P.E.R.C. No. 84-69

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE BOARD OF HIGHER EDUCATION,

Respondent,

- and -

Docket No. CO-83-249-81

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

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge that the Council of New Jersey State College Locals, NJSFT, AFT/AFL-CIO filed against the State Board of Higher Education. The charge had alleged that the Board violated the New Jersey Employer-Employee Relations Act when, during successor contract negotiations, it proposed an amendment to N.J.A.C. 9:2-3.8 concerning the notice faculty members must receive before a reduction in force. The Commission holds that the charge is now moot and unworthy of further adjudication since the parties have entered a successor contract essentially resolving this dispute and there has been no further action to amend N.J.A.C. 9:2-3.8.

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Charging Party.

Appearances:

For the State Board of Higher Education
Irwin I. Kimmelman, Attorney General
(Grey J. Dimenna, Deputy Attorney General)

For the Charging Party
Sauer, Boyle, Dwyer & Canellis, Esqs.
(George W. Canellis, Esq.)

DECISION AND ORDER

On March 15, 1983, the Council of New Jersey State College Locals, NJSFT, AFT/AFL-CIO ("AFT"), the majority representative of faculty members at New Jersey's State Colleges, filed an unfair practice charge against the State Board of Higher Education ("Board") with the Public Employment Relations Commission. The charge alleged that the Board violated subsections 5.4(a)(1), (3), and (5) [1/] of the New Jersey Employer-Employee Relations Act,

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 of condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act", and "(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."

N.J.S.A. 34:13A-1 et seq., when, during successor contract negotiations, it proposed an amendment to N.J.A.C. 9:2-3.8 which would have set a maximum of 45 days notice to faculty members before a reduction in force due to "fiscal exigency." The charge alleged that the proposed amendment chilled negotiations over the AFT's desire to carry over a clause in its predecessor contract providing for 195 days of written notice before a reduction in force for "financial reasons."

On April 7, 1983, the Director of Unfair Practices issued a Complaint and Notice of Hearing. The Board then filed an Answer admitting that an amendment had been proposed, but denying that the proposal, standing alone, violated the Act or that it had refused to negotiate in good faith under all the circumstances.

On May 31, June 8, 14, and 21, 1983, Hearing Examiner Alan R. Howe conducted hearings. The parties examined witnesses and presented exhibits. At the conclusion of AFT's case, the Hearing Examiner dismissed for lack of evidence that portion of the Complaint alleging a violation of subsection 5.4(a)(3) of the Act. The parties waived oral argument, but filed post-hearing briefs.

On September 26, 1983, the Hearing Examiner issued his report and recommended decision. H.E. No. 84-18, 9 NJPER 619 (¶14266 1983). He concluded that the Board's proposal to amend N.J.A.C. 9:2-3.8 violated subsections 5.4(a)(1) and (5). He recommended an order requiring the Board, upon AFT's demand, to negotiate in good faith concerning any proposal to reduce the number of days of notice before a reduction in force; to refrain from implementing any change in N.J.A.C. 9:2-3.8 before a declaration

of impasse and the exhaustion of the Commission's dispute resolution procedures; and to post a notice of its violation and the remedies ordered.

On November 4, 1983, the Board filed exceptions. It asserts that it did not refuse to negotiate in good faith or otherwise violate the Act; and that it acted within its regulatory powers to respond to financial crises and pursuant to legal advice from the Attorney General's office.

On November 23, 1983, AFT and the Board filed statements indicating that since the issuance of the Hearing Examiner's report, they had successfully negotiated a new contract. This contract provides for 195 days written notice before a tenured faculty member is retrenched for financial reasons, but also contains a new paragraph specifically setting forth certain powers of the Board, if authorized by the Governor, to deal with a fiscal crisis which would not permit compliance with the 195 day notice provision before a reduction in force occurs. Both parties also stated that no further action had been taken to adopt the proposed amendment to N.J.A.C. 9:2-3.8.

In Galloway Twp. Bd. of Ed. v. Galloway Twp. Ed. Ass'n, 78 N.J. 25 (1978), our Supreme Court, in response to a contention that a dispute was moot, held that the Commission"...possesses the authority under [N.J.S.A. 34:13A-5.4(c)] to adjudicate and remedy past violations of the Act if, in its expert discretion, it determines that course of action to be appropriate under the circumstances of the particular case." Id. at p. 39. Exercising this discretion in the instant case, we do not believe that

further adjudication of this case is warranted since the parties' contract settlement has essentially resolved this dispute and there has been no further action to amend N.J.A.C. 9:2-3.8.[2/] See e.g., In re Township of Rockaway, P.E.R.C. No. 82-72, 8 NJPER 117 (¶13050 1982); In re Borough of Oradell, P.E.R.C. No. 84-26, 9 NJPER 595 (¶14250 1983). We emphasize that we are not adopting or rejecting the Hearing Examiner's report or intimating any opinion on his findings, analysis, or conclusion.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Hartnett, Newbaker and Suskin voted in favor of this decision. Commissioners Graves and Hipp voted against the decision.

DATED: Trenton, New Jersey
December 9, 1983
ISSUED: December 12, 1983

2/ We note, as the Hearing Examiner found, that the Board in fact withdrew consideration of the proposed amendment from its June, 1983 agenda following a request of the Council of State Colleges, an advisory body composed of the presidents and the Chairpersons of the Boards of Trustees of the nine State Colleges, to defer action on any amendment pending negotiations with the AFT. Given this deferral, and the absence of any further action on the proposed amendment, we need not consider whether the proposed amendment, if adopted, would have been entitled to preemptive effect under the tests set forth in State College Locals v. State Board of Higher Ed., 91 N.J. 18 (1982).

H.E. No. 84-18

STATE OF NEW JERSEY
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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-and-

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

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Board violated Subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when, at a meeting on March 18, 1983, it unilaterally adopted a resolution seeking to amend the RIF regulation (N.J.A.C. 9:2-3.8) during the course of negotiations for a successor agreement before an impasse was reached and before exhaustion of the dispute resolutions procedures of the Commission. The agreement, which expired July 1, 1983, contains a 195-day notice of retrenchment and the Respondent Board sought in negotiations to reduce this period, first to 30 days and then later to 45 days. The Respondent on March 18th unilaterally decided on 45 days and initiated the amendment process. Neither party had declared an impasse and, as a result, the Commission's dispute resolution procedures, i.e., mediation and fact finding, had not been utilized or exhausted.

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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(George W. Canellis, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on March 15, 1983 by the Council of New Jersey State College Locals, NJSFT, AFT/AFL-CIO (hereinafter the "Charging Party" or the "AFT") alleging that the State Board of Higher Education (hereinafter the "Respondent" or "Board") 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, notwithstanding that Article XXXV of the current agreement provides for at least 195 days of written notice of retrenchment or layoff, the Respondent on March 18, 1983 unilaterally issued a memorandum proposing an amendment to N.J.A.C. 9:2-3.7 (sic), which would change the present regulation regarding notice from "as soon as possible" to "45 days prior to date of layoff" without negotiations with the Charging Party contrary to the decision of the New Jersey Supreme Court in State College Locals v. State Board of Higher Education,

91 N.J. 18 (1982), all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (3) and (5) 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 April 7, 1983. Pursuant to the Complaint and Notice of Hearing, hearings were held on May 31, June 8, 14 and 21, 1983 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Two interlocutory decisions were issued by the Hearing Examiner prior to the taking of testimony and the receipt of documentary evidence: On May 23, 1983 the Respondent's Motion to Dismiss was denied (H.E. No. 83-41) and on June 2, 1983 the Respondent's Petition/Motion To Quash Subpoenas was denied in part and granted in part (H.E. No. 83-42). On June 21, 1983 the Hearing Examiner granted the Respondent's oral Motion to Dismiss the Subsection(a)(3) allegation at the conclusion of the Charging Party's case. At the conclusion of the hearing oral argument was waived and the parties filed post-hearing briefs by September 7, 1983.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, 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 State Board of Higher Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

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.

"(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 Council of New Jersey State College Locals, NJSFT, AFT/AFL-CIO is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. The AFT has been the collective negotiations representative for the faculty of the nine State Colleges for approximately ten years and has entered into a number of collective negotiations agreements with the Board during that period. The most recent collective negotiations agreement expired on June 30, 1983. The material provision from that agreement, Article XXXV "Retrenchment, Retraining and Reinstatement," was received in evidence as CP-1.

4. Article XXXV, supra, provides, in pertinent part, as follows:

> "A. 1. When a tenured faculty member is to be retrenched for financial reasons the College will attempt to provide the involved individual with a full academic year or two successive semesters' written notice of such action, but in no case shall such written notice be less than one hundred ninety-five (195) days... (emphasis supplied).
>
> 3. ...Employees. who are to be retrenched during the term of a multi-year contract will be given one hundred eighty (180) days written notice of such action..." 1a/

5. Negotiations for a successor agreement to CP-1 commenced early in October 1982. Marcoantonio Lacatena, the President of the Charging Party, was the principal negotiator for the AFT and Edwin C. Evans, a Coordinator with the Office of Employee Relations (OER), was the principal negotiator for the Board.

6. On October 5, 1982 Evans told Lacatena in a telephone conversation that there was not much to negotiate with respect to the notice provisions in Article XXXV, supra, in view of a recent New Jersey Supreme Court decision in State College Locals v. State Board of Higher Education, 91 N.J. 18, which was decided in August 1982. Evans added that Article XXXV interfered with RIF procedures because the 195-day notice was too long.

7. Formal collective negotiations commenced on October 18, 1982 where the ground rules for negotiations were established and it was agreed that the parties

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1a/ References hereinafter to 195 days notice shall be deemed to include the 180 days notice provision, supra.

would exchange contract proposals on October 29th with a first negotiations meeting on November 3, 1983.

8. The parties met on October 29th and exchanged non-economic contract proposals. The Board included a proposal for a 30-day notice of retrenchment in lieu of the current 195-day notice in Article XXXV, Section A. 1, supra.[2/]

9. At the November 3rd meeting the parties commenced explanation of their contract proposals and this continued through four meetings in November and on December 1, 1982.

10. On November 9, 1982 the Chancellor of the Board, T. Edward Hollander, called Lacatena to advise him of a three percent (3%) reduction in the budgets for the nine State Colleges. Hollander stated that the Presidents of the Colleges were drafting plans to meet this budget reduction. On November 12th the nine College Presidents sent their plans to Chancellor Hollander, which included furloughs of six-eight days. On November 15th Hollander wrote to Garry Stein of the Governor's office, in which he proposed a salary "roll back" of seven percent (7%). Neither the "roll back" nor the furloughs were ever implemented because of the action of the Legislature on December 30 and 31, 1982 when the budget crisis was resolved by the enactment of additional taxes.

11. On December 7, 1982 the parties in negotiations began responding Article by Article to one another's contract proposals and at three meetings in December they got no further than the grievance procedure - Article VII.

12. At a meeting on January 12, 1983 Evans stated to Lacatena that he was interested in negotiating on the retrenchment (RIF) proposal of the Board. For the first time Evans mentioned the possibility of a notice period of 45 days instead of the original 30 days, which was proposed in October. Lacatena, who had presented the AFT's economic demands earlier, stated that he was not interested in negotiations

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2/ In the preceding collective negotiations the Board had sought a 30-day notice provision for substitution in Article XXXV but this proposal was abandoned. Additionally, during the prior negotiations the Board did not seek to amend any regulation during the course of negotiations as was undertaken during the course of the negotiations in 1982 and 1983 for a successor agreement to CP-1, infra.

on notice but, rather, wanted Evans to submit an economic proposal. Evans refused. From this point the negotiating positions of the parties continued unchanged, both at meetings on January 18th and 20th and in numerous telephone discussions over the next several months and an exchange of letters in March (R-2 and R-3).

13. The parties next met in negotiations on May 18, 1983, at which time Evans placed an economic offer on the table. Lacatena rejected the offer as "ridiculous" and "stormed out of the room." This occurred before there were any negotiations regarding the 45-day notice proposal by the Board. As of the last day of hearing on June 21, 1983 there had been no further negotiations meetings between the parties.

14. The Council of State Colleges (hereinafter the "Council") includes as its members the Presidents and the Chairpersons of the Boards of Trustees of the nine State Colleges. The current Chairperson of the Council is Eleanor Spiegel, the Chairperson of the Board of Trustees of Thomas Edison College. The current Vice-Chairman of the Council is David W. D. Dickson, the President of Montclair State College. The function of the Council is to provide advice to the Board regarding the common concerns of the nine State Colleges. The Council meets monthly for this purpose.

15. At a meeting of the Council on February 15, 1983 Chancellor Hollander was present and, in response to an item on the agenda regarding the modification of the present RIF regulation, stated that OER had brought the issue before the AFT and that the AFT had been reluctant to address the matter. The Chancellor then stated that the Board can only seek modification of the RIF regulation after an impasse has been reached in negotiations.[3/] The Council adopted a motion by a vote of 12-1 to request that the Chancellor urge the Board to reduce the period of notice for RIF and thereby provide the Colleges with greater flexibility. The foregoing is set forth in the minutes of the February 15, 1983 meeting of the Council (CP-6) and was confirmed by the testimony of Chairperson Spiegel and Vice-Chairman Dickson.

3/ This opinion was based on advice from the Attorney General's office.

16. The Council at its next meeting on March 15, 1983 heard a report from Eric M. Perkins, the Special Assistant to the Chancellor, on the legal implications of the proposed amendment to the RIF regulation (CP-7). Perkins testified that the Chancellor requested him to take action on the RIF notice period in February 1983. Perkins prepared a document for transmittal to the Board, which contained a notice period of 45 days. Perkins testified that the period of 45 days was his idea and that he drew upon the Civil Service regulations as the source. He also testified that he had been aware of the 30-day notice period proposed by OER.[4/] Perkins, in orginating the 45-day notice period, concluded that it was legally correct in the light of the State College Locals Supreme Court decision, supra.

17. At a meeting of the Board on March 18, 1983 a memorandum was circulated, which had been prepared by Perkins for the Chancellor (CP-2). In this memorandum the Chancellor recited the history of the regulations of the Board governing RIF, the history of contract negotiations on notice of RIF and the August 1982 Supreme Court decision in State College Locals, supra. The memorandum concluded with a recommendation that the RIF regulation (N.J.A.C. 9:2-3.7)[5/] be amended and published in the New Jersey Register. The proposed amendment was that the notice of layoff be changed from "as soon as possible" to "45 days prior to the date of layoff." It was stipulated that the proposed amendment originated from advice from the Attorney General's office. A resolution to this effect was adopted by the Board at the March 18, 1983 meeting (CP-3). The intention of the Board was that the amendment would become effective

4/ Notwithstanding that Perkins claimed that he originated the 45-day notice proposal, the Chancellor testified that it was his suggestion and that he, too, followed the Civil Service model. He also said that he thought the 45-day period would relate well to the beginning of the second semester. Unlike Perkins, the Chancellor testified that he was unaware that OER had proposed in negotiations a 30-day notice period.

5/ The memorandum and the subsequent resolution erroneously referred to N.J.A.C. 9:2-3.7 when the correct reference should have been N.J.A.C. 9:2-3.8.

July 1, 1983 after the current agreement had expired.[6/]

18. Chancellor Hollander also testified as to the implications of the 45-day RIF notice in the proposed amendment to the RIF regulation vis-a-vis Article XXXV and the 195-day notice provision contained therein. He stated that as presently drawn Article XXXV provides for 195 days of notice "for financial reasons," which includes "fiscal exigency." He defined "fiscal exigency" as a sudden and unexpected fiscal crisis. The Chancellor testified that his intention in amending N.J.A.C. 9:2-3.8 to provide for 45 days of notice was to meet only the contingency of "fiscal exigency." In other words, he perceived the 195-day notice as remaining applicable to instances arising from "financial reasons,"[7/] which might include a sudden increase in the cost of fuel or a drop in enrollment at a given State College.

19. Following discussion among the members of the Council at its meeting on April 12, 1983, regarding the proposed amendment to the RIF regulation (CP-8), the Council at its May 17, 1983 meeting unanimously adopted a motion calling on the Board to defer action on the proposed RIF amendment pending negotiations with the AFT (CP-9). Under date of May 19, 1983, Speigel sent a letter to Chancellor Hollander reciting the foregoing action of the Council at its May 17th meeting (CP-5).

20. Whether or not as a direct result of the Council action of May 17th, the Board removed the RIF notice regulation from the agenda of its meeting of June 17, 1983, and, as of the conclusion of the instant hearing on June 21, 1983, no further action had been taken by the Board. The effect of withdrawing the matter from the June 17th agenda was to preclude final adoption of the RIF notice regulation amendment by July 1, 1983.

6/ Chancellor Hollander also testified that the Board intended to allow negotiations with the AFT over implementation of the proposed amendment to the RIF regulation although he did not believe that the AFT was interested in "bargaining" over it. Evans testified that while he preferred to negotiate the RIF notice, he felt that the unilateral action by the Board was legal under State College Locals, supra.

7/ Evans testified to the contrary, i.e., that he never distinguished between "fiscal emergency" (exigency) and "financial reasons" as to the 195-day notice in Article XXXV.

THE ISSUE

Did the Respondent Board violate Subsections(a)(1) and (5) of the Act when, during the course of negotiations for a successor agreement with the AFT, it unilaterally adopted a resolution on March 18, 1983 which set in motion an amendment to the RIF regulation (N.J.A.C. 9:2-3.8) before an impasse was reached in collective negotiations?

DISCUSSION AND ANALYSIS

The Respondent Violated Subsections (a)(1) And (5) Of The Act When During The Course Of Negotiations For A Successor Agreement, It Unilaterally Adopted A Resolution On March 18, 1983 To Amend N.J.A.C. 9:2-3.8 Before An Impasse Was Reached In Collective Negotiations

Preliminarily, the Hearing Examiner notes that, but for the Board's action of March 18, 1983 in initiating an amendment to N.J.A.C. 9:2-3.8, the Hearing Examiner would not have found a violation of the Act. The basis for this statement derives from an examination of Findings of Fact Nos. 7-9 and 11-13, supra, wherein the actions of Evans, the Board's negotiator, are completely consistent with a finding that Evans negotiated in good faith. On October 29, 1982 Evans initially proposed a 30-day notice of retrenchment in lieu of the current 195-day notice period in Article XXXV. On January 12, 1983 Evans modified the Board's proposal to a notice period of 45 days. The position of the AFT's negotiator, Lacatena, was to reject any negotiations on the period of notice until an economic offer was proposed by Evans. When this finally occurred on May 18, 1983, Lacatena rejected the economic offer and left the room before any negotiations on the 45-day notice period could take place. In so far as this record is concerned there have been no negotiations since that date.

Unfortunately for the Respondent Board, it was not content to rest on the actions of its negotiator, but elected on March 18, 1983 to undertake unilateral action on

a track parallel to that of its negotiator. It is this action of the Board which the Hearing Examiner finds and concludes was a violation of the Act for the reasons hereinafter set forth.

It appears from the record in this case that the Chancellor received sound advice from the Attorney General's office and then proceeded to ignore that advice. As set forth in Finding of Fact No. 15, supra, the Chancellor attended a meeting of the Council on February 15, 1983 where, in responding to an item on the agenda regarding a modification of the present RIF regulation, he stated that OER had brought the issue before the AFT and that the AFT had been reluctant to address the matter. The Chancellor then stated that the Board can only seek a modification of the RIF regulation after an impasse has been reached in negotiations. The Chancellor's opinion with respect to impasse was based on sound advice from the Attorney General's office. The Council adopted a motion requesting the Chancellor to urge the Board to reduce the period of notice for RIF.

The Chancellor, apparently acting in response to the motion adopted by the Council at its February meeting, supra, directed his Special Assistant, Eric Perkins, to take action on the RIF notice. As a result, Perkins prepared a document for transmittal to the Board, which contained a notice period of 45 days.[8/] The language for the proposed amendment to N.J.A.C. 9:2-3.8 originated from advice from the Attorney General's office.

A memorandum (CP-2) was circulated to the Board on March 18, 1983 and the Board on that date adopted a resolution that the RIF regulation be amended so that notice of layoff be changed from "as soon as possible" to "45 days prior to the date of layoff" (CP-3). The Board further resolved that the proposed amendment be published in the New Jersey Register. It was the intention of the Board that the proposed amendment would become effective on or about July 1, 1983, after the current agreement had expired. See Finding of Fact No. 17, supra.

8/ The Hearing Examiner attaches no significance to whether the period of 45 days originated with Perkins or the Chancellor (see Finding of Fact No. 16, supra).

Notwithstanding that the proposed amendment to N.J.A.C. 9:2-3.8 was never consummated, by reason of the Board never having taken final action on adoption at its June 17, 1983 meeting, the Hearing Examiner finds and concludes that the Board violated Subsections(a)(1) and (5) of the Act: City of Jersey City, P.E.R.C. No. 77-58, 3 NJPER 123 (1977) and Rutgers, The State University, P.E.R.C. No. 80-114, 6 NJPER 180 (1980). These decisions compel the conclusion that the Respondent Board failed to negotiate in good faith when on March 18, 1983 it initiated the amendment process unilaterally and without collective negotiations with the AFT, in the absence of a declaration of impasse by one of the parties and without thereafter entering into mediation and fact finding under the rules and regulations of the Commission.

If the 45-day notice period "proposal" of the Board, as made by Evans, is deemed its "last best offer" then City of Jersey City, supra, sets forth the Commission's standards for unilateral implementation of the "last best offer" by a public employer. There the Commission held if the parties have exhausted the dispute resolution procedures, supra, and a genuine impasse still exists, then the public employer may act unilaterally without committing an unfair practice.

The Commission elaborated further on this question in Rutgers, supra, stating:

> "...Whether an impasse has been reached is a difficult judgment to make and must be tied to each specific situation. We perceive it to be a hybrid, partly a factual determination and partly a conclusion of law..." (6 NJPER at 181).

In Rutgers the Commission found that an unfair practice had not occurred because the mediation and fact finding phases of negotiations had been concluded and, notwithstanding additional discussion between the parties thereafter, there was nothing to indicate that "...the impasse was less than real... We will not utilize a mechanical counting of the number of bargaining sessions but will look to the totality of the negotiations history in all post-fact finding unilateral implementation matters..." (Emphasis supplied) (6 NJPER at 181).

Based on Jersey City and Rutgers, supra, the Hearing Examiner has no difficulty

in supporting his conclusion that given the "totality of the negotiations history" herein, which, as noted above, is basically the conduct of OER negotiator Evans on the one hand, and the parallel actions of the Board, commencing on March 18, 1983, on the other hand, the Board violated Subsections(a)(1) and (5) of the Act. First, the Chancellor and the Board ignored the advice received from the Attorney General's office that unilateral implementation of a change in the RIF regulation could only occur after impasse. As noted above, under the Commission's decision in Jersey City there must be an exhaustion of the dispute resolution procedures provided for in the Commission's regulations before unilateral implementation by the employer of its "last best offer." 9/ In addition, Rutgers, suggests that, even after the conclusion of fact finding, there must be some further effort by the parties to resolve the impasse before unilateral implementation may be made. Since the Commission's dispute resolution procedures have never been exhausted by the Respondent herein, the instant case does not begin to satisfy the standards of Jersey City and Rutgers, supra.

The Hearing Examiner now turns to the several arguments of the Respondent that the Board's action of March 18th, in undertaking to amend N.J.A.C. 9:2-3.8, supra, preempted collective negotiations on the subject matter of the RIF notice period, relying upon State Supervisory 10/ and State College Locals, supra.

The Respondent first cites and then dismisses as inapposite the Supreme Court's decision in Galloway Township Board of Education v. Galloway Township Education Association, 78 N.J. 25 (1978) (Respondent's Main Brief, p. 5). Admittedly, Galloway did not involve a State agency, but the Hearing Examiner concludes that several of the principles stated therein are germane to the instant case. For example, drawing upon private sector precedent, the Court said:

9/ See N.J.A.C. 19:12-3.1 to 3.5 and 19:12-4.1 to 4.3.

10/ State v. State Supervisory Employees Association, 78 N.J. 54 (1978).

> "...an employer's unilateral alteration of the prevailing terms and conditions of employment during the course of collective bargaining concerning the affected conditions constitutes an unlawful refusal to bargain, since such unilateral action is a circumvention of the statutory duty to bargain. NLRB v. Katz, 369 U.S. 736, 743-47...(1962)... 'Unilateral' in this regard refers to a change in the employment conditions implemented without prior negotiation to impasse with the employee representative concerning the issue... Unilateral changes... are unlawful because they frustrate the 'statutory objective of establishing working conditions through bargaining.' NLRB v. Katz, supra, 369 U.S. at 744 ..." (78 N.J. at 48) (Emphasis supplied).

The Court also noted that our legislature has recognized that unilateral imposition of working conditions is the antithesis of its goal that terms and conditions of employment be established through bilateral negotiations. The Court then quoted from N.J.S.A. 34:13A-5.3, which provides, in part, that, "Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established." The Court then stated explictly in footnote 9 that the quoted provision, supra, precludes not only a unilateral change in terms and conditions of employment during the period of negotiations for a new collective agreement, but, also, "...applies at all times and is thus more expansive than the Katz rule..." (78 N.J. at 49).

It is true that in State Supervisory, which dealt with the effect of regulations on collective negotiations, the Supreme Court said, paraphasing, that the adoption of any specific regulation, which sets or controls a particular term or condition of employment will preempt any inconsistent provision of a negotiated agreement (78 N.J. at 81). However, in State College Locals, supra, the Supreme Court further refined the issue of when a regulation by a State agency is entitled to preemptive effect. The defendant in State College Locals was the State Board of Higher Education, the Respondent herein. The Court noted that the Board is both a regulator and an employer, and that:

> "When an agency performs dual roles as both regulator and employer, the possibility exists that the agency could use its preemptive regulatory power in an abusive or arbitrary manner to insulate itself from negotiations with its employees..." (91 N.J. at 27).

The Court then went on to state that where a State agency is a regulator-employer

the preemption normally accorded the State agency's administrative regulations "...must be qualified." (91 N.J. at 28). The Court said further that:

> "...if the agency acts in dual capacities and promulgates a regulation affecting employees under its control, its regulations establishing terms and conditions of employment will not necessarily preempt negotiation on the subject matter covered therein. In this latter setting, preemption will be presumed. However, that presumption can be overcome by demonstrating that the regulations were arbitrary, adopted in bad faith, or passed primarily to avoid negotiation on terms and conditions of employment. When such a showing is made, the regulations will not be given preemptive effect." (91 N.J. at 28) (Emphasis supplied).

Finally, the Court listed eight relevant factors for use in rebutting the presumption of preemptive effect, among which are the circumstances under which the regulation was adopted and the basic fairness of the regulation to the employees affected.

The Respondent seeks to distinguish the instant case from State College Locals by reason of the fact that here the effort to amend the RIF notice period regulation has not been consummated, i.e., the Board has not yet adopted the amended regulation. The Hearing Examiner finds that this is a distinction without meaning, given the dynamics of collective negotiations. The chilling effect on employees represented by the AFT, as a result of the Board's unilateral action on March 18th, is clearly within the scope of the concern delineated by the Supreme Court in Galloway, supra, where the Court, in proscribing unilateral conduct by a public employer, said that it:

> "...would also have the effect of coercing its employees in the exercise of the organizational rights guaranteed them by the Act because of its inherent repudiation of and chilling effect on the exercise of their statutory right to have such issues negotiated on their behalf by their majority representative..." (78 N.J. at 49) (Emphasis supplied).

Counsel for the Respondent contends that it has satisfied all of the eight relevant factors listed by the Supreme Court in State College Locals (see Respondent's Main Brief, p. 11-14). These factors were listed by the Court as guidelines for determining whether or not preemptive effect should be given to a regulation. However, prior to the enumeration of the eight factors, the Court first pointed to "bad faith" adoption and primary avoidance of negotiation on terms and conditions of employment as demonstrating that preemptive effect should not be given. Under the Jersey City

and Rutgers analysis, supra, the Hearing Examiner has concluded that the Board engaged in bad faith negotiations by having sought to implement an amendment to the RIF notice regulation prior to impasse and exhaustion of the dispute resolution procedures of the Commission under its rules. Further, the Hearing Examiner concludes that while the Board's action was not "arbitrary," it was undertaken primarily to avoid negotiations with the AFT and was a unilateral action to reduce the 195-day notice period to 45 days.

Finally, the Hearing Examiner, in considering two of the eight relevant factors, supra, which he deems pertinent herein, notes that (1) the circumstances under which the resolution, seeking to amend the RIF regulation, was adopted are tainted by the fact that the parties had not yet reached an impasse in their negotiations for a successor agreement; and (2) the actions of the Board on and after March 18th appear to be basically unfair to the affected employees, in that, without negotiations, the Board acted unilaterally in derogation of the employees' statutory right to have changes in their terms and conditions of employment negotiated by their majority representative. 11/

For all of the foregoing reasons, the Hearing Examiner finds and concludes that the Respondent Board violated Subsections(a)(1) and (5) of the Act by its conduct herein.

* * * *

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

CONCLUSION OF LAW

The Respondent Board violated N.J.S.A. 34:13A-5.4(a)(1) and (5) when, during the course of negotiations for a successor agreement, it unilaterally adopted a resolution on March 18, 1983 to amend N.J.A.C. 9:2-3.8 before an impasse had been reached in collective negotiations.

11/ See Galloway, supra. (78 N.J. at 49).

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Board 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 unilaterally adopting a resolution to amend the RIF notice regulation before an impasse has been reached in collective negotiations.

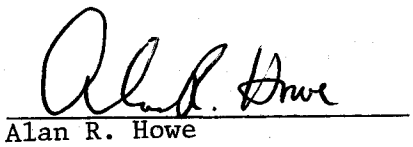
2. Refusing to negotiate in good faith with the AFT, the majority representative, concerning a proposed reduction in the RIF notice period from 195 days to 45 days, particularly, by unilaterally adopting a resolution to amend the RIF notice regulation before an impasse has been reached in collective negotiations.

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

1. Upon demand, negotiate in good faith with the AFT concerning the Respondent's proposal to reduce the RIF notice period from 195 days to 45 days, and refrain from implementing any change in the RIF regulation (N.J.A.C. 9:2-3.8) before a declaration of impasse and the exhaustion of the Commission's dispute resolution procedures (N.J.A.C. 19:12-3.1 to 3.5 and 19:12-4.1 to 4.3).

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 by the Respondent Board to insure that such notices are not altered, defaced or covered by other materials.

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



Alan R. Howe
Hearing Examiner

Dated: September 26, 1983
Trenton, New Jersey

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 NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly, by unilaterally adopting a resolution to amend the RIF notice regulation before an impasse has been reached in collective negotiations.

WE WILL NOT refuse to negotiate in good faith with the AFT, the majority representative, concerning a proposed reduction in the RIF notice period from 195 days to 45 days, particularly, by unilaterally adopting a resolution to amend the RIF notice regulation before an impasse has been reached in collective negotiations.

WE WILL, upon demand, negotiate in good faith with the AFT concerning our proposal to reduce the RIF notice period from 195 days to 45 days, and refrain from implementing any change in the RIF regulation (N.J.A.C. 9:2-3.8) before a declaration of impasse and the exhaustion of the Commission's dispute resolution procedures (N.J.A.C. 19:12-3.1 to 3.5 and 19:12-4.1 to 4.3).

STATE BOARD OF HIGHER EDUCATION
(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 Jeffrey B. Tener, Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780