P.E.R.C. NO. 84-92

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SOMERSET COUNTY,

Respondent,

-and-

Docket No. CO-82-246-94

DISTRICT 1199J, NATIONAL UNION OF HOSPITAL & HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that Somerset County was obligated to negotiate with District 1199J, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO before it unilaterally adopted a regulation prohibiting social workers and psychologists from conducting any private practice within Somerset County.

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In the Matter of

SOMERSET COUNTY,

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-and- Docket No. CO-82-246-94

DISTRICT 1199J, NATIONAL UNION OF HOSPITAL & HEALTH CARE EMPLOYEES, RWDSU, AFL-CIO,

Charging Party.

Appearances:
For the Respondent, Lanigan, O'Connell & Chazin, Esqs. (Daniel F. O'Connell, Of Counsel)

For the Charging Party, Greenberg, Margolis, Ziegler and Schwartz, Esqs. (Mark S. Tabenkin, of Counsel)

DECISION AND ORDER

On March 14, 1983, District 1199J, National Union of Hospital & Health Care Employees, RWDSU, AFL-CIO ("District 1199J") filed an unfair practice charge against Somerset County ("County") with the Public Employment Relations Commission. District 1199J, the majority representative of the County's nonsupervisory professional employees including social workers, psychologists, and psychiatrists, alleged that the County violated subsections 5.4(a)(1) and (5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it unilaterally changed

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; and (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."

the rules concerning the ability of its social workers and psychologists to conduct private practice in Somerset County during non-working hours. The charge specifically alleged that it had been understood that social workers, psychologists, and psychiatrists could conduct private practices, provided the practice took place during non-working hours, occurred outside the Richard Hall Community Mental Health Center ("Center"), and involved only individuals who were not patients of the Center. The County changed this alleged understanding when in March 1983, it adopted a regulation prohibiting social workers and psychologists (but not psychiatrists) from conducting private practices within Somerset County. The charge further alleged that the County had ordered the immediate termination of the private practices of social workers and psychologists in Somerset County.

On May 12, 1983, the Director of Unfair Practices issued a Complaint and Notice of Hearing pursuant to N.J.A.C. 19:14-2.1.

On May 24, 1983, the County filed its Answer. It admitted that it had adopted a resolution prohibiting its social workers and psychologists from having a private practice in Somerset County involving the same type of service they perform at the Center. It further admitted that this resolution "supplemented" the previous restrictions on private practices described in the charge. It denied that the new resolution constituted a unilateral change in the terms and conditions of employment of its social workers and psychologists.

On July 26, 1983, Hearing Examiner Alan R. Howe conducted a hearing. The parties stipulated the facts and introduced

exhibits. They waived oral argument but filed post-hearing briefs.

On October 17, 1983, the Hearing Examiner issued his report and recommended decision. H.E. No. 84-24, 9 NJPER 672 (¶14293 1983) (copy attached). He recommended dismissal of the Complaint because, he believed, N.J.S.A. 40:23-6.51 preempted negotiation over the resolution restricting outside employment and the County had a non-negotiable managerial prerogative to adopt such a resolution.

On October 31, 1983, District 1199J filed exceptions. It argues that N.J.S.A. 40:23-6.51, adopted more than two months after the resolution, did not preempt negotiations and that the record contains no evidence showing why the County believed it needed to adopt the resolution.

The County has not filed any exceptions. It has, however, filed a statement reaffirming its preemption argument.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 2-4) are accurate. We adopt and incorporate them here.[2/] Under all the circumstances of this case, however, we disagree with his conclusions that N.J.S.A. 40:27-6.51 preempted negotiation over the resolution and that the County had a managerial prerogative to adopt the resolution.

Association of New Jersey State College Faculties, Inc. v. New Jersey Board of Higher Education, 66 N.J. 72 (1974) ("Higher Education") is the controlling precedent. There, the Supreme

2/ We add that there is nothing in the record to indicate why the County issued the new resolution or why the County exempted psychiatrists from this resolution.

Court invalidated administrative regulations which had required employees of State colleges to receive prior and continuing written approval before they could engage in regular outside employment or part-time work for another public institution. The Court contrasted and approved more limited pre-existing regulations which had barred employees from engaging in business transactions or professional activities in substantial conflict with their duties; using their official privileges to secure unwarranted privileges for themselves; acting officially in matters in which they were financially interested; accepting gifts which might be construed as influencing their official actions; and, specifically, engaging in outside employment which constituted a conflict of interest, occurred during working time, or diminished the employee's efficiency in performing his or her primary work obligation. The Court concluded:

> In [Burlington County College Fac. Assn. v. Bd. of Trustees, 64 N.J.10 (1973)], we held that the college calendar was not a proper subject of mandatory negotiation. In [Association of New Jersey State College Faculties, Inc. v. Dungan, 64 N.J. 338 (1974)], we held that rules on faculty tenure policies for State colleges did not have to be negotiated. However, in [Englewood Bd. of Ed. v. Englewood Teachers Assn., 64 N.J. 1 (1973)], we held that issues which bore directly on the hours and compensation of the individual grievant teachers were proper subjects of mandatory negotiation. Within the cited cases, particularly Englewood, the Board's 1973 guidelines, insofar as they embodied additional restrictions on outside employment beyond those which were preexistent, should have been negotiated. As the Appellate Division put it, they directly affected the work and welfare of the college employees, related to the terms and conditions of their employment within the contemplation of the statute, and did not affect any major educational policy.... Id. at pp. 76-77.

Higher Education is still good law. The Hearing Examiner

attempted to distinguish this case because it was decided before the 1974 amendments to the Act and the evolution of the three-part negotiability test embodied in IFPTE Local 195 v. State, 88 N.J. 393 (1982) ("Local 195"). The current negotiability tests, however, derive from the Supreme Court's pre-amendment cases and certainly do not further constrict the scope of what is mandatorily negotiable if not preempted. Compare State v. State Supervsory Employees Assn., 78 N.J. 54, 72-80 (1978) ("State Supervisory") and In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12 (App. Div. 1977) with Dunellen Bd. of Ed. v. Dunellen Ed. Assn., 64 N.J. 17 (1973); Englewood Bd. of Ed. v. Englewood Teachers Assn., supra; and Burlington County College Fac. Assn. v. Bd. of Trustees, supra.

The Hearing Examiner also attempted to distinguish Higher Education because the regulations in question there involved teachers; prohibited all unapproved outside employment; and did not specifically involve the receipt of fees for professional educational services. We believe that Higher Education is much more on point than the Hearing Examiner thought. We specifically note that in that case and this one, valid pre-existing regulations protected the employer's interests without unduly trenching upon the employees' interests. The changes which were then made severely restricted the ability of employees to secure any outside employment. In the Higher Education case, the restriction was conditional (upon the employer's approval) and essentially

applied to full-time employment, but was unlimited in territorial operation; in the instant case, the restriction was absolute and applied to any amount of private practice (i.e., one case or a full caseload), but was limited to barring practice within the County involving the same kind of service performed at the Center. While, however, the similarities between Higher Education and this case are strong, we believe that the differences do warrant further inquiry under Local 195's negotiability tests.

In Local 195, the Supreme Court set forth the tests for determining whether a subject is mandatorily negotiable. The Court stated:

> To summarize, a subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.
> Id. at pp. 404-405.

Applying the second Local 195 test, the Hearing Examiner concluded that N.J.S.A. 40:23-6.51 preempted negotiation over the County's new private practice resolution. We disagree.

In Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Assn., 91 N.J. 38 (1982), the Supreme Court set forth the rules for determining when a statute or regulation preempts negotiation. The Court stated:

> As a general rule, an otherwise negotiable topic cannot be the subject of a negotiated agreement if it is preempted by legislation. However, the mere existence of legislation relating to a given term or condition of employment does not automatically preclude negotiations. Negotiation is preempted only if the regulation fixes a term and condition of employment "expressly, specifically and comprehensively." Council, 91 N.J. at 30. The legislative provision must 'speak in the imperative and leave nothing to the discretion of the public employer.' In re IFPTE Local 195 v. State, 88 N.J. 393, 403-04 (1982), quoting State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80 (1978). If the legislation, which encompasses agency regulations, contemplates discretionary limits or sets a minimum or maximum term or condition, then negotiation will be confined within these limits. Id. at 80-82. See N.J.S.A. 34:13A-8.1. Thus, the rule established is that legislation 'which expressly set[s] terms and conditions of employment...for public employees may not be contravened by negotiated agreement.' State Supervisory, 78 N.J. at 80. Id. at p. 44

N.J.S.A. 40:23-6.51 states in part:

> The governing body of a county which has promulgated and adopted a county code of ethics may, by ordinance or resolution as appropriate, authorize and provide that the members of county authorities shall be subject to the provisions of the county code of ethics....

The statute does not mandate that the county board of freeholders adopt a code of ethics nor does it mandate that any code of ethics adopted contain certain features or restrictions. We see nothing in this statute which "expressly, specifically, and comprehensively" requires the County to preclude social workers and psychologists (but not psychiatrists) from conducting a private practice during non-working time at non-County facilities with non-County patients.[3/]

3/ The Hearing Examiner indicated that the County also acted under the "Conflict of Interest" laws, N.J.S.A. 52:13D-12 et seq. However, he did not cite any provision of those statutes which mandates that a county adopt a code of ethics or that any code adopted contain a particular feature. Moreover, the County has disclaimed any reliance on N.J.S.A. 52:13D-12.

We now apply Local 195's first and third tests. After reviewing and weighing the interests of employees and employers, we conclude, under Higher Education as applied to the particular circumstances of this case, that the County's March 1, 1983 resolution on outside employment was mandatorily negotiable.

We believe that the resolution intimately, directly, and adversely affects social workers and psychologists. As the Hearing Examiner found, the employment opportunities and earning capacity of these employees are clearly diminished by not being permitted to have any private practice involving their areas of expertise within the County. Being forced to locate one's private practice outside the County, in addition to the other already existing and uncontested restrictions, might well mean the difference between some outside income or no income.

On this record, we do not believe that negotiation over the severe additional restriction imposed by this resolution would significantly interfere with the exercise of inherent managerial prerogatives pertaining to the determination of governmental policy.[4/] The Supreme Court has stressed that

> "...most decisions of the public employer affect the work and welfare of public employees to some extent and that negotiations will always impinge to some extent on the determination of governmental policy. [In re Paterson Police PBA, 87 N.J. 78, 91-92] The requirement that the interference be significant is designed to effect a balance between the interests of public employees and the requirements of democratic decision seeking." Local 195 at p. 404

See also Bd. of Ed. of Woodstown-Pilesgrove Regional School Dist. v. Woodstown-Pilesgrove Regional Ed. Assn., 81 N.J. 582 (1980).

4/ As the Supreme Court did in Higher Education, we assume the validity of the pre-existing restrictions.

Given the lead of Higher Education and in the absence of any specific evidence showing a governmental policy need to adopt the latest resolution,[5/] we hold that, on balance, this resolution predominantly affects the interests of employees and was thus mandatorily negotiable.

ORDER

The Public Employment Relations Commission orders Somerset County to:

A. Cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act by failing to negotiate with District 1199J, National Union of Hospital & Health Care Employees, RWDSU, AFL-CIO concerning the resolution adopted on March 1, 1983;

2. Refusing to negotiate in good faith with District 1199J before adopting this resolution; and

3. Implementing this resolution.

B. Take the following action:

1. Negotiate in good faith with the Union concerning any proposed changes in the restrictions on outside employment as they existed prior to March 1, 1983; and

2. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the County has taken to

5/ There is no evidence showing why the latest and most severe restriction was adopted, how it furthers the County's governmental policies, or why psychiatrists were exempted.

comply with this Order.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Hipp, Newbaker and Suskin voted in favor of this decision. Commissioners Graves and Hartnett were not present.

DATED: Trenton, New Jersey
January 18, 1984
ISSUED: January 20, 1984

H.E. No. 84-24

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

In the Matter of

SOMERSET COUNTY,

Respondent,

-and-

Docket No. CO-82-246-94

DISTRICT 1199J, NATIONAL UNION
OF HOSPITAL & HEALTH CARE EMPLOYEES,
RWDSU, AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent County did not violate Subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when it unilaterally adopted a Resolution of Ethics and Conflicts, which restricted Social Workers and Psychologists from having a private practice in the same type of service which they perform for the Richard Hall Community Mental Health Center within the confines of the Center's "designated service area," which embraces all of the County of Somerset. Although a ban on outside income within the County intimately and directly affects the work and welfare of the affected employees, the aforesaid Resolution was adopted pursuant to an Act of the Legislature, and spoke in the "imperative" and "set" a term and condition of employment, namely, a ban on employment in the County in the same type of work performed at the Center. Also, the Hearing Examiner found that the adoption of the aforesaid Resolution was the exercise of an inherent managerial prerogative pertaining to the determination of governmental policies.

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

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

In the Matter of

SOMERSET COUNTY,

Respondent,

-and-

Docket No. CO-83-246-94

DISTRICT 1199J, NATIONAL UNION
OF HOSPITAL & HEALTH CARE EMPLOYEES,
RWDSU, AFL-CIO,

Charging Party.

Appearances:

For Somerset County
Lanigan, O'Connell & Chazin, Esqs.
(Daniel F. O'Connell, Esq.)

For the Charging Party
Greenberg, Margolis, Ziegler & Schwartz, Esqs.
(Mark S. Tabenkin, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on March 14, 1983 by District 1199J, National Union of Hospital & Health Care Employees, RWDSU, AFL-CIO, (hereinafter the "Charging Party" or "1199") alleging that Somerset County (hereinafter the "Respondent" or the "County") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that the Respondent has now ordered that every Social Worker and Psychologist within the collective negotiations unit represented by the Charging Party must immediately cease and desist from carrying on private practice within Somerset County and must notify the County regarding compliance with the said order, which is alleged to be a unilateral change in terms and conditions of employment of Social Workers and Psychologists who currently carry on private

practice within Somerset County, all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act.[1/]

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on May 12, 1983. Pursuant to the Complaint and Notice of Hearing, a hearing was held on July 26, 1983 in Newark, New Jersey, at which time the parties stipulated a complete record upon which a decision might be made by the Hearing Examiner. Oral argument was waived and parties filed post-hearing briefs by October 3, 1983.

An Unfair Practice Charge having been filed with the Commission, a question concerning an alleged violation of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the stipulated record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. Somerset County is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. District 1199J, National Union of Hospital & Health Care Employees, RWDSU, AFL-CIO is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. On April 20, 1976 the Respondent's Board of Chosen Freeholders adopted a Resolution on "Ethics and Conflicts," which provided, inter alia, that no County officer or employee shall engage in any business transaction or professional activity that is in substantial conflict with the proper discharge of his duties

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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.
"(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."

in the public interest; nor shall such officer or employee act in his official capacity or undertake any employment or service in any matter wherein he has a direct or indirect personal financial interest that might reasonably be expected to impair his objectivity or independence of judgment (J-1). Under date of September 30, 1976 a copy of the foregoing Resolution was sent to all County employees with a request to execute a "Conflict of Interest Compliance Report Form." (J-1).

4. The Charging Party was certified as the collective negotiations representative for all non-supervisory professional employees at Richard Hall Community Mental Center on January 20, 1977 (Docket No. RO-76-78).

5. Thereafter, in 1977, certain "Private Practice Stipulations" were prepared by the County in order clarify the Resolution on "Ethics and Conflicts" (J-1) for employees of the Richard Hall Community Health Center, who were represented by 1199. These stipulations (J-2), which were set forth in four paragraphs, provided essentially that the premises of the Center shall not be used for private practice by any employee; that the facilities of the Center shall not be used by any employee to develop, organize or schedule private practice during regular working hours; that the private practice schedule of any employee of the Center shall not conflict with his work schedule; and that no client being seen at the Center shall in anyway be transferred to an employee's private practice. These Private Practice Stipulations, supra, provided the working basis for the implementation of the Resolution on "Ethics and Conflicts" (J-1), supra, from 1977 until 1983.

6. On March 1, 1983 the Board of Chosen Freeholders of Somerset County adopted an additional Resolution establishing off-duty employment restrictions for employees of the Richard Hall Community Mental Health Center (J-3). In this Resolution the Respondent resolved that employees of the Center are restricted and prohibited from having a private practice in the same type of service which they perform for

for the Center within the confines of the Center's "designated service area." Psychiatrists were exempted from this proscription. This Resolution was adopted without notice to or negotiations with the Charging Party.

7. A copy of the foregoing Resolution (J-3) was sent to each professional staff member of the Richard Hall Community Mental Health Center on March 7, 1983 together with a "Compliance Report Form," which inquired as to whether the employee had a private practice and whether the private practice was located outside of the County or within the County (J-4).

8. It was stipulated by the parties that the March 1, 1983 Resolution (J-3) operates only to prohibit the establishment of an office in Somerset County and in no way prohibits the establishment of an office in any of the counties contiguous to Somerset County, notwithstanding that clients may come from Somerset County to such office outside the County.

THE ISSUE

Did the Respondent violate Subsections(a)(1) and (5) of the Act, when, on March 1, 1983, it unilaterally adopted an additional Resolution on Ethics and Conflicts (J-3), which restricted Social Workers and Psychologists, represented by the Charging Party, from having a private practice in the same type of service which they perform for the Richard Hall Community Mental Health Center within the confines of the Center's "designated service area," which embraces all of the County of Somerset?

DISCUSSION AND ANALYSIS

The Respondent Did Not Violate The Act When, On March 1, 1983, It Unilaterally Adopted An Additional Resolution On Ethics And Conflicts Establishing Off-Duty Employment Restrictions For Social Workers And Psychologists At The Richard Hall Community Mental Health Center

The Charging Party, after noting that the parties have since 1977 operated under the so-called Private Practice Stipulations (J-2), which set forth certain

limitations and proscriptions on the private practice of Social Workers and Psychologists, argues that the instant limitation on outside employment (J-3) is contrary to the decision of the Supreme Court in Association of New Jersey State College Faculties, Inc. v. New Jersey Board of Higher Education, 66 N.J. 72 (1974). The Respondent distinguishes this case and undertakes a detailed exposition of the state of the law vis-a-vis the obligation of a public employer to negotiate in areas of governmental policy and managerial prerogative.

The Hearing Examiner, in determining whether or not the provisions of the Resolution of March 1, 1983 are mandatorily negotiable, will utilize the three-fold test set forth by the New Jersey Supreme Court in IFPTE Local 195 v. State, 88 N.J. 393 (1982). There the Supreme Court, citing three earlier decisions[2/], said that a subject is negotiable only if it "...intimately and directly affect(s) the work and welfare of public employees..." The Court gave as prime examples such subjects as rates of pay and working hours.[3/]

The second inquiry is whether the subject matter has been preempted by statute or regulation. Negotiation is preempted if a statutory or regulatory provision "...speak(s) in the imperative and leave(s) nothing to the discretion of the public employer...": State Supervisory, supra, 78 N.J. at 80.

The third element of the test holds that a topic that affects the work and welfare of public employees is negotiable only if it is a matter "...on which negotiated agreement would not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy..."[4/] The Court noted that this principle rests on the assumption that most decisions of a public employer affect the work and welfare of public employees to some extent

2/ See City of Paterson v. Paterson Police PBA Local No. 1, 87 N.J. 78 (1981); Board of Education of Woodstown-Pilesgrove v. Woodstown-Pilesgrove Education Association, 81 N.J. 582 (1980); and State v. State Supervisory Employees Association, 78 N.J. 54 (1978).

3/ See Woodstown-Pilesgrove, supra.

4/ See cases cited in footnote 2, supra.

and that negotiations will always impinge to some extent on the determination of governmental policy. The key word is "significant" which is designed to effect a balance between the interests of public employees and the requirements of democratic decision-making by public employers.

Before proceeding to analyze the instant case in terms of the three-fold test of Local 195, supra, the Hearing Examiner first considers the Association of New Jersey State College Faculties case cited by the Charging Party, supra. It is first noted that the case, having been decided in 1974, antedates the series of Supreme Court decisions commencing in 1978, from which the three-fold test for negotiability has evolved, supra. Secondly, it dealt with teachers and regulations that prohibited all outside employment without permission from the public employer. Further, there was no issue in that case concerning outside employment of teaching personnel in relationship to individuals who might pay a fee for the rendering of professional educational services. Finally, unlike the instant case, the prohibition on outside employment was broad and without limitation whereas the instant Resolution (J-3) restricts outside employment only within the County of Somerset and only in the type of service provided for the Center.

Notwithstanding the argument of the Respondent that the Resolution of March 1st does not intimately and directly affect the work and welfare of the Social Workers and Psychologists represented by the Charging Party, the Hearing Examiner finds that the Charging Party has satisfied the first part of the Local 195 test. While the affected employees may derive income from practice in the counties contiguous to Somerset, their employment opportunities would clearly be enhanced by being permitted to practice within the County. The case of Essex County Sheriff's Department, P.E.R.C. No. 82-129, 8 NJPER 404 (1982), cited by the Respondent, is totally inapposite inasmuch as it is an issue identification decision, which determines only whether or not certain issues are economic or non-economic. It does not go to the question of negotiability. Hence, the first test for negotiability

is satisfied.

It appears to the Hearing Examiner that the Respondent has collectively met the second and third parts of the Local 195 test. The Hearing Examiner is impressed by the Respondent's contention that the County acted under the "State Conflict of Interest Law," N.J.S.A. 52:13D-12, in adopting the Resolution of March 1, 1983. Further, the Legislature thereafter on May 23, 1983 enacted an "Act concerning County Codes of Ethics," which provides:

> "The Governing body of a county which has promulgated and adopted a code of ethics... may authorize and provide that the members of county authorities shall be subject to the provisions of the County Code of Ethics..." N.J.S.A. 40:23-6.51

The use of the word "shall" in the May 23, 1983 enactment, supra, indicates that the Legislature has spoken in the imperative as to persons covered by a County Code of Ethics. This would appear to leave no room for collective negotiations under State Supervisory, supra. In other words, again following the language and rationale of State Supervisory, the combined effect of the Respondent County's action in adopting the Resolution (J-3) and the Legislature's enactment of May 23rd adds up to the County having "set" a term and condition of employment, namely, a ban on private practice within the County.

Even assuming arguendo that the Respondent has not set a term and condition of employment by adopting its Resolution of March 1, 1983, the Respondent has clearly satisfied the third element of the three-fold test of Local 195, supra. To permit negotiation with respect to the Resolution would significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy. The Respondent County clearly has an inherent managerial prerogative, in the implementation of governmental policy, to adopt a Code of Ethics, which impacts on terms and conditions of employment, particularly those of the Social Workers and Psychologists involved herein. It is noteworthy that the County has not sought to ban all outside employment but, rather, has tailored the limitation.

The Respondent makes note of this point in its Brief (pp. 16, 17), with which the Hearing Examiner agrees. The affected employees are not banned from all employment within the County, only the pursuit of private practice "...in the same type of service which they perform..." for the Center. Thus, the scope of the ban is entirely distinguishable from that in State College Faculties, supra, where the ban was total with respect to outside employment. The Respondent has a legitimate interest in preventing the appearance of a conflict of interest among professionals at the Center who derive their primary income in the form of wages or salary from the Center. The County seeks only to restrict private practice during non-working hours within the "designated service area," i.e., the County.

* * * *

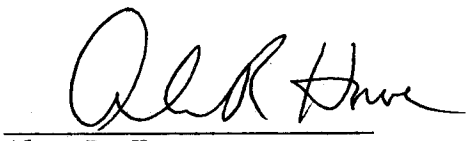
Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSION OF LAW

The Respondent County did not violate N.J.S.A. 34:13A-5.4(a)(1) and (5) when, on March 1, 1983, it unilaterally adopted an additional Resolution on Ethics and Conflicts, which restricted Social Workers and Psychologists, represented by the Charging Party, from having a private practice in the same type of service which they perform for the Richard Hall Community Mental Health Center within the confines of the Center's "designated service area."

RECOMMENDED ORDER

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



Alan R. Howe
Hearing Examiner

Dated: October 17, 1983
Trenton, New Jersey