

P.E.R.C. NO. 2002-37

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 No. CO-H-98-190

UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY,
COUNCIL OF AMERICAN ASSOCIATION
OF UNIVERSITY PROFESSORS CHAPTERS,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against the University of Medicine & Dentistry of New Jersey. The Complaint was based on an unfair practice charge filed by the University of Medicine and Dentistry of New Jersey Council of American Association of University Professors Chapters. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act when it did not renew Anne Ugrovics' employment contract because of her protected activities and did not renew Patrice Case's contract to conceal that unlawful action. The Commission concludes that there is not enough credible evidence of hostility to warrant a conclusion that the employer acted for anti-union reasons.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Charging Party.

Appearances:

For the Respondent, John J. Farmer, Jr., Attorney General
of New Jersey (Cindy K. Miller, Senior Deputy Attorney
General, before the Hearing Examiner; Michael J.
Gonnella, Deputy Attorney General, on the answering brief)

For the Charging Party, Sterns & Weinroth, P.C.
(Mark D. Schorr, of counsel)

DECISION

On November 26, 1997, the University of Medicine and
Dentistry of New Jersey Council of American Association of
University Professors Chapters (AAUP) filed an unfair practice
charge against the University of Medicine and Dentistry of New
Jersey.^{1/} The charge alleges that the employer violated the New

^{1/} The charge was filed on behalf of the AAUP, Anne Ugrovics
and Patrice Case, but was litigated on behalf of the AAUP.

Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (3),^{2/} when it did not renew Anne Ugrovics' employment contract because of her protected activities and, in an attempt to conceal that unlawful action, did not renew Patrice Case's contract.

On May 20, 1998, a Complaint and Notice of Hearing issued. On June 8, UMDNJ filed its Answer. The employer asserts that it had filled all positions within the School for which Ugrovics and Case were qualified

On May 4 and 5, 1999, Hearing Examiner Charles A. Tadduni conducted a hearing. The parties examined witnesses and introduced exhibits.

On October 11, 2001, the Hearing Examiner issued his report recommending that the Complaint be dismissed. H.E. No. 2002-3, 28 NJPER ____ (¶____ 2001). He found that the charging party did not establish that the two faculty members were laid off in retaliation for the exercise of protected rights. He further found that the employer established legitimate, non-discriminatory reasons for the layoff.

^{2/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

On October 26, 2001, AAUP filed exceptions. It argues that the issue is why Ugrovics and Case were singled out for layoff and that the two reasons asserted by UMDNJ are pretextual. The AAUP asserts that although Frances Quinless, Dean of the School of Nursing, testified that Ugrovics and Case failed to fulfill any of her three strategic goals (pursuing a doctoral degree, retooling to gain certification as a primary care nurse practitioner, and becoming engaged in the School Community Health Services Program), she allegedly repudiated that testimony when she admitted that three of the seven faculty members she did retain were indistinguishable in those respects. AAUP also argues that Quinless's explanation that other faculty were more versatile than Ugrovics and Case should be rejected because Quinless made those comparisons for the first time on redirect examination. AAUP also relies on its post-hearing submissions.

On November 2, 2001, UMDNJ filed an answering brief. It asserts that except for its discussion concerning Quinless's allegedly repudiated testimony, AAUP does not specify any questions of procedure, fact, law or policy to which exception is taken, as required by N.J.A.C. 19:14-7.3. As for the allegedly repudiated testimony, UMDNJ argues that Quinless never testified that the three retained employees fulfilled her strategic goals. UMDNJ contends that many factors affected the Dean's retention decisions, but none involved hostility toward Ugrovics for her protected activity. Finally, UMDNJ questions the practice of

incorporating post-hearing briefs by reference. Without waiving its objection, it also relies on its post-hearing submissions.

We have reviewed the record. We adopt and incorporate the Hearing Examiner's findings of fact (H.E. at 3-29).

We begin with a procedural issue. N.J.A.C. 19:14-7.3(b) requires that:

Each exception shall specify each question of procedure, fact, law, or policy to which exception is taken; identify that part of the report and recommended decision to which objection is made; designate by precise page citation the portions of the record relied on; state the grounds for the exception; and include the citation of authorities unless set forth in a supporting brief. Any exception which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with these requirements may be disregarded.

While we have permitted parties to incorporate post-hearing arguments, they are an adjunct to and not a substitute for exceptions and a brief in support of exceptions or an answering brief. We will not consider any argument not raised in the exceptions or answering brief.

Under In re Tp. of Bridgewater, 95 N.J. 235 (1984), no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for us to resolve.

Anne Ugrovics taught in the associate's degree program (ASN) of the School of Nursing and was a very active AAUP member. She was the only faculty member from the School active in contract negotiations; and she was active in grievance filing and processing.

Enrollment in the ASN program declined. UMDNJ bylaws require that faculty with one year appointments must be notified of reappointment or non-reappointment three months before their contract expires. Faculty with two year appointments must be given six months notice. Faculty with three year or longer appointments must be given one year's notice.

In December 1996, Quinless notified seven ASN faculty members whose contracts would expire in June 1997 that they were being reappointed.^{3/} Quinless evaluated each faculty member's qualifications, but did not compare their qualifications to those of Ugrovics or Case. UMDNJ's Board of Trustees ratified Quinless's action in March 1997. Ugrovics and Case had three-year contracts which expired in June 1998. They were notified in late May or early June 1997 that they would not be reappointed.

Quinless made her reappointment decisions upon reviewing the recommendation of the regional assistant dean. Ugrovics and Case were told that they were not being reappointed because of declining enrollment. Quinless would not discuss with them why less senior faculty had just been rehired. Quinless then suggested that Ugrovics and Case apply for positions at Englewood Medical Center. Because those positions are not funded by UMDNJ, they are not in the AAUP's negotiations unit. Ugrovics and Case applied for the positions, but were not hired.

There is no direct evidence of anti-union animus. Thus, to prove a violation, AAUP must rely on circumstantial evidence. There is no dispute that Ugrovics engaged in protected activity

^{3/} It is not clear to us exactly how many ASN faculty were reappointed during the 1996-1997 academic year. All of the documents and testimony do not appear to coincide, but resolution of that issue is not essential to this decision.

and that the employer was aware of that fact. The remaining burden on AAUP is to prove, by a preponderance of the evidence, that UMDNJ was hostile to Ugrovics' protected activity. The Hearing Examiner found that AAUP did not meet that burden. We accept that recommendation.

AAUP suggests that other employees were dismissed because they filed grievances, but the record does not bear out that allegation. AAUP suggests that seniority was used as a criterion for layoff in the past. At best, the record indicates that "junior" employees were laid off during the last round of layoffs.

AAUP points to inconsistencies in how Quinless explained why Ugrovics and Case were not renewed. At the time of the non-renewals, Ugrovics and Case were not told that they were not being renewed because of their failure to meet one or more of goals Quinless outlined. The Hearing Examiner explained that telling Case and Ugrovics that other faculty members had been reappointed because they had achieved one or more of the three strategic objectives would seem to have served little purpose at that point. That may be so, but it would have lent support to a finding that those were, in fact, the criteria that Quinless applied at the time of the non-reappointment decision.

On direct examination, Quinless testified that each of the faculty reappointed in March 1997 was meeting one or more of her three goals, and that Ugrovics and Case were not. On

cross-examination, Quinless acknowledged that three of the reappointed faculty did not meet any of those goals. AAUP argues that this contradiction in testimony undermines UMDNJ's business reason and proves hostility to Ugrovics's protected activity.

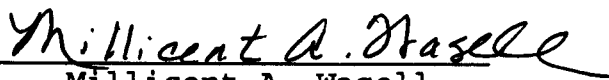
We agree with the AAUP that Quinless's rationale for choosing whom not to renew was undercut by her testimony on cross-examination. Three of the seven reappointed faculty do not appear to have met the criteria any more than Ugrovics and Case. The fact that Quinless was able to review the faculty's respective qualifications at hearing and indicate that Ugrovics and Case were the least qualified does not reflect her motivation at the time of the non-reappointment decisions where the testimony shows that Quinless did not make those comparisons at that time.

Nevertheless, we will still adopt the Hearing Examiner's recommendation to dismiss the Complaint. Bridgewater requires that the charging party prove by a preponderance of the evidence that protected activity was a substantial or motivating factor in an adverse personnel action. The fact that the administration may not have had clearly articulated standards in its decisionmaking does not mean that it acted because of hostility to protected activity. There is simply not enough credible evidence of hostility to warrant a conclusion that UMDNJ acted for anti-union reasons. Accordingly, we dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners McGlynn, Ricci and Sandman voted in favor of this decision. Commissioners Buchanan, Muscato and Madonna voted against this decision.

DATED: December 20, 2001
Trenton, New Jersey

ISSUED: December 21, 2001

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ANNE UGROVICS AND PATRICE CASE,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss a complaint filed by the charging Party, AAUP, alleging that the public employer, UMDNJ, violated subsections 5.4a(1) and (3) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

The Hearing Examiner found that the Charging Party failed to establish that the University had laid off two faculty members in retaliation for the exercise of protected rights. The Hearing Examiner found no direct evidence of hostility to protected activity and only weak circumstantial evidence of hostility -- there was a layoff, one of the two laid off employees was a union activist and the employer did not use seniority to determine whom to layoff. Further, the Hearing Examiner found that the employer had established cogent reasons for the layoff and the decision concerning whom to layoff -- the layoff was due to declining program enrollments and resultant financial factors; all unit employees had satisfactory performance ratings; the employer renewed employee contracts in the order of their contract renewal dates; had the employer valued all its employees, it would have determined to layoff the same two employees based upon overall qualifications, flexibility and usefulness to the University's changing nursing program.

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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent, John J. Farmer, Jr., Attorney General
of New Jersey
(Cindy K. Miller, Senior Deputy Attorney General)

For the Charging Party, Sterns & Weinroth, P.C.
(Mark D. Schorr, of counsel)

**HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION**

On November 26, 1997, the University of Medicine and
Dentistry of New Jersey Council of American Association of
University Professors Chapters, (AAUP), Anne Ugrovics (Ugrovics) and
Patrice Case (Case), collectively filed an unfair practice charge
(C-1)^{1/} with the Public Employment Relations Commission against

^{1/} "C" refers to Commission exhibits received into evidence at
the hearing in the instant matter. "CP" and "R" refer to
the Charging Party's exhibits and Respondent's exhibits,
respectively, received into evidence at the hearing .
Transcripts of the successive days of hearing are referred
to as "1T" and "2T."

the University of Medicine and Dentistry of New Jersey (UMDNJ or the University), alleging that UMDNJ violated provisions 5.4a(1) and (3) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).^{2/} Specifically, the AAUP alleges that UMDNJ unlawfully failed to renew Ugrovics' employment contract because of her protected activities and further unlawfully failed to renew Case's employment contract so that its unlawful action with respect to Ugrovics would be concealed. The AAUP claims that UMDNJ has consistently discriminated against its faculty members by failing to renew their contracts or discharging them, because they have engaged in protected activities. Finally, the AAUP asserts that UMDNJ discriminated against Ugrovics and Case: (1) in retaliation for Ugrovics' protected activities and (2) in order to discourage them and the AAUP from exercising rights guaranteed by the Act.

On May 20, 1998, the Director of Unfair Practices issued a Complaint and Notice of Hearing with respect to the unfair practice charge (C-1).

On June 8, 1998, UMDNJ filed an Answer (C-2) to the charge, denying any unlawful actions. Specifically, UMDNJ claims that when Ugrovics' and Case's contracts were up for renewal, no positions

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were available within the University for which they were qualified. The University further sets forth several affirmative defenses in its Answer: 1) the Complaint fails to set forth a claim upon which relief can be granted; 2) the Complaint is barred by the statute of limitations; 3) UMDNJ acted with good faith and without fraud or malice at all relevant times; and 4) UMDNJ does not waive any defenses which may be realized during discovery.

A hearing was held on May 4 and 5, 1999. The parties filed post hearing briefs by August 6, 1999; reply briefs were filed by August 27, 1999; a surrebuttal brief was filed by the AAUP by October 1, 1999. Based upon the record in this case, I make the following:

FINDINGS OF FACT

1. The University is a public employer within the meaning of the Act, is subject to its provisions and had been the employer of Ugrovics and Case prior to June 30, 1998.
2. The AAUP is the statutory majority representative of a collective negotiations unit comprised of all full-time and part-time teaching and/or research faculty and librarians employed by the University, is subject to the Act, and was the majority representative of Ugrovics and Case.
3. The University and the AAUP are parties to a collective negotiations agreement covering the period from July 1, 1995 - June 30, 2000.

4. The University is comprised of several distinct schools. The AAUP is the collective negotiations representative for faculty and librarians employed at the following schools within the University: 1) the New Jersey Dental School; 2) the New Jersey Medical School; 3) the Robert Wood Johnson Medical School; 4) the School of Osteopathic Medicine and; 5) the School of Nursing (1T23).

Faculty at the School of Nursing became part of the AAUP unit in March 1993 (2T24). Prior to 1993, the nursing program was contained in the School of Health Related Professions. Nursing faculty was then contained in a unit represented by the NJEA. When the University created the School of Nursing, the nursing faculty chose (through a contested Commission election) to be represented by the AAUP (1T23-1T26; CP-1).^{3/} Currently, there are 1,240 persons in the AAUP unit, 21 of whom are employed in the School of Nursing (1T23). In 1993, there had been approximately 32 AAUP faculty unit employees in the School of Nursing (1T23-1T25).

Joyce Orenstein is the Executive Director of the Council of AAUP Chapters at UMDNJ and has served in that capacity for 17 years. Her duties include collective negotiations and contract administration. She also communicates with the membership and administers the Council's affairs (1T23-1T24).

^{3/} The record contains no information about the nature of the relationship between the nursing faculty, when it was represented by the NJEA, and the University.

Anne Ugrovics' Background and Employment History

5. Anne Ugrovics has been a nurse since 1966. In 1974, she received a bachelor's degree in health care administration. In 1983, she completed 12 credits toward a master's degree in hospital administration and in 1988, she received a master of science in nursing degree ("MSN") (1T56-1T57). Ugrovics does not have a Ph.D. (1T77).

6. Upon becoming a nurse in 1966, Ugrovics worked as a staff nurse in the recovery room at Mountainside Hospital for two years (approximately 1966-1968). She then worked at Point Pleasant Hospital in the coronary care unit, the intensive care unit and the emergency room, eventually serving as the supervisor for her shift (1968-?) (1T57-1T58).

Ugrovics next served as a faculty member at the Jersey Shore Medical Center School of Nursing until 1987. She then worked for the Visiting Nurses of Central Jersey as a clinical specialist in their community health services division. She served in that position for approximately one year (1987-1988). During that time, she also taught in a bachelor of science in nursing ("BSN") program at Monmouth College as an adjunct faculty member. Upon leaving Visiting Nurses, she performed foreign nurse recruitment at a staffing agency while continuing as an adjunct at Monmouth College (1988-1989) (1T57-1T58, 1T78).

The staffing agency folded after a year; Ugrovics then taught at St. Francis Hospital School of Nursing for two years

(89-91) and also taught obstetrics, pediatrics and med-surg (medical surgical nursing) part-time at Ocean County College in their associate's degree program (1T59, 2T80, 2T87-2T88). In Fall 1991, Ugrovics started teaching at the School of Nursing at UMDNJ and taught there through June 1998 (1T59-1T60).

7. The School of Nursing had several different programs during Ugrovics' employment. There was a two-year associate's degree in nursing ("ASN") program; a bachelor of science in nursing (BSN) program and a master of science in nursing (MSN) program (1T59-1T60). Ugrovics taught in the ASN program at Middlesex County College while employed by UMDNJ (1T60, 2T87). Specifically, while at UMDNJ, she taught basic nursing, psychiatric/mental health nursing, critical care med-surg, nursing management, and changes and lifelong health patterns, a course combining geriatrics and community nursing. She also designed the foundation for the course in basic nursing that was offered in her last year there, and taught a second level med-surg course (1T60, 2T80). Ugrovics never taught pediatric nursing or ob-gyn nursing at UMDNJ (2T87).

While on the faculty at UMDNJ, Ugrovics engaged in some primary care activity, serving as a community health nurse at Holy Redeemer Visiting Nurse Service in Ocean County. There, she counseled adults who had medical surgical problems, worked on the hospice team and was on-call for hospice patients in Point Pleasant Hospital. This primary care activity constituted Ugrovics' faculty practice, which was the way in which faculty worked in areas of

their expertise and produced income for the school. Ugrovics is not a nurse practitioner (2T82-2T83, 2T85-2T86).

Despite Ugrovics' years of service, the Dean of the School of Nursing, Frances Quinless, did not consider Ugrovics a "senior" faculty member in the context of an academic health science university since she was not tenured, had not engaged in scholarly research or been involved in grants research or contracts activity (2T29-2T32).

8. Ugrovics' first contract with UMDNJ was for one year, 1991-1992 (covering July 1991-June 1992); that contract was received in approximately June 1991. Her second contract was also for one year, 1992-1993; that contract was received (i.e., she received notice of contract renewal) in approximately March 1992. Ugrovics' next contract was for two years, 1993-1995; that contract was received in approximately March 1993. Her final contract was for three years, 1995-1998; that was received in approximately December 1994. Quinless notified Ugrovics that her contract would not be renewed in May 1997. All of the notices of renewal and nonrenewal were given in accordance with statutory and contractual requirements and in accordance with University practice (1T60-1T61, 1T85, 2T63-2T66).

Ugrovics Protected Activity

9. Ugrovics was one of the few faculty members from the School of Nursing active in AAUP affairs during her employment at

the University. She was the only one active in contract negotiations; she and other unit employees were active in such activities as grievance filing and processing. Ugrovics' AAUP activities began in approximately March 1993 and continued through approximately May 1997.^{4/} She served on the AAUP Executive Council from 1994-1996. Case did not participate in any protected activities on behalf of the AAUP while employed by the University (1T17, 1T36-1T41, 1T45, 1T116).

More specifically, Ugrovics was involved in the AAUP negotiations for the 1992-1995 collective negotiations agreement, serving as the only School of Nursing representative on behalf of the AAUP. This was the first agreement between the AAUP and the University which included School of Nursing faculty. The negotiations went to mediation and factfinding. Because resolving the various initial contract issues for the School of Nursing was difficult, the factfinding for the School of Nursing issues was conducted separately from the factfinding for the rest of the contract. Ugrovics gave the sole testimony on behalf of the nursing faculty at the factfinding. These negotiations occurred between March 1993 and December 1994. Ugrovics also participated in the negotiations for the 1995-2000 AAUP agreement, from approximately

^{4/} Apparently, Ugrovics assisted an employee (McCauley) with the filing of a grievance in 1991. However, Ugrovics was neither the filer nor the NJEA's representative or spokesperson in that matter (T170-T174).

Spring 1995 through Spring 1997, when they were "winding down"^{5/} (1T36-1T43, 1T75; CP-7 & CP-17).

10. In 1994-1995, the AAUP filed six grievances arising from the School of Nursing (1T25-1T26, 1T43-1T44, 1T50-1T51; CP-3). Specifically, on May 15, 1995, Ugrovics filed a grievance on behalf of the School of Nursing faculty regarding workload and reimbursement rates. The grievance was initially denied. However, discussions continued between the parties regarding the grievance and resulted in one of the sites named in the grievance, the Georgia King Village, being declared unsafe by the School and shut down (1T117-1T119). Additional discussions between Ugrovics, Orenstein and Dean Quinless occurred regarding the safety of other sites named in the grievance (1T30-1T32, 1T46-1T47, 1T117-1T122; CP-4).

On August 31, 1995, Ugrovics filed a grievance regarding her faculty practice commitment being unilaterally increased by the School of Nursing. That grievance was settled (1T32, 1T37; CP-5).

In April 1996, Ugrovics filed a grievance on behalf of the AAUP concerning faculty safety and requested that greater attention be given to faculty safety in certain areas. The grievance led to productive discussions between the parties and resulted in the University implementing various health and safety measures (1T47-1T48, 1T118-1T122).

^{5/} The record does not indicate the nature of the negotiations for the 1995-2000 agreement (i.e., "easy", "normal" or "difficult").

In June 1995, the AAUP, specifically through Orenstein and faculty member Katherine Skura, filed a grievance regarding the conversion of certain faculty appointments from 12 months to 10 months. Six faculty members in the School of Nursing were specifically involved in the grievance: 1) Skura; 2) Tony Forrester; 3) Pamela Grandinetti; 4) Mary Jane Tranzillo; 5) Linda Nolan; and 6) Teresa Palmer (1T27-1T28, 1T52-1T54, 1T74; CP-2, CP-3, R-1). Only Forrester, a tenured faculty member, and Grandinetti actually participated in the grievance through arbitration; the other four grievants had resigned during the summer the grievance was filed (1T28-1T29, 1T75-1T76). Ugrovics, although not one of the grievants, had brought the situation to Orenstein's attention. Also, Ugrovics, Orenstein and University representatives met about the grievance and Ugrovics (along with other AAUP representatives) attended the eventual arbitration (1T33-1T34, 1T73-1T74).^{6/}

In June and September 1995, Katherine Skura filed grievances alleging incorrect contractual interpretations concerning vacation time issues. Skura filed the grievances while she was in the process of resigning. The grievances were eventually resolved

^{6/} Pamela Grandinetti was one of the several grievants in the June 1995 grievance (CP-2, CP-3; Finding Nos. 9 & 10). In June 1996, while the grievance was in arbitration, Grandinetti's contract was not renewed. Quinless testified without contradiction that Grandinetti's evaluations were deficient and the nonrenewal decision was based upon that (1T123-1T125). Subsequently, Grandinetti left on a long-term disability; she was eventually terminated on December 16, 1996 (1T122-1T125, 1T127-1T130; CP-11).

and withdrawn. Ugrovics had no involvement with these grievances (1T50-1T56, 1T124-1T125; R-1, R-2).

11. The record shows no other AAUP grievance activity between March 1993 and June 1997.^{7/} In her capacity as an AAUP representative, Ugrovics met with Quinless and AAUP Executive Director Orenstein in Spring 1996 to discuss the post-master's degree certification program. The goal of the program was for faculty with doctorates to obtain primary care skills and for those who are primary care providers (nurse-practitioners) without doctorates to enroll in doctoral programs. The program, which was worth \$10,000 in tuition for an enrolled faculty member, was offered free to faculty so that they could obtain those primary care skills and retool their academic qualifications (2T49-2T53, 2T78).

Ugrovics explained several reasons why the program would not be attractive to faculty, including herself, and why she would not support or advocate it. Specifically, Ugrovics was concerned about whether faculty would equally be able to take advantage of the program; that is, would program scheduling be flexible enough to enable faculty to also maintain their specialties. Further, she was concerned about whether faculty, upon completion of the program,

^{7/} The record indicates that in November 1991, a grievance was filed on behalf of nursing faculty (Hyacinth McCauley and Janet Robbins) by the NJEA (the then majority representative of nursing faculty). The grievance concerned an instructional restructuring. Robbins resigned in January 1992; McCauley resigned in December 1992, before her contract expired. Ugrovics was only peripherally involved with this grievance (1T70-1T73; CP-1; footnote no. 4).

would be expected to engage in the community health services program. Ugrovics was concerned that there was more than one nurse practitioner program available at the School and that the program would be limited to only adult nurse practitioners. She also expressed her concerns that the program was only going to be offered for a short period of time. These issues were not then able to be resolved. There were no subsequent meetings about the program and, consequently, the program was not offered to faculty because of the lack of (AAUP) support it received; rather, it was offered to faculty administrators who are not AAUP unit members. A large number of faculty administrators completed the program (2T50-2T53, 2T68-2T69, 2T77-2T80).

12. Of the approximately 12 employees who had filed six grievances between 1991 and 1998, either as one or more individuals or in combination with the AAUP (or NJEA), one employee was nonrenewed for poor performance, two employees (Ugrovics and Case) were nonrenewed in a RIF, several employees voluntarily resigned and several are still employed.^{8/}

^{8/} Charging Party suggests that the employees who resigned were forced to do so by the University as retaliation for the grievances. There is no factual basis for that contention -- or any other contention about the resignations -- in the record; accordingly, I decline to infer such a conclusion. I might as easily conclude the resignations were because of their presumed unhappiness over the terms and conditions of employment about which they grieved. The record does not establish or otherwise indicate the reasons for the various resignations.

Changes in the School of Nursing and in the Program of Instruction

13. Frances Quinless has been the Dean of the School of Nursing since the school was created on December 10, 1992. Quinless has been associated with the nursing program at UMDNJ since 1986, when she was appointed Chair of the Department of Nursing (1T91). Quinless has a bachelor of science, a master of arts, and a Ph.D. in nursing, and a nurse practitioner's certification (1T89-1T91).

14. In 1992, the School of Nursing operated a joint ASN program with a major in nursing at Middlesex County College. It also offered an MSN program with a nurse practitioner certification at the Rutgers University Newark campus.

Subsequently, the School developed a four-year BSN program with Ramapo College in which Englewood Medical Center is a clinical partner (1T92). The School of Nursing developed another BSN program with the New Jersey Institute of Technology and Burlington County College in Mt. Laurel, NJ, as joint partners (1T92).

In 1994, the School of Nursing began an MSN program in southern New Jersey on UMDNJ's Stratford campus, in cooperation with the School of Osteopathic Medicine.

Subsequently, the University developed a clinical affiliation with Our Lady of Lourdes Hospital for this MSN program. Thus, the School's MSN program now has 7 tracks on 4 sites; the BSN program has 3 tracks on 3 sites; and the ASN program is located solely at Middlesex County College (1T92-1T93).

15. In her testimony, Quinless described how the practice of nursing has radically changed since the School of Nursing was constituted in 1992. These changes in nursing practice were driven by changes in the health care system and the health care delivery system. The health care system changes created demands for different types of nursing services. First, there has been a major shift away from acute care nursing to primary care nursing (direct medical care rendered [mostly] by nurse practitioners) and a shift in service location from acute care hospitals to ambulatory, community-based programs (i.e., clinic-type settings). Also, there has been a shift of emphasis from provider-based care to supervised patient self-care. Further, New Jersey now recognizes nurse practitioners as primary care providers entitled to reimbursement through managed care entities (HMO's, etc.). These changes have required changes in the nursing curriculum; specifically, a stronger focus is now required on community care nursing. As a result, the BSN program is exclusively a community-based care program; the MSN program has completely eliminated the acute care component and replaced it with a primary care oriented nurse-practitioner program (1T93-1T95).

The ASN program has also been affected because it primarily prepared individuals for registered nurse licensure for work in acute care hospitals. The changes in the health care system have reduced the numbers of acute care hospitals and thus reduced the number of employment opportunities for registered nurses (1T95). The School of Nursing has sought to adjust to these changing needs.

As a result of these on-going changes, in Fall 1996, Quinless recommended to the University's President and Senior Vice-Presidents, that they implement a budget plan (CP-13) which would: (1) reduce enrollment in the ASN program from 60 to 40 students; (2) cap enrollment in the BSN program; (3) limit enrollment in the BSN program at NJIT, and (4) decrease enrollment in nurse practitioner programs (1T137-1T142). Quinless' recommendation to reduce the number of students in the ASN program from 60 to 40 per class originated with the administration of the School of Nursing; it was one of several reduction scenarios considered (1T142).

There were no other formal, written reduction plans prior or subsequent to CP-13 (1T142-1T145). However, throughout the summer and into Fall 1996, discussions continued within the University administration about various possible reduction plans and their negative impact. The discussions ended in January 1997 when CP-13, including its plan to reduce enrollment in the ASN program, was finalized and adopted (1T144-1T146).

16. At one time, specifically in 1990, the ASN program had the capacity for and enrollment expectation of 100 students. However, because of the changes in the health care system, the University gradually decreased ASN enrollment, first to 80 students in 1992, then to 60 in 1994; and ultimately, it reduced enrollment to 40 in 1997, by virtue of CP-13 (1T62-1T63, 1T96-1T97, 1T115).

During this same approximate time period, between 1992 and 1998, there was a series of RIF's and attritions in the School of Nursing faculty during which the faculty was reduced from approximately 32 employees to 21 employees^{2/}. Ugrovics and Case were two of the employees not reemployed by the University in the 1997-1998 RIF (1T106-T107, 1T136-1T137).

In 1996, while the ASN program enrollment was being reduced, UMDNJ increased enrollment in the BSN program; specifically, it developed a program in southern New Jersey because of the University's growing needs there (1T97-1T99, 2T56-2T57). Further, because of the on-going changes, the University changed the program focus in Stratford and Newark from acute care nurse training to family primary care training; it enhanced the curriculum of those MSN programs and then capped enrollment in each MSN program to 10 full-time students (1T97-1T99, 1T115).

Ugrovics was aware that the MSN program was expanding both geographically and in the number of students being trained in the period from 1995-1997; and she realized that during this same time, the ASN program at Middlesex County College was being reduced both

^{2/} During the 1994-1995 school year, there was a RIF of six faculty employees in the School of Nursing. The least senior faculty were nonrenewed in that RIF. There was no indication in the record of a contractual, statutory or past practice obligation to use seniority as the RIF determinant in either the 1994-1995 RIF or the 1997-1998 RIF (1T62). I specifically decline to find that the parties' single experience of the 1994-1995 RIF constituted a past practice for RIF purposes.

in the number of students and faculty. Consequently, some (qualified) faculty members in the ASN program transferred to the BSN program in South Jersey (1T85-1T86).

17. The shift in focus and the change in enrollment patterns in the BSN, MSN and ASN programs had a major effect on faculty at the UMDNJ School of Nursing; specifically, the University needed to be able to move faculty around (program-wise) where and when needed. Generally, the need for faculty was decreasing in the acute-care based ASN program and was increasing (comparatively) in the BSN and MSN programs. Thus, in accordance with these changes, faculty were encouraged to achieve three specific enhancement objectives: (1) to maintain and enhance their educational background by pursuing a doctoral program; (2) to retool so as to obtain primary care skills and gain certifications as primary care nurse practitioners; and (3) to become actively engaged in the School's Community Health Services Program ("CHSP" in Newark and Camden) through direct care patient involvement (1T98-1T101; CP-16). These three strategic objectives or goals were discussed in the School of Nursing Executive Council, a body elected by faculty and which serves, within the University structure, on behalf of them. Quinless is the Chair of the Executive Council; Ugrovics and Case were Council members from 1993-1996.

Quinless believed that the changing demands of the nursing services marketplace and health care environment mandated that the Nursing School adjust its programs. Further, she believed the three

qualification objectives were aligned with the changing nature of the nursing services marketplace (1T84, 1T99-1T101, 1T135-1T136, 1T139, 2T17-2T18, 2T32-2T33).

These three strategic goals were also broadly outlined in CP-16, the School's Strategic Directions Plan for 1997-2002. The Strategic Directions Plan is fairly specific and outlines how the School intends to operate. CP-16 emanated from the School of Nursing Executive Council in Fall 1996 and was accepted by the faculty in January or February 1997. Faculty had first received a copy of CP-16 before their meeting in January 1996. Ugrovics and Case were aware of the contents of CP-16 in their capacity as Executive Council members and as faculty members. CP-16 specified that, throughout the State, enrollment in ASN programs had decreased. The Strategic Directions Plan was not the School's only indicator to faculty of what they should be doing, career-wise; there had been many faculty meetings over time where such issues were specifically addressed and explored (1T115-1T116, 1T154-1T155, 2T11-2T14, 2T33-2T35; R-4). Some Nursing School faculty members made adjustments to gain these upgraded, refocused qualifications, or indicated that they were (or would be) pursuing them. Ugrovics and Case were not among those attempting to adjust to these qualifications (1T105-1T107).

On November 25, 1996, the ASN faculty met. At their meeting, the faculty discussed the decreased enrollment in the ASN program, along with other items in the Strategic Directions

document. Case and Ugrovics attended this meeting (2T35-2T36; R-4).

Ugrovics had first become specifically aware that the number of students in the ASN program was going to be reduced to 40 students upon reading a June 27, 1996 newspaper article in the Home News/Tribune (1T68-1T69; CP-10).

Ugrovics and Case are not reappointed in the 1997-1998 RIF

18. After the adoption of CP-13, the School of Nursing reappointed certain faculty on March 11, 1997, as listed in CP-14. Seven of the reappointments listed in CP-14 were for ASN faculty at Middlesex County College where Case and Ugrovics taught (1T150-1T151, 2T53). Specifically, those reappointed there were: (1) Janice Aloï; (2) Zelia Bown; (3) Rizalina Dumadag; (4) Dawn Kozlowski; (5) Theodora Pappas; (6) Mary Tistler; and (7) Patricia Morrissey (CP-6).

19. University bylaws specify when faculty are to receive notice of reappointment or nonreappointment. Specifically, the bylaws provide that faculty with a one-year contract must be notified three months before the contract expiration date; faculty with a two-year contract must be notified six months before the contract expiration date; and faculty with a three-year-or-longer contract must be notified one year before the contract expiration date. The ASN faculty whose reappointments are listed in CP-14 all had two-year contracts ending June 1997; thus, they had to have been

notified of reappointment or nonreappointment by the end of December 1996 (2T40-2T41, 2T63-2T64, CP-17). University practice has been for faculty to be informed of reappointment or nonreappointment at the mandated time and not before (2T64-2T65). Ugrovics and Case had three-year contracts expiring June 30, 1998; thus, their notification date was June 30, 1997 (2T41-2T42).

20. The first step for the reappointment process which concluded with the promulgation of CP-14 began in early Fall 1996, when the on-site Nursing School administrator formally evaluated the faculty. The assistant dean for that region then sent Quinless a recommendation memo, either recommending reappointment or nonreappointment based on the outcome of the overall evaluation process. In December 1996, Quinless wrote a memo to each affected faculty member indicating whether or not he (or she) was recommended for reappointment. Quinless' decision was based primarily on the assistant dean's recommendation. Quinless then prepared a faculty transaction form and, where applicable, a letter of reappointment. This form was then forwarded to the Senior Vice-President for Academic Affairs; then to the University Affairs Research Committee and finally, to the Board of Trustees for review and ratification at its next meeting (in March 1997). Once the University Affairs Research Committee acted, the recommendations were implemented. This is the usual reappointment process for faculty at the University (1T149-1T150, 2T53-2T55, 2T74).

Thus, by Board action on March 11, 1997, seven faculty in the ASN program at Middlesex County College were reappointed; Case and Ugrovics were not reappointed then. In accordance with University practice, their employments were not acted upon at a time when their reappointment/nonreappointment was not due to be acted upon. At that point in time, Quinless knew: (1) that the incoming class for September 1997 was going to be reduced and consequently there would be a concomitant reduction in the number of faculty; and (2) that Ugrovics and Case (probably) could not be reappointed because of the seven that had just been reappointed. Quinless could have considered Case and Ugrovics for reappointment in March 1997 but chose not to (in accordance with the practice). Quinless did not inform Ugrovics and Case in March 1997 that she was reappointing seven other ASN faculty members (1T152-1T153).^{10/}

In March 1997, when CP-14 was generated, Quinless had not made a final decision with regard to the reappointment or nonreappointment of Case and Ugrovics. Quinless had no further time leeway regarding the seven employees to whom she gave notices of reappointment in December 1996 -- she had to make a decision regarding their employment status in December 1996 (2T40-2T41). However, in December 1996, Quinless still had time regarding Case and Ugrovics -- their notices of reappointment/nonreappointment

^{10/} Although the seven renewed faculty members were formally reappointed in March 1997, their notice of reappointment had to be given in December 1996 (see finding no. 19).

were not due until June 1997. Quinless explained that because the University was a large, dynamic entity, various circumstances could change which might impact employment, including the positions held by Case and Ugrovics. Although the University knew the budget constraints it was facing, Quinless explained that the University could redirect funds, obtain funds from new sources, or utilize some other opportunity to preserve employment positions. Thus, in December 1996, it was too early to determine for certain whether the University would or would not be able to continue employing Case and Ugrovics (2T46-1T49, 2T55-2T56).

In March 1997, Quinless evaluated each faculty member up for reappointment based upon their individual qualifications; she did not make a comparative judgment about the entire faculty (2T60-2T61).^{11/}

21. The general evaluation procedure begins at the time of appointment and is a continuous process which is conducted by the on-site administrator (an assistant dean) and the regional dean (2T66-2T67). This general process for Case and Ugrovics had begun in August 1995, when they had last been reappointed. On May 24, 1997, Assistant Dean Minerva Guttman gave Ugrovics her Faculty Evaluation Form, CP-8. Upon reviewing it, Ugrovics observed that

^{11/} However, Quinless testified that if she had made a comparative judgment, she would have made the same judgment -- that is, that she would not have appointed Case and Ugrovics in the place of two of the other faculty members who were reappointed in March 1997 (2T61-2T62). I credit this testimony, for reasons discussed below.

the "goals and objectives" section for the following year was incomplete. Ugrovics said that she thought this was unusual, because she stated that this section was usually completed. Ugrovics then asked Guttman why no goals and objectives were listed and further asked where she would be working after she completed her present contract; Ugrovics said that Guttman replied, "Anne, there are no more jobs left in the School of Nursing; we are sorry, we forgot,..." (1T63-1T64, 1T80-1T83, 2T4, 2T74; CP-8; R-3). In fact, the record shows that in four evaluations given to Ugrovics between 1992 and 1997, only one evaluation (the 1992 evaluation) had the "goals and objectives" section completed. Thus, Ugrovics' indication in her testimony that there was something unusual about her 1997 evaluation is inconsistent with the evaluations themselves. Consequently, I do not credit this testimony (T163-T165, T181-T183; Exhibit R-3). Ugrovics had not learned that she would not be rehired prior to receiving CP-8 (1T63-1T64).

22. After her meeting with Guttman, Ugrovics (and Case, who had also not been reappointed) met with Quinless on June 9, 1997. Quinless then gave Case and Ugrovics each a letter of nonreappointment (1T65-1T67, 1T86-1T87; CP-9). Quinless had made the decision to not reappoint them in June 1997 upon reviewing, as usual, the recommendation of the regional assistant dean (2T68-2T69, 2T74-2T75; See finding nos. 20 & 21).

During their meeting, Quinless told Case and Ugrovics that they were not being reappointed because of "numbers" --

specifically, because the number of students in the ASN program was being reduced. Quinless told them there was decreased enrollment in the ASN program and thus less faculty would be required in that program. Ugrovics then asked why all faculty listed on CP-6 and CP-14 had been rehired prior to her and Case not being rehired. Ugrovics asked about these others because some of them had been employed at the School for less time than she had been, and, in the 1995 reduction in force, the lowest seniority faculty had not been rehired. Quinless declined to discuss her employment decisions concerning other faculty (1T66-1T67, 1T74-1T75, 1T136-1T137).

Quinless then suggested that Ugrovics and Case apply for two positions at Englewood Medical Center. Quinless knew there were two openings in the Englewood program and thought they were qualified to teach in those positions. Guttman also encouraged them to apply for those positions (1T79-1T80, 1T107-1T108).

The Englewood positions fall within the School of Nursing but are funded by Englewood Medical Center, not UMDNJ, and are not in the AAUP unit (1T133). Further, Englewood Medical Center makes the ultimate hiring decision on the positions, with input from the School of Nursing (2T42-2T43).

Ugrovics and Case applied for the positions. Guttman and Director of Education Kathie Scanlon drove Ugrovics and Case to Englewood Medical Center to introduce them to the administration and facilitate their interview process in July 1998. However, Ugrovics and Case were not hired (1T79-1T80, 1T107-1T108). Quinless never

spoke to Ugrovics about transferring to the BSN program in Mt. Laurel; Ugrovics never asked for a transfer there, as she believed there were no openings (1T87-1T89, 1T108-1T109). Quinless knew there were no other faculty openings in the School of Nursing at the time and so informed Ugrovics and Case (1T86-1T87, 1T131-1T134, 1T136-1T137). In 1998, the University received funding for several positions in the University's clinical program. Quinless offered two positions -- as generalist practice nurse clinicians -- to Ugrovics and Case; they declined the offer (2T47-2T51, 2T55-2T57).

Quinless stated that Ugrovics and Case were not reappointed because there were no positions for them in any School of Nursing program, based on the number of positions funded and the student enrollment numbers across the state system (1T126, 1T136-1T137). Quinless felt Ugrovics and Case were still qualified to work in the ASN program; however they were not rehired because of the reduction in the number of needed ASN faculty (1T137). Quinless asserted that her decision not to reappoint Ugrovics (and Case) was not because Ugrovics had engaged in protected activities (2T53, 2T59-2T60, 2T69).

The faculty who were reappointed in 1996-1997

23. Quinless claims the seven ASN faculty that were reappointed between June 1996 and June 1997 were well qualified for reappointment in ways that Case and Ugrovics were not. Specifically, they were fulfilling one or more of the University's three strategic objectives. They had qualifications that enhanced

their ability to work in the changing nursing school program and/or were (or had indicated interest in) working in the CHSP. According to Quinless, those who were not reappointed -- Ugrovics and Case -- were neither making concrete steps towards any of the three strategic objectives, nor had they indicated any interest in doing so. However, Quinless did not tell Ugrovics and Case this at their June 1997 meeting (1T116-1T118, 1T138-1T139; See finding nos. 21 & 22).^{12/}

Quinless was not aware that either Case or Ugrovics had any unique qualifications that would have persuaded her to reappoint them over the individuals she reappointed in CP-14 (2T61-2T62).

Specifically, Quinless explained she would have retained Aloï and Brown because both are psych/mental health nurses, which is a strong component of the University's ASN program; also, they were participants in the University's CHSP (2T40-2T45).

Quinless explained she would have retained Dumadag because she is an adult health care provider. Dumadag had also completed the post-masters certification program and was able to accept graduate students into her UMD care program; further, Dumadag had

^{12/} At the June 1997 meeting, Quinless told Case and Ugrovics that they were not being reappointed and that it was due to "numbers", that is, that the decline in enrollment had led to a RIF. I credit those statements. Quinless declined to discuss the employment status of other faculty members or to justify her decision about reappointments. Telling Case and Ugrovics that she (Quinless) reappointed other faculty members because they had achieved one or more of the three strategic objectives (or were about to) would seem to have served little purpose at that point.

moved to an MSN/BSN position at the Stratford Campus. Quinless noted she would have also retained Tistler because she is an adult generalist practice nurse who had stated she wanted to work in the research programs in the CHSP (1T102, 2T23-2T26, 2T44-2T45).

Quinless stated she would have retained Pappas because she is an adult nursing and fundamental nursing specialist who was working in the University's joint program with Robert Wood Johnson Medical School and Rutgers University (2T45-2T46).

Quinless stated she would have retained Kozlowski because she is an adult generalist practice nurse who was taking classes in a Ph.D. program (2T45-2T46).

Finally, Quinless said she would have retained Morrissey because of her pertinent experience and because she had two masters degrees. Morrissey had moved into the BSN program and was designated to head the community health leadership program within the BSN program at Middlesex County College (1T103-1T105, 2T43-2T46).

24. Kregeloh was an adult generalist practice nurse and a pediatric nursing specialist. She had been reappointed in February 1997, the month prior to when the package of seven ASN faculty were reappointed in March 1997 (see finding no. 23). Thus, her notice of reappointment would have been due in approximately November 1996. When this reappointment decision was being made, there were then still eight faculty positions left to fill before layoffs would become probable. At that point, reappointment/nonreappointment decisions had not been made concerning the nine remaining ASN faculty whose contracts were coming up for renewal (2T43-2T46, CP . . .

Mahoney was the only ASN faculty member teaching ob-gyn. She also had been renewed (at an unspecified time) prior to the package of seven ASN faculty renewed in March 1997; thus, the timing considerations of Mahoney's renewal are similar to those regarding Kregeloh (2T45).

Also prior to the 1997-1998 layoffs, faculty members Zamudio and Triano had been moved to the BSN program in southern New Jersey. Both were involved in the CHSP. Zamudio was also applying to doctoral programs (1T102-1T105, 1T151 & 2T25).^{13/}

25. Quinless noted that student evaluations are an important part of the evaluation process. The student evaluations of Case and Ugrovics had been excellent. Both had received the Faculty Excellence Award, an award based on student nominations (2T27-2T30).

Neither Case nor Ugrovics held doctoral degrees; nor did they have any primary care skills and they were not involved in the CHSP (1T106-1T107). Nor did they indicate any intention to pursue a doctoral degree, obtain primary care skills (nurse-practitioners certification), or become involved in the CHSP. Further, neither Ugrovics' nor Case's faculty practice involved the type of primary care nursing as constituted at the University's Newark and Camden

^{13/} Although Ugrovics testified that after leaving employment with UMDNJ that she began teaching as an adjunct in Rutgers' BSN program, Quinless explained that Ugrovics was not a good candidate for the UMDNJ BSN program because the UMDNJ program is focused on research, leadership and community nursing. The Rutgers BSN program is focused on generalist practice nursing skills; thus, Ugrovics was suited to teach in that program (1T108-1T110).

CHSP sites (2T15-2T16, 2T30-2T31). Quinless does not believe the performance evaluations of Ugrovics and Case were ever downgraded because either failed to retool their primary skills or failed to provide primary care in a CHSP setting (2T27-2T30; CP-8; R-3). Quinless was aware that Case had once been enrolled in a doctoral program at Rutgers University; her enrollment in that program technically satisfied one of the three strategic goals the University wanted faculty to satisfy (1T131; 2T10-2T11). However, Case was not a matriculated student in the Rutgers Ed.D. program and had not participated or taken classes in that program during any of the time she taught at UMDNJ (1992-1998) (T230-T231). Case's 1997 evaluation lists objectives for Case for 1998; one of those objectives is "conference, community based, homeless shelter, plans to present it as CHSP as continuing education" (2T10-2T11; CP-15). She is then cited in that evaluation for using the CHSP as a teaching site for students' clinical experiences (2T8-2T11, 2T38-2T40; CP-15; R-4). However, Quinless distinguished between faculty's use of the CHSP as a teaching site and their actually working in the CHSP (T28, T219-T225). It was the latter activity that was one of the three enhancements the faculty was encouraged to engage.

ANALYSIS

Public employees and their representative organizations have a statutory right to engage in collective negotiations activities. N.J.S.A. 34:13A-5.3. Retaliation for the exercise of that right violates the Act. N.J.S.A. 34:13A-5.4a(1) and (3).

The AAUP contends that Ugrovics was discharged because of her protected activities in violation of section 5.4a(1) and (3) of the Act. The AAUP further contends that Case was discharged in order to mask the violation vis-a-vis Ugrovics.

In re Bridgewater Tp., 95 N.J. 253 (1994), sets forth the standards for determining whether a personnel action was discriminatorily motivated in violation of subsections 5.4a(1) and (3). To establish such a violation, the Charging Party must prove, by a preponderance of evidence on the entire record, that protected conduct was a substantial and motivating factor in the adverse personnel action. This may be done by direct or circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile towards the exercise of protected rights. Id. at 246.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both unlawful motives under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a

whole, that anti-union animus was a motivating or substantial reason for the personnel action.

The AAUP has not demonstrated by a preponderance of the evidence that Ugrovics was discharged due to her protected activities. While the AAUP established both that Ugrovics had engaged in protected activities and that the University was aware of her protected activities, it did not establish that employer hostility to that activity was a substantial factor in the decision to layoff Ugrovics; I conclude it was not even a partial factor.

In Brick Tp. Bd. of Education, P.E.R.C. No. 88-48, 13 NJPER 846 (¶18326 1987), Charging Party alleged a discriminatory layoff. Finding no violation, the Commission noted that although the timing was suspect (layoff right after difficult, contentious negotiations), the Charging Party did not establish that protected activity motivated the reduction. Rather, the Commission found that the Board made an educational policy decision to improve its lagging special education program by hiring more teachers and reducing class sizes. This resulted in fewer aides being needed; thus, the layoff. In Princeton Regional Bd. of Education, P.E.R.C. No. 91-37, 16 NJPER 575 (¶21252 1990), the Commission found no violation in an alleged discriminatory layoff. The Commission concluded that there was no retaliation by the employer for protected activity and that the furloughed aide was one of eight employees who were laid off when the program in which they worked was eliminated. Accord, Burlington County, P.E.R.C. No. 97-144, 23 NJPER 387 (¶28175 1997),

(no evidence of hostility for protected activity; layoff due to economic and educational reasons). In State of New Jersey (Corrections), P.E.R.C. No. 94-109, 20 NJPER 237 (¶25117 1994), the Commission found no violation concerning allegations of discriminatory discipline; the Commission found no direct evidence of hostility and that the employer was not disturbed by the employee's exercise of protected rights.

In Chathams School District, P.E.R.C. No. 91-112, 17 NJPER 334 (¶22147 1991), Charging Party alleged a discriminatory layoff. Here, the employer did not use seniority to determine the layoff but rather chose the "least valuable" employee for layoff. Although evidence showed the employer was motivated in part to layoff the employee due to protected activity, the Commission found no violation because the employer showed the employee would have been selected for layoff even absent protected activity. In Borough of Tinton Falls, H.E. No. 2000-15, 26 NJPER 401 (¶31158 2000) (final agency decision), Charging Party alleged a retaliatory failure to promote. The Hearing Examiner found no evidence of hostility between Charging Party and his supervisor and found that Charging Party's not being promoted was not due to his protected activities; rather, the employer promoted another employee whose work rating was excellent. Accord, Hudson County, P.E.R.C. No. 86-128, 12 NJPER 441 (¶17163 1986) (no a(3) found because employer promoted another employee more qualified for the position). In Middletown Tp. Bd. of Education, P.E.R.C. No. 86-142, 12 NJPER 521 (¶17194 1986), Charging

Party alleged a discriminatory transfer. The Commission found no hostility for protected activity. The Commission found that although the school's new principal was displeased with employees' uncooperative attitude, the principal's dismay resulted from his attempts to institute new educational programs that were met with resistance from a teaching staff "set in its ways". The Commission noted that changing educational policies was a managerial decision and that while the transfers might have been a harsh methodology, the selection of the transferees had a rational basis that was unrelated to the employees' protected activities. Finally, in Rutgers University, P.E.R.C. No. 84-34, 9 NJPER 585 (¶14245 1983), the Commission found no violation in a charge alleging a discriminatory layoff. The Commission found the layoff was due to financial exigencies, that the employee was offered another job but refused it and that the employee had not exercised her bumping rights.

Ugrovics was not discharged ("fired"). She was rified -- the subject of a layoff. Her job performance as a faculty member in the University's ASN program was good. She had no disciplinary problems; there are no facts in the record which indicate that the University thought of her as a troublesome employee. There is nothing in the record to suggest that the University intended to get rid of Ugrovics -- to discharge her or not renew her contract -- absent the eventuality of the layoff.

The layoff was not "staged" to get rid of Ugrovics. It was not a one-time cut -- disguised as a reduction-in-force -- designed to laser-out Ugrovics. The layoff was part of a pattern of layoffs and attrition stretching back seven years. Ugrovics was one of nine nursing faculty who were either rified or otherwise attrited from the nursing faculty over the period between 1991-1998. The School of Nursing reductions-in-force over that period of time were necessitated by declining student enrollments, mostly in the ASN program. These declines were driven by changes in the types and amounts of nursing care demanded by the marketplace, which in turn were driven by broad changes in the healthcare system. Thus, the essential issue is whether Ugrovics was unfairly selected for layoff due to her protected activities. I conclude she was not.

There is no direct evidence of employer hostility to Ugrovics' protected activities. Although Ugrovics participated in negotiations and some grievance processing, there was no demonstration of a hostile relationship between Ugrovics and Quinless or Ugrovics and the University.

The 1995-2000 contract negotiations were characterized as long and "difficult". This would not appear unusual, as it was the first contract covering the newly designated School of Nursing and the first in which the AAUP was representing the nursing program faculty after a contested representation election. Thus, it would seem that the difficulty and length of these negotiations was owing to the many issues which, in an initial contract situation, had to

be worked out for the first time. There is no showing in the record that either Ugrovics or Quinless or both were the "reasons" for the difficulty; that either had an agenda which they were strongly advocating, etc. In fact, there is no indication that Ugrovics was any more than an individual member of the AAUP negotiations team. In the negotiations proper, she was not the AAUP's chief spokesperson (although Ugrovics was the only witness for the AAUP in the School of Nursing portion of the factfinding proceeding).

During the processing of the three grievances which Ugrovics filed, there appears to have been no rancor, no hostile confrontations, no harsh words. Moreover, there is no indication in the record that any of the grievances concerned issues which were inordinately meaningful to the University, so that if it lost in arbitration or settled unsatisfactorily, there would be resentment against Ugrovics for having prosecuted the grievance. On the face of them, the grievances and the outcomes appear unremarkable. The last grievance Ugrovics filed was in April 1996; her nonrenewal notice occurred in June 1997. That timing does not suggest hostility.

Ugrovics' opposition to the post-certification masters program would also not seem to be the type of issue over which the University would become so exercised as to seek to discharge an employee. This program was designed to enhance faculty qualifications, an issue the University as employer has ultimate

control over. With this proposal, the University was seeking to treat the issue of qualification upgrades in a kind of collegial way, encouraging its faculty to decide that they would participate. It advanced the proposal, which, for various reasons, was opposed by the AAUP. Acceptance of the program could have been a plus to both sides -- the University getting upgraded faculty; the employees getting a qualification enhancement program which the University would pay for. Rejection of the program did not necessarily mean the program was dead. Rather, it could have been repackaged and presented again. However, even if the program was withdrawn and never presented again, the University lost nothing.

Thus, through an examination of all Ugrovics' protected activity, there is no direct evidence of hostility -- no threats, no difficult conversations, no unfair evaluations, no punishing assignments. Nor is there convincing circumstantial evidence of hostility.

The sequence of event dates in Ugrovics' employment appears as follows.

Ugrovics received her first contract from the University in approximately June 1991. In November 1991, she assisted McCauley with a grievance (she was neither the filer nor the Association's primary representative/spokesperson for that grievance).

In March 1992, Ugrovics received her second contract from the University. In March 1993, Ugrovics received her third contract from the University (a two-year contract). Also, in March 1993, the

University and the AAUP commenced negotiations for the first agreement in which the AAUP's negotiations unit would include the faculty of the then newly-organized School of Nursing. Negotiations for the initial contract that would include the new addition to the AAUP unit (nursing faculty) were long and difficult.

Ugrovics was the representative from the School of Nursing on the AAUP's negotiations team. Ugrovics testified at the factfinding hearing. The contract was resolved in December 1994.

In 1994-1995, there was a reduction-in-force of six School of Nursing faculty members. In December 1994, Ugrovics received her fourth contract from the University (a three-year contract).

In approximately Spring 1995, negotiations began for the 1995-2000 AAUP/University agreement. Ugrovics and faculty member Tony Forrester participated on the AAUP negotiations team as representatives of the School of Nursing. In May 1995 and August 1995, Ugrovics filed grievances concerning various faculty practice commitment issues (i.e., faculty members' work in the field). The ensuing discussions between the parties led to the closure of one of the sites at the focus of one of the disputes, based on considerations of safety; the August 1995 grievance was resolved separately.

In April 1996, Ugrovics filed a grievance concerning faculty safety. The parties' ensuing discussions resulted in the implementation of a series of health and safety measures to enhance security. Inasmuch as several significant security issues were

identified and resolved in the course of addressing this grievance, the University viewed the entire process and the results as very positive; it believed the parties worked through difficult issues well and reached results that were positive for the entire University community. Quinless thanked Ugrovics for her role in this matter.

Also in Spring 1996, Ugrovics and Orenstein met with Quinless regarding the post-masters certification proposal by the University. The AAUP's coolness to the proposal led to the withdrawal of the offer by the University. In June 1995, the AAUP, Orenstein and nursing faculty member Skura filed a grievance on behalf of certain nursing faculty employees concerning the conversion of faculty positions from twelve-month to ten-month durations. Although peripherally involved, Ugrovics was neither a named grievant nor the AAUP's primary representative/spokesperson regarding this grievance. In June and September 1995, Skura filed two more grievances alleging certain incorrect contractual interpretations. Ugrovics had no involvement in those grievances.

In December 1996, Quinless made decisions concerning the renewal/nonrenewal of seven School of Nursing faculty members; one of the effects of those decisions was to put at some risk the continued employment of Ugrovics and Case. In June 1997, Quinless notified Ugrovics and Case of their nonrenewal.

* * * *

By March 1993, when the University gave Ugrovics her first multiple year contract, it would seem that the University was at least aware that Ugrovics was active in the AAUP and engaged in protected activities. By December 1994, when the University gave Ugrovics her second multiple year contract, the University was fully on notice of the nature and extent of her involvement in the AAUP and of her participation in protected activities. Also by December 1994, the University and the School of Nursing had made decisions regarding the 1994-1995 layoffs; those layoffs did not affect Ugrovics.

Thus, in March 1993 and December 1994, when well aware of her protected activities, the University treated Ugrovics favorably by giving her multiple year contracts. Further, in December 1994, there was an opportunity for the University to nonrenew (reduction-in-force) Ugrovics (or to set up a nonrenewal); it did not do so. These actions are not consistent with an employer who is concerned with or angered by an employee's involvement in union activities.

If we focus on the 1995-1998 time period, we might ask whether the University's view of Ugrovics' protected activity might have become illegal hostility during this time. Given the nature and extent of Ugrovics' activity in this period, it is unlikely.

With regard to any of the three Ugrovics' grievances, the record does not indicate that the University or any of its representatives were upset or otherwise hostile, either at the

filings or at how any of the grievances were addressed or resolved. See, State of New Jersey, P.E.R.C. No. 94-109, supra. If one were to evaluate which grievance might result in the largest "setback" to the University -- monetarily, at least -- it most likely would be the challenge to the conversion of faculty positions from twelve-month to ten-month terms, with the concomitant decrease in compensation to each employee. However, Ugrovics was only peripherally involved in that grievance.

Case had no protected activity. Charging Party asserts that she was nonrenewed so as to "mask" the University's illegal conduct in not renewing Ugrovics.

To find that they got rid of Case just to "cover their tracks" regarding Ugrovics, one would think that (a) they greatly wanted to be rid of Ugrovics -- i.e., to go so far as to get rid of an innocent bystander (Case), just to be able to get rid of Ugrovics; and (b) one would expect some overt indication of that strong desire to be rid of Ugrovics -- some unfriendly behavior, poor assignments, disparaging remarks, threats, etc. There was no such indication in this record.

After Ugrovics and Case received their notices of nonrenewal, Dean Quinless, Assistant Dean Guttman and Director of Education Scanlon all tried to help Ugrovics and Case secure other employment with the School of Nursing. They encouraged Ugrovics and Case to apply for the faculty positions in the joint program with Englewood Medical Center. Guttman and Scanlon drove Ugrovics and

Case to Englewood to introduce them to the administrators and smooth the way for their interviews. When these positions were not offered to Ugrovics and Case, Quinless then offered them staff nursing positions at the University, which they declined.

If the object was to get rid of Ugrovics at all costs, why go to these lengths to secure other positions for her at the University? Why risk her getting the Englewood position or accepting your offer of a staff position? Even if just as temporary employment? Again, this conduct by the University appears inconsistent with that of an employer who is so intent on severing an employment relationship that it would also discharge an innocent employee to achieve its end. See Rutgers University, P.E.R.C. No. 84-34, supra.

The essential question in deciding whether there was an a(3) violation here was whether the University selected Ugrovics for layoff because of her protected activities. There is no direct proof of this and the circumstantial evidence is neither consistent nor convincing.

The AAUP argues that it is compelling evidence of a violation that the University (a) did not use (reverse) seniority to designate employees for layoff and (b) designated Ugrovics, a union activist, for layoff.

It is the employer's prerogative to determine that a layoff is needed and, absent statutory or contractual provisions which may govern layoffs, to determine who to layoff. However, an employer

may not choose to layoff an employee because of the employee's protected activity. N.J.S.A. 34:13A-5.4a(3).

In the instant matter, the University determined that a layoff was needed in 1997-1998, and determined which employees to layoff and which to retain. In making the latter determination, it resolved not to use seniority in determining who to layoff; it was not obligated to use seniority as there are no statutory or contractual provisions requiring it. The fact that the record shows that the University used seniority to determine order of layoff in the 1994-1995 reduction-in-force does not constitute a past practice that would require the University to use seniority to determine the order of layoff in 1997-1998. Among faculty who were all satisfactory employees, the University used another methodology to determine which employees to retain and which to layoff. The University made these decisions based on its assessment of a faculty member's overall qualifications and their flexibility in being able to teach in the University's changing nursing program. It generally measured this ability by looking to see if a faculty member had achieved one of the three goals for faculty set forth in the School of Nursing Strategic Directions document -- (a) enhancing their academic qualifications by pursuing a doctoral degree; (2) retooling their skills by obtaining primary care capabilities (i.e., nurse practitioner certification); and (3) participating in the School of Nursing's Community Health Services Program. But it looked to other factors as well.

As they came up for renewal, the University -- Quinless and the School of Nursing -- valuated faculty members against the changing nature of the School of Nursing program. Quinless believed the seven faculty renewed in December 1996 were qualified in ways which were most useful to the University and thus, they should have been -- and were -- renewed. She did this with the tacit recognition that the University would be short two positions -- unless something changed budgetarily or program-wise -- when Ugrovics and Case came up for renewal in six months (in June 1997). When questioned about this, Quinless said that if she had done an overall evaluation of the faculty (a ranking) in the fall of 1996, she would have made the same decision about the layoff. She noted that although Ugrovics and Case had greater seniority than some of the other (renewed) ASN faculty members, their seniority did not translate into superior qualifications, as frequently may be the case in an academic university setting. While the record showed that Ugrovics and Case were competent faculty members who would have been retained if not for the layoff, Quinless noted that their qualifications were not unique or so special that she would have made a point of retaining them. This valuation decision about the best overall qualifications to teach in the University's School of Nursing program is one for the employer to make; Quinless made that decision based on their (the faculty members') overall qualifications, flexibility and usefulness to the University's changing nursing program, not based on Ugrovics' protected

activity. See Chathams School District and Borough of Tinton Falls, supra.

* * * *

The AAUP argued that the University was inconsistent in its application of the three goals for faculty because Tistler, Mahoney and Kregeloh had not fulfilled any of the goals.

The three goals were a measure -- one palpable measure -- of employee value to the University. (See Chathams School District and Borough of Tinton Falls, supra.) The record shows other measures were considered. For example, the reappointment decision began with an employee's performance evaluation. But here, the University was dealing with a group of employees who were all satisfactorily rated. It then also looked at (current) experience, the ability to teach multiple subject areas and to teach in an increasingly primary care-oriented curriculum. The three goals seem more a signpost to faculty about what they should be striving for than a restriction on employment decisions for the University.

Seven faculty were given notice of renewal in December 1996 and then were actually renewed in March 1997. Each had either fulfilled one of the goals for faculty or indicated an intent to do so. The evaluation and employment decisions concerning Kregeloh, Mahoney, Zamudio and Triano had been made prior to the consideration of the final nine faculty (Ugrovics, Case and the seven March renewals) for the remaining seven positions. Those decisions were made before the order-of-layoff issue began to crystallize. Each

had either fulfilled one of the faculty goals or possessed other qualifications which the University deemed valuable to the changing nursing program. Mahoney was the only faculty member teaching ob-gyn in the ASN program; Kregeloh was cross-trained in both pediatric nursing and adult care nursing. Zamudio and Triano were transferred from the ASN program at Middlesex to a BSN program in southern New Jersey. Both were involved in the CHSP.

* * * *

Based upon the foregoing, I conclude that the AAUP has not demonstrated that the University declined to renew Ugrovics due to her protected activities. I base this conclusion on the absence of any direct proof of hostility and at best, weak circumstantial evidence of hostility that is insufficient to prove a violation. The essence of the circumstantial case is that Ugrovics was a union activist, the University had a layoff, it laid off Ugrovics and it did not use seniority to determine the order of layoff.

However, the University was not obligated to use seniority to determine the order of layoff. Thus, one of the underpinnings of the circumstantial case comes undone.

Further, the University presented cogent reasons for why it did what it did. The 1997-1998 layoff was part of a longer-term trend that was driven by changes in the nursing field. The forces that created the layoff were also redirecting the focus of the nursing program. It was in the context of these changes that the University made its decisions about whom to retain and whom to

layoff. The three goals for faculty had been created by the School of Nursing Executive Committee well in advance of the 1997-1998 layoffs. They were designed to prepare the faculty to address the redirected nursing program. The University's decisions were made not from the point of view of whom should we get rid of but rather from the point of view of whom should we retain. Chathams, supra.

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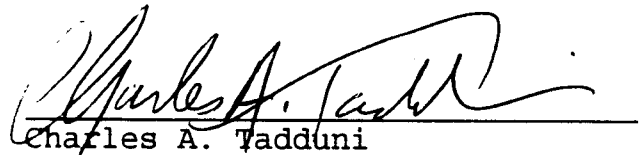
Accordingly, based upon the entire record and the above findings and analysis, I make the following:

CONCLUSIONS OF LAW

The University of Medicine and Dentistry of New Jersey did not violate N.J.S.A. 34:13A-5.4a(1) and (3) by laying off Anne Ugrovics and Patrice Case.

RECOMMENDATION

I recommend that the Commission dismiss the Complaint.



Charles A. Tadduni
Hearing Examiner

Dated: October 11, 2001
Trenton, New Jersey