

P.E.R.C. NO. 91-98

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BERGEN PINES COUNTY HOSPITAL,

Respondent,

-and-

Docket No. CO-H-90-44

JNESO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that Bergen Pines County Hospital violated the New Jersey Employer-Employee Relations Act by pressuring Sandra Berman to refrain from attending negotiations as a member of JNESO's negotiations team without having a substantial business justification to do so. The Commission dismisses allegations that the employer retaliated for the exercise of protected rights by subcontracting the services of its methadone clinics or making nurses who were displaced by the subcontracting interview for alternate positions as if they were new hires.

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Charging Party.

Appearances:

For the Respondent, Peter J. Scandarito, County Counsel  
(Rudolph J. Wenzel, Jr., Assistant County Counsel)

For the Charging Party, Zazzali, Zazzali, Fagella & Nowak,  
attorneys (Paul L. Kleinbaum, of counsel)

DECISION AND ORDER

On August 14, 1989, JNESO filed an unfair practice charge against Bergen Pines County Hospital. The charge alleges that the employer 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), <sup>1/</sup> by subcontracting the services of its methadone clinics

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<sup>1/</sup> 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.

to retaliate for the exercise of protected rights. In addition, JNESO alleges that the employer, contrary to established practice, made nurses who were displaced by the subcontracting interview for alternate positions as if they were new hires.

On October 13, 1989, a Complaint and Notice of Hearing issued. On May 18, June 8, and August 31, 1990, Hearing Examiner Stuart Reichman conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

On January 4, 1991, the Hearing Examiner issued his report and recommendations. H.E. No. 91-18, 17 NJPER 75 (¶22035 1991). He found that the employer did not subcontract its clinic services to retaliate against JNESO and did not otherwise violate the Act when, pursuant to the parties' contract, it reassigned displaced nurses into positions held by the least senior nurses anywhere in the hospital. But he found that subsection 5.4(a)((1) was violated when an employee was pressured to refrain from attending negotiations.

On February 8, 1991, after an extension of time, JNESO filed exceptions. It relies principally on its post-hearing brief. It claims that the Hearing Examiner erred by not concluding that the employer went through the motions in trying to implement a fee collection system for its methadone clinics, and by not finding that nurses from the methadone clinic were not given priority within the psychiatric division or on the same shift. It argues that the

parties' contract, when read in light of their conduct, showed their intent that displaced nurses would have preference within a division of the hospital and not within the hospital as a whole. Finally, JNESO argues that the Hearing Examiner's failure to recommend the posting of a notice does not effectuate the purposes of the Act.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 3-16) are thorough and accurate. We incorporate them with this addition. Three displaced nurses were placed outside the psychiatric division (3T28) and two on different shifts (3T29).

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

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive

cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for us to resolve.

JNESO was engaged in protected activity and the employer knew of that activity. Negotiations began in late 1988 and ended in the fall of 1989. But Bridgewater also requires that a charging party show hostility to the exercise of protected rights. The record does not support such a finding.

Although a failure to make good faith efforts to address fiscal problems before subcontracting could raise doubts about an employer's intentions, it does not necessarily signal anti-union animus. We find no such animus.

JNESO argues that hostility was demonstrated by the employer's failure to use negotiations and labor-management meetings to discuss the possibility of subcontracting and receive JNESO's input. In Local 195, IFPTE v. State, 88 N.J. 393 (1982), the Supreme Court held that subcontracting decisions are not mandatorily negotiable, but added that discussions about economic subcontracting "would be in the public interest, since employees could demonstrate that they would do the same work more efficiently than a private

contractor." Id. at 410. In In re Hunterdon Cty. Freeholder Bd., 116 N.J. 322 (1989), the Court again promoted discussion and chastised the parties for instead resorting to litigation:

We trust that in the future, these parties, and others similarly situated, can better manage to effectuate the goals of the Employer-Employee Relations Act and strive for the improved welfare of all citizens of our state by sincerely attempting to communicate with each other before resorting to the procedural weapons provided by the labor-relations process. [Id. at 338-339]

Had this employer discussed its subcontracting decision with JNESO in advance, even though that decision was not predominately an economic one, some strife might have been avoided. Nevertheless, the record does not support a finding that the subcontracting decision was motivated by hostility to protected rights.

Nor do the parties' different interpretations of the employer's contractual obligations regarding displaced nurses prove that the employer was retaliating or breaching any duty to negotiate in good faith. Although reluctant to resolve contractual disputes, we must sometimes interpret contract language raised as a defense to an allegation that the employer unilaterally changed terms and conditions of employment. The disputed language requires that displaced nurses are entitled to "select a position from a listing of the least senior nurses in the Hospital." The language does not permit nurses to select from a hospital division and any practice of permitting such selecting does not bind the employer to disregard the clear and controlling contractual language. Accordingly, we

dismiss the allegations of violations of subsections 5.4(a)(3) and (5).

In the absence of exceptions, we find that subsection 5.4(a)(1) was independently violated when a head nurse and the director of nursing pressured Sandra Berman to refrain from attending negotiations even though her release could be accommodated. Those actions interfered with Berman's right to participate in union activity. We modify the Hearing Examiner's remedy and order the employer to post a notice of its violation. Notices to other employees reassuring them of their protected rights are often the most appropriate remedy available in cases involving interference with protected rights.

ORDER

Bergen Pines County Hospital is ordered to:

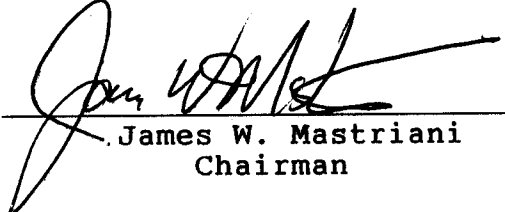
A. Cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by pressuring Sandra Berman to refrain from attending negotiations as a member of JNESO's negotiations team without having a substantial business justification to do so.

B. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

C. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

The remaining allegations in the Complaint are dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Goetting, Johnson, Regan, and Wenzler voted in favor of this decision. Commissioners Bertolino and Smith voted in favor of this decision but dissented with respect to the issue of retaliatory subcontracting.

DATED: April 19, 1991  
Trenton, New Jersey  
ISSUED: April 19, 1991





# NOTICE TO EMPLOYEES

## PURSUANT TO

AN ORDER OF THE



### PUBLIC EMPLOYMENT RELATIONS COMMISSION

AND IN ORDER TO EFFECTUATE THE POLICIES OF THE

### NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED,

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly by pressuring Sandra Berman to refrain from attending negotiations as a member of JNESO's negotiations team without having a substantial business justification to do so.

Docket No CO-H-90-44

BERGEN PINES COUNTY HOSPITAL

(Public Employer)

Dated: \_\_\_\_\_

By: \_\_\_\_\_

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

H.E. NO. 91-18

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

In the Matter of

BERGEN PINES COUNTY HOSPITAL,

Respondent,

-and-

Docket No. CO-H-90-44

JNESO,

Charging Party.

**SYNOPSIS**

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that Bergen Pines County Hospital did not violate the New Jersey Employer-Employee Relations Act by subcontracting the Methadone Clinic to a private, non-profit corporation. The Hearing Examiner finds that Bergen Pines did not subcontract the clinic in order to retaliate against JNESO and its members. The Hearing Examiner also finds that Bergen Pines did not violate the Act by requiring nurses affected by the subcontracting of the clinic to consider alternate job opportunities in any division of Bergen Pines.

The Hearing Examiner recommends that the Commission find that Bergen Pines violated the Act by pressuring a member of JNESO's negotiating team to refrain from attending negotiations without a legitimate business justification.

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. 91-18

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

In the Matter of

BERGEN PINES COUNTY HOSPITAL,

Respondent,

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Docket No. CO-H-90-44

JNESO,

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Appearances:

For the Respondent, Peter J. Scandarito, County Counsel  
(Rudolph J. Wenzel, Jr., Assistant County Counsel)

For the Charging Party, Zazzali, Zazzali, Fagella & Nowak,  
Attorneys (Paul L. Kleinbaum, of counsel)

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

On August 14, 1989, JNESO ("Charging Party") filed an Unfair Practice Charge (C-2)<sup>1/</sup> against Bergen Pines County Hospital ("Bergen Pines"). The Charging Party alleged that Bergen Pines violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically Sections 5.4(a)(1),

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<sup>1/</sup> Exhibits received in evidence marked as "C" refer to Commission exhibits, those marked "CP" refer to Charging Party exhibits and those marked "R" refer to Respondent's exhibits. Transcript citations "1T1" refer to the transcript developed on May 18, 1990, at p. 1; transcript citations "2T and 3T" refer to the transcripts developed on June 8, 1990 and August 31, 1990, respectively.

(3) and (5)<sup>2/</sup> by subcontracting the methadone clinics maintained by Bergen Pines on the hospital's grounds in Paramus and at a satellite location in Hackensack, in retaliation against nurses exercising their rights protected by the Act. Additionally, the Charging Party alleges that Bergen Pines failed to negotiate the procedures to be used in reassigning those nurses affected by the closure of the methadone clinics and required such nurses to apply for other nursing positions in a manner which was contrary to the established practice employed by Bergen Pines in similar situations.

On October 13, 1989, the Director of Unfair Practices issued a Complaint and Notice of Hearing (C-1). Hearings were conducted on May 18, June 8, and August 31, 1990, at the Commission's offices in Newark, New Jersey. The parties were afforded an opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. The parties filed timely post-hearing briefs.

Upon the entire record, I make the following:

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<sup>2/</sup> 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."

**FINDINGS OF FACT**

1. Bergen Pines is a public employer and JNESO is a public employee representative within the meaning of the Act (1T9).

2. The organizational structure at Bergen Pines provided for the methadone clinics to be included in the psychiatry division. Approximately eight nurses work in both clinics (1T39-1T40).

3. In 1986, it became known that the Monsignor Wall Methadone Clinic ("Wall") in Hackensack would be closed and its patient services would be consolidated with those rendered at Bergen Pines (1T62). Protests by Wall's patients and staff resulted in the Board of Chosen Freeholders rescinding its determination to close the facility (1T64).

4. In October 1987, Peter Martindale became the Medical Director of Bergen Pines' Psychiatry Division and was responsible for the methadone program (2T48; 2T50). Martindale reviewed the methadone program specifically with regard to how it fit into the overall substance abuse plan in the Psychiatry Division (2T51). He found a patient population which was not only abusing substances but suffered from other psychological problems (2T53). He also found problems with the methadone program's record keeping and fee collection systems. It was difficult to determine active from inactive patients and it was clear that patients were not paying for methadone doses administered (2T53; 2T55-2T56). Another problem

identified was that some staff were working simultaneously with methadone maintenance and drug-free patients. The concern from a clinical viewpoint was that it was difficult for staff to "switch gears" to properly treat the different patient populations (2T55; 2T82). Martindale concluded that Bergen Pines was offering more patient services than it could properly provide (2T52).

4. In 1988, the State Division of Mental Health and Hospitals indicated that the funding provided to Bergen Pines' Psychiatry Division should not be used for substance abuse patients. The Division of Mental Health and Hospitals took the position that methadone maintenance was not a psychiatric problem (2T54-2T55; 2T88). The elimination of funding by the Division of Mental Health and Hospitals for substance abuse patients raised the question of whether the methadone maintenance program should be moved out of the Division of Psychiatry (2T59-2T60). Martindale believed that moving the methadone program out of the Psychiatry Division was a logical step, since it would reduce the patient population to a more manageable size and would result in a more homogeneous patient population, better suited for available in- and out-patient psychiatric services (2T60). Moreover, such action was also in keeping with Martindale's view that the overall treatment plan should move in the direction of a drug-free model, rather than a substance dependent model, as is the case in the methadone maintenance program. Martindale expressed interest in moving toward the drug-free model to Elizabeth Moore, Director of the Psychiatry Division in early 1988 (2T113).

5. Robert Bedell, Bergen County Alcoholism Coordinator, prepared a methadone treatment report which, on January 6, 1989, was given to Edward Lewis, Director of Bergen Pines (J-10). The report makes two suggestions in order to help Bergen Pines alleviate some of its financial concerns about operating its methadone program. The report suggests that Bergen Pines should look into the possibility of obtaining additional funding from the Department of Health, Division of Narcotics. Another alternative suggested was for Bergen Pines to turn over the methadone program to a private, nonprofit corporation (J-10).<sup>3/</sup>

6. Robert Bedell and Gail Sternitzke, Assistant Administrator for Bergen Pines' Psychiatry Division (3T41), met with Richard Russo, Assistant Commissioner of the State Department of Health, concerning the methadone program. This meeting was memorialized in a February 7, 1989, memorandum (J-11). Not wanting the discontinuation of the methadone program in Bergen County, Russo indicated that additional funding would be provided for the methadone program by the State of New Jersey beginning in July, 1989 (J-11; 2T79). Also discussed at the meeting was the possibility of a private, nonprofit corporation replacing Bergen Pines as the methadone program provider (J-11). On March 14, 1989, Bedell wrote Lewis a letter indicating that Russo was reluctant to recruit

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<sup>3/</sup> J-10 was submitted into evidence with some pages missing. However, it is clear enough from a reading of the submission that the two alternatives outlined above were suggested in that report.

alternative service providers interested in taking over the administration of Bergen Pines' methadone program until receiving a letter from the hospital indicating that it was serious in seeking alternatives along those lines (J-12). On March 20, 1989, Lewis wrote Russo a letter confirming that Bergen Pines was evaluating the feasibility of a private, nonprofit corporation administering the methadone maintenance program and invited Russo's assistance in soliciting interested parties (J-13).

7. Martindale and Moore had been discussing the idea of moving toward a drug-free model in the Psychiatry Division since early 1988 (2T120). In early 1989, Martindale recommended to Lewis that the Psychiatry Division adopt a drug-free treatment model (2T120). In February 1989, Moore began a serious review of the methadone program (2T80). In March through May, 1989, Moore had frequent discussions with Lewis concerning the financial condition of the methadone clinic and the idea of employing a drug-free treatment model (2T121).

8. Negotiations between Bergen Pines and JNESO began in the latter part of 1988 and ended in the fall of 1989 (1T55; 2T22). Approximately 14 negotiations sessions were conducted (2T22). During the course of negotiations neither Bergen Pines nor JNESO raised the issue of subcontracting the methadone program. (1T18; 1T39; 1T56; 1T72; 1T90; 2T23).

9. The collective agreement provides for the conduct of periodic labor-management meetings. In the Psychiatry Division



labor-management meetings are conducted every two or three months (1T21; 1T40). Ralph Kornfeld, Personnel Director, arranges the meetings and occasionally attends (2T23). An agenda for the meeting is established, however, the meetings are viewed as informal and nonagenda items are frequently raised and discussed (2T102).

10. Several JNESO witnesses testified that Bergen Pines never raised the issue of subcontracting the entire methadone program at a labor management meeting until June 6, 1989 (1T21; 1T24; 1T77-1T79; 1T84; 1T90-1T91; 2T103). JNESO witnesses Mabelene Strickland and Sondra Berman testified that in April, 1989, in response to JNESO's inquiry, Bergen Pines indicated during a labor management meeting that the Wall clinic in Hackensack might be consolidated with the Bergen Pines clinic in Paramus at some future time (1T23-1T24; 1T41-1T42).

Bergen Pines' witnesses Kornfeld and Moore testified that the issue of subcontracting the methadone clinics was mentioned at a labor management meeting which occurred in February or March, 1989. No formal notice of the subcontracting was given at that time (2T9; 2T24; 2T101).

I credit JNESO's witnesses. On May 1, 1989, a memorandum was sent to Strickland discussing upcoming changes in the Psychiatry Division (CP-1). Nothing was mentioned in CP-1 indicating that the methadone clinics would be or even might be subcontracted. I find that had such an important issue as subcontracting been raised in any manner in February or March, 1989, it would have been reflected in CP-1.

11. On June 7, 1989, Bergen Pines met with the Bergen County Board of Freeholders to present a resolution which called for the subcontracting of the methadone clinics to Straight and Narrow, a private, non-profit corporation (1T43; 2T109; R-11). On June 5, 1989, Ralph Kornfeld received a memorandum dated June 2, 1989, from Edward Lewis, directing Kornfeld to contact the affected employee organizations in order to advise them of Bergen Pines' intention to subcontract the methadone program to Straight and Narrow (R-5). On June 7, 1989, Kornfeld sent JNESO's Executive Director Virginia Treacy a letter advising that the methadone program at the hospital would be subcontracted to another service provider on or about June 25, 1989 (R-2b). The letter indicated that the transition would become effective approximately 30 to 60 days thereafter. On approximately June 23, 1989, Kornfeld sent each nurse in the methadone clinic a memorandum indicating that on or about August 1, 1989, employees would be reassigned or separated from their current role in the methadone program and invited the nurses to contact Bergen Pines' nursing recruiter regarding such reassignment or other job opportunities (2T11-2T12; CP-7). All of the methadone nurses contacted Kornfeld or nursing recruiter Barbara Pillone in order to discuss available jobs (2T13). All displaced clinic nurses were placed in other jobs at Bergen Pines.

12. During all times relevant to this proceeding, the parties were covered by an expired collective agreement for the period January 1, 1987 through December 31, 1988 (R-1). Article 10, Section 7, Seniority, sets forth the following:

(a) The hospital will notify the local union president/designee, in advance, and in writing, of any decisions involving the reassignment, layoffs and transfers of employees covering by the Bargaining Agreement due to the partial or total consolidation, combination or closure of any hospital facility, operation or unit, except in condition of temporary, immediate and emergent effect on patient care. Such latter circumstance shall be communicated to the local unit president or designee upon occurrence and in advance, in writing, within twenty-four (24) hours.

(b) Procedure - Affected employees shall first review and may opt to fill any authorized and posted vacancy in the Hospital in order of seniority. Those nurses who do not select from among the published vacancies may select a position from a listing of the least senior nurses in the Hospital, a number equal to those being reassigned.

Employees who are displaced may then opt for any authorized position posted by the employer.

Whenever possible, the Hospital will endeavor to situate a nurse on a shift or unit comparable to the vacated position in accordance with the statutory rules governing such changes.

13. From September, 1988, through September or October, 1989, the parties conducted collective negotiations for a successor agreement (1T55-1T56; 1T89; 2T22; J-22). Although the successor collective agreement (J-22) was retroactive to January 1, 1989, it did not go into effect until September or October, 1989, after subcontracting the methadone clinic. Article 9, Section 7, Seniority, in J-22 follows the language in the predecessor agreement (R-1) identically, except for the significant exception of paragraph (b). Section 7(b) has been changed in J-22 to read as follows:

b. Procedure - Affected employees shall first review and may opt to fill any authorized and posted vacancy in the Hospital in order of total seniority. Those nurses who do not select from among the published

vacancies may select a position from a listing of the least senior nurses within the affected employees division, a number equal to those being reassigned.

Thus, the language in J-22 has been changed from the predecessor agreement (R-1) to now provide for displaced nurses to bump less senior nurses within the affected employees' division, rather than anywhere in the hospital (1T72-1T73).

14. Other nurses at Bergen Pines have been affected by closures or consolidations of hospital units prior to the subcontracting of the methadone clinic. Approximately four years ago, ten to twelve nurses were displaced when the 8/4 medical-surgical unit was closed (3T5). An agreement between Nursing Executive Director Spiegel and JNESO provided for nurses to be given preference for positions contained on the vacancy list over all other in-house personnel. Nurses not satisfied with positions available on the vacancy list bumped less senior nurses and were maintained in the same division and on the same work shift (3T5-3T7; 3T13). Approximately three years ago, the 11/3 medical-surgical unit was closed (3T7). Affected nurses were given the opportunity to remain in the acute service division on their same shifts (3T7-3T8). In 1987 the title Assistant Head Nurse was eliminated and nurses holding that title were demoted to staff nurse. All of the affected nurses were maintained on their respective units and shifts (3T8-3T9).

15. With respect to the closing of the 11/3 medical-surgical unit and the elimination of the Assistant Head

Nurse title, Rosemary Flynn incorrectly testified that no contractual procedure governed those situations (3T11). However, R-1 (the collective agreement between Bergen Pines and JNESO) covered the period January 1, 1987 through December 31, 1988. Thus, Article 9, Section 7, existed and applied to the above-mentioned events occurring in 1987.

16. On May 11, 1987, Mabelene Strickland received a copy of a letter from Mary Dougherty, Director of Nursing Services, to one of the nurses affected by the 11/3 medical-surgical unit closure (3T17-3T18; CP-11). The letter advised that since the nature of patient care on the unit would change from medical-surgical to alcohol treatment, the medical-surgical nursing staff would be transferred to other units within the medical-surgical division.

17. Approximately two years ago, the Psychiatry Division was moved to a new building (3T21). After the move, some of the patient units remained in tact, but some of the large 50 to 60 bed units were divided into two 20 to 30 bed units (3T21; 3T38). All of the affected nurses remained in the Psychiatry Division, on their same shifts. However, the split into smaller units created the need for additional nursing positions rather than fewer (3T21; 3T38). Consequently, while there was a change in the Psychiatry Division's organizational structure, no displacement of nurses due to unit closure or consolidation occurred.

18. Nurses affected by the methadone clinic subcontracting did not receive priority treatment in obtaining new positions. Job

vacancies which were posted pursuant to the collective agreement were not frozen (1T25-1T26; 2T26-2T27). Methadone clinic nurses were required to bid on posted positions and be interviewed by head nurses like any other hospital employee seeking to change jobs (1T26; 1T45-1T47; 2T26-2T27; 2T36). Rosemary Flynn, a staff nurse and JNESO officer at the time relevant to the clinic subcontracting, spoke to Elizabeth Moore about keeping affected nurses in the Psychiatry Division (3T40). Moore told Flynn that she would adhere to the collective agreement which only allows nurses to bump the least senior nurses in the hospital, but does not guarantee nurses the right to remain in any particular division (3T40).

19. Sondra Berman worked as a staff nurse in the methadone clinic for approximately five years (1T37-1T38). After being advised of the closing, Berman, along with the other affected clinic nurses, was told to bid on posted positions. Berman was interested in a part-time, day shift position in the F.G. Childrens Crisis Unit in the Psychiatry Division. On May 8, 1989, the F.G. position was posted showing a single vacancy (2T37; R-6). Staff nurses Braun and Scalabrin bid on the position. Scalabrin was the successful bidder. On June 5, 1989, the part-time F.G. position was reposted, since the original posting did not indicate that two part-time positions were available (2T37; R-6). In light of the error with the F.G. position posting, Braun was advised that the position would be reposted and her previous bid would be considered as her response to the second posting (2T39). The collective agreements (R-1 and

J-22) require that job vacancy notices remain posted for ten working days. Additionally, postings are sent to JNESO and posted in the personnel department (2T44).

20. On June 19, 1989, Berman prepared a memorandum addressed to Pillone advising that she (Berman) wished to bid on the F.G. position (R-7). However, Berman was out of work due to an illness and asked a friend to deliver R-7 to Pillone (3T24). R-7 was received in the personnel office on June 28, 1989, after the close of the bidding period for the F.G. position and after Braun, a nurse who was already working in the F.G. unit on a full-time basis, was accepted to fill the part-time position (1T68; 2T39; 3T24; R-6). Upon receipt of Berman's bid on June 28, 1989, Pillone immediately advised Berman that the bid was untimely and referred her to the then current June 26, 1989 job vacancy list (R-10).

21. JNESO filed a grievance on behalf of Berman alleging a violation of the bidding procedure. The grievance was appealed through step 4, pre-arbitration, where it was heard by Executive Director Lewis. The hospital denied the grievance and the matter was not pursued to arbitration (2T17-2T19; 3T31-3T32).

22. The methadone clinic and central intake unit were located in Building 14 on Bergen Pines' Paramus campus. In 1987, the methadone clinic was moved to Building 10 but central intake remained in Building 14 (1T48). Berman sent a memorandum to Head Nurse Day raising certain problems with the new arrangement (CP-8). Bergen Pines and JNESO jointly conducted a labor management meeting

so that JNESO could explain the problems associated with separating the clinic from central intake (1T49; 1T51).

23. On July 20, 1988, Berman took part in a meeting which involved secretaries, social workers and doctors from various departments which work through the central intake area. The meeting was conducted in an effort to resolve operational problems which had developed (1T52-1T53). As the result of the meeting, certain changes were identified to improve patient confidentiality, reduce unnecessary laboratory work, improve security and provide additional transportation assistance through the assignment of a male attendant in the central intake area. Also recognized was the need to further address problems which arose from locating central intake and the methadone clinic in separate buildings (CP-3). On July 27, 1988, Gail Sternitzke, Assistant Administrator in the Psychiatry Division, sent a memorandum to Berman indicating that the changes set forth in CP-3 merely represented possible changes and that further discussions with various departments needed to take place prior to implementation (CP-4). Subsequently, many, but not all, of the changes discussed in CP-3 were effectuated (1T54; 2T94-2T96; 2T104-2T105; 2T108; 3T47-3T48). While Berman may have been apprised of actions taken by hospital administrators in response to problems raised in CP-3 and CP-8 on an informal verbal basis, she never received formal written notification (2T103; 3T23; 3T49). Subsequent to July 27, 1988 (the date that CP-4 was written), JNESO never raised the issues contained in CP-3 and CP-8 again (3T48).



24. Jerry Sweeney and Berman served on JNESO's negotiating committee for the collective agreement covering the period January 1, 1989, through December 31, 1990 (J-22). The methadone clinic at the hospital's Paramus campus was staffed by four nurses, two being Sweeney and Berman (1T24; 1T39; 1T56). Berman's supervisor, Head Nurse Frita Day, did not like both nurses having to be released to attend negotiations. Day spoke to Director of Nursing Hutchinson in order to obtain his assistance in stopping both nurses from attending negotiations at the same time. Hutchinson asked Berman if it were necessary for both nurses to attend negotiations and asked Berman to remain on duty in the clinic. Berman continued to attend all of the negotiations sessions.<sup>4/</sup>

25. Occasionally, the day after a negotiations session, Head Nurse Day would tell Berman how busy the clinic and the remaining nurses were during her absence for negotiations. Once, on a day that negotiations was conducted, Day asked Berman to return to the clinic to relieve the remaining nurses for lunch. Since Berman was unable to determine when she would be able to leave the session, she told Day that she would not be able to accommodate her request (1T56-1T57; 1T69-1T71).

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<sup>4/</sup> Berman may have been absent for one session, however, there is no evidence to indicate that the absence was related to any refusal on Bergen Pines' part to release her. (1T71).

26. At the beginning of Peter Martindale's tenure as Medical Director of the Psychiatry Division (October, 1987), Bergen Pines viewed the delivery of methadone to its user population as a free service (2T48; 2T58). Martindale believed that requiring a patient to pay for the services received in the methadone clinic enhanced the value of such services for the patient and developed the patient's sense of responsibility, an important treatment aspect to the program. Accordingly, clinic administrators took steps to implement a fee-collection system (CP-5; CP-6; CP-10; J-2; J-3; J-4; J-5; J-6; J-7; J-8). Only marginal improvements in the rate of fee collections were realized after the implementation of various fee-collection rules. Bergen Pines continued to grapple with fee-collection problems at the time that the clinic was subcontracted to Straight and Narrow (2T99; 2T117-2T118; J-4).

### **ANALYSIS**

JNESO alleges that Bergen Pines violated N.J.S.A. 34:13A-5.4(a)(3) and, derivatively, (1) by subcontracting the methadone clinic in retaliation against the majority representative and its members. JNESO contends that the subcontracting of the methadone clinic resulted in the elimination of six negotiations unit positions. JNESO concedes that it does not challenge Bergen Pines' right to subcontract and acknowledges that such decisions are generally non-negotiable. IFPTE Local 195 v. State of N.J., 88

N.J. 393 (1982). However, JNESO asserts that an employer's right to subcontract is not absolute, in that an employer may not "subcontract in bad faith for the sole purpose of laying off public employees or substituting private workers for public workers." Id. at 411. A public employer may not subcontract in order to retaliate against a public employee organization or its members. Glassboro Housing Auth., P.E.R.C. No. 90-16, 15 NJPER 524 (¶20216 1989), adopting H.E. No. 89-45, 15 NJPER 439 (¶20180 1989).

The New Jersey Supreme Court has set forth the standard for determining whether an employer's actions violated subsection 5.4(a)(3) of the Act in Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984). Under Bridgewater, 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. In this case JNESO concedes that there is no direct evidence of anti-union motivation. Charging Party brief at p. 8. Thus, JNESO relies on circumstantial evidence to establish its prima facie case.

Clearly, JNESO was engaged in protected activity and Bergen Pines knew of this activity. JNESO proffers several examples to show that Bergen Pines was hostile toward the exercise of protected

rights. JNESO points out that Bergen Pines never raised the possibility that the methadone clinic would be subcontracted during any of the negotiations sessions or labor management meetings conducted by the parties. In April, 1989, it was evident to Bergen Pines administrators that the subcontracting of the methadone clinic was at least a possibility. Yet, when JNESO raised the methadone clinics during the April, 1989 labor management meeting, in order to discuss rumors concerning consolidations of the clinics, management officials said nothing about subcontracting. JNESO also asserts that the hospital was derelict in its responsibility to communicate such an important matter to the union as required by the parties' collective agreement. JNESO cites Art. 9, Sec. 7(a) and Art. 3 of the current agreement (J-22) as requiring such issues to be brought to the union's attention.<sup>5/</sup> JNESO claims that Bergen Pines' hostility was demonstrated by the manner in which it required methadone clinic nurses to obtain alternate positions at the hospital after the subcontracting was announced. JNESO asserts that the subcontract was not motivated by legitimate business considerations, in that it failed to institute the necessary fee-collection procedures in spite of a recognition of the need to improve the clinic's financial condition. Lastly, JNESO alleges that Bergen Pines harassed Sondra Berman when it requested that she

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<sup>5/</sup> I note that Art. 9, Sec. 7(a) and Art. 3 in the predecessor collective agreement (R-1) contain identical language as those articles in J-22.

not attend some negotiations sessions. JNESO suggests that these actions by Bergen Pines establishes hostility.<sup>6/</sup>

After finding the right to subcontract a non-negotiable, managerial prerogative and rejecting contrary authority found in other jurisdictions, the New Jersey Supreme Court, in In re IFPTE Local 195, 88 N.J. at 409-410, said the following:

These out-of-state decisions also emphasize the wisdom of pursuing discussion between public employers and employees. [Citation excluded.] We fully agree that such discussions are valuable and should be fostered. They would undoubtedly promote labor peace and harmony, a major goal of the New Jersey Employer-Employee Relations Act. N.J.S.A. 34:13A-2. Moreover, they may even result in greater efficiency of economy. If a public employer is considering subcontracting as a means to achieve these goals, employees may be motivated to suggest changes in working conditions that could accomplish the same or better results.

For these reasons, we fully expect that discussions between public employers and employees will be undertaken by the [employer]. It is clearly in the interest of the [employer] to do so.

\* \* \*

We do not mean to stifle discussion. We encourage it. [The public employer's] officials would be derelict in their public responsibilities if they did not pursue such discussions.

To this end, we hold that a public employment contract may include a provision reciting an agreement by the [public employer] to discuss [emphasis in original] decisions to contract or subcontract whenever it becomes apparent that a layoff or job displacement

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<sup>6/</sup> JNESO also contends that by requesting Sondra Berman not to attend negotiations, Bergen Pines violated Subsection 5.4(a)(1), independently. I will address this issue later in the report.

will result, if the proposed subcontracting is based on solely fiscal considerations. [Emphasis added.] In such situations, the public would clearly benefit from suggestions by public employees directed toward improving economy or efficiency. While the public employees have no right to negotiate on the ultimate decisions to subcontract, they may have a procedural right to present their position on the economic issue.

\* \* \*

Discussion of subcontracting which is contemplated for purely fiscal reasons does not implicate governmental policy to the extent that it would if the decision were based on non-fiscal reasons. Replacing public employees with private employees solely to save money does entail a choice about the level of government spending, a matter of great public concern. However, discussion about such a replacement would not significantly interfere with the determination of public goals. In fact, ...such discussions would be in the public interest, since employees could demonstrate that they would do the same work more efficiently than a private contractor.

JNESO argues that Bergen Pines' failure to inform JNESO during either the course of the negotiations or in labor management meetings that it (Bergen Pines) was considering subcontracting the methadone clinic demonstrates that Bergen Pines was hostile towards the exercise of employee rights protected by the Act. However, the application of IFPTE Local 195 to the facts in this case result in a different conclusion.

In October, 1987, Medical Director Martindale found numerous problems with the operations of the methadone program, only one of which related to its fiscal condition. Since the beginning of Martindale's tenure as Medical Director, he was concerned about the difficulty for the staff to properly deliver psychiatric

services to drug-dependent and drug-free patient populations, simultaneously. Martindale believed that by treating only drug-free patients, the patient population in the Psychiatry Division would become more manageable and better suited for available in- and out-patient psychiatric services. Moreover, such action was also in keeping with Martindale's view that the overall treatment plan in the Psychiatry Division should move toward a drug-free model, rather than a substance-dependent model. Martindale began discussing the idea of moving toward a drug-free model in early 1988. Thus, for at least a year prior to the issuance of Alcoholism Coordinator Bedell's methadone treatment report, Martindale had been discussing with Director Moore changing the delivery of psychiatric services to a drug-free model.

In IFPTE Local 195, the court emphasized the propriety of undertaking discussions when "...the proposed subcontracting is based on solely fiscal considerations." Id. at 409. The Court noted that where a determination to subcontract is based on non-fiscal reasons, such decision implicates governmental policy considerations to a greater extent. Id. at 410. In this case, the decision to subcontract the methadone clinic was based on the policy goal to serve a homogeneous drug-free patient population in addition to other reasons, including fiscal. Thus, while parties are always encouraged to communicate, Bergen Pines' failure to apprise JNESO until June 6, 1989, that it was considering subcontracting the clinic cannot be considered hostility, since it was under no

obligation to do so except as provided by the collective agreement. Bergen Pines, through Kornfeld, formally advised JNESO of the subcontract on June 7, 1989, immediately after adoption by the Board of Freeholders.

Bergen Pines required the methadone clinic nurses to obtain other positions in the hospital through the use of the bidding process set forth in the collective agreement. Bergen Pines did not give affected nurses any priority in obtaining alternate positions, nor did it take any steps to ensure that such nurses remain within the Psychiatry Division. JNESO alleges that such action is contrary to the established practice of providing nurses affected by a consolidation with preferential treatment to fill vacant positions and with bumping rights in order to remain within their division.

The Commission has consistently held that a contractual provision will be controlling over a past practice if the language contained in the collective agreement is sufficiently clear and unambiguous so that the mutual intent of the parties can be readily discerned. State of N.J., P.E.R.C. No. 79-33, 5 NJPER 27 (¶10018 1978). See also, Upper Pittsgrove Tp. Bd. of Ed., P.E.R.C. No. 90-34, 15 NJPER 621 (¶20259 1989), aff'g H.E. No. 89-44, 15 NJPER 429 (¶20179 1989); N.J. Sports & Expo. Auth., P.E.R.C. No. 88-14, 13 NJPER 710 (¶18264 1987); N.J. Dept. of Education, H.E. No. 87-76, 13 NJPER 604 (¶18228 1987) adopted P.E.R.C. No. 88-72, 14 NJPER 137 (¶19055 1988), aff'd. App. Div. Dkt. No. A-3502-87T8 (5/22/89); Sussex-Wantage Reg. Bd. of Ed., P.E.R.C. No. 86-57, 11 NJPER 711



(¶16247 1985), adopting H.E. No. 85-49, 11 NJPER 430 (¶16148 1985); and New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1978), recon. den. P.E.R.C. No. 78-56, 4 NJPER 156 (¶4073 1978), aff'd. App. Div. Dkt. No. A-2450-77 (4/2/79).

In this case Art. 9, Seniority, Sec. 7 of the collective agreement (R-1) in effect at the time of the subcontract clearly and unequivocally sets forth the manner in which the parties have agreed to proceed in circumstances involving the closure of any hospital facility, operation or unit. Sec. 7(b) of the agreement details the procedure afforded nurses affected by the subcontract. While the practice may have provided more for nurses affected by a consolidation, combination or closure of an operation or unit, such practice is contrary to the clear terms of the agreement and, consequently, cannot supersede or negate its wording. Thus, Bergen Pines' refusal to allow affected nurses to remain in the Psychiatry Division does not demonstrate hostility on its part since its position is in accordance with the terms of the collective agreement. An employer meets its negotiations obligation when it acts pursuant to its collective agreement. Pascack Valley Bd. of Ed., P.E.R.C. No. 81-61, 6 NJPER 554 (¶11281 1980).

While it is not entirely clear from the evidence, it appears that Bergen Pines may not have been in total compliance with Section 7(b) in terms of only allowing affected nurses to apply for alternate positions through the use of the regular bidding process. However, JNESO never filed a grievance with respect to this

provision seeking to enforce its terms.<sup>1/</sup> Accordingly, I find that such arguable violation of the collective agreement by Bergen Pines does not establish hostility under the facts of this case.

Head Nurse Freda Day and Director of Nursing Hutchinson asked Sondra Berman not to attend negotiations sessions at the same times as Gerry Sweeney, another methadone clinic nurse who also served on JNESO's negotiations team. JNESO contends that with respect to its contention that Bergen Pines subcontracted the clinic in retaliation against JNESO, this action demonstrates hostility on the part of Bergen Pines. I disagree. Neither Day nor Hutchinson was involved in the determination to subcontract the methadone clinic. Thus, there is no nexus between Berman's attendance at the negotiations and Bergen Pines' decision to subcontract the clinic.

JNESO argues that the decision to subcontract was not motivated by legitimate business considerations. It points out that "...for almost two years, the hospital failed to take any steps to improve collection procedures despite a recognition of the need to do so." JNESO brief at 11.

The evidence establishes that Bergen Pines recognized its problem with fee collection at the clinics and made several attempts to institute remedial action. While it is clear that the administration was incapable of instituting an effective fee

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<sup>1/</sup> JNESO, on behalf of Berman, filed a grievance concerning the manner in which the bidding procedure was followed. This grievance related to a different contract article and raised different issues.

collection procedure, such circumstance does not establish hostility toward the union.

Even assuming that one or more of the elements discussed above establishes hostility and, thus, allows JNESO to make out its prima facie case that protected activity was a substantial or motivating factor in Bergen Pines' decision to subcontract the methadone clinic, I find no violation on the part of Bergen Pines, since the evidence demonstrates that the methadone clinic would have been subcontracted even in the absence of the protected conduct. Bergen Pines was experiencing a substantial budget deficit in the operation of the methadone clinic and was incapable of instituting procedures to limit its loss. Further, in terms of service delivery, there was concern over the staff having to "switch gears" to treat both a drug-free and drug-dependent patient population. Bergen Pines' administration wanted to move toward a drug-free treatment model. Also, methadone maintenance funding from the State Division of Mental Health and Hospitals was being terminated, since the State did not view methadone maintenance as a psychiatric problem. In early January, 1989, Bergen County Alcoholism Coordinator Bedell issued an independent report suggesting that Bergen Pines could alleviate some of the problems associated with operating the methadone clinic by turning it over to a private, nonprofit corporation. I find that it was these problems and Bedell's report that were the motivating factors which brought about the subcontract and not a desire to retaliate against JNESO for engaging in protected activity.

JNESO alleges that the hospital violated Section 5.4(a)(5) and, derivatively, (a)(1) of the Act by unilaterally changing the procedure for assigning nurses who are displaced by a unit closure or consolidation. JNESO supports its contention by introducing evidence of the manner in which nurses were treated in various other instances of unit closures or consolidations. Under the circumstances of this case, I find this issue is moot.

In Ramapo-Indian Hills Ed. Assn., P.E.R.C. No. 91-38, 16 NJPER (¶ 1990), the Commission said the following:

We have often held that the successful completion of contract negotiations may make moot disputes over alleged misconduct during negotiations. We have so held irrespective of whether the charging party is a majority representative or a public employer. Continued litigation over past allegations of misconduct which have no present effects unwisely focuses the parties' attention on a divisive past rather than a cooperative future. See, e.g., Bayonne Bd. of Ed., P.E.R.C. No. 89-118, 15 NJPER 287 (¶20127 1989), aff'd App. Div. Dkt. No. A-4871-88T, (3/5/90); Belleville Bd. of Ed., P.E.R.C. No. 88-66, 14 NJPER 128 (¶19049 1988), aff'd App. Div. Dkt. No. A-3021-87T7 (11/23/88); Matawan-Aberdeen Reg. Sch. Dist. Bd. of Ed., P.E.R.C. No. 88-52, 14 NJPER 57 (¶19019 1987), aff'd App. Div. Dkt. Nos. A-46-87T1, A-2433-87T1, A-2536-87T1 (1/24/90); Rutgers, the State Univ., P.E.R.C. No. 88-1, 13 NJPER 631 (¶18235 1987), aff'd App. Div. Dkt. No. A-174-87T7 (11/23/88); State of New Jersey, P.E.R.C. No. 88-2, 13 NJPER 634 (¶18236 1987); State Bd. of Higher Ed., P.E.R.C. No. 84-69, 10 NJPER 27 (¶15016 1983); Oradell Bor., P.E.R.C. No. 84-26, 9 NJPER 595 (¶14251 1983); Rockaway Tp., P.E.R.C. No. 82-72, 8 NJPER 117 (¶13050 1982); Union Cty. Reg. H.S. Bd. of Ed., P.E.R.C. No. 79-90, 5 NJPER 229 (¶10126 1979); see also Asbury Park Bd. of Ed. v. Asbury Park Ed. Ass'n, 155 N.J. 76 (App. Div. 1977). Under all the circumstances, this case does not warrant an exception to our reluctance to resurrect pre-contract negotiations disputes.

JNESO contends that Bergen Pines unilaterally changed an established practice without negotiations. However, as indicated above, a past practice which is contrary to the clear terms of a collective agreement cannot supersede or negate the wording such agreement. See New Brunswick Bd. of Ed.; Upper Pittsgrove Tp. Bd. of Ed. The seniority article in the current collective agreement (J-22) was specifically modified to allow affected nurses to "...select a position from a listing of the least senior nurses within the affected employees division..." Thus, it would appear from a plain reading of the current collective agreement, that the parties have agreed to memorialize in the current agreement the condition of employment JNESO seeks to enforce as the "established practice." There is no evidence to suggest that in the future the parties will not act in conformance with Section 7(b) of J-22. Questions arising concerning the application or interpretation of this contract provision may be referred to the parties negotiated grievance procedure.

Even assuming the nurse reassignment procedure issue is not moot, I find no violation of Section 5.4(a)(5). The provisions contained in R-1 were controlling at the time of the subcontract. Article 10, Section 7(b), Seniority, set forth the procedure to be followed in circumstances involving closure or consolidation of any hospital facility, operation or unit. A plain reading of Section 7(b) indicates that affected nurses are not guaranteed alternate positions limited to their division, but could be reassigned into

positions held by the least senior nurses anywhere in the hospital. This holding becomes even more evident when the language contained in the seniority article of R-1 is compared with the seniority article in J-22. Thus, in accordance with New Brunswick Bd. of Ed., any prior practice contrary to the terms of the collective agreement must be disregarded. JNESO's recourse to enforce the terms of the collective agreement is found in its contractual grievance procedure, not through the unfair practice process. N. J. Dept. of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

JNESO asserts that Bergen Pines independently violated Section 5.4(a)(1) of the Act when it asked Sondra Berman to refrain from attending negotiations. The standard for finding an independent subsection (a)(1) violation is set forth in N.J. Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550, 551, n. 1 (¶10285 1979) where the Commission stated the following:

It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification.

The evidence does not support a finding that Bergen Pines exhibited anti-union bias toward Berman. Berman took the lead in advising Bergen Pines concerning certain problems associated with housing the methadone clinic and central intake in different buildings on the hospital campus. Berman took part in meetings focusing on such problems. While Bergen Pines administration may

not have directly responded to Berman with respect to the issues raised during the meetings, Bergen Pines treated the issues raised by Berman in a serious manner and made several changes in an effort to achieve a resolution.

Bergen Pines administration, through Head Nurse Day and Director of Nursing Hutchinson asked Berman to refrain from attending negotiations at the same time as Gerry Sweeney, another methadone clinic nurse serving on JNESO's negotiations team. While it is understandable that Day may have been unhappy to lose half of the methadone clinic nursing complement, the evidence shows that both nurses were released to attend negotiations and the clinic function continued. While Bergen Pines never refused to allow Berman to attend negotiations, nor required her to return to the clinic to relieve other nurses for lunch, Day would complain to Berman regarding how busy the clinic and the remaining nurses were during her attendance at negotiations.

I find the course of action taken by a head nurse and, particularly, by the Director of Nursing to constitute a technical violation of subsection (a)(1) of the Act. Had Bergen Pines taken the position that the absence of half of the methadone clinic's nursing staff would result in an undue operational burden on the clinic, and refused to release Berman on that basis, sufficient business justification might have been available to arrive at a different conclusion. However, Bergen Pines accommodated Berman's release to attend each of the negotiations sessions. By pressuring

Berman to refrain from attending negotiations after demonstrating that it was capable of accommodating her release, Bergen Pines harassed Berman and, thereby, tended to interfere, restrain or coerce Berman in the exercise of her rights guaranteed by the Act.

Remedially, I recommend that the Commission issue an order directing Bergen Pines to cease and desist from acting in a manner which tends to interfere with Berman's right to participate in union activity free from employer harassment, however, I do not recommend a posting. I make this recommendation on the basis that negotiations is over and no evidence suggests that the completion of such negotiations was affected by the misconduct.

Based upon the evidence, I make the following:

#### CONCLUSIONS OF LAW

1. Bergen Pines violated Section 5.4(a)(1) of the Act by requesting Sondra Berman to refrain from attending negotiations as a member of JNESO's negotiating team without a legitimate and substantial business justification.
2. Bergen Pines did not violated Section 5.4(a)(3) and, derivatively, (1) of the Act by subcontracting the methadone clinic in order to retaliate against JNESO and its members.
3. Bergen Pines did not violated Section 5.4(a)(5) and, derivatively, (1) by requiring nurses affected by the subcontracting of the methadone clinic to consider alternate job opportunities outside of the Psychiatry Division.




**RECOMMENDATIONS**

I recommend that the Commission **ORDER**:

A. That Bergen Pines County Hospital cease and desist  
from:

1. Interfering with, restraining or coercing Sandra Berman in the exercise of the rights guaranteed by the Act, particularly by requesting that she refrain from attending negotiations as a member of JNESO's negotiating team without having a and substantial business justification.

I recommend that the Commission **ORDER** that all other allegations contained in the Complaint be dismissed.

  
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Stuart Reichman  
Hearing Examiner

Dated: January 4, 1991  
Trenton, New Jersey