P.E.R.C. NO. 88-19

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY (TRENTON STATE COLLEGE),

Respondent,

-and-

Docket No. CO-86-115-124

COUNCIL OF NEW JERSEY STATE COLLEGE LOCALS, NJSFT-AFT/AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the State of New Jersey (Trenton State College) violated the New Jersey Employer-Employee Relations Act when its Dean of the School of Nursing sent a letter to members of the faculty represented by Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO advising them not to discuss the school's reorganization with the Council.

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COUNCIL OF NEW JERSEY STATE COLLEGE LOCALS, NJSFT-AFT/AFL-CIO,

Charging Party.

Appearances:

For the Respondent, W. Cary Edwards, Attorney General
(Melvin E. Mounts, Deputy Attorney General)

For the Charging Party, Barbara Hoerner, Staff Rep., NJSFT

DECISION AND ORDER

On November 13, 1985, the Council of New Jersey State College Locals, NJSFT-AFL/CIO ("Council") filed an unfair practice charge against the State of New Jersey (Trenton State College) ("College"). The Council alleges that the College violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1),(2) and (5),[1/] when Barbara

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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; (5) Refusing to negotiate in good

Footnote Continued on Next Page

Chapman, Dean of the School of Nursing, ended negotiations on issues relating to a reorganization at the School of Nursing; told Arthur Steinman, president of the local Council, that it was inappropriate for him to discuss the reorganization with the faculty, and sent a letter to the faculty explaining that negotiations had ceased.

On February 27, 1986, a Complaint and Notice of Hearing issued.

On March 13, 1986, the College filed an Answer denying that the dean reached agreement with the faculty on a new organizational structure or negotiated with the Council president. As an affirmative defense, it claims any discussions between the Dean and President concerned non-negotiable subjects.

On January 30 and February 5, 1987, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses and introduced exhibits. At the end of the hearing, the Council withdrew its 5.4(a)(5) charge. The charging party argued orally and both parties filed post-hearing briefs.

On June 26, 1987, the Hearing Examiner issued his report and recommended decision. H.E. No. 87-74, 13 NJPER 570 (¶18209 1987). He found that Chapman's oral and written comments to

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1/ Footnote Continued From Previous Page

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."

Steinman did not tend to interfere with Steinman's exercise of protected activity, but concluded that her sending the written comments and another document to the nursing faculty did tend to interfere with the faculty's exercise of protected activity. He found the faculty could reasonably interpret the documents as limiting what topics they could discuss in private with their union president, criticizing their union president, and inviting them to deal directly with the College. Finally, he found no evidence that the dean's conduct actually interfered with the Council's formation, existence or administration and recommended dismissal of the subsection 5.4 (a)(2) allegation.

On July 17, 1987, the College filed exceptions. It sees a paradox in the Hearing Examiner's conclusion that the dean's communication of identical statements did not tend to interfere with the president's protected activity but did tend to interfere with other employees' protected activity. It claims the dean's comments all related to her assessment that the school's organizational structure was not negotiable. Also, it claims that the faculty could not have reasonably interpreted Chapman's correspondence as limiting the topics they could discuss with their union president because there was a faculty meeting afterwards and there is no allegation that the correspondence affected discussion at that meeting. It further contends that unit members could not have reasonably interpreted the correspondence as a criticism of their union president.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-9) are accurate. We adopt and incorporate them here with this modification. While the president did not dispute the chronology, he did dispute the dean's characterization that the president sought to broaden the scope of negotiations and thus left her no choice but to discontinue negotiations.

Section 5.4(a)(1) cases require a balancing of two important but conflicting rights: the employer's right of free speech and the employees' rights to be free from coercion, restraint or interference in the exercise of protected rights. See generally, Cty. of Mercer, P.E.R.C. No. 86-33, 11 NJPER 589 (¶16207 1985). In striking that balance, all the circumstances of a particular case must be reviewed.

Considering the dean's conduct in the context in which it occurred, see NLRB v. E.I DuPont de Nemours, 750 F.2d 524, 118 LRRM 2014, 2016 (6th Cir. 1984), we adopt the Hearing Examiner's conclusion that the dean's remarks and memorandum to the president were not inherently coercive. New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). An employer is free to express its opinion about what is good labor relations to a union representative. Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 83-119, 7 NJPER 502 (¶12223 1981). The dean's comments were the opinion of one negotiator to another: an exchange between equals.

Further, the dean's transmission of that memorandum to the faculty does not necessarily violate the Act. The dean had the right to advise the employees of the reasons the employer decided to cease negotiations and to solicit their input into matters which did not pertain to mandatory subjects of negotiations. We find that most of the communication was lawful. However, we do agree with the Hearing Examiner that the portion of the October 11 letter which implied that employees should not discuss the organizational structure with their union went across the line separating permissible employer speech from speech that could reasonably be found to interfere with the employees' ability to meet with their union leaders. While the dean may have properly believed that she had no duty to negotiate or discuss the reorganization with the union, she could not advise employees that they should or could not discuss that matter with their chosen representative.2/

Finally, we agree with the Hearing Examiner that the Council failed to prove that the dean's conduct actually interfered with the formation, existence or administration of the Council, and accordingly dismiss the subsection 5.4(a)(2) allegation.

2/ We reject the exception that identical statements to a union leader and unit members must have an identical impact. We also reject the notion that there must be a finding of actual interference in order to find a violation of subsection 5.4(a)(1). Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd. App. Div. Dkt. No. A-1642-82T2 (12/8/83).

ORDER

The State of New Jersey (Trenton State College) is ordered to:

A. Cease and desist from:

Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by sending documents to the nursing faculty which contain statements which could reasonably be interpreted by faculty members to limit the topics the faculty may discuss with union officials.

B. Take the following affirmative action:

1. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be 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.

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

C. The subsection 5.4(a)(2) allegation is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
August 19, 1987
ISSUED: August 20, 1987

APPENDIX "A"

NOTICE TO ALL 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 cease and desist from interfering with, restraining or coercing our employees in the exercise of the rights guaranteed to them by the Act, particularly by sending documents to the nursing faculty which contain statements which could reasonably be interpreted by faculty members to limit the topics the faculty may discuss with union officials.

Docket No. CO-86-115-124

STATE OF NEW JERSEY (TRENTON STATE COLLEGE)
(Public Employer)

Dated _____

By _____
(Title)

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 St., CN 429, Trenton, NJ 08625 (609) 984-7372.

H.E. NO. 87-74

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

In the Matter of

STATE OF NEW JERSEY (TRENTON STATE COLLEGE),

Respondent,

-and-

Docket No. CO-86-115-124

COUNCIL OF NEW JERSEY STATE COLLEGE LOCALS, NJSFT-AFT/AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the State of New Jersey, Trenton State College violated §5.4(a)(1) of the New Jersey Employer-Employee Relations Act when it sent documents to faculty members which contained statements tending to limit what topics unit members could discuss with the union president. The Hearing Examiner recommended dismissal of a §5.4(a)(2) allegation. There was no showing that the College actually interfered with the formation, existence or administration of the union.

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

H.E. NO. 87-74

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

In the Matter of

STATE OF NEW JERSEY (TRENTON STATE COLLEGE),

Respondent,

-and-

Docket No. CO-86-115-124

COUNCIL OF NEW JERSEY STATE COLLEGE LOCALS, NJSFT-AFT/AFL-CIO,

Charging Party.

Appearances:

For the Respondent
W. Carey Edwards, Attorney General
(Melvin E. Mounts, D.A.G.)

For the Charging Party
Barbara Hoerner, Staff Rep., NJSFT

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On November 13, 1985, Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO ("Council") filed an unfair practice charge alleging that the State of New Jersey (Trenton State College)("College"), through its agent Barbara Chapman, Dean of the School of Nursing at Trenton State College, violated subsections 5.4(a)(1), (2) and (5) of the New Jersey Employer-Employee Relations

Act, N.J.S.A. 34:13A-1 et seq. ("Act").[1/] The Council alleges that Chapman terminated negotiations on issues relating to a reorganization at the School of Nursing, told local Council President Arthur Steinman that it was inappropriate for him to discuss the reorganization with the faculty, and sent a letter to the faculty explaining that negotiations had ceased.

On February 27, 1986, the Director of Unfair Practices issued a Complaint and Notice of Hearing.

On March 13, 1986, the College filed an Answer generally denying any violation of the Act.

After granting several requests for postponements based on the parties' attempts to informally resolve this matter, I conducted a hearing on January 30 and February 5, 1987.[2/] The parties examined witnesses and introduced documents. At the conclusion of the hearing the Council withdrew its 5.4(a)(5) charge (TB48-TB50).

The parties filed post-hearing briefs, the last of which I received April 21, 1987.

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

2/ The transcript from January 30 shall be referred to as TA; the transcript from February 5 shall be referred to as TB.

Based on the entire record, I make the following:

FINDINGS OF FACT

1. The State of New Jersey is a public employer within the meaning of the Act, and the Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO, is an employee organization within the meaning of the Act. NJSFT Local 2364 represents faculty at Trenton State College.

2. Barbara Chapman has been the Dean of the School of Nursing at Trenton State College for approximately 4 1/2 years. During the 1983-84 school year, the School of Nursing underwent a program review. Part of that review was an examination of the organization of the school. Chapman included the faculty in collegial discussions about the reorganization. Arthur Steinman, President of Council Local 2364, represented the faculty in discussions with Chapman about the reorganization. Neither party characterizes these collegial discussions as negotiations.

3. The discussions began during the 1983-84 school year. Steinman apparently suggested a reorganization under which the School of Nursing would be divided into three departments. Neither Chapman nor the consultant who was involved in the program review approved of Steinman's suggestion. The 1983-84 school year ended with no agreement on a reorganization plan.

4. Discussion continued through the fall and into the spring of the 1984-85 school year. In late March 1985 an agreement was reached on a new organizational structure for the School of

Nursing. On March 27, 1985, the faculty voted to adopt an organizational structure with two departments (R-3).

5. On or about April 19, 1985, Chapman forwarded a recommendation of the new plan to College Vice President DiGiorgio. A few days later at a regular meeting of the academic affairs staff, the deans at Trenton State College pointed out that two proposals in the reorganization plan conflicted with terms of the master collective negotiations agreement. Under the proposed reorganization the election of faculty to department chairs would be open to the entire faculty at the College rather than to faculty within each department. The new plan also provided for the appointment, reappointment and tenuring of faculty on a school-wide rather than a department-wide basis (R-3).

6. On or about May 15, 1985, Chapman discussed these two problems with the faculty. Someone suggested that the parties negotiate a memorandum of understanding reconciling the two problems with the master agreement. At the conclusion of this meeting, the faculty decided to seek the advice of Council President Steinman. On or about May 23, 1985, the faculty met with Steinman and he later informed Chapman that the faculty wanted to negotiate a memorandum of agreement to reconcile the two problem areas (R-3).

7. On May 24 and June 10, 1985, Steinman and Chapman met and negotiated the issues of faculty chair election and the appointment and tenure processes (R-3). Two drafts of a memorandum of agreement were prepared but Steinman and Chapman could not agree

on language (R-4; R-6). Chapman and Steinman did not meet again until August 15, 1985. On that date Steinman gave Chapman a third draft of a memorandum of agreement (R-7). This draft, however, included language on the issues of retrenchment and layoffs. Chapman told Steinman that the new issues were not negotiable and that it was inappropriate for Steinman to raise them because they did not relate to the two issues that the parties had agreed to negotiate (TA77). Chapman did indicate, however, that she would give some thought to the new issues raised by Steinman (TA78). Chapman prepared a fourth draft of the memorandum of agreement on or about August 20, 1985 (R-8).

8. On or about October 4, 1985, Steinman met Chapman in her office and apologized for a delay in responding to her about draft 4 of the memo (TB9; C-1B; C-1C #8). Steinman told Chapman that he intended to meet with school coordinators to discuss potential problems with the proposed new structure (TB45). Chapman told Steinman that she did not think it appropriate for him to discuss these issues with the coordinators. She pointed out that the reorganization of the school was not negotiable and that it was her responsibility, not the union's, to discuss related problems with the faculty (TB28).

Shortly after this meeting, Chapman met with Vice-President DiGiorgio, who advised Chapman to discontinue negotiations with Steinman (TB30). On October 11, 1985, Chapman wrote a letter to Steinman (C-1C) summarizing the chronology of events since May 1985

and expressing her reasons for terminating negotiations. The entire text of the letter is as follows:

> This letter is to inform you that I am ceasing negotiation with Local 2364 on the matter of a memorandum of agreement that would provide for: a) continuing the practice of appointing, reappointing and tenuring faculty to the School of Nursing rather than to a specific department within the School and b) election of department chairs by the faculty of the School. The events chronicled below form the background for this action, with our conversation of last Friday and the letter I received from you on October 9 serving to finalize the decision.
>
> 1. At the conclusion of the Program Review conducted during 1983-84 the School of Nursing faculty recommended that the organization of the School be changed to a departmental structure.
>
> 2. I did not concur with the recommendation and expressed my reservations to the faculty directly and in the Dean's summary of the Program Review. I recommended a structure in which there would be coordinators of the programs within the School (BSN and School Nurse Certificate). Faculty continued to prefer a departmental structure. I agreed to give the matter further thought during the summer.
>
> 3. In the Fall Semester, 1984 I indicated to the faculty that I had given the matter of the organizational structure further consideration and that I would be willing to organize into two departments. Following several meetings of the total faculty at which the proposal was discussed, the faculty voted to accept the structure (March, 1985).
>
> 4. We agreed that while there would be two departments, faculty and the School would be best served if faculty continued to be appointed, reappointed and tenured as faculty of the School, rather than as faculty of a particular department. This was consistent with an earlier Memorandum of Agreement (#6, dated November 1, 1977). Further, given the nature of the proposed departments, it was preferable for chairs to be elected by the faculty of the School.

5. In the process of planning for the implementation of the new structure it became apparent that a memorandum of agreement with Local 2364 would be needed in order to provide for faculty appointment and election of chairs as described in #4 above.

6. Negotiation began in May, 1985. At no time was the subject of negotiation anything other than a) appointment, reappointment and tenuring faculty to the School of Nursing rather than to a particular department and b) election of department chairs by the total faculty. Several drafts of an agreement evolved, culminating with my developing Draft 4 on August 20. At that time we appeared to be one word away from agreement. You wanted to insert the word "retained' and I was unwilling to do so.

7. As of October 4, I had no response from you regarding Draft 4 which I sent on August 20.

8. On October 4 you dropped by my office to apologize for the delay in responding. You also indicated that you planned to meet with Coordinators in the School to discuss any problems they might see in how the School would function with the new structure. I told you that I did not think that this was appropriate for you to do. The organizational structure of the School of Nursing is not negotiable and was not the subject being negotiated. Discussions about problems or potential problems with the organizational structure of the School or alternate organizational structures for the School should take place between the faculty and me, not the faculty and the union.

9. On October 9 I received a letter from you in which you stated that you planned to explore with several people in the School, questions as to how smoothly the structure would work. The letter confirmed the intent that you expressed to me on October 4.

I regret that we were not able to reach agreement on the matters being negotiated. Your actions to broaden the scope of negotiations and into areas not appropriate for negotiation left me no choice other than to discontinue negotiation. [C-1c]3/

3/ There is no dispute about the accuracy of Chapman's characterization of this chronology of events.

On October 11, 1985, Chapman circulated a memo (C-1D) among the faculty, giving her reasons for terminating negotiations. Attached to C-1D was Chapman's letter to Steinman (C-1C). The October 11 memo is as follows:

> It is with deep regret and disappointment that I inform you that negotiation with AFT Local 2364 on matters relating to implementation of our new organizational structure have ceased. Given the events that have transpired since March, 1985 when you and I agreed on a new organizational structure, I was left with no choice other than to discontinue negotiations with Mr. Steinman. Attached is a copy of my letter to Mr. Steinman [a reference to C-1c] informing him of my decision to stop negotiations.
>
> The organizational structure of the School of Nursing is a matter that you and I need to work out. We need to explore issues, problems, and alternative organizational structures. As a result of our discussions, a decision can be reached and a new structure implemented. Organizational structure is not something that is negotiable.
>
> I continue to be willing to meet with any and/or all of you to discuss your views regarding the current proposed organizational structure. I am also willing to discuss alternatives other than the proposal that we devised last spring. I am certain that you and I share the same goal, that of an effective and efficient organizational structure that will enable us to provide the very highest quality educational programs for our students. [C-1d]

10. Steinman testified that Chapman's statements in C-1C and her subsequent memo to the faculty (C-1D) had a chilling effect on his relationship with the faculty (TA30). He also testified that he felt that Chapman's sending C-1D and C-1C to the faculty was intended to embarrass or punish him. He explained that he thought sending C-1D and C-1C to the faculty would cause the nurses to feel that "their involvement with the union would work to their

detriment." (TA42) Steinman also testified that C-1C caused a delay in his meeting with the faculty (TA33).

By memo of November 19, 1985 (CP-1) Steinman advised the facuty of his opinion and reaction to C-1C and C-1D. He explained that he would not accept Chapman's comments as to which topics he could discuss with unit members, and he told the faculty that the union would discuss any subject the membership agreed to discuss. Steinman concluded CP-1 by telling the faculty that they would have a meeting in December.[4/] Steinman did hold a meeting with the nursing faculty in December 1985 (TA38, TA40).

ANALYSIS

At the conclusion of hearing in this case the Council withdrew its 5.4(a)(5) allegation. The remaining issues are whether Chapman's conduct violated subsections 5.4(a)(1) or (2) of the Act. The Council claims that Chapman's conduct had the tendency to

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4/ The last two paragraphs of CP-1 are as follows:

> The Union will not accept management's dictation as to which topics we are permitted to discuss with our unit members. The Union will continue to discuss with you ANY subject we mutually agree to discuss. Furthermore, we feel that the actions of Chapman and DiGiorgio serve to interfere with your ability to exercise the rights guaranteed you under New Jersey's collective bargaining law. Consequently, the Union has filed an Unfair Labor Practice charge with the New Jersey Public Employee Relations Commission.
>
> In the meantime, I hope to have a meeting with you in early December to explore potential problems with the proposed structure, as well as to discuss issues related to the behaviors of Dean Chapman and Vice President DiGiorgio. More will be said about this meeting at a later time.

interfere with Steinman's exercise of protected activity, i.e., his representation of faculty at the School of Nursing. It also claims that Chapman's conduct interfered with the administration of the union.

The standard to determine whether an independent 5.4(a)(1) violation has been committed is set forth in New Jersey Sports and Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979):

> 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 to coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification. [Id. at 551 n. 1]

It is immaterial that an employer's allegedly illegal conduct did not actually coerce an employee or was not illegally motivated. It is the tendency of the employer's conduct, not its result or motivation which is at issue. Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd App. Div. Dkt No. A-1642-82T2 (12/8/83); Middletown Tp., P.E.R.C. No. 84-100, 10 NJPER 173 (¶15085 1984).

The Act also grants to public employers the right to express opinions about labor relations provided such statements are noncoercive. In Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 83-19, 7 NJPER 502 (¶12223 1981), the Commission stated:

> A public employer is within its rights to comment upon those activities or attitudes of an employee

> representative which it believes are inconsistent with good labor relations, which includes the effective delivery of governmental services, just as the employee representative has the right to criticize those actions of the employer which it believes are inconsistent with that goal. [Id. at 503]

Analyzing 5.4(a)(1) cases may be difficult because a balance must be struck between two equally important but conflicting rights: the employer's right of free speech and the rights of employees to be free from coercion, restraint or interference in their exercise of protected activities. See generally Cty. of Mercer, P.E.R.C. No. 86-33, 11 NJPER 589 (¶16207 1985)

The standard adopted by the Commission in these cases mirrors that developed in the private sector under the Labor Management Relations Act. 29 U.S.C. §141 et seq. See Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n. of Ed. Sec., 78 N.J. 1, 9 (1978). The leading private sector case addressing the issue is NLRB v. Gissel Packing Co., 395 U.S. 575, 71 LRRM 2481 (1969). There, the Supreme Court, in setting forth the balance required in these cases, said:

> Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely...and any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested

> ear. Stating these obvious principles is but another way of recognizing that what is basically at stake is the establishment of a non-permanent, limited relationship between the employer, his economically dependent employee and his union agent...Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit."...If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such, without the protection of the First Amendment. [71 LRRM at 2497-98; citations omitted]

In determining whether a statement is coercive, the NLRB considers the "total context" of the situation and is justified in determining the question from the standpoint of employees over whom the employer has a measure of economic power. See NLRB v. E.I. DuPont de Nemours, ____ F.2d _____, 118 LRRM 2014, 2016 (6th Cir. 1984).

Chapman's conduct must, therefore, be considered in the context in which it occurred. The parties had been involved in collegial discussions about the reorganization of the School of Nursing for approximately one and one-half years. Chapman and Steinman had also spent approximately six months negotiating about the election of chairs and the appointment and tenuring processes. The tone set by the parties was one of cooperation, not coercion. Many of the issues discussed were not within the scope of negotiations. Both Steinman and Chapman were trying to

make the transition in the organization of the School an easy one.

It is in this setting that the balance must be struck between Chapman's right to express her opinions about labor relations and Steinman's (and the faculty's) right to be free from coercion.

Chapman told Steinman that she did not consider it appropriate for him to discuss the reorganization with the faculty. She felt that that was her responsibility. I find that her remarks, when made to Steinman, fall within the type of speech protected by Black Horse Pike. I characterize Chapman's remarks to Steinman on October 4 and in C-1C were an expression of her opinion about her responsibilities as the Dean of the School of Nursing. She did not threaten Steinman with reprisals and her remarks were not inherently coercive. Under the circumstances, I conclude that Chapman's comments to Steinman did not have a tendency to interfere with his exercise of protected activity.

I conclude, however, that Chapman's subsequent conduct in sending C-1C and C-1D to the nursing faculty did have the tendency to interfere with the exercise of protected activity. Chapman's comments to Steinman were merely the opinion of one negotiator expressed to another. She thought it was her job, not Steinman's, to discuss the reorganization with faculty. Chapman's memo to the faculty, with her letter to Steinman attached, however, goes beyond

the expression of her opinion about labor relations. The faculty could reasonably interpret Chapman's correspondence as limiting what topics the faculty could discuss in privacy with their union President.

The members of Local 2364 could also have reasonably interpreted Chapman's correspondence as a criticism of their union president coupled with an invitation to deal with a problem without him.

It is the tendency to interfere, not motive or consequences, that is essential for finding a 5.4(a)(1) violation. I do not find that Chapman possessed any animus toward Steinman or Local 2364. I do find, however, that her correspondence to the faculty did have the tendency to interfere with the faculty's exercise of protected activity. With her memo to the faculty, it could be inferred that Chapman announced that, while she was willing to continue discussing issues with the faculty, she was no longer willing to permit the union to represent them in the discussions. I conclude that the faculty could reasonably construe this as an attempt to discourage their participation in union activities. To this extent I conclude that Chapman's conduct was coercive and tended to interfere with protected rights. Compare Camden Fire Dept., P.E.R.C. No. 82-103, 8 NJPER 309 (¶13137 1982).

The remaining issue is whether Chapman's conduct violated subsection 5.4(a)(2) of the Act. Commission cases dealing with 5.4(a)(2) claims generally involve organizational rights or the

actions of an employee with a conflict of interest caused by his membership in the union and his or her position as an agent of an employer. Union Cty. Reg. Bd. of Ed., P.E.R.C. No. 76-17, 2 NJPER 50 (1976) (exclusivity clause is not per se violation of §5.4(a)(2) but must give way to organizational rights once timely representation petition is filed or during open period); Cty. of Middlesex (Roosevelt Hosp.), P.E.R.C. No. 81-129, 7 NJPER 266 (¶12118 1981)(employer may not negotiate with incumbent if real question of representation is pending); Cty. of Camden, P.E.R.C. No. 83-113, 9 NJPER 156 (¶14074 1983)(county violates §§5.4(a)(1) and (2) by permitting its personnel assistant, who is also union officer, to represent the county in handling of employee's grievance).

While motive is not an element of a 5.4(a)(2) offense, there must be a showing that the acts complained of actually interfered with (or dominated) the formation, existence or administration of the employee organization. See Morris, The Developing Labor Law, at 279 (2d Ed. 1983) citing Garment Workers (Bernard Altman Texas Corp. v. NLRB), 366 U.S. 731 (1961): ("There is no basis for a finding of a §8(a)2 violation without evidence of its realization.").

Noting the absence of any evidence that Chapman's conduct actually interfered with the formation, existence or administration of the Council, I recommend dismissal of the subsection 5.4(a)(2) claim.

Based upon the entire record I make the following:

Conclusions of Law

1. The College violated §5.4(a)(1) of the Act by sending documents to the nursing faculty which contained statements tending to interfere with the faculty's rights to engage in protected activity.

2. The College did not violate §5.4(a)(2) of the Act by any of its actions.

RECOMMENDED ORDER

I recommend that the Commission Order:

A. That the College cease and desist from:

Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by sending documents to the nursing faculty which contain statements which tend to limit what topics the faculty may discuss with their union president.

B. That the College take the following affirmative action:

1. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be 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.

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

C. That the §5.4(a)(2) alleged violation of the Act be dismissed.

Arnold H. Zudick
Hearing Examiner

Dated: June 26, 1987
Trenton, New Jersey

NOTICE TO ALL 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 cease and desist from interfering with, restraining or coercing our employees in the exercise of the rights guaranteed to them by the Act.

WE WILL cease and desist from making statements to the nursing faculty which tend to interfere with their exercise of protected rights, and which tend to limit what topics the faculty may discuss with their union president.

Docket No. CO-86-115-124 STATE OF NEW JERSEY (TRENTON STATE COLLEGE)
(Public Employer)

Dated_____ By_____
(Title)

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 St., CN 429, Trenton, NJ 08625 (609) 984-7372.