

P.E.R.C. NO. 86-5

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY,

Respondent,

-and-

Docket No. CO-84-279-157

SCHOOL OF HEALTH RELATED
PROFESSIONAL FACULTY
ASSOCIATION, NJEA,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the University of Medicine and Dentistry of New Jersey violated the New Jersey Employer-Employee Relations Act when it failed to renew Vickie Ann Miktus' employment contract. The Commission holds that the non-renewal occurred in unlawful retaliation against Miktus' exercise of protected union activity. The Commission further holds, however, that the University did not violate the Act when it did not renew Nanette Kanoff's employment contract. The charging party failed to prove that the non-renewal was in retaliation against Kanoff's exercise of protected union activity. A Hearing Examiner recommended this conclusion, and in the absence of exceptions, the Commission adopts it.

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Charging Party.

Appearances:

For the Respondent, Hon. Irwin I. Kimmelman,
Attorney General
(Barbara A. Harned, Deputy Attorney General)

For the Charging Party, Sterns, Herbert & Weinroth, Esqs.
(Michael J. Herbert, of Counsel; Linda K. Stern, On the Brief)

DECISION AND ORDER

On April 6, 1984, the School of Health Related Professions (SHRP) Faculty Association, an affiliate of the NJEA ("Association") filed an unfair practice charge against the University of Medicine and Dentistry of New Jersey ("University") with the Public Employment Relations Commission. The charge alleged that the University violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (3)^{1/} when it changed the employment contract of Vicky Miktus and

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

Nanette Kanoff to place them outside "tenure track" positions and subsequently failed to renew their employment contracts, allegedly in retaliation for their activity on behalf of the Association.

On June 29, 1984, the Administrator of Unfair Practice Proceedings issued a Complaint and Notice of Hearing. On July 16, 1984, the University adopted its previously filed Statement of Position as its Answer. It denied that it changed the contract terms of Miktus and Kanoff or did not renew their contracts in retaliation for union activity. Rather, it contended that these actions were taken for legitimate academic reasons unrelated to any union activity. Finally, it contends that the charge pertaining to the change in contract terms was barred by the six month statute of limitations. N.J.S.A. 34:13A-5.4(c).

On September 6,7,11,14, and 19 and October 1 15, and 19, 1984, Hearing Examiner Alan R. Howe conducted hearings. Both parties examined witnesses and introduced evidence. Oral argument was waived, but the parties filed post-hearing briefs.

On January 25, 1985, Hearing Examiner Howe issued his report and recommended decision. H.E. No. 85-26, 11 NJPER ____ (Para. ____ 1985). He concluded that the University violated the Act when it refused to renew Miktus' employment contract. He specifically found that the College had knowledge of Miktus' union activity and that its proffered business justification was pretextual. Therefore, he recommended that the Commission reinstate

Miktus to the rank of Assistant Professor and award her back pay from September 1, 1984 together with 12% interest. However, with respect to Kanoff, he found that the University did not violate the Act when it failed to renew her employment contract. His conclusion was based primarily upon the limited nature of Kanoff's union activity and the cessation of her limited activity well before the termination. Therefore, he concluded that the charging party failed to establish a causal nexus "between the exercise of protected activities and the alleged discriminatory termination."

On February 8, 1985, after having received an extension, the University filed exceptions. It excepts to numerous factual findings^{2/} made by the Hearing Examiner and to his legal conclusion

^{2/} Specifically, it excepts to the following Hearing Examiner's findings of fact: (1) No. 4 that "Pitts was...on a level with Martin and that Carroll was Program Director until August 31, 1984; (2) No. 6 that Miktus met with in July, 1982 to discuss the Assistant Professor position and that in August Martin offered Miktus the Assistant Professor position; (3) No. 8 since it omits why the change in the recommended rank to clinical rank was made; (4) No. 10 for the same reasons as the second exception and specifically that Martin appointed Miktus to the Assistant Professor position; (5) No. 12 because it omits Martin's inquiry concerning the Academic Committee's rationale on initial appointments and that Martin "confessed error" in seeking a tenure track for a one-year appointment; (6) No. 15 because it omits that Martin was happy to make the change requested by the faculty; (7) No. 16 that credited Miktus' testimony that Martin saw her with Galcher; (8) No. 17 that suggests that the curriculum was completed in January 1983 as being contrary to the weight of the evidence; (9) No. 24 that the administration had notice of a union newsletter; (10) No. 26 that Martin advised of renegeing on his April 8, 1983 recommendation; (11) No. 30 as omitting relevant facts; (12) No.

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that the University violated the Act when it did not renew Miktus' contract. It specifically excepts to his conclusion that the University engaged in a pretext in refusing to renew the contract of Miktus. It further contends that the Association did not establish a prima facie case since there was no evidence that the University was hostile to Miktus' protected activities. It further excepts to the proposed remedy that Miktus be appointed to Assistant Professor since she had never obtained that rank.

On February 15, 1985, the Association filed a brief in support of the Hearing Examiner's decision and reply to the exceptions filed by the University. It contends that the majority of the exceptions filed by the University pertain to challenges to

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32 that Carroll told Martin that Miktus was busy with the Association; (13) No. 34 that the sole purpose of the meeting was to criticize Carroll, not Miktus or Kanoff; (14) No. 35 as omitting the relevant fact that Martin informed Carroll that he needed evaluations by March 1, 1984 because renewal decisions were to be made then; (15) No. 36 that Gibson received a memo as omitting that it was received after the non-renewal letter was sent; (16) No. 41 as omitting that the Dean declined to recommend the award for Kanoff and that she did not receive it; (17) No. 42 that Miktus and Kanoff's evaluations were "highly favorable"; (18) No. 43 as omitting other reasons Martin testified for not renewing the employment contracts; (19) No. 44 that Martin's testimony was "evasive"; (20) No. 45 that Martin's testimony that he had no knowledge of union activity was not credible; (21) No. 46 that Carroll resigned as omitting that she asked to resign; (22) No. 47 that admits evaluations of other faculty members since they are not relevant and are confidential. We reject these exceptions because they pertain to credibility determinations which we have reviewed but will not disturb; challenge characterizations made by the Hearing Examiner and supported by the record or pertain to essentially irrelevant factual issues.

the Hearing Examiner's credibility determinations which should not be disturbed. It relies on, among other cases, Clark Township, P.E.R.C. No. 80-117, 6 NJPER 186, 187 (Para. 11089 1980); City of Trenton, P.E.R.C. No. 80-90, 6 NJPER 49 (Para. 11025 1980) and Hudson County Bd. of Chosen Freeholders, P.E.R.C. No. 78-48, 4 NJPER 87 (Para. 4041 1978).

We have reviewed the record. The Hearing Examiner's findings of fact are accurate (pp. 3-16) and we adopt and incorporate them here. We agree with his conclusion that the University did not violate the Act when it did not renew Nanette H. Kanoff's employment contract. We agree that the charging party failed to prove, by a preponderance of the evidence, that Kanoff was terminated in retaliation for engaging in union activity. We now consider whether the University violated the Act when it did not renew Vickie Ann Miktus' employment contract for 1984-1985.

In re Bridgewater Twp., 95 N.J. 235 (1984) sets forth the standard to determine whether an employer has illegally discriminated against an employee in retaliation for union activity:

...the employee must make a prima facie showing sufficient to support the inference that the protected union conduct was a motivating factor or a substantial factor in the employer's decision. Mere presence of anti-union animus is not enough. The employee must establish that the anti-union animus was a motivating force or a substantial reason for the employer's action. Transportation Management, supra, ___ U.S. ___, 103 S.Ct. at 2474, 76 L.Ed.2d at 675. Once that prima facie case is established, however, the burden shifts to the employer to demonstrate by a preponderance of evidence that the same action would have taken place even in the absence of the protected activity. Id. at 244.

Here, there is an absence of direct evidence of anti-union motivation for the non-renewal. Given this absence, to establish a prima facie case, the charging party must show (1) that the employee engaged in protected activity; (2) that the employer had knowledge of this activity; and (3) that the employer was hostile toward the exercise of protected rights. Bridgewater, supra at 246; In re Gattoni, P.E.R.C. No. 81-32, 6 NJPER 443, 444 (Para. 11227 1980); In re North Warren Regional Board of Education, P.E.R.C. No. 79-9, 4 NJPER 417 (Para. 4187 1978). Applying these standards, we find that the charging party established a prima facie case.

First, it is undisputed that Miktus was engaged in substantial protected activity. Miktus commenced her activity on October 8, 1982 when she signed an authorization card for the Association. She subsequently solicited other faculty members to join the Association. Later, she attended a Commission conference concerning the Petition for Certification of Representative. Her activities intensified in late Fall of 1983 and Winter of 1984 when she became actively involved in the preparation for negotiations. She was a member of the negotiations committee and vice-president of the Association. Indeed, she was characterized by one witness as the most active Association official.

Secondly, we agree with the Hearing Examiner that the College and specifically Dean John P. Martin had knowledge of these activities. The solicitation of the authorization cards was done openly; she wrote several written memos to the University and other

faculty members concerning requests for negotiations and sought information relevant to prepare for negotiations; and she represented the Association at a Commission conference where members of the College were present. In this regard, we specifically adopt the Hearing Examiner's finding that Martin was aware of these activities.^{3/} Indeed, the record is replete with evidence sufficient to support this finding. Martin was in attendance at the same Commission conference as Miktus; Miktus testified that Martin saw her together with an Association representative; Carroll testified that she told Martin that Miktus could not serve on the library committee because she was busy with "Association activity." Beyond that, given Miktus' substantial activities on behalf of the Association and that several of Martin's aides were well aware of this activity, we agree that an inference could well be drawn imputing knowledge to Martin from these facts. Therefore, given all the foregoing, we do not credit Martin's contrary testimony that he had no knowledge of Miktus' union activities. See, e.g., City of East Orange, P.E.R.C. No. 84-70, 10 NJPER 28 (¶15017 1984) (Commission will not generally disturb Hearing Examiner's credibility determination).

We next consider the final question in determining whether the charging party has established a prima facie case: was the

^{3/} Martin denied having knowledge of Miktus' activities in an
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College hostile towards Miktus' exercise of protected activities? This question is often the most difficult because it is rare that direct evidence exists of hostility. The Supreme Court recognized that hostility toward the exercise of protected rights can be inferred from employer conduct in In re Bridgewater, 95 N.J. 235 (1984):

PERC held that the following facts were sufficient to establish the Township's hostility toward Longo's union activities: Longo's transfer so soon after his March 5 protest and his recent promotion; the absence of any written complaints about his employment; and the failure of the Township to follow its own written procedures and give Longo 30 days written notice of the elimination of his transfer.

Thus we conclude that there is sufficient and credible evidence to support PERC's position that the Association established a prima facie case that a motivating factor in Longo's transfer was the Township's reprisal for his protected union activity.
95 N.J. at 247.

We find that the timing of the non-renewal in the face of Miktus' Association activities and Miktus' excellent evaluations warrants an inference of animus under the circumstances of this case. Miktus, although having engaged in Association activity for the preceding two years, had clearly escalated this activity in the Fall of 1983 and Winter of 1984 when she commenced preparations for

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affidavit submitted to PERC prior to hearing. Subsequently, in his testimony, however, he admitted seeing Miktus at a PERC conference.

negotiations and sought meetings with the University. It was at this precise time that Martin made the decision to not renew her employment contract. Further, this decision was made even though Miktus' evaluation by her primary supervisor had been excellent during this period and she had no negative comments in her personnel file. Indeed, Carroll said Miktus was one of the top three faculty members of the nine in the department and was a better faculty member than two others that were renewed. These two factors -- the timing of the non-renewal so close to the acceleration of Miktus' Association activity and her excellent evaluations -- warrant a finding that her union activity was a substantial or motivating factor in her non-renewal. Bridgewater, supra; Brookdale Community College, P.E.R.C. No. 78-80, 4 NJPER 243 (¶4123 1978), aff'd App. Div. Dkt. No. A-4824-77 (1980).

Once a prima facie case is established, the burden shifts to the employer to establish by a preponderance of the evidence that it had a business justification for the action taken -- i.e., it would have taken the same action, even absent the protected activity. Bridgewater at 244. We hold that the employer has not met this burden. The reasons relied upon by the College were summarized in Martin's testimony:

[the] program was in serious trouble, that it needed new blood, new leadership; that we could not succeed in our goal continuing with the same team...the faculty who were trying to make a contribution to the program...were not allowed to make that contribution...unwillingness of...Miktus to work with them.

In addition, Martin also testified that he was concerned that the curriculum was late in developing and that Miktus had been working on that project.

Under the circumstances of this case, we cannot accept this proffered justification. Compare Bergen County Utilities Authority, P.E.R.C. No. 84-52, 9 NJPER 678 (¶14296 1983); Newark Housing Authority, P.E.R.C. No. 83-68, 9 NJPER 24 (¶14012 1982); Township of Teaneck, P.E.R.C. No. 81-142, 10 NJPER 351 (¶12158 1981). First, the complaints regarding Miktus came from faculty members. While it appears that a rift had developed among certain faculty members, it strains credulity to suggest that this is a reason to not renew an employee's employment contract who has consistently been given excellent evaluations. It is equally perplexing that Martin never put Miktus on notice that she was not to be renewed because of the "rift." This is strong support that these proffered reasons by Martin were a pretext. It strains credulity that Martin would rely entirely on the statements of certain faculty members and not offer Miktus a chance to respond. This is especially true since Miktus was, according to her supervisor Carroll, one of the top three faculty members. Martin never evaluated the faculty and therefore could not independently be aware of their performance. We take note that Martin testified that he did not consider Carroll's evaluations to be meaningful since they were "conclusory." Such testimony is quite suspect since he also testified that he relied on Carroll's evaluation to first decide not to renew another employee's contract

(who was subsequently renewed after Carroll resigned). Accordingly, we believe this failure to give notice prior to the non-renewal decision is strong evidence, at least under these circumstances, that the proffered business justification was pretextual. See, Morris, The Developing Labor Law, at 213-214 (2nd Ed. 1983).^{4/} Finally, the delay in the development of the curriculum does not, under these circumstances, constitute an adequate business justification. Carroll was responsible for this product; not Miktus. Further, while Martin complained to Carroll about the delay, he never gave notice of such dissatisfaction to Miktus.

Based on the foregoing, we hold that the College violated subsections 5.4(a)(1) and (3) of the Act when it failed to renew Vickie Ann Miktus for the 1984-1985 academic year. Accordingly, we direct that she be reinstated and made whole. The State has excepted to that portion of the order concerning reinstatement to the position of "Assistant Professor" since she had never been appointed to that position. We agree that she should be reappointed to her prior position which was Assistant Professor of Clinical

^{4/} The Hearing Examiner also relied on the fact that no reasons were given to support an inference of hostility. Under these circumstances, we disagree. First, since this was a "non-renewal," the College was under the impression that it need not give reasons. Secondly, at Miktus' meeting with Martin subsequent to her firing, Martin's uncontroverted testimony was that he refused to give reasons on the advice of counsel. We will not infer anti-union animus under those circumstances and do not consider this in making our determination.

Nursing.^{5/} Finally, the State has excepted to this remedy because only the Board can appoint faculty members and Martin only makes recommendations. There is no merit to this exception under the circumstances of this case. Martin was acting on behalf of the College when he made these decisions and Miktus should be restored to the position she would have been in had Martin not made his illegal recommendation. It does appear clear from the record that she would have been reappointed were it not for the illegal recommendation. Given this, it is appropriate to order Miktus reinstated. Any other order would be contrary to our mandate "to take such reasonable affirmative action as will effectuate the policies of this Act." N.J.S.A. 34:13A-5.4(c).

ORDER

The University of Medicine & Dentistry of New Jersey is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by failing to renew the contract of Vickie Ann Miktus for the 1984-85 academic year due to her engaging in protected activities.

^{5/} The apparent difference is that the former is "tenure eligible" while the latter is not. While the record indicates that two nursing faculty members have since Miktus' non-renewal been granted tenure eligible positions, the others have not. Given this record, it would be speculative to assume that Miktus would have been granted this position.

2. 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 the Act, particularly, by failing to renew the contract of Vickie Ann Miktus for the 1984-85 academic year on account of her engaging in protected activities.

B. Take the following affirmative action:


1. Forthwith reinstate Vickie Ann Miktus to the rank of Assistant Professor of Clinical Nursing and make Miktus whole for all salary due from September 1, 1984 to date less interim earnings with interest at the rate of 12% per annum.

2. 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 insure that such notices are not altered, defaced or covered by other materials.

3. Notify the Commission in writing within twenty (20) days of receipt of this Order what steps Respondent University has taken to comply herewith.

C. That the Unfair Practice Charge as to Nanette H. Kanoff be dismissed in its entirety.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Suskin, Wenzler and Graves voted for this decision. Commissioner Hipp abstained. None opposed.

DATED: Trenton, New Jersey
July 1, 1985
ISSUED: July 2, 1985

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 failing to renew the contract of Vickie Ann Miktus for the 1984-85 academic year due to her engaging in protected activities.

WE WILL cease and desist from 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 the Act, particularly, by failing to renew the contract of Vickie Ann Miktus for the 1984-85 academic year on account of her engaging in protected activities.

WE WILL forthwith reinstate Vickie Ann Miktus to the rank of Assistant Professor of Clinical Nursing and make Miktus whole for all salary due from September 1, 1984 to date less interim earnings with interest at the rate of 12% per annum.

UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY

(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,

429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

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

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Docket No. CO-84-279-157

SCHOOL OF HEALTH RELATED PROFESSIONS
FACULTY ASSOCIATION, NJEA

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent University violated Subsections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act when the Dean of the School of Health Related Professions refused in February 1984 to renew the contract of Vicki Ann Miktus, an Assistant Professor, for the 1984-85 academic year. The Hearing Examiner concluded that Miktus' vigorous exercise of union activities on behalf of the Association was the true reason for non-renewal. He found that failure of the Dean to give any reasons whatsoever for non-renewal indicated that his decision was a sham and a pretext. The Hearing Examiner ordered reinstatement with back pay and interest.

However, the Hearing Examiner also recommended dismissal of charges that the Dean likewise discriminatorily refused to renew the contract of Nanette H. Kanoff since her exercise of protected activity was minimal and not causally connected to the Dean's decision.

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.

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FACULTY ASSOCIATION, NJEA

Charging Party.

Appearances:

For the Respondent

Hon. Irwin I. Kimmelman, Attorney General
(Barbara A. Harned, D.A.G.)

For the Charging Party

Sterns, Herbert & Weinroth, Esqs.
(Michael J. Herbert, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on April 6, 1984 by the School of Health Related Professions Faculty Association, NJEA (hereinafter the "Charging Party" or the "Association") alleging that the University of Medicine & Dentistry of New Jersey (hereinafter the "Respondent" or the "University") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that Vickie Ann Miktus and Nanette H. Kanoff were hired in August 1982 by the University as Assistant Professors of Nursing in the School of Health Related Professions (hereinafter "SHRP") on a 12-month contract, which was on a prospective tenure track, and thereafter both were active in campaigning for the Association; subsequently, Dean John Martin of SHRP modified the contract terms of Miktus and Kanoff, placing them in a qualified rank of Clinical Assistant Professor; Miktus became a Vice-

President of the Association and Kanoff was the leading advocate against the change in the qualified rank of the nursing faculty; during their employment with the University in SHRP, which continued to June 30, 1984, both Miktus and Kanoff received excellent evaluations; when the University would not voluntarily recognize the Association as the collective negotiations representative for SHRP faculty, the Association filed a petition with the Commission and won an election, which resulted in the certification of the Association by the Commission on October 28, 1983 (Docket No. RQ-83-99); in February 1984 Dean John Martin notified Miktus and Kanoff that their contracts would not be renewed beyond June 30, 1984, and when Miktus and Kanoff in March 1984 requested reasons from Martin for their non-renewal, they were told by Martin that there were "reasons" but he would not divulge them. Based on the foregoing, the Charging Party alleges that Miktus and Kanoff were not renewed because of the union activism of Miktus and the protected activity of Kanoff, including her opposition to the change to qualified rank status of the nursing faculty; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1) and (3) of the Act. ^{1/}

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on June 29, 1984. Pursuant to the Complaint and Notice of Hearing, hearings were held on September 6, 7, 11, 14, 19 and October 1 and 15, 1984 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by January 18, 1985.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing,

^{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.

"(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."

and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

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

FINDINGS OF FACT

1. The University of Medicine & Dentistry of New Jersey is a public employer within the meaning of the Act, as amended, and is subject to its provisions.
2. The School of Health Related Professions Faculty Association, NJEA is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions,
3. For the purposes of this proceeding, Vickie Ann Miktus and Nanette H. Kanoff are public employees within the meaning of the Act, as amended, and are subject to its provisions.
4. John P. Martin has been the Dean of SHRP since April 1975. SHRP established a Nursing Program jointly with Essex County College in the early part of 1982. Essex County College was to provide the Liberal Arts component and the University was to provide the professional component of the Program. Lawrence Pitts, the Division Chairman of Biology at Essex County College, worked with the University in setting up the Nursing Program. Pitts exercised a supervisory function in the Nursing Program and was on a level with Martin. Doris E. Carroll, who has been on the faculty of Essex County College since 1972, became Chairman of the joint Nursing Program in July 1982 with the title of Program Director. She continued in that position until August 31, 1984. Carroll was under the supervision of Pitts. When the Nursing Program commenced in or around July 1982 the faculty staffing consisted of six members. By February 1984 there were nine faculty members in the Nursing Program at SHRP.
5. Each applicant for the Program submitted an application and a resume. Carroll then conducted interviews and made recommendations to Martin (see, E.g. CP-5 & CP-12).
6. Miktus responded to an advertisement for a faculty position in the Nursing

Program on June 28, 1982 (CP-1) and submitted a resume (CP-2). After being interviewed by Carroll she met with Martin at the end of July 1982 where she discussed only the position of Assistant Professor. Under date of August 5, 1982 Martin offered Miktus the position of Assistant Professor in the Nursing Program, which was subject to the approval of SHRP's Committee on Appointments and Promotion (CAP), and then approval by the Board of Trustees of the University (CP-3).

7. Miktus commenced her duties on August 17, 1982. On October 4, 1982 Martin sent a memo to David M. Gibson, the Assistant Dean for Administration, who was also the Chairman of the Committee on Appointments and Promotion; Martin advised Gibson that he was recommending Miktus for appointment to the rank of Assistant Professor (CP-6).

8. On October 19, 1982 Gibson advised Martin that the Committee recommended the initial appointment of Miktus to the rank of Assistant Professor in the Department of Nursing (CP-7A). In Gibson's communication to Martin he also advised that the Committee had expressed reservations about recommending Miktus to the unqualified rank of Assistant Professor in the light of her minimal teaching experience. In a second memorandum under the same date, October 19, 1982, Gibson advised Martin, after restating the reservations regarding Miktus' minimal teaching experience, that the Committee on Appointments and Promotion concurred in the Miktus appointment "...along with all other appointments in the department to the rank of clinical assistant professor..." (CP-7B) (Emphasis supplied).^{2/}

9. On October 20, 1982 Martin advised the Executive Council of the University that he was recommending six named individuals, including Miktus and Kanoff, "...for appointment to the rank of Clinical Assistant Professor..." (CP-8).^{3/}

^{2/} Carroll testified credibly that the reference to "clinical rank" meant that there was no tenure track involved in the appointment of Miktus and others to the nursing faculty of SHRP, which angered the appointees, especially Kanoff (CP-14 and 1 Tr. 59, 60). See also, memorandum of Charles Vevier dated November 2, 1982 (CP-16, infra).

^{3/} See footnote 2, supra.

10. Kanoff submitted her application for employment in the Nursing Program at SHRP to Carroll on July 12, 1982 (CP-9), enclosing a resume (CP-10). After being interviewed by Carroll she spoke with Martin, discussing with him rank and a concern about steps. Kanoff was left with the clear impression that her appointment was to the rank of Assistant Professor. Under date of August 25, 1982 Kanoff received from Martin a letter of appointment to the position of Assistant Professor effective August 17, 1982 (CP-11). The letter was identical in its terms to the one sent by Martin to Miktus (CP-3, supra). Kanoff commenced employment on August 17th. On October 4, 1982, Martin wrote to Gibson recommending Kanoff for appointment to the rank of Assistant Professor (CP-13).

11. Also, with respect to Kanoff, Gibson wrote to Martin on October 19, 1982 advising him that the Committee on Appointments and Promotion recommended the initial appointment of Kanoff to the rank of Assistant Professor in the Department of Nursing (CP-14). Gibson added that all nursing faculty should be appointed to the "clinical track" for a one-year appointment "...because of their need to engage intensively in the curriculum design and implementation of the new program."

12. In late October 1982 Martin met with the faculty of the Nursing Program and told them of the advice he had received from CAP, stating that he was never willing to offer a four-year appointment. The faculty members agreed. Martin confessed error in seeking a tenure track for a one-year appointment.

13. On November 3, 1982 Martin wrote again to the Executive Council of the University recommending the appointment of the six newly hired faculty to the rank of Clinical Assistant Professor, including Miktus and Kanoff (CP-15). This memorandum was identical in all respects to that of October 20, 1982 (CP-8, supra).^{4/}

14. On November 2, 1982 Charles Vevier, the Executive Vice President of the University, sent a memorandum to Martin responding to Martin's request for permission

^{4/} See footnote 2, supra.

to hire Assistant Professors in SHRP for an initial term of one year (CP-16). Vevier referred to the University's By-laws relating to faculty appointments (R-4). Article V, Title B, Section 1 of the By-laws provides, in part, that "Assistant Professors may be appointed for an initial term of four years.... and may be reappointed for one additional term of three years..." Vevier stated to Martin that the University interprets the By-laws, and past practice indicates, that such "an appointment to the tenure track does require a time commitment from the University, and in the case of the Assistant Professor rank, this initial commitment is for four years." The memorandum concluded with a statement that "it is clear that the tenure track itself serves as a probationary period for tenure" and, "as such the period of four years for an initial appointment as Assistant Professor must be honored."^{5/}

15. On December 1, 1982 Martin sent identical letters to Miktus and Kanoff advising them that their title had been changed from Assistant Professor to Clinical Assistant Professor (CP-18 and CP-21). When dissatisfaction was expressed with this change by the nursing faculty, Martin met with them and accepted their recommendation that the title be changed from Clinical Assistant Professor to Assistant Professor of Clinical Nursing. This was acknowledged to Miktus and Kanoff in letters from Martin dated December 7, 1982 (CP-19, CP-64; see also, CP-20).

* * * *

16. The faculty of SHRP, numbering in excess of 50 members, had been engaged in organizational activity since 1980. Members of the SHRP faculty approached those in the Nursing Program regarding organization shortly after the Nursing Program was established in July 1982. As a result of this organizational activity, which was undertaken by Beth Stolar, the President of the Faculty Association, and Leo Galcher, a representative of the NJEA, authorization cards were signed. Miktus signed an authorization card on October 8, 1982 (CP-56) and solicited the signature of Kanoff (CP-63) and others. Miktus was successful in soliciting approximately 12

^{5/} Robert D'Augustine, the Assistant Vice-President for Academic Affairs and a witness for the Charging Party, concurred in this interpretation of the By-laws.

authorization cards from the total faculty of SHRP. This was done openly by Miktus and was observed by at least one Program Director, Theresa Marsico. It was stipulated that Program Directors are first-line supervision, who report directly to Martin. Although Martin testified that he never saw Miktus and Galcher together, the Hearing Examiner credits the testimony of Miktus that she met with Galcher on the third floor of the Martland Building in September and October of 1982 and that Martin and Gibson saw them together. A Petition for Certification of Representatives was filed with the Commission by the Association on October 22, 1982 for a unit of 42 faculty members (CP-39; Docket No. RO-83-99). A conference to set up an election, at which Miktus was present for the Association, was held on November 16, 1982. Martin and Gibson were present for the University.^{5a/} The University opposed the requested unit on the ground that it wanted a University-wide unit, including the existing AAUP unit. After the exhaustion of Commission procedures, an election was conducted on October 20, 1983. Miktus was an observer for the Association at the election. The Association was successful and was duly certified as the SHRP collective negotiations representative by the Commission. Other activities engaged in by Miktus on behalf of the Association will be set forth hereinafter.

* * * *

17. One of the first tasks undertaken by the six faculty members of the SHRP Nursing Program was to develop a curriculum so that the faculty might be ready for students by January 1983. Martin testified of his own volition that Miktus and Kanoff assumed leadership roles in the development of the curriculum for the Nursing Program. This is indicated by Kanoff's role in developing the idea for "modules" as part of the curriculum and her having become the coordinator for their development. When the nursing faculty commenced work on developing the curriculum, including the modules, they were able to refer to a "New Program" document, which had been jointly approved by Essex County College and the University on May 10, 1982 (R-10). Martin was the author of the New Program document, having developed it with input from Pitts.

^{5a/} Gibson testified that Miktus was present "...for...formation of the union" (6 Tr. 13).

The document described a two-year, 72-credit "Associate in Applied Science Degree in Nursing." It provided that Essex County College would assume responsibility for the Liberal Art component while the University (SHRP) would provide the requisite professional nursing courses. Although not detailed with respect to curriculum, the goals and objectives of the Nursing Program were set forth together with a proposed curriculum (R-10, pp. 8-10, 11a, 12).

18. Based on work done by the nursing faculty on curriculum, Martin submitted to the New Jersey State Board of Nursing a proposed curriculum on October 7, 1982 (CP-45). This proposed curriculum, after setting forth the philosophy of the program, included four course descriptions : Nursing 101, 102, 201 and 202 (CP-45, pp. 11-23).

19. Under date of October 25, 1982 the New Jersey State Board of Nursing advised Martin that it anticipated that the curriculum would be further developed, and specified additional requirements to be undertaken by Martin on behalf of SHRP (CP-46). Under date of November 4, 1982 Martin responded to the foregoing request of the State Board of Nursing, providing further detail on course outlines and other related matters (CP-47).^{6/} On November 18, 1982 the New Jersey State Board of Nursing gave preliminary approval to the curriculum presented by Martin for the Nursing Program (CP-50).

20. The work on the modules continued until their completion in April 1984 although the basic work on the module for Nursing 101 was completed by January 1983 (R-6A) and the basic work on the module for Nursing 103 was completed by June 1983 (R-6B). Keohane, on behalf of the Committee on Academic Affairs of SHRP, sent a memorandum to Carroll on February 9, 1984 indicating that "full approval" had been given to the nursing courses designated as Nursing 101 and Nursing 201 (R-5).

* * * *

6/ On November 10, 1982 Elaine Keohane of SHRP's Committee on Academic Affairs advised the Assistant Dean for Instructional Development and Research of SHRP that preliminary approval had been given to the courses for the Nursing Program (CP-48 and CP-49).

21. On February 28, 1983 Carroll prepared her first written evaluation of Miktus (CP-62) and of Kanoff (CP-31), sending a copy to each of them. A copy of each evaluation was also sent to Martin. Both evaluations were overwhelmingly satisfactory. As to Miktus, Carroll noted that her greatest contribution was in the clinical area and that she stood without equal as a practitioner. Carroll recommended Miktus for appointment to a tenured faculty position. As to Kanoff, Carroll stated that her performance in the classroom reflects her years of experience and that her delivery demonstrates an understanding of the typical student enrolled in this program. Carroll recommended that Kanoff be advanced several steps on the salary scale and that she be appointed to a tenure track to ensure her continued employment, which was absolutely essential to the ongoing development of the program.

22. Martin testified that in the Spring of 1983 he recommended reappointment for all of the nursing faculty to the rank of Assistant Professor for one year, which he stated was based on his continued interpretation of the By-laws, as in 1982. Accordingly, on April 8, 1983 Martin advised Miktus and Kanoff in writing that he was recommending their appointment to the faculty rank of Assistant Professor. He added that this recommendation would be submitted to the Board of Trustees for their consideration at a meeting in June 1983. (CP-24 and CP-32).

23. In April 1983, at some point after Martin's letters to Miktus and Kanoff, supra, Martin had a meeting with Stanley S. Bergen, Jr., the President of the University, which was attended by Norma Davenport, the Contract Administrator for the University, and D'Augustine where Martin argued that it would be desirable to appoint Assistant Professors to the tenure track for one year, and that the By-Laws permitted this. Martin did not prevail in his contentions. Martin then met immediately with the nursing faculty and told them of his difficulty in obtaining support for his interpretation of the By-laws, but that he

would "press on."

24. On May 10, 1983 Miktus and Stolar sent a memo over their signatures to all members of the SHRP faculty, advising the faculty of a meeting on May 17th on the third floor of the Martland Building regarding the upcoming "PERK" election (CP-41). This notice was disseminated by inter-office mail and was posted in all departments. A copy was not sent to Martin or to the administration. Given the posting in all departments, the Hearing Examiner finds as a fact that Martin and the administration had notice of the posting of CP-41.

25. On May 31, 1983 Carroll again made a laudatory evaluation of both Miktus and Kanoff (CP-25 and CP-33). Carroll recommended that Miktus receive a merit increase for the 1983-84 academic year and that Kanoff receive an "exceptional" merit increase for the same year.

26. Sometime in mid-June 1983 Martin met again with Bergen on the matter of appointments to Assistant Professor for one year on a tenure track. Bergen stood by his initial interpretation of the By-laws, which was that such appointments were not permissible. Martin then presented the matter to the Personnel Committee of the Board of Trustees in late June 1983. The Personnel Committee advised Martin to offer the rank of Assistant Professor of Clinical Nursing. Martin convened a meeting of the nursing faculty on June 20, 1983 and advised them of his having to renege on his letters of April 8, 1983, in which he had recommended appointment to the faculty rank of Assistant Professor (CP-24 and CP-32, supra). Kanoff adamantly protested this change. ^{7/}

27. Kanoff, on her own initiative, prepared a letter to Bergen under date of June 21, 1983 on the subject of faculty appointments on a tenure track in the

^{7/} The testimony indicates that Kanoff was the spokesperson for the nursing faculty at the various meetings with Martin and Gibson. Martin testified that the spokesperson at meetings attended by him was Mariellen Willhaus. Inasmuch as Miktus acknowledged the advocacy of Willhaus at the meeting with Martin on June 20, 1983, the Hearing Examiner finds as a fact that both Kanoff and Willhaus were active spokespersons on behalf of the nursing faculty. However, Kanoff appears to have been the more vociferous, as, in January 1983, when she accused Martin of lying before the entire SHRP faculty (3 Tr. 39, 40).

SHRP Nursing Program, which was signed by seven members of the nursing faculty (CP-53). Kanoff testified that the reason she directed the letter to Bergen instead of Martin was that the nursing faculty was not getting a "fair shake." A copy of this letter was sent to Martin and to Carroll among others.

28. On June 22, 1983 Martin sent a letter to Miktus and Kanoff and other nursing faculty, advising them of the change in recommended faculty status as set forth in his original letter of April 8, 1983, supra. The revised offer was for a teaching position described as Assistant Professor of Clinical Nursing (CP-26 and CP-34).

29. Following a meeting of Gibson and the nursing faculty on June 27, 1983, where Gibson advised them that Martin could not offer a one-year tenure track appointment, Martin then sent letters to the nursing faculty, including Miktus and Kanoff, on June 28, 1983, advising them of the outstanding offer of employment to the rank of Assistant Professor of Clinical Nursing (CP-27 and CP-35). Martin gave them until July 27, 1983 to respond. After formal action by the Board of Trustees, Martin formalized the letters of appointment on July 29, 1983 (CP-28 and CP-36).

30. Martin had scheduled a Faculty Retreat to be held on June 1 and June 2, 1983. On May 10, 1983 Kanoff wrote to Martin, stating that due to a longstanding personal commitment she would be unable to attend (CP-65). Martin acknowledged the receipt of Kanoff's letter and later noted on it, "Kanoff did not attend." After Kanoff sent the letter, and before the Retreat occurred, she met with Martin in the latter part of May 1983 where the matter of her inability to attend was discussed. Martin expressed displeasure over her inability to attend. Kanoff did not attend for the reasons stated in her letter of May 10th (CP-65, supra).

31. On November 2, 1983 the Negotiating Committee of the Association, of which Miktus was a member, sent a memo to all non-administrative faculty, solici-

iting information regarding the program in which the faculty member was employed, the rank, the salary, years of teaching experience, etc. (CP-68).

32. In December 1983 Martin asked Carroll to appoint Miktus to the Library Committee. Carroll stated to Martin that Miktus was busy with the Association and that he should appoint someone else.

33. By November or December 1983 a rift had developed among the nursing faculty with Miktus, Kanoff, Willhaus and Barbara Smalley in one group and the remaining faculty members in another group, including Hyacinth McCaulay, Dora Maddox and Marlene Harvey. There was uncontradicted testimony that Carroll referred to these latter three faculty members as the "Black Faculty" or the "Black Caucus." Further, Carroll had also said to the three of them on one occasion in the parking lot, "What are you black revolutionaries planning now." Regarding this rift among faculty, Carroll aligned herself with Miktus, Kanoff, Willhaus and Smalley.

34. In either mid-December 1983 or the early part of January 1984 McCaulay and Maddox met with Martin and described the situation regarding Carroll. McCaulay testified that Martin referred to Carroll's leadership and indicated that he knew of some problems. Martin agreed with the assessment of Carroll by McCaulay and Maddox. Martin brought up the names of Miktus and Kanoff as those who were "running the program." However, Martin indicated no criticism of Miktus or Kanoff in that meeting. The sole purpose of the meeting, according to McCaulay and Maddox, was to criticize Carroll, not Miktus or Kanoff. ^{8/} Harvey met privately with Martin in January 1984 and relayed her concerns regarding the lack of leadership and Carroll's abdication of leadership to Miktus and Kanoff. She

^{8/} Maddox had met privately with Martin on one prior occasion where she brought up the leadership of the program and Carroll. She made no criticism of Miktus or Kanoff. Martin confirmed that he spoke individually to Maddox on December 15, 1983 and that Maddox complained about the program and Carroll. Martin testified on direct examination that he had spoken with eight members of the nursing faculty about Miktus and Kanoff, and acknowledged that he never gave Miktus or Kanoff an opportunity to rebut what had been said to him.

stated that this had created a division in the faculty and that she, Maddox and McCaulay were resentful of it.

35. Although Martin testified that in December 1983 he requested that Carroll evaluate the nursing faculty by March 1, 1984 there was no written memorandum to this effect until January 10, 1984 when Martin sent a memo to all "Program Directors" (CP-58). In this memo to Program Directors Martin set a deadline of March 15, 1984 (notwithstanding that he told Carroll March 1st) and attached a copy of the guidelines used in previous years. ^{9/}

36. Early in January 1984 Stolar, as President of the Association, wrote to Davenport and, among other things, advised her that the Association was ready to commence bargaining, suggesting two dates, February 13 and February 23, 1984 (CP-42). ^{10/} Miktus was shown as "cc" on this letter. In an undated memo from the Association's officers, including Miktus, the faculty of SHRP was informed of the above letter to Davenport and the date of February 23rd having been proposed for the commencement of negotiations (CP-67). Gibson received a copy (6 Tr. 20).

37. On January 13, 1984, Miktus sent a memo to D'Augustine regarding preparations for negotiations, which requested data, and in which she stated that Davenport had suggested that the Association contact his office for the necessary data (names, addresses, ranks, dates of hire, etc.). See CP-43.

^{9/} Martin testified in several instances that he did not consider the evaluations of Miktus and Kanoff as "favorable" since, according to him, Carroll set forth no facts, detail or documentation, which would enable him to reach a conclusion of his own. Martin stated that as early as February 1983 he told Carroll that her evaluations were "meaningless" yet Martin took no corrective action and told Carroll in December 1983 to complete her evaluation of the nursing faculty by March 1, 1984. The Hearing Examiner does not credit Martin's testimony and characterization of Carroll's evaluations. Thus, the Hearing Examiner accepts the three evaluations of Miktus and Kanoff by Carroll on their face (CP-25, CP-30 and CP-62; CP-31, CP-33 and CP-38B). The Hearing Examiner also accepts the testimony of Carroll that she rated Kanoff number one and Miktus number two or three among the nine nursing faculty members, with which Pitts agreed (1 Tr. 90, 91; 2 Tr. 62, 63).

^{10/} Martin testified that although he had not seen this document until the hearing in this matter, he had a conversation in January 1984 with Davenport regarding the issue of dues deduction, which is also contained in CP-42. Further, although Martin had no role in the mechanics of the negotiations process he was consulted as to strategy.

38. On January 31, 1984 Camille Pruchnicki, who works in the office of Martin, sent a memorandum to Miktus (CP-44) in response to the request for data directed to D'Augustine on January 13, 1984 (CP-43, supra). Pruchnicki attached certain of the requested data to her memorandum to Miktus (CP-44) and sent a copy to Martin. 11/

39. Carroll testified credibly that Martin never indicated to her by early 1984 that he was not going to renew the contracts of Miktus and Kanoff and, further, that Martin had expressed no criticism of them up until that point. Pitts also testified credibly that Martin never indicated to him any dissatisfaction with Miktus and Kanoff between December 1983 and mid-February 1984 although by then Martin had spoken to a number of members of the nursing faculty, supra.

40. Martin stressed in his testimony that the nursing faculty members had come to him and that he had not reached out to them. Martin had concluded that there were two factions in the faculty, namely, one consisting of Miktus, Kanoff, Willhaus and Smalley, and the other faction consisting of the balance of the faculty. He had concluded that there was faculty disengagement, that the students were being deprived of an educational experience and that "new blood was needed."

41. On February 22, 1984 Carroll sent a memo to Martin recommending Kanoff for an excellence in teaching award (CP-38A).

42. On either February 27 or February 28, 1984 Martin decided not to renew the contracts of Miktus and Kanoff for the 1984-85 academic year, having concluded that "new blood" and leadership were needed and that the program was in serious trouble and that he could not continue with the same team. Martin wrote to Miktus and Kanoff on February 29, 1984 advising them that their faculty appoint-

11/ Martin testified at the hearing that he had no recollection of seeing CP-44 but acknowledged that he must have received it.

ments would not be renewed (CP-29 and CP-37). This action by Martin in communicating with Miktus and Kanoff occurred before receipt by Martin of highly favorable evaluations of them by Carroll on March 1, 1984, in which she recommended their appointment to Assistant Professor (CP-30 and CP-38B).

43. Although Martin refused to give Miktus and Kanoff any reasons for their non-renewal, he held separate meetings with them in mid-March 1984 where he stated there was no need to give any reasons. Martin testified at the hearing that the reasons were that the faculty was not allowed by them to make contributions to the program and, additionally, their unwillingness to work with the faculty.

44. Martin also decided in late February 1984 not to renew the contract of Maddox for the 1984-85 academic year. Martin testified that his decision was based on the assessments and memoranda from Carroll. Martin was asked on cross-examination why he did not make his decision on the non-renewal of Miktus and Kanoff on the same basis, i.e., assessments and memoranda from Carroll. Martin's response was evasive. The Hearing Examiner finds as a fact that his response was unsatisfactory and unconvincing, particularly in view of Martin's immediate subsequent testimony that he never expressed any criticism of Miktus or Kanoff to them.

45. Although not relevant to any knowledge of union activity engaged in by Miktus prior to Martin's decision not to renew her contract as of February 27-28, 1984, the Hearing Examiner finds that Miktus continued to be active on behalf of the Association by participating in negotiations on and after April 5, 1984, which ceased as of the expiration of her 1983-84 appointment on June 30, 1984. The Hearing Examiner rejects as not credible the testimony of Martin that he had no knowledge of the union activity of Miktus on behalf of the Association prior to his decision not to renew Miktus on February 29, 1984. The Hearing Examiner

refers to and incorporates by reference his prior findings regarding the union activity engaged in by Miktus and the direct or imputed knowledge of this activity to Martin: See Findings of Fact Nos. 16, 24, 31, 32, 36, 37, 38, supra. ^{12/}

46. Carroll resigned as Program Director of the Nursing Program effective June 30, 1984. Carroll was replaced by Harvey who, after June 30, 1984, recommended that Maddox be renewed for the 1984-85 academic year. Martin decided to reverse his decision on Maddox in July 1984 and she was reappointed. Martin testified that he never decided to reassess his decision regarding the non-renewal of Miktus and Kanoff.

47. The Hearing Examiner conditionally received in evidence the evaluations of three members of the Nursing Faculty, who were identified as employees "X," "Y" and "Z" (CP-59, CP-60 and CP-61). The purpose of the Charging Party in offering these evaluations was to attempt to establish disparate treatment between these three employees and Miktus and Kanoff. The basis of the contention was that although Miktus and Kanoff received overwhelmingly favorable evaluations from Carroll during their two years in the Nursing Program, and were non-renewed, the other three employees, "X," "Y" and "Z," received negative evaluations and were renewed for the 1984-85 academic year. The Hearing Examiner has carefully read the evaluations of these three renewed employees and finds as a fact that the evaluations are not negative and are consistent with renewal for the next academic year. The Hearing Examiner notes that Carroll herself recommended retention of the three subject employees for one year. Accordingly, Exhibits CP-59, CP-60 and CP-61 are received in evidence without conditions.

^{12/} For these reasons the Hearing Examiner rejects as not credible the statement by Martin in his Affidavit of May 7, 1984 that he had no personal knowledge of any "union activities" by Miktus (CP-54); see also, references to Miktus being involved in the "faculty organization" in three evaluations by Carroll (CP-25, CP-30 & CP-62). The Hearing Examiner does credit Martin's denial that he had no knowledge of any union activities by Kanoff since the Association adduced no proof of such activities.

DISCUSSION AND ANALYSIS

The Respondent Violated Subsections
(a)(1) And (3) Of The Act By Its
Refusal To Renew The Contract Of
Vickie Ann Miktus In February 1984

The New Jersey Supreme Court in Bridgewater Township v. Bridgewater Public Works Association, 95 N.J. 235 (1984) examined the two types of discrimination cases analyzed by the National Labor Relations Board in Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980), each of which, in turn have been adopted by the United States Supreme Court in NLRB v. Transportation Mgt. Corp., ___ U.S. ___, 113 LRRM 2857 (1983).

The first aspect of Wright Line, adopted by the Court in Bridgewater, supra, deals with the discharge of an employee for having engaged in union activities, with no other basis for the discharge. More typically, however, the employer usually asserts that it has fired the employee for a legitimate business reason. If an examination of the evidence reveals that the asserted justification is a sham, or is not in fact relied upon, then the reason advanced by the employer is deemed pretextual, i.e., wholly without merit, and, since no legitimate business reason exists, there is no dual motive involved. See 95 N.J. at 241, 244.

The second, and more common aspect, which has come to be known as the Wright Line test, involves the "dual motive" case and the following requisites in assessing employer motivation: (1) the Charging Party must make a prima facie showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the employer's decision to discipline; and (2) once this is established, the employer has the burden of demonstrating that the same action would have taken place even in the absence of protected activity. See 95 N.J. at 242.

The Court in Bridgewater further refined the test in dual motive cases by adding that the protected activity engaged in must have been known by the employer and, also, it must be established that the employer was hostile towards the exercise of

the protected activity. (95 N.J. at 246). The Hearing Examiner also notes that the Charging Party must establish a nexus between the exercise of protected activity and the employer's conduct in response thereto: North Brunswick Township, P.E.R.C. No. 80-69, 5 NJPER 544 (1979).

Based upon the instant record, the Hearing Examiner concludes that the Respondent, acting primarily through Dean Martin, engaged in a sham and a pretext in refusing to renew the contract of Miktus for the 1984-85 academic year. The factual analysis for this conclusion will follow.

In so concluding, the Hearing Examiner has considered thoroughly the arguments and citations of authority by counsel for the Respondent. For example, it is true that it is an established principle that an employer may legally discharge an employee for any cause, whatever others may think of its adequacy, so long as the motivation is not interference with rights protected under the Act: NLRB v. Eastern Smelting and Refining Corp., 598 F. 2d 666, 669 (1st Cir. 1979). Similarly, an employer can fire an employee for good, bad, or no reason, so long as the purpose is not to interfere with union activities: NLRB v. Loy Foods Stores, Inc., 697 F. 2d 798, 801 (7th Cir. 1983).

Although the Hearing Examiner has concluded that this case involves pretext on the part of the Respondent in failing to renew Miktus' contract, he must, of course, determine whether Miktus has met the burden of proving that she engaged in protected activities with employer knowledge thereof and has shown hostility towards their exercise. Here consider the following:

a. Miktus signed an authorization card for the Association on October 8, 1982 and thereafter solicited the signatures of Kanoff and others. Miktus was successful in soliciting approximately 12 authorization cards from the SHRP faculty, numbering in excess of 50 employees. This solicitation was done openly and was observed by at least one program director, Theresa Marsico. It was stipulated that Program Directors are first-line supervisors, who report directly to Martin. Thus,

knowledge of the solicitation activity of Miktus may be imputed to Martin on agency principles. Further, although Martin testified that he never saw Miktus and Galcher together, the Hearing Examiner has credited the testimony of Miktus that she met with Galcher on the third floor of the Martland Building in September and October 1982, and that Martin and Gibson saw them together. See Finding of Fact No. 16, supra.

b. After a Petition for Certification of Representatives was filed by the Association with the Commission on October 22, 1982, a conference to set up an election was held at the Commission's offices in Newark on November 16, 1982 where Miktus was among those present for the Association. Martin and Gibson, among others, were present for the University. Gibson testified that Miktus was present "...for... formation of the union." Over the opposition of the University, an election was conducted on October 20, 1983 where Miktus was an observer for the Association. See, also, Finding of Fact No. 16, supra.

c. On May 10, 1983 Miktus and Stolar sent a memo over their signatures to all members of the SHRP faculty, advising them of a meeting on May 17th. This notice was disseminated by inter-office mail and posted in all departments. Although a copy was not sent to Martin or the administration, given the posting in all departments, the Hearing Examiner has found as a fact that Martin and the administration had notice of the posting. See Finding of Fact No. 24, supra.

d. On November 2, 1983 the Negotiating Committee of the Association, of which Miktus was member, sent a memo to all non-administrative faculty, soliciting pertinent information for negotiations. ^{13/} See Finding of Fact No. 31, supra. In December 1983 Martin asked Carroll to appoint Miktus to the Library Committee, but she told him that Miktus was busy with the Association. See Finding of Fact No. 32.

e. On January 13, 1984 Miktus sent a memo to D'Augustine, regarding preparations for negotiations, in which she stated that Davenport had suggested that

13/ In reaching his conclusions herein, the Hearing Examiner has not considered as probative to discriminatory intent, i.e., animus, any lapse in the time between the date of certification of the Association by the Commission in late 1983 and the commencement of negotiations in April 1984.

the Association contact his office. See Finding of Fact No. 37, supra. On January 31st Pruchnicki, who works in Martin's office sent a memorandum to Miktus in response to the request for data directed to D'Augustine, supra. Pruchnicki attached certain data in this memo to Miktus and sent a copy to Martin. Martin acknowledged that he must have received it. See Finding of Fact No. 38, supra.

f. Martin, in an Affidavit on May 7, 1984, stated, inter alia, that he had no personal knowledge of any "union activities" by Miktus (CP-54). Given the recapitulation of the pertinent Findings of Fact on Miktus' "union activities," supra, together with the references to Miktus being involved in the "faculty organization" in three evaluations of Miktus by Carroll (CP-25, CP-30 and CP-62), the Hearing Examiner has previously rejected as not credible Martin's statement in his Affidavit that he had no knowledge of Miktus' "union activities." See footnote 12, supra.^{14/} Any lingering doubt as to whether Martin is to be charged with knowledge of Miktus' union activities is dispelled by the Hearing Examiner's conclusion that knowledge may be imputed to Martin under the "small plant doctrine": Wiese Plow Welding Co., Inc., 123 NLRB 616, 43 LRRM 1495 (1959).

The University contends that it has not discriminated against Miktus since, even assuming that Martin had knowledge of all of her union activities, dating back to October 1982, Martin demonstrated that he was not motivated by anti-union animus because he recommended the reappointment of all of the nursing faculty, including Miktus, in the Spring of 1983. The Hearing Examiner's answer to this contention is that Miktus' union activities prior to the Spring of 1983 had occurred only in October and November 1982. No further activity occurred until May 10, 1983 when Miktus and Stolar sent a memo to all members of SHRP Faculty, advising them of a meeting on the upcoming PERC election. Thus, the union activities of Miktus

at the time of the Spring 1983 reappointment may well not have been foremost among

14/ The union activities engaged in by Miktus

Martin's concerns. However the activities of Miktus became much more overt and pronounced beginning in October 1983 when Miktus was the observer at the PERC election, and in November when Miktus, as a member of the Negotiating Committee, sent a memo to all non-administrative faculty, requesting data to be used in the upcoming negotiations. In December 1983 Carroll advised Martin that Miktus was busy with the Association when Martin asked Carroll to appoint Miktus to the Library Committee. Further, the evidence of Miktus' activities on behalf of the Association is substantial in the month of January 1984 as the preparation for the commencement of negotiations intensified. As found above, Martin is chargeable with knowledge of all of these activities of Miktus, which immediately preceded Martin's decision not to renew her in the latter part of February 1984.

On either February 27 or February 28, 1984 Martin decided not to renew the contract of Miktus for the 1984-85 academic year. Miktus was advised of this by letter dated February 29, 1984. No reasons were provided by Martin for his decision not to renew, notwithstanding the favorable evaluations of Miktus by Carroll in 1983 (CP-25 and CP-62).^{15/} Also recall that Carroll and Pitts rated Miktus number two or number three among the nine nursing faculty members (see footnote 9, supra). In a separate meeting with Martin in mid-March 1984 Martin refused to give Miktus any reasons for the non-renewal, stating that there was no need to give any reasons.^{16/} The Hearing Examiner finds and concludes that no reasons whatever were given to Miktus until Martin testified at the hearing in this matter on September 14 & 19, 1984.

The Hearing Examiner takes especial note of the fact Martin himself never expressed to Miktus any criticism of her work or performance as a nursing faculty member. Nor did Martin ever express any dissatisfaction with Miktus to Carroll or Pitts. Miktus was never the subject of any warnings or reprimands by Martin or

^{15/} In footnote 9, supra, the Hearing Examiner rejected Martin's testimony, which characterized Carroll's evaluations as "meaningless." Note here that when Martin decided not to renew Maddox in February 1984, he based it upon Carroll's assessments and memoranda (see Finding of Fact No. 44, supra). When asked why he did not make his decision on Miktus on the same basis, Martin was evasive.

^{16/} The claim that Martin was acting on the advice of counsel does not insulate the University from a finding that it violated the Act. The University through Martin assumed whatever risks might flow from erroneous legal advice.

or anyone else prior to Martin's decision not to renew her contract in February 1984.

There are many decisions of the Courts and the NLRB, which predicate, in whole or in part, a finding of discrimination in the terminating of an employee where no reason for termination is given at the time of termination such as in the instant case. See, for example: Humes Electric, Inc. v. NLRB, ___ F. 2d ___, 114 LRRM 2445 (9th Cir. 1983); Bill Johnson's Restaurants, Inc., 249 NLRB No. 26, 104 LRRM 1205 (1980); Emery's IGA Store, 219 NLRB No. 26, 90 LRRM 1191 (1975); Minnesota (3M) De Puerto Rico, Inc., 214 NLRB No. 78, 88 LRRM 1204 (1974); and Mid-Ohio Automotive, Inc., 200 NLRB No. 105, 82 LRRM 1331 (1972).^{17/}

The Hearing Examiner turns now to the testimony of Martin at the hearing where, for the first time, the alleged reasons for not renewing Miktus' contract were revealed. An examination of these alleged reasons is, of course, necessary to the completion of the sham-pretext analysis under Bridgewater. Findings of Fact Nos. 33, 34, 39, 40, 42 and 43, supra, disclose that the problem of a RIF among the nursing faculty was attributable not to Miktus, but to Carroll. Thus, it was Carroll who exploited the racial issue in the division of the nursing faculty. In meetings with Martin in December 1983 and January and February 1984, the aggrieved faculty members brought up the name of Carroll as the problem and not Miktus although these aggrieved faculty members claimed that Carroll had abdicated leadership to Miktus, which again points to a problem with Carroll, not with Miktus. Martin's testimony that he concluded that "new blood" and leadership were needed, and that he could not continue with the same team, logically suggests an overhaul in supervision and not the firing of the underlings. Martin also testified that the nursing faculty was not allowed by Miktus to make contributions to the program, and that she displayed an unwillingness to work with the faculty. If this was true, then certainly Martin

^{17/} The Hearing Examiner also concludes that the failure of Martin to provide Miktus with reasons for his decision not to renew her contract raises an inference, analogous to the failure to testify, that any reasons proffered would be insubstantial and spurious.

should have communicated the complaints of other nursing faculty members directly to Miktus, and this should have been done long before Martin's decision of non-renewal.

All of the foregoing actions of Martin, in response to complaints from nursing faculty, lead clearly to the conclusion that his reason or reasons for not renewing Miktus were threadbare, spurious, pretextual and a sham. Thus, one can only conclude that the true reason for the non-renewal of Miktus was her extended exercise of protected activities on behalf of the Association.

In conclusion, the Hearing Examiner rejects as non-probative the fact that Stolar was not the subject of retaliatory or discriminatory action by the University, notwithstanding that she was active on behalf of the Association, since there is ample authority for the proposition that once discrimination is established, i.e., against Miktus, it is not disproved because all of the Association adherents were not discriminated against: Nachman Corp. v. NLRB, 337 F. 2d 421, 424, 57 LRRM 2217 (7th Cir. 1964). Also, there is not involved in the case of Miktus any hiatus in her exercise of protected activities, which would otherwise negate a causal connection between the exercise of protected activities and the employer's discriminatory conduct: compare New Jersey Sports and Exposition Authority, P.E.R.C. No. 84-150, 10 NJPER 431 (1984); Kenilworth Board of Education, P.E.R.C. No. 85-14, 10 NJPER 508 (1984); and Propak Corp. v. NLRB, 578 F. 2d 169 (6th Cir. 1978).

Based upon all of the foregoing, the Hearing Examiner concludes that the Charging Party has proven by a preponderance of the evidence that the Respondent University violated Subsections(a)(1) and (3) of the Act when Dean John Martin refused to renew the contract of Vickie Ann Miktus for the 1984-85 academic year.

The Respondent Did Not Violate Subsections
 (a)(1) And (3) Of The Act By Its Refusal
 To Renew The Contract Of Nanette H. Kanoff
 In February 1984

The case of Kanoff is distinguishable from that of Miktus largely because Kanoff's exercise of protected activities was less substantial than that of Miktus. First, it is clear that Kanoff did engage in the limited activity of questioning and protesting the University's handling of the matter of professorial rank on the tenure track for the SHRP nursing faculty. Plainly, this was protected activity: North Brunswick Township Board of Education, P.E.R.C. No. 79-14, 4 NJPER 451 (fn. 16) 1978. and Ocean County College, P.E.R.C. No. 85-12, 10 NJPER 502, 504 (1984).

However, the record discloses that the number of instances that Kanoff made such protests directly to Martin or Gibson were severely limited, covering the period from the late Fall of 1982 to June 27, 1983 (see Finding of Fact Nos. 15, 26 and 29; 2 Tr. 166, 168 & 3 Tr. 11, 12, 17, 18, 39, 70).

The Hearing Examiner finds and concludes that there was no proof whatever that the University had any knowledge that Kanoff was the author of the June 21, 1983 letter to President Stanley Bergen (CP-53) even though a copy was delivered to Martin. This letter was signed by Kanoff and six others of the nursing faculty, including Miktus. There is no way to tell who was the author or prime signatory. Thus, the June 21st letter does not constitute activity on the part of Kanoff of which the Respondent is chargeable with knowledge.

As can be gleaned from the above, Kanoff's protected activity was limited in nature and in scope both as to the activity itself and employer knowledge. Further, the activity ceased altogether on June 27, 1983. Thus, there was a fatal hiatus in activity from June 27th to February 27 or 28, 1984 when Martin decided not to renew Kanoff's contract. ^{18/} This hiatus resulted in a clear lack of causal nexus

^{18/} In this regard, compare Kanoff to Miktus, whose protected activities intensified between October 1983 and January 1984.

between the exercise of protected activities and the alleged discriminatory termination.^{19/} The mere fact that Martin terminated both Kanoff and Miktus together does not overcome the failure of proof of causation in the case of Kanoff.

In conclusion, either under the sham-pretext analysis or the dual motive analysis in Bridgewater, supra, the Charging Party has failed to prove by a preponderance of the evidence that Kanoff's exercise of protected activity was the reason for Martin's decision not to renew her contract for the 1984-85 academic year.

* * * *

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

CONCLUSION OF LAW

1. The Respondent University violated N.J.S.A. 34:13A-5.4(a)(1) and (3) when Dean John Martin refused in February 1984 to renew the contract of Vickie Ann Miktus for the 1984-85 academic year.
2. The Respondent University did not violate N.J.S.A. 34:13A-5.4(a)(1) and (3) when Dean John Martin refused in February 1984 to renew the contract of Nanette H. Kanoff for the 1984-85 academic year.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

- A. That the Respondent University cease and desist from:
 1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by failing to renew the contract of Vickie Ann Miktus for the 1984-85 academic year due to her engaging in protected activities.

^{19/} See New Jersey Sports & Exposition Authority and Kenilworth Board of Education, supra at p. 23.

2. 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 the Act, particularly, by failing to renew the contract of Vickie Ann Miktus for the 1984-85 academic year on account of her engaging in protected activities.

B. That the Respondent University take the following affirmative action:

1. Forthwith reinstate Vickie Ann Miktus to the rank of Assistant Professor and make Miktus whole for all salary due from September 1, 1984 to date less interim earnings with interest at the rate of 12% per annum.

2. 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 insure that such notices are not altered, defaced or covered by other materials.

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

C. That the Unfair Practice Charge as to Nanette H. Kanoff be dismissed in its entirety.



Alan R. Howe
Hearing Examiner

Dated: January 25, 1985
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 NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly, by failing to renew the contract of Vickie Ann Miktus for the 1984-85 academic year on account of her engaging in protected activities.

WE WILL NOT discriminate 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 the Act, particularly, by failing to renew the contract of Vickie Ann Miktus for the 1984-85 academic year on account of her engaging in protected activities.

WE WILL forthwith reinstate Vickie Ann Miktus to the rank of Assistant Professor and make Miktus whole for all salary due from September 1, 1984 to date less interim earnings with interest at the rate of 12% per annum.

UNIVERSITY OF MEDICINE AND DENTISTRY
OF NEW JERSEY

(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
Chairman, Public Employment Relations Commission,
P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780