

P.E.R.C. NO. 2014-86

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EDISON TOWNSHIP BOARD OF  
EDUCATION,

Respondent/Public Employer,

-and-

Docket No. CI-2008-022

CAROL PARENTE ZIZNEWSKI,

Charging Party,

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EDISON TOWNSHIP EDUCATION  
ASSOCIATION,

Respondent/Employee Representative,

-and-

Docket No. CI-2008-023

CAROL PARENTE ZIZNEWSKI,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission sustains the refusal of the Director of Unfair Practices to issue Complaints based on unfair practice charges filed by Carol Parente Ziznewski against the Edison Township Board of Education and the Edison Township Education Association. The Commission holds that, even if the charges are deemed timely, the allegations, if true, would not violate the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

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

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Appearances:

For the Respondent/Public Employer, Wolff, Helies,  
Duggan, Spaeth & Lucas, P.A., attorneys (Peter H.  
Spaeth, of counsel)

For the Respondent/Employee Representative, Zazzali,  
Fagella, Nowak, Kleinbaum & Friedman, attorneys (Colin  
Lynch, of counsel)

For the Charging Party, Carol Parente Ziznewski, pro se

DECISION

Charging Party Carol Parente Ziznewski seeks reactivation of  
her appeal of determinations by the then Director of Unfair  
Practices not to issue complaints on separate charges she filed

against the Edison Township Board of Education and the Edison Township Education. D.U.P. No. 2009-10, 35 NJPER 173 (¶65 2009).

On June 1, 2009 , the charging party filed an appeal of D.U.P. No. 2009-10. But, with the charging party's concurrence, since November 9, 2009 her appeal has been held in abeyance pending the outcome of separate, but related, proceedings involving her employment status as a teaching staff member in the Edison School District. By letter dated February 19, 2014, the Charging Party requested that her appeal of D.U.P. No. 2009-10 be reactivated.

The related proceedings are:

- Tenure charges filed by the Board seeking her removal;
- An arbitration seeking restoration of her withheld salary increments for the 2007-2008 school year.

On August 3, 2010, the Commissioner of Education, adopting the recommendation of an Administrative Law Judge, sustained the tenure charges and terminated Ziznewski's employment with the Edison District.<sup>1/</sup> In the Matter of the Tenure Hearing of Carol Ziznewski, School District of the Township of Edison, Middlesex County, 2010 N.J. AGEN LEXIS 973.

The arbitration proceeding on the increment withholding was held in abeyance until the tenure charges were concluded. But,

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<sup>1/</sup> The hearing before the ALJ covered 43 separate dates. The ALJ issued a 450 page report. 2010 N.J. AGEN LEXIS 203.

as of the date of the charging party's letter seeking activation of her appeal, no arbitration hearing has apparently been held.<sup>2/</sup>

Before commencing our consideration of the charging party's appeal, we note that, both when she first appealed D.U.P. No. 2009-10 and following her request to reactivate her appeal, the charging party filed numerous additional documents. The Commission, in deciding whether to issue a complaint, cannot consider information in addition to the allegations made in an unfair practice charge. N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. Our focus will be on the allegations of the charges as amended.<sup>3/</sup>

Ziznewski filed her charges on February 13, 2008. On March 11, she filed amendments.

The initial charge against the Board alleges that it violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (3) and (4)<sup>4/</sup> as follows:

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<sup>2/</sup> The letter from the then Commission Chair to the parties confirming that the charging party's appeal would be held in abeyance advised that absent a response from the charging party within 30 days after the completion of the related proceedings, the case would be administratively dismissed. As the grievance arbitration challenging the withholding of the charging party's salary increment is still open, that deadline has been met.

<sup>3/</sup> However, we take administrative notice of the outcome/status of the tenure charges and increment withholding arbitration to update the procedural history of the charging party's disputes with the Board and the Association.

<sup>4/</sup> These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the  
(continued...)

Ms. Toth failed to provide me with the letters from Assistant Superintendent Banks or Assistant Superintendent Traficante. I had no knowledge of their actions until some time in July 2007.

The amended charge states:

The Board of Education failed to provide me the opportunity to respond to the charges put forth by Maryanne Banks former Assistant Superintendent. I did not receive the letter of Assistant Superintendent Rose Traficante until sometime in October of 2007. The decision to rescind my increment was done July 23, 2007. The Board of Education denied my grievance at Level 4 October 23, 2007.

It is also my opinion that an Affirmative Action Investigation was undertaken in March 2007 and charges were never clear on what the accusations were. A record was not made of the meeting.

In October of 2007 yet another Affirmative Action Investigation was begun. The outcome is still unknown.

The initial charge against the Association alleges that it violated 5.4b(1)<sup>5/</sup> of the Act as follows:

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4/ (...continued)  
rights guaranteed to them by this act . . . (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act . . . (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act."

5/ This provision prohibits employee organizations, their representatives or agents from "Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act."

President Ferlicchi has failed to represent me my contracted and protect interests to both the Commissioner of Education and PERC against the Edison Board of Education for the rescision [sic] of contracted increment; misrepresented my requests for grievance in a filed report;

Former President Myron Fouratt has failed to represent my contracted and protected interests to both the Commissioner of Education and PERC and failed to file grievances.

The amended charge alleges:

President Ferlicchi has failed to represent my contracted and protected interests to both the Commissioner of Education and PERC against the Edison Township Board of Education for their decision to rescind my contracted increment; Mr. Ferlicchi misrepresented my requests for grievance in a filed report; February 5, 2008 was the last occasion that I received notification that Mr. Ferlicchi would be back to discuss matters with me. Mr Ferlicchi has not done so. On November 27, 2008 I met with him and the grievance committee [sic] Jeff Bowden and a new member of the committee, retired President John Sundry. I informed them that Mr. Fouratt had discussed the recommendations of the NJEA Attorney Steven Klausner and that appeals to both the Commissioner and PERC had to be filed. Neither have been filed as far as I am aware. I requested clarification from an NJEA Uniserve Rep Thomas Bonyak. I have not heard from him since that time.

Former President Myron Fouratt has failed to represent by contracted and protected interests to both the Commissioner of Education and PERC and failed to file grievances.

On April 8, 2009, the Director wrote to the parties advising that he was not inclined to issue complaints and set forth his

reasoning. He also provided the parties with an opportunity to submit documentary materials, affidavits or other evidentiary materials and a letter brief in support of their positions.

On April 20, 2009, Ziznewski filed a letter advising that she had not been provided with the documents submitted by the Board and the Association upon which the Director based his tentative conclusion. After receiving the documents, Ziznewski filed another response on May 17, 2009 in which she repeated an earlier request that the matter be held in abeyance pending completion of the tenure charges. On May 20, the Director ruled that the complaint issuance standard had not been met and issued his decision dismissing the charges. This appeal followed.

The Board and the Association denied the charges. The Association specifically asserted that it challenged Ziznewski's increment withholding by filing a formal grievance.

The Commission has authority to issue a complaint where it appears that the Charging Party's allegations, if true, may constitute an unfair practice within the meaning of the Act and formal proceedings should be instituted in order to afford the parties an opportunity to litigate relevant legal and factual issues. N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. The Commission has delegated that authority to the Director of Unfair Practices. N.J.A.C. 19:14-2.1. Where the complaint issuance standard has not been met, the Director may decline to issue a complaint. N.J.A.C. 19:14-2.3.

Ziznewski was employed as a tenured teacher by the Board, which, on July 23, 2007, decided to withhold her salary increments for the 2007-2008 school year. On August 3, 2007, the Association filed a grievance challenging the increment withholding. The Board denied the grievance. On November 1, 2007 the Association filed for binding arbitration.<sup>6/</sup>

#### ANALYSIS

In deciding whether to issue a complaint, the Commission focuses on allegations of the charge. See N.J.A.C. 19:14-2.1. Docket No. CI-2008-023 (Charges Against the Board)

The Director dismissed Ziznewski's charge against the Board as untimely as the charge, dated February 11, 2008, alleges that the Board withheld her increment on July 23, 2007, that Ziznewski was informed of the decision a day or two later, and that no facts suggested that she was prevented from filing a timely charge. According to information supplied by Ziznewski, the Board's Superintendent, Carol Toth, informed her of the Board's action in a July 24, 2007 letter. In addition, the Association informed Ziznewski of the action "in July 2007" and that the Board denied her grievance on October 23, 2007. In her amended charge, Ziznewski alleges that the Board failed to provide her

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<sup>6/</sup> The arbitration did not proceed pending the conclusion of hearings on tenure charges preferred against Ziznewski by the Board. Ziznewski has not taught since the Board suspended her with pay on April 15, 2008. On May 15, 2008, Ziznewski's status was changed to suspended without pay.



the opportunity to reply to the charges of former Superintendent Maryanne Banks and that she did not receive the letter of Assistant Superintendent Rose Traficante until October of 2007. Ziznewski filed her charge on February 13, 2008.

To be considered timely, unfair practice charges must be filed within six months of the alleged unfair practice, unless the charging party was prevented from filing a timely charge. N.J.S.A. 34:13A-5.4(c).

In Kaczmarek v. N.J. Turnpike Authority, 77 N.J. 329 (1978), our Supreme Court explained that the statute of limitations was intended to stimulate litigants to prevent the litigation of stale claims, and cautioned that it would consider the circumstances of individual cases. Id. at 337-338. The Court noted that it would look to equitable considerations in deciding whether a charging party slept on her or his rights.

The withholding of a teaching staff member's salary increment is governed by N.J.S.A. 18A:29-14, which provides, in pertinent part:

It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned. The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the decision of the board of education or direct that the increment or increments be paid.

D.U.P. No. 2009-10 refers to a July 6, 2007 letter from Traficante that is critical of Ziznewski and advises that

Traficante would recommend that the Board withhold her increment. If Ziznewski's charge is referring the Traficante's July 6, 2007 letter and, if that letter constitutes the reason Ziznewski's salary increment was withheld, then Ziznewski's alleged receipt of that letter in October 2007, may make her January 11, 2008 charge against the Board timely.<sup>7/</sup>

In Borough of North Caldwell, P.E.R.C. No. 2008-51, 34 NJPER 69 (¶27 2008), we determined that a charging party might be able to overcome the timeliness bar if he or she can prove the delay in filing a charge was caused by a union's breach of the duty of fair representation. The Commission in North Caldwell, 34 NJPER at 70, went on to state:

In determining whether a party was "prevented" from filing an earlier charge, the Commission must conscientiously consider the circumstances of each case and assess the Legislature's objectives in prescribing the time limits as to a particular claim. The word "prevent" ordinarily connotes factors beyond a complainant's control disabling him or her from filing a timely charge, but it includes all relevant considerations bearing upon the fairness of imposing the statute of limitations.[citing Kaczmarek]. Relevant considerations include whether a charging party

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<sup>7/</sup> Documents supplied by Ziznewski in support of her charges include a July 12, 2007 letter to Ziznewski from Board Superintendent Toth advising that Toth will recommend to the Board that Ziznewski's increment be withheld for four specified reasons. Those four reasons were cited again by Toth in her July 24, 2007 letter to Ziznewski as the reasons the Board voted to withhold her increment at its July 23, 2007 meeting. The discrepancies as to when Ziznewski was informed by the Board about the reasons for the increment withholding can be addressed if this matter is scheduled for hearing.

sought timely relief in another forum; whether the respondent fraudulently concealed and represented the facts establishing an unfair practice; when a charging party knew or should have known the basis for its claim; and how long a time has passed between the contested action and the charge. State of New Jersey, P.E.R.C. No. 2003-56, 29 NJPER 93 (¶26 2003).

Ziznewski alleges that she did not receive Assistant Superintendent Traficante's letter until October 2007. She further alleges that on November 27, she advised Association representatives of an NJEA attorney's recommendation that appeals to both the Commissioner and PERC be filed. That meeting took place approximately four months after Ziznewski was informed of the July 23, 2007 decision of the Board to withhold her increment, within one or two months after receiving Traficante's letter, and was within a few weeks of the Association filing a grievance on her behalf. In her appeal, Ziznewski asserts that: she was being represented by an NJEA attorney; she was communicating with the Association president and president-elect; that she understood the filing would have been timely; she believed she must exhaust all steps to remedy the grievance with the Board; when an agreement with the Board failed, she believed that, based on a July 2007 representation of the Association president, an appeal would be made to the Commissioner of Education and the Commission.

In view of this record, the February 11, 2008 unfair practice charge could be timely if the Association breached its

duty of fair representation. But, as we conclude for the reasons discussed below, even if the charges are deemed timely, the allegations listed therein, if true, would not violate the Act.

The Director also determined that Ziznewski did not allege that she engaged in any protected activity in advance of the Board's action that would indicate that its motive could have been retaliatory or that it tended to interfere with any of Ziznewski's protected rights in violation of subsections 5.4a(1), (3) and (4).

An employer independently violates subsection 5.4a(1) if its actions tend to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. Orange Bd. of Ed., P.E.R.C. No. 94-124, 20 NJPER 287 (¶25146 1994); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER550 (¶10285 1979); Gorman, Basic Text on Labor Law, at 132-34 (1976). Proof of actual interference, intimidation, restraint, coercion or motive is unnecessary. The tendency to interfere is sufficient. Mine Hill Tp.

The standard for determining whether an employer's action violates subsection 5.4a(3) of the Act was established by the New Jersey Supreme Court in Bridgewater Tp. V. Bridgewater Public Works Assn., 95 N.J. 235 (1984).

A charging party must prove by a preponderance of the evidence on the entire record that protected activity was a

substantial or motivating factor in the employer's adverse action. This may be done by direct or circumstantial evidence that demonstrates that:

- (1) the employee engaged in protected activity;
- (2) the employer knew of this activity; and
- (3) the employer was hostile toward the exercise of the protected activity.

In order to secure the issuance of a Complaint on charges of subsection 5.4a(1) and (3) violations, a charging party must allege facts to support the claim of protected activity, employer knowledge, and hostility.

On April 8, 2009, the Director advised Ziznewski of deficiencies in her charges and afforded her the opportunity to supply additional information for his consideration. In her April 20, 2009, response Ziznewski supplied copies of letters to various officials including a copy of an undated letter to Lucille Davy, then Commissioner of the State Department of Education. In that letter, which appears to have been written after the Board withheld her increment, Ziznewski asserts that questionable practices by some educators within the school resulted in discrimination that denied equal educational opportunities. Ziznewski further asserts that the catalyst for the attacks on her professionalism was her public advocacy on behalf of children, teachers, and parents.

Another letter appended to her April 20th letter is a June 19, 2006 letter from Ziznewski and a colleague to the president of the Board, in which the writers assert that they had been contacted by former colleagues at a school regarding problems with the school administration, including unethical and possibly illegal conduct affecting teachers, students and parents at the school. The writers go on to complain about patronage appointments. The writers further assert that;

[Our] motives for coming forward have been continually attacked, diverting attention from the real issues. While our illegal transfers violated current labor law and the negotiated ETA contract, they are somewhat insignificant when contrasted to the unethical and illegal conduct of some administrators.

In her appeal, Ziznewski states her belief that she "has been targeted for her outspoken stance on Board and Association actions violating our agreement and NJ statutes on a number of issues including due process, discrimination and misappropriation of funds." Ziznewski further states in her appeal that she was an Association representative for many years and that she was involved in defeating an attempt by the Board to add a meeting every second Tuesday that violated the respondents' agreement.

It is unclear at this point as to whether Ziznewski is specifically alleging that the Board withheld her increment because of the allegations noted above. More importantly, Ziznewski's charge and amended charge do not specifically make an allegation as to why the Board withheld the increment. The

charge and amended charge merely alleged that the Board failed to provide her with an opportunity to respond to charges; that there was a delay in her receipt of a Board letter; that the Board's decision to withhold her increment was made on July 23, 2007; that the Board denied her grievance; and that affirmative action investigations were initiated, and that no record was made of at least one meeting. None of these allegations as set forth in the charge against the Board, if true, would constitute a violation of the Act. We therefore sustain the refusal to issue a complaint in Docket No. CI-2008-022 with respect to the allegations that the Board violated subsections 5.4a(1) and (3).

One remaining charge against the Board must be addressed. Public employers violate subsection 5.4a(4) when they discharge or otherwise discriminate against any employee because she has signed or filed an affidavit, petition or complaint or given any information or testimony under the Act. The essence of a subsection 5.4a(4) claim is that the employer discharges or otherwise discriminates against an employee *after* that employee, in the course of, or in connection with, a Commission proceeding, signs or files a document or gives testimony or a statement. Ziznewski has not alleged facts establishing a violation of subsection 5.4a(4). All of Ziznewski's allegations, including the alleged unfair practices of the Board, occurred prior to Ziznewski's charges. Accordingly, the allegation that the Board violated subsection 5.4a(4) is dismissed.

Docket No. CI-2008-022 (Charge Against the Association)

Section 5.3 of the Act empowers an employee representative to represent employees in the negotiation and administration of a collective agreement. With that power comes the duty to represent all unit employees fairly in negotiations and contract administration. The standards in the private sector for measuring a union's compliance with the duty of fair representation were articulated in Vaca v. Sipes, 386 U.S. 171 (1967). Under Vaca, a breach of the statutory duty of fair representation occurs only when a union's conduct towards a member of the negotiations unit is arbitrary, discriminatory, or in bad faith. Id. at 191. That standard has been adopted in the public sector. Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976); see also Lullo v. International Ass'n of Fire Fighters, 55 N.J. 409 (1970); OPEIU Local 153, P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983).

Ziznewski alleges that the Association breached its duty of fair representation by failing to challenge the Board's decision to withhold her salary increment in three forums - in arbitration and before the Commissioner of Education and our Commission.

A union is allowed a wide range of reasonableness in servicing its members. An employee organization must evaluate an employee's request to arbitrate or otherwise appeal discipline on the merits and decide, in good faith, whether it believes the



employee's claim has merit. See Ford Motor Company v. Huffman, 345 U.S. 330, 337-338, 73 S.Ct. 681, 97 L.Ed. 1048 (1953); D'Arrigo v. New Jersey State Bd. of Mediation, 119 N.J. 74 (1990); Carteret Ed. Ass'n. (Radwan), P.E.R.C. No. 97-146, 23 NJPER 390, 391 (¶28177 1997); Camden Cty. College (Porreca), P.E.R.C. No. 88-28, 13 NJPER 755 (¶18285 1987); Trenton Bd. of Ed. (Salter), P.E.R.C. No. 86-146, 12 NJPER 528 (¶17198 1986); Essex-Union Joint Meeting (McNamara), D.U.P. No. 91-26, 17 NJPER 242 (¶22108 1991).

N.J.S.A. 34:13A-26 et seq., mandates that all disputes over increment withholdings of teaching staff members shall be submitted to binding arbitration except those based predominately on an evaluation of teaching performance. Edison Tp. Bd. of Ed. v. Edison Tp. Principals and Supervisors Ass'n, 304 N.J. Super. 459 (App. Div. 1997), aff'g P.E.R.C. No. 97-40, 22 NJPER 390 (¶27211 1996). If the reason for a withholding is related predominately to the evaluation of teaching performance, any appeal shall be filed with the Commissioner of Education.

N.J.S.A. 34:13A-27d. If there is a dispute as to whether an increment withholding is disciplinary, the Commission determines the matter in a scope of negotiations proceeding. N.J.S.A. 34:13A-27a, N.J.A.C. 19:13-2.2. If the Commission determines that the withholding was related predominantly to teaching performance, the teaching staff member may then file an appeal with the Commissioner of Education within 90 days of notice of

the Commission's decision. Thus, the Commission has jurisdiction to decide if a dispute over the withholding of an increment can be submitted to either binding arbitration, or the Commissioner of Education, not both. But, absent the filing of a petition for scope of negotiations determination by a school district, seeking to restrain arbitration to review an increment withholding, the dispute will be resolved through arbitration.

Ziznewski asserts that the Association violated the Act by failing to file an action with the Commission, the Commissioner of Education, and in arbitration. As noted above, there is a pending arbitration on Ziznewski's increment withholding. The Board did not file a scope of negotiations petition with the Commission asserting that the reason for the increment withholding related predominantly to teaching performance. The Association did not violate the Act by not filing an appeal with the Commissioner of Education.

Ziznewski also alleged that the Association breached its duty of fair representation by not filing a challenge of her increment withholding with the Commission. It is unclear what type of challenge Ziznewski contends should have been filed with the Commission. As noted above, the Association did not violate the Act by only filing a grievance challenging the withholding. As is also noted above, it is unclear if Ziznewski is alleging that the Board violated the Act by withholding her increment because Ziznewski engaged in activity protected by the Act. It

is further unclear if Ziznewski is alleging that the Association violated its duty of fair representation by not filing an unfair practice charge alleging that the Board withheld the increment because of Ziznewski's exercise of protected activity.

The allegations that the Association violated subsection 5.4b(1) by failing to file appeals with the Commissioner of Education and this Commission, in addition to filing a grievance challenging the increment withholding, are dismissed.

As noted above, arbitration of the grievance challenging the salary increment withheld from Ziznewski has apparently not gone forward even through the tenure charges were decided.<sup>8/</sup> But, Ziznewski's charge against the Association does not allege that challenging the withholding via grievance arbitration violated the Act. Instead, she asserts that the Association should have filed proceedings in multiple forums. That allegation does not warrant the issuance of a complaint because:

- The merits of an increment withholding can be challenged either through binding grievance arbitration or through an appeal to the Commissioner of Education, but not in both forums;
- Absent an allegation that an increment was withheld in retaliation for specific protected activity, occurring within six months of the date of filing of an unfair practice charge, that personnel action would not violate the Act.

While we conclude, without deciding, that Ziznewski's charges may have been timely, the allegations set forth would

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<sup>8/</sup> We make no rulings regarding the increment grievance.

not, if true violate the Act. We sustain the refusals to issue complaints against the Board and the Association.

ORDER

A. The allegation that the Board violated subsection 5.4a(1) (3) and (4) are dismissed as the allegations of the charge, as amended, against the Board, would not, if true, violate the Act.

B. The allegation that the Association violated subsection 5.4b(1) by filing a grievance to challenge the increment withholding rather than also filing a challenge with the Commissioner of Education and this Commission, would not if true constitute a violation of the Association's Duty of Fair Representation.

C. Based on the reasons set forth in the foregoing opinion, D.U.P. No. 2009-10 is affirmed.<sup>9/</sup>

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson, Jones, Voos and Wall voted in favor of this decision. None opposed.

ISSUED: June 26, 2014

Trenton, New Jersey

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<sup>9/</sup> This determination is a final administrative action for purposes of appeal.