

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOARD OF EDUCATION OF THE VOCATIONAL
SCHOOLS IN THE COUNTY OF ESSEX,

Respondent,

-and-

Docket No. CO-81-44-15

SECRETARY AIDES AND CLERKS ASSOCIA-
TION OF THE ESSEX COUNTY VOCATIONAL
AND TECHNICAL SCHOOLS,

Charging Party.

SYNOPSIS

In an unfair practice proceeding, the Commission affirms the Recommended Report and Order of the Hearing Examiner who found that the Board of Education did not violate N.J.S.A. 34:13A-5.4(a) (1), (3) and (5) when it transferred an employee from one office to another for justifiable business reasons and did not post the new position into which she was transferred.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOARD OF EDUCATION OF THE VOCATIONAL
SCHOOLS IN THE COUNTY OF ESSEX,

Respondent,

-and-

Docket No. CO-81-44-15

SECRETARY AIDES AND CLERKS ASSOCIA-
TION OF THE ESSEX COUNTY VOCATIONAL
AND TECHNICAL SCHOOLS,

Charging Party.

Appearances:

For the Respondent, David H. Ben-Asher, Esq.
(Elaine K. Hyman, of Counsel)

For the Charging Party, Rothbard, Harris & Oxfeld, Esqs.
(Sanford R. Oxfeld, of Counsel)

DECISION AND ORDER

An Unfair Practice Charge was filed with the Public Employment Relations Commission on August 19, 1980 by the Secretary Aides and Clerks Association of the Essex County Vocational and Technical Schools (the "Charging Party" or the "Association") alleging that the Board of Education of the Vocational Schools in the County of Essex (the "Respondent" or the "Board") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"). The Charge alleged that Respondent, through its representative: (1) in May 1980 spoke directly to the members of the collective negotiations unit during the period of negotiations for a first agreement, stating that the Respondent wanted to give the employees certain benefits but the Association would not agree; (2) in July 1980 posted a position without negotiating the salary

with the Association; and (3) on July 29, 1980 notified the President of the Association, Celeste DaSilva, that she was being transferred from the main office of the Board into an unposted position at the Technical Career Center, in retaliation for her being President and without negotiations with the Association for the salary range for the position. These events were alleged to be violations of N.J.S.A. 34:13A-5.4(a)(1), (3) and (5).^{1/}

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on September 8, 1980. Pursuant to the Complaint and Notice of Hearing, a hearing was held on April 1 and 2, 1981 before Commission Hearing Examiner Alan R. Howe, in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by May 6, 1981.

The Hearing Examiner issued his Recommended Report and Decision, H.E. No. 81-44, 7 NJPER ____ (¶ ____ 1981), on May 14, 1981. He concluded that the Board had not violated Subsection (a)(1) of the Act in that its representatives did not speak directly with members of the collective negotiations unit at any time regarding its desire to grant employees certain benefits and

^{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."

that there had been no violation of the Act by the Board in posting a position in July of 1980 without negotiating the salary with the Association. He found as well that when the Board transferred Celeste DaSilva involuntarily from its office in East Orange to the Technical Careers Center in Newark, it had legitimate business justifications for the transfer and that there was no anti-union motivation involved. Thus, neither subsection (a)(1) nor (3) was violated. It was recommended that the Commission dismiss the Association's Complaint in its entirety.

In general the facts of this case involve Celeste DaSilva, a Data Processing Clerk for the past five years and an employee of the Board for thirteen years. She was transferred from her job location at the Board office in East Orange to the Technical Careers Center in Newark. DaSilva became a member of the NJEA in the beginning of November 1979. In prior years she had been affiliated with the independent Secretary Aides and Clerks Association of the Essex County Vocational and Technical Schools. The Association affiliated with the NJEA in October of 1979 and, following a Commission-conducted election in March 1980, the newly affiliated Association entered into negotiations for a collective negotiations agreement, which was to be retroactive to July 1, 1979. Negotiations were concluded in or around September 1980, and on September 22, 1980 the Board authorized the execution of a new agreement, which the Association ratified in October 1980 and which remained effective through June 30, 1981.

During the period in which the Association affiliated with NJEA the teachers, represented by the NJEA in a separate unit, conducted a strike and in sympathy DaSilva and the secretaries

represented by the Association refused to cross the teachers' picket line. At the hearing, Ralph Caputo, a former Assistant Superintendent of the Board testified that H. Ronald Smith, the Board's Secretary-Business Administrator, had been angry about the secretaries' failure to cross the picket line and had labeled them "a bunch of troublemakers" and said that "he would deal with them later." As to DaSilva, Caputo testified that Smith had said that "she was a troublemaker, that she was organizing the union." In January 1980, DaSilva was elected President of the Association.

At a regular meeting of the Board on July 28, 1980, Smith reported that he had received a request for an experienced Data Processing Clerk at the Technical Careers Center in Newark. Smith recommended the transfer of DaSilva from her post as a Data Processing Clerk at the Board's Central Business Office in East Orange to the Newark Office where her experience would more greatly be utilized in working with a more complicated computer. Smith recommended that the transfer be effective September 1, 1980. Both DaSilva and Smith testified that there would be no change in salary, terms and conditions of work, benefits, tenure standing, or seniority for DaSilva with the new position. Smith also advised the Board that there was a good possibility that DaSilva's position would be partially funded under the Federal Title I Program, adding that, if not, then the Board would have to fund the position totally. Smith's recommendation was approved by the Board and in September, DaSilva reported for one day of work. She has been ill and off the job ever since.

There was no posting by the Board for the position to which DaSilva was transferred in September. The Board did, however,

post the position of a 12 month Data Processing Clerk made vacant by DaSilva's transfer. There was also another vacancy within the Board's East Orange office for a ten month Data Processing Clerk which the Board posted on July 2, 1980. The salary which was established for this position was not negotiated with the Association, but rather was established by taking 80% of the salary range for a twelve month position. This action concerning salary occurred prior to the completion of negotiations for the collective agreement which were completed on September 20, 1980.

The Association has put forth a series of exceptions to the Hearing Examiner's Recommended Report and Decision. These exceptions will be treated seriatim.

The first exception concerns the conclusion reached by the Hearing Examiner that the Board did not violate the Act in failing to post the position into which DaSilva was transferred in Newark. The Examiner's reason for this conclusion is two-fold: 1) There was no posting of a vacancy for the position at the Technical Careers Center because there was not, in the technical sense, a "vacancy" inasmuch as no one had previously occupied that position; 2) at that moment in time, the contract did not contain any posting provision and it was not until September-October 1980 that a new negotiated agreement was consummated which did include a posting provision.

Although the Commission does not totally adopt the reasoning of the Hearing Examiner, we do affirm his conclusion. We do not agree with the Hearing Examiner's definition of the term "vacancy" and believe that generally, unless so designated in the agreement, a "vacancy" includes those newly created positions which

have never been previously occupied.

We agree with the Hearing Examiner's conclusion, however, that the Board was under no contractual obligation to post DaSilva's new position. The Association takes exception to this by relying on the testimony of Bernard Lelling, an NJEA UniServ field representative, who testified that it had been the past practice of the Board to post all positions, either newly created or vacant. Lelling had also stated that although there had never been any provision in any previous agreement concerning posting the provision in the new contract was merely a reiteration of what had always been the past practice. Although there was this brief testimony concerning past practice, the Commission finds that the testimony was insufficient to establish a binding obligation on the Board's part to post the position. It is evident from the testimony of all parties that the Board did post some positions prior to the inclusion of such a provision into the new agreement but the testimony is lacking as far as establishing that it had evolved into a firm and binding practice that the Board was obligated to follow.

The second exception related to the Hearing Examiner's failure to find that the Board had violated the Act when it did not negotiate the salary of the newly created position of ten month Data Processing Clerk which was posted on July 2, 1980. It is the position of the Board that at the time the position was posted salaries for 1979-1980 and 1980-1981 had not yet been agreed to in the new contract and the practice that was utilized in figuring out the salary for the ten month position was the same practice that had been utilized for other ten month salary ranges

equal to 80% of twelve salary ranges. The Association contends, citing Galloway Tp. Bd. of Ed. v. Galloway Tp. Assoc. of Educational Secretaries, 78 N.J. 1 (1978); Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assoc, 78 N.J. 25 (1978) and the Dunellen trilogy of cases starting at 64 N.J. 17 (1973), that salary is a term and condition of employment which must be negotiated, and that not only was the salary for the ten month position never negotiated but neither was the formula of taking 80% from a twelve month salary guide to arrive at a ten month salary guide.

The Hearing Examiner stated that the Board had not violated the Act,

"...when it posted a position for a 10-month Data Processing Clerk on July 2, 1980 without negotiating the salary range with the Association, but instead extrapolated the salary figure from the 12-month Data Processing Clerk position. Thus, this action did not constitute a violation of the Act.
Footnote 9, H.E. No. 81-44, 7 NJPER ____ (¶ ____ 1981).

He further found that since the action taken by the Board had occurred prior to the completion of negotiations for the new contract, it was not in derogation of the Board's obligation to negotiate in good faith.

Again, the Commission affirms the holding of the Hearing Examiner on the question. When this position was posted on July 2, 1980, a salary range was also posted with the explanation that the range was for the ten month position. Additionally, once the agreement for July 1, 1979 through June 30, 1981 became effective, there was included in that agreement salary ranges for both ten and twelve month data processing clerks. At the time the job was

posted, the Board utilized the guide then in effect and the formula for a 10 month position it had been using. The Association was in a position to negotiate on the salary range when the job was first posted and did negotiate a ten month salary range in the subsequent negotiations.^{2/}

The Association next excepts to the Hearing Examiner's conclusion that DaSilva was transferred from her data processing position in East Orange to a data processing position in Newark for reasons motivated by something other than anti-union animus. A great deal of importance was placed on the testimony of Ralph Caputo, Assistant Superintendent of Schools until June 30, 1980. In his testimony, Caputo stated that Ronald Smith, Board Secretary and School Business Administrator, had told him during the period when the Association members refused to cross the striking teachers' picket line that they were a "bunch of troublemakers" and that he would deal with them later. In reference to DaSilva in particular, Caputo stated that Smith called her a troublemaker and that she was organizing the union. These statements were made in November of 1979 and DaSilva's transfer did not occur until the end of July in 1980. We agree with the Hearing Examiner that there was not a sufficient causal nexus between Smith's alleged characterization of DaSilva as a "troublemaker" in November and his actions in July in recommending her transfer.

^{2/} The salary range contained on the Notice (Exhibit CP-4) reflects 80% of the 1978-1979 guide for Data Processing Clerk in the 1976-1977 collectively negotiated agreement (Exhibit J-1). As noted by the Association, Data Processing Clerk was, at that time solely a 12-month position. The 1979-1980 and 1980-1981 guides were not established until after the 10-month data processing clerk position was posted. No old position was eliminated, only a new one created for the East Orange Center.

We do not find, as the Association contends, that the statements establish a case for a violation of section (a)(3) of the Act. We do not make the causal connection between isolated statements made during the heat of an illegal strike and a transfer of one of those employees referred to by those statements nine months later.

There are standards which must be met before the Commission will find that an employer has violated (a)(3) of the Act. In Cape May City Board of Education, P.E.R.C. No. 80-87, 6 NJPER 45 (¶11022 1980) the standard was lucidly put forth.

Consistent with N.J.S.A. 34:13A-5.4(c), the Commission placed upon the shoulders of the charging party in these (a)(3) discrimination matters the burden of proving its case by a preponderance of the evidence. Once the charging party has shown that an employee who has been disciplined, discharged, etc. has engaged in protected activity and that the employer had knowledge of such activity, and was hostile toward a union a prima facie (a)(3) violation is made out. The burden then shifts to the respondent which must demonstrate that the actions were taken for legitimate reasons. If the evidence produced at hearing indicates that the rationale offered by respondent is merely pretextual, a violation of the Act may be found. However, if the evidence indicates that the respondent justification is valid, then it becomes the obligation of the trier of fact to determine, bearing in mind that the charging party has the burden of proof by a preponderance of the evidence that the action was taken, at least in part, in retaliation for the employee's exercise of protected rights.
Cape May at 46.^{3/}

^{3/} This standard has changed somewhat with the introduction of a recent NLRB decision, Wright Line, A Division of Wright Line, Inc., 251 NLRB No. 150, 105 LRRM 1169 (August 1980). In cases where a prima facie case has been established to show that an employer may have been motivated by anti-union animus in its actions, the employer then has the burden to show that his actions were motivated by business justifications. If this can be done,
(continued)

We do not find that these standards have been met and, in particular, that the Board acted with hostility toward DaSilva because of protected activity. The record shows that there were other members within the Association who also were labeled troublemakers who have never received any discriminatory treatment and in fact have been promoted. Further, it is important to note that DaSilva's new position in no way resulted in any loss of benefits that she enjoyed in her first position. There was also testimony by Harold Stiedl, the President of the computer company that sold the various machines to the Board, that the computer which DaSilva would be working with in the Newark office was a more complicated piece of machinery, well within her experience to operate, which more greatly enhanced her ability to professionally advance.

The Association also presented as evidence of the Board's anti-union animus testimony of Eleanor Copeck, an accounting clerk employed by the Board and an NJEA member. She had been interviewed by Mr. Smith, Mrs. Risinger, an Assistant Superintendent, and Marilyn Furze, Chairman of the interviewing team, for a position as a Business Office Aide. During the course of the interview, Copeck testified that she was asked about loyalty but had no idea as to what this referred to. She also stated that she was asked by Smith to "[r]emember the conversation we had," which she thought referred to a conversation Smith had had with her concerning

3/ (Continued) then it is up to the trier of fact to determine if the same action would have been taken by the employer even if there had been no discriminatory motive involved. If the answer is in the affirmative, then the action is upheld.

In the present case, however, the Hearing Examiner never got past the first step in the analysis in finding that no anti-union motive in transferring DaSilva had been established. We agree with the Hearing Examiner in this analysis.

complaints that he had received concerning her and has power to transfer her. Copeck was very general in her testimony concerning these statements and at no time did she connect them with any union activity on her part. Smith testified that the question concerning loyalty was asked of all applicants because the position was supervisory and of a confidential nature. We do not find Copeck's testimony to be evidential of the Board's hostility toward the Association in general or to DaSilva in particular.

One final point covered by the Association concerning this exception was that the Board had not properly followed the procedures required when applying for a Title 1 funded position as it was suggested that the new Data Processing Clerk position would be.^{4/} This was mentioned by the Association to show that the position was never really contemplated by the Board but was created at the last minute merely to get rid of DaSilva. The Commission does not place any great importance on whether Title 1 requirements were followed in applying for Title 1 funding. The Hearing Examiner was convinced that the position to which DaSilva was transferred was one created out of need and that DaSilva was the most experienced data processing clerk employed by the Board and the one best qualified to fill that post. It was the Hearing Examiner's conclusion that her transfer was not motivated by her union activity and we agree.

^{4/} It turns out that DaSilva's job at the Technical Careers Center in Newark was to be split-funded in that it was partially funded by Federal Title 1 funds with the balance provided by the Board. In fact, the Board has been funding the whole position and continues to pay DaSilva even though she has been on sick leave since the second day of her employment in that position.

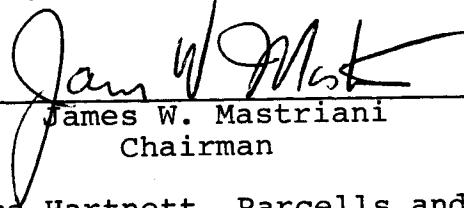
Finally, the Association excepted to the Hearing Examiner's comments on the Ridgefield Park Ed. Ass'n v. Ridgefield Park Board of Ed., 78 N.J. 144 (1978) decision and believed them to be incorrect. He did not simply state as the Association contends, that a public employer has the unfettered prerogative to transfer employees involuntarily, but rather qualified that statement by also mentioning that such a transfer may not be motivated by any discriminatory intent.^{5/}

Upon careful review of the entire record in this matter, we hereby adopt the findings of fact and conclusions of law made in H.E. No. 81-44. We find that the Board's actions did not violate N.J.S.A. 34:13A-5.4(a)(1), (3) and (5) and we adopt the Hearing Examiner's recommendation that the Complaint be dismissed in its entirety.

ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that the Complaint be dismissed in its entirety.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hartnett, Parcels and Suskin voted for this decision. Commissioners Hipp, Graves and Newbaker abstained. None opposed.

DATED: October 2, 1981

Trenton, New Jersey

ISSUED: October 5, 1981

^{5/} Citing Laurel Springs Bd. of Ed., P.E.R.C. No. 78-4, 3 NJPER 228 (1977).

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

In the Matter of

BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS
IN THE COUNTY OF ESSEX,

Respondent,

-and-

Docket No. CO-81-44-15

SECRETARY AIDES AND CLERKS ASSOCIATION OF THE
ESSEX COUNTY VOCATIONAL AND TECHNICAL SCHOOLS,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Board did not violate Subsections 5.4(a)(1), (3) and (5) of the New Jersey Employer-Employee Relations Act when it involuntarily transferred a Data Processing Clerk, Celeste DaSilva, who was also the President of the Association, from her job location at the Board office in East Orange to the Technical Careers Center in Newark effective September 1, 1980. The Charging Party failed to prove by a preponderance of the evidence that the Board was motivated by anti-union animus and the Board provided legitimate business justification for its actions in that it needed the skills possessed by DaSilva at the Newark location. Additionally, the Hearing Examiner rejected the Charging Party's contention that the Board violated the Act by failing to negotiate the salary with the Association for a posted position in July 1980. Finally, the Hearing Examiner found as a fact that the Board did not communicate directly with unit employees represented by the Association regarding the status of the negotiations in May 1980.

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.

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

In the Matter of

BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS
IN THE COUNTY OF ESSEX,

Respondent,

-and-

Docket No. CO-81-44-15

SECRETARY AIDES AND CLERKS ASSOCIATION OF THE
ESSEX COUNTY VOCATIONAL AND TECHNICAL SCHOOLS,

Charging Party.

Appearances:

For the Respondent

David H. Ben-Asher, Esq.
(Elaine K. Hyman, Esq.).

For the Charging Party

Rothbard, Harris & Oxfeld, Esqs.
(Sanford R. Oxfeld, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on August 19, 1980 by the Secretary Aides and Clerks Association of the Essex County Vocational and Technical Schools (hereinafter the "Charging Party" or the "Association") alleging that the Board of Education of the Vocational Schools in the County of Essex (hereinafter the "Respondent" or the "Board") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that the Respondent through its representatives: (1) in May 1980 spoke directly to the members of the collective negotiations unit during the period of

negotiations for a first agreement, stating that the Respondent wanted to give the employees certain benefits but the Association would not agree; (2) In July 1980 posted a position without negotiating the salary with the Association; and (3) on July 29, 1980 notified the President of the Association, Celeste DaSilva, that she was being transferred from the main office of the Board into an unposted position at the Technical Career Center, in retaliation for her being President, and without negotiations with the Association for the salary range for the position; all of which was alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (3) & (5) of the Act. ^{1/}

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on September 8, 1980. Pursuant to the Complaint and Notice Hearing, a hearing was held on April 1 and 2, 1981 ^{2/} in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by May 6 , 1981.

^{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."

^{2/} The hearing was originally scheduled to commence in mid-October 1980, but, at the request of the Charging Party, the hearing was adjourned to mid-November 1980. Thereafter, the hearing was adjourned several times between November 1980 and March 1981 due to the illness of the Association President, Celeste DaSilva.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing briefs of the parties, 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 Board of Education of the Vocational Schools in the County of Essex is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Secretary Aides and Clerks Association of the Essex County Vocational and Technical Schools is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. The Association was an independent public employee representative prior to October 1979 and was a party to a collective negotiations agreement with the Board, which was effective during the term of July 1, 1976 through June 30, 1979 (J-1).

4. The Association affiliated with the New Jersey Education Association (NJEA) in October 1979 and, following a Commission-conducted election in March 1980, the newly affiliated Association entered into negotiations for a collective negotiations agreement, which was to be retroactive to July 1, 1979. Negotiations were concluded in or around September 1980 and on September 22, 1980 the Board authorized the execution of a new agreement, which the Association ratified in October 1980. The new agreement is effective during the period July 1, 1979 through June 30, 1981 (J-2).

5. Celeste DaSilva became a member of the NJEA in 1979 during the course of a teachers strike, which was being conducted against the Board by the NJEA. The secretaries in the unit represented by the Association did not cross the teachers' picket line. ^{3/} The strike occurred in November, 1979.

6. DaSilva was elected President of the Association in January 1980. DaSilva has been employed by the Board a total of thirteen (13) years and for the past five years has been a 12-month Data Processing Clerk. DaSilva agreed that her job description as Data Processing Clerk is accurately set forth in Exhibit J-1 (p.V). DaSilva had always worked at the Board's office in East Orange.

7. At a regular meeting of the Board on July 28, 1980 Smith reported that he had received a request for an experienced Data Processing Clerk at the Technical Careers Center in Newark. Smith recommended the transfer of DaSilva to this position effective September 1, 1980 at no change in salary. Smith also advised the Board that there was a good possibility that DaSilva's position would be funded under the Federal Title I Program, adding that, if not, then the Board would have to fund the position. The Board approved Smith's recommendation. (See CP-1).

8. Under date of July 29, 1980 Smith sent DaSilva a letter advising her that the Board on July 28, 1980 had approved the recommendation of her transfer to the Technical Careers Center effective September 1, 1980 (CP-9). ^{4/}

^{3/} Ralph Caputo, a former Assistant Superintendent of the Board, testified that the Board's Secretary-Business Administrator, H. Ronald Smith, was angry at the secretaries for not crossing the picket line and allegedly characterized them as a "bunch of troublemakers" and said that he would "deal with them later" (1 Tr. 149,150). As to DaSilva, Smith said that "she was a troublemaker, that she was organizing the union" (1 Tr. 150).

^{4/} It was undisputed that DaSilva was the most experienced and a highly proficient Data Processing Clerk. The basis for Smith's recommendation that she be transferred to the Technical Careers Center was the need for a person of DaSilva's experience. There was, however, no posting of a vacancy at the Technical Careers Center since, according to the testimony of Smith, there was not a "vacancy" in the technical sense inasmuch as no one had previously occupied the position. The Hearing Examiner accepts the Board's position that there was no vacancy to be posted. Additionally, the Hearing Examiner notes that there was no provision in J-1 for the posting of vacancies, notwithstanding that when J-2 was ultimately consummated in September-October 1980 it did so provide (J-2, Article V, p.18).

9. Under date of July 2, 1980 Smith posted a 10-month Data Processing Clerk vacancy at the Board's office in East Orange (CP-4). Smith testified credibly that the salary range was established by taking 80% of the salary range for a 12-month position (2 Tr. 150,151). The Hearing Examiner finds that this action by Smith occurred prior to the completion of negotiations for J-2 and was not in derogation of the Board's obligation to negotiate with the Association in good faith.

10. Under date of July 30, 1980 Smith posted a 12-month Data Processing Clerk vacancy at the Board's office in East Orange (CP-10). This vacancy arose because of the transfer of DaSilva to the Technical Careers Center in Newark and the need for a replacement Data Processing Clerk.

11. On August 6, 1980 DaSilva wrote to Smith and applied for the Data Processing Clerk's position in East Orange (CP-11). After being interviewed by Smith, Smith declined her application since the effect would have been to transfer DaSilva back to East Orange from the position at the Technical Careers Center where she had just been transferred by the Board. ^{5/}

12. On or about September 2, 1980 DaSilva commenced work as a Data Processing Clerk at the Technical Careers Center in accordance with the foregoing transfer. DaSilva worked one day on the job and has been ill and off the job ever since.

^{5/} The Hearing Examiner finds no inconsistency in Board action in transferring DaSilva to the Technical Careers Center effective September 1, 1980 vis-a-vis the Board's refusal to transfer to the position of Accounting Clerk in 1979 (CP-6, CP-7, CP-8). In 1979 DaSilva was the only Data Processing Clerk at the Board's Main Offices in East Orange. In the intervening year between 1979 and 1980 the Board hired a second Data Processing Clerk, who, in the intervening period, gained sufficient experience so that DaSilva could be transferred to the Technical Careers Center as of September 1, 1980 without any resulting loss of data processing proficiency in the East Orange office. Since an additional Data Processing Clerk was needed in the East Orange office Smith posted a vacancy on July 30, 1980 (CP-10, supra).

13. The Hearing Examiner credits Smith's testimony that DaSilva retained her tenure with the Board as a 12-month Data Processing Clerk at the Technical Careers Center on and after September 1, 1980 and also, that DaSilva was transferred with no change in salary or benefits and with an enhanced opportunity for future advancement.^{6/} Further, Smith testified credibly that DaSilva's transfer was not in anyway motivated by her union activity (2 Tr. 139).

14. The Data Processing Clerk vacancy at the Board's offices in East Orange was, after posting, supra, filled in October 1980 by one Anna Milstein, who had been a clerk-typist for approximately one year.^{7/}

15. Theresa Vitale testified that Jeanette Christafas, a member of the NJEA, told Vitale in March 1980, that Smith said that the Board was "ready to give us, you know, settle with us as far as money-wise, (but) that Celeste DaSilva and Mr. Lelling were holding it up" (2 Tr. 5). Smith testified without contradiction that he never had a conversation with Christafas and further, that he never made a statement that settlement was being held up by DaSilva and finally, that he never in anyway discussed negotiations with any members of the Association (2 Tr. 149).^{8/}

6/ DaSilva's job at the Technical Careers Center was "split-funded" in that it was partially funded by Federal Title I funds with the balance provided by the Board.

7/ Milstein withdrew from membership in the Association as of January 1981. Three other employees also withdrew from membership in the Association at the same time after being promoted. These three employees, Carol Ann DeVito, Camille Russomanno and Angela Meglio, testified credibly that the reason that they withdrew their Association membership was because of dissatisfaction with the quality of representation provided to them by the Association. The Hearing Examiner finds as a fact there was no causal connection between the withdrawal of membership in the Association by these four employees and the Board's transfer of DaSilva to the Technical Careers Center in September 1980.

8/ The Hearing Examiner credits Smith's denials that he never communicated with any member of the Association regarding the status of negotiations. The only contrary evidence is hearsay testimony by Vitale, which cannot prevail in the face of contrary direct testimony by Smith.

9/
THE ISSUE

Did the Respondent Board violate Subsections(a)(1) and (3) of the Act when it involuntarily transferred Celeste DaSilva to the Technical Careers Center in Newark effective September 1, 1980, i.e., was DaSilva transferred because of her position as President of the Association?

DISCUSSION AND ANALYSIS

The Respondent Board Did Not Violate Subsections (a)(1) and (3) Of The Act When It Transferred Celeste DaSilva To The Technical Careers Center In Newark Effective September 1, 1980

The Hearing Examiner finds and concludes that when Smith on July 28, 1980 recommended the involuntary transfer of DaSilva from the Board's office in East Orange to the Technical Careers Center in Newark effective September 1, 1980 Smith was not motivated, in whole or in part, by anti-union animus. Smith, on behalf of the Respondent, demonstrated a legitimate business justification for his recommendation of transfer in that DaSilva was the most experienced of the Data Processing Clerks and that there was a need for her level of skills at the Technical Careers Center. Additionally, Smith testified credibly that DaSilva's future opportunities for advancement were enhanced by the transfer.

9/ The Charging Party has alleged a violation of the Act in May 1980 in that the Respondent's representatives spoke directly to employees in the unit during negotiations stating that the Respondent wanted to give the employees certain benefits but that the Association would not agree (C-1, para. 1). In Finding of Fact No. 15, supra, the Hearing Examiner has found that the Respondent did not communicate directly with members of the unit regarding matters, which were the subject of collective negotiations and thus, no violation of the Act occurred in this regard.

The Charging Party has also alleged that the Respondent violated the Act in July 1980 when it posted a position without first negotiating the salary with the Association (C-1, para. 2). In Finding of Fact No. 9, supra, the Hearing Examiner has found that the Respondent acted properly when it posted a position for a 10-month Data Processing Clerk on July 2, 1980 without negotiating the salary range with the Association, but, instead extrapolating the salary figure from the 12-month Data Processing Clerk position. Thus, this action did not constitute a violation of the Act.

The Subsection(a)(3) standard was first enunciated by the Commission in Haddonfield Borough Board of Education, P.E.R.C. No. 77-36, 3 NJPER 71 (1977) and City of Hackensack, P.E.R.C. No. 77-49, 3 NJPER 143 (1977), rev'd on other grounds, 162 N.J. Super. 1 (App. Div. 1978), aff'd as modified, 82 N.J. 1 (1980). See also Brookdale Community College, P.E.R.C. No. 78-80, 4 NJPER 243 (1978), aff'd App. Div. Docket No. A-4824-77 (1980) and Cape May City Bd. of Education, P.E.R.C. No. 80-87, 6 NJPER 45 (1980). Further, for a Subsection(a)(3) violation to be found the actions of the public employer must be "discriminatory" (See Haddonfield) and must have been committed with a "discriminatory motive" (See Cape May City Bd. of Education).

The foregoing Findings of Fact indicate clearly that DaSilva's activities on behalf of the Association were limited to her having been President of the Association since January 1980. The Hearing Examiner is willing to take administrative notice of the fact that the Respondent had knowledge that DaSilva was President of the Association since in or about January 1980 and thus the preliminary proof standard of Haddonfield, supra, has been satisfied. The problem confronting the Hearing Examiner is whether a causal connection has been established between DaSilva's activities on behalf of the Association and the Respondent's decision to transfer DaSilva involuntarily to the Technical Careers Center effective September 1, 1980. Put another way, did the Respondent retaliate against DaSilva in its decision to transfer her on account of her activities on behalf of the Association as its President?

The Hearing Examiner is not persuaded that Caputo's testimony as to what Smith allegedly said during the teachers strike in November 1979 wherein Smith referred to DaSilva as a "troublemaker" is conclusive (See Finding of Fact No. 5, supra). It strikes the Hearing Examiner that if Smith was motivated by anti-union animus and was intent on discriminating against DaSilva

for not having crossed the teacher picket line in November 1979 he would have acted with much greater dispatch than waiting until July 28, 1980 to recommend to the Board that she be involuntarily transferred from East Orange to Newark. In other words, the Hearing Examiner cannot find a sufficient causal nexus between Smith's alleged characterization of DaSilva as a "troublemaker" in November and his action in July in recommending DaSilva's transfer.

No sufficient reason was provided by Caputo or any other witness for the Charging Party as to why Smith would have in November singled out DaSilva from the other secretaries as a "troublemaker", as to whom he intended to act against discriminatorily in July 1980. DaSilva was not in November any more than a member of the NJEA - she did not become President until January 1980.

The Hearing Examiner has not found as a fact that Smith ever again after November said anything about DaSilva while she was President and presumably an Association activist that would support a finding of animus.^{10/} Thus, the only indication of anti-union animus toward DaSilva by Smith is the "troublemaker" remark in November 1979. The Hearing Examiner finds and concludes that this is not sufficient to establish a violation of the Act in the time frame of November 1979 to July 1980.

Finally, the Hearing Examiner observes that the New Jersey Supreme Court has recognized that a public employer has an unfettered prerogative to transfer employees involuntarily: Ridgefield Park Ed. Ass'n. v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978). The Commission has previously held that such a

^{10/} In Finding of Fact No. 15, supra, the Hearing Examiner credited the denial of Smith that he ever made any statement to any employees in the collective negotiations unit regarding DaSilva holding up the contract settlement.

transfer absent discriminatory motivation is not a violation of the Act: 11/
Laurel Springs Bd. of Ed., P.E.R.C. No. 78-4, 3 NJPER 228 (1977).

Based on the foregoing the Hearing Examiner concludes that the Charging Party has failed to prove by a preponderance of the evidence that DaSilva was transferred to the Technical Careers Center in September 1980 because of her activities on behalf of the Association, particularly by serving as its President. Therefore, the Hearing Examiner will recommend dismissal of this final aspect of the Unfair Practice Charge.

* * * *

Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Respondent did not violate N.J.S.A. 34:13-5.4(a)(1) in that its representatives did not speak directly with members of the collective negotiations unit at any time, particularly in or around May 1980, regarding its desire to grant employees certain benefits, as to which the Association would not agree.
2. The Respondent did not violate N.J.S.A. 34:13A-5.4(a)(1) and (5) when in July 1980 it posted a position without negotiating the salary with the Association.
3. The Respondent did not violate N.J.S.A. 34:13A-5.4(a)(1) and (3) when it involuntarily transferred Celeste DaSilva from its office in East Orange to the Technical Careers Center in Newark effective September 1, 1980.

11/ See, also, cases cited in Respondent's Brief, pp. 7,8. Compare City of Elizabeth, P.E.R.C. No. 79-93, 5 NJPER 231 (1979) and cases cited in Respondent's Brief, pp. 10,11.

RECOMMENDED ORDER

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



Alan R. Howe
Hearing Examiner

Dated: May 14, 1981
Trenton, New Jersey