

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Respondent,

-and-

Docket Nos. CO-78-250-78
and CO-78-241-85

RUTGERS COUNCIL OF AMERICAN
ASSOCIATION OF UNIVERSITY
PROFESSORS,

Charging Party.

SYNOPSIS

The Commission affirms a Hearing Examiner's Recommended Report and Decision in which the Hearing Examiner had found that the University had not violated the Act when it implemented a new grievance procedure covering faculty personnel decisions but that it had violated the Act when it failed to negotiate, upon demand, with the AAUP regarding a definition of grievance which comports with the statutory requirements.

P.E.R.C. NO. 80-114

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RUTGERS COUNCIL OF AMERICAN
ASSOCIATION OF UNIVERSITY PROFESSORS,

Charging Party.

Appearances:

For the Respondent, Pitney, Hardin & Kipp, Esqs.
(Mr. S. Joseph Fortunato, of Counsel)

For the Charging Party, Sterns, Herbert & Weinroth, Esqs.
(Mr. John M. Donnelly, of Counsel)

DECISION AND ORDER

Two Unfair Practice Charges were filed with the Public Employment Relations Commission by Rutgers Council of American Association of University Professors ("AAUP") alleging violations of the New Jersey Employer-Employee Relations Act ("Act") by Rutgers, The State University ("Rutgers"). The Director of Unfair Practices, Carl Kurtzman, issued an Order Consolidating these matters, and a hearing was held before Commission Hearing Examiner Edmund G. Gerber. He issued his Recommended Report and Decision on November 15, 1979, designated as H.E. No. 80-21, 6 NJPER 1 (¶11000, 1979). A copy is attached hereto and made a part hereof. Exceptions were filed by both parties, as well as replies to the exceptions which were received by January 2, 1980.

Oral argument was heard by the Commission on February 19, 1980.

In his report, the Hearing Examiner recommended that one charge be dismissed. This related to the unilateral implementation of a new grievance procedure for faculty personnel decisions (Article 10), which was distinct from the grievance procedure for all other matters (Article 9). This other grievance procedure was the subject of the second charge, in which the Hearing Examiner found that Rutgers had failed to negotiate upon demand with the AAUP regarding a definition comporting with the statutory requirements.

Unilateral Implementation

Negotiations for a successor to the 1975-77 contract between the parties had apparently been all but concluded by September 1977 when the Governor rejected the proposed economic settlement. With negotiations necessarily "reopened" at that time, Rutgers informed the AAUP that it wished to have a new procedure for grieving personnel decisions. Its proposal on that item was given to the AAUP in early December, and shortly thereafter a counter-proposal was submitted. Primarily at issue was the question of whether a panel of arbitrators, which was to be the final step in the procedure, would have the power to order a substantive remedy or whether it would be limited to remanding a dispute to the decision-making body. As found by the Hearing Examiner, and not disputed, there were negotiations on this topic

during a number of sessions between December 12 and January 18, with no change in position. Although the parties did reach a tentative new economic agreement in January, remaining issues went to a fact-finder who took formal testimony and evidence, issuing a report on April 4, 1978. On the remedy dispute, the fact-finder recommended limiting remedy to remands as per the Rutgers proposal.

Two negotiations sessions were held after the fact-finder's report came out, and although there was compromise by Rutgers on other aspects of the personnel grievance procedure, no movement took place on the remedy question. Rutgers proposed a 20 day moratorium on personnel grievances - personnel actions were due on April 14 - and the AAUP rejected that notion on April 12. Outside the meeting itself, Rutgers' attorney asked AAUP's attorney if he was correct in understanding that substantive remedy power was "essential" to reaching an agreement, and was given an affirmative answer. Two days later Rutgers unilaterally implemented the new procedure it had proposed - as modified by the negotiations in some areas - claiming that an impasse existed.

In re City of Jersey City, P.E.R.C. No. 77-58, 3 NJPER 123, (1977), sets forth the Commission's standards for unilateral implementation of a last best offer by the employer. If the parties have exhausted dispute resolution procedures and a genuine impasse still exists, then the employer may act without

committing an unfair labor practice.^{1/} 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. In that context our conclusion herein is that the Hearing Examiner was correct in determining that an impasse on the issue of remedy did exist. We are not persuaded that the obvious - and undenied - concern of Rutgers regarding the imminent announcement of personnel actions injected a note of bad faith or indicated that the impasse was less than real. That was the traditional time for such actions to take place and could not lightly be changed. Moreover, the concessions made by Rutgers on other aspects of the grievance procedure^{2/} are an indication of its good faith. 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. Herein we are satisfied that no unfair practice took place.

West Windsor

Rutgers has excepted to the Hearing Examiner's recommendations that a violation of N.J.S.A. 34:13A-5.4(a)(5) be found

1/ Passage of P.L. 1977, c. 85 (N.J.S.A. 34:13A-14 et seq.), mandating binding interest arbitration for police and fire employees makes this a moot point for those employees.

2/ Although the fact-finder agreed that the Provost should serve on the first step Committee of Review, Rutgers acceded to the AAUP demand to delete him.

for its refusal to negotiate a grievance procedure - apart from the personnel grievance procedure treated supra. - in accordance with the requirements of N.J.S.A. 34:13A-5.3 as analyzed by the Commission in In re Township of West Windsor, P.E.R.C. No. 77-59, 3 NJPER 124 (1977), aff'd as modif. 78 N.J. 98 (1978). There is no dispute that the AAUP's demand to negotiate so that Article 9 of the contract comported with West Windsor was refused by Rutgers. It is now urged that the modification of our decision by the Supreme Court negated any duty to negotiate with the AAUP on that score. We do not agree.

Our West Windsor decision literally interpreted §5.3 to require negotiations for a grievance procedure covering all decisions affecting employees. The Supreme Court limited the words "affecting them" to meaning affecting terms and conditions of employment. With that clarification, it affirmed. Rutgers' refusal to negotiate at all regarding the Article 9 grievance procedure is a clear violation of the Act notwithstanding the Supreme Court having narrowed the scope of negotiations somewhat.^{3/} Therefore, we also affirm that portion of the Hearing Examiner's report.

ORDER

For the foregoing reasons and upon the entire record herein, IT IS HEREBY ORDERED that Rutgers:

^{3/} We agree with the Hearing Examiner that the later decision in Bd of Ed, Bernards Twp. v. Bernards Twp. Education Assn, 79 N.J. 311 (1979) expanded the scope of negotiated grievance procedures, but find it unnecessary to use that case as a basis for our decision herein.

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, in particular by refusing to negotiate an appropriate grievance procedure to cover the interpretation, application or violation of policies, agreements, and administrative decisions affecting employees.

B. Take the following affirmative action:

1. Negotiate upon demand with the Rutgers Council of American Association of University Professors concerning a grievance procedure covering the interpretation, application or violation of policies, agreements and administrative decisions affecting employees represented by the AAUP.

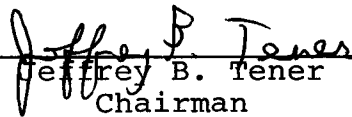
2. Post copies of the attached notice marked "Appendix A". Copies of said notice on forms to be provided by the Commission shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof, and maintained by it for a period of at least sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by said Respondent to insure that such notices are not altered, defaced or covered by any other material.

3. Notify the Chairman, in writing, within twenty (20) days of receipt of this Order what steps said Respondent

has taken to comply herewith.

IT IS HEREBY FURTHER ORDERED that the unfair practice charge relating to implementation of a faculty personnel grievance procedure be dismissed in its entirety.

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Graves, Hartnett, Hipp, Newbaker and Parcells voted for this decision. None opposed.

DATED: Trenton, New Jersey
April 3, 1980
ISSUED: April 7, 1980

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, in particular by refusing to negotiate an appropriate grievance procedure to cover the interpretation, application or violation of policies, agreements, and administrative decisions affecting employees.

WE WILL negotiate upon demand with Rutgers Council of American Association of University Professors concerning a grievance procedure covering the interpretation, application or violation of policies, agreements and administrative decisions affecting employees represented by the AAUP.

Rutgers, The State University

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

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
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ASSOCIATION OF UNIVERSITY PROFESSORS,

Charging Party.

RUTGERS, THE STATE UNIVERSITY,

Respondent,

-and-

Docket No. CO-78-241-85

RUTGERS COUNCIL OF AMERICAN
ASSOCIATION OF UNIVERSITY PROFESSORS,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends to the Public Employment Relations Commission (Commission) the dismissal of a complaint alleging that Rutgers, The State University, committed an unfair practice when it unilaterally imposed a new personnel grievance procedure. It was found that the University negotiated for a new procedure in good faith and the parties exhausted all the Commission's conciliation procedures. It was only when a genuine post fact-finding impasse was reached that the University implemented its last best offer.

It was further recommended that the Commission find that Rutgers committed an unfair practice when it refused to negotiate a grievance procedure that covered the scope of possible grievances as defined in the Commission's West Windsor decision. It was recommended that the Commission find the University guilty of subsections (a)(1) and (5) of the Act.

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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-and-

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Appearances:

For the Respondent
Pitney, Hardin & Kipp
(S. Joseph Fortunato, of Counsel)

For the Charging Party
Sterns, Herbert & Weinroth, Esqs.
(John M. Donnelly, of Counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

The Rutgers Council of American Association of University Professors (AAUP) filed two separate charges with the Public Employment Relations Commission (Commission) alleging that Rutgers, The State University, engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended (Act), specifically N.J.S.A. 34:13A-5.4(a)(1) and (5) ^{1/} by its conduct in negotiations. The first charge was filed on April 7, 1978, and alleged that

^{1/} These subsections prohibit 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. (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."

Rutgers refused to negotiate a grievance procedure in conformity with the Commission's decision in Township of West Windsor, PERC No. 77-59, 3 NJPER 124 (1974). The second charge was filed on April 21, 1978. This charge incorporated the allegations of the April 7 charge and, in addition, alleged that Rutgers unilaterally implemented a personnel grievance procedure without reaching a post fact-finding impasse. The AAUP submitted an application for interim relief, which was subsequently denied in a proceeding before Stephen B. Hunter, Special Assistant to the Chairman.

It appearing that the allegations of the charges filed by the AAUP, if true, might constitute unfair practices within the meaning of the Act, consolidated Complaints and a Notice of Hearing were issued on June 20, 1978. Hearings were held in New Brunswick, New Jersey, on July 25, August 2, August 24, September 12, October 6, November 15, December 13, 1978 and January 29, 1979, at which time all parties were given an opportunity to examine witnesses, present evidence and to argue orally. Briefs and supplemental briefs were received by May 7, 1979.

It is undisputed that Rutgers and the AAUP are respectively a public employer and an employee representative within the meaning of the Act.

The Unilateral Implementation

The 1975-1977 contract between Rutgers and the AAUP provided for two separate grievance procedures. The Article 9 Grievance Procedure governs grievances that allege violations of provisions of the contract or regulations concerning terms and conditions of employment other than regulations concerning personnel actions. The Article 10 Faculty Personnel Grievance Procedure governs claims of "violations of established University regulations and procedures or provision of the agreement regarding failure to award tenure, promotion or reappointment." This complaint concerns the conduct of negotiations and Rutgers' subsequent unilateral modifications to the Article 10 Faculty Personnel Grievance Procedure. The AAUP claims that Rutgers did not bargain in good faith during the course of negotiations and further a legitimate post fact-finding impasse was not reached in the course of bargaining. Accordingly the AAUP argues it was improper for Rutgers to unilaterally alter the Article 10 Grievance Procedure.

Rutgers maintains that it did bargain in good faith, honestly attempted

to reach an agreement and did not alter the contract until there was a legitimate post fact-finding impasse.

Both Rutgers and the AAUP rely on the Commission's decision In the Matter of City of Jersey City, P.E.R.C. No. 77-58, 3 NJPER 123 to support their respective positions.

In Jersey City the city and the union, Local 246, were negotiating for a new contract. The city claimed that it was in a fiscal emergency and took the position in negotiations that it was forced to increase the hours of all its employees including the unit members in question by one hour a day without a corresponding increase in salary. The union would not agree to such a change. After six negotiating sessions the parties then went through mediation and thereafter fact-finding. The fact-finder's report was rejected by both sides. After two additional negotiation sessions the city unilaterally altered the work week of unit members. The union filed an unfair practice charge claiming the city could not lawfully implement such a change unilaterally. The Commission held that the city did not commit an unfair practice. An employer is generally precluded from altering the status quo regarding terms and conditions of employment while engaged in collective negotiations but the Commission recognized that there must be some ultimate resolution to the bargaining process. If the employer demonstrates an honest desire to reach an agreement, uses the impasse resolution procedures of the Commission and still the parties cannot reach an agreement, then the employer does not commit an unfair labor practice by unilaterally implementing its last best offer made during negotiations so long as the offer imposed reflects the employer's best offer, in terms of the employee organization.

In the instant matter, the parties commenced negotiations for a new contract to succeed the 1975-1977 contract in October of 1976. The parties negotiated steadily until June 24, 1977 when the parties entered into a tentative economic agreement and on July 1 the parties began negotiations for modifications to the Article 10 Grievance Procedures. The Article 10 Grievance Procedure provides for a four-step procedure.^{2/} The first step is a review by the grievant's dean or director. The second step is a formal hearing before the Committee of Review and the Committee of Review issues a written decision. Either party may appeal to the

^{2/} These are formal steps. The procedure expressly encourages informal settlement as well.

third step, the University Appeals Committee, which is composed of three faculty members chosen by the AAUP, three persons appointed by Rutgers and a seventh member chosen by the appointed members. A decision of this committee is considered advisory to the President and the Board of Governors. If the President's decision is at odds with the University Appeals Committee, the entire matter is put before the University Senate. The Senate then transmits its findings with a recommendation to the Board of Governors, whose decision on the issue is final.

While negotiations were continuing on non-economic items the Governor's office announced that it was rejecting the tentative economic agreement. Shortly thereafter Rutgers put an entirely new economic proposal on the table. On September 30, 1977, Rutgers indicated it believed the parties had reached an impasse over economics. Further, Rutgers and the AAUP, according to Sandra Walther, the Executive Director of Rutgers Council AAUP, and Richard Peskin, chief negotiator for the AAUP, were essentially in agreement on modifications to Article 10. But Rutgers outlined a proposal for an entirely new Article 10 grievance procedure. Rutgers filed a Notice of Impasse and a fact finder was appointed. The first meeting with the fact finder was on December 9. The parties agreed that the fact finder would initially serve as a mediator in an attempt to reach a settlement. At the next meeting, on December 12, the parties largely discussed economics although Rutgers distributed written copies of their proposed new grievance procedure.

The University's proposed procedure consisted of two main steps, first an informal hearing before the Committee of Review. The committee's recommended decision is then forwarded to the President. If the grievant is not satisfied with the President's answer the grievant may then proceed to arbitration before a tripartate panel, one member chosen by the AAUP, one by Rutgers and a neutral arbitrator. The decision of the arbitration panel (as well as the recommended decision of the Committee of Review) is expressly limited to remand to the decision-making body for reconsideration.^{3/} At the December 6 meeting Peskin took the position Article 10 was settled by the understanding of September 30. Rutgers responded that if every other item in the contract was agreed to, the earlier understanding would be agreeable to the University. Peskin was then asked to identify the elements of the personnel grievance procedure he felt were most important. He identified availability of a

^{3/} Unless there was personal prejudice against the grievant, in which case a substituted body will reconsider the aggrieved personnel action.

remedy other than remand; termination of the process in peer review and continuation of the Committee of Review as it was then constituted.

At the next meeting, on December 12, counsel for Rutgers, H. Reed Ellis, reiterated that Rutgers could not agree to the panel of arbitrators having any power beyond remand.

The AAUP maintained that they were preoccupied with economic issues during this time. However at the December 16 meeting between the parties, the AAUP had their own counterproposal ready and submitted it to Rutgers. The major difference between its personnel grievance procedure and Rutgers' is that, in addition to a remand remedy the proposal provides that in those cases where the panel of arbitrators decides that the evidence of violation is sufficiently strong and convincing, the panel of arbitrators can order a substantive remedy.

On January 18 the parties reached a tentative settlement on an economic package that was ultimately implemented. Also at that meeting Rutgers submitted a revised personnel grievance procedure in which the Provost served on the Committee of Review and again in which remand is the sole and exclusive remedy that can be awarded by the arbitration panel.

All in all between December 12 and January 18 there were six negotiations sessions, two of these sessions were also part fact-finding sessions. At each session there was a half-hour to an hour of negotiations over the personnel grievance procedure and at one meeting, on December 29, there was approximately six hours of negotiations concerning the personnel grievance procedure. At no time did either party modify their position as to the remedy available to the arbitration panel.

Formal fact-finding on the grievance procedure occurred on January 17 and 18 and February 17 and 23. The parties met with the fact finder on March 27, when he told the parties of his thinking and asked them for their comments.

On April 4, 1978, the fact finder issued his report. Although the fact finder report states "The following recommendations are made in the hope that they will form the basis for further discussion between the parties and resolution hereafter, they do not incorporate specific language in most instances but deal rather in broad principles," the fact finder's recommendations are very specific and simply adopt or modify the University's report paragraph by paragraph. The fact finder recommended that the arbitration panel be limited to a remedy of remand.

He also recommended that the Committee of Review hearing be formal in nature and further that the Provost play a part in the Committee of Review. On April 7 the parties met to discuss the fact finder's report. Rutgers announced that it would agree to the fact finder's report and handed out a revised proposal which Rutgers felt was in accord with the fact finder's recommendations. The procedure did include a formal proceeding before the Committee of Review. There is some dispute as to whether the parties negotiated at this meeting or merely reviewed the fact finder's report and Rutgers revised proposal. The meeting lasted three hours and the AAUP did express its position as to items in the report. At the end of the meeting Ellis proposed that the parties hold the filing of grievances under Article 10 in abeyance for 20 days so that negotiations could continue. The Board of Governors was scheduled to meet on April 14 and consider personnel action for the upcoming academic year. Rutgers wanted the new grievance procedure in place to handle the anticipated grievances of the Board's action. The AAUP took this proposal under advisement.

The parties next met on April 12. The meeting began at 2 p.m. with agreement that negotiations would conclude at 8 p.m. At the outset Peskin

Rutgers' proposed moratorium on the filing of grievances - at this meeting agreed after a long caucus to remove the Provost from the Committee. Walther acknowledged that this was an important concession from the University. There was much discussion as to open procedural questions, as an example agreed to an AAUP position that the record made by the Committee of Review would go forward to the arbitration panel, but the AAUP wanted a definition of what was the record. The AAUP feels that this question (as with other procedural questions) was never resolved.

The major area of disagreement, what Peskin characterized at the time as "philosophically the most important issue" was the question of substantive remedy. Rutgers maintained its position that the only remedy available to the arbitration panel was remand. They did not want an infringement on academic judgment; the Board of Governors should not be limited in their actions.

The AAUP suggested alternative solutions, such as non-binding recommendations made by the arbitrators and they wanted to discuss, as they phrased it, alternative rather than substantive remedies. Shortly before the meeting was to end Ellis asked for the AAUP's bottom line. The AAUP responded that they weren't thinking that way. The University's position was they did not want non-binding remedies and demanded specific language precluding other remedies (it is noted that the phrase

"sole and exclusive remedy" had been in the Rutgers proposals since December 12). Ellis testified that Peskin stated the authority of the Committee of Review and the Panel of Arbitrators to make recommendations other than remand was an essential and critical attribute of any agreement. Peskin's testimony varied from Ellis' on this matter. But Ellis also testified that he spoke privately with the attorney for the AAUP during the negotiations session and asked if his (Ellis') understanding of Peskin's position was correct. That is, an essential attribute of the agreement had to be the University's willingness to permit the Committee of Review and the Panel of Arbitrators to recommend substantive remedies. Counsel for the AAUP acknowledged that Ellis' understanding was correct and this testimony stands uncontroverted. Then Rutgers announced that the AAUP had received its last best offer. The AAUP suggested that since it was after 8:30 the meeting end and "the University and the AAUP considered their respective flexibility." The University responded there was a post fact-finding impasse on a critical issue. Rutgers offered to meet within a day or two to attempt to come to a resolution before the Board of Governors meeting or, alternatively, to agree to a 20-day moratorium on the filing of grievances. There was no agreement and two days later without a prior announcement, Rutgers Board of Governors implemented the new procedure.

The AAUP argues that the negotiations leading up to fact-finding were in bad faith and that Rutgers rushed the parties into fact finding before there was a legitimate impasse. During November 1977 the AAUP wouldn't meet with Rutgers unless the fact finder was present. The parties were clearly in a bad way over economics and there was an impasse on that issue. Also, there is no evidence that the AAUP ever expressed to the fact finder that formal fact-finding over the grievance procedure was premature at the time it commenced. The argument that these issues were not given enough time for negotiations is unpersuasive. For as noted the parties clearly had time after the January economic settlement to continue to negotiate but they did not -- because the major issue was clear and well defined. Rutgers did not want the old cumbersome Article 10 procedure and they wanted remedy limited to remand. The AAUP on the basis of their conduct had no objection to a simplified procedure but they wanted alternative remedies.

The AAUP objected to Rutgers inserting a new proposal on the grievance procedure into the negotiations after the parties had reached a tentative agreement on that issue. When the new proposal was introduced into negotiations, the tentative economic package had fallen through and the parties had to begin a new round of

negotiations. There were no negotiation ground rules to prohibit the introduction of new items into negotiation and as the AAUP inferentially argues in the West Windsor aspect of this case, the obligation to negotiate over all terms and conditions of employment is ongoing. The obligation is satisfied only when a contract is signed and even then the obligation to negotiate continues as to those terms and conditions of employment not covered in the contract.

The AAUP also argues that Rutgers could not implement the new procedure because there was not a genuine post fact-finding impasse. Rutgers was simply preoccupied with getting the new procedure implemented before the Board of Governors made the personnel actions on April 14, and their refusal to bargain beyond April 14th unless there was a moratorium created unlawful preconditions to bargaining. The AAUP also points to the prior experience of Rutgers and AAUP bargaining when parties bargained for several months after a fact finder's report.

They also point to a number of procedural ambiguities and inconsistencies that were not fully negotiated prior to implementation. ^{4/}

Taking the AAUP's last argument first, it is true that there is a recognized duty to continue to bargain despite an impasse on one issue, but this must be distinguished from an impasse on a critical issue. American Fed. of Television and Radio Artists v. NLRB, 395 F.2d 633, 67 LRRM 3032 (CAD, 1968). Here, the other unresolved issues were procedural in nature. The only area of substantive dispute was the issue of remedy and the University was not prepared to budge. Rutgers uniformly kept their position throughout the negotiations and once the fact finder upheld their position, it is not realistic to think that they would give in to the AAUP's position.

The AAUP's position on the issue of remedy was more than pragmatic, it was philosophic, witness Peskin's statement. It was not realistic to think that further legitimate progress could be made in spite of the language changes suggested. The University already had given in to the AAUP on an important issue (the removal of the Provost from the Committee of Review) so there was little further room for compromise. Resolution of all procedural issues would not result in a breakthrough

^{4/} A case in point is transcripts at the Committee of Review. In a post-hearing letter the AAUP brought to the hearer's attention a very large bill for such transcripts. The implemented procedure provides that the cost of transcripts is to be split between the parties. It is noted however that the pre-fact-finding positions of the parties was that the AAUP wanted a formal Committee of Review hearing with a record and Rutgers wanted an informal hearing with no mention of a record. In the AAUP's brief to the fact finder the AAUP suggests that the arbitrators should have either a transcript or a recording of the Committee of Review proceeding and it was the fact finder in his report who suggests that a stenographic transcript be made with the parties sharing the costs.

on remedy. 5/

Having found a deadlock, it follows that further negotiations would not be fruitful. As in Jersey City, supra, the number of meetings after fact-finding does not control when a post fact-finding impasse occurs. The parties must exhibit a sincere desire to reach an agreement but that does not mean they cannot take a firm, hard stand on one issue as Rutgers did. Their refusal to meet again without pre-conditions was not motivated by bad faith, it was motivated by realism. Granted the timing of the impasse is questionable. Rutgers undoubtedly was in a rush to get the new procedure implemented. But its underlying position was legitimate. Rutgers demonstrated a sincere desire to reach an agreement as well. The fact finder upheld their position that the Provost should be included in the Committee of Review. But Rutgers moved off this position in an effort to resolve the deadlock. Accordingly, the undersigned will recommend to the Commission that they dismiss the charge relating to Rutgers' unilateral implementation of a grievance procedure.

The AAUP points out that if Rutgers committed an unfair practice when it refused to negotiate a West Windsor grievance procedure, then such an unfair practice must be considered in evaluating whether Rutgers acted in good faith. It is noted elsewhere Rutgers was required to negotiate a West Windsor type procedure and this finding has been considered. However such a consideration does not alter the undersigned's overall view of the conduct of the parties.

The charging party argues that the respondent Rutgers has the burden of proof in proving its unilateral actions were not an unfair practice. It argues that in order to make out a prima facie case of unfair practice the charging party need only prove that the employer unilaterally changed a term and condition of employment during the pendency of negotiations. Once that has been shown, the charging party has discharged its burden and it has proved a violation of the Act. The burden then shifts to the respondent to show as a defense to the charges that it properly made the change in status quo during negotiations. After making a prima facie case the burden of proof and the burden of going forward with the evidence shifts to the employer to prove its unilateral action was permissible.

The charging party has confused the requirement to go forth with evidence during the course of a hearing with the standards applied to the evidence at the conclusion of a hearing. If the charging party makes out a prima facie case, then the burden

5/ Walther testified a number of the unresolved issues could not be identified until the procedures were implemented. This situation would not have changed if there was an agreement. Contracts have unanticipated problems. Also the duty to negotiate is ongoing however and does not end with the imposition of the grievance procedure. The parties should still negotiate on those unresolved aspects of the grievance procedure.

is on the respondent to go forward but it need only make out its own prima facie case. If the evidence of the parties is qualitatively equal the respondent must prevail. N.J.A.C. 19:14-6.8 is explicit: the charging party must prove the allegations in its complaint by a preponderance of the evidence. This standard is applied at the end of the case after all evidence is before the trier of facts. Accordingly the burden never shifts. Merely because the respondent's defense is, in effect, an affirmative defense does not change the charging party's burden.

The charging party further argues that because this case deals with the imposition of a grievance procedure it must be looked at in a different light. The Act provides "public employees shall negotiate written policies setting forth grievance procedures by means of which their employees may process grievances." It is argued that this language represents a strong policy recognition of the desirability of mutually agreed upon dispute resolution mechanisms. This is correct as far as it goes, but the parties did negotiate and went as far as they could in negotiations. Further, the instant case was not over the filing and processing of grievances. Rather it was over the remedy available in arbitration and the same paragraph of the Act quoted by the AAUP states that "grievance procedures may provide for binding arbitration as a means of resolving disputes." (emphasis supplied). Clearly the Act does not recognize policy considerations concerning a final binding step in the negotiations process. Therefore its argument, which in other circumstances might be compelling, falls short here.

Finally, it is argued that the University may not "unilaterally impose a final and binding arbitration clause upon another party." The AAUP cites Apostolico v. County of Essex, 142 N.J. Super. 296. A trial judge ordered the parties to enter into binding arbitration to resolve a dispute over wages and hours. The employer appealed and the appellate court reversed stating binding arbitration can be invoked only upon agreement of the parties. The trial court order for the parties to submit to binding arbitration made mandatory what was only permissive. Here entirely different dynamics are at work. No one is forcing the AAUP to go to arbitration. Rather, a procedure to permit the AAUP to go to arbitration if they want to has been provided. The AAUP's real objections were not addressed to the process. They were addressed to the remedy. The parties negotiated towards a mutually agreeable procedure and went as far as they reasonably could before the imposition of the new procedure.

West Windsor

At the December 29, 1977, negotiations session the AAUP made a demand for a "West Windsor" grievance procedure. This was defined as a grievance procedure pursuant to the Commission holding in the West Windsor case. In West Windsor, P.E.R.C. No. 77-5, 3 NJPER 124, the Commission analyzed that portion of N.J.S.A. 34:13A-5.3 which states in part:

Public employers shall negotiate written policies setting forth grievance procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions affecting them, provided that such grievance procedures shall be included in any agreement entered into between the public employer and the representative organization.

The Commission held that this statutory language is obligatory in nature and must be viewed as imposing an affirmative duty on public employers and majority representatives of public employees. A forum must be provided by means of which public employees or their representatives may appeal the interpretation, application or violation of policies, agreements, and administrative decisions affecting them.

Rutgers replied that they would not respond to such a request in the abstract but if the AAUP had a specific proposal the University would consider it.

This issue was again raised on January 7. The AAUP maintained the parties had to negotiate amendments to Article 9 to cover the principles as set forth in the Commission's decision in West Windsor. Rutgers responded that negotiations on Article 9, the contract grievance procedure, were closed except that what might happen in the negotiations for the personnel grievance procedure could refer back to Article 9.

The issue was raised before the fact finder. In his report, the fact finder states that at the initial meeting, when establishing ground rules and parameters, no mention was made of West Windsor or N.J.S.A. 34:13A-5.3. Therefore the fact finder held that the matter was not put before him at an appropriate time. He went on to state his opinion that there is a statutory obligation to negotiate procedures pursuant to N.J.S.A. 34:13A-5.3 and he recommended that the parties commence such negotiations as soon as possible.

Rutgers however did not alter its position and refused to negotiate. After the complaint issued, the Supreme Court which reviewed the West Windsor matter on

appeal, affirmed the Commission's decision at 78 N.J. 98 (1978), but limited the scope of grievance procedure to the interpretation, application or violation of policies, agreements and administrative decisions affecting terms and conditions of employment. The court then expanded West Windsor in The Board of Education of the Township of Bernard, 79 N.J. 311 (1979). The court held that a grievance procedure which encompasses the applicability of managerial prerogatives is itself a term and condition of employment and therefore mandatorily negotiable provided such grievance procedures terminate in a non-binding procedure. (The court held in essence that advisory arbitration on West Windsor issues is mandatorily negotiable).

Essentially, West Windsor defines the limits of what is recognizable as a grievance. It does not set forth an actual "procedure" as called for in the AAUP's demand. But there is no evidence to indicate that Rutgers was confused by or did not understand the demand. Further just as Rutgers reopened negotiations over the Article 10 grievance procedure after there was a tentative agreement, so too should the AAUP have been able to reopen negotiations concerning a West Windsor grievance procedure even though negotiations on the Article 9 grievance procedure were completed. During the course of the hearing the parties notified the undersigned that a West Windsor grievance procedure had been negotiated between the parties and the AAUP no longer seeks a bargaining order as a remedy but still seeks a finding from the Commission that the University acted in violation of its protected rights.

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

conclusion
CONCLUSIONS OF LAW

The Respondent Rutgers did not violate the Act when it unilaterally implemented a personnel grievance procedure on April 14, 1978.

The Respondent Rutgers did violate N.J.S.A. 34:13A-5.4(a)(5) and derivatively 5.4(a)(1) when it refused to negotiate with the AAUP concerning a West Windsor type grievance procedure during the course of negotiations.

Recommended Order

The Hearing Examiner recommends that the Commission ORDER:

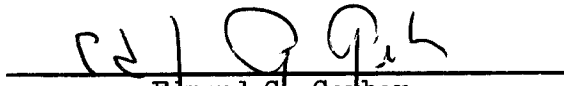
A. That the allegations alleging that Rutgers' unilateral implementation of a personnel grievance procedure constitutes an unfair practice be dismissed in its entirety.

B. That the Respondent Rutgers cease and desist from

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, in particular by refusing to negotiate an appropriate grievance procedure to cover the interpretation, application or violation of policies, agreements, and administrative decisions affecting all their employees.

2. That the Respondent Rutgers take the following affirmative action:

a. Post at all places where notices to employees are customarily posted, copies of the attached Notice marked Appendix "A."



Edmund G. Gerber
Hearing Examiner

DATED: Trenton, New Jersey
November 15, 1979

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, in particular, by refusing to negotiate an appropriate grievance procedure to cover the interpretation, application or violation of policies, agreements, and administrative decisions affecting all our employees.

(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, Trenton, New Jersey 086 Telephone (609) 292-6780