P.E.R.C. NO. 82-117

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF BERGEN-OPERATING
BERGEN PINES COUNTY HOSPITAL,

Respondent,

-and-

Docket No. CO-81-375-178

LOCAL 549, COUNCIL 52, AFSCME
AFL-CIO,

Charging Party.

## SYNOPSIS

The Public Employment Relations Commission, adopting a Hearing Examiner's recommendations, finds that the County of Bergen - Operating Bergen Pines County Hospital did not violate the New Jersey Employer-Employee Relations Act when it laid off a morgue custodian because of a decrease in the number of autopsies, but did violate the Act when it refused to consider his applications for re-employment as either a building maintenance worker or hospital attendant.

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LOCAL 549, COUNCIL 52, AFSCME
AFL-CIO,

Charging Party.

Appearances:
For the Respondent, Edwin C. Eastwood, Jr., Esq.

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

DECISION AND ORDER

On June 15, 1981, Local 549, Council 52, AFSCME, AFL-CIO ("Local 549") filed an unfair practice charge against the County of Bergen, Operating Bergen Pines County Hospital ("Hospital"). The charge alleged that the Hospital violated the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"), specifically subsections 5.4(a)(1) and (3),[1/] when it laid off the president of Local 549, Richard McCulley, from his position of morgue custodian and subsequently refused to rehire him in other positions for which he was qualified.

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 June 24, 1981, the Director of Unfair Practices issued a Complaint and Notice of Hearing pursuant to N.J.A.C. 19:14-2.1. The Hospital filed an Answer in which it admitted that it had laid off McCulley and had rejected his applications for the positions of technical assistant, anatomical pathologist and pharmacist assistant, but denied that it was motivated by anti-union animus. Instead, it averred that it abolished McCulley's position, with Civil Service approval, because the minimal number of autopsies per year did not warrant the employment of two mortuary assistants, that it rejected his applications for valid reasons, and that McCulley had refused to accept any position outside the mortuary, including the positions of building maintenance worker or hospital attendant which the Hospital offered to him.

On October 2 and November 4, 1981, Commission Hearing Examiner Alan R. Howe conducted a hearing and afforded the parties an opportunity to examine witnesses, present evidence and argue orally.[2/] The parties filed post-hearing briefs by December 21, 1981.

On December 24, 1981, the Hearing Examiner issued his Recommended Report and Decision (copy attached). He found that given the decline in the number of autopsies, Local 549 had not proved illegal McCulley's lay-off from the position of mortuary custodian. He found, however, that the Hospital violated subsections 5.4(a)(3) and, derivatively, 5.4(a)(1) when, because

2/ On November 3, 1981, the Hospital filed a Motion to Dismiss on the grounds that McCulley had elected to pursue grievance arbitration. On November 9, 1981, the Hearing Examiner denied this motion. H.E. No. 82-17, 7 NJPER ___ (¶_____ 1981). This decision has not been appealed.

McCulley was president of Local 549, it refused to consider him for employment as a building maintenance worker or a hospital attendant. His recommended order would require the Hospital to cease and desist from interfering with, restraining or coercing its employees in the exercise of their rights and from discriminating in regard to hire or tenure of employment, to reemploy McCulley in the position of buiding maintenance worker or hospital attendant, or any other substantially equivalent position, and to make him whole for lost earnings from June 8, 1981 at the rate of pay for the higher of the two positions less interim earnings, together with interest at the rate of 8% per annum from June 8, 1981.

On January 18, 1982, the Hospital filed Exceptions. The Hospital contended that it had proved a legitimate business justification in not considering McCulley's applications for the position of building maintenance worker or hospital attendant; it took issue with several of the Hearing Examiner's findings of fact on this issue. The Hospital further contends that the recommended order unreasonably requires it to compensate McCulley at the higher rate of pay of the two positions and that the notice provision is not based on the evidence. On February 29, 1981, Local 549 filed an Exception requesting that the Commission order interest at the rate of 12% rather than 8%.

We have reviewed the entire record. The Hearing Examiner's findings of fact are accurate. We adopt them and incorporate them here. Based on these findings, we also adopt his recommended conclusions of law and his recommended order, although

we modify the rate of interest awarded.

In East Orange Public Library v. Taliaferro, 180 N.J. Super. 155, 163 (App. Div. 1981), the Court adopted the standards the National Labor Relations Board used in Wright-Line, Inc., 251 NLRB No. 150, 105 LRRM 1169 (1980), aff'd as modified 108 LRRM 2513, 662 F.2d 899 (1st Cir. 1981), cert. den. (March 1, 1982), to determine whether a particular personnel action violated an employee's rights to be free from anti-union animus or to engage in protected activity. The Court quoted the following passage from Wright-Line:

> Under the [Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977)] test, the aggrieved employee is afforded protection since he or she is only required initially to show that protected activities played a role in the employer's decision. Also, the employer is provided with a formal framework within which to establish its asserted legitimate justification. In this context, it is the employer which has "to make the proof." Under this analysis, should the employer be able to demonstrate that the discipline or other action would have occurred absent protected activities, the employee cannot justly complain if the employer's action is upheld. Similarly, if the employer cannot make the necessary showing, it should not be heard to object to the employee's being made whole because its action will have been found to have been motivited by an unlawful consideration ....105 LRRM at 1174.

We are satisfied that Local 549 initially showed that anti-union animus and McCulley's protected activity as president of Local 549 played a substantial role in the Hospital's refusal to consider his application for the positions of building maintenance worker or hospital attendant. The Hearing Examiner's findings of fact (Nos. 6, 7, and 15)[3/] and his discussion of the significance of

3/ The Hospital takes exception to finding of fact No. 15, arguing that McCulley in fact experienced no difficulty in filing (Continued)

these facts (Slip Opin. at pp. 8-9) are correct and dispositive of this issue.

We are also satisfied that the Hospital has not demonstrated that absent McCulley's protected activity, it still would not have considered his applications for the positions of building maintenance worker or hospital attendant. There is no dispute that McCulley was qualified to perform either position, and that the Hospital did not consider him for either position. The Hospital's asserted reason for not considering this qualified employee for either position is that he had previously indicated a preference for the position of technological assistant. The Hearing Examiner did not find this reason believable or substantial. Based on his accurate findings of fact (Nos. 12-14), his credibility findings which we will not secondguess (No. 12), and his discussion of these findings (Slip Opin. at pp. 9-10), we agree.[4/]

Finally, we are satisfied that the Hearing Examiner's proposed remedy is essentially proper. The appropriate remedy in

3/ (Continued) grievances for several years although he spent a majority of his time doing union work. The record supports the Hearing Examiner's findings that the specific incidents he described occurred. We believe these incidents sufficiently indicate anti-union animus, regardless of other instances when the Hospital cooperated with McCulley. Accordingly, we reject the Hospital's Exception to finding of fact No. 15.

4/ We reject the Hospital's argument that the Hospital's personnel officer testified credibly that he did not consider McCulley's applications because McCulley had previously expressed a preference for another position and because McCulley, when a morgue custodian, had refused to work in the laboratory. We do not believe that the personnel officer could reasonably have concluded that the applications McCulley filed on June 8, 1981 were a sham worthy of no consideration. We also reject the Hospital's contention that McCulley's failure to file a formal application was significant; his letter of June 8, 1981 sufficiently manifested his intent and entitled him to a response.

cases of this type was expressed in Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941). There, the Court held that specific statutory language was unnecessary for the National Labor Relations Board to order reinstatement with back pay, since that power was encompassed within its general authority to mandate affirmative action to effectuate the policies of the federal law. Compare Galloway Tp. Bd. of Ed. v. Galloway Tp. Assn. Ed. Sec., 78 N.J. 1, 13 (1978). The Phelps-Dodge Court held that the NLRB was authorized to order the hiring of a person who had unlawfully been denied employment, notwithstanding that such action did not actually constitute "reinstatement". 313 U.S., supra at 191; Compare Galloway Tp. Bd. of Ed., supra, at 13-14.

Additionally, we disagree with the Hospital's exception to the Hearing Examiner's recommended order that McCulley be compensated at the rate of pay applicable to the higher of the two positions.[5/] Local 549 met its burden of proof when it demonstrated that the Hospital refused to consider either of McCulley's applications because of anti-union animus and his protected activities. The Hospital did not deny that McCulley was qualified to fill either position capably. Because the Hospital refused to consider McCulley, an admittedly qualified applicant, for either position, it has comitted two violations and can be ordered to make McCulley whole for either one. Under these circumstances, the Hearing Examiner did not err in recommending

5/ The total difference in yearly salary between the maximum levels of the two positions was $353.00, the position of hospital attendant exceeding that of building maintenance worker.

that McCulley receive the pay he would have received if employed as a hospital attendant.[6/]

The Hospital has also excepted to the notice the Hearing Examiner recommended because it is allegedly not based on the evidence. We disagree. The violations have been established, and the recommended notice is an appropriate remedial measure.

Finally, Local 549 requests that we order interest on the award at the rate of 12%, not the 8% the Hearing Examiner recommended. Under R.4:42-11, 12% is now the appropriate rate of interest, and we will accordingly modify the award. See Salem County Bd. for Vocational Ed. v. McGonigle, App. Div. Docket No. A-3417-78 (9/28/80); In re County of Cape May, P.E.R.C. No. 82-1, 7 NJPER 432 (¶12192 1981).

ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that;

A. The County of Bergen-Operating Bergen Pines County Hospital cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by refusing to consider Richard McCulley for employment as a building maintenance worker or a hospital attendant on and after his application for said positions on June 8, 1981.

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6/ Had the Hospital proved that McCulley was not qualified to be a hospital attendant, we would not have ordered the Hospital to employ him in that position or pay him back pay based on the salary for that position.

2. 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 the Act, particularly, by refusing to consider Richard McCulley for employment as a building maintenance worker or a hospital attendant on and after his application for said positions on June 8, 1981.

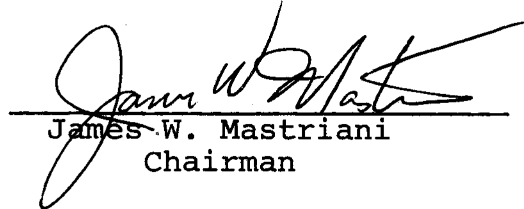
B. The Hospital take the following affirmative action:

1. Forthwith offer to reemploy Richard McCulley in the position of building maintenance worker or hospital attendant, or any other substantially equivalent position; make him whole for lost earnings from June 8, 1981 at the rate of pay for the higher of the two positions, less interim earnings, together with interest at the rate of 12% per annum from June 8, 1981.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as "Appendix A." Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon receipt thereof and, after being signed by the Hospital's authorized representative, shall be maintained by it for at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Hospital to insure that such notices are not altered, defaced or covered by other materials.

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Hospital has taken to comply herewith.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hartnett, Butch, Hipp and Newbaker voted for this decision. None opposed. Commissioner Suskin was not present at the time of the vote. Commissioner Graves was not in attendance.

DATED: Trenton, New Jersey
June 3, 1982
ISSUED: June 4, 1982

APPENDIX A

# NOTICE TO ALL EMPLOYEES

## PURSUANT TO

AN ORDER OF THE

## PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

## NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce employees in the exercise of the rights guarateed to them by the Act, particularly, by refusing to consider Richard McCulley for employment as a building maintenance worker or a hospital attendant on and after his application for said positions on June 8, 1981.

WE WILL NOT discriminate 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 the Act, particularly, by refusing to consider Richard McCulley for employment as a building maintenance worker or a hospital attendant on and after his application for said positions on June 8, 1981.

WE WILL forthwith offer to reemploy Richard McCulley in the position of building maintenance worker or hospital attendant, or any other substantially equivalent position; make him whole for lost earnings from June 8, 1981 at the rate of pay for the higher of the two positions, less interim earnings, together with interest at the rate of 12% per annum from June 8, 1981.

COUNTY OF BERGEN-OPERATING BERGEN PINES COUNTY HOSPITAL
(Public Employer)

Dated ____________________ By ______________________________ (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

H.E. No. 82-24

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

In the Matter of

COUNTY OF BERGEN-OPERATING BERGEN PINES COUNTY HOSPITAL,

Respondent,

-and-

Docket No. CO-81-375-178

LOCAL 549, COUNCIL 52, AFSCME AFL-CIO

Charging Party.

## SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent violated Subsections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relation Act when it failed and refused to consider the application of Richard McCulley, the President of the Charging Party, for employment as a Building Maintenance Worker or a Hospital Attendant on and after his application for said positions on June 8, 1981. The Hearing Examiner found that McCulley had, as President, been the principal union activist in the processing of grievances since becoming elected President in 1976. When his position as Morgue Custodian was abolished effective June 11, 1981 McCulley applied for several positions and was, as a result of his union activities, denied consideration for employment.

By way of remedy, the Hearing Examiner ordered that McCulley be offered employment as a Building Maintenance Worker or a Hospital Attendant, or any other substantially equivalent position, and be made whole for lost earnings at the higher salary of the two positions from June 8, 1981, less interim earnings, with interest at the rate of 8% per annum.

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

COUNTY OF BERGEN-OPERATING BERGEN
PINES COUNTY HOSPITAL,

Respondent,

-and-

Docket No. CO-81-375-178

LOCAL 549, COUNCIL 52, AFSCME
AFL-CIO

Charging Party.

Appearances:

For the Respondent
Edwin C. Eastwood, Jr., 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 June 15, 1981 by Local 549, Council 52, AFSCME, AFL-CIO (hereinafter the "Charging Party" or the "Local") alleging that the County of Bergen-Operating Bergen Pines County Hospital (hereinafter the "Respondent" or the "County") 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 eliminated the job title of Richard McCulley, the President of the Charging Party, on or about June 11, 1981 and simultaneously laid him off, and also in having rejected his application for a number of vacant positions for which he was qualified, and that in so doing the Respondent was motivated by anti-union animus, all of which was alleged to be

a violation of N.J.S.A. 34:13A-5.4(a)(1) and (3) 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 June 24, 1981. Pursuant to the Complaint and Notice of Hearing, hearings were held on October 2 and November 4, 1981 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally.[2/] Oral argument was waived and the parties filed post-hearing briefs by December 21, 1981.

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 County of Bergen-Operating Bergen Pines County Hospital is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. Local 549, Council 52, AFSCME, AFL-CIO is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. Richard McCulley is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

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1/ These Subsections prohibit public employers, their representative 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."

2/ A Motion to Dismiss was filed by the Respondent on November 2, 1981 and was denied on November 9, 1981 (HE. No. 82-17).

4. McCulley was hired as a Morgue Custodian in April 1968 and continued in that position until he was terminated on June 11, 1981 due to the abolishment of the position (CP-3B).[3/] His salary at the time of termination was $12,541 per annum.

5. McCulley's duties as Morgue Custodian included assisting the pathologist in autopsies, "stiching-up" the cadaver and "putting it away," delivering specimens, cleaning up the Morgue and assisting in conferences. Beginning in 1980 his duties also included working in the Laboratory area when there was no work in the Morgue.

6. In 1975 the Charging Party organized the blue collar workers of the Respondent, which included the Morgue. McCulley was Chief Steward for one year thereafter and became President of the Charging Party in January or February 1976 for a term of two years. McCulley was re-elected President in 1978 and 1980 for two-year terms and, thus, was President of the Charging Party at the time of his termination in June 1981. McCulley, as President, has attended all negotiations sessions since he became President in 1976. The Charging Party is provided with an office in the basement of Building No. 6 and McCulley mans the office on behalf of the Charging Party. McCulley, as President, has also filed approximately 85% of the grievances under the agreement since 1976.

7. McCulley's disciplinary record until February 1976 had consisted only of a one-day suspension for refusing to scrape a floor with a knife. However, after he became President he incurred four suspensions, namely, 30 days in 1976, *inter alia*, for alleged violation of a court order involving the distribution of union literature,[4/] two days and ten days in 1978-79 for excessive absence, and 15 days for excessive absence, also in 1979.[5/]

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3/ The Respondent offered data indicating that the number of autopsies per year had declined from 209 in 1971 to 35 in 1980 and 12 up to June 11, 1981 (R-5).

4/ An Arbitrator vacated the 30-day suspension and ordered back pay on September 10, 1976 (CP-1).

5/ An Arbitrator vacated the 15-day suspension and ordered back pay on December 18, 1979 (CP-2).

8. In accordance with Civil Service regulations McCulley received a 45-day notice of termination on April 7, 1981 inasmuch as his position as Morgue Custodian was being abolished, (CP-3A&B). McCulley was apprised by the Respondent that he could apply for any position for which he was qualified. This was confirmed by the Respondent in a letter to Richard Gollin, a representative of the Charging Party, under date of April 13, 1981 (CP-4).

9. Job vacancies are posted on various bulletin boards throughout the Bergen Pines Hospital every two or three weeks. Thus, prior to McCulley's termination date, June 11, 1981, the Respondent posted vacancies in the blue and white collar collective negotiations unit on April 27, 1981 (CP-5), May 11, 1981 (CP-6) and June 1, 1981 (CP-7). McCulley received a copy of each of these postings by virtue of his position as President of the Charging Party.

10. Under date of April 28, 1981 McCulley applied for the position of Pharmacist's Aide (CP-8), which was one of the positions set forth as vacant on the April 27, 1981 posting, _supra_. McCulley was thereafter interviewed by the Chief Pharmacist. Ralph Kornfeld, the Respondent's Personnel Officer, testified that the Chief Pharmacist was not interested in McCulley. McCulley was notified by Kornfeld under date of May 9, 1981 that McCulley's request "... may not be accommodated ..." (CP-9). He was encouraged to review other available job opportunities.

11. In early May McCulley learned of a possible new position for which he might qualify: Technical Assistant Anatomical Pathology. Under date of May 5, 1981 McCulley applied in writing to Kornfeld for this position (CP-10). Kornfeld replied to McCulley in writing on May 13, 1981 and advised McCulley that the position of "Technical Assistant, Pathology Division" was yet to be published and that it must receive the authorization of the Board of Chosen Freeholders and also be negotiated with the Union, after which it would be "offered to the Public." (CP-11). Kornfeld said that he would retain McCulley's application. Kornfeld also added a "Note: For the record" that his office had discussed with McCulley the opportunity

for Building Maintenance Worker and Hospital Attendant prior to his lay off and that "... No further word has been receive (sic) regarding your interest or lack of interest in either of these categories." (CP-11).

12. As of May 13, 1981 McCulley had never himself applied for the positions of Building Maintenance Worker or Hospital Attendant although Gollin, on McCulley's behalf, had expressed interest in these positions to Kornfeld. McCulley did, however, apply specifically for these positions in writing under the date of June 8, 1981 (CP-13). Kornfeld testified incredibly that he did not thereafter offer either the position of Building Maintenance Worker or Hospital Attendant to McCulley because he did not consider CP-13 as a "request" for these positions because McCulley had on May 13, 1981 expressed a preference for the as yet unauthorized position of Technical Assistant, Pathology Division.[6/]

13. Under date of May 13, 1981 McCulley sent a letter to Kornfeld in response to CP-11, supra, in which he stated that his first preference was for the position of Technical Assistant, Pathology Division but added that "... By opting for positions other than that described above, I will be placed in a position of having exhausted my rights under Article VI, Sections 7 and 8 of the agreement ...(CP-12).[7/]

14. McCulley was notified by the Civil Service under date of June 5, 1981 that he had no special re-employment opportunities by virtue of his lay off from the

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6/ To compound the situation further, Kornfeld testified that McCulley would not have qualified for the position of Technical Assistant, Pathology Division since it would have involved work in the Histology Department, involving the examination of tissues, for which McCulley had no experience. This position of Technical Assistant, Pathology Division never materalized since the Administration of the Respondent never authorized the position for posting, notwithstanding that a salary had been fully negotiated with the Union by June 3, 1981 (CP-14 and 15).

7/ It appears that McCulley was in error in referring to Article VI, Sections 7 & 8 of the current collective negotiations agreement (J-1) inasmuch as there is no reference made therein regarding the exhaustion of rights in connection with transfer to other positions.

position of Morgue Custodian as of June 11, 1981 and, further, that he had no demotional rights (R-3). It was this letter which triggered McCulley's written application on June 8, 1981 to Kornfeld for the positions of Building Maintenance Worker and Hospital Attendant (CP-13, supra). McCulley also applied again for Pharmacist's Aide.

15. McCulley testified without contradiction that in April 1981 Edward Lewis, an Assistant Executive Director, objected to the amount of time spent by McCulley on the processing of grievances. McCulley was at that time advised by Dr. Edward Wagman, Director of Laboratories, to report to Lewis before filing a grievance. Under date of May 4, 1981 McCulley was sent a memo by Lewis regarding a meeting held on May 1, 1981 in the presence of Wagman (R-1). This memo complained about McCulley disrupting operations and reciting that under the collective negotiations agreement he was only authorized to investigate grievances with the approval of Administration. Finally, he was threatened with disciplinary action if he did not cooperate with the directions set forth in the said memo (R-1).

16. Under date of June 22, 1981, after McCulley's termination on June 11, the Respondent posted blue and white collar job vacancies, which included the positions of Building Maintenance Worker and Hospital Attendant, in addition to Pharmacist's Aide (CP-21).

17. In a period of twelve years only one position in any of the Respondent's collective negotiations units has been abolished for reasons of economy and that was McCulley's position of Morgue Custodian.

## THE ISSUE

Did the Respondent violate Subsection(a)(3), and derivatively Subsection(a)(1), of the Act when it refused to consider Richard McCulley, the President of the Charging Party, for employment as a Building Maintenance Worker or a Hospital Attendant on and after his application for said positions on June 8, 1981?

## DISCUSSION AND ANALYSIS

### The Respondent Violated Subsection(a) (3), And Derivatively Subsection(a)(1), Of The Act When It Refused To Consider Richard McCulley For Employment As A Building Maintenance Worker Or A Hospital Attendant On And After His Application For Said Positions On June 8, 1981

The Hearing Examiner finds and concludes that the Respondent violated Subsection (a)(3), and derivatively Subsection(a)(1), 8/ of the Act when it refused to consider Richard McCulley, the President of the Charging Party, for employment as a Building Maintenance Worker or a Hospital Attendant on and after his application for said positions on June 8, 1981. This was in the context of McCulley's position of Morgue Custodian being abolished as of June 11, 1981.

It appears to the Hearing Examiner, contrary to the Charging Party's contention that the instant case involves conduct "inherently destructive" of important employee rights, that this is a case of "dual motive" as analyzed by the National Labor Relations Board (NLRB) in Wright Line, Inc., 251 NLRB No. 150, 105 LRRM 1169 (1980). 9/

The NLRB in Wright Line adopted the analysis of the United States Supreme Court in Mt. Healthy City School District v. Doyle, 429 U.S. 274 (1977) in modifying the Section 8(a)(3) standard in "dual motive" cases where the decision to discipline involves two factors: (1) employer disciplinary reaction to an employee's engaging in protected activities and (2) the employer's legitimate business justification for imposing the discipline. 10/

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8/ See Galloway Township Board of Education, P.E.R.C. No. 77-3, 2 NJPER 254, 255 (1976).

9/ The Appellate Division has adopted the Wright Line analysis in "dual motive" cases in East Orange Public Library v. Taliaferro, 180 N.J. Super. 155 (1981), which is binding upon the Commission.

10/ In accordance with the New Jersey Supreme Court's directive in Lullo v. International Association of Firefighters, 55 N.J. 409 (1970) and Galloway Township Board of Education v. Galloway Township Educational Secretaries, 78 N.J. 1 (1978) the Commission looks to Federal precedent as a guide to deciding cases under our Act.

Simply put the NLRB in Wright Line decided to employ the following "causation test" in determining employer motivation: (1) the General Counsel (Charging Party) must make a prima facie showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the employer's decision to discipline and (2) once this is established, the employer has the burden of demonstrating that the same displinary action would have taken place even in the absence of protected activity. The Board, thus, adopted with appropriate modification the Supreme's Court Mt. Healthy standard where the Supreme Court in reversing a District Court stated that the burden was initially upon the Respondent plaintiff:

> "... to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor' - or, to put it in other words, that it was a 'motivating factor' in the (school) Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to Respondent's reemployment even in the absence of the protected conduct ..." (429 U.S. at 287).

The Appellate Division in East Orange Public Library, supra, specifically approved the NLRB's Wright Line analysis, incorporating the Mt. Healthy test, stating that: "We are persuaded that the Mt. Healthy approach is sound, balanced and fair to both sides ..." (180 N.J. Super. at 163).

Applying the foregoing legal rationale to the instant case, the Hearing Examiner notes that McCulley has, since becoming President of the Charging Party in January or February 1976, been the dominant spokesman and activist for the Charging Party in the intervening years. Thus, McCulley has attended all negotiations sessions, is provided with an office which he mans, and has also filed approximately 85% of the grievances filed under the agreement since 1976 (see Finding of Fact No. 6, supra). It is also noted that until 1976 McCulley's discipline was limited to a one-day suspension. However, after McCulley became President he incurred four suspensions, the two major ones of 30 days and 15 days having been reversed by arbitrators, who ordered that McCulley be made whole for lost earnings (see Finding Fact No. 7, supra).

Finally, it is noted that McCulley's activity in the processing of grievances was objected to as recently as April and May of 1981 when he was sent a memo regarding his disruption of operations in pursuing the grievance procedure. He was threatened with disciplinary action if he did not cooperate with the directions set forth in a memo of May 4, 1981 (see Finding of Fact No. 15, supra).

Based on the foregoing facts it is as plain as a pikestaff that McCulley has been engaged in the exercise of activities protected by the Act continuously since becoming President of the Charging Party in 1976. Thus, the Hearing Examiner finds and concludes that the Charging Party has established a prima facie showing sufficient to support an inference that McCulley's protected activities were a "substantial" or a "motivating" factor in the Respondent's conduct in denying McCulley consideration for employment for the positions of Building Maintenance Worker and Hospital Attendant on and after June 8, 1981.[11/]

The Charging Party, having established a prima facie case on behalf of McCulley, supra, the burden shifted to the Respondent to demonstrate that its conduct vis-a-vis McCulley was dictated by a legitimate business justification unrelated to McCulley's activities as President of the Charging Party over the years. The Hearing Examiner finds and concludes that the Respondent has failed woefully in advancing any legitimate business justification for not having considered McCulley's application for the positions of Building Maintenance Worker or Hospital Attendant prior to his termination on June 11, 1981.

It is first noted that the Charging Party has not successfully attacked as unlawful the Respondent's decision to eliminate the position of Morgue Custodian in April 1981. Plainly, the employer had a managerial prerogative so to do, especially

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11/ It is noted that while McCulley himself had never applied for these positions as of May 13, 1981, Gollin, on McCulley's behalf, had expressed an interest in these positions to Kornfeld by that date (see Finding of Fact No. 12, supra).

in the light of the declining number of autopsies performed by the Respondent over the years (see footnote 3, supra). The tainted conduct of the Respondent concerns solely its response to McCulley's request for consideration for other positions in the Respondent's hospital most or all of which would have constituted lateral moves, either by way of skill or salary. The Hearing Examiner finds completely wanting Kornfeld's "explanation" that the reason that no response was made to McCulley's application of June 8, 1981 was because McCulley had requested a preference for the position of Technical Assistant, Pathology Division on May 13, 1981. The Hearing Examiner has found this testimony of Kornfeld to be incredible (see Finding of Fact No. 12, supra).

In so far as McCulley having delayed his final application for positions to June 8, 1981, the Hearing Examiner finds this completely reasonable in view of Civil Service not having notified McCulley until June 5, 1981 that he had no special re-employment opportunities by virtue of his layoff from the position of Morgue Custodian as of June 11, 1981 (see Finding of Fact No. 14, supra).

Any question but that the Respondent was illegally motivated and lacked a substantial or any legitimate business justification for its conduct toward McCulley on and after June 8, 1981 is resolved by the job posting of June 22, 1981, 11 days after McCulley's termination. This posting included the positions of Building Maintenance Worker and Hospital Attendant, in addition to Pharmacist's Aide (see Finding of Fact No. 16, supra). Not only had these positions not been filled prior to June 11, 1981 but were still vacant as of June 22, 1981.

Based on all the foregoing, no other inference can be drawn but that the Respondent has violated Subsections(a)(1) and (3) of the Act by its conduct herein. Accordingly, an appropriate remedy will be recommended.

* * * *

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

CONCLUSION OF LAW

The Respondent violated N.J.S.A. 34:13A-5.4(a)(3), and derivatively 5.4(a)(1), when it refused to consider Richard McCulley, the President of the Charging Party, for employment as a Building Maintenance Worker or a Hospital Attendant on and after his application for said positions on June 8, 1981.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by refusing to consider Richard McCulley for employment as a Building Maintenance Worker or a Hospital Attendant on and after his application for said positions on June 8, 1981.

2. 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 the Act, particularly, by refusing to consider Richard McCulley for employment as a Building Maintenance Worker or a Hospital Attendant on and after his application for said positions on June 8, 1981.

B. That the Respondent take the following affirmative action:

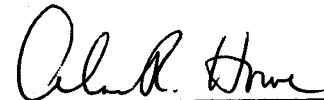
1. Forthwith offer to reemploy Richard McCulley for the position of Building Maintenance Worker or Hospital Attendant,or any other substantially equivalent position; make him whole for lost earnings from June 8, 1981 at the rate of pay for the higher of the two positions, less interim earnings, together with interest at the rate of 8% per annum from June 8, 1981. 12/

2. Post in all places were notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice, on forms

12/ See Salem County Bd. for Vocational Ed. v. McGonigle, App. Div. Docket No. A-3417-78 (9/29/80) and County of Cape May, P.E.R.C. No. 82-2, 7 NJPER 432 (1981).

to be provided by the Commission, shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced or covered by other materials.

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.



Alan R. Howe
Hearing Examiner

Dated: December 24, 1981
Trenton, New Jersey

Appendix "A"

# NOTICE TO ALL EMPLOYEES

## PURSUANT TO

AN ORDER OF THE

## PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

## NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly, by refusing to consider Richard McCulley for employment as a Building Maintenance Worker or a Hospital Attendant on and after his application for said positions on June 8, 1981.

WE WILL NOT discriminate 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 the Act, particularly, by refusing to consider Richard McCulley for employment as a Building Maintenance Worker or a Hospital Attendant on and after his application for said positions on June 8, 1981.

WE WILL forthwith offer to re-employ Richard McCulley for the position of Building Maintenance Worker or Hospital Attendant, or any other substantially equivalent position, and make him whole for lost earnings from June 8, 1981, at the rate of pay for the higher of the two positions, less interim earnings, together with interest at the rate of 8% per annum from June 8, 1981.

COUNTY OF BERGEN-OPERATING BERGEN PINES COUNTY HOSPITAL
(Public Employer)

Dated ____________________ By ____________________________________
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with James Mastriani, Chairman, Public Employment Relations Commission, 429 E. State State Street, Trenton, New Jersey 08608 Telephone (609) 292-9830.