

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CAMDEN BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-82-288-42

CAMDEN ADMINISTRATORS'
COUNCIL,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge the Camden Administrators' Council filed against the Camden Board of Education. The charge alleged that the Board violated the New Jersey Employer-Employee Relations Act when it unilaterally abolished the position of chief psychologist, transferred the incumbent chief psychologist to the position of psychologist, and reduced his salary despite allegedly being aware that the transferred employee continued to perform the same duties. The Commission agrees with its Hearing Examiner that the Council failed to prove its allegations by a preponderance of the evidence.

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Appearances:

For the Respondent, Murray & Granello, Esqs.
(Karen A. Bulsiewicz, of Counsel)

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

DECISION AND ORDER

On April 26, 1982, the Camden Administrators' Council ("Council") filed an unfair practice charge against the Camden Board of Education ("Board") with the Public Employment Relations Commission. The charge alleged that the Board violated subsections 5.4(a)(1), (3), (5), and (7)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), when it

^{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; (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; and (7) Violating any of the rules and regulations established by the commission."

unilaterally abolished the position of chief psychologist, transferred the incumbent chief psychologist (Claus Schwarzkopf) to the position of psychologist, and reduced his salary despite allegedly being aware that Schwarzkopf continued to perform the same duties he had as chief psychologist.

On November 18, 1982, the Director of Unfair Practices issued a Complaint and Notice of Hearing.

On February 10, 1983, the Board filed an Answer and a certification of the reasons it did not file its Answer within the time period set forth in N.J.A.C. 19:14-3.1. The Hearing Examiner allowed the Board a retroactive extension of time and denied the Council's motion to enter a default judgment against the Board for failure to file an Answer. The Answer admits that the Board abolished the chief psychologist position, transferred Schwarzkopf to a psychologist position, and reduced his salary accordingly. The Board denies that Schwarzkopf continued to perform the functions of chief psychologist after that position was abolished. As separate defenses, the Board alleges that the charge is untimely; the complained-of actions involve non-negotiable managerial prerogatives; and this Commission lacks jurisdiction because the proper forum for contesting these actions is before the Commissioner of Education.

On February 17 and 28, April 19 and 20, and June 20 and 21, 1983, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses, introduced exhibits, made motions, argued orally, and filed briefs. During the hearing, the Hearing Examiner granted the Board's motion to dismiss those portions of the

Complaint alleging violations of subsections 5.4(a)(5) because, he concluded, the Board had no duty to negotiate with the Council over the abolition of the chief psychologist position, the ensuing transfer to a non-unit position, or the salary for that non-unit position. He also dismissed the subsection 5.4(a)(7) allegation since the Council had not alleged that a specific Commission rule had been violated.

On December 5, 1983, the Hearing Examiner issued his report and recommended decision. H.E. No. 84-30, 9 NJPER _____ (¶ _____ 1983) (copy attached). He recommended we dismiss the Complaint and specifically found no merit in the allegations since the Board had legitimate reasons for abolishing the chief psychologist position, transferring Schwarzkopf to a psychologist position, and paying him accordingly; and since Schwarzkopf's duties did change after his chief psychologist position was abolished.^{2/}

On December 20, 1983, the Council filed exceptions. It asserts that the Hearing Examiner erred in finding that Schwarzkopf did not continue to perform the duties of chief psychologist until January 6, 1982; in crediting the testimony of Schwarzkopf's immediate supervisor, Dr. Robert James, instead of Schwarzkopf's testimony on that point; in not applying In re Deptford Bd. of Ed. P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980), aff'd App. Div. Docket No. A-1818-80T1 (May 24, 1982) ("Deptford"); in not finding

^{2/} We have streamlined our discussion of the procedural history; an accurate and fuller account of the tangled history may be found in the Hearing Examiner's report (pp. 1-8).

that the Board retaliated against Schwarzkopf because he had filed an earlier unfair practice charge; and in finding that the Board's motivation for abolishing the position was economic.^{3/}

The Board has filed a brief seeking adoption of the Hearing Examiner's report and recommendations. The Council has filed a reply.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 5-13) are accurate with a slight modification and addition.^{4/} We adopt and incorporate them here. We specifically accept his resolution of the credibility issues.^{5/}

We next consider the merits of the Council's allegations.^{6/} We hold that, under all the circumstances of this case, the Council has not proved by a preponderance of the evidence that the Board violated the Act.

^{3/} The Council has also requested oral argument pursuant to N.J.A.C. 19:14-8.2. This request is denied.

^{4/} In finding No. 9, the Hearing Examiner states that Dr. Webster made an initial "recommendation" to eliminate various "chief" titles, including chief psychologist, in the mid-1970's. It does not appear that Dr. Webster made a formal "recommendation" as such, although it is clear that Dr. Webster emphatically believed that these "chief" positions should be phased out and replaced with a "team" concept and that this belief was indirectly implemented when "chief" positions were not filled after becoming vacant. It should also be added that Schwarzkopf's superiors all commended him for his willingness to assume voluntarily extra responsibility and duties.

^{5/} The Council asserts that the Hearing Examiner erred in crediting Dr. James' testimony and not stressing his statement that Schwarzkopf continued to do the same duties as a "liaison" after July 1981 he did as a "chief" before. We have closely reviewed Dr. James' testimony and find that, read as a whole, it is worthy of credit and detailed in its description of the changes in what Schwarzkopf did following his transfer.

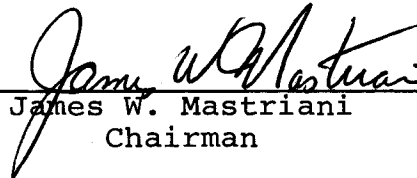
^{6/} Neither the Council nor the Board has excepted to the Hearing Examiner's rulings concerning the statute of limitations, the Board's Answer, or the effect of related proceedings before the Commissioner of Education. We will therefore go directly to the merits of this controversy. We are not, however, endorsing or rejecting the Hearing Examiner's analysis of these issues.

The Board had no obligation to negotiate with the Council over the abolition, the ensuing transfer, or the salary for a non-unit position, see Ridgefield Park Bd. of Ed. v. Ridgefield Park Ed. Assn., 78 N.J. 144 (1978); In re Trenton Board of Ed., P.E.R.C. No. 83-37, 8 NJPER 574 (¶13265 1982), mot. for recon. den, P.E.R.C. No. 83-62, 9 NJPER 15 (¶14006 1982), appeal pending, App. Div. Docket No. A-1606-82T3; thus, there is no legal basis for finding that the Board refused to negotiate in good faith in violation of subsection 5.4(a)(5) when it made these personnel moves. The record is bereft of evidence proving that either the abolition, transfer, or salary reduction was motivated or caused by any protected activity on behalf of the Council; thus, there is no factual basis for finding that the Board discriminated against Schwarzkopf in violation of subsection 5.4(a)(3) when it made these personnel moves. Deptford is distinguishable because there we found that a change in position was a "...change in name only to camouflage its attempt to get the work performance for less money" (p. 36) while here the change in position entailed a substantial change in duties and eventuated from legitimate, non-discriminatory business reasons. Finally, we do not believe that the January 6, 1982 memorandum constituted illegal retaliation for Schwarzkopf's earlier filing of an individual unfair practice charge; this memorandum was not meant to punish Schwarzkopf or to change his terms and conditions of employment, but merely to clarify his duties as a psychologist and to reaffirm that following his transfer he was not to act as a chief psychologist or administrator.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch and Suskin voted for this decision. None opposed. Commissioners Hipp and Newbaker abstained. Commissioners Graves and Hartnett were not present.

DATED: Trenton, New Jersey
January 18, 1984

ISSUED: January 20, 1984

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CAMDEN ADMINISTRATORS' COUNCIL,

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SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommended that the Commission find that the instant Charge was timely filed. However, the Hearing Examiner also recommended that the Commission find that the Charging Party failed to prove by a preponderance of the evidence that the Board abolished the Chief Psychologist position and reassigned employee Schwarzkopf to a psychologist position at a lower rate of pay for reasons violative of the Act. The Hearing Examiner found that the Charging Party did not demonstrate that Schwarzkopf had engaged in protected activity. The Hearing Examiner further found that the Board's decision to abolish the Chief's title and reassign Schwarzkopf at a lower rate of pay was based upon legitimate business reasons. Finally, the Hearing Examiner concluded that the Commission did not lack jurisdiction to hear this matter under the particular circumstances presented herein even though a Petition raising similar issues had been filed with the Commissioner of Education.

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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(Karen A. Bulsiewicz, Of Counsel)

For the Charging Party
Freeman, Zeller and 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 April 28, 1982, by the Camden Administrators' Council ("Council" or "Charging Party") alleging that the Camden Board of Education ("Board") 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 Council alleged that the Board unilaterally abolished the position of Chief Psychologist and unilaterally demoted the former Chief Psychologist, Claus Schwarzkopf, to a psychologist, and reduced his salary, all of which was alleged to be in violation of subsections

34:13A-5.4(a)(1), (3), (5) and (7) of the Act. ^{1/}

The Council asserted that effective September 1, 1981, Schwarzkopf's salary was reduced to that of a psychologist even though he, allegedly, continued to perform the duties of the Chief Psychologist, and it argued that such action interfered with and discriminated against him in violation of the rights guaranteed to him by the Act. ^{2/} The Board argued that the Chief Psychologist position was abolished because of business and financial reasons, that Schwarzkopf did not continue to act as Chief after September 1, 1981, and, that no violation of the Act was committed.

^{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; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; (7) Violating any of the rules and regulations established by the commission."

^{2/} On the first day of hearing the Charging Party made a Motion to Amend the Complaint to allege that the Board's creation of a new title, Supervisor of Special Education Classes, and its filling of another title, Supervisor of Child Study Services, violated the Act allegedly because those titles assumed duties previously performed by the Chief Psychologist. The Charging Party did not adequately clarify the allegation, but the undersigned believes it was apparently alleging that since those other titles assumed duties formerly performed by the Chief, the elimination of the Chief's title was illegally motivated.

The undersigned reserved on deciding the Motion in order to permit the Charging Party the opportunity to clarify and develop the allegation in order to demonstrate a nexus between the new allegation and the allegations in the original Charge. Although the nexus is now more apparent, that allegation was not substantiated.

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 November 18, 1982, and hearings were held in this matter by agreement of the parties on February 17 and 28, April 19 and 20, and June 20 and 21, 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. ^{3/} Both parties filed post-hearing briefs and reply briefs, the last of which was received on September 19, 1983.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act exists, 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 Camden Board of Education is a public employer within the meaning of the Act and is subject to its provisions.

3/ At the conclusion of the Charging Party's case on direct the Board made a Motion to Dismiss the Charge in its entirety. The undersigned refused to dismiss the 5.4(a)(1) and (3) allegations, but dismissed the 5.4(a)(5) and (7) allegations for several reasons. (Transcript ("T") 6 pp. 14-16)

The (a)(7) allegation was dismissed because no rules of the Commission were alleged to be violated.

The (a)(5) allegation was dismissed because the undersigned held that the Board had no duty to negotiate the abolishment of the Chief's position, and it had no duty to negotiate over Schwarzkopf's salary as a psychologist since psychologists were not officially organized in a negotiations unit.

2. The Camden Administrators Council is a public employee representative within the meaning of the Act and is subject to its provisions.

3. On December 28, 1981, Schwarzkopf, acting as an individual, filed an unfair practice charge against the Board, Docket No. CI-82-29, explaining that the Chief Psychologist position had been abolished, that he was transferred to a psychologist position at a reduced salary, and that he continued to perform the same duties he had performed as Chief. ^{4/} Schwarzkopf did not allege in that Charge that the Board's actions were taken in violation of the Act or because of his exercise of protected activity. He neither alleged he was engaged in protected activity nor that the Board's actions interfered with or discriminated against him.

Thereafter on December 30, 1981, the Director of Unfair Practices ("Director") requested the parties to submit statements of position regarding that Charge, and the Board, through its attorneys, submitted a lengthy response dated January 19, 1982. Schwarzkopf, through his attorney, submitted a response dated January 26, 1982. Neither party was required to serve a copy of their position statements on opposing counsel at that time.

In its position statement to that Charge the Board asserted that the Charge did not allege a violation of the Act, and, that the abolishment of the Chief's position was a reduction in force ("RIF") and that a RIF is a managerial prerogative and within the jurisdiction of the Commissioner of Education ("Commissioner") and not the Commission. Moreover, the Board argued that Schwarzkopf

^{4/} All of the information regarding CI-82-29 was derived from the Commission's file in that matter which was not admitted into evidence herein, but of which the undersigned took Official Notice pursuant to N.J.A.C. 1:1-15.3.

had already filed a Petition concerning the RIF with the Commissioner on December 30, 1981 (State Department of Education Docket No. 3-1/82A), and that in any case Schwarzkopf had not engaged in protected activity since he never filed grievances or participated in negotiations.

Schwarzkopf's position statement in CI-82-29 merely reiterated the wording of the Charge and did not allege that the Board's actions were taken in violation of the Act.

Thereafter, by letter dated April 19, 1982, the Director advised the parties that the charge in CI-82-29 did not allege a violation of the Act and that it would be dismissed unless the charging party could meet the complaint issuance standard within seven days. In response thereto, Schwarzkopf's attorney filed what was alleged to be an amendment to CI-82-29. However, that filing designated the Camden Administrators Council as the Charging Party, and the Commission, therefore, docketed that Charge as a charge by a labor organization and it became Docket No. CO-82-288, the instant matter.

Thereafter, by letter dated June 11, 1982, the Board filed a response to CO-82-288, a copy of which was sent to the Charging Party's attorney, and argued that Schwarzkopf had not engaged in protected activity and that the RIF was not subject to negotiations and was within the jurisdiction of the Commissioner and therefore the Commission should dismiss the Charge.

After the conduct of an exploratory conference on October 1, 1982, Docket No. CI-82-29 was withdrawn by letter dated November 12,

1982, and Docket No. CO-82-288 proceeded to Complaint. ^{5/}

^{5/} When the Complaint was issued herein on November 18, 1982, it also scheduled a prehearing conference for January 11 and a hearing for January 26, 1983. However, in early January the Board's attorney requested a rescheduling of this matter, and by letter dated January 7, 1983, the undersigned decided not to reschedule a prehearing conference, but did reschedule the hearing for February 17, 1983. On February 3, 1983, the Charging Party's attorney telephoned the undersigned and inquired whether an Answer had been filed and the undersigned indicated that no Answer had been received, but that the Board's attorney would be contacted to see if one had been sent. Thereafter, on February 7, 1983, the undersigned received a Motion from the Charging Party dated February 4, 1983, Exhibit C-2, seeking a default judgment against the Board for failing to file an Answer. On February 10, 1983, the undersigned received the Board's Answer herein which was dated February 9, 1983, Exhibit C-3, and a copy of which was sent to the Council's attorney.

The Answer set forth the standard denials, and also listed five affirmative defenses. Included among them were that the Charge failed to state a violation, that the Commission did not have jurisdiction, that the actions complained of were managerial prerogatives, and that the Charge was untimely filed.

By letter dated February 10, 1983, the undersigned advised the parties that the decision on the Motion would be decided at the hearing on February 17, 1983. By letter dated February 11, 1983, Exhibit C-4, the Council's attorney reiterated his objection to accepting the Answer, and he objected to the undersigned's call to the Board's attorney to inquire whether an answer had been filed.

At the hearing on February 17, 1983, the undersigned denied the Motion and accepted the Answer as timely filed. N.J.A.C. 19:14-3.1 requires that an Answer be filed within ten days from the service of a complaint, but it also gives the Hearing Examiner the discretion to extend the time within which the Answer may be filed. In practice before the Commission it is not uncommon to find that Answers are provided at the prehearing conference. Since the prehearing was cancelled in this matter the undersigned was not certain whether an Answer had been filed thus an inquiry was made to ascertain whether the Answer had already been sent.

The Answer was actually received on February 10, 1983, one week prior to the hearing, and other than the statute of limitations defense, no new defenses were alleged. In fact, the Answer reiterated some of the defenses set forth in the Board's position statement of June 11, 1982, a copy of which was provided to the Council, and the parties had the additional opportunity to discuss their positions at the exploratory conference on October 1, 1982. The Answer did not delay the commencement of the hearing and did not unduly surprise or prejudice the Council.

4. After the Commission was advised of the filing of a Petition with the Commissioner (during the processing of CI-82-29), the staff agent requested the Charging Party to provide copies of all relevant submissions in that matter. On July 12, 1982 the Commission received the requested material which included a copy of the Petition filed by Schwarzkopf, the Answer to the Petition and a Motion to Dismiss, and the briefs in opposition to the Motion. The Petition was originally filed by Schwarzkopf on December 28, 1981 (received January 4, 1982) appealing the Board's decision to reduce his salary. The Petitioner asserted that the Board's decision to eliminate the Chief Psychologist position and reduce his salary violated the Education Law.

On January 26, 1982 the Board filed an Answer to the Petition and a Motion to Dismiss. The Answer raised several affirmative defenses including timeliness. That case was transferred to the Office of Administrative Law ("OAL") in March 1982 and was assigned to Judge Thomas (OAL Docket No. EDU00772-82). Briefs in opposition to the Motion were filed by April 6, 1982. Conferences were held before Judge Thomas on April 12 and May 26, 1982.

On August 19, 1982, the Commission received a copy of Judge Thomas' decision in that matter which issued on July 8, 1982. Judge Thomas concluded that the Petition should be dismissed because it had been filed untimely. The Commissioner of Education affirmed the dismissal on August 23, 1982. On June 9, 1983, the Petitioner appealed the Commissioner's decision to the State Board of Education, and the Legal Committee of the State Board recommended that the Petition be found to have been timely filed. As of September 14,

1983 (the date of the Board's posthearing brief herein), however, the State Board of Education had not decided the matter, and the Petition has never been considered on its merits.

5. The official Board action abolishing the Chief Psychologist title occurred at the Board meeting of April 27, 1981 as evidenced by the Board minutes of that meeting, Exhibit CP-6. However, the facts show that both Schwarzkopf, and the Council through its President at that time, William Peacock, were informed of the Board's intention to abolish the Chief's position prior to the official Board action.

Peacock admitted that at a negotiations session on March 25, 1981, the Superintendent informed him that the Chief's title would be RIF'ed, and he knew that said title would not be in the Council's unit after June 30, 1981. (T3 pp. 16-18, 29, 58, 63). He further admitted that although the negotiations for a new agreement with the Council lasted until October or November 1981 (T3 pp. 55-56), the Council did not attempt to negotiate the RIF, and it did not subsequently attempt to negotiate for the Chief's title because it was no longer in their unit, because Schwarzkopf never asked him to, and because he believed it had been abolished. (T3 pp. 29, 36, 58, 62).

Schwarzkopf knew about the Board's intent to abolish his Chief's title as early as April 14, 1981, on which date he sent a letter to the Superintendent, Exhibit CP-2, asking that said title not be eliminated. But after the Board action of April 27, 1981, the Superintendent, by letter dated April 28, 1981, Exhibit CP-1, advised Schwarzkopf that his Chief's title was abolished because of budget limitations, and he informed him that he would

be transferred to another position.

Thereafter, at a Board meeting on July 27, 1981 Schwarzkopf was officially transferred from the Chief Psychologist position to a psychologist position to be effective September 1, 1981 (Exhibit CP-4). Schwarzkopf was personally and officially notified of the transfer and of the effective date of the same by letter from the Superintendent dated July 29, 1981 (attachment to Charge Exhibit C-1). Schwarzkopf admitted that he interpreted CP-1 and the July 29 letter as official notice that he was no longer Chief Psychologist and was instead a psychologist. (T1 p. 127).

Subsequently, on September 15, 1981, Schwarzkopf received a paycheck covering the two-week period beginning September 1, 1981, and that check represented a reduction in his salary from what it had been as Chief Psychologist, to the salary level of a psychologist. (Schwarzkopf's salary had not been reduced between June 30 and September 1, 1981.) Finally, on January 6, 1982, Schwarzkopf received a memorandum (attachment to Charge Exhibit C-1) from his immediate supervisor, Dr. James, directing him not to perform any administrative or quasi-administrative functions, and reminding him only to perform the duties of a school psychologist. The record reflects that Dr. Arnold Webster, the Assistant Superintendent who is Dr. James' supervisor, directed Dr. James to issue the January 6 memorandum.

6. In addition to admitting that the Council did not attempt to negotiate for the Chief's position after March 25, 1981, Peacock was uncertain whether the Council was really a party in the instant matter. (T3 p. 47).

7. The facts show that Schwarzkopf has never participated in negotiations on behalf of the Council, and that he has never processed grievances (T2 pp. 1-12). In fact, other than just being in the Council's unit when he held the Chief's title, and other than filing CI-82-29, there is no showing that Schwarzkopf participated in any other form of union or protected activity.

8. The history of the Chief Psychologist title shows that it was part of a chiefs team in the early 1970's which also included the Chief Social Worker, Chief Learning Disability Teacher Consultant ("LDTC"), and Chief Speech Therapist. However, by the mid to late 1970's the Chief Social Worker, LDTC, and Speech Therapist positions became vacant and were essentially abolished. ^{6/} (T4 pp. 39-41, 82).

Although the Chief Psychologist title was not abolished at that time, the evidence shows that had Schwarzkopf resigned his Chief's title, the same would not have been filled. (T3 p. 165).

After abolishing the Chief Psychologist title, the only remaining chief titles employed by the Board were the Chief Attendance Officer and Chief Medical Inspector, neither of whom were part of the Chief's team, and neither of whom were supervisors. (T4 p. 36, T6 p. 49).

9. The actual recommendation to eliminate the Chief Psychologist title in early 1981 was made to the Board by the Superintendent. (T5 p. 12) However, the initial recommendation to eliminate all of the Chiefs on the Chiefs' team, including the Chief Psychologist, was made by Dr. Webster in the mid-1970's. (T5 p. 85).

^{6/} Although those positions were not formally abolished by the Board, once they became vacant, the Board made the decision not to fill the positions thereby essentially abolishing the same. (T3 pp. 49, 60).

In fact, Dr. James testified that although he personally was not in favor of eliminating the four Chief positions, Dr. Webster had discussed eliminating those titles in 1975-1976. (T4 pp. 57-58).

10. The Board's explanation for abolishing the Chief Psychologist title was given by Preston Gunning, the Board Secretary and Deputy Superintendent, and by Dr. Webster. Gunning testified that in October 1980 the Superintendent discussed with the Board the abolishment of the Chief's title because of budgetary reasons. (T5 p. 20). Once the Board actually abolished the title the Board's attorney recommended that Schwarzkopf be placed on the top step of the psychologist guide (T5 p. 31).

Webster testified in greater detail that he recommended eliminating all of the Chief positions because none of them held supervisory certificates, they had no real duties or functions to perform as Chiefs, and because there was no need for them. (T5 p. 60, T6 pp. 20, 29, 44) He further testified that it was necessary to abolish the Chief Psychologist title in particular because of a conflict that arose between Schwarzkopf and Dr. James. (T6 pp. 29-31). Webster indicated that most of those conflicts arose over Schwarzkopf attempting to assume responsibilities which he did not have over new psychologists.

11. The duties of the Chief Psychologist prior to July 1981 included, at least to a certain extent, the supervision of psychologists and interns, the administration of contracts with outside neurologists and psychiatrists, screening of neurologists and psychiatrists, interviewing and making joint recommendations for the hiring of psychologists, evaluation of psychiatrists, out

of district placement of students, and interaction with the Domestic and Juvenile Courts in Camden County. Schwarzkopf contended that he performed the same duties after July 1, 1981 as he did before his Chiefs title was abolished. However, Dr. James testified that Schwarzkopf's duties as Chief decreased over a period of time, and that after July 1, 1981 his role as a psychologist was no different than other psychologists. 7/

James testified, for example, that after June 30, 1981 Schwarzkopf did not supervise, interview, evaluate or make recommendations concerning psychologists, (T3 pp. 143, 148), and he ceased attending Dr. Webster's meetings for supervisors. (T4 pp. 30-31). He further testified that the out of district placement of students was a team assignment given to the team Schwarzkopf belonged to, and it was not just a responsibility reserved for Schwarzkopf. (T3 p. 168, T4 pp. 25-26, 68). Finally, James testified that other psychologists have become involved with the Courts (T3 p. 163), and that other psychologists may become involved in the recruitment, interviewing, selection and recommendation of new psychologists. (T3 pp. 161-163). 8/

7/ James indicated that none of the psychologists do exactly the same thing and that their jobs differ depending upon their actual assignments. However, he stated that Schwarzkopf's duties as a psychologist differed no more from the other psychologists than they did from each other. (T3 pp. 147, 162)

8/ The undersigned finds Dr. James' testimony to be the most credible information as to duties performed by Schwarzkopf after June 30, 1981. Schwarzkopf did not extensively elaborate on his testimony that his duties remained the same after June 1981. Certainly, some of his functions did remain the same, but as Dr. James explained, certain of those functions were never really assigned to Schwarzkopf as Chief, and several of his functions were - or could have been - performed by other psychologists.

12. There are no facts to suggest that the Board retaliated against Schwarzkopf because of the filing of CI-82-29, or because he in some unknown way prevented the Board from abolishing his title in the late 1970's.

ANALYSIS

Having reviewed all of the testimony and the post-hearing submissions of the parties the undersigned recommends that the Complaint be dismissed in its entirety. First, the undersigned finds that the Charge, at least with respect to the abolishment of the Chief Psychologist title, was untimely filed because both CI-82-29 and CO-82-288 were filed more than six months after both the Council and Schwarzkopf learned about the Board's intent to abolish the title. Second, even if the Charge was timely filed as to all issues, in consideration of the merits of the case the undersigned is convinced beyond any doubt that Schwarzkopf was not engaged in any protected activity, that the Chief Psychologist title was abolished only because of legitimate business considerations, and that Schwarzkopf's duties did change after June 30, 1981.

The Statute of Limitations

N.J.S.A. 34:13A-5.4(c) provides in pertinent part that "no complaint shall issue based upon any unfair practice occurring more than six months prior to the filing of the charge...."

That portion of the statute has been interpreted to permit the late filing of a charge before this Commission when the matter was originally timely filed, but filed in the wrong forum. See Kaczmarek v. N.J. Turnpike Authority and N.J. Turnpike Authority Employees Union Local 194 IFPTE, 77 N.J. 329, 4 NJPER 368 (¶4168

1978); and In re N.J. Turnpike Authority, P.E.R.C. No. 80-106, 6 NJPER 106 (¶11055 1980). In Kaczmarek, supra, the charging party filed what was really a timely unfair practice charge with the Superior Court. When it became clear that the Superior Court lacked jurisdiction to hear the matter the charging party filed a charge with the Commission, but it was then several months past the six-month statute of limitations. The Supreme Court held that equitable considerations should be applied in analyzing the statute of limitations, and that since the charging party therein was essentially "prevented" from filing a timely charge with the Commission, and since the charging party did not initially "sleep on his rights," the charge should be considered timely filed. ^{9/}

The Charge in this case, CO-82-288, was filed on April 28, 1982 which was more than six months past the date of September 15, 1981, the date Schwarzkopf learned of his salary reduction, and one year past the date that both the Council and Schwarzkopf learned that the Chief Psychologist position would be abolished. Although that Charge also alleged January 6, 1982 as the day Schwarzkopf received the memorandum from Dr. James informing him not to perform any administrative duties, the undersigned does not believe that January 6 is the operative date herein. The January 6 memorandum merely reinforced what Schwarzkopf had learned in April 1981 and was officially informed of by Exhibit CP-1, that he was no longer Chief Psychologist and was to perform the duties of a psychologist. The January 6 memorandum, therefore, was not the

^{9/} In In re N.J. Turnpike Authority, supra, the facts were similar to Kaczmarek, and the Commission upheld the Director of Unfair Practices' finding in a previous decision that Kaczmarek applied and therefore the charge was timely. However, since the Director refused to issue a complaint in that case for other reasons, the Commission, on a Request for Review, directed the issuance of a Complaint.

vehicle by which Schwarzkopf's position was abolished or by which his salary was reduced.

The real issue raised by the Charging Party herein was the reduction of Schwarzkopf's salary, not the abolishment of his title, and the operative date for the salary reduction was September 15, 1981. ^{10/} Consequently, the undersigned believes that on the face of the Charge, CO-82-288 was actually filed out of time.

But the undersigned also considered whether a Kaczmarek-type result should be applied herein because of the filing of CI-82-29 on December 28, 1981, which was well within the six-month statute of limitations of September 15, 1981. The Court in Kaczmarek held that the purpose of a statute of limitations was to compel the exercise of a right of action within a reasonable time and to prevent the litigation of stale claims. It also emphasized the application of equitable consideration to the filing of a charge.

In this case the undersigned believes that equitable considerations exist to permit the filing of CO-82-288 as timely filed with respect to the salary reduction issue. There is an unmistakable connection between the filing of CI-82-29 and CO-82-288 regarding the salary reduction issue. Both cases concern the same facts and the Charging Party was not abandoning its claims in CI-82-29 by withdrawing the same to process CO-82-288. Since CI-82-29 was timely filed regarding the salary reduction issue which arose on September 15, 1981, since CO-82-288 was not a stale claim or filed at an unreasonable time, and since CO-82-288 was essentially a

^{10/} In support of the finding that the real issue herein is the salary reduction, not the abolishment of the title, the undersigned notes that the Council, as evidenced by Peacock's testimony, did not contest the abolishment of the title during negotiations in 1981.

carryover of CI-82-29, then the instant Charge was timely filed regarding that issue.

However, the Charge was untimely regarding the abolishment of the Chief Psychologist position. The facts clearly show that both the Council and Schwarzkopf were officially aware of the abolishment of the title in April 1981, yet both CI-82-29 and CO-82-288 were filed well beyond the six-month statute of limitations regarding that issue. It appears that they were not contesting the Board's right or reason for abolishing the Chief's title. 11/

The Merits

It is well settled law in this State that a public employer has a managerial prerogative to abolish positions and transfer or reassign employees to other positions if based upon legitimate reasons. Ridgefield Park Bd/Ed v. Ridgefield Park Ed/Assn, 78 N.J. 144, 156 (1978); Ramapo-Indian Hills Ed/Assn v. Ramapo-Indian Hills Reg. H.S. Dist. Bd/Ed, 176 N.J. Super. 35 (App. Div. 1980); In re Maywood Bd/Ed, 168 N.J. Super. 45, certif. den. 81 N.J. 292 (1979); In re Trenton Bd/Ed, P.E.R.C. No. 83-37, 8 NJPER 574 (¶13265 1982).

The Board herein did just that, it lawfully abolished the Chief Psychologist position and reassigned Schwarzkopf to a psychologist position at a lower rate of pay. There was no requirement for the Board to negotiate with the Council over the abolishment of the Chief's position or Schwarzkopf's reassignment to a psychologist or his subsequent salary reduction.

11/ No decision on the Statutute of Limitations issue could have been made without considering the merits of the instant case.

The facts show that other than Schwarzkopf's mere membership in the Council, he did not participate in any other form of protected activity until after the Board had abolished his position and reduced his salary. The Charging Party's contention that the Board's actions were in retaliation for Schwarzkopf's filing CI-82-29 is without merit. The abolishment of the Chief Psychologist title and Schwarzkopf's reduction in salary occurred prior to the filing of CI-82-29.

There is ample evidence on the record to support the Board's contention that the Chief's position was abolished only for business reasons, i.e., because it was no longer needed and because of conflicts between Schwarzkopf and Dr. James. Once that position was abolished the Board had the right to assign Schwarzkopf to a psychologist position and to reduce his salary to fall within the salary scale established for psychologists.

In re Trenton Bd/Ed, supra, is directly on point with the instant matter. In that case the Board abolished a secretarial position and reassigned the affected employee to a secretarial position in a different unit at a lower salary. The Commission held that the Board's actions were managerial, and it also held that even a contractual clause requiring the Board to keep the employee in the original unit and pay her original salary would be illegal. ^{12/}

Finally, the Charging Party's assertion that Schwarzkopf's duties did not change after June 30, 1981 was not supported by a preponderance of the evidence. The undersigned credits Dr. James'

^{12/} See also Plainfield Assoc. of School Administrators v. Plainfield Bd/Ed, 187 N.J. Super. 11 (App. Div. 1982).

testimony that Schwarzkopf's duties had changed after June 1981 particularly in the elimination of his supervisory duties over the other psychologists.

Pursuant to the above analysis it is recommended that the Charge may be dismissed on its merits.

The Jurisdictional Issue

The Board asserts that pursuant to the Supreme Court's decision in City of Hackensack v. Winner, 82 N.J. 1 (1980), that the Commission lacks jurisdiction to decide this matter because of the Petition filed with the Commissioner of Education raising issues similar to those raised herein. The undersigned disagrees.

The facts in Hackensack, supra, show that full hearings were held before Civil Service and PERC on a similar issue and resulted in different decisions from the two agencies. The matter before Civil Service began first, and concluded before PERC reached a final decision. Civil Service found in its decision that the petitioner was not discriminated against because of union activity. PERC, however, reached the opposite conclusion. The Supreme Court held that Civil Service had jurisdiction in that matter and PERC should not have proceeded. Moreover, the Court recognized that Civil Service fully litigated the issue of union activity.

The facts in this case are distinguishable from Hackensack. Although CO-82-288 was filed after the Petition to the Commissioner, and although the Board raised a jurisdictional issue during the pre-complaint processing of both CI-82-29 and CO-82-288,

the facts show that the Complaint in CO-82-288 did not issue until November 18, 1982, approximately three months after the Commissioner of Education had already adopted the Administrative Law Judge's decision of July 8, 1982 to dismiss the Petition as untimely. Consequently, there was no "contested case" within the meaning of N.J.A.C. 1:1-1.4 and 1:1-1.5 before this Commission prior to November 18, 1982. Moreover, no hearing or decision on the merits of the Petition had been held at the time the Complaint issued herein, and it appeared as if the matter before the Commissioner was completed. In fact, according to the Board, no appeal of the Commissioner's decision was taken until June 9, 1983, which was after the completion of four of the six days of hearing in the instant matter.

Unlike the facts in Hackensack where Civil Service did hold a hearing on the merits and fully litigated the unfair practice issues, no hearing on the merits has been conducted on the instant Petition, and certainly the unfair practice issues were not fully and fairly litigated in that forum. Moreover, to have abandoned the instant matter after most of the hearing had been completed merely because of the filing of an appeal of the Commissioner's decision makes little sense.

In addition, the undersigned is unaware of any attempt by the Board to consolidate the instant Charge with the Petition pursuant to N.J.A.C. 1:1-14.1. 13/

13/ If the State Board of Education overturns the Commissioner and orders a hearing on the merits of the Petition then it may be appropriate for the Board to seek an application of Hackensack to prevent a hearing before an Administrative Law Judge if it believes that in the hearing before the undersigned, the parties fully litigated the issue(s) raised in the Petition.

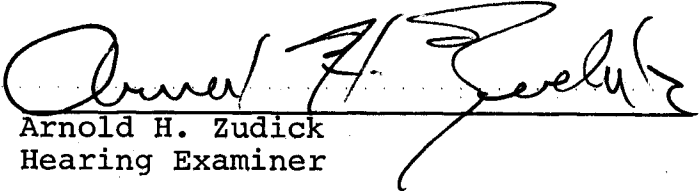
Accordingly, based upon the entire record in this case, and based upon the above analysis, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

The Respondent Board did not violate N.J.S.A. 34:13A-5.4 (a) (1), (3), (5) and (7) by abolishing the Chief Psychologist position held by Claus Schwarzkopf, or by reassigning Schwarzkopf to a psychologist position with a lower salary.

RECOMMENDED ORDER

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


Arnold H. Zudick
Hearing Examiner

Dated: December 5, 1983
Trenton, New Jersey