

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(VINELAND STATE SCHOOL),

Respondent,

-and-

Docket No. CI-83-36-3

ROSE M. WALKER,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated to him by the full Commission, dismisses a Complaint alleging that the State of New Jersey (Vineland State School) violated the New Jersey Employer-Employee Relations Act when it terminated Rose M. Walker, allegedly because she had processed a grievance. The Chairman, agreeing with a Commission Hearing Examiner, concluded that Walker had not proved by a preponderance of the evidence that her grievance was a substantial or motivating factor in the Hospital's decision to terminate her. Neither party filed exceptions to the Hearing Examiner's report.

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Appearances:

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

For the Charging Party, Freeman & Bryant, Esqs.
(Allen S. Zeller, of Counsel)

DECISION AND ORDER

On January 13, 1983, Rose M. Walker filed an unfair practice charge against the State of New Jersey (Vineland State School) ("Hospital") with the Public Employment Relations Commission. The charge, as amended on February 3, 1983, alleged that the Hospital violated subsections 5.4(a)(1) and (3)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when its officials terminated her, allegedly because she had processed a grievance.

On July 6, 1983, the Director of Unfair Practices issued a Complaint and Notice of Hearing.

^{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 (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."

On July 20, 1983, the Hospital filed an Answer. It denied that Walker's termination was related to the filing of any grievance and asserted instead that Walker was terminated for legitimate business reasons.

On October 3, 19, and 27, 1983, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses, introduced exhibits, and argued orally. Both parties filed post-hearing statements.

On February 3, 1983, the Hearing Examiner issued his report and recommended decision. H.E. No. 84-40, 10 NJPER ____ (¶ ____ 1984) (copy attached). He found that Walker had failed to establish by a preponderance of the evidence that her grievance was a substantial or motivating factor in her termination.^{2/}

The Hearing Examiner served his report on the parties and informed them that exceptions, if any, were due on or before February 16, 1984. Neither party filed exceptions or requested an extension of time.

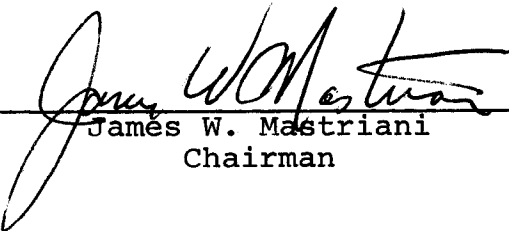
^{2/} During the hearing, the Hearing Examiner denied the State's motion to dismiss the Complaint following the presentation of Walker's case. Applying the mandated standard of taking every allegation as true and according every favorable inference to the party opposing the motion, the Hearing Examiner found that Walker had introduced sufficient evidence, if ultimately accepted, to prove that her protected activity had been a motivating or substantial factor in her termination. However, following presentation of the Hospital's case and consideration of the entire record, the Hearing Examiner found that Walker had not proved by a preponderance of the evidence that her grievance was in fact a substantial or motivating factor in her termination.

Pursuant to N.J.S.A. 34:13A-6(f), the full Commission has delegated authority to me to decide this case in the absence of exceptions. I have reviewed the record. The Hearing Examiner's findings of fact are accurate and supported by specific credibility determinations. I adopt and incorporate them here. Based on these findings of fact, I agree with the Hearing Examiner that Walker has not established by a preponderance of the evidence that her grievance was a substantial or motivating factor in the Hospital's decision to terminate her. Township of Bridgewater and Bridgewater Public Works Ass'n, ___ N.J. ___ (Feb. 2, 1984). Accordingly, the Complaint is dismissed.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

DATED: Trenton, New Jersey
February 21, 1984

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

In the Matter of

STATE OF NEW JERSEY
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Respondent,

-and-

Docket No. CI-83-36-3

ROSE M. WALKER,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the State of New Jersey did not violate the New Jersey Employer-Employee Relations Act by terminating Rose Walker from her employment at Vineland State School. The Hearing Examiner found that the Charging Party failed to prove by a preponderance of the evidence that she was terminated because she filed and processed a grievance. The Hearing Examiner further found that the State had legitimate business justification for terminating the Charging Party.

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.

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For the Respondent

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(Michael L. Diller, Deputy Attorney General, Of Counsel)

For the Charging Party

Freeman, Zeller & Bryant, Esqs.
(Allen S. Zeller, Of Counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on January 13, 1983 and amended on February 3, 1983 by Rose M. Walker ("Charging Party") alleging that the State of New Jersey at Vineland State School (Hospital) ("State" or "Hospital") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). The Charging Party has alleged that the State, through its officials at the Hospital, unlawfully threatened her and terminated her because she filed and processed a grievance all of which was alleged to be in violation of N.J.S.A. 34:13A-5.4

(a) (1), (3), and (7) of the Act. 1/

The State denied that the Charging Party was threatened or terminated because she filed and processed a grievance. Rather, it argued that there was legitimate business justification for terminating the Charging Party, i.e., that she failed to perform according to the terms of her provisional status.

It appearing that the allegations of the Unfair Practice Charge may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on July 6, 1983. Hearings were then held in this matter on October 3, 19 and 27, 1983, in Trenton, New Jersey, at which time the parties had the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. Both parties filed post-hearing briefs, the last of which was received on December 7, 1983.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act exists,

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; (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; (7) Violating any of the rules and regulations established by the Commission."

When the Charge was originally filed on January 13, 1983, the Charging Party alleged a violation of N.J.S.A. 34:13A-5.3, and apparently of 34:13A-5.4(a) (7). However, by letter dated February 1, 1983, received by the Commission on February 3, 1983, the Charging Party alleged a violation of 34:13A-5.4(a) (1) and (3), and said nothing about the 5.3 or (a) (7) charges. At hearing the undersigned Hearing Examiner accepted the February 1 document as an amendment to the Charge and found that the Charging Party was alleging only a violation of N.J.S.A. 34:13A-5.4(a) (1) and (3). To be certain no other subsections of 5.4 remained alive, the undersigned dismissed the (a) (7) allegation because no rule or regulation of the Commission was alleged to have been violated.

and after hearing, and after consideration of the post-hearing briefs, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record the Hearing Examiner makes the following:

Findings of Fact

1. The State of New Jersey (Vineland State School (Hospital) is a public employer within the meaning of the Act and is subject to its provisions.

2. Rose M. Walker was a public employee within the meaning of the Act, and was employed by the State at Vineland State Hospital in a provisional Civil Service appointment as a full-time graduate nurse (RN - registered nurse) beginning in late May 1982. She was originally assigned to the afternoon shift, 2:30 p.m. - 11:00 p.m., in the "A" wing. Walker had been employed at the Hospital as a part-time licensed practical nurse (LPN) for approximately two years preceding her provisional appointment as a graduate nurse. ^{2/}

3. On August 24, 1982 Walker was involved in an incident which resulted in corrective action being taken that resulted in her being moved to the third shift. ^{3/} On that date it was discovered that the wrong intervenous (IV) bottle was hung for a

^{2/} Walker was hired as a provisional employee because in May 1982 she had not been notified whether she passed the RN examination, and she had not been certified by Civil Service. Walker was not certified by Civil Service as a Registered or Graduate Nurse until sometime after her termination from Vineland State School.

^{3/} Although the incident report (Exhibit R-8) indicated that the incident occurred on August 21, 1982, the witnesses testified it occurred on August 24, and certain other documents, Exhibits CP-3, CP-5, and R-1 also use August 24. The actual date, however, is not material to the disposition of this case.

particular patient. Although the Charging Party was not accused of hanging the wrong bottle, she was accused of having mislabeled the bottle that was hung. Walker wanted to explain the situation to her supervisor, Barbara Nitolo, and despite being told that Nitolo was in a meeting with another employee, Walker entered Nitolo's office and verbally attacked her. (Transcript ("T") 2 pp. 137-141). ^{4/}

The following day Michael DuBrink, Director of Nursing, investigated the incident and spoke with Walker. He indicated that Walker admitted that she was "out of line" with respect to her comments to Nitolo, and that he told her that he wanted to move her to the third shift where she would receive more supervision because there were two supervisors on that shift. (T 2 pp. 142-143).

After talking to Walker, DuBrink had a conversation with Dominic Ciancerelli, the personnel officer at the Hospital, concerning Walker's confrontation with Nitolo. Ciancerelli recommended that since Walker was only a provisional employee who could be discharged without cause, that she be terminated because of her behavior to Nitolo. (T 2 pp. 49, 56-58, 74-75, 143). DuBrink, however, thought Walker would improve and wanted to give her another chance, thus, he decided against her termination at that time. (T 2 p. 49).

Consequently, on August 31, 1982 DuBrink notified Walker (Exhibit R-1) that she had been disobedient and disrespectful to Nitolo, and that she was being transferred effective September 6,

^{4/} The Charging Party never actually denied having verbally attacked Nitolo, she only testified that Nitolo told her she (Nitolo) didn't like her (Charging Party) questioning her (Nitolo) ideas and that she (Nitolo) then told her (Charging Party) to leave her office. (T 1 p. 39).

1982 to the third shift in order to receive additional supervision. That letter also warned her that further incidents would result in severe disciplinary action. The following day, September 1, 1982, Walker filed a grievance (Exhibit CP-1) over her shift change and sought a return to the second shift. By letter to Walker dated September 8, 1982 (Exhibit CP-12), Ciancarelli's office acknowledged the grievance and scheduled a hearing for October 13, 1982.

4. The Charging Party was also involved in work-related incidents on September 17, 1982 and October 2, 1982. On September 17, Jean McQuillan, the third shift nursing supervisor, ordered Walker at the start of her shift to work in "B" wing because there were no nurses on that wing. Walker told McQuillan that she did not want to work "B" wing because she had not gotten enough sleep. ^{5/} Nevertheless, Walker went to "B" wing, but in approximately one-half hour she called McQuillan and told her she was going home sick with a headache. (Exhibit CP-3, R-9). McQuillan requested Walker to stay, but when she refused, McQuillan herself, worked "B" wing. McQuillan filed an incident report on September 18, 1982 (Exhibit R-9).

Walker was involved in a similar incident on October 2, 1982. On that day acting nurse supervisor Vargas was attempting to arrange coverage for "B" wing, and Walker told her that if she (Walker) was assigned to "B" wing she would go home sick (T 2 p. 155). As a result of the Charging Party's threat, acting supervisor Vargas did not change Walker's assignment, but she did inform DuBrink of the incident. The following day, October 3, 1982, DuBrink met with

^{5/} Presumably, Walker did not want to work "B" wing because she was tired and would be the only nurse there and probably would not have had an opportunity to rest as she might have on "A" wing.

Walker concerning the matter. Walker did not deny having made the comment to Vargas, rather she said she was only joking. (T 2 p. 156). DuBrink did not discipline Walker for that behavior at that time, but on October 4, 1982, he did notify Walker by memorandum (Exhibit R-10) that she was required to provide a physician's certificate of illness for each day or fraction thereof that she declined to work due to illness.

5. The last, and most serious incident involving the Charging Party began on October 4, 1982. On that day Walker was working the afternoon shift and a patient, Virginia Goodwin, was scheduled to receive a phenobarbitol pill at 8:00 p.m. ^{6/} On October 5, however, nurse Betty Forosisky found that Goodwin's phenobarbitol pill intended for 8:00 p.m. on October 4 was still in her medication cassette. Forosisky examined Goodwin's medication cardex (Exhibit CP-9) and noted that Walker had not initialed it in the 8 p.m. slot for October 4, and had not signed the back. She then filled out a pharmacy slip (Exhibit R-11) indicating that the pill was not given and informed nurse supervisor Charlotte DiGiovachino of the incident. ^{7/}

DiGiovachino, also on October 5, then checked Goodwin's cardex herself, and confirmed Forosisky's finding that Walker had not initialed the card. ^{8/} She then filled out a medication incident report (Exhibit CP-7A) indicating that the medication had been omitted, and then informed DuBrink of the incident.

^{6/} There was no evidence in the record to indicate why Walker was working the 2:30-11:00 shift on October 4, 1982.

^{7/} Pursuant to DuBrink's request, Forosisky filled out a report of the October 5 incident (Exhibit R-14) on October 8, 1982.

^{8/} Pursuant to DuBrink's request, DiGiovachino also filled out a report of the October 5 incident (Exhibit CP-6) but hers was dated October 7, 1982.

That same day, October 5, DuBrink checked Goodwin's cassette and saw the pill in question, examined the medication cardex and confirmed Forosisky's statement that Walker had not initialed or signed it, and, he checked the nurses notes, Exhibit CP-8, for any note by Walker regarding the phenobarbitol. He indicated that although the notes showed that Walker administered aspirin to Goodwin at 9:00 p.m. on October 4, there was no indication that the phenobarbitol had been given to the patient at that time or at any time.

As a result of the incident, DuBrink, on October 5, left a copy of the medication incident report (CP-7A) for the third shift supervisor with a note to Walker to explain the incident. On October 6, DuBrink examined Walker's written explanation of the incident (Exhibit CP-7B). She indicated that she gave the phenobarbitol at 9:00 p.m. on October 4, and she added that the pill found in the cassette could have been an oversupply. Walker also testified that there could have been an oversupply. (T 1 p. 53). After reviewing Walker's explanation DuBrink again checked Goodwin's cardex (CP-9). This time, however, he found that Walker had initialed the 8:00 p.m. slot for October 4, and that she signed the back of the card and indicated that the pill was given at 9:00 p.m. on October 4.

DuBrink decided to investigate further and checked with the pharmacy on how many pills were sent up for Goodwin on October 4, and how many - if any - were returned. The pharmacy records verified that only one phenobarbitol pill was sent up for Goodwin on October 4 (Exhibit R-13), and that one such pill was returned indi-

cating it was not given (Exhibit R-12). 9/

DuBrink testified at length that his analysis of the investigation over the October medication incident revealed that Walker had falsified the records to indicate that she gave Goodwin the phenobarbitol. DuBrink indicated that if Walker really gave Goodwin the phenobarbitol at 9:00 p.m. on October 4 she would have so indicated on the nurses notes (CP-8), and she would have initialed the cardex (CP-9). However, there was no indication on the nurses notes that phenobarbitol was given, in fact only aspirin was noted, and DuBrink himself examined the cardex and noted that there was no entry by Walker regarding the phenobarbitol until after she had been notified of the incident. (T 3 pp. 9-18, 27, 31). 10/

After completing the investigation of that incident DuBrink, on that same day October 6, met with Walker and informed her that

9/ At the hearing the Charging Party questioned the accuracy of Exhibits R-12 and R-13 in an apparent attempt to prove that those documents could not be relied upon to show whether or not Walker gave Goodwin the phenobarbitol. However, the undersigned at T 3 pp. 63-64, held that the accuracy of R-12 and R-13 is not the issue herein. In fact, the question of whether Walker should have been terminated over the incident is not before the undersigned. The only issue herein is what was the reason and basis for the termination. If it was based upon Walker's filing of a grievance then it was illegal. If, however, the termination was based upon DuBrink's investigation of the various incidents Walker was involved in, and his interpretation of the information relevant thereto, then it was not a violation of our Act.

10/ The undersigned fully credits DuBrink's explanation of the events and his analysis of the investigation. He had a thorough and quick knowledge of the events and documents concerning Walker, and there was no reliable evidence to contradict his testimony.

he would recommend that she be terminated because of that incident. DuBrink told her she was not being terminated only because she failed to give the medication, but because she falsified the records and thereby endangered the patient's life. (T 3 pp. 26-27).

The following day, October 7, DuBrink met with Ciancarelli, informed him of the medication incident, and recommended that Walker be terminated primarily because she falsified records (T 3 p. 33). Ciancarelli indicated that since Walker was then still a provisional employee she could be terminated without charging her with incompetence. As a result of that meeting the personnel office prepared a termination memorandum addressed to Walker dated October 8, 1982 (Exhibit R-5) which made Walker's termination effective October 15, 1982. That memorandum was given to DuBrink to deliver to Walker, however, DuBrink did not believe that there was enough notice time and he requested another termination date. (T 3 pp. 35, 99-101). Consequently, a second termination memorandum was prepared dated October 13, 1982 (Exhibit R-4) informing Walker that she was terminated effective October 18, 1982. That memorandum was sent to DuBrink who served it upon Walker after the grievance hearing on October 13, 1982. Walker's last work day was October 18, 1982.

6. The hearing on Walker's grievance took place on October 13, 1982. Prior to the hearing on that day DuBrink spoke to Walker and at one point said "Are you ready to do battle." (T 3 p. 43).

Walker was represented at that hearing by union representative, Robert Yaeger. At one point in that hearing Yaeger objected to DuBrink's attempt to raise questions of Walker's job

performance since that was not the issue in that hearing. (T 2 p. 6). Yaeger also told DuBrink that Walker had the right to file the grievance and that she could not suffer any reprisal for so doing. (T 2 p. 7). DuBrink acknowledged Walker's right to file the grievance and indicated no reprisals would be taken because she filed a grievance, and he also agreed not to raise other unrelated issues. (T 2 pp. 8, 16-17).

Yaeger also testified that the instant Charge was filed because of the coincidence in timing of the filing of the grievance, the grievance hearing, and the termination. (T 2 p. 21). However, he acknowledged that Walker was not a union officer and was not engaged in organizing, and he admitted that Ciancarelli told him that the decision to terminate Walker occurred prior to October 13, 1982. (T 2 pp. 20, 22).

DuBrink testified that near the close of that hearing Walker accused him of:

...trying to fire her at that very moment and that it was all part of some conspiracy about the issue she was grieving about.... (T 3 p. 40).

The grievance hearing officer, Donna Ingram, Ciancarelli's assistant, issued a written decision on October 25, 1982 (Exhibit R-3). She denied the grievance and held that there was no evidence that any contractual provision, or any Hospital rule, regulation or policy was violated as a result of Walker's shift assignment.

Analysis

Having reviewed the entire record herein the undersigned finds that the Charging Party failed to prove by a preponderance of the evidence that Walker was terminated because she filed a grievance.

In fact, the undersigned is convinced beyond any doubt that Walker was terminated primarily because she falsified records concerning Goodwin's medication, and secondarily because of the series of work-related incidents that she was involved in beginning in August 1982.

The record clearly shows that Ciancarelli had recommended Walker's termination in August 1982, prior to the filing of her grievance, and that she was not terminated at that time only because DuBrink wanted to give her another chance. In fact, DuBrink gave her a third chance since he took no disciplinary action against her concerning the "B" wing incidents. Additionally, the record shows that Walker knew as early as October 6 that DuBrink intended to terminate her because of the October medication incident. Therefore, Walker's assertion at the grievance hearing that DuBrink was planning to terminate her because of the grievance is without merit.

Moreover, the Charging Party's assertion that DuBrink threatened her is totally unsupported by the evidence. On October 6 DuBrink did tell her he would recommend her termination because of the Goodwin medication incident, but it is not a violation for a public employer to tell an employee that it will do what it has a legal right to do, that is, terminate an employee for good cause. ^{11/} In addition, DuBrink's remark to Walker, "Are you ready to do battle," in the context of this case was nothing more than a passing

^{11/} Compare In re Rutgers University, P.E.R.C. No. 83-136, 9 NJPER 276 (¶14127 1983), where the Commission held that it was not a violation for the employer to advise employees that their salary could be higher, lower, or stay the same as a result of negotiations. See also In re Middlesex Community College, D.U.P No. 82-21, 8 NJPER 149 (¶13064 1982), where it was held that an employer's refusal to do what it was not legally required to do, negotiate over non-negotiable issues, was not a violation of the Act.

remark made prior to the grievance hearing which was neither threatening nor intimidating.

In its post-hearing brief the Charging Party argued that this case presented a dual motive discharge that required the application of the "substantial or motivating factor"/"business justification" test which was established by the United States Supreme Court in Mt. Healthy City Bd/Ed v. Doyle, 429 U.S. 274 (1977), which was applied by the National Labor Relations Board in Wright Line, Inc., 251 NLRB No. 150, 105 LRRM 1169 (1980), and adopted in New Jersey in East Orange Public Library V. Taliaferro, 180 N.J.Super. 155 (App. Div. 1981). ^{12/} In application of those cases the Charging Party asserted that it met its burden of proving a prima facie case, and that the burden then shifted to the State to prove legitimate business justification for Walker's termination. The Charging Party argued that no legitimate business justification existed.

The undersigned has considered the Charging Party's argument in that regard but disagrees with the conclusion. The Charging Party did not establish based upon a preponderance of the evidence that her grievance was a substantial or motivating factor in her termination. Although the termination notice was given to Walker on the same day as the grievance hearing it was more coincidence than it was intent. In fact, the first termination notice, R-5, was dated October 8 and would have been given to Walker prior to the October 13 grievance hearing if it had not been for DuBrink's

^{12/} The Commission has also endorsed the motivating factor/business justification test. See In re Bd/Ed Vocational Schools in Essex Co., P.E.R.C. No. 82-32, 7 NJPER (¶12263 1981); and, In re Madison Bd/Ed, P.E.R.C. No. 82-46, 7 NJPER 669 (¶12303 1981).

insistence that she be given a little more time. Consequently, the undersigned does not believe that the Charging Party established a prima facie case. 13/

However, even if a prima facie case was established, the undersigned finds that the overwhelming weight of the evidence demonstrates that the State had legitimate business reasons to terminate Walker. The undersigned credits and agrees with DuBrink's interpretation of the evidence concerning the October medication incident. That evidence shows that not only did Walker fail to give Goodwin the phenobarbitol, but that she falsified the records in an attempt to prove that she did. Such actions by an employee who is trusted with the health and safety of patients is a legitimate basis for termination.

Accordingly, based upon the entire record and the above analysis, the Hearing Examiner makes the following:

Conclusions of Law

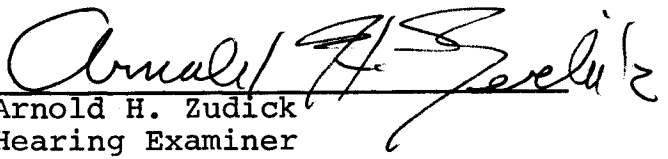
The State did not violate N.J.S.A. 34:13A-5.4(a)(1) and (3) by terminating Rose Walker from her employment at Vineland State School. 14/

13/ During the hearing the undersigned denied the State's motion to dismiss the complaint after the Charging Party had presented its case. The undersigned found at that time that the Charging Party had established a prima facie case. However, that finding was only made by giving every favorable inference to the Charging Party, and it was made without having heard the State's case. After consideration of the case as a whole, however, it is clear to the undersigned that the grievance had nothing to do with Walker's termination.

14/ In the event that the Charging Party was successful herein the parties stipulated to the introduction of certain information (Exhibit J-2) relevant to a consideration of mitigation of damages. However, since the undersigned found no violation herein, J-2 was not considered.

Recommended Order

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.


Arnold H. Zudick
Hearing Examiner

Dated: February 3, 1984
Trenton, New Jersey