both provisions of this paragraph are prospective only.

5. Negotiate in good faith with the CWA regarding any future contemplated reductions of hours of unit members prior to the implementation of such reductions.

6. Post in 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 College authorized representative shall be maintained

* Any monetary award to any employee is subject to mitigation by appropriate subsequent employment.

by it for at least sixty (60) consecutive days. Reasonable steps shall be taken by the College to insure that such notices are not altered, defaced or covered by other materials.

Edmund G. Gerber
Chief Hearing Examiner

DATED: April 16, 1984
Trenton, New Jersey

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 NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, from discriminating in regards to a term and condition of employment to discourage employees in the exercise of the rights guaranteed to them by the Act and refusing to negotiate in good faith with the union concerning the terms and conditions of employment of employees by unilaterally reducing to weekly hours of its employees in order to avoid providing negotiated contractual benefits.

WE Will immediately offer to all part-time employees who were working 20 hours or more per week for six months or more to restore their weekly work schedule in effect at the College immediately prior to the Collegewide February 1980 work week reduction. *

WE WILL reimburse to all employees the difference between the salaries they earned at the College and what they would have earned had their hours not been reduced in February and again in July of 1980 by the College wide reduction. *

WE WILL provide to all so affected employees the equivalent cash value of all fringe benefits to which they otherwise would have been entitled had those employees' hours not been reduced in February and/or July of 1980. The computation of this dollar amount shall be computed from January 25, 1980, that is from six months prior to the filing of the original complaint in this action, in compliance with the Act's six month statute of limitation. *

STATE OF N.J., DEPT. HIGHER ED. (KEAN COLLEGE)
(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 James Mastriani, Chairman, Public Employment Relations Commission, 429 E. State State Street, Trenton, New Jersey 08608 Telephone (609) 292-9830.

NOTICE TO ALL EMPLOYEES

(continued)

WE WILL provide to said employees all benefits enumerated in the appropriate contractual benefits and petition Civil Service to classify the position affected by this Order as provisional positions. Both provisions of this paragraph are prospective only.

WE WILL negotiate in good faith with the Association regarding any future contemplated reduction of hours of unit members prior to the implementation of such reductions.

* Any monetary award to any employee is subject to mitigation by appropriate subsequent employment.