I.R. NO. 89-18

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOARD OF TRUSTEES OF MIDDLESEX
COUNTY COLLEGE,

Respondent,

-and-

Docket No. CO-89-313

FACULTY UNION OF MIDDLESEX COUNTY
COLLEGE, LOCAL 1940, AFT/AFL-CIO,

Charging Party.

SYNOPSIS

The Faculty Union of Middlesex County College, Local 1940 was denied an application for interim relief when it sought to compel the Middlesex County College to continue to accept applications for enrollment in its school of nursing. The charging party alleged that the College was altering the nursing program in retaliation for the exercise of protected rights. However, the charging party failed to establish it had a substantial likelihood of success in prevailing on the facts in this matter.

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Appearances:

For the Respondent
Dwyer and Canellis, Esqs.
(Paul J. Burns, of counsel)

For the Charging Party
Jackson, Lewis, Schnitzler & Krupman
(Jeffrey J. Corradino, of counsel)

INTERLOCUTORY DECISION

On April 21, 1989, the Faculty Union of Middlesex County College, Local 1940, AFT/AFL-CIO ("AFT" or "Charging Party") filed an unfair practice charge and request for interim relief with the Public Employment Relations COmmission ("Commission") against the Board of Trustees of Middlesex County College ("College") alleging that the College violated subsections 5.4(a)(1), (2), (3) and (5) of

the New Jersey Employer-Employee Relations Act ("Act")[1/] by refusing to accept applications for enrollment in the school of nursing for the fall 1989 term and by actively pursuing "independent contractors" to perform the work currently performed by the nursing faculty. The AFT claims that this action was done for the purpose of discouraging the exercise of protected activities.

The charge was accompanied by an Order to Show Cause which was signed and made returnable for May 3, 1989. Both parties submitted briefs and affidavits prior to the return date and argued orally.

The standards that have been developed by the Commission for evaluating interim relief requests are similar to those applied by the Courts when addressing similar applications. The moving party must demonstrate that it has a substantial likelihood of success on the legal and factual allegations in a final Commission decision and that irreparable harm will occur if the requested relief is not granted. Further, in evaluating such requests for

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (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."

relief, the relative hardship to the parties in granting or denying the relief must be considered.[2/]

On or about October 1, 1988, the parties were engaged in contract negotiations. On October 5, 1988 faculty members engaged in a walk-out and demonstration. The AFT claims that at that time, the president of the College commented that she was surprised and disappointed in the support of the union given by the nursing faculty.

The affidavit supplied by the charging party in support of this allegation does not state who heard this statement or where this statement was made. The President of the College, by way of affidavit, denied that she ever made any comments about the nurses participation in the walk-out. Moreover, the College president further states that she was not aware of the nursing school faculty participation in the College walk-out at the time the restructuring was being planned.

The College acknowledges that it is seeking to restructure the nursing school. However, it maintains that it began planning this restructuring in March 1988, prior to the faculty walk-out and that the restructuring is an outgrowth of poor performance of the school of nursing graduates on the State licensing examination, the

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2/ Crowe v. DeGioia, 90 N.J. 126 (1982); Tp. of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Tp. of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 36 (1975).

NCLES. The College has been in contact with other institutions including the University of Medicine and Dentistry and the Raritan-Valley Community College to create a joint nursing program and the Raritan-Valley College has agreed to take 10 incoming students beyond its normal complement of students in cooperation with the College for the fall 1989 semester. The College admits that it does not plan to take any students into its nursing program in the fall of 1989 but maintains that it is doing so strictly as an outgrowth of this planned restructuring.

ANALYSIS

The charging party has failed to show that it has a substantial likelihood of prevailing at a full hearing on its (a)(3), or anti-union animus allegation. The timing of the announcement of the restructuring of the nursing school may be evidence of anti-union animus, but the only other evidence proferred by the AFT is the disputed statement of the College President. The AFT has not named the person who heard this statement, much less provided an affidavit from that person. Such hearsay can be given very little weight. Moreover, in determining whether the College violated its duty to negotiate in good faith, one must balance decisions on terms and conditions of employment against the colleges managerial prerogatives. In re IFPTE Local 195 v. State, 88 N.J. 393, 404 (1982).

> In determining what is significant, the Court has focused on the extent to which the issue involves

> an educational purpose. Thus, institutions are required to negotiate on matters intimately and directly affecting an employee's working terms and conditions such as compensation, hours, work loads, sick leaves, personal and sabbatical leaves, physical accommodations and grievance procedures where the thrust of the decision does not impact on an institution's education purpose. Burlington Cty. Col. Fac. Ass'n v. Bd. of Trustees, 64 N.J. 10, 14 (1973). In contrast courts have consistently held that the decision to hire, retain, promote, transfer or dismiss employees is an inherent management prerogative concerning sensitive educational policy and cannot be negotiated away. See, e.g., Teaneck Bd. of Educ. v. Teaneck Teachers Ass'n, 94 N.J. 9 (1983) (hire); N. Bergen Tp. Bd. of Educ. v. N. Bergen Fed'n of Teachers, 141 N.J. Super. 97 (App. Div. 1976) (promote or hire); Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978) (transfer); Bd. of Educ., Wyckoff Tp. v. Wyckoff Tp. v. Wyckoff Educ. Ass'n, 168 N.J. Super. 497 501 (App. Div. 1979), certif den. 81 N.J. 349 (1979) (retain); Old Bridge Tp. Bd. of Educ. v. Old Bridge Educ. Ass'n, 98 N.J. 523 (1095) (abolish position); and Bethlehem Township Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38 (1982) (teacher evaluations and teacher dismissals). Other decisions that the courts have held to be nonnegotiable are school calendar, Burlington Co. Col. Fac. Ass'n v. Burlington Co. Col. Bd. of Trustees, 64 N.J. 10 (1973); and subcontracting, In re IFPTE Local 195 v. State, 88 N.J. 393 (1982).
> UMDNJ and AAUP, 223 N.J. Super 323, App. Div. 1988

Here, the decision to restructure the nursing school is a non-negotiable managerial prerogative. Accordingly, the AFT has failed to show a substantial likelihood of success on both the law and the facts.

> It is noted however, that the Courts have distinguished between substantive policy-making powers of employers and the procedural rights of employees. Negotiations on procedures governing a staff reduction, N.J. State Col. Locals v. State Bd. of Higher Educ., 91 N.J. 18, 32-33

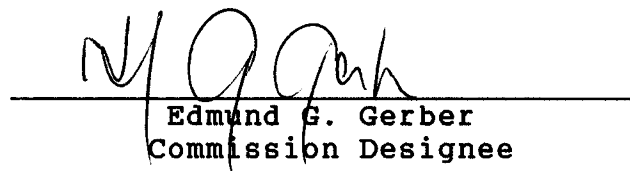
> (1982); procedures for implementing transfers and reassignment, In re IFPTE Local 195 v. State, 88 N.J. 393, 417 (1982); promotional procedures, State v. State Supervisory Employees Ass'n, 78 N.J. 54, 90-91; procedures for teacher evaluations, Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 50 (1982); and procedures for notice of layoff, Old Bridge Tp. Bd. of Educ. v. Old Bridge Educ. Ass'n, 98 N.J. 523 (1985) have all been held negotiable matters even though the substantive decision is not. UMDNJ and AAUP.

It is also noted that the contract between the parties provides in Article 8:

> A. The Board agrees that it will make no change in existing policy relative to wages, hours, and other conditions of employment without appropriate prior consultation and negotiations with the Union.

Accordingly, it is anticipated that the College here will negotiate with the AFT appropriate procedures for implementing its restructuring on matters that concern terms and conditions of employment.

Accordingly, consistent with the negotiations obligations of the College, the AFT's petition is denied.



Edmund G. Gerber
Commission Designee

DATED: May 8, 1989
Trenton, New Jersey