

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COLLEGE OF MEDICINE AND
DENTISTRY OF NEW JERSEY,
Respondent,

-and-

Docket No. CO-76-1-28

COUNCIL OF CHAPTERS OF THE AMERICAN
ASSOCIATION OF THE UNIVERSITY PRO-
FESSORS AT THE COLLEGE OF MEDICINE
AND DENTISTRY OF NEW JERSEY,
Charging Party.

SYNOPSIS

In agreement with the Hearing Examiner and overruling exceptions filed by the charging party, the Commission dismisses the complaint in an unfair practice proceeding. The charging party claimed that a unit member had been terminated because he had filed a grievance, and that the termination violated the provisions of the parties' collective negotiations agreement. The Commission rules that substantial record evidence exists to support the Hearing Examiner's finding that the employee's termination was not motivated by his filing of a grievance. Similarly, the record supports the finding that the parties' contractual provisions and the employer's by-laws were not violated, and the Commission states that it need not determine whether a contrary conclusion would constitute a per se violation of the Act.

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Appearances:

For the Respondent, William F. Hyland, Attorney General
(Melvin E. Mounts, Deputy Attorney General, of Counsel).

For the Charging Party, Sterns & Greenberg, Esqs.
(Michael J. Herbert, of Counsel).

DECISION AND ORDER

An unfair practice charge was filed with the Public Employment Relations Commission (the "Commission") on July 1, 1975 by the Council of Chapters of the American Association of the University Professors at the College of Medicine and Dentistry of New Jersey (the "AAUP") alleging that the College of Medicine and Dentistry of New Jersey (the "College") engaged in certain unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"). In particular the AAUP alleged that the College terminated the employment of Dr. Morton Berenbaum as a direct result of his filing of a grievance and that this termination was in violation of N.J.S.A. 34:13A-5.4(a)(3), (4) and (5). The charge was processed pursuant to the Commission's Rules, and it appearing to the

Commission's Executive Director that the allegations of the charge, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on October 28, 1975.

Pursuant to the Complaint and Notice of Hearing a plenary hearing was held before Edmund G. Gerber, Hearing Examiner of the Commission, on December 2, 1975 at which all parties were represented and were given the opportunity to present evidence, to examine and cross-examine witnesses, and to argue orally. Briefs were submitted by the College and the AAUP to the Hearing Examiner on February 6 and February 9, 1976 respectively. On April 20, 1976 the Hearing Examiner issued his Recommended Report and Decision, which report included findings of fact, conclusions of law, and a recommended order. The original of the report was filed with the Commission and copies were served upon all parties. A copy is attached hereto and made a part hereof.

The AAUP filed exceptions to the Hearing Examiner's Recommended Report and Decision on May 4, 1976 and the College filed cross-exceptions on May 19, 1976. Both parties consented to these filings at the times stated. Those findings of the Hearing Examiner to which no exception was taken are hereby adopted. See N.J.A.C. 19:14-7.3(b).

The AAUP claims that the College violated N.J.S.A. 34:13A-5.4(a)(3), (4) and (5) of the Act by refusing to renew Dr. Berenbaum's contract. The alleged unfair practice rests

essentially upon two grounds. First, the AAUP alleges that Dr. Berenbaum was not re-employed because he filed a grievance, pursuant to an existing collectively negotiated agreement between the AAUP and the College, in opposition to what Dr. Berenbaum deemed to be two disparaging memos submitted to him by his Department Chairman. Second, the non-renewal allegedly did not conform to the terms of the contract and thus constituted a unilateral change in terms and conditions of employment and thus a per se violation of Section 5.4(a)(1) of the Act. Although this issue was raised for the first time at hearing, it was not objected to by counsel for the College and was litigated before the Hearing Examiner.

The College contends that the decision not to re-employ Dr. Berenbaum was made prior to Dr. Berenbaum's institution of the grievance and based upon substantial questions concerning his productivity and job performance rather than for any reasons violative of the Act. It is further claimed that the procedure which was followed concerning the non-reemployment was in accord with the by-laws of the College and the collective negotiations agreement.

The Hearing Examiner concluded that the record did not show that the decision not to re-employ Dr. Berenbaum was motivated by anti-employee association or anti-grievance procedure animus. In light of all the evidence before him including that concerning Dr. Berenbaum's overall performance, he concluded that the testimony indicating that Dr. Berenbaum was not re-employed for reasons other than the assertion of rights protected

by the Act to be both credible and persuasive. The Hearing Examiner also concluded that the non-renewal of Dr. Berenbaum was governed by the College's by-laws and was accomplished in accordance with the provisions of these by-laws. Thus, the Hearing Examiner concluded that there was no unilateral change in terms and conditions of employment by the College, and, thus, no statutory violation.

While the AAUP does not challenge the legal standards employed by the Hearing Examiner in his Recommended Report and Decision, it does contend the Hearing Examiner made fundamental errors in his interpretation of the facts presented in the record. Accordingly, AAUP has filed exceptions to the report, in accordance with N.J.A.C. 19:14-7.3. These exceptions may be summarized as follows:

1. The Hearing Examiner incorrectly states the AAUP's legal theory with regard to the College's conduct allegedly violative of N.J.S.A. 34:13A-5.4(a) and fails to properly construe the evidence proffered on this issue. The AAUP contends that Dr. Berenbaum was discriminated against because he filed a grievance.

2. The Hearing Examiner errs in stating that this case turns entirely on the timing of the notification of non-renewal to Dr. Berenbaum in light of the fact that Dr. Berenbaum was notified that he was being fired only after he filed a grievance and after he refused to relinquish his statutory rights by refusing to withdraw his grievance. Furthermore, the AAUP

disputes the conclusion of the Hearing Examiner that the College has overcome any presumption of discriminatory action.

3. There is no factual foundation for the Hearing Examiner to conclude that the Department Chairman had long questioned Dr. Berenbaum's performance and that the Hearing Examiner did not deal even-handedly with the conflicting evidence and credibility of such testimony. Evidence relating to the consideration of Dr. Berenbaum for promotion is claimed to be irrelevant in this regard.

4. The conclusion of the Hearing Examiner that the College did not violate its contract with AAUP by declining to re-employ Dr. Berenbaum is incorrect and the College did in fact violate the contract, thereby committing an unfair practice.

We find these exceptions to be without merit. There is no significant disagreement regarding the provisions of N.J.S.A. 34:13A-5.4(a)(3) and we find that the Hearing Examiner correctly analyzed this provision. The AAUP, in its exceptions, indicates its agreement with the Hearing Examiner's statements in this regard but disputes his interpretation of the facts.

The facts, according to the AAUP, lead inescapably to the conclusion that Dr. Berenbaum was discriminated against because he filed a grievance. The sequence of events as set forth by the AAUP follows:

Dr. Berenbaum and the Department Chairman met on May 1 to discuss Dr. Berenbaum's grievance. The grievance was

denied orally and Dr. Berenbaum stated that he would submit a formal grievance. This was in accordance with the provisions of the parties' agreement. The Department Chairman met with Dr. Berenbaum on May 2 and asked Dr. Berenbaum to withdraw his grievance. Only when Dr. Berenbaum refused to withdraw the grievance did the Department Chairman state that Dr. Berenbaum should resign and that if he did so, the Department Chairman would remove the protested documents from Dr. Berenbaum's file. Then, when Dr. Berenbaum said that he would not resign, the Department Chairman said he would be fired at the end of his contract term.

While these facts are not in dispute, and the Hearing Examiner recited them in his report, the Hearing Examiner nonetheless concluded, based on the record as a whole, that Dr. Berenbaum was not discriminated against because he filed a grievance. We agree. Additional facts must also be considered. As the AAUP acknowledges in the exceptions, there was "hostility or antagonism by the Department Chairman toward Dr. Berenbaum."

A memo, Exhibit CP-12 in evidence, from Dr. Berenbaum to the Department Chairman on May 2, quotes the Department Chairman as having said, "...that since you do not see any hope of our disagreement being solved...that you planned to submit... a recommendation that my contract not be renewed..." The memo also states that Dr. Berenbaum had been informed that the Department Chairman would consider removing the two memos discussed above if Dr. Berenbaum chose to resign. This memorandum,

prepared by Dr. Berenbaum on the day that his meeting with the Department Chairman occurred, provides no evidence nor even a claim that the Department Chairman's action was taken because Dr. Berenbaum had filed a grievance or engaged in any protected activity.

Additionally, as noted by the Hearing Examiner, and based in part upon his credibility determinations to which appropriate deference must be accorded, there is substantial record evidence indicating disappointment on the part of the Department Chairman with certain aspects of Dr. Berenbaum's job performance and productivity. In this connection, we agree that evidence relating to the promotional prospects of Dr. Berenbaum is relevant and supportive of the Hearing Examiner's findings and conclusions and that the Hearing Examiner has based his findings and conclusions upon the record in its entirety. Furthermore, and of particular significance, the evidence indicates that the Department Chairman met with the Dean approximately one month before the grievance was filed and before the Department Chairman stated to Dr. Berenbaum that the Department Chairman would not recommend renewal of Dr. Berenbaum's contract. Thus, while Dr. Berenbaum was not informed that he would not be recommended for renewal until after he filed a grievance, the credible evidence indicates that the Department Chairman had discussed this matter with the Dean and that the Dean had suggested withholding notice to Dr. Berenbaum at that time in case the Department Chairman changed his mind.

As the Hearing Examiner stated, it is not for us to determine whether the College's reasons for its decision not to renew Dr. Berenbaum's contract were good, sufficient, appropriate, etc. Rather, we must determine whether that action was taken in violation of the Act, i.e., there was discrimination against Dr. Berenbaum which had the effect of encouraging or discouraging employees in the exercise of rights guaranteed to them by the Act. The record evidence simply does not support the AAUP's charge.

Finally, on the evidence before us we agree with the findings and conclusions of the Hearing Examiner that Dr. Berenbaum's nonrenewal did not constitute a violation of the Act by virtue of any breach of the contract between the College and the AAUP. That nonrenewal was in accordance with the terms of the contract and the operative by-laws. Accordingly, we need not determine whether we would have found a violation of the contract to be a per se violation of the Act.

ORDER

For the reasons hereinabove set forth, the Commission hereby adopts the Hearing Examiner's recommended Order and the instant Complaint^{1/} is hereby dismissed in its entirety.

BY ORDER OF THE COMMISSION



Acting Chairman

DATED: Trenton, New Jersey
June 22, 1976

Date Issued: June 23, 1976

1/ In his recommended Order, the Hearing Examiner inadvertently referred to dismissal of the Charge.

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COUNCIL OF CHAPTERS OF THE AMERICAN ASSOCIATION
OF THE UNIVERSITY PROFESSORS AT THE COLLEGE OF
MEDICINE AND DENTISTRY,
Charging Party.

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

On July 1, 1975, an Unfair Practice Charge was filed by the Council of Chapters of the American Association of University Professors at the College of Medicine and Dentistry (AAUP) against the College of Medicine and Dentistry of New Jersey (College) claiming the College violated N.J.S.A. 34:13A-5.4(a) 3, 4 and 5 and engaged in an unfair practice by discharging Dr. Morton Berenbaum ^{1/} because he exercised his rights guaranteed under N.J.S.A. 34:13A-1 et seq. It appearing to the Executive Director, Jeffrey B. Tener, that the allegations of the charge, if true, might constitute an unfair labor practice, a complaint and notice of hearing was issued October 28, 1975. A hearing was held on this matter pursuant to said complaint on December 2, 1975, at 1100 Raymond Boulevard, Newark, New Jersey before Edmund G. Gerber, Hearing Examiner of the Public Employment Relations Commission.

Both parties appeared at the hearing represented by counsel and were afforded full opportunity to be heard to examine and cross-examine witnesses and to introduce relevant evidence. Briefs were submitted by both parties to the Hearing Examiner on February 6 and February 9, 1976, respectively. Upon the entire record in the proceeding the Hearing Examiner finds:

1. The New Jersey College of Medicine and Dentistry is a public employer

^{1/} Dr. Berenbaum's name also appears in the record as Berebaum.

within the meaning of the New Jersey Employer-Employee Relations Act, as amended and is subject to its provisions.

2. The Council of Chapters of the American Association of University Professors at the College of Medicine and Dentistry is an employee representative within the meaning of the New Jersey Employer-Employee Relations Act, as amended, and is subject to its provisions.

3. As noted, an unfair practice charge having been filed with the Commission alleging that the New Jersey College of Medicine and Dentistry has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, a question concerning an alleged violation of the Act exists and this matter is appropriately before the Commission for determination.

Discussion

Dr. Berenbaum received a negative evaluation in a memo from his superior, the Chairman of the Department of Pedodontics, Dr. Houpt in April of 1975. Dr. Houpt then placed a similar, negative memo in Dr. Berenbaum's file. Dr. Berenbaum submitted a grievance protesting these two memos and a day later, Dr. Berenbaum was notified by Dr. Houpt that he would not be recommended for renewal in the following year. A month later Dr. Berenbaum received a letter from the Dean of the College stating that his contract would not be renewed and his employment would be terminated on July 1, 1976.

The AAUP claims that the college violated 34:13A-5.4(a) 3, 4 and 5 of the Act ^{2/}by refusing to renew Dr. Bernbaum's contract. The unfair practice

2/ N.J.S.A. 34:13A-5.4(a) 3, 4 and 5 are as follows:

Employers, their representatives or agents are prohibited from:

- (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.
- (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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.

rests on two grounds, One, Dr. Berenbaum was discriminated against because he used the grievance process ^{3/} and two, the non-renewal did not conform to the terms of the contract. ^{4/} This alleged action constituted a unilateral change in the terms and conditions of employment and therefore, arguable, an unfair practice.

I

Dr. Berenbaum was first employed by the New Jersey Dental School of the New Jersey College of Medicine and Dentistry on July 15, 1972. His initial appointment at the school was to the position of Assistant Professor, Department of Pedodontics, the position which he held at the time of the hearing.

In June of 1973, one year after he began at the College and again in June of 1974, Dr. Houpt, the Chairman of the Department of Pedodontics recommended that Dr. Berenbaum receive an increment. Dr. Houpt's testimony was that during this time however, he discussed with Dr. Berenbaum two problem areas, one being interpersonal relationships with both faculty and students and the other, a general lack of productivity. ^{5/} In line with his concerns, Dr. Houpt sent a memo to Dr. Berenbaum on July 29, 1974 which delineated his responsibilities and directed him to develop a program for the treatment of handicapped patients as well as other tasks. He was also asked to submit a progress report

^{3/} In their briefs the AAUP contends that the "College violated Section A3 in discriminating against Dr. Berenbaum because he exercised the right of filing a grievance, as guaranteed to him by the New Jersey Employer-Employee Relations Law; and Section A4, in discharging him for filing a petition or complaint in the nature of a grievance, pursuant to collective negotiations contracts, negotiated under the terms of the Act, and Section A5 by the College's refusal to process Dr. Berenbaum's grievance by firing him after he had initiated such a grievance. Each of these three sections are interrelated but the AAUP principally contends that the college violated Section A3 of the Act."

^{4/} This issue was not raised in the original charge filed by the petitioner. It was raised at the hearing however, without objection by counsel for the College and it has been litigated before me. See New Jersey Court Rules 4:9-2 Amendment to Conform to the Evidence and Board of Englewood Public Schools and Englewood Administrators' Association CO-76-31-21. See also f.n. 11, below.

^{5/} Dr. Houpt testified that he had discussions with members of the staff and student body about Dr. Berenbaum's performance. Dr. Berenbaum admits that meetings occurred between himself and Dr. Houpt, but claims, "He never specifically criticized what I did." Page 19 Line 9 of the transcript on p. 20.

to Dr. Houpt by November 1. Pursuant to this request Dr. Berenbaum submitted a memo to Dr. Houpt dated November 19, 1974. The two then met and discussed this memo as well as Dr. Berenbaum's progress in general.

Following this meeting Dr. Houpt sent a Progress Review Memorandum to Dr. Berenbaum dated November 25, 1974 in which Dr. Houpt stated in part:

"I reiterate that although you are now very much busy with many activities throughout the school, I did not consider your activities to be sufficiently broad-based to enhance your curriculum vitae for future recommendation for promotion. I strongly urge that you become involved in scholarly pursuits as mentioned above."

On April 7, 1975, Dr. Houpt met with Dr. Berenbaum and discussed Dr. Berenbaum's productivity. Following this meeting Dr. Houpt sent a memorandum to Dr. Berenbaum on April 14, which reviewed these discussions. Dr. Houpt expressed his disappointment and concern about Dr. Berenbaum's performance in several areas including his failure to develop the handicapped teaching program as per the memorandum of July, 1974. On April 15, 1975, Dr. Houpt placed a memorandum in Dr. Berenbaum's file reiterating his criticism of Dr. Berenbaum.

Dr. Berenbaum then moved to file a grievance over both the notice to his file of April 15 and the personal memo of April 14. The contract provides that the first step of the grievance procedure consists of an oral complaint by the grievant directly to the Department Chairman. The parties met on May 1, 1975, at this time Dr. Houpt denied the grievance and Dr. Berenbaum stated that he would submit a formal grievance. The next day Dr. Houpt met with Dr. Berenbaum again and asked him to withdraw the grievance. Dr. Houpt stated that if he would resign, he would remove the documents from his file, but he would not remove them in any other way, shape or form. When Dr. Berenbaum stated he would not resign, Dr. Houpt replied that "since (he) did not see any hope of our disagreement being solved or remedied, that (he) planned to submit by 6/30/75 a recommendation that Dr. Berenbaum's contract not be renewed and his employment be terminated effective July 1, 1976. ^{6/}

^{6/} Memorandum from Dr. Berenbaum to Dr. Houpt dated May 2, 1975.

Subsequently, on July 1, 1975, Dr. Berenbaum received a letter from Dr. Bennet, Dean of the New Jersey State Dental School. The letter stated in part that:

"Your department chairman has recommended and I have concurred that your contract should not be renewed beyond June 30, 1976. The memorandum is the formal notice of non-renewal as required by the Collegewide By-Laws, Article V, Title B, Section 3C and Article VII, Title B, Section I."

It is the contention of the AAUP that the non-renewal of Dr. Berenbaum was precipitated by the filing of this grievance. It is argued that if the employer in any way discouraged or discriminated against a public employee who filed a grievance that employer is in violation of Subsection 3 of N.J.S.A. 34:13A-5.4(a). ^{7/} This is not entirely accurate. The AAUP's argument treats discouragement and discrimination as if they were two separate entities. They are not. Discouragement, as used in Subsection 3, specifically refers to the end result of the discrimination. The unfair practice is encouraging or discouraging employees in the exercise of their rights by means of discrimination. Also the Act does not bar an employer from discriminating among his employees; again, it only bars discrimination for the purpose of discouraging employees in the exercise of their rights guaranteed by this Act. The employer's purpose, therefore, determines whether an unfair labor practice has occurred when he discriminates among his employee. In the instant case there is no specific evidence of any anti-employee association (or anti-grievance procedure) animus. However, specific evidence of intent to encourage or discourage is not an indispensable element of proof of violation of Subsection 3. An employer's naked protestation that he did not intend to encourage or discourage cannot serve as

^{7/} Pursuant to N.J.S.A. 34:13A-5.3 which stated in part: Public employers shall negotiate written policies setting forth grievance procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions affecting them.

as a defense where a natural consequence of his action was such encouragement or discouragement. Under such circumstances, a presumption is raised that the intent of such actions was to discourage employees in the exercising of their rights. ^{8/}

Dr. Berenbaum claims that there were personal differences between himself and Dr. Houpt about work loads within the department, these disagreements occurred early in 1975 and arose during departmental meetings and, it is argued, because of them, Dr. Houpt developed an antagonism towards Dr. Bernbaum. Even if these claims were true this would have no bearing here, for the discrimination involved would not go to a protected activity. ^{9/} In any event the facts do not bear out this allegation. In November of 1974 before these disagreements took place, Dr. Houpt had warned Dr. Berenbaum that unless he increased his scholarly output (as quoted above) "he would not be recommended for promotion." This clearly shows that Dr. Houpt was questioning Dr. Berenbaum's future in the institution prior to this incident.

The AAUP's case must rest entirely upon the timing of the notification to Dr. Berenbaum that he would not be renewed. Assuming that Dr. Houpt's telling Dr. Berenbaum he would not be renewed the day after he initiated the grievance process raises a presumption of discriminatory action, ^{10/} the college has overcome the presumption.

Dr. Houpt testified that in March, 1975, he had a meeting with the Dean of the Dental School, Dr. Bennett, to discuss the non-renewal of Dr. Berenbaum and the contractual provisions for such action were discussed. Dr. Houpt told Dean Bennett that he planned not to recommend Dr. Berenbaum for renewal.

^{8/} See Radio Officer Union v. NLRB 317 U.S. 17, 33 LRRM 2417 (1971) which deals with similar language in the National Labor Relation Act; Lullo v. International Association of Fire Fighters 55 N.J. 409 (1970) in which the N.J. Supreme Court advised PERC to look to the NLRB Law for guidance.

^{9/} No claim was made nor evidence introduced that the disagreement itself concerned a protected activity within the meaning of the Act.

^{10/} The Commission has not enunciated a test or standards for discrimination. It is not necessary to do so here.

It was decided at the meeting that Dr. Berenbaum would not receive notice of non-renewal until June 30, 1975, which they believed to be the last date that notice could be given under the contract. Dr. Bennett testified that Dr. Houpt's mind was made up about Dr. Berenbaum. At the time, Dr. Bennett counseled Dr. Houpt, however, to take no immediate action for something could happen to change his mind. It is clear that nothing happened to change Dr. Houpt's opinion of Dr. Berenbaum, otherwise, the memoranda, over which Dr. Berenbaum grieved, would not have been issued in the first place.

As Dr. Houpt testified, once the grievance was filed and the matter was brought to a head, he changed his mind only, as to when Dr. Berenbaum should be notified of his intention to recommend non-renewal. In light of the evidence before me concerning Dr. Berenbaum's overall performance, I find this testimony to be credible.

I therefore, find that Dr. Berenbaum was not discriminated against, within the meaning of the Act, for filing a grievance.

II

The second issue is whether the college violated the contract and thereby, committed an unfair practice by unilaterally changing the terms and conditions of employment. ^{11/} During the period in question the parties were governed by a collective negotiation contract, the effective dates of which were June 3, 1973 to June 30, 1975. The contract provided for the ratification of by-laws subsequent to the signing of the agreement. The by-laws were ratified on December 14, 1973.

^{11/} N.J.S.A. 34:13A-5.3 provides in part: "proposed new rules or modification of existing rules governing working conditions shall be negotiated with the majority representative before they are established." The question here is whether a contract violation is also a per se violation of this provision of the Act and therefore, 5.4 1(a) 1. See In the Matter of Town of Orangetown and Town of Orangetown, Unit Rockland County Chapter Civil Service Employees Association, Inc. 8 PERB 3042. In light of the facts of this case, it is not necessary to rule on this question here.

Title B, Article V of the by-laws provides that an Assistant Professor may be appointed for an initial term of four years. Article VII Title B provides that the term of appointments may not be extended. The service of members of the academic staff having term appointments shall cease automatically at the end of the specified term and such automatic cessation shall not be considered termination for cause. However, under Article V Title 13, when the decision is made that an employee will not be renewed, where an appointment is for longer than two years, there must be twelve months notice. Title C provides that faculty members with full academic rank may be discharged at any time for cause.

If Article V Title B is applicable to Dr. Berenbaum the by-laws' standards for non-renewal have been met by the College. He commenced work in July, 1972, and received one year notice that his term of employment would expire in July, 1976. The AAUP claims however, that Article V Section B does not apply to Berenbaum for he was hired in 1972, prior to the implementation of the by-laws. They argue that his status is governed by a letter of understanding dated June 26, 1974 signed by Professor Fox on behalf of the College, the pertinent part of which read as follows:

"Faculty members who as of July 1, 1974 have been employed for six years in the rank of Assistant Professor and who have not received one year notice of termination of employment as of that date shall be regarded as having tenure," and that the "college shall provide to all bargaining unit faculty members a letter recording: 1. The effective dates of their appointment which shall be the effective date approved by the Board of Trustees of the College. 2. Their rank on appointment. 3. The effective date of any promotions which may have occurred. 4. The effective date on which they may qualify for tenure. 5. The percentage of time for which they are employed."

The AAUP maintains that only the provisions of this letter are controlling on Dr. Berenbaum. The by-laws are not specifically retroactive, and

do not apply to any faculty members hired prior to their enactment. The only document which speaks to faculty in this situation is this letter and because Dr. Fox's letter refers to the original date of hire and the date of tenure only, all the members of this class must have a term of employment from the date of hire to the date of tenure or seven years.

I find the AAUP's argument here strained at best. The letter makes no specific mention of length of appointment for current non-tenured faculty member nor can this be easily inferred. Dr. Fox ^{12/} maintains that there never was an understanding by the parties to the negotiations to this effect, nor was this position even expressed by the AAUP at the time of the negotiations. The letter was written in accordance to an agreement to notify all faculty members of their date of tenure only. ^{13/}

If the rights of non-tenured faculty were compromised by the by-laws, then the AAUP argument might be more persuasive. It is noted however that prior to the by-laws all faculty were hired without any term and the by-laws

^{12/} This evidence is by way of affidavit. At the hearing the parties entered into a stipulation allowing for the submission of affidavits concerning Dr. Fox's letter to the Hearing Examiner after the close of hearing.

^{13/} Pursuant to this agreement the notification to Dr. Berenbaum reads as follows:

"The records of the College of Medicine and Dentistry of New Jersey/New Jersey Dental School indicate your faculty appointment as an Assistant Professor of Pedodontics was effective July 15, 1972. The percentage of time of your appointment is 100%.

Assuming your continuous employment at the College of Medicine and Dentistry of New Jersey/New Jersey Dental School, you will be eligible for tenure on July 1, 1979 providing that you are promoted to Associate Professor on this date. In your case, the review for granting of tenure will occur and be communicated to you before July 1, 1978. You will also be eligible for tenure if you are promoted to Associate Professor prior to this date.

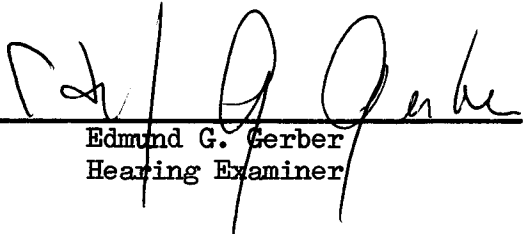
We shall continue to count on you to make a significant contribution to the School and College during the years ahead. Please accept my best wishes for continued growth and happiness in all your academic endeavors."

certainly grant non-tenured faculty greater rights than they had before. I therefore find, in accordance with the plain and clear meaning of both Dr. Fox's letter and the by-laws, that Dr. Berenbaum's term of employment is governed by the by-laws. Accordingly, I find that the non-renewal of Dr. Berenbaum was in accordance with the existing contractual agreement; there was no unilateral change in working conditions, and hence, no unfair practice.

I have found that the non-renewal was not done to discourage protected rights and, since the contract does not require that the college show cause for non-renewal, I cannot go behind the decision and question the standards used by Dr. Houpt. In the private sector the standard for discharge of an unfair labor practice case under the National Labor Relations Act is that an employee "may be discharged for a good reason, a poor reason, or no reason at all so long as the terms of the statute are not violated NLRB v. Condenser Corp. CA. 3, 1942 10 LRRM 483. ^{14/} The AAUP introduced a number of documents which were laudatory to Dr. Berenbaum as to both his abilities and performance. In deciding this case I have considered them for the purpose of the credibility of Dr. Houpt only. I cannot consider them to question the soundness of Dr. Houpt's decision.

ORDER

Accordingly, for the reasons set forth, the charge in this matter is dismissed in its entirety.


Edmund G. Gerber
Hearing Examiner

DATED: Trenton, New Jersey
April 20, 1976

^{14/} Another court put it "the question is not whether the discharges were merited or unmerited, just or unjust, nor whether as disciplinary measures they were mild or drastic. These matters to be determined by management. The NLRB's sole duty is to determine whether the discharge were to discourage or encourage union membership or a reprisal for entering in protected activities" (NLRB v. Montgomery Ward) (CA 8 1946) 19 LRRM 2490.