I.R. NO. 96-4

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNIVERSITY OF MEDICINE AND DENTISTRY
OF NEW JERSEY,

Respondent,

-and- Docket Nos. CO-96-3 and CO-96-7

LOCAL 5094, HOSPITAL PROFESSIONALS
AND ALLIED EMPLOYEES OF NEW JERSEY,
AFT/AFL-CIO, AND LOCAL 5089, HOSPITAL PROFESSIONALS
AND ALLIED EMPLOYEES OF NEW JERSEY,
AFT/AFL-CIO,

Charging Parties.

Appearances:

For the Respondent,
Deborah T. Poritz, Attorney General of New Jersey
(Richard W. Schleifer, Deputy Attorney General)

For the Charging Parties,
Loccke & Correia, attorneys
(Leon B. Savetsky, of counsel)

INTERLOCUTORY DECISION

On July 5 and 7, 1995, two locals of the Hospital Professionals & Allied Employees of New Jersey, AFT/AFL-CIO (Locals 5089 and 5094) filed unfair practice charges against the University of Medicine and Dentistry of New Jersey alleging the University

engaged in unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (5) and (7).[1/]

On July 21, 1995, the two locals filed orders to show cause seeking interim restraints against UMDNJ. The orders were executed and consolidated and a hearing was heard on the return date of August 1, 1995.

The facts are not in dispute.

The parties are engaged in collective negotiations for a successor agreement. The most recent agreements expired on June 30, 1995. Both agreements provide for a grievance procedure ending in binding arbitration. Both agreements state:

> The arbitration provision of this Agreement expires at the same time as the Agreement expires and neither party shall be obligated to arbitrate any matter after expiration of this Agreement and no arbitrator shall have the power to arbitrate any matter after this Agreement has expired.

On June 23, 1995, one week before the expiration of the agreement, the University's Director of Labor Relations sent letters

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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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (7) Violating any of the rules and regulations established by the commission."

to both locals advising them of the employer's position that the arbitration provisions of the agreements would not remain in effect after June 30, the expiration date of the agreements; in the absence of successor agreements, no currently scheduled arbitration between the parties could go forward and; further, any arbitration scheduled to be held after June 30, 1995 could not take place.

There were six arbitrations pending at the expiration of the contract. Two hearings had already commenced. One of the arbitrations had already had three days of hearing and involved the calculation of holiday overtime compensation for 500 nurses for work already performed. The other arbitrations involved claims of unjust discipline and alleged contract violations which arose before the contract expired. The University sent letters to the respective arbitrators in all pending arbitrations stating that no authority existed for any arbitration hearing to either commence or continue. The University has stated that when a new contract is entered into, it will resume the arbitrations. The University does not seek to exclude its binding arbitration clause from any successor contract.

The locals do not dispute that the employer has no obligation to participate in arbitrations over disputes arising and grievances filed after the expiration of the contract. They do contest the employer's right to discontinue arbitrations already in progress before the contract expired.

The locals rely on Nolde Bros. v. Bakery Workers, 430 U.S. 243 51 L. Ed 2d 300, 94 LRRM 2753 (1977), where a union sought to

arbitrate severance pay for employees when the employer closed a bakery shortly after the parties' contract expired. The Court held that the dispute was contractually arbitrable. The locals rely on this language in Nolde:

> Our prior decisions have indeed held that the arbitration duty is a creature of the collective-bargaining agreement and that a party cannot be compelled to arbitrate any matter in the absence of a contractual obligation to do so. Adherence to these principles, however, does not require us to hold that termination of a collective-bargaining agreement automatically extinguishes a party's duty to arbitrate grievances arising under the contract. Carried to its logical conclusion that argument would preclude the entry of a post-contract arbitration order even when the dispute arose during the life of the contract but arbitration proceedings had not begun before termination. The same would be true if arbitration processes began but were not completed, during the contract's term. Yet it could not seriously be contended in either instance that the expiration of the contract would terminate the parties' contractual obligation to resolve such a dispute in an arbitral, rather than a judicial forum. (citations omitted) Nolde concedes as much by limiting its claim of nonarbitrability to those disputes which clearly arise after the contract'S expiration. LRRM at 2756.

The locals also cite Litton Financial Printing Div. v. NLRB, 501 U.S. 190, 137 LRRM 2441, 115 L. Ed. 2d 177 (1991) which narrowed Nolde but nevertheless upheld a finding by the NLRB that an employer's refusal to arbitrate a certain grievance after the expiration of the contract constituted an unlawful refusal to bargain, a violation of §8(a)(1) and (5) of the National Labor Relations Act, 29 USC §158. The Court held that "[R]ights which are accrued or vested under the agreement will

survive termination of the agreement" and are subject to arbitration even after the expiration of the agreement. The locals argue that the University's actions constitute a unilateral alteration of a term and condition of employment during negotiations and thus cause irreparable harm. Galloway Tp. Bd. of Ed. v. Galloway Township Ed. Assn., 78 N.J. 25 (1978).

The University argues that the sole issue presented is one of contract interpretation and that the Commission has no jurisdiction to hear this contractual arbitrability dispute. It relies on Ridgefield Park Ed. Assn. v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978) where the Court stated that issues of contract arbitrability are "questions for the arbitrator and/or the Court." Id 154. In the alternative, it argues that as a matter of law, the contract frees both parties from arbitrating any matter after the contract expires and therefore, its suspension of all outstanding arbitrations did not alter a term and condition of employment. Finally, it argues that neither Nolde nor Litton is controlling because the collective bargaining agreements in those cases did not contain a sunset provision.

The standards that have been developed by the Commission for evaluating interim relief requests are similar to those applied by the courts when addressing similar applications. The moving party must demonstrate that it has a substantial likelihood of success in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested

relief is not granted. Further, in evaluating such requests for relief, the relative hardship to the parties and the public interest in granting or denying the relief must be considered.[2/]

Ridgefield Park addresses the appropriate jurisdiction for determining contract arbitrability. It does not address jurisdiction to consider unfair practice charges. The Commission "has exclusive power...to prevent anyone from engaging in any unfair practice." N.J.S.A. 34:13A-5.4(c).

The Commission, as affirmed by the Courts, has consistently held that it is an unfair practice for an employer to unilaterally alter the status quo[3/] concerning employment conditions during negotiations; one cannot act unilaterally and simultaneously negotiate about the same issue. Any alteration of a term and condition of employment before impasse impermissibly interferes with the negotiation process. This interference is irreparable in nature and can only be remedied by the granting of an interim order. Galloway. Rutgers, the State Univ. and Rutgers Univ. College

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2/ Crowe v. DeGioia, 90 N.J. 126 (1982); Tp. of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Tp. of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 36 (1975).

3/ Terms and conditions of employment, rather than contractual provisions themselves constitutes the status quo. Although they may have been created by a contract, contract rights do not survive the life of the contract, only terms and conditions of employment remain in effect during negotiations. Galloway; State of New Jersey, I.R. No. 82-2, 7 NJPER 532 (¶12142 1981).

Teachers Ass'n., P.E.R.C. No. 80-66, 5 NJPER 539 (¶10278 1979) aff'd and modified App Div. Dkt No. A-1572-79 (4/1/81); State of New Jersey; City of Vineland, I.R. No. 81-1, 7 NJPER 234 (¶12142 1981) interim order enforced and leave to appeal denied App. Div. Dkt No. A-1037-80T3 (7/15/81).

I believe that the locals have a substantial likelihood of proving that the employer has altered the status quo by unilaterally discontinuing arbitration proceedings already begun before the contract expired. The canceled arbitrations all concern grievances over contractual claims arising during the life of the contract. In two cases, hearings had already begun; and in all cases, the parties had mutually begun the arbitration process by selecting arbitrators. The employer does not dispute that the arbitrations will ultimately be completed and only seeks to delay these arbitrations until after the hiatus between contracts is over. Under all the circumstances of this case, I believe that the status quo encompasses continuing rather than terminating the arbitrations that were already underway when the contract expired.

The University argues that the contract permitted it to discontinue the arbitrations. An employer may change an employment condition if a contract clearly and unequivocally authorizes such a change. Red Bank Reg. H.S. Bd. of Ed. v. Red Bank Reg. Ed. Ass'n., 78 N.J. 122, 140 (1978); State of New Jersey. I am not persuaded that the contractual language relied upon by the employer constitutes a clear and unequivocal waiver; it does not expressly and specifically refer

to arbitrations that had already begun and thus were within the arbitrator's jurisdiction before the contract expired. Under all the circumstances of this case, I believe that it was incumbent upon the employer to ask a Court (or an arbitrator) to resolve its contractual arbitrability claim before it unilaterally terminated arbitration proceedings that had already begun[4/] Here, given the employer's recognition that these matters ultimately will return to arbitration minimal harm will result in ordering the University to do so before the resolution of negotiations over the matters. I believe that the public interest in a viable negotiations process also favors granting interim relief preserving the status quo during the sensitive negotiations period between contracts. Cf. Woodstown-Pilesgrove Reg. H.S. Dist. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Assn., 81 N.J. 582, 591 (1980).

Having concluded that the locals have met the applicable standards, I will issue an interim relief order requiring the employer to reschedule the suspended arbitrations. That order, however, will permit the employer an opportunity to apply to Superior Court for an order restraining arbitrability on the grounds that the grievances in dispute are not contractually arbitrable, an issue I have not addressed.

4/ I stress that I do not address or resolve the contractual arbitrability question. That is a separate and distinct question from whether the employer may have committed an unfair practice by terminating arbitration proceedings unilaterally.

Accordingly, it is hereby ORDERED that within the next 30 days, the University and the charging parties shall meet to reschedule the suspended arbitrations unless the University has within that 30 day period applied for a Superior Court order restraining completion of the already commenced arbitration proceedings.

BY ORDER OF THE COMMISSION

Edmund G. Gerber
Commission Designee

DATED: August 29, 1995
Trenton, New Jersey