P.E.R.C. NO. 2015-70

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

JERSEY CITY HOUSING AUTHORITY,

Respondent,

-and- Docket No. CI-2012-002

INDEPENDENT SERVICE WORKERS
OF AMERICA,

Respondent,

-and-

MATTHEW P. CRAWFORD,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts a Hearing Examiner's recommended decision in an unfair practice case filed by Matthew P. Crawford against the Jersey City Housing Authority and the Independent Service Workers of America. That decision recommended that the Commission dismiss charges alleging that JCHA and ISWA violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by colluding in Crawford's loss of seniority and layoff, and by the ISWA failing its duty of fair representation regarding a disciplinary grievance. The Commission rejects Crawford's exceptions, finding that many do not comply with N.J.A.C. 14-7.3(b), that several exceptions relate to internal union matters, and that the Hearing Examiner did not err: in interpreting a settlement agreement between JCHA and ISWA; by referencing Crawford's disciplinary history; or by finding that ISWA did not violate, and the JCHA did not collude with ISWA to violate, its duty of fair representation.

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, Ruderman and Glickman, attorneys (Littie E. Rau, of counsel)

For the Respondent, Cohen, Leder, Montalbano and Grossman, attorneys (Bruce Leder, of counsel)

For the Charging Party, Feintuch, Porwich and Feintuch, attorneys (Philip P. Feintuch, of counsel)

DECISION

This case is before the Commission on exceptions filed by Matthew P. Crawford (Charging Party) to the Report and Recommended Decision of a Commission Hearing Examiner, H.E. No. 2014-16, 41 NJPER 23 (¶6 2014). The Hearing Examiner recommended that the Commission Order that the Complaint be dismissed.

On July 15, 2011, the Charging Party filed an unfair practice charge, which was amended on July 25 and July 28, 2011, alleging

that the Jersey City Housing Authority (JCHA or Authority) and the Independent Services Workers of America (ISWA or Union) violated all of the 5.4a and 5.4b subsections, respectively, of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A:1 et seq. (Act). The Charging Party alleged that the JCHA colluded with the ISWA resulting in Crawford's loss of seniority and subsequent layoff. The Charging Party also alleged that the ISWA failed in its duty to represent him fairly regarding a grievance filed over certain discipline he received which resulted in his loss of seniority and his subsequent layoff. The Charging Party seeks reinstatement to his prior position, restoration of his seniority, back pay, the direction of "open" union elections and the removal of an alleged supervisory employee from the ISWA negotiations unit.

A Complaint and Notice of Hearing was issued by the Director of Unfair Practices on November 19, 2012 limited to the 5.4a(1) and (5) and b(1) allegations in the charge (C-1).[1/2/] Both

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1/ The 5.4a provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (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."

The 5.4b provisions prohibit employee organizations, their representatives or agents from: "(1) Interfering with,

(continued...)

Respondents filed Answers by November 29, 2012, denying having violated the Act and raising certain affirmative defenses (C-2, C-3).

Hearing Examiner Wendy L. Young conducted hearings on August 29, September 16 and December 18, 2013.[3/] All parties filed post-hearing briefs and reply briefs by March 10, 2014.

On June 16, 2014 the Hearing Examiner filed her Report and Recommended Decision which is now before us to adopt, reject or modify. The Hearing Examiner concluded that the JCHA did not violate 5.4a(1) or a(5) of the Act, and the ISWA did not violate 5.4b(1) of the Act by the events leading to the Charging Party's suspension or layoff, and recommended that the Complaint be dismissed.

Following the issuance of the decision, the Charging Party filed exceptions, after an extension was granted, on July 3, 2014. The JCHA filed a brief on July 9 and the ISWA, after an extension, filed its brief on July 18. The JCHA and ISWA urge that we adopt the Hearing Examiner's Report and Recommended

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1/ (...continued)
restraining or coercing employees in the exercise of the rights guaranteed to them by this act."

2/ "C", "CP" and "ER" refer, respectively, to Commission, Charging Party and Employer exhibits received into evidence at the hearing.

3/ The Transcripts will be referred to as 1T (8/29/13), 2T (9/16/13), and 3T (12/18/13).

Decision in its entirety and reject the Charging Party's exceptions.

The Hearing Examiner issued a 29 page Report and Recommended Decision and made 19 comprehensive findings of fact supported by references to the transcripts and exhibits introduced into evidence. H.E. at 3-17. Her findings of fact are accurate. We adopt and incorporate the Hearing Examiner's findings of facts and summarize the facts that are relevant to this appeal as follows.

The JCHA and ISWA were parties to a collective negotiations agreement effective April 1, 2005 through March 31, 2008 (ER-4). The ISWA represents non-supervisory blue and white collar employees employed by the JCHA. On December 3, 2007, the JCHA and the ISWA entered into a settlement agreement (CP-1), which in pertinent part, provided for the following:

> 3. ISWA agrees that in any future layoff actions, the application of "merit along with seniority," as provided for in Article 24 of the ISWA collective bargaining agreement, will be defined as follows:
>
> "An employee who has had four or more days suspension (or loss of vacation in lieu of suspension) within the last three years will loss [sic] seniority rights for the purposes of layoff, demotion in lieu of layoff or recall."
>
> 6. The parties agree that this Agreement is binding in future arbitration cases.

The Charging Party was employed in several positions and ultimately as a plasterer for the JCHA for approximately 19 years. On December 29, 2010, the Charging Party was involved in an altercation with a fellow employee at the work place. The other employee, Omar Parsons, was the son of the ISWA President, Fred Parsons. The Charging Party reported the incident to his manager and then sought medical attention because he injured his shoulder during the incident and filed a Workers' Compensation claim on January 4, 2011. On January 14 the JCHA served the Charging Party with a letter (ER-5) that charged him with "conduct unbecoming a public employee" for the altercation on December 29, 2010, and "failure to follow Workers' Compensation directives" for not reporting back to the medical facility on December 31, 2010, as directed. He was informed that he could potentially receive a five day suspension. The letter specifically informed the Charging Party of the following:

> OPPORTUNITY FOR HEARING
>
> In accordance with the ISWA collective bargaining agreement, you have the right to have an informal meeting with your supervisors . . . to review the charges and proposed disciplinary action. Please contract [sic] [your supervisor] immediately if you wish to do so.
>
> If the informal meeting does not resolve this issue, or if you do not wish to have an informal meeting with your supervisors, you may request a formal Hearing to review the charges. You may be present at the Hearing and you may be represented by a union

> official and/or attorney. You may present any testimony and/or evidence on your behalf. If you wish to have a formal Hearing, please advise this office in writing no later than Friday, January 21, 2011.
>
> Please call if you have any questions about this letter.

The Charging Party met with his Shop Steward, Clifford Brown, about the charges and Brown offered to represent him but the Charging Party declined. The Charging Party then contacted the ISWA Vice President Robert Brunner who advised him that either he would represent him or the Charging Party could arrange for a lawyer to represent him. After Vice President Brunner allegedly told the Charging Party that he had no defense, he hired his own attorney to represent him regarding the disciplinary charges. The hearing was ultimately held on April 12, 2011, before Grace Malley, the JCHA's Director of Staff/Resident Development and Strategic Planning. The Charging Party's attorney represented him at the formal hearing and never requested an informal meeting with the supervisors. On April 25, 2011, the Charging Party was served with a letter that indicated that the second charge regarding the Workers' Compensation issue had been dismissed, but that he had been found guilty of the first charge regarding the altercation, and as a result, had received a four day suspension. On May 13, 2011, the Charging

Party was laid off as a result of a reduction in force, having lost his seniority based on his four day suspension.[4/]

We begin with the standard we apply in reviewing the Hearing Examiner's Findings of Fact. We cannot review these findings de novo. Instead, our review is guided and constrained by the standards of review set forth in N.J.S.A. 52:14B-10(c). Under that statute, we may not reject or modify any findings of fact as to issues of lay witness credibility unless we first determine from our review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence. See also New Jersey Div. of Youth and Family Services v. D.M.B., 375 N.J. Super. 141, 144 (App. Div. 2005) (deference due to fact-finder's credibility determinations and "feel of the case" based on seeing and hearing witnesses); Cavalieri v. PERS Bd. of Trustees, 368 N.J. Super. 527, 537 (App. Div. 2004).

Our case law is in accord. It is for the trier of fact to evaluate and weigh contradictory testimony. Absent compelling contrary evidence, we will not substitute our reading of the transcripts for a Hearing Examiner's first-hand observations and judgments. See Warren Hill Reg. Bd. of Ed., P.E.R.C. No. 2005-

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4/ Although the Charging Party was the most senior plasterer with the JCHA and would not have been laid off, due to his four day suspension and the language of CP-1, he lost his seniority and was subject to the lay off.

26, 30 NJPER 439 (¶145 2004), aff'd 32 NJPER 8 (¶2 App. Div. 2005), certif. den. 186 N.J. 609 (2006); Trenton Bd. of Ed., P.E.R.C. No. 79-70, 5 NJPER 185 (¶10101 1979); City of Trenton, P.E.R.C. No. 80-90, 6 NJPER 49 (¶11025 1980); Hudson Cty., P.E.R.C. No. 79-48, 4 NJPER 87 (¶4041 1978).

Vaca v. Sipes, 386 U.S. 171, 190 (1967), is the seminal case setting out the standard for a union's duty of fair representation. The Court in Vaca found that a violation of a union's duty of fair representation occurs when its conduct towards one of its members is "arbitrary, discriminatory or in bad faith."

We reviewed the limits on our jurisdiction over disputes involving the relationship between a union and its members in NJ State PBA and PBA Local 199 (Rinaldo), P.E.R.C. No. 2011-83, 38 NJPER 56 (¶8 2011):

> We do not have power to enforce union constitutions and by-laws. These documents may establish judicially enforceable contractual rights, but a violation of their provisions does not generally constitute an unfair practice under our Act. Teamsters Local 331 (McLaughlin), P.E.R.C. No. 2001-30, 27 NJPER 25, 27 (¶32014 2000); Calabrese v. PBA Local 76, 157 N.J. Super. 139 (Law Div. 1978). Nor do we have authority to referee or resolve internal union disputes unconnected to allegations and proof that an unfair practice has been committed. City of Jersey City, P.E.R.C. No. 83-32, 8 NJPER 563, 565-566 (¶13260 1982); cf. Danese v. Ginesi, 280 N.J. Super. 17, 25 (App. Div. 1995) (unions are entitled to considerable latitude in making membership rules). Nor

> do we have jurisdiction to enforce the New Jersey Constitution as opposed to the statutory rights specifically granted by the New Jersey Employer-Employee Relations Act. In contradistinction to all these broader disputes, our unfair practice jurisdiction over membership matters is statutorily confined under the Act we administer to two instances. The first instance is where a majority representative violates its duty to represent its members fairly in contract negotiations and grievance processing, N.J.S.A. 34:13A-5.3; OPEIU Local 153 (Johnstone), P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983). The second instance is where a majority representative arbitrarily, discriminatorily, or invidiously excludes or expels a negotiations unit employee seeking to participate in majority representative affairs affecting his or her employment conditions. FOP Lodge 12 (Colasanti), P.E.R.C. No. 90-65, 16 NJPER 126 (¶21049 1991); PBA Local 199 (Abdul-Haqq), P.E.R.C. No. 81-14, 6 NJPER 384 (¶11198 1980).

The Charging Party has filed nine exceptions to the Hearing Examiner's recommended decision. N.J.A.C. 19:14-7.3, exceptions; cross-exceptions; briefs; answering briefs, provides in pertinent part:

> (b) Each exception shall specify each question of procedure, fact, law, or policy to which exception is taken; identify that part of the report and recommended decision to which objection is made; designate by precise page citation the portions of the record relied on; state the grounds for the exception; and include the citation of authorities unless set forth in a supporting brief. Any exception which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with these requirements may be disregarded.

At the outset we note that many of the Charging Party's exceptions do not comply with N.J.A.C. 14-7.3(b). Additionally the Charging Party has only included the citation of five authorities, all of which relate to the allegation that the ISWA violated its duty of fair representation to the Charging Party.[5/]

> Exception 1: The Hearing Examiner erred by not considering the fact that the Independent Service Workers Association (ISWA), alternately referred to as the ISWA or the union, is an association, in name only and not a responsible bargaining agent.

The Charging Party has not cited to any page in the Hearing Examiners Report but instead references the transcript claiming that the ISWA had no elections for the last 11 years; meetings are not held very often; and, the vice President believed that President Parsons had the authority to sign off on any document without the approval of the membership. As a result, the Charging Party asserts that the Hearing Examiner erred by not considering this information. We reject this exception, as the

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5/ Brooks v. New Jersey Mfrs. Ins. Co., 170 N.J. Super. 20 (App. Div. 1979); Union County College Chapter, American Association of University Professors, P.E.R.C. No. 85-121, 11 NJPER 374 (¶16135 1985); Local 2293, AFSCME Council #73, AFL-CIO, P.E.R.C. No. 82-87, 8 NJPER 223 (¶13092 1982); Licensed Practical Nurse Association of New Jersey, INC., P.E.R.C. No. 80-133, 6 NJPER 220 (¶11111 1980); N.J. Turnpike Employees Union, Local 194, I.F.P.T.E., AFL-CIO, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979). All four of the Commission cases were cited by the Hearing Examiner, three of which, were cited by the Charging Party for the proposition that those decisions are distinguishable based on the facts of the instant case.

Commission has consistently held that it does not have jurisdiction to intervene under the Act in internal union matters. See Hudson Cty. and United Workers of America, Local 322 and District 1199J, NUHHCE, AFSCME, AFL-CIO, P.E.R.C. No. 2006-76, 32 NJPER 101 (¶49 2006); New Jersey State PBA and PBA Local 105, P.E.R.C. No. 91-92, 17 NJPER 245 (P22111 1991).

> Exception 2: The Hearing Examiner erred in her finding that the authority and union signed an agreement (CP-1) to solely resolve a previously filed grievance and was not meant to be part of a negotiated agreement.

Again, the Charging Party has not cited to any page in the Hearing Examiner's Report but instead references the transcript claiming that the Charging Party never voted on a contract; there was never any literature regarding meetings or contracts; that the neither he, nor any other ISWA member ever received a copy of CP-1; that the ISWA did not rebut this allegation; and that any action taken by President Parsons was outside his authority. We reject this exception as it pertains to an internal union matter. Hudson Cty.; New Jersey State PBA. Additionally, under N.J.A.C. 19:14-6.8, the Charging Party has the burden to prove the allegations in the Charge.[6/]

6/ 19:14-6.8 Prosecution by charging party; burden of proof:

> "The charging party shall prosecute the case and shall have the burden of proving the allegations of the complaint by a preponderance of the evidence. The

(continued...)

> Exception 3: The Hearing Examiner officer erred in finding that a contract that did not come into being until a date subsequent to the subject altercation was retroactive.

The Charging Party has cited to H.E. at 5 and asserts that the Hearing Examiner stated that there was no contract in effect in December 2010 (the time of the altercation); that there was no contract in effect between April 2008 and March 2011; and that the ISWA did not produce any documentation to prove that President Parsons had the authority to sign any document on behalf of the ISWA. We reject this exception as the Hearing Examiner throughly addressed these issues in Finding of Fact 1, H.E. at 3-5. We find that the terms of the CNA that expired in 2008 and CP-1 were in effect at all relevant times in this matter.

> Exception 4: The Hearing Examiner erred in her interpretation of (CP-1).

The Charging Party has not cited to any page in the Hearing Examiner's Report or the transcript but asserts that CP-1, citing paragraph 6 of the agreement set forth above, only applies to arbitrations and not matters before the Commission. We reject this exception. CP-1 was a settlement agreement between the JCHA and ISWA that resolved a matter that was proceeding to

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6/ (...continued)
respondent shall have the burden of establishing any affirmative defenses in accordance with law."

arbitration. The clear language of the agreement in paragraph three, however, applies to the specific facts of the instant case where an employee has four or more days suspension. Paragraph six merely states that the agreement will apply in future arbitration cases.

> Exception 5: The Hearing Examiner erred in her report when she included past alleged disciplinary actions of Mr. Crawford in spite of the fact that the JCHA did not go back beyond 3 years in determining disciplinary actions.

The Charging Party cites to H.E. at 6 where the Hearing Examiner referenced his prior disciplinary history with the JCHA. The Hearing Examiner also referenced the disciplinary history of the other employee involved in the altercation, Omar Parsons, in her Report also at H.E. at 6. We reject this exception. We find that the fact that the Hearing Examiner referenced the disciplinary history of the Charging Party is not relevant to the underlying charges in this matter that the JCHA colluded with the ISWA and that the ISWA violated its duty of fair representation to the Charging Party. The purpose of the Hearing, before the Hearing Examiner, in this matter was not to re-litigate the merits of the Charging Party's four day suspension.

> Exception 6: The Hearing Examiner erred in failing to recognize the animus between Fred Parsons and Matthew Crawford and her failure to do so influenced her decision.

The Charging Party has not cited to any page in the Hearing Examiner's Report regarding an error but cites to the transcript and asserts the ISWA failed to provide the Charging Party with the "statutorily guaranteed duty of fair representation"; that the Charging Party did not have a good relationship with President Parsons; that President Parsons testified against the Charging Party at the disciplinary hearing; and that the Charging Party only hired his private attorney after the Vice President Brunner told him that "there was no defense for him" and refused to authorize the Charging Party to use the ISWA attorney. We reject this exception. The Hearing Examiner addressed these issues in detail at H.E. at 24-28 and determined that the ISWA did not violate its duty of fair representation to the Charging Party since neither President Parsons nor Vice President Brunner had acted in an arbitrary or discriminatory manner or in bad faith. H.E. at 26. Additionally, the Hearing Examiner noted that Shop Steward Crawford and Vice President Brunner had originally offered to represent the Charging Party, and if that occurred, then it would have been likely that an informal conference would have been scheduled prior to the formal hearing. H.E. at 26-27. Finally, the Hearing Examiner noted that President Parsons was a witness to the incident, and as a result, was required to testify "honestly and tell what he saw happen that day." H.E. at 27-28. We find that the ISWA did not violate

its duty of fair representation to the Charging Party in this matter.

> Exception 7: The Hearing Examiner erred not considering the fact that the workers' compensation claim filed by Crawford substantiated that he was not the aggressor in the altercation.

This exception is similar to Exception 5 above because it is not relevant. The Charging Party has not cited to any authorities regarding this exception. What happened with respect to the Workers' Compensation claim and settlement was not relevant to the instant case before the Commission since, based on the Complaint (C-1), the issue was not whether the Charging Party was the aggressor, but whether the JCHA or the ISWA violated the Act.[7/8/] We reject this exception.

> Exception 8: The Hearing Examiner erred by failing to find that the JCHA was complicit with the union in failing to properly represent Crawford.

7/ The Hearing Examiner noted in Finding of Fact 6, H.E. at 7, that the workers compensation claim was denied noting that: "your case is denied as it did not arise in the normal course and scope of your employment" (ER-1; 2T17-2T22). That case was subsequently settled with Crawford receiving $5,600 (2T99).

8/ As a general matter, we note that settlement discussions and settlements are not relevant because a settlement is not evidence of liability. See Wyatt v. Wyatt, 217 N.J. Super. 580, 586 (App. Div. 1987); Winfield Mut. Housing Corp. v. Middlesex Concrete Products & Excavating Corp., 39 N.J. Super. 92, 99-101 (App. Div. 1956).

Regarding this exception, the Charging Party cites to the transcripts and the Hearing Examiner's Report asserting essentially that it is clear that the ISWA and the JCHA worked together to ensure that the Charging Party did not receive the proper representation since Vice President Brunner did not advise him that if he was suspended he would lose seniority and could be laid off; that Vice President Brunner misrepresented the truth because the Charging Party testified that if given the opportunity he would have accepted union representation; that "It defies credulity that Malley would have to rely upon the UNION to request an informal hearing and it would be at that time that presumably the four day suspension would be reduced."[9/]; and that

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9/ The Charging Party cites to Finding of Fact 14, H.E. at 13-14, where the Hearing Examiners Report states in pertinent part:

> "Malley acknowledged she knew that by assessing Crawford a four-day suspension, he would lose his seniority and likely lead to layoff (1T38-1T39, 3T31). She conceded she could have recommended a suspension of less than four days but she believed that based upon the seriousness of the incident, the potential for violence, and because the evidence convinced her that Crawford initiated the argument, a four-day suspension was consistent with discipline assessed other employees in past similar circumstances (1T39-1T40, 3T24-3T25). Malley noted Fred Parson did not influence her decision (3T50).
>
> Malley explained that Omar received less discipline because he was actually talking to another employee, not Crawford, but that it was Crawford who initiated the verbal altercation with Omar (3T24-3T25). Malley also explained that Crawford's conduct did not warrant dismissal, but that his layoff was a consequence of the agreement with the Union

(continued...)

the Charging Party believed that "Fred Parsons convinced and/or coerced Malley to suspend him for four days knowing he'd be laid off." The Hearing Examiner specifically found the following regarding this assertion, "Malley denied such conduct (3T78). Given the lack of facts to support Crawford's contention, I find Malley was not coerced and I credit her testimony." Finding of Fact 15, H.E. at 15.

With respect to this exception, other than providing the isolated portions of the transcript testimony and the Charging Party's suspicions regarding the alleged collusion between the ISWA and the JCHA, based on the entire voluminous record, we find no compelling contrary evidence and will not substitute our reading of the transcripts for the Hearing Examiner's first-hand observations and judgements regarding credibility determinations. Additionally, as set forth above, the Charging Party was specifically put on notice of his ability to request the informal conference in ER-5, was represented by an attorney, and for unknown reasons, did not request the informal conference. We reject this exception.

9/ (...continued)
on how to handle longer suspensions (3T66). Malley conceded, however, that Crawford's discipline could have been less than four days if the Union had requested an informal hearing and presumably made a recommendation for discipline less than four days that the Authority was willing to accept (3T62-3T63)."

> Exception 9: The Hearing Examiner erred by not finding the union violated its obligation of fair representation by not notifying Crawford of his options following his termination.

The Charging Party has not cited to any authority, the Hearing Examiner's Report or the transcripts regarding this exception. We note however, that the Hearing Examiner addressed this issue at H.E. at 27:

> [It] could not have been a [duty of fair representation] violation for Brunner to tell Crawford after Malley issued her decision that he (Crawford) could not appeal the discipline she assessed in his grievance. Article 16.4(f) of ER-2 limits such appeals to discipline of six or more days.

We reject this exception. As set forth above, after our independent review of the entire record, we find no evidence that anyone associated with the ISWA (or the JCHA) acted in a manner towards the Charging Party that was arbitrary, discriminatory or in bad faith. Vaca.

Finally, the Charging Party asserts arguments regarding the Hearing Examiner's Analysis. H.E. at 17-28. However, the Charging Party's arguments merely restate his assertions that were already made in several of his exceptions above regarding the meaning of CP-1, whether ER-2 was in effect at the time of the disciplinary hearing, and asserting that the ISWA violated the duty of fair representation standard with respect to the Charging Party (based on his interpretation of the record). We

have reviewed the entire record and found that the Hearing Examiner's findings of fact are accurate and were not arbitrary, capricious or unreasonable and were supported by sufficient, competent, and credible evidence in the record. N.J.S.A. 52:14B-10(c).

ORDER

The Hearing Examiner's dismissal of the Complaint is affirmed.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson, Jones and Voos voted in favor of this decision. None opposed. Commissioner Wall was not present.

ISSUED: May 21, 2015

Trenton, New Jersey