P.E.R.C. NO. 87-153

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOARD OF TRUSTEES OF
BERGEN COMMUNITY COLLEGE,

Respondent,

-and-

Docket No. CO-80-341-6

BERGEN COMMUNITY COLLEGE
FACULTY ASSOCIATION,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated to him by the full Commission, dismisses a Complaint based on an unfair practice charge filed by the Bergen Community College Faculty Association against the Board of Trustees of Bergen Community College. The charge alleged that the College violated the New Jersey Employer-Employee Relations Act when it docked the pay of faculty members who did not attend graduation, allegedly in retaliation for protected activity and to force the Association to approve a contract; refused to restore the docked monies after the Association prevailed on a grievance because the College had not responded timely and unilaterally determined the compensation for faculty teaching certain summer courses. The Chairman, however, in agreement with a Hearing Examiner, finds that faculty attendance of graduation was contractually required and that the refusal of faculty members to attend graduation was unprotected activity; the College's failure to submit a timely written response to the Association's grievance was at most a mere breach of contract instead of an unfair practice and compensation paid to faculty teaching the summer session courses accorded with the parties' agreement.

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FACULTY ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Pitney, Hardin, Kipp & Szuch, Esqs.
(Patrick J. McCarthy and Suzanne Raymond, of counsel)

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

DECISION AND ORDER

An unfair practice charge and amended charges were filed by the Bergen Community College Faculty Association ("Association") with the Public Employment Relations Commission ("Commission") against the Board of Trustees of Bergen Community College ("College"). The charge, as amended, alleges that the College violated the New Jersey Employer- Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1),(3) and (5),[1/] when it: (1) docked the pay of faculty members who

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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; (3) Discriminating in regard to hire or

Footnote Continued on Next Page

did not attend graduation, allegedly in retaliation for protected activity and to force the Association to approve a contract; (2) refused to restore the docked monies after the Association prevailed on a grievance because the College had not responded timely, and (3) unilaterally determined the compensation for faculty teaching certain summer courses.2/

The Director of Unfair Practices issued a Complaint and Notice of Hearing. The College filed an Answer asserting, in part, that: (1) it had properly docked faculty who had not fulfilled their obligation to attend graduation; (2) it had timely denied the grievance on the docked monies and, in any event, had committed at most a breach of contract rather than an unfair practice, and (3) paid the negotiated rate of compensation to faculty teaching summer session courses.

Hearing Examiner Charles A. Tadduni conducted hearings in this matter. The parties examined witnesses, introduced exhibits

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1/ Footnote Continued From Previous Page

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; and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ The charge had also alleged that the College violated 5.4(a)(6) by refusing to reduce a collective negotiations agreement to writing. That allegation was withdrawn after an agreement was executed.

and filed post-hearing briefs and reply briefs.

The Hearing Examiner issued a Recommended Report and Decision in which he recommended that the Complaint be dismissed. H.E. No. 87-67, 13 NJPER ___ (¶_____ 1987). He found, essentially, that: (1) faculty attendance at graduation was contractually required and that the refusal of faculty members to attend graduation was unprotected activity; (2) the College's failure to submit a timely written response to the Association's grievance was at most a mere breach of contract instead of an unfair practice, and (3) compensation paid to faculty teaching the summer session courses accorded with the parties' agreement.

The Hearing Examiner informed the parties that exceptions were due by May 29, 1987. Neither party filed exceptions or requested an extension of time.

I have reviewed the record. The Hearing Examiner's findings of fact (3-30) are comprehensive and accurate. I adopt and incorporate them here. I also agree with his conclusions of law. Accordingly, acting pursuant to authority delegated to me by the full Commission, I dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

DATED: Trenton, New Jersey
June 11, 1987
ISSUED: June 12, 1987

H.E. NO. 87-67

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

In the Matter of

BOARD OF TRUSTEES OF BERGEN
COMMUNITY COLLEGE,

Respondent,

-and- DOCKET NO. CO-80-341-6

BERGEN COMMUNITY COLLEGE
FACULTY ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Hearing Examiner recommends that the Commission dismiss Unfair Practice Charges filed against Bergen Community College by the Bergen Community College Faculty Association, which alleged that the College had violated N.J.S.A. 34:13A-5.4(a)(1), (3) and (5) of the New Jersey Employer-Employee Act when it docked pay from unit members to induce approval of a contract and in retaliation for the exercise of protected activity; when the College unilaterally imposed certain new terms and conditions of employment and when the College refused to abide by the terms of the contractual grievance procedure. The Hearing Examiner concluded that the employees' decision not to attend graduation was, in the context of this matter, not activity protected under this Act; the Hearing Examiner further concluded that the Association had failed to adduce proofs showing that the College was hostile toward to exercise of protected activities. Accordingly, the Hearing Examiner recommended that the Commission conclude that the College did not violate §§ (a)(3) and (a)(1) of the Act.

With regard to the charge alleging that the College failed to abide by the contractual grievance procedure, the Hearing Examiner concluded that these allegations were not sufficient to support a charge of unilateral change in the terms and conditions of employment; rather, the Hearing Examiner found that these allegations amount to a mere breach of contract claim. Accordingly, the Hearing Examiner recommended that the Commission find no violation of §§ (a)(5) and (a)(1) of the Act.

Finally, the Hearing Examiner concluded that the College did not unilaterally impose terms and conditions of employment when it paid faculty teaching during Summer Session I, 1980 at the 1979-80 overload rate. The Hearing Examiner found that the College acted in accordance with the parties' past practice for summer session compensation and thus, did not unilaterally impose terms and conditions of employment. The Hearing Examiner recommended that the Commission find no violation of §§ (a)(5) and (a)(1) of the Act. Accordingly, the Hearing Examiner recommended that the Complaint be dismissed in its entirety.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 87-67

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For the Respondent
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For the Charging Party
Sterns, Herbert & Weinroth, Esqs.
(Mark D. Schorr, of counsel)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed by the Bergen Community College Faculty Association ("Charging Party" or "Association") on May 20, 1980, with the Public Employment Relations Commission ("Commission"). On June 30 and December 30, 1980, the Charging Party filed amendments to the charge. The Charging Party alleges that the Board of Trustees of Bergen Community College ("College") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). More specifically, the Charging Party alleges that the College

violated §§ 5.4(a)(1), (3), (5) and (6) of the Act,[1/] when it allegedly failed to reduce a negotiated agreement to writing;[2/] docked pay from unit members to induce approval of a contract and in retaliation for the exercise of protected activity; and unilaterally imposed certain new terms and conditions of employment. The Charging Party also alleged that the College violated provisions of the parties' collective negotiations agreement when it refused to abide by the terms of the contractual grievance procedure.

A Complaint and Notice of Hearing was issued on July 23, 1980. An answer and two amended answers were filed by December 26, 1980. In its amended answer, the College denied the charges and asserted affirmative defenses.

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

2/ On the first day of hearing in this matter, the Association withdrew this aspect of the charge; the parties had concluded and executed a new collective negotiations agreement.

Hearings were conducted in this matter on January 6, 7 and 8, March 2, 3 and 6, 1981,[3/] at which times all parties were given opportunties to present evidence, examine and cross-examine witnesses and argue orally. By May 22, 1981 both parties had filed briefs and reply briefs.

Based upon the entire record in this matter, I make the following:

Findings of Fact

1. The Board of Trustees of Bergen Community College is a public employer within the meaning of the Act and is subject to its provisions.

2. The Bergen Community College Faculty Association is an employee representative within the meaning of the Act and is subject to its provisions.

3. The College and the Association were parties to a collective negotiations agreement for the period from June 8, 1977 through June 30, 1980 (Exhibit J-1(a), (b) & (c)) (hereinafter J-1(a), (b) & (c)). Negotiations for a successor agreement began on February 28, 1980, and concluded in July 1980. An agreement was then approved and executed by the parties covering the period from July 1, 1980 through June 30, 1982 (J-2).

3/ The transcripts from the six hearings shall be referred to as follows: TA is January 6, 1980; TB is January 7; TC is January 8; TD is March 2; TE is March 3, part 1; TF is March 3, part 2; and TG is March 6. Exhibits are referred to as: C -- Commission; J -- joint; A -- Association; R -- Respondent.

The Course of Negotiations, the Non-Attendance of Graduation and the Docking of Pay --

4. The Association's aim in the 1980-81 contract negotiations was to get an extension of the existing contract with increases in wages and changes in only a few contractual provisions (TB80-TB82, TD11-TD12, TE75). The College had several substantive areas in the contract which it wished to address: the distribution of -- and controlling costs associated with -- overload teaching, the provision concerning notice and compensation to laid-off tenured faculty, and the overall cost of the contract in relation to several contingent financial circumstances, the results of which could affect the College's payment capabilities (TD11-TD12, TD28-TD35). Another of the negotiations goals set by the College was for the parties to review, edit and revise the several documents then defining the parties' contractual relationship (TD15). More specifically, at that time, the parties' existing contract (J-1(a), (b), and (c)) was comprised of three separate booklets; the parties' relationship was also governed by (as contended by the Association) a series of documents known as "sign-offs" which addressed various terms and conditions of employment not specifically addressed by the contract proper.

Little progress was made during the early negotiations sessions. The Association's negotiators voiced a series of objections concerning the composition of the College's negotiations team (TB60-TB62). At various times in these early sessions, the

Association's negotiators objected to the presence on the College negotiations team of Mr. Hana (Director of Personnel), Mr. Braddish (the Executive Assistant to the President for Personnel Affairs and Labor Relations) and Dean Laughlin (TD2-TD11, TD115, TD148-TD149). The Association's team also objected to talking about certain negotiations topics -- specifically, the overload teaching issue. At certain times, the Association negotiations team walked out of negotiations for periods varying from fifteen minutes to two hours; they turned their backs on the College's negotiations team and refused to engage in any discussions; or they refused to talk about a given subject under threat of walking out of negotiations. These various objections and complaints by the Association had the net effect of slowing down any progress the parties could make toward a new agreement (TE118-TE124, TG4-TG7). During all of their negotiations through the spring of 1980, the Association never submitted a written proposal to the College (TB 62).

5. The Association had set a strike deadline for April 18, 1980. Negotiations began to pick up in early April 1980 (TB66). On April 17, the parties had a marathon negotiations session that commenced in the early afternoon and concluded at approximately 1 a.m. on April 18, 1980. At that session, the parties reached some tentative understandings and agreements on the framework for a new agreement (R-19 and A-13). Both parties altered their negotiations positions to reach those understandings (TB68-TB70). At the end of that session, the Association sought to sign a memorandum of

agreement, as it indicated to the College negotiators that it needed something to take back to its membership on April 18. The College negotiations team did not want to sign any binding document for several reasons: 1) in reaching the tentative understandings, they had moved beyond the area for settlement which the College Board of Trustees had circumscribed in their instructions to their negotiations team; the College's negotiations team plainly informed the Association's negotiators of that fact -- i.e., that the tentative understandings were more than the Board of Trustees was then prepared to offer; 2) the tentative understandings did not address the curbing of overload costs; and 3) the College's negotiations team did not have the authority to bind the Board of Trustees; any agreements reached by the College negotiations team would have to be taken back to, reviewed and ratified by the Board of of Trustees (TB68-TB72, TD15-TD30).

During the early morning hours of April 18, 1980, the parties' negotiators signed a short, one-page document (R-19) indicating that they "have agreed to jointly prepare a Memorandum of Position on the subjects of negotiations for presentation to their principals". The parties contemplated that R-19 would lead to a lengthier document which would then be presented to their principals for consideration. The Association called a ratification meeting for Wednesday, April 23, 1980.

6. David Braddish, the Executive Assistant to the (College) President for Personnel Affairs and Labor Relations, was

given the responsibility of initially drafting the "Memorandum of Position". By noon on April 23, 1980, after extensive back-and-forth consultation between Braddish and Peter Helff (the Association's Grievance Chairperson and Co-Chief Negotiator), the parties' negotiations teams signed a "tentative statement of mutual position which, if approved by their respective constituents, will lead to a re-negotiated contract between the Board of Trustees and the Faculty Association. The negotiating parties have agreed to recommend to their respective principals the following proposed changes to the existing agreement:" (A-13 at. p. 1). On April 23, 1980, the Association's membership approved the tentative statement of mutual position (A-13).

7. The College negotiations team was scheduled to present A-13 to the Board of Trustees at a Board meeting on April 30, 1980. At that time, the College team did recommend the approval of A-13 to the Board (TD52-TD55). Although the Board then declined to ratify A-13, they also did not reject it (TE112-TE117).

The Board had several negotiations concerns which were not addressed by A-13. Before approving an agreement, or the framework for an agreement, the Board told its negotiations team to re-address those specific concerns. These concerns were as follows: 1) the Board wanted to limit its compensation liability to laid-off tenured faculty; 2) the Board was concerned with the rapidly escalating

costs of overload teaching;[4/] 3) the Board wanted the Association to produce all of the contractual sign-offs for the negotiations teams to review and discuss, in order to determine whether or not they would be part of the parties' new agreement.[5/] The Board wanted to see, in written form, one logical, integrated contract document combining Exhibit J-1(a), (b), and (c), the sign-offs and Exhibit A-13, before it entered into any binding agreement (TA37).[6/]

8. Although the College negotiations team had been asking the Association to produce the sign-offs all through negotiations so that they could be reviewed and discussed, the Association team put off their requests, saying we'll get to them later. By April 30, 1980, the sign-offs had still not been produced by the Association (TC63-TC65, TD174-TD175).

Between April 30 and May 14, 1980, the Association produced the sign-offs. During that time, the parties' negotiations teams

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4/ Overload teaching is teaching by the faculty beyond their normal load of fifteen contact hours per semester.

5/ Sign-offs were documents which the Association and various members of the College Administration had executed since the creation of the College. They addressed certain specific subject areas not addressed by the contract. The College contended that the sign-offs were not binding upon the College inasmuch as only an action of the Board of Trustees can bind the College. The Association viewed the sign-offs as part of the parties' contractual relationship.

6/ Exhibit A-13, the tentative statement of mutual position, states: "Language to be combined and cleaned up from..." Exhibits J-1(a), (b), and (c) and the sign-offs.

met two or three times to discuss the matters of concern which remained; they resolved some of those issues (TC63-TC66). The parties discussed the sign-offs and resolved the status of most of them. But on May 14, 1980, at least one of the sign-offs remained unresolved (Honors Program) (TD177).

9. At the College negotiations team's meeting with the Board of Trustees on May 14, the Board still had some problems with the parties' tentative agreement. I note that the Board had been given all of the sign-offs and a tentative, unified first contract draft one day before this meeting. The draft was in very rough form and contained many errors. The Board wanted to see a clearer contract draft. The Board also wanted its negotiations team to press for more restraints on the amount of overload entitlement[7/] and finally, the Board wanted the agreements on the sign-offs to be finalized (TC60-TC65, TD28-TD50).

10. On the evening of May 14, 1980, the Association's leaders learned that the Board had again failed to approve A-13. The Association's leaders were angry (TD54). Peter Helff called College President Alton Reid at his home and told him that the College had a problem -- the fact that the Board of Trustees had failed to ratify A-13. During this conversation, Helff insisted that there be a special Board of Trustees meeting the next day

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7/ Between April 30 and May 14, 1980, the parties had negotiated an agreement on overload distribution only.

(May 15) to ratify A-13 -- before the graduation ceremony scheduled in the evening (TA45-TA55, TE75-TE79).

The next morning, Reid met in his office with Peter Helff, Neil Ender, the Association President, and Jerry Veldof, the NJEA UniServ Representative for Higher Education. The Association's representatives told Reid that the College had a problem with having the faculty participate in commencement in view of the Board's failure to ratify A-13. They told Reid that there was a strong likelihood of no faculty participation in graduation that evening (TA53-TA58, TB88-TB92, TC23-TC26, TE75-TE92).

They indicated to Reid that he should contact the Board of Trustees and arrange for them to ratify A-13 before the graduation that evening. Reid indicated that he was doubtful he could persuade the Board to do that. The Association leaders were dismayed with that response (TC19-TC23, TE110-TE113).

Reid told them that this was a disruption of a College function and that there could be penalties meted-out to the faculty if they did not attend graduation (TE75-TE85). Veldof verified the possibility of penalties to the faculty (TE81-TE82). On direct and cross examination, Helff said that the he and Ender told Reid that under these circumstances, it would be hard to ask the faculty to volunteer its time for graduation (TA52-TA55; TB88-TB90). Helff stated that it came out in conversation between the Association's leaders and Reid that if the Board did not sign A-13 that afternoon,

the faculty would not be at graduation that evening (TB85-TB95).[8/]

11. A faculty conference had been scheduled for May 15, 1980.[9/] After the meeting in Reid's office, Helff, Ender, Veldof

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8/ I note that the testimony of Reid, Helff and Ender varies somewhat concerning what was said and what was indicated during the course of the morning meeting in Reid's office on May 15, 1980. I credit Reid's version of what was said and indicated during this meeting for the following reasons. 1) Helff's testimony on redirect contradicted the testimony which he gave on direct and cross-examination. Initially, Helff testified that during the May 15 meeting in Reid's office, the Association's leaders told Reid that under this circumstance, it would be hard to ask the faculty to volunteer its time for graduation (TA52-TA55). He also testified that they told Reid that if the contract wasn't signed, the faculty would not attend graduation (TB88-TB90). On redirect, Helff testified that the only demand made by the Association was for the Association leadership to talk directly to the Board of Trustees concerning the ratification of A-13. 2) Although Ender's testimony is generally consistent with Helff's redirect testimony -- that the Association only wanted to talk to the Board of Trustees at that point -- Ender did testify that they told Reid that the faculty was "practically out of control", "they're ready to walk out" and, in response to questioning concerning whether he and the faculty would go to graduation that evening, Ender's response was "I never got to tell him", and "I never had to tell him because the word spread immediately" (TC24-TC26). 3) Reid testified that he said to Helff, Ender and Veldof, during the course of the May 15 meeting, that if the faculty boycotted graduation, they might suffer penalties as a result. Reid also indicated that Veldof verified the possibility of penalties and also suggested that there was likely to be a litigation about the penalties (TE78-TE82, TE105-TE107). I note that Veldof was present and testified at this hearing and did not refute this testimony. 4) Reid was a generally credible witness. 5) In fact, the faculty did not attend graduation.

9/ Attendance at faculty conferences is considered by the College to be a mandatory obligation of the faculty, coming under the rubric of "special College functions" in the contract. Faculty conferences are also posted in the academic calendar. See also Faculty Handbook, Administrative Procedures and Helff's testimony at TB55.

and Reid went down to the scheduled faculty conference. Reid testified that when he tried to call the faculty conference to order, they left the hall. Reid said that he saw and heard Association leaders encouraging the faculty to leave the hall. He said it was an enmasse exit -- not coincidental. Reid then left the hall and returned to his office (TE82-TE90).

Two hours later, Helff telephoned Reid and said the faculty had returned to the hall and were ready for the conference. Reid then returned to the hall and made a statement regarding the status of negotiations and conducted the faculty conference as per the agenda.

Helff testified that they had made an agreement with Reid while in his (Reid's) office on May 15, 1980, that Reid would come down to the hall, make opening remarks and adjourn the faculty conference to allow himself time to contact the Board of Trustees to get a response -- another response -- on A-13 (TA54-TA60). Reid denied that he made such an agreement (TE83-TE86).

12. After Reid was initially unable to call the faculty conference to order and had returned to his office, the Association leaders called a meeting of the Association. Helff testified that, at that meeting, he and Ender told the faculty that the Association leaders felt the College had not negotiated in good faith (TA58-TA68). Helff further testified that many suggestions came from the floor of the meeting to pressure the College into signing A-13 -- striking the summer session (spring semester was over),

disrupting graduation, wearing arm bands to graduation, not attending graduation, etc. (TA55-TA65, TA85-TA95). Helff and Ender told the faculty that they would not attend graduation and that the rest of the faculty would have to decide this issue for themselves on an individual basis (TC22-TC26).

13. Later that day (5:15 p.m.), Helff said that he learned that College Deans were calling Department Chairpersons to pressure them into attending graduation. Reid testified that he had given an instruction earlier in the day for Deans to contact Department Chairpersons in order to determine what personnel the College would have to work with that evening at graduation. Reid and Braddish denied any harassment of Department Chairpersons (TD55-TD60, TE89-TE94).

Helff contacted Braddish to tell him to stop the phone calls, or he (Helff) would not "convince" his technical assistants "to stay on the job" for graduation (TA60-TA67, TD55-TD60, TE89-TE94).[10/] The College agreed to stop the phone calls at that point -- noting they were just about completed anyway. On the evening of May 15, 1980, only one faculty member attended the Bergen Community College graduation (TC36).

10/ Technical assistants are faculty unit members whose responsibilities included setting up and running the audio equipment at graduation. Technical assistants do not have faculty rank.

On May 28, 1980, the Board of Trustees passed a resolution docking the pay of those faculty who failed to attend graduation and who were not excused therefrom, for that part of the day proportionate to the time they failed to work. See J-4 and A-17.

14. The parties' negotiations teams continued to meet after May 15 to resolve the remaining aspects of overload, the sign-offs and the contract language issues (TB79-TB82, TC15-TC20; TD61). The parties had three meetings between May 20 and June 11, 1980 and resolved all of the open issues. Braddish and Ender eventually worked out the new salary schedule in June 1980 (TD27).

The Board of Trustees approved the agreement between the Faculty Association and the College in early July 1980 (TC19).

15. The Association alleged that in consolidating J-1(a), (b) and (c), the sign-offs and Exhibit A-13, Braddish made substantive changes in the drafts of the new contract. The Association believed that the College was thus trying to "slip the changes by them" and that this was another demonstration of their failing to negotiate in good faith. In his testimony, Ender identified several of the changes and alleged there were others (which he did not identify). Those identified were: a) elimination of the vice president title from the unit exclusions clause; b) when referencing a particular College office, Braddish changed the name of the Office of the Registrar and Admissions; c) changes made in language concerning class size and lecture mode; d) changes in language concerning overload for Group T faculty; and e) a change in

language concerning the formulation and review of the College calendar (TC4-TC15).

16. Braddish discussed the contract language review and consolidation process in his testimony. He alluded to several problems. Braddish was attempting to review the language from Exhibit J-1(a), (b) & (c), the agreed-upon sign-offs and A-13, edit them (remove redundancies, clarify unclear language, get rid of and/or update obsolete language) and recombine the language into a new, logical whole. Braddish was working under time pressures; he was working with a typist who was just getting used to a new word processing system and he was engaging a large amount of (principally telephone) give-and-take concerning the language in the new contract draft, with both members of his own negotiations team (Board Counsel McCarthy and Dean Lopez-Isa) and the Association negotiations team (Helff and Ender) (TA91-TA103, TD70-TD76). Ender acknowledged the hectic nature of the circumstances surrounding Braddish's efforts (TC64-TC66).

Braddish testified that he was not trying to make substantive changes in the contract; he was trying only to edit and produce a new, logical and coherent contract document (TE45-TE54). In referring to the particular changes noted by Ender, Braddish stated that: a) there no longer was a vice president title at the College; b) the Admissions and Registration Department had in fact been renamed; c) regarding the class size and lecture mode language, Braddish claims that he incorporated the A-13 language on this

subject into his initial contract draft and believed that that was what the parties had agreed to during negotiations; later, Helff convinced him that the J-1 language was not being abandoned, but merely added to by the A-13 language; Braddish then restored the J-1 language, although, he noted that the parties did later agree on some changes to the J-1 language (TE46-TE48); d) regarding the changes in the Group T faculty language, Braddish felt this change was merely clarifying an existing practice concerning the distribution of and compensation for overload teaching: the old contract had stated that when Group T employees taught overload, they were compensated at the full overload rate; the contract had been silent regarding what happened when Group A, L, R and S employees taught overload, despite there being a practice that they, too, received the full overload rate. Thus, his change was, essentially, to say that all faculty teaching overload got the full overload rate. The Association ultimately agreed with this change; e) with regard to the change in language concerning the review of the College calendar, Braddish initially wondered whether this was a proper subject for collective negotiations. Upon seeing how disturbing the change in the language was to the Association, Braddish returned the language to its original form in a subsequent draft (TD64-TD73).

17. Braddish turned out a total of five contract drafts over the period from May through June 1980. He gave copies of each draft to Helff and Ender and his own negotiations team members, as he completed them; he solicited the Association's suggestions and

input for each of the contract drafts. He often called Helff and Ender as he was writing, with a particular problem he had encountered or with regard to an issue about which he was uncertain (TE2-TE16).[11/] The parties (principally Braddish, Helff and Ender) had three meetings where they worked out most of the language items in May and June 1980. By the time they got to the third draft, things began going more smoothly with the contract language items. The Board of Trustees was also provided with copies of the drafts as they were produced.

18. Aside from the events leading up to the faculty's non-attendance of graduation and the Board of Trustees docking of pay from those faculty members who did not attend graduation and who had not obtained a prior excuse for non-attendance, there was testimony concerning whether graduation was an employment obligation of the faculty.

The Association contended that each year, the faculty "volunteered" their time to attend graduation. While acknowledging that most of the faculty wanted to attend graduation out of a sense of responsibility to their students and the College community in general, the Association noted that there was no specific contract provision which required faculty to attend graduation. The Association further contended that each year a substantial number (15-20%) of the faculty did not attend graduation.

11/ I note that, to this point in time, Braddish had been with the College for a total of only three months.

19. The College presented testimony on this issue as follows. From the inception of the College and the first graduation (approximately 1970), the faculty have been obligated to attend graduation and, in fact, upwards of 95% have attended each year.12/

12/ I note that the testimony presented by the Association on this issue contradicts the testimony presented by the College. I credit the testimony presented by the College for the reasons which follow. The testimony presented on this issue by the Association came from Helff and Ender. They related their observations of the approximate number of faculty who attended graduations over the years. During the graduation functions, Helff and Ender either marched with the faculty and were seated with the faculty (at ground level) or Helff supervised the technical assistants (also from a ground level position) or Ender testified that he had, occasionally, been seated on the stage (TB58-TB59).

The College position concerning the number of faculty who have attended graduation over the years was based upon testimony from Dean Lopez-Isa and Dean Laughlin. Both Laughlin and Lopez-Isa have attended every graduation held at Bergen Community College and both have usually been seated on the stage area during those graduations. From the stage, they would have a better view of the faculty seating sections than would an observer from ground level. See A-20.

Both Laughlin and Lopez-Isa further indicated that during all of the graduations, they had responsibility for certain departments within the College (TE131-TE137, TF5-TF7). Their responsibilities included having approved or disapproved requests from the faculty to be absent from graduation. In that regard, when they scanned the faculty seating area from their position on the stage, it was, at least in part, to confirm that the only faculty from their departments who were absent from graduation were those who had secured prior approval. Prior to 1980 and the controversy over whether faculty were obligated or not obligated to attend graduation, Helff and Ender would have had no particular reason to scan the faculty section and to make accurate mental note of the number of faculty attending and the number of faculty absent. Accordingly, I believe that the testimony of Lopez-Isa and Laughlin would be more accurate on this issue (TE131-TE137, TF5-TF7, TG43-TG47, TG60-TG64).

The College notes that Appendix D of the existing contract (Exhibit J-1(a)) contains the following language:

> If an illness or disability exceeds one day, a member shall not be charged for days against sick time on which he has no scheduled obligations. Scheduled obligations shall be understood to include in addition to teaching his classes, office hours, committee meetings and special College functions or assignments. (emphasis added). J-1(a) at p. 22.

The College also notes that all of the faculty handbooks that have been issued by the College (R-7, R-8, R-9 and R-10) have required the faculty to attend graduation. The 1979 through 1981 handbook provides as follows:

> Commencement will take place once each year at the end of the spring semester. The College occasions committee, composed of faculty and students, makes all necessary arrangements. All faculty members are expected to participate in academic robes unless excused in advance by the appropriate Dean. R-7 at p. 28.

Although the Association presented testimony about how it had objected over the years to the College's inclusion of various terms and conditions of employment in the faculty handbook, and how the discussions which it had with the College had resulted in certain changes being made in the faculty handbook, I note that the requirement to attend graduation has remained in each handbook (R-7, R-8, R-9 and R-10).

I further note that each year, the College through the Dean of Instruction, has issued a reminder memo to the faculty telling them that all faculty were required to attend graduation unless they were excused therefrom (R-3, R-5 and A-14; TE16-TE30, TE131-TE137,

TF5-TF25). The College has also issued a series of other memos to the faculty (concerning caps and gowns and other graduation procedures) which clearly bespeak the expectation of all concerned that all faculty would attend graduation (R-21 and R-22; TF5-TF25, TG11-TG42, TG52-TG65).

Perhaps most troubling from the Association's viewpoint of the graduation attendance issue, and most telling, is the relatively large number of written excuses submitted to the College by the faculty, year after year, in advance of graduation exercises. This is an indication from a significant number of faculty members that they believed they needed to request to be excused from attending graduation in advance of that function. These requests to be excused from graduation attendance were responded to by the appropriate College administrative or supervisory person (R-6).

Finally, I note that prior to the 1980 graduation, the Association never grieved or complained about the graduation attendance requirement; nor did it seek to negotiate concerning the graduation attendance requirement or compensation therefor, prior to 1980.

The Docking Grievance --

20. On June 16, 1980, the Association filed a grievance, requesting restoration of all monies docked from the compensation of unit members who did not attend graduation (A-1). The grievance was processed in accordance with contractual requirements through the

first step, resulting in a denial of the grievance by the College President on August 21, 1980 (A-2, A-3, A-4, A-5 and A-6; J-2; TB15-TB21).

21. On August 29, 1980, the Association requested a step two grievance hearing. The hearing was scheduled for September 9, 1980, postponed by agreement of the parties, and conducted on September 30, 1980. At the hearing, the Board's attorney requested, and the Association agreed to, an extension of time until October 10, 1980, for the College Board of Trustees to render its determination on the grievance (A-7, A-8, A-9 and A-12; TB21-TB17).

This extension was sought because the step two hearing was to proceed before the Personnel Subcommittee of the Board of Trustees; because of the importance of this grievance, the College wanted to have the matter placed before the entire Board of Trustees for a decision; however, the entire Board of Trustees was not scheduled to meet again until October 8, 1980, a point in time after which the Board would have had to make its determination herein under the contractual grievance procedure.

22. The step two grievance hearing was convened on September 30, 1980, before the Personnel Subcommittee. At this proceeding, only the position of the Association was presented to the Personnel Subcommittee; the College Administration provided no testimony or documentary materials to the Personnel Subcommittee. During its step two hearing presentation, the Association (through Grievance Chairperson Helff) argued that several employees who

either did work during graduation or who had obtained a prior written excuse from graduation attendance were docked and should not have been docked. This argument was not presented at the step one hearing (TD102). After the Association had presented its case to the Personnel Subcommittee, they asked Braddish to research the new issue raised by Helff. Braddish had to check the records of the College in order to answer this inquiry (TD98-TD102). The Personnel Subcommittee also told Braddish to secure an extension of time for the Board to render its decision so that the full Board could consider the grievance (TD98-TD103).

At second level grievance hearings, it is a common practice for only the Association to present its case. After the Association's presentation, the Board then goes into an executive session and receives testimony and materials from the College administration without the presence of the Association. That is what happened in the treatment of the docking grievance (TB20-TB27, TD9).

23. At the October 8, 1980 meeting of the full Board of Trustees, the Board's Personnel Subcommittee presented to the full Board of Trustees the step one hearing officer's report on the docking grievance; the argument presented to the Personnel Subcommittee by the Association at the September 30 hearing; and the recommendation of the Personnel Subcommittee to deny the grievance. At that time, Braddish also reported to the Board of Trustees the results of his research concerning the four faculty members whom

Helff had argued were unfairly docked pay. Braddish concluded that only one of those faculty persons had actually attended graduation and therefore, only that person should not have been docked. Braddish sent a memo to the payroll department to remove the dock from that person's pay. The Board concurred (R-17, R-18; TD98-TD111).

24. On October 9, 1980, Braddish telephoned Helff and told him that the Association had lost the grievance. Helff testified that he told Braddish that he never had any doubt about how the Board would rule on the docking grievance (TB41, TB121; TD107).

Reid testified that on October 9 and 10, 1980, he was attending to duties which kept him away from the College for most of those days (TE95-TE99). On October 13, 1980, College President Reid sent a memo to Association Grievance Chairperson Helff informing him of the Board of Trustees denial of the docking grievance (A-10). Reid testified that it was part of his duties as President of the College to inform parties of formal actions taken by the Board of Trustees. Braddish and Helff testified that Reid is considered to be a member of the Board of Trustees (TD90-TD100; TB43-TB48). On October 15, 1980, Chairman of the Board of Trustees Andora sent Association President Ender a letter transmitting the Board of Trustees' decision on the docking grievance.

25. On October 13, 1980, Helff called Braddish and told him that the Board of Trustees "blew it", that the docking grievance answer was late and that the Board had defaulted. Braddish's

response to Helff was that "you're kidding". Helff admitted this was the first time that the Association had taken up a time default grievance; he further stated that it was the first time he had looked for such a way to win a grievance (TB121, TB128).

26. By letter dated November 10, 1980, Association President Ender informed Board of Trustees' Chairman Anthony Andora that the Association believed the College had defaulted on the docking grievance. In support of this contention, Ender cited Article XVII, Section 4, paragraph 5 of the collective negotiations agreement between the parties, which states:

> The Board of Trustees shall make a determination of the grievance in writing within seven (7) days of the last hearing or last submission of materials, indicating its disposition of the grievance. A copy of the Board's disposition shall be transmitted to the grievant and the President. The disposition of the grievance by the Board of Trustees shall be final....Any grievance not answered within the time specified above shall be deemed as granting relief to the grievant.

The Association stated that it had not received written notice of the College's determination on the grievance until three days after the agreed upon date and that notification from the Board of Trustees itself was required by the contract; the Association noted that the notification occurred five days out of time. Thus, Ender requested the restitution of wages docked from faculty members for failure to attend graduation (J-2; A-12), in accordance with the provisions of the grievance procedure. The College denied this grievance and the Association then amended its unfair practice charge to include these allegations.

The 1980 Summer Session Issue --

27. In summer 1980, another dispute arose between the parties concerning compensation for faculty teaching courses during part of the summer 1980. The College offered two summer sessions in 1980: Session I was conducted between May 19 and June 21, 1980; Session II was conducted between June 30 and August 8, 1980. The College compensated faculty who taught Summer Session I based on the overload rate for the 1979-80 academic year, established in the collective agreement covering June 8, 1977 through June 30, 1980 (J-1(a), (b) & (c) and J-3, R-14 and R-16; TB11-TB13). The College compensated faculty who taught during Summer Session II based upon the overload rate for academic year 1980-81, established in the parties' successor agreement, J-2.

28. On June 27, 1980, the Association filed a grievance seeking compensation at the overload rate established in the successor agreement (1980-81) for faculty who taught during Summer Session I.[13/] In support of this position, the Association argued that the College had "arbitrarily imposed" the overload rate from the 1979-1980 contract/fiscal year upon faculty who taught during 1980 Summer Session I and had thus violated past practice with

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13/ In fact, the College had paid employees who taught in 1980, Summer Session I at the 1980-81 contractual overload rate. The College contended this was a mistake and that these employees should have been paid at the 1979-80 overload rate. The College indicated that it would take action to recover the amount of compensation paid to these employees in excess of the 1979-80 overload rate.

respect to compensation for teaching summer session courses. On August 6, 1980, President Reid denied the grievance (R-14, and R-15; TB9-TB12). The Association then incorporated the grievance claim into this unfair practice charge.

The College argues that its past practice with regard to the payment of faculty who taught during summer sessions is clear: the faculty was paid at the overload rate in effect for the latest contract/fiscal year in which the summer session occurred. The College claims that its actions with regard to Summer Session I were completely consistent with that practice.

29. In 1978, there was a summer session with three distinct segments: (a) a three-week segment from June 5 through June 23, 1978; (b) a six-week segment from June 28 through August 4, 1978; and (c) a three-week segment from July 10 through July 28, 1978. Segment (a) was paid at the 1977-78 contract/fiscal year overload rate because it fell totally within the contract/fiscal year 1977-1978. Segment (b) was paid at the 1978-79 contract/fiscal year overload rate because it fell within both contract/fiscal years 1977-78 and 1978-79. Segment (c) was paid at the 1978-79 overload rate because it fell totally within the 1978-79 contract/fiscal year (Exhibit R-16; TD90-TD98).

30. In 1979, there was a three-week summer session and a six-week summer session; the three week session, because it fell totally within the 1978-79 contract/fiscal year was paid at the 1978-79 contract overload rate. The six-week session, because it

fell within both contract/fiscal years 1978-79 and 1979-80 was paid at the overload rate for 1979-80 (TD90-TD98).

31. In 1980, there were two summer sessions: Summer Session I ran from May 19 through June 27, 1980; and Summer Session II ran from June 30 through August 8, 1980. For Session I, faculty were paid at the 1979-80 contract year overload rate, as that session fell totally within the 1979-80 contract/fiscal year. In Session II, faculty were paid at the 1980-81 contract year overload rate, as that session fell within both contract/fiscal years 1979-80 and 1980-81 (TD90-TD93).

32. Lewis Smith, former Executive Assistant to the President for Personnel Affairs and Labor Relations, testified that in the spring of 1978, he had discussions with the Association about compensation for the summer 1978 mini-session. He testified that the parties had by then developed a past practice for determining the compensation of faculty who taught during the summer sessions. That practice was to pay faculty who taught during the summer session at the overload rate in effect for the latest contract/fiscal year in which the session occurred.

33. Helff raised a question with Smith about which overload rate would be applied for faculty teaching during the 1978 summer mini-session. Smith indicated to Helff that while he hadn't thought about it, he assumed that the overload rate of the present school year (1977-78) would be used to determine compensation, because the first summer mini-session would be started and finished

within the present school year (1977-78). Helff agreed (TC115-TC120).

34. Smith testified that the practice of compensating faculty who taught during the summer sessions at the overload rate for the upcoming school year was an accomodation to the payroll department; by using this compensation method, they would not have to use two overload rates to compute compensation for a summer session which began during one contract/fiscal year with one overload rate and concluded during the next contract/fiscal year with another overload rate (TC115-TC120).

35. Regarding the 1979 summer mini-session, there was a discussion between Smith and Helff about how selections of faculty to teach summer sessions would be made. That discussion resulted in a memo from Smith to Helff regarding the 1979 summer mini-session and an agreement between the parties concerning the distribution of overload teaching (Exhibits R-12, R-13). The record does not indicate that any discussion occurred concerning compensation.

36. In his testimony, Helff contended that mini-sessions were mini-sessions, and summer sessions were summer sessions, and that the two were not the same.

Smith's testimony, on the other hand, indicates that the mini-sessions, the summer sessions and the double summer sessions were all viewed in pretty much the same way. Thus, the two six-week summer sessions during summer 1980 should not be viewed as something "new", but rather as something that was within the contemplation of

the parties' existing contract and past practice (TC120-TC146; A-18, A-19 & R-11). Smith did not see his discussions with Helff on these matters as negotiations; rather, he viewed these discussions as contractual interpretation or clarification, which relied for its substance on the parties' prior negotiations and past practice (TC130-TC146).

37. Virginia Laughlin, Dean of Student Services, and David Braddish, the Executive Assistant to the President for Personnel Affairs and Labor Relations, testified that the practice of paying faculty who taught summer sessions at the overload rate of the upcoming contract/fiscal year began as an administrative convenience (TD82-TD86, TG48-TG52). Summer sessions often had begun in June and ran through July. Rather than computing pay at one rate for a few days in June (at the old contract year overload rate) and then computing the balance of pay at the new contract year overload rate (after July 1), the College decided to pay faculty who taught during a session which overlapped two contract years at the upcoming contract/fiscal year's (higher) overload rate (TG48-TG52; TD82-TD90). The Association never objected to this practice.

38. In January through March 1978, the College conducted a four-week "STIP" session. Faculty teaching courses during the STIP session were compensated at the contractual overload rate for the 1977-78 academic year (TD92-TD97).

39. Compensation rates for the STIP sessions, the mini-sessions and the full summer sessions reviewed above were not

referenced in the collective negotiations agreement then in effect (J-1(a), (b) & (c)). Testimony indicates that STIP sessions were not discussed by the parties. Summer session compensation was discussed as set forth above (TB6-TB8; TC115-TC120; TD92-TD96).

40. Prior to the dispute concerning compensation for the first summer session in 1980, the Association had never filed a grievance covering summer session compensation nor did it grieve the STIP session wages. Further, aside from those negotiations referenced above concerning the summer sessions, the Association never sought further negotiations on this subject until the issue arose in 1980 (TC111-TC121).

41. The Association brought the payment grievance concerning the 1980 summer session, went through grievance step one and then discontinued processing the grievance. The Association decided to incorporate the grievance into the unfair practice charge and place the matter before the Commission. The College never assented to that procedure (TD94-TD98).

The Association argued that the College had arbitrarily imposed the overload rate from the 1979-80 contract/fiscal year on faculty who taught during Summer Session I, 1980, violated the parties' past practice, refused to negotiate concerning "the new" summer session compensation rates and thus violated §§ (a)(5) and (a)(1) of the Act.

ANALYSIS AND CONCLUSIONS OF LAW

I. The College's Docking of Pay from Faculty Members Who Did Not Attend Graduation Exercises --

In its charge, the Association alleged that the College's action in docking faculty members' pay was motivated by anti-union animus and was aimed at forcing the Association to execute the contract then being negotiated. The Association charged that the policy of requiring faculty to attend graduation had never been negotiated and therefore the unilateral imposition of that requirement on the faculty was violative of the Act. In its brief, the Association argues as follows:

> It should at once be evident that the decision by the Association's members not to attend graduation was provoked by the stance of the College's negotiators throughout the negotiations and the delays occasioned by the Board in effecting ratification of the Agreement....[the] Association's members believed they were not being dealt with fairly and that the boycott of graduation -- attendance at which they deemed not to have been a term and condition of their employment -- was the only way they could have registered their protest.
>
> All of that being so, the issue on graduation is clearly defined. If attendance was indeed obligatory, the College was justified in taking some sort of punitive action. If not, the dock was in retaliation for bona fide organizational activity undertaken by Association members and thus a violation of N.J.S.A. 34:13A-5.4(a)(1) and (3). (Association brief at p. 35).

The College denies that it docked faculty who did not attend graduation in order to pressure the Association into signing the contract or to weaken the Association or to discourage the

exercise of protected rights. The College states that it docked pay from those faculty members who did not perform their assigned duties and were not otherwise excused.

I first consider the Association's contention that the College refused to negotiate in good faith. In State of New Jersey, E.D. No. 79, 1 NJPER 39 (1975), aff'd 141 N.J. Super 470 (App. Div. 1976), the Commission set forth the appropriate standard for determining whether a party has refused to negotiate in good faith:

> It is necessary to subjectively analyze the totality of the parties' conduct in order to determine whether an illegal refusal to negotiate may have occurred...A determination that a party has refused to negotiate in good faith will depend upon an analysis of the overall conduct and/or attitude of the party charged. The object of this analysis is to determine the intent of the respondent, i.e., whether the respondent brought to the negotiating table an open mind and a sincere desire to reach an agreement, as opposed to a pre-determined intention to go through the motions, seeking to avoid, rather than reach, an agreement.
> [Id. at 40, footnotes omitted].

That case further stated:

> It is well established that the duty to negotiate in good faith is not inconsistent with a firm position on a given subject. "Hard bargaining" is not necessarily inconsistent with a sincere desire to reach an agreement. An adamant position that limits wage proposals to existing levels is not necessarily a failure to negotiate in good faith.
> [Id. at 40].

See also Mt. Olive Board of Education, P.E.R.C. No. 84-73, 10 NJPER 34 (¶15020 1983) and Ocean County College, P.E.R.C. No. 84-99, 10 NJPER 172 (¶15084 1984).

Under the totality of the circumstances of this case, I find that the College's negotiations attitude and behavior did not constitute a refusal to negotiate in good faith. In this regard, I particularly note the following.

During the 1980 negotiations, the Association's own negotiations tactics contributed to the slow progress of negotiations, particularly during the early stages of negotiations. While I agree with the Association's characterization of these tactics as being part of their negotiations strategy and lawful in all respects, nevertheless, the net effect of this course of conduct was to increase the delay in the parties reaching a final agreement. As time went on, the Association became caught in a time bind relative to negotiations and its own strike deadline. In no small measure, the Association laid much of the foundation for the problem which arose later, on May 15, 1980.

A-13 is not a binding agreement. By its own terms, A-13 is a "tentative statement of mutual position..." The language of A-13 clearly requires approval by the negotiators' principals. The College negotiations team did not have the authority to bind the Board and the Association was never led to believe that the College team had such authority. In fact, quite the opposite is true. The College negotiations team stressed to the Association team that the terms of A-13 exceeded the contractual proposals which the Board had, to that point in time, been prepared to offer. A-13 has clear limiting language which indicates that the statements contained in

it are the parties' positions, and that any agreements reached were subject to being approved by the parties' principals. The failure of a principal to approve a memorandum of agreement entered into by the principal's negotiator, where the terms of the memorandum make it subject to the approval of the principal, is not a violation of the Act. Cf. City of Camden, P.E.R.C. No. 82-103, 8 NJPER 309 (¶13137 1982); Trenton Board of Education, D.U.P. No. 87-15, 13 NJPER ___, (¶_____ 1987); South Amboy Board of Education, P.E.R.C. No. 82-10, 7 NJPER 448 (¶12200 1981); see also City of Jersey City, H.E. No. 86-64, 12 NJPER 506 (¶17190 1986), withdrawn prior to Commission action.

The Association had little interest in the language revisions to the contract or the College's effort to limit overload teaching. The Board of Trustees was clearly concerned about these issues as well as the overall costs of the new contract. On April 30 and May 14, 1980, the Board was still not satisfied with the shape of the tentative agreement and sought to negotiate further. Thus, the Association here is essentially complaining because the College did not sign the contract as the Association wanted it (the contract) and when the Association wanted it signed (TB81, TD42-TD44). The Board, instead, sought to pursue negotiations in several specific areas.

Revising and combining the language from J-1(a), (b) and (c), the agreed-upon sign-offs and A-13 was a complex and time consuming task. Many of the changes made to the drafts by Braddish,

which Ender and Helff cite in support of their contention that the College was negotiating in bad faith, seemed to be legitimate language items for the parties to try to work out during their negotiations. When the language problems were pointed out to Braddish, his response was I know there are problems with the drafts, I think we have to sit down and work them out. Five documents preceded the final version of J-2; these documents were not proffered to the Association as a "final document" for them simply to sign; the five were proffered as drafts and the College was quite willing to discuss them with the Association and to revise them. Given the facts that Braddish was new at the College, that there were problems with the new word processing system used to produce the drafts, that the revisions were being done under time pressures and that the College did extensively discuss and negotiate the language of J-2 with the Association, there is nothing here which indicates bad faith negotiations.

Accordingly, based upon the record herein and the foregoing analysis, I conclude that the College did not fail to negotiate in good faith.

In State of New Jersey and Seaman, P.E.R.C. No. 87-88, 13 NJPER 117 (¶18051 1987), the Commission reviewed the framework for the analysis of § (a)(3) allegations. The Commission stated:

> In re Bridgewater Tp., 95 N.J. 235 (1984) establishes the analysis we must apply when considering allegations of discriminatory conduct. 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. State of New Jersey, supra, at p. 118.

The Association's contention is that the dock was in retaliation for "bona fide organizational activity" -- the non-attendance of graduation -- and thus, was violative of subsection (a)(3) of the Act. The decision not to attend graduation -- regardless of whether there was a contractual obligation to attend graduation -- was, in the context of this matter, not activity protected under this Act. In Sayreville Board of Education, P.E.R.C. No. 86-120, 12 NJPER 375 (¶17145 1986), the Hearing Examiner found that there was no protected activity engaged in by Association members who withheld their services on and after the commencement of the school day on September 26, 1984. Hearing Examiner Howe stated:

> Whatever flows thereafter, regarding the nonpayment of teachers who timely failed to report to work on September 26, constitutes a consequence without legal redress. Sayreville, H.E. No. 86-26, 12 NJPER 86 (¶17030 1985).

In agreeing with the Hearing Examiner, the Commission determined that the Board did not violate the Act when it withheld salary for the day that employees reported to work late because they were participating in an unlawful job action. See also Board of Education of the Borough of Union Beach v. N.J.E.A., 53 N.J. 29 (1968).

The College's decision to dock the pay of faculty was based upon the faculty's nonperformance of assigned work. However, the Association argued that there was no obligation on the faculty to attend graduation. I disagree.

Year after year, at least 95% of the faculty have attended graduation. Most of the faculty who have not attended graduation secured prior permission from the appropriate College administrator not to attend. Memos reminding faculty that they must attend graduation unless excused have been distributed by the College year after year, as were other memoranda outlining graduation procedures for the faculty. The Association has never grieved the graduation attendance requirement nor sought to negotiate concerning it. It was accepted, by the faculty and the Association, as a fact of faculty life at the College.

The contract contains no specific requirement that the faculty attend graduation, although the College argued that the

language in Appendix D of J-1 indicates that graduation is a "special College function" and thus, is an obligation of the faculty. However, the faculty handbooks issued by the College have always stated the requirement that the faculty attend graduation.

Based upon the foregoing, I find that there was a clear past practice of acceptance by the Association and the faculty of the graduation attendance requirement and of the faculty attending graduation. See Somerset County Voc-Tech Board of Education, P.E.R.C. No. 78-54, 4 NJPER 153 (¶4071 1978); Barrington Board of Education, P.E.R.C. No. 81-122, 7 NJPER 240 (¶12108 1981); and Montville Tp. Board of Education, P.E.R.C. No. 86-51, 11 NJPER 702 (¶16241 1985).

Further, the Association adduced no proofs tending to show that the College was hostile toward the exercise of protected activities engaged in by the Association.

Accordingly, the Association has failed to demonstrate by a preponderance of the evidence that it had engaged in protected activities of which the employer was aware and that the employer was hostile toward the exercise of those protected rights. Therefore, I conclude that the Association has not proved a violation of N.J.S.A. 34:13A-5.4(a)(3) and (1) of the Act.

II. The Docking Grievance --

In the fourth count of its Complaint, the Association alleges that the College violated §§ (a)(5) and (a)(1) of the Act, when it failed to comply with the contractual grievance procedure in

the parties' collective negotiations agreement. The Association contends that the contractual grievance procedure requires the Board to make a written disposition of a grievance within seven days of the last hearing day, that this written disposition shall be transmitted to the grievant and the College President, and that this disposition shall be final. The Association notes that the grievance procedure provides the following: "Any grievance not answered within the time specified above shall be deemed as granting relief to the grievant." The Association contends that the Board did not provide a written answer to the Association within seven days of the last hearing day. The Association argues that the Board violated the contractual grievance procedure; the Association contends that, in accordance with the terms of the contract, it demanded the relief sought in the docking grievance (restoration of monies docked from the faculty that did not attend graduation) and that the College denied the relief sought. The Association argues that this denial constitutes a unilateral change in terms and conditions of employment without prior negotiation.

The College position on the docking grievances is twofold. The College argues that the Association's interpretation of the time provisions of the parties' contractual grievance procedure is incorrect. The College makes the following points: a) it argues that the contractual grievance procedure does not require that the written determination to the step two hearing <u>be received by the Association</u> within seven days of the last date of hearing or the

last submission of materials; b) nor does the grievance procedure require the Board to transmit the written determination of the step two hearing within seven days of the last hearing date or the last submission of materials; c) rather, the College argues that the only action which is required to be taken within seven days of the last hearing date or last submission of materials is that the Board must make a determination of the grievance in writing, indicating the disposition of the grievance. The grievance procedure requires that a copy of the Board's disposition be transmitted to the grievant. The College notes that there are no time requirements imposed by the grievance procedure on the transmission of this copy; d) the College contends that the Board of Trustees meeting on October 8, 1980, was a continuation of the second step grievance hearing process. At the October 8 meeting, the Board received the hearing officer's report from the step one hearing, a presentation of the arguments made to the Personnel Subcommittee at the September 30 hearing, documentary materials concerning the docking grievance, and the recommendation from the Personnel Subcommittee that the grievance be denied. Accordingly, the College argues that even assuming arguendo that the grievance procedure required the Association to have received a written determination of the grievance within seven days of the last hearing date or the last submission of materials (by October 15, 1980), the Board complied with that requirement in this matter; e) the parties' past practice with regard to the administration of the grievance procedure indicates that the parties have taken a flexible

approach in processing grievances and have not interpreted strictly the procedural requirements of the grievance procedure.

The second major position taken by the College with regard to the docking grievance is that this matter is simply a contractual dispute and is not properly before the Commission for determination. The College argues that this matter should be adjudicated by the Superior Court or such other forums as the parties may agree upon.14/

In State of New Jersey, Department of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984), the Commission affirmed the refusal to issue a complaint by the Director of Unfair Practices based upon unfair practice charges which allege only a breach of contract.

The Commission stated:

> The breach of a collective negotiations agreement is not enumerated as an unfair practice. We deem this omission to be significant and to evidence a legislative intent that claims merely alleging a breach of contract based on apparent good faith differences over contract interpretation would not, even if proven, rise to the level of a refusal to negotiate in good faith under subsection 5.4(a)(5).
> Id. at 42.

14/ On the first day of hearing in this matter, the Association moved to amend its charge to include count four (the docking grievance). The College objected to the Association's request to amend its charge to include count four. The College based its objection on the contention that count four sets forth a purely contractual dispute which is not appropriately before the Commission. The Hearing Examiner reserved upon ruling concerning whether or not count four would be accepted as an amendment to the unfair practice charge (TA7-TA9). The Hearing Examiner addresses that motion hereinabove.

In Human Services, the Commission affirmed a policy statement made in Borough of Palisades Park, D.U.P. No. 78-71, 3 NJPER 238 (1977):

> The Commission does not view its role as the enforcer of collective negotiations agreements. Such a matter is appropriately the concern of an arbitrator, or alternatively the courts upon a suit for contract enforcement. In certain limited situations where a contract has been breached, the Commission will find that such a breach has also constituted a statutorily prohibited unilateral change in terms and conditions of employment without prior negotiations and thereby find that an unfair practice has occurred.
> Id. at 239, n. 8. (Citations omitted).

In Human Services, the Commission cited United Telephone Co. of the West, 112 NLRB No. 103, 36 LRRM 1097 (1955), where the NLRB, in refusing to issue a complaint, stated:

> ...There is no showing that the Respondents, in carrying out the contract as they did, were acting in bad faith. Furthermore, the Respondents' action was in accordance with the contract as they construed it, and was not an attempt to modify or to terminate the contract....
>
> In view of its contractual relations with the Respondents, the Union's recourse in this situation was to exhaust the possibility of settling the overtime question by negotiation and failing such settlement, to seek judicial enforcement of its construction of the contract. The Board is not the proper forum for the parties seeking to remedy an alleged breach of contract or to obtain specific enforcement of its terms.
> Id. at 1098-1099. (Citations omitted).

In reaching its determination in Human Services, the Commission stated:

> We conclude that a mere breach of contract claim does not state a cause of action under subsection

> 5.4(a)(5) which may be litigated through unfair practice proceedings and instead parties must attempt to resolve such contract disputes through their negotiated grievance procedures. We base this conclusion primarily on our interpretation of the Act and the legislative policy expressed therein favoring the use of negotiated grievance procedures for handling contractual disputes. Human Services, at 42.

In the instant matter, with regard to the docking grievance, there appears to be no allegations which would provide a specific basis for finding that the College has refused to negotiate in good faith. The College met its obligation in the first instance by negotiating and agreeing to a grievance procedure. The contract clause in question may arguably be interpreted to support the position taken by either of the parties. The College has not repudiated the grievance procedure, but rather, has an understandable difference of interpretation with regard to the application of the grievance procedure to the facts of this matter. Under all of these circumstances, I cannot conclude that the Association's breach of contract claim, even if found to be ultimately meritorious, would amount to an unfair practice. See Human Services, supra, and Roselle Board of Education, D.U.P. No. 86-6, 12 NJPER 218 (¶17088 1986).

Based upon the record in this case and the foregoing, I conclude that the Association's allegations concerning the processing of the docking grievance are not sufficient to support a charge alleging a unilateral change of terms and conditions of employment, but rather amount to a mere breach of contract claim.

Accordingly, the Association's request to amend its unfair practice charge to include the allegations of count four is hereby denied.

Even assuming arguendo that the College's actions herein would be determined to be a unilateral change of terms and conditions of employment, I decline to find a violation of §§ (a)(5) and (a)(1) of the Act. In the instant matter, the Association contends that the Board's written determination to the step two hearing should have been provided to the Association no later than October 10, 1980. Putting aside the contractual interpretation issue for the moment, let us examine what happened here. On September 30, 1980 at the hearing before the Personnel Subcommittee of the Board of Trustess, the Association presented its case on the docking grievance. The parties then agreed to an extension of time for the Board to make a determination on the grievance. The agreed-upon extension was through Friday, October 10, 1980. On Wednesday, October 8, at the meeting of the Board of Trustees, the Personnel Subcommittee presented to the Board the hearing officer's report from the step one grievance hearing, the arguments made by the Association to the Personnel Subcommittee, and the recommendation of the Personnel Subcommittee to deny the grievance. A College administrator also presented information concerning the Association's contentions on the docking grievance. The Board of Trustees then made a determination to deny the grievance.

On Thursday, October 9, 1980, Braddish telephoned Helff and informed him that the Board of Trustees had denied the Association's

grievance. On Monday, October 13, 1980, College President Reid sent a memo to Association Grievance Chairperson Helff informing him of the Board of Trustees' denial of the docking grievance. On October 15, 1980, Board of Trustees Chairman Andora sent Association President Ender a letter transmitting the Board of Trustees' decision on the docking grievance. On October 13, 1980, Helff called Braddish and told him that the Board of Trustees had defaulted on the docking grievance because its answer was late. The Association subsequently demanded that the Board of Trustees grant the relief sought in the docking grievance because the College had defaulted on the grievance and under the grievance procedure, the Association argued that it was entitled to the relief originally sought in the grievance (the docked monies). Even were I to interpret the contract as the Association argues it should be, the facts of this matter mitigate against finding an unfair practice. The record shows that the College diligently and thoroughly processed the grievance; that the Association never doubted that the Board would deny the grievance at the step two level; that a responsible leader of the Association was orally and accurately notified of the grievance determination made by the Board of Trustees on October 8, 1980; that a formal, written notification of the Board's step two grievance determination was provided to the Association on October 13, 1980; that there is no indication in the record that the parties' past practice in the administration of the grievance procedure was to strictly adhere to the procedural

requirements of the grievance procedure; that this was the first instance in which the Association ever looked for and, in fact, filed a time default claim in the processing of a grievance; and that there was no indication in the record that the Association was harmed by the delay in the receipt of a written determination from Friday, October 10 to Monday, October 13, 1980.

Assuming the Association's contractual interpretation argument is correct, the College's action in delaying its written response to the Association by three days was but a technical violation of the grievance procedure. At worst, such a change is a technical violation of the Act, occasioned by inadvertence, the impact of which on the Association was de minimis. Accordingly, based upon the foregoing, I decline to find that the College violated §§ (a)(5) and (a)(1) of the Act. See Caldwell-West Caldwell Ed. Assn'n and Caldwell-West Caldwell Bd. of Ed., 180 N.J. Super 440 (1981).15/

III. The 1980 Summer Session Issue --

The Association alleges that the College arbitrarily and unilaterally set a term and condition of employment when, during the summer of 1980, it compensated faculty who taught during Summer Session I at the overload rate for the 1979-80 contract/fiscal

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15/ Further, were a technical violation of the Act to be found as indicated above, the remedy sought by the Association is not warranted under the circumstances of this case.

year. The Association contends that this was in violation of the parties' past practice and that because the first summer session of 1980 was a new "entity", the College was required to negotiate with the Association concerning same. The Association alleges that the College refused to negotiate concerning this issue. Accordingly, the Association alleges that the College has violated §§ (a)(5) and (a)(1) of the Act.

The College denies that it has violated the parties' past practice, the collective negotiations agreement or §§ (a)(5) and (a)(1) of the Act. The College contends that its actions in compensating faculty who taught during Summer Session I, 1980, at the overload rate for contract/fiscal year 1979-80 was completely consistent with the parties' past practice and the collective negotiations agreement. Further, the College argues that the first summer session of 1980 was not sui generis; rather, it argues that Summer Session I, 1980, was merely one session during a multiple session summer program -- completely like the multiple-session summer programs which the college conducted during the summers of 1979 and 1978.

The record in this matter reveals a clear past practice concerning the compensation of faculty who taught during summer sessions. Faculty who taught during summer sessions were compensated at the overload rate in effect for the latest contract/fiscal year in which the session occurred. It is also clear that the genesis of that practice was to accommodate the

payroll department -- to simplify the computation of and accounting for payments to faculty who taught during a summer session which straddled two contract years. Where faculty taught during such a summer session, they were compensated at the overload rate in effect for the later contract/fiscal year. The Association fully accepted this practice.

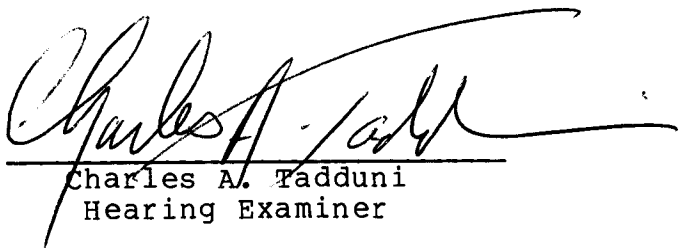
The record indicates that the parties did discuss the compensation rates which were to be applied during multiple-session summer programs. Smith's testimony on this point is clear: he told Helff and Ender that the College would pay the 1978 summer mini session I faculty at the 1977-78 contract/fiscal year overload rate because that is when that summer session occurred. (It started and ended within the 1977-78 contract/fiscal year). The Association's representatives accepted that contractual interpretation/resolution. The testimony presented by the Association on this issue was essentially explanatory; it did not refute Smith's testimony.

The College's summer program in 1980 was comprised of two six-week sessions. The College's summer programs during 1978 and 1979 were each comprised of one six-week session and two three-week sessions. The programs (1978, 79 and 80) were quite similar. The only difference which may be pointed to is the length of the individual sessions. In all other respects, these summer programs were similar. There is no support in the record for a different conclusion.

Thus, in the summer of 1980, the compensation rate for faculty who taught during Summer Session I was cast by the parties' past practice concerning summer session compensation and the overload rate in the parties' 1979-80 contract. Accordingly, I find that there was no violation of a past practice and no unilateral change of terms and conditions of employment. Accordingly, I conclude that the College did not violate §§ (a)(5) and (a)(1) of the Act.

RECOMMENDATION

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



Charles A. Tadduni
Hearing Examiner

DATED: May 15, 1987
Trenton, New Jersey