

P.E.R.C. NO. 88-59

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

JERSEY CITY BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-87-345

JERSEY CITY EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated to him by the full Commission, finds that the Jersey City Board of Education violated the New Jersey Employer-Employee Relations Act when it unilaterally adopted a promotional procedure which violated its agreement with the Jersey City Education Association.

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Charging Party.

Appearances:

For the Respondent, William A. Massa, Esq. and
James J. Seaman, Esq.

For the Charging Party, Feintuch & Porwich, Esqs.
(Philip Feintuch, of counsel)

DECISION AND ORDER

On May 28 and September 9, 1987, the Jersey City Education Association ("Association") filed an unfair practice charge and amended charge against the Jersey City Board of Education ("Board"). The charge, as amended, alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsection 5.4(a)(5),^{1/} when it unilaterally adopted a promotional procedure which violated the parties' negotiated agreement.

^{1/} This subsection prohibits public employers, their representatives or agents from "(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."

On September 22, 1987, a Complaint and Notice of Hearing issued.

On September 24, 1987, Commission designee Edmund G. Gerber granted the Association's application for interim relief. He restrained the Board from making promotions "for a period of not less than 45 days from the final posting of a notice describing...the manner in which the selection process is being made."

On October 6, 1987, the Board filed its Answer. It contends that its promotional "processes" are authorized by the collective negotiations agreement and are pursuant to its managerial prerogative to select and promote employees.

On November 2, 1987, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and introduced exhibits.

On December 14, 1987, the Hearing Examiner issued his report and recommended decision. H.E. No. 88-25, 14 NJPER ____ (¶ ____ 1987). He determined that the Board violated the Act when it failed to notify the Association and prospective candidates of the procedural requirements for promotion; follow the new promotional criteria, and create and post a rank order list required by the parties' collective agreement. He recommended a cease and desist order and posting a notice of the violation. He declined to order any other remedy since the Board had complied with the interim relief order and had otherwise complied with the parties' agreement concerning promotional procedures.

The Hearing Examiner served his report on the parties and informed them that exceptions were due on or before December 29, 1987. Neither party filed exceptions.

The Hearing Examiner's findings of fact (pp. 4-9) are accurate. I adopt and incorporate them here. Acting pursuant to authority delegated to me by the full Commission and in the absence of exceptions, I agree with the Hearing Examiner's conclusions of law and recommended remedy.

ORDER

The Jersey City Board of Education is ordered to::

A. Cease and desist from:

1. Refusing to negotiate in good faith with the Jersey City Education Association concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the Association, particularly, by failing to notify applicants of the procedural requirements for promotions, to follow the new promotional criteria, and to create and post a rank order list.

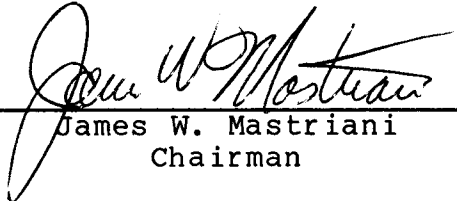
B. Take the following affirmative action:

1. 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 Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days.

Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

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

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Dated: Trenton, New Jersey
January 20, 1988

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 refuse to negotiate in good faith with the Jersey City Education Association concerning terms and conditions of employment of employees in that unit, or refuse to process grievances presented by the Association, particularly, by failing to notify applicants of the procedural requirements for promotions, to follow the new promotional criteria, and to create and post a rank order list.

Docket No. CO-H-87-345

JERSEY CITY BOARD OF EDUCATION

(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, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.

H.E. NO. 88-25

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

In the Matter of

JERSEY CITY BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-87-345

JERSEY CITY EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Board violated §5.4(a)(5) of the New Jersey Employer-Employee Relations Act when it posted on May 8, 1987, a list of promotional vacancies and a new "Selection Process" without having given employees notice of what the new process was and without explaining in layman's terms the procedures to be utilized by the Board in making promotions to the posted vacancies. The Board also failed to follow its new promotional criteria and did not create and post a rank order list.

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.

H.E. NO. 88-25

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

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Docket No. CO-H-87-345

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Appearances:

For the Respondent
William A. Massa, Esq.
James J. Seaman, Esq.

For the Charging Party
Feintuch & Porwich, Esqs.
(Philip Feintuch, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter "Commission") on May 28, 1987, and amended on September 9, 1987, by the Jersey City Education Association (hereinafter the "Charging Party" or the "Association") alleging that the Jersey City Board of Education (hereinafter the "Respondent" or the "Board") has 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 "Act"), in that the Board violated the collective negotiations agreement between the parties, i.e., the Board on May 8, 1987,

posted a list of promotional positions, to which was attached a "Selection Process," which set forth a series of requirements which candidates or applicants must meet in order to be considered for promotion to various job titles, which were also attached to the May 8, 1987 posting; that the prior practice, which utilized a written examination was eliminated; that promotions hereinafter made were to be based solely on an oral interview; and, finally, that the foregoing changes in promotional procedures were implemented without negotiations with the Association; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(5) of the Act.^{1/}

It appearing that the allegations of the unfair practice charge, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on September 22, 1987, scheduling hearings for October 30 and November 2, 1987 in Newark, New Jersey.

Prior to the issuance of the Complaint and Notice of Hearing, supra, an interim relief hearing was held upon application by the Association before Edmund G. Gerber, Commission designee, on September 14, 1987. Commission designee Gerber made the following order on the record in response to the Association's application, namely, that

^{1/} This subsection prohibits public employers, their representatives or agents from: "(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."

...I am going to order...that the current selection process be suspended. I am not going to ask that the Board repeat the process up until now...I think all that is required under the law [is that] the Board is to notify applicants of what the process was and will continue to be (Tr 33, 34).

...the Board is restrained from implementing any promotions for a period of not less than 45 days from the final posting of a notice describing exactly the manner in which the selection process is being made. That notice shall remain in effect for a period of 30 days, that notice shall explain in layman's terms the procedure and shall include but shall not be limited to the applicant rating sheet which (the Board) provided...this morning....Once the ratings and rankings have been known, those ratings shall be posted for a period of not less than 15 days prior to the appointments to the vacant positions... (Tr 42, 43).^{2/}

Pursuant to the Complaint and Notice of Hearing, supra, a hearing was held on November 2, 1987, in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Both parties argued orally and waived the filing of post-hearing briefs.

An unfair practice charge, as amended, having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration

^{2/} On June 2, 1980, the Board had initiated a scope proceeding on a range of issues, including promotions, and the Commission in Jersey City Bd. of Ed., P.E.R.C. No. 82-52, 7 NJPER 682 (¶12308 1981)[Jersey City I] held, inter alia, that certain of the District's promotional policies were procedural and negotiable while others were non-negotiable managerial prerogatives. See also, Jersey City Bd. of Ed., P.E.R.C. No. 82-110, 8 NJPER 318 (¶13144 1982)[Jersey City II] and Jersey City Ed. Assn. v. Jersey City Bd. of Ed., 218 N.J. Super. 177 (App. Div. 1987). Relevant parts of these decisions will be discussed hereinafter.

of the oral argument of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record in this case,^{3/} the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Jersey City Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Jersey City Education Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. There was received in evidence the collective negotiations agreement between the parties covering the period September 1, 1984 through August 31, 1986 (J-1) and the successor collective negotiations agreement covering the period September 1, 1986 through August 31, 1988 (J-2).

4. The two collective negotiations agreements, J-1 and J-2, supra, contain identical provisions regarding "Promotions."

Article 16 in each agreement provides as follows:

16-1. The administrative and supervisory positions listed below shall be filled by Board appointment, in order of numerical ranking from appropriate eligibility lists.

3/ No reference has been made to the transcript of the Interim Relief hearing held on September 14, 1987, supra.

16-2. It is agreed that, in administering this policy: Vacancies to be filled shall be publicized in all schools within ten (10) school days after an opening occurs.

16-3. All publicity and notices of such vacancies and positions shall set forth qualifications for and duties of the positions.

16-4. Promotional examinations shall be held within sixty (60) days following said announcement. Any necessary extension of this period shall be made by mutual agreement between the Office of the Superintendent of Schools and the Association.

16-5. All vacancies and positions shall be filled without regard to race, age, creed, color, religion, nationality, sex, or marital status.

5. The Board in 1981 commenced using a written examination in addition to an oral examination for promotions in the District pursuant to the contract provisions on promotion in Art. 16, supra.

6. Due to litigation between the parties, the last promotions were made in 1983, at which time a written examination was used in addition to the oral examination. Historically, the weight given to the written examination was 40% and the weight given to the oral examination was 60%.

7. Thomas J. Favia, the First Vice-President of the Association, testified that the Association never objected to the weight given to the oral examination used in promotions. Louis Lanzillo, the First Assistant Superintendent for Personnel, and the Grievance Chairman for the Association from 1979 to 1985, testified without contradiction that the Association never challenged the use by the Board of an oral examination in promotions.

8. Favia testified without contradiction that in the negotiations which resulted in the current collective negotiations agreement (J-2, supra), the Board made no proposals for any change in the promotional procedure(s) nor were there any negotiations regarding any change in the promotional procedure(s).

9. On or about May 8, 1987, the Board posted a list of 18 positions for which promotions were available "...to persons in the district who presently meet the requirements indicated on the attached job descriptions..." (J-3). The first page of this posting set forth the procedure for making application to the open positions and set a deadline for the receipt of applications of May 22, 1987. The second page of the posting (J-3) outlined a new "Selection Process" for determining "...qualified candidates for available promotional positions..." It was stipulated that this "Selection Process" did not provide for a written examination but did by its terms provide for an oral examination or interview.

10. Lanzillo explained in detail the changes that had occurred in the "Selection Process" as set forth in J-3. There are seven paragraphs set forth in the "Selection Process," the first four of which determine whether or not an applicant becomes qualified to take the oral examination or interview, which is conducted by the Personnel Review Committee (PRC).^{4/}

^{4/} The Personnel Review Committee consists of four members: an Assistant Superintendent; an Administrator (a Principal or Supervisor); a Parent; and a Board Member. It is not a requirement that the composition of the PRC be the same for the interview of each applicant.

(a) First, the professional qualifications of the applicant, as per the job description, are reviewed by the PRC. Secondly, the applicant must submit a biographical/experience questionnaire, which consists of the applicant's statement of community, professional and other related experience. The applicant's administrative/supervisory job experience is rated by the PRC based on years of experience in specific positions. Finally, the applicant's job performance in previous positions, based on recommendations and formal evaluations, are to be reviewed by the PRC. [See Tr 48, 51-54, 56].

(b) Lanzillo testified that applicants, who responded to J-3, supra, were rated by a point value system for biographical background and community/professional/administrative and work-related experience. Additionally, points were given to the three recommendations submitted by each applicant. Finally, points were given to each applicant's evaluations.

(c) Paragraph 6 of the "Selection Process" (J-3, p. 2, supra) sets forth six areas of inquiry for oral examination or interview by the PRC. The questions propounded to applicants by the PRC were developed by Nicholas Duva, the Director of Research of the Board (Tr 58). Lanzillo testified that there was no standard answer or any rule for the scoring of answers, it being a judgment made by the PRC (Tr 58, 59). Based on the oral interview, and the points received in the six areas of inquiry, each applicant was given a final point rating.

11. Favia testified without contradiction that there had been no negotiations between the Association and the Board regarding the change in the "Selection Process" set forth in J-3, supra. Lanzillo acknowledged that the above "Selection Process" failed to indicate how an applicant would know the basis for the top 25% grouping, or how he or she would be rated.

12. In response to the order made upon the record by Commission designee Gerber on September 14, 1987, supra, the Board undertook to make certain changes in its promotional policy. Commission designee Gerber had ordered that the Board be restrained from implementing any promotions for a period of not less than 45 days from the final posting of a notice describing exactly the manner in which the "Selection Process" was being made and, further, that the notice should remain in effect for a period of 30 days and explain in layman's terms the procedure for promotions. Finally, Commission designee Gerber ordered that once the ratings and rankings had been known, those ratings and rankings were to be posted for a period of not less than 15 days prior to the appointments to the vacant positions (Tr 42, 43).

13. The Board on September 24, 1987, adopted a resolution, which first recited the procedural history of this case, i.e., (1) an action by the Association in the Superior Court of Hudson County challenging the promotional process of the Board, which is still pending; (2) the institution of the instant Unfair Practice Charge before the Commission by the Association; and (3) the holding of a

hearing before Commission designee Gerber, as a result of which the Board was advised to post notices for 30 days specifying in detail the process used in order to establish an appropriate eligibility list and resultant rank order of successful candidates and to post the names of these candidates for a period of 15 days (R-2). The action of the Board was to appoint a list of candidates to a series of positions in an "acting capacity," pending the conclusion of litigation before the Superior Court and the Commission for a period expiring August 31, 1988 (R-2).

14. Following the Board's resolution of September 24, 1987, supra, the administration of the Board undertook to rate all applicants numerically, based on the process outlined in Finding of Fact No. 10, supra. Every applicant was scored exactly alike by Touche Ross in order to establish a cutoff of applicants at 25% so that they might proceed to the oral interview or examination. This procedural aspect of the promotion process was set forth in a memo to all Instructional Personnel, dated September 29, 1987 (R-1), which was posted for 30 days and thereafter a promotional list in rank order was prepared for each position, the total number involving some 75 employees of the Board (CP-1).

DISCUSSION AND ANALYSIS

The Respondent Board Violated §5.4(a)(5) Of The Act When, On May 8, 1987, It Unilaterally Changed Its Promotional Policy.^{5/}

The parties to this proceeding have had a long history in terms of litigating over the promotional policy and procedure of the Board. For example, the Board on June 2, 1980, filed a "Scope Petition" (Jersey City I, supra), which raised a series of negotiable versus non-negotiable issues, among which were those involving the Board's promotional policies and procedures. The Commission concluded that while many provisions involved criteria and were non-negotiable there were a number of provisions that involved procedures regarding promotions which were mandatorily negotiable. Interestingly, the Commission addressed a number of contentions of the parties regarding Art. 16, which is herein involved, stating that while certain procedural aspects of the decision to promote are negotiable "...other aspects, such as the qualifications and criteria for promotion as well as the method of selection of candidates, are beyond the scope of collective negotiations..." (emphasis supplied)(7 NJPER at 685). Thus, while Art. 16-1, which requires the Board to promote candidates "...in order of numerical ranking ranking..." is procedural in nature and a subject of collective negotiations, this is true only so long as the

^{5/} In adjudicating the question of whether the Board violated the Act, the Hearing Examiner can only consider the events prior to the filing of the Unfair Practice Charge on May 28, 1987. The steps taken by the Board following the Interim Relief hearing on September 14, 1987 operate only to affect the remedy, infra.

provision is not construed to require the Board to make a promotion from a list resulting from an announced vacancy, the Board retaining the prerogative to promote only qualified candidates (see 7 NJPER at 685 and State of New Jersey, etc. v, State Troopers NCO, etc., 179 N.J. Super. 80 (App. Div. 1981). In this connection, the Appellate Division in State Troopers, supra, determined that even after announcing a vacancy with specific criteria and numerical weights, the State had the discretion, after promulgating a list, to determine that a promotion need not be made at all, indicating, for example, that the highest score has not produced a sufficiently qualified person to justify a promotion.

Also, in Jersey City I, Art. 16-1.1 required that the numerical ranking be determined through competitive examinations, made up of written and oral sections. The Commission said in Jersey City I that "While it has been determined that contract provisions which require that announcement of job vacancies contain the exact weight to be assigned to each criterion, State Troopers, supra, 179 N.J. Super. at 89, the establishment of such criteria is a managerial prerogative and is not mandatorily negotiable" (emphasis supplied)(7 NJPER at 685).

Further, the Commission quoted additionally from the Appellate Division in State Troopers when it noted that: "...whether a written examination shall be given involves a managerial function relating to the establishment of criteria and that the determination, together with the type, administration and

scoring of the examination, is a necessary extension of the management decision..." (179 N.J. Super. at 90).

The Commission next proceeded to observe that while candidates for promotion should be made aware of the basis upon which they would be evaluated, it was clear to the Commission that the Art. 16-1 requirement that promotional examinations be made up of both written and oral parts, and that certain weights be given to those parts, was an impermissible infringement upon a managerial prerogative.

Finally, for purposes of the instant decision, it is noted that the Commission determined in Jersey City I that union participation in the promotional process infringes upon a management prerogative and is not negotiable: Rutgers, The State University, P.E.R.C. No. 76-13, 2 NJPER 13 (1976).

The Hearing Examiner necessarily concludes from the Commission's decision in Jersey City I, supra, that a union, such as the Association herein, is limited to contesting only the procedural-negotiable components of the promotional process as opposed to the criteria-non-negotiable aspects of the promotional process.

Additional evidence of Commission policy regarding the promotional policies of the instant Board is found in Jersey City II, supra, where a different unit of the Board's employees was involved, namely, the administrators and supervisors. Here also there was involved a provision dealing with appointments in order of

numerical ranking from appropriate eligibility lists. Again, this was held mandatorily negotiable so long as it was not construed to require the Board to make a promotion after announcing a vacancy.

There was another clause in Jersey City II which provided for numerical ranking by competitive examinations which were weighted 40% for the written section and 60% for the oral section. Here the Commission, quoting from State Troopers, supra, stated that the public employer must be free to alter unilaterally the criteria or method of selection, provided it complies with any notice provisions.

...A contractual provision cannot require an employer to use a particular method of evaluation during the duration of the contract. The Court specifically approved our previous holding that whether a written examination shall be given involves a managerial function relating to the establishment of criteria and that such a determination, together with the type, administration and scoring of the examination, is a necessary extension of managerial decision-making..." (emphasis supplied)(8 NJPER at 320).

The Commission then stated that the provision in question, involving the giving of written examinations and oral examinations and the weights to be assigned thereto was "...non-negotiable because it requires the Board to base promotions upon competitive examinations during the duration of the contract..."

Finally, there is also the relevant Appellate Division decision involving the instant parties, to which the Hearing Examiner refers and which he has cited above, namely, 218 N.J.

Super. 177 (1987).^{6/} While this decision deals at length with the infirmities of an arbitration award, it also deals at the end thereof with the procedural requirements of Art. 16-1, some of which are found in Art. 16 of J-1 and J-2, supra. The Court said, in pertinent part:

...We fully agree that the procedural requirements of Article 16-1 required the Board to first compile a rank order list and then promote from that list. Even though the Board was free to unilaterally determine the promotion criteria, it was obligated after making that determination to give notice as to what the requirements were for promotion. It was also obligated to follow the criteria it established. Procedurally, it was then required to compile a rank order list. This the Board did not do. It simply conducted interviews and then made promotions. It made no apparent attempt to create a rank order list. In these circumstances, the arbitrator correctly decided that the appointments involved in Grievance #2 which were made from no list violated Article 16-1 of the Agreement...(emphasis supplied)(218 N.J. Super. at 195).

* * * *

Jersey City I & II, supra, and the Jersey City Appellate Division decision, supra, make it abundantly clear that the area of negotiability for promotions is narrow. Thus, "...qualifications and criteria for promotion as well as the method of selection of candidates, are beyond the scope of collective negotiations..." (7 NJPER at 685). Further, "...the type, administration and scoring of

^{6/} To complete the circle, there is one other proceeding involving the instant parties, which should be noted although not immediately relevant to the disposition in the instant case: I.R. No. 85-13, 11 NJPER 415 (¶16144 1985), aff'd P.E.R.C. No. 86-134, 12 NJPER 450 (¶17169 1986).

the examination, is a necessary extension of the management decision..." (179 N.J. Super. at 90). Finally, "...A contractual provision cannot require an employer to use a particular method of evaluation during the duration of the contract...(and)...whether a written examination shall be given involves a managerial function relating to the establishment of criteria and...is a necessary extension of managerial decision-making..." (8 NJPER at 320).

However, as the Appellate Division noted in its Jersey City decision, supra, the contract required the Board to compile a rank order list and promote from that list and, even though the Board was free to determine unilaterally the promotion criteria, "...it was obligated after making that determination to give notice as to what the requirements were for promotion. It was also obligated to follow the criteria it established. Procedurally, it was then required to compile a rank order list..." (218 N.J. Super. at 195). It is clear that the Board in the instant case did not follow the mandate of the Appellate Division's decision, supra. The deficiencies in the conduct of the Board are as follows:

1. Although Art. 16-1 through 16-3 of J-2, supra, provide for promotions in order of numerical ranking from appropriate eligibility lists with the necessary publicity regarding notices of vacancies and the qualifications and duties of the positions, the notice which the Board posted on May 8, 1987 (J-3) failed to meet the foregoing procedural requisites in J-2.

2. The second page of J-3, which outlined a new "Selection Process" for determining qualified candidates, failed to provide adequate notice as to what the requirements were for promotion. As noted by Commission designee Gerber, a proper notice should explain the promotion procedure in layman's terms. The testimony of Lanzillo outlined in detail the actual procedural aspects of the "Selection Process," supra, which should have, in some form, been incorporated into J-3 so that an applicant would have had notice as to what the requirements were for promotion to the 18 positions for which vacancies then existed (see Finding of Fact No. 10, supra). As set forth in Finding of Fact No. 10, supra, the respective weights given to the various criteria were delineated and the basis for attaining the necessary points were explained so that an applicant could have understood how he or she could qualify for inclusion in the top 25%, following which an invitation would issue for a formal interview with the PRC. This, of course, the Board failed to do when it prepared the May 8, 1987 posting (J-3, supra) and Lanzillo acknowledged this failure (see Finding of Fact No. 11, supra).

3. It was conceded by the parties that the Board never gave notice to the Association in negotiations of its intentions to change or modify the procedures attendant to its promotional policy or process during the term of J-2 (September 1, 1986 through August 31, 1988). Thus, there were no negotiations between the parties with respect to this issue.

Given the foregoing deficiencies in the May 8, 1987 posting for promotions to the 18 positions listed, the Hearing Examiner finds and concludes that the Board violated §5.4(a)(5) of the Act by its failure, after establishing the promotion criteria in J-3, to have given proper notice to applicants as to what the requirements were for promotion and thereafter to follow the new promotional criteria established, which should have ended in the compilation of a rank order promotion list. As the Appellate Division stated in Jersey City, supra, the Board merely conducted its "Selection Process" interviews and then made promotions with no apparent attempt to create a rank order list (218 N.J. Super. at 195).

THE APPROPRIATE REMEDY

Inasmuch as the Board has complied with the interim relief order entered by Commission designee Gerber on September 14, 1987, the Recommended Order of the Hearing Examiner will be tailored to what has already taken place.

Commission designee Gerber restrained the Board from implementing any promotions for a period of not less than 45 days from the final posting of a notice describing exactly the manner in which the selection process was being made. This latter notice was to remain in effect for a period of 30 days and once the ratings and rankings were known they were to be posted for a period of not less than 15 days before appointments to the vacant positions.

In response to the Gerber order of September 14, 1987, the Board on September 24, 1987, adopted a resolution, which appointed a

list of candidates to a series of positions in an "acting capacity," pending the conclusion, inter alia, of litigation before the Commission. This list is not to expire until August 31, 1988.

Following the Board's resolution of September 24th, the administration undertook to rate all applicants numerically based on the process outlined in Finding of Fact No. 10, supra. Every applicant was scored exactly alike in order to establish a cutoff of applicants at 25%, as provided in J-3, so that they might proceed to the oral interview examination. This procedural aspect of the promotion process was set forth in a memo to all Instructional Personnel under date of September 29, 1987, which was posted for 30 days as directed by Commission designee Gerber and thereafter a promotional list in rank order was prepared for each of the 18 positions, the total number of candidates involving some 75 employees of the Board.

It appearing to the Hearing Examiner that since the Board has fully complied not only with the interim relief order of Commission designee Gerber but with the procedural requisites for promotions as outlined in the decisions of the Commission in Jersey City I and Jersey City II as well as the Appellate Division decision in Jersey City, supra, all of the affirmative requirements of a Recommended Order by the Hearing Examiner have been met. The superintendent is at this point free to make the necessary appointments in rank order from the current promotional list, involving some 75 candidates, and, thus, the Hearing Examiner need only recommend a cease and desist order in the usual fashion.

* * * *

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

CONCLUSION OF LAW

The Respondent Board violated N.J.S.A. 34:13A-5.4(a)(5) of the Act when on May 8, 1987, it posted a list of positions for promotion and included in this posting a new "Selection Process" for determining qualified candidates, which posting, however, failed to notify applicants of the procedural requirements for promotion. Further, the Respondent Board failed to follow its new promotional criteria and to create and post a rank order list.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Board cease and desist from:

1. 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, particularly, by failing to notify applicants of the procedural requirements for promotions, and to follow the new promotional criteria, and to create and post a rank order list.

B. That the Respondent Board take the following affirmative action:^{7/}

1. 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 Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

C. 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 14, 1987
Trenton, New Jersey

^{7/} Because of the affirmative steps taken by the Board to date, as a result of the order of Commission designee Gerber in the interim relief proceeding on September 14, 1987, supra, no additional affirmative order need be recommended. Designee Gerber's order of September 14th, having been self-executing, would appear to be moot.

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 refuse 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 refuse to process grievances presented by the majority representative, particularly, by failing to notify applicants of the procedural requirements for promotions, and to follow the new promotional criteria, and to create and post a rank order list.

Docket No. CO-H-87-345

JERSEY CITY BOARD OF EDUCATION

(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, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.