

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BROOKDALE COMMUNITY COLLEGE,

Respondent,

-and-

Docket No. CI-76-29-39

GEORGE J. ABEL,

Charging Party.

SYNOPSIS

In an unfair practice charge filed by a faculty member alleging that he was denied a promotion from associate professor to full professor because of his exercise of rights protected by the Employer-Employee Relations Act, the Commission orders the College to promote the faculty member retroactive to the 1976-77 school year.

The faculty member had organized the Faculty Association, was its first president, and has been chairman of its negotiating committee in all negotiations for formal contracts with the College. He is conceded to be a "very competent" teacher and the Commission finds that he was worthy of a promotion on any traditional academic measure of ability.

Given the above information and the fact that not promoting this individual was highly unusual in light of the history of promotions at the College, the Commission is satisfied that, absent a showing by the College of substantial and legitimate business justification, the College's motivation in not promoting the individual was improper. Several occurrences were cited which serve to further establish animosity toward the Association and the Charging Party as its leader. The Commission is not satisfied that the College established a substantial and legitimate business justification for its decision not to promote the Charging Party. Accordingly, the Commission, in reversing the Hearing Examiner's recommendation, issues an order that the College promote the individual retroactive to the 1976-77 school year without prejudice to any rights or privileges and make him whole by paying to him the difference between the salary he received in the 1976-77 and 1977-78 school years, and that he would have received as a full professor in those years. Additionally, also contrary to the Hearing Examiner's recommendation, the Commission dismisses a finding that the College violated the Act by not adhering to its contractual evaluation procedure in the promotion process, in part because this aspect of the matter was neither pleaded nor litigated.

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Charging Party.

Appearances:

For Brookdale Community College, Murray,
Granello & Kenney (Robert Murray, of Counsel,
Robert J. Hrebek on the Brief)

For George J. Abel; Sterns, Herbert and
Weinroth (Michael J. Herbert, of Counsel)

Decision and Order

On June 23, 1976, George J. Abel filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") alleging that he had been denied promotion by Brookdale Community College ("College") in derogation of his rights under the New Jersey Employer-Employee Relations Act ("Act"), N.J.S.A. 34:13A-1 et seq.^{1/}

It appearing that the allegations, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued, and a hearing was conducted before Commission Hearing Examiner Edmund G. Gerber on January 25 and 26, and March 7, 1977. All parties had the opportunity to examine and cross-examine witnesses, present

^{1/} The allegations are that the College violated §34:13A-5.4 (a)(1) and (3).

evidence and argue orally. After submission of post-hearing briefs by both sides, the Hearing Examiner issued his Recommended Report and Decision on January 27, 1978. It was designated as H.E. No. 78-20 and a copy is annexed hereto.

Pursuant to N.J.A.C. 19:14-7.3(a) exceptions to the Hearing Examiner's Report were filed by both parties, with supporting briefs, as well as a request for oral argument pursuant to N.J.A.C. 19:14-8.2 filed by the College. Oral argument was heard by the Commission on April 20, 1978, at which time a motion by the charging party to re-open the record was denied. Subsequently, on June 5, 1978, the College moved to supplement the record and for re-argument. Separately, on the same date, the College demanded production of "all reports, documents, or papers submitted to and/or prepared for the Commission thus far as supplements to the record below," or in the alternative dismissal of the Complaint. These motions will be considered, infra. On June 21, 1978, Counsel for Mr. Abel submitted papers opposing these motions.

The Hearing Examiner recommended that the charge be dismissed insofar as it alleged that Mr. Abel had been denied promotion in order to discourage him in engaging in activities protected by the Act. However, he did recommend that the College be found to have violated N.J.S.A. 34:13A-5.4(a)(1), having interfered with rights guaranteed to its employees under the Act by not honoring the provisions for evaluation procedures contained in the collective negotiations agreement then in force between the College and the Brookdale Community College Faculty Association ("Association").

The College excepted to this finding of an (a)(1) violation while Mr. Abel excepts to the recommended dismissal of the discrimination charge.

The standard for analyzing whether discrimination has taken place in violation of N.J.S.A. 34:13A-5.4(a)(3) was set forth by this Commission in two cases -- In re Haddonfield Board of Education, P.E.R.C. No. 77-36, 3 NJPER 71 (1977) and In re City of Hackensack, P.E.R.C. No. 77-49, 3 NJPER 143 (1977), appeal pending App. Div. Docket No. A-2546-76. We adopted a two-fold test. Discrimination is proven either if it is shown that an employer was motivated in whole or in part by union animus, or if an employer's actions were so inherently destructive of employee rights that improper motivation may be presumed.^{2/}

After careful consideration of the entire record we conclude, in disagreement with the Hearing Examiner, that the Charging Party has established that the College's failure to promote him was motivated, at least in part, if not exclusively, by union animus.^{3/}

Mr. Abel has been an Associate Professor of Chemistry at the College since joining the faculty in 1969-70 school year. When the faculty formed the Brookdale Community College Faculty Association that year, Abel served as Chairman of the organizing

^{2/} Before these tests can be applied, the charging party must show that the employee(s) was engaging in protected activities and the employer knew of them. See Hackensack, supra. That burden has been met here. This conclusion is buttressed by the incident at a cocktail party soon after Smith's arrival as President in which he referred to Abel as a "troublemaker". While this may have been harmless banter as postulated by the Hearing Examiner, it certainly does establish knowledge of Abel's protected activity.

^{3/} In light of our holding, we shall not reach the issue of whether the College's conduct also was inherently destructive of employees rights.

committee and was later elected President of the Association for its first year. He has served as Chairman of the Association negotiating committee in all negotiations for formal contracts with the College.

The College is divided into four main units -- the Applied Sciences Institute, the Applied Humanities Institute, the Human Affairs Institute, and the Learning Resources Center. Within each institute were Learning Centers (departments). Abel was in the Science Learning Center in which the chairman was Ron Kudile. John Frey was Dean of the Applied Sciences Institute in which Abel taught.

In the fall of 1975 numerous applications for promotion were made within the Applied Sciences Institute. The Promotion Committee within the Institute recommended 17 people for promotion.^{4/} Dean Frey received these recommendations, and consulted with the four learning center chairmen within the Institute including Kudile. Abel was rated the fourth highest among those eight Frey recommended to the Vice President, but Frey considered him most deserving of all and attributed his ranking to the desire of the various chairmen to emphasize promotion of instructors. Vice President Gallagher forwarded Frey's list to President Donald Smith, who then made his own recommendations to the Board of Trustees. Smith's list included all of the people on Frey's list except Abel, and it added Roland Baril who was not one of Frey's recommendations.

On Frey's list, Abel was highest of those up for promotion to full professor, while Baril who also sought full

^{4/} Not all the people were on the same level - i.e. while Abel sought promotion from Associate Professor to Professor, others were seeking promotion to Associate Professor, etc.

professor, was not on it at all. Kudile also felt that Abel was the most deserving of promotion of anyone in that Learning Center. Both men testified that Abel, over the years, had received consistently high evaluations as a teacher.

The only witness for the College was President Smith. His testimony corroborated that of Frey and Kudile that Abel was a "very competent" teacher and met the contractual criteria for promotion. Given the absence of any evidence to the contrary, we must conclude that Abel was worthy and deserving of promotion on any traditional academic measure of ability. As recounted earlier, Abel had been extraordinarily active in the Association as President and Chief Negotiator. Thus, it is a situation in which a deserving teacher who was by any measure the spearhead of the employee organization movement at the College was denied promotion. What we must determine is whether the relationship of his union activity to the denial of promotion was one of cause and effect.

A review of the testimony clearly indicates that not promoting Abel was highly unusual in light of the history of promotions at the College. In the past, Smith had accepted the recommendations of his Deans without changes, and this was the first time he acted contrary to a Dean's wishes. Also, Baril, a non-recommended faculty member from the same institute was promoted, again a first in terms of promotional procedures followed at the College. Only one other highly recommended Associate Professor not on sabbatical was not promoted, so it cannot be argued that Abel was just one of many who were in his situation. When an employer

varies from his established procedures when taking action that has a discriminatory effect on an employee who is known to have been vigorously active on behalf of an employee organization, an inference may be drawn that the action was motivated by that union activity on the part of the affected employee. D.H. Baldwin Co., 207 NLRB 25, 84 LRRM 1409 (1973), enforced 90 LRRM 2891 (CA8 1974).

Consistent with Baldwin, supra, it would be possible to reach the conclusion that the decision not to promote Abel was violative of the Act given the undisputed facts of his leadership in the union, his admitted competency for the promotion and high recommendation, and the unprecedented deviation from the normal promotional decision making process.^{5/} However in this case there is additional evidence, to support the inference that the deviation in this case was motivated by antipathy toward the Charging Party based

^{5/} This case recognizes the difficulty of finding specific evidence of motivation in every situation. In many cases of discrimination it is unlikely that an offended party will have access to or knowledge of facts which will undeniably establish that a decision was made for an impermissible reason. This is even more likely where the case involves sophisticated individuals, and the actual decision maker is one person who chooses not to consult with anyone in reaching his or her choice. In this regard President Smith acknowledged that he did not even recall if he looked at evaluations of Abel prepared by other people in the promotional process, let alone discuss the basis for his conclusion not to promote him.

his exercise of activities protected by this Act.^{6/}

Two specific occurrences were introduced to help establish President Smith's animosity toward the Association and to Abel personally as its leader. The Charging Party testified concerning his activity and that of the Association in support of a faculty member discharged for writing an editorial charging a conflict of interest by one of the members of the Board of Trustees, which was published in the College newspaper. The individual faculty member sued alleging violation of her constitutional rights of free speech. This case, in which the Association joined as a plaintiff, resulted in a verdict in favor of the faculty member, reinstating her with tenure and awarding back pay, and other compensatory and punitive damages.^{7/} Judgment was entered against the College for reinstatement and back pay and against President Smith and the individual members of the Board of Trustees personally for the other compensatory and punitive damages.^{8/}

^{6/} It should be recognized that N.J.S.A. 34:13A-5.4(a)(1) and (3) in part implement the protection guaranteed public employees by Article I, Paragraph 19 of the New Jersey Constitution, which provides that public employees shall have the right to organize and make known their proposals and grievances through representatives of their own choosing.

^{7/} Judgment was entered against the Association as plaintiff.

^{8/} On appeal the personal judgments against the individual members of the Board were reversed, but the personal judgment against President Smith for both compensatory and punitive damages was affirmed, though reduced from \$10,000.00 each to \$2,500.00 each. Endress v. Brookdale Community College, 144 N.J. Super. 109 (App. Div. 1976). The Appellate Division issued its decision on August 27, 1976, subsequent to the events of this charge. Therefore at the time that President Smith was considering Professor Abel's promotion he was personally liable for a judgment totally over \$20,000.00, as were all other members of the Board of Trustees, emanating from a law suit in which the Association had been a plaintiff, and which Abel, its leader, had supported. See page 8, infra, and Endress, Id., pages 120 to 122.

In the trial judge's decision, as reported in the Appellate Division opinion, see footnote 8, supra, President Smith was singled out as being the person responsible for initiating and orchestrating Ms. Endress' discharge in violation of her constitutional rights, Endress, supra, pages 126-129 and 138. Professor Abel testified that he had been involved in the Endress matter and supported her. As stated in footnote 8, supra, at the time that President Smith was considering Abel's promotion the judgment of the trial court was in effect and we do believe and find that Abel's and the Association's support of Endress is relevant to show possible animus as the real motivation in not promoting Abel.^{9/}

The second incident introduced by the Charging Party to support the allegation that President Smith was motivated by union animus toward Abel concerned a comment made at a cocktail party. The affair was being held in President Smith's home when he was first appointed president of the College. It was at this party that Smith and Abel first met and both Abel and his wife testified that upon being introduced, Smith stated "Oh, you're the troublemaker I've heard about." Smith testified that he did know about Abel and his activity on behalf of the Association prior to the party but had no recollection as to whether he had made the specific statement or not. The Hearing Examiner found that the statement had been made but was willing to assume, given the social setting and the lack

^{9/} The trial judge in Endress "put little stock in any of Smith's testimony", 144 N.J. Super. at 128. The Commission's Hearing Examiner refused to consider this finding as inadmissible as evidence relative to Smith's credibility as a witness. He relied for this conclusion on Rule 47 of the New Jersey Rules of Evidence. We agree with his conclusion and have not considered the Endress matter for any other purpose but its relevance to President Smith's motivation in deciding not to promote Abel.

of any other evidence that it was made in earnest, that it was made in the "spirit of harmless banter." We feel, however, that this statement does give some further support to the Charging Party's case. Even assuming that it was intended as cocktail party small talk we believe that it is indicative of the way Abel had been characterized to Smith and the way he perceived him. First and foremost, Smith was aware of Abel as the Union leader and not a teacher of science.

Both the Endress case and the cocktail party statement were uncontraverted, and we find that they did take place as testified to by the Charging Party. The Hearing Examiner also found that they occurred but discounted them as not being sufficient to establish that Smith was motivated by an intention to discriminate against Abel. We are also not convinced that these two incidents, standing alone or even together, would be adequate to establish a violation of the Act, but we do find that when they are added to the undisputed facts of Abel's leadership of the Association, qualification for promotion, recommendation for promotions by superiors, and deviation from past promotional practices that the Charging Party has sustained its burden of proof that an intention to discourage, and retaliate for, the exercise of activity protected by this Act was one of the motivating factors, if not the only motivating factor, in President Smith's decision not to promote Abel.

We turn now to a consideration of the reasons advanced by the College as an explanation for its failure to promote Abel. Again, contrary to the Hearing Examiner's conclusion, we are not persuaded that the College has offered a substantial and legitimate business justification for its action. In concluding that

the College had substantial and legitimate business justification for its decision not to promote Abel, as opposed to any union animus, the Hearing Examiner seemed to limit himself to the question of whether Roland Baril had been promoted for legitimate reasons.^{10/} He found Smith's testimony as to his personal feeling that Baril deserved promotion for non-academic reasons - procurement of gift equipment for the College in furtherance of the auto technical program - to be credible. Consistent with our past reluctance to overrule a Hearing Examiner on credibility judgments, we accept the finding of fact that Baril's promotion was itself legitimate and not designed to block Abel. Yet we do not regard that finding as closing the question. We think it still incumbent on the College to show why Abel was not promoted.

Smith testified that he established in his own mind four criteria for promotion, only two of which are relevant - the total number of promotions and the mission of the College.^{11/} While the Hearing Examiner spoke of an "apparently limited number of promotions to full professor" we do not agree that the evidence justifies that conclusion. Smith denied that there was any quota or imposed limit. Even if Baril's addition to the list meant that someone had to go, why was Abel the one? Smith stated that he did not know the relative rankings of those recommended to him for promotion. If that is accepted - as the Hearing Examiner

^{10/} This was apparently done because the total number of promotions remained the same, so the promotion of Baril, in effect, substituted for the recommended promotion of Abel.

^{11/} The others were male-female ratio and affirmative action.

did in noting that Smith did not know Abel was considered most deserving by Frey - it shows no reason for deciding on Abel as odd man out. No specific reason was ever given to Abel prior to hearing for not promoting him other than "finite resources," the same one given to all non-promoted faculty, including those who were not recommended by their superiors.

The same defect adheres to the other standard cited by Smith, the "mission of the College." This was explained to mean that Smith felt more recognition was needed for faculty in occupational - technical education, which was one reason why he determined that Baril must get promoted. Again, assuming the validity of that claim, it still does not answer the question of why Abel was left out.^{12/} Not all of the people on Frey's recommendation list were in occupational - technical teaching so why were they not passed over instead?

In short, we do not find President Smith's testimony dispositive of the issue of motivation. Again, assuming the validity of his statements on Baril, the College has not overcome the proof offered by Abel to demonstrate that Abel should have been promoted.

We therefore, conclude that the College has not established a business justification for its decision not to promote Abel.^{13/} The preponderance of the evidence establishes that the reason that the College did not promote Abel, in a substantial

^{12/} Moreover, Smith testified that at the time he was reaching his decision, he assumed Abel was teaching occupational students.

^{13/} At best the College has established that there was business justification for promoting Baril, although he was not in the "recommended" list submitted by Dean Frey.

departure from previous practices, is that he was being discriminated against because of his exercise of protected rights under the Act to "freely and without fear of penalty or reprisal, to form, join and assist [an] employee organization."^{14/}

We also reverse the Hearing Examiner's finding that the College violated N.J.S.A. 34:13A-5.4(a)(1) by not following the contract procedure for using evaluations in the promotion process. As argued by the College, that was not pleaded, no amendment to the pleadings was offered and this issue as a separate unfair practice has not been fully litigated in the Unfair Practice proceeding.^{15/} It only found its way into the record to support the allegation that Smith disregarded established practices in not promoting Abel and that in doing so he disregarded the recommendations and evaluations concerning Abel. The College had no opportunity or notice that this was being offered as evidence of a separate violation of the Act. Although the charge does claim a violation of subsection (a)(1) as well as (a)(3), it is clear to us that this was pleaded and litigated as a claim of a derivative violation, i.e., the discrimination under (a)(3) is per se coercion and interference with employees in the exercise of their rights.

The motions made by the College after oral argument are denied. As the transcript of that argument indicates, the College

^{14/} N.J.S.A. 34:13A-5.3.

^{15/} Additionally, the record reveals that a grievance on this matter has been filed, and thus the matter is being litigated in an appropriate forum. See N.J.S.A. 34:13A-5.3. We have often, where appropriate, deferred resolution of unfair practices to contractual grievance machinery and this "deferral" policy has been noted with approval by the courts. See State v. Council of N.J. State College Locals, 153 N.J. Super., 91 (App. Div. 1977).

strongly objected to Abel's motion to re-open the record, quite properly contending that at some point the hearing must be finalized. Therefore, it would now also be inappropriate to grant the College's current motion on this score. This is particularly true as the sole ground presented is a possible misunderstanding as to one fact which related to matters similar to those alleged in Abel's motion.

A request for copies of all "reports, papers or memoranda prepared by any person for the Commission and the Hearing Examiner" was made and rejected in In re New Brunswick Board of Education, P.E.R.C. No. 78-56, 4 NJPER 156 (para. 4073 1978). Therein we stated it would not be appropriate to make available to a litigant any internal legal research or proposed drafts of decisions, and nothing has been presented to warrant deviating from that ruling. Mazza v. Cavicchia, 15 N.J. 498 (1954) and other cases cited by the College are fully complied with by the Commission. Here both parties have filed exceptions to the Hearing Examiner's Recommended Report before action was taken by the Commission and all discussions of the case have been held at open public meetings. The motion to dismiss is disposed of by the statement, supra, that no facts outside the record made before the Hearing Examiner have been considered by the Commission.

ORDER

Upon an independent review of the entire record herein, and for the aforestated reasons, IT IS HEREBY ORDERED that the Brookdale Community College shall:

1. Cease and desist from interfering with employees in the exercise of rights guaranteed by the New Jersey Employer-Employee Relations Act and discriminating in regard to hire or tenure of employment to discourage employees in the exercise of rights under the Act by refusing to promote George J. Abel to full professor.

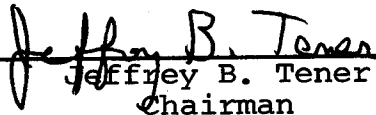
2. Take the following affirmative action:

(a) Promote George J. Abel to full professor, retroactive to the 1976-77 school year without prejudice to any rights or privileges and make him whole by paying to him the difference between the salary he received in the 1976-77 and 1977-78 school years, and that he would have received as a full professor in those years.

(b) Post at its central administrative building copies of the attached notice marked Appendix "A". Copies of such 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 Respondent to insure that such notices are not altered, defaced or covered by any other material.

(c) Notify the Chairman of the Commission in writing, within twenty (20) days of receipt of this ORDER, what steps the Respondent has taken to comply herewith.

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

DATED: Chairman Tener, Commissioners Hartnett and Graves voted for this decision. Commissioners Schwartz and Parcels voted against this decision. Commissioner Hipp was not present. Commissioner Schwartz filed a separate dissenting opinion.

DATED: Trenton, New Jersey
June 30, 1978
ISSUED: July 5, 1978

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 employees in the exercise of the right guaranteed to them by the Act or discriminate in regard to hire or tenure of employment to discourage employees in the exercise of rights under the Act by not promoting George J. Abel to full professor.

WE WILL promote George J. Abel to full professor retroactive to the 1976-77 school year without prejudice to any rights or privileges and make him whole by paying to him the difference between the salary he received in the 1976-77 and 1977-78 school years, and that he would have received as a full professor in those years.

Brookdale Community College

(Public Employer)

Dated _____

By _____

(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with Jeffrey B. Tener, Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of
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-and-

Docket No. CI-76-29-39

GEORGE J. ABEL,
Charging Party

SCHWARTZ, COMMISSIONER (CONCURRING IN PART AND DISSENTING IN PART)

I concur with that portion of the Commission's Decision and Order reversing the Hearing Examiner's finding that the Respondent violated N.J.S.A. 34:13A-5.4(a)(1) by not following the contract procedure relating to the use of evaluations in the promotion process.

I dissent, however, from that part of the Decision and Order which finds that the Respondent's decision not to promote Professor Abel was a violation of N.J.S.A. 34:13A-5.4(a)(3). The standard of proof set forth by the Commission, in my view, falls short of that traditionally established by administrative agencies enforcing labor laws and the standards followed by this Commission in prior unfair practice decisions.

Particularly, the Decision and Order raises serious questions about the exact nature of the burden of proof of the Charging Party. In our lead decision in this area, the Commission stated:

Furthermore, the two-fold test upholds the employer's legitimate prerogative to discharge, suspend or refuse to promote employees for reasons unrelated to union activities. The employer may take such action for any cause or no cause at all as long as it is not retaliatory. It is the Charging Party that must prove its case by a preponderance of the evidence. ^{1/}

The decision of the majority appears to rest heavily on two grounds. Both deserve critical analysis. First, the majority concludes that the Endress ^{2/} case, while perhaps not in itself "adequate to establish a violation of the Act" (Decision at p.9), when added to other circumstances, assists the Charging Party in meeting its burden of proof.

In fact, the Commission, in a clear reversal of the judgments made by the Hearing Examiner, goes to great lengths to present the Endress case as support for the Respondent's anti-union animus. The majority is fully aware that Endress had nothing to do with protected concerted activity. Yet, the Decision relies on Endress "to show

1/ In the Matter of Board of Education of the Borough of Haddonfield, Camden County and Haddonfield Supportive Staff Association, a/w New Jersey Education Association, PERC No. 77-36, January 26, 1977. (Emphasis supplied).

2/ Endress v. Brookdale Community College, 144 N.J. Super 109 (App. Div. 1976).

possible animus as the real motivation in not promoting Abel." (Decision at p.8, emphasis supplied). The use of the word "possible" is highly revealing. Administrative agencies in labor law do not and should not rely on non-relevant factors in the establishment of animus. Yet, the majority, struggling to piece together a violation where insufficient proof of one exists, takes an event completely unrelated to protected activity and creates the most tenuous of relationships between it and Professor Abel's non-promotion.

Endress is irrelevant to these proceedings and is useless as a support for a finding of a violation.

Secondly, the majority's conclusions are based upon its own questions. Yet, the transcript indicates that many of the questions the majority uses to reach its conclusions were not asked during the hearing itself. For whatever reason, the Charging Party did not develop these matters. The Hearing Examiner, obviously limited by his quasi-judicial role, could not properly assume that responsibility. The Respondent, not confronted by any testimony concerning the questions now raised by the majority, was under no obligation to respond to the assumptions and inferences made by the majority for the first time in this final Decision and Order. ^{3/}

Although we stated clearly in Haddonfield, supra that it is the Charging Party that must prove its case by a preponderance of the

^{3/} If the majority felt it could not make a final determination without drawing significant inferences from factors not litigated, it should have more properly reopened this hearing.

evidence, we abandon that standard in the face of circumstances ^{4/} which raise questions in our minds.

While the Commission must protect the rights of employees engaged in legitimate labor organization activities, it must not succumb to the pressure to find violations where only mere suspicions exist. To base our findings on inferences and presumptions rather than long-established standards of proof will damage the public view of this agency and may very well subject our findings to intensified appellate review.

One of the critical aspects of rights protection is reasonable speed of the administrative and court process. The approach of the majority in this case presents an invitation to New Jersey courts to review both the factual and legal conclusions upon which we base our decisions. Such a development will endanger all of those decisions, not merely the few in which we find it necessary to apply more lenient standards. Therefore, the opinion of the majority in this matter has ramifications that go far beyond the bounds of this case.

Mere suspicions raised by any case do not, in themselves, warrant deviation from our own prior decisions or a lowering of the standards of proof necessary to find a violation.

For the foregoing reasons, I would find that the Charging Party has failed to prove by the preponderance of the evidence that the

^{4/} Some of those circumstances, such as Endress, are unrelated in any way to this matter.

non-promotion of George Abel was violative of N.J.S.A. 34:13A-5.4(a)(3)
and I would dismiss the charge in its entirety.

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

In the Matter of

BROOKDALE COMMUNITY COLLEGE,

Respondent,

-and-

Docket No. CI-76-29-39

GEORGE J. ABEL,

Charging Party.

Appearances:

For Brookdale Community College,
Murray, Meagher & Granello, Esq.
(Robert J. Hrebek, On the Brief)

For George J. Abel
Sterns, Greenberg, Herbert & Weinroth
(Michael J. Herbert, on the Brief)

HEARING EXAMINER'S
DECISION ON MOTION TO DISMISS

Pursuant to a Complaint and Notice of Hearing issued by the Public Employment Relations Commission (Commission) on October 1, 1976, hearings were held on January 25 and 26, 1977, before the undersigned Hearing Examiner. At the close of the second day of hearing the Charging Party announced that he had presented his entire case. The next date for the hearing was set down for March 8, 1977. On February 13, 1977, the Respondent filed a motion to dismiss, alleging the Charging Party failed to make out a cause of action under N.J.S.A. 34:13A-5.4(a)(1) and (3).^{1/} A supporting brief was submitted and the Charging Party filed a reply brief on February 24, 1977.

1/ These subsections provide in pertinent part that

- a. Employers, their representatives or agents are prohibited 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.

Although the Administrative Procedures Act as well as the Commission Rule 19:14-6.6 state that the rules of court are not controlling in this type of proceeding, it is useful, nevertheless, to look to the rules for guidance in setting the standards to be used in disposing of the instant motion. New Jersey Civil Practice Rule 4:37-2 provides:

(b) At Trial--Generally. After the plaintiff has completed the presentation of his evidence on all matters...he shall so announce to the court, and thereupon the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal of the action or any claim against him on the ground that upon the facts and upon the law the plaintiff has shown no right to relief. Whether the action is tried with or without a jury, such motion shall be denied if the evidence, together with the legitimate inferences therefrom, could sustain a judgment in plaintiff's favor.

The State Supreme Court interpreted this rule in Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969). They held that the judicial function at this stage of the proceedings "is quite a mechanical one. The trial court is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion."

The evidence will, therefore, be reviewed in accordance with Dolson, supra. It should be noted that the college raised factual arguments in its brief which may ultimately have merit. However, here, all factual issues have been resolved in favor of the Charging Party.

At the hearing the Charging Party, George Abel, introduced evidence substantiating the basic factual allegation of his charge as incorporated in the Complaint.

George Abel is an Associate Professor at Brookdale College. Approximately five years ago he was instrumental in creating the Faculty Association of Brookdale College, a public employee organization, and was its first president. He is currently chairman of the Negotiating Team.

On November 19, 1975, Abel was recommended for promotion by the Institute Evaluation Committee. ^{2/} A list containing the names of 17 persons

^{2/} There are three institutes in the College: The Institute of Natural and Applied Science, which is the one referred to here, also, the Institute of Applied Humanities and the Institute of Human Affairs.

who were recommended for promotion by the committee was submitted to the dean of the Institute, John Frey. In turn Dean Frey recommended eight people from the list for promotion.

These eight persons were placed on a list and ranked in order from the most deserving to the least deserving. Frey testified that although Abel was ranked fourth on this list, Abel was the most deserving of all those listed for promotion. This apparent discrepancy is related to Frey's view of promotions. There are two types of promotions involved here. One is from instructor to assistant professor and the other is from assistant professor to full professor. Frey believes that promotion from instructor to assistant professor is more urgent from a financial and career standpoint. Hence, all of those in such a position should be promoted first. Frey noted that Abel was ranked first of the four individuals recommended for promotion from associate professor to full professor. This list was then forwarded to the office of the President of the College. All of those persons recommended by Frey were promoted with the exception of Abel. Instead, another associate professor from Frey's Institute, Roland Baril, was promoted to full professor. Baril's name, however, did not appear on Frey's list of those recommended for promotion.

Frey testified that in his two years of participating in evaluation for promotion, the only recommendation which he had made during this period of time which was not accepted by the administration was his recommendation of Abel. Further, in this same period, no faculty member had ever been promoted who had not first been recommended by his or her Dean with the exception of Roland Baril. Abel testified that in all his years at the college this had never happened before.

Evidence that Abel has had uniformly high evaluations was presented and Ron Kudile, chairman of Abel's learning center, ^{3/} testified that Abel was the most deserving of the various candidates who had applied for promotion within the Learning Center.

3/ Each institute within the college is divided into learning centers. The learning centers are more or less equivalent to departments in other institutions.

The Collective Negotiations Contract between the parties was submitted into evidence. This contract provides that the systematic evaluation conducted by faculty members' learning center chairmen and deans will be the primary instrument or tool for purposes of promotion. However, no one ever contacted Frey as to why his recommendation of Abel was not followed, or why another employee who was not recommended for promotion was in fact promoted.

No reason was given to Abel as to why his application was denied other than a form letter sent to all unsuccessful candidates which stated, in effect, that the financial resources of the school are limited.

When the current President of the college first met Abel at a cocktail party the President stated, "Oh, you are the troublemaker I have heard about."

The Respondent raises four legal arguments in support of its motion to dismiss in its brief: 1) Abel offered no proof that the school or its President acted in a discriminatory manner; 2) the college's right to select candidates for promotion is not a term and condition of employment; 3) Abel could offer no proof that the school or its President were motivated in any way to discourage him in the exercise of this protected right; 4) Abel could offer no proof that the actions of the school or its Presidents had or could have had the effect of discouraging him or others from the exercise of protected rights. These arguments shall be considered in order.

1. Abel offered no proof that the school or its President acted in a discriminatory manner - This argument is pure semantics. As stated in In re College of Medicine and Dentistry, P.E.R.C. No. 76-46, 2 NJPER 219 (1976). "The Act does not bar an employer from discriminating among his employees; it only bars discrimination for the purpose of discouraging employees in the exercise of their rights guaranteed by the Act." The very nature of choosing which employees are to be promoted is, in effect, discriminating among them and the decision of the school not to select Abel is, by definition, an act of discrimination. The real question is, whether the discrimination was done "to encourage or discourage employees in the exercise of the rights guaranteed them by this Act."

2. The college's right to select candidates for promotion is not a term and condition of employment - The moving party here argues that Subsection (a)(3) of the Act applies only where a discriminatory act effects a

term and condition of employment. It is argued, promotions are not a term and condition of employment. Rather, only the procedures for promotion are terms and conditions of employment. Here, since the contractual procedures for promotion were complied with, the Charging Party has no cause of action. In support of this argument the Respondent cites Board of Ed. of North Bergen v. North Bergen Federation of Teachers, 141 N.J. Super. 97 (App. Div. 1976). The court there held that promotions were a matter of basic educational policy and therefore not negotiable and not a term and condition of employment. In reaching this decision they referred to a series of cases emanating from the Dunellen Trilogy, 64 N.J. 1, et seq. where the court applied a balancing test weighing an employee's right for negotiations against a school's duty to exercise and implement basic educational policy.

Standing by itself, a promotion to a higher position within the same unit brings with it a raise in pay as well as an increase in job-related responsibilities (and stature) and all of these things are terms and conditions of employment. The importance of the educational policies in a decision to promote outweigh an employee's right to negotiations and therefore promotions are not negotiable and not terms and conditions of employment. It is implicit in the Charging Party's allegations that the school's actions were not based upon an educational policy, but rather upon an intent to discourage the exercise of protected rights. When an employer ceases to act for reasons of educational policy, the balance shifts and the employees' rights must become pre-eminent. As the court stated in North Bergen, supra, "Arbitrary action on the part of the [employer] which bear no reasonable relationship to educational goals...cannot and will not be tolerated." Accordingly, if Abel was in fact denied a promotion in order to discourage the exercise of employee protected rights, an (a)(3) violation has occurred. 4/

3. Abel could offer no proof that the school or its President were motivated in any way to discourage him from the exercise of his protected right - Assuming arguendo that the College President's statement to Abel that he was "the troublemaker he has heard about," is not a scintilla of evidence of motivation, such a failure to adduce evidence of motivation is not necessarily grounds for dismissal. The Commission has, in In re Haddonfield Bd. of Educ.,

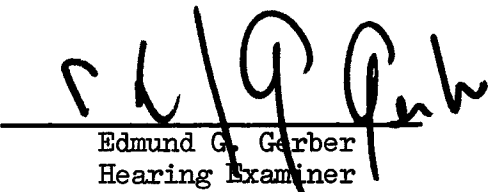
4/ It is noted that N.J.S.A. 34:13A-5.4(c) grants the Commission exclusive jurisdiction in all unfair practice cases. See also Patrolmen's Benevolent Assn. of Montclair v. Town of Montclair, 70 N.J. 130 (1976).

P.E.R.C. No. 77-36, 2 NJPER ____, created a twofold test for discrimination cases. This test holds that an employer's conduct would be a violation of the Act even if it was in part motivated by an intent to discourage the exercise of protected rights. Further, if said conduct is inherently destructive of employee rights, the existence of such motivation as one of the factors in the employer's decision may be presumed and need not be proven (emphasis supplied). In In re N.J. College of Medicine and Dentistry, P.E.R.C. No. 76-46, 2 NJPER 219 (1976), the Commission ruled that such a presumption would normally be rebuttable by evidence of legitimate and substantial business justification for the employers' conduct.

4. George Abel could offer no proof that the actions of Brookdale Community College or its President had or could have had the effect of discouraging him or others from the exercise of protected rights.

In the instant matter, granting every favorable inference to the Charging Party, the denial of a promotion to Abel could be considered inherently destructive of employee rights. Abel's fellow employee could logically conclude that he was denied a promotion because of his Faculty Association activities. Such a conclusion could certainly discourage employees from exercising their protected rights of participation in the Faculty Association out of fear that they too would be denied a promotion.

Accordingly, for the reasons set forth above, it is hereby ruled that the Respondent's motion to dismiss is denied.


Edmund G. Gerber
Hearing Examiner

Dated: Trenton, New Jersey
March 2, 1977

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

In the Matter of
BROOKDALE COMMUNITY COLLEGE,
Respondent,

-and-

Docket No. CI-76-29-39

GEORGE J. ABEL,
Charging Party.

SYNOPSIS

In a Recommended Report and Decision to the Public Employment Relations Commission a Hearing Examiner finds that Brookdale Community College did not discriminate against George Abel, the chairman of the Employee Association negotiating team in denying his application for a promotion to full professor. Abel had claimed that the College's denial of this application was motivated by an intent to discourage the exercising of employee rights under the New Jersey Public Employer-Employee Relations Act and further that said denial was inherently destructive of such rights. The Hearing Examiner found that Abel did not prove any intent to discriminate on the part of the College and further found that although Abel had excellent credentials as a faculty member and was deserving of a promotion, the College presented substantial evidence of legitimate educational reason why Abel was denied a promotion and therefore this denial could not be held to be inherently destructive of employee rights.

The Hearing Examiner did find however that Abel was not evaluated in compliance with the procedures in the contract between the parties and stated that it was an unfair practice for the College to deviate from the provisions of the contract without prior negotiations with the Association. Accordingly, the Hearing Examiner recommends to the Commission that they order the College to re-evaluate Abel in accordance with the provisions of the contract.

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 conclusions of law.

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

In the Matter of
BROOKDALE COMMUNITY COLLEGE,
Respondent,

-and-

Docket No. CI-76-29-39

GEORGE J. ABEL,
Charging Party.

Appearances:

For Brookdale Community College
Murray, Meagher & Granello, Esqs.
(Robert Murray, Robert J. Hrebek,
on the Brief)

For George Abel
Sterns, Greenberg, Herbert & Weinroth
(Michael J. Herbert, of Counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

George Abel, an individual, filed an unfair practice charge with the Public Employment Relations Commission (the "Commission") on June 23, 1976, alleging that his employer, Brookdale Community College (the "College"), committed an unfair practice within the meaning of the New Jersey Employer-Employee Relations Act (the "Act"), N.J.S.A. 34:13A-1 et seq.,^{1/} in denying Abel's application for a promotion to full professor status within the college.

It appearing that the allegation of the charge if true might constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on October 1, 1976. The hearing was conducted before the undersigned on January 25, January 26 and March 7, 1977. All parties were given

^{1/} It is specifically alleged that the College violated N.J.S.A. 34:13A-5.4 (a)(1) and (3). These subsections provide that an employer, its representatives or agents are prohibited 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."

an opportunity to examine and cross-examine witnesses, to present evidence and to argue orally. Both parties submitted post-hearing briefs by May 17, 1977.

Upon the entire record in this proceeding, I find that the College is a public employer within the meaning of the Act and is subject to its provisions. An unfair practice charge having been filed with the Commission alleging that the College has engaged or is engaging in unfair practices within the meaning of the Act, a question concerning alleged violations of the Act exists and this matter is appropriately before the Commission for determination.

George Abel is an Associate Professor at Brookdale Community College. In 1970 he was instrumental in creating the Faculty Association of Brookdale Community College (the "Association"), a public employee organization and was its first president. He is currently chairman of the negotiating team.

There are three institutions in the College: The Institute of Natural and Applied Science, to which Abel belongs, the Institute of Applied Humanities, and the Institute of Human Affairs.

In compliance with the procedures established in the collective negotiations agreement, Abel submitted his name for promotion to his institute's evaluation committee in the fall of 1976. A list of 17 persons, including Abel, who were recommended for promotion by the committee was submitted to the institute's Dean, John Frey. Frey selected eight people from this list whom he recommended for promotion.

The eight persons were placed on a list and ranked in order from the most deserving to the least deserving. Frey testified that although Abel was ranked fourth on this list, Abel was the most deserving of all those listed for promotion. This apparent discrepancy is related to Frey's view of promotions. There are three types of promotions involved here: from instructor to assistant professor, from assistant professor to associate professor, and associate to full professor. Frey believes that promotion from instructor to assistant professor is more urgent from a financial and career standpoint. Hence, all of those in such a position should be promoted first. It is noted that out of the eight promotions recommended by Frey, two were from associate

to full professor. This list was then forwarded to the office of the Vice President for Academic Affairs Dr. Gallagher and from there to the President of the College. All of those persons recommended by Frey were promoted with the exception of Abel. Instead, another associate professor from Frey's institute, Roland Baril, was promoted to full professor. Baril's name, however, did not appear on Frey's list of those recommended for promotion. ^{2/}

Frey testified that in his two years of participation in evaluation for promotion, the only recommendation that he had made during this period of time which was not accepted by the administration was his recommendation of Abel. Further, in this same period, no faculty member had ever been promoted who had not first been recommended by his or her dean with the exception of Roland Baril. Abel testified that in all his years at the College, no one had ever been promoted without their dean's recommendation before.

The Charging Party also testified that in his experience only three persons besides himself were highly recommended by their respective deans for promotions but were nevertheless not promoted, and two of the three were granted sabbatical leave for the following academic year.

Evidence that Abel has had uniformly high evaluations was presented and Ron Kudile, chairman of Abel's learning center, ^{3/} testified that Abel was the most deserving of the various candidates who had applied for promotion within the learning center.

The collective negotiations contract between the parties was submitted into evidence. This contract provides that the systematic evaluation conducted by faculty members' learning center chairmen and deans will be the primary instrument or tool for purposes of promotion. However, no one ever contacted Frey as to why his recommendation of Abel was not followed or why another employee who was not recommended for promotion was in fact promoted.

^{2/} The record is somewhat unclear as to whether Baril's name was left off Frey's list due to inadvertence or whether Frey knowingly did not recommend Baril. The undersigned is satisfied that Baril was knowingly not recommended. The confusion arose because Frey sent two lists on one letter to the administration -- his own list of those recommended for promotion and the Evaluation Committee's list of 17 names. Frey inadvertently left Baril's name off the latter list of 17 names.

^{3/} Each institute within the College is divided into learning centers. The learning centers are more or less equivalent to departments in other institutions.

No reason was given to Abel as to why his application was denied other than a form letter sent to all unsuccessful candidates which stated, in effect, that the financial resources of the school are limited. ^{4/}

Abel claims that one of the motivating factors of the College's failure to promote him to full professor was an intent to discourage the exercise of protected rights and, further, that his denial of a promotion was inherently destructive of employee rights. See In re Board of Education of the Borough of Haddonfield, P.E.R.C. No. 77-31, 3 NJPER 71 (1977). There is no evidence of any particularly antagonistic relationship between the parties either in the day-to-day interaction between the College and the Association or at the negotiation table. Nor did the Charging Party introduce any evidence of possible animus on the part of the College save two incidents. The Association was a plaintiff in litigation in which it was found that a faculty member had been wrongfully discharged by the College and its president, Donald Smith, when she exercised her First Amendment right of free speech. Endress v. Brookdale Community College, 144 N.J. Super. 109 (App. Div. 1976). Secondly, when Smith was first appointed president of the College a cocktail party was given in his honor; Abel and his wife attended. The Abels testified that when they were introduced to Smith he stated, "Oh, you're the troublemaker I've heard about." Smith, in his testimony, acknowledged that he did know of Abel and his position in the Association prior to the party, but he stated there were so many people at the affair he can't recall whether or not this conversation took place.

The undersigned found Abel to be a credible witness and found no reason to doubt that Smith did make the statement in question; however, no evidence was adduced as to whether or not the statement was made in the spirit of harmless banter or in earnest. One can only assume the former, given the social situation. ^{5/} In any event, I cannot find that either the statement nor

^{4/} The Charging Party grieved this matter using the grievance procedure of the contract and claimed he continually asked for the reason for the denial of his promotion but was never given any explanation other than the letter until the time of the hearing.

^{5/} It should not be forgotten that the Charging Party has a burden of establishing every allegation of his charge.

the lawsuit are sufficient evidence to show motivation of an intent to discriminate. For the Charging Party to prevail here it must be shown that the actions taken by the College were inherently destructive of employee rights. It is noted that when conduct is inherently destructive of employee rights the existence of such motivation as one of the factors in the employer's decision may be presumed and need not be proved. However, if the destructive nature of such conduct is not severe the presumption would normally be rebuttable by evidence of a legitimate and substantial business justification for said conduct. See, In the Matter of Long Branch Board of Education, P.E.R.C. No. 77-70, 3 NJPER ____ (1977); H.E. No. 77-12, 3 NJPER ____ (1977), appeal pending, Appellate Division Docket No. A-4787-76.

President Smith was the College's only witness. In his testimony he explained how he arrived at his recommendations to the Board of the College for faculty promotions. He pointed out several factors aside from academic excellence which he considered in his recommendations: the economic necessity of limiting the total number of faculty to be recommended, the ratio of men to women, the affirmative action considerations, and the mission of the College, that is the importance of the occupational programs as compared to the traditional liberal arts and sciences. He admitted that only the question of the total number of promotions and the mission of the College were relevant to his decision about Abel. Smith testified that the occupational program was designed to prepare a person for employment at the completion of their two-year program. The liberal arts program, on the other hand, is designed, in major part, for transfer to a four-year college. Smith maintained that the occupational program of the school was equally as important as the liberal arts. He pointed out, however, that in 1975-1976 there were eight full professors at the College but none of them had full-time occupational program assignments. ^{6/} He felt there should have been a balance between occupational programs and the liberal arts. Smith went on to say that Baril ^{7/} had made a truly outstanding contribution to the College in his role as head of the auto-technical program.

^{6/} Two or three of the eight professors did teach some occupational students.

^{7/} Who the Charging Party says replaced Abel.

Smith cited Baril's leadership in that program, the development of a new laboratory, his contacts with industry in obtaining equipment for the College and the general development of this program. I found this testimony of Smith's opinion of Baril to be entirely credible. Abel points out in his brief that each of the three members of the auto-technical program received a promotion. While the Charging Party's point is the lack of balance in Smith's choice, it also demonstrates Smith's genuine appreciation of this particular program. Similarly, on cross-examination, when Smith was asked how well does he know Baril, Smith mentioned that he knew him reasonably well for he was at his lab a number of times when pictures were taken of gift engines and equipment. It seems clear from his response that Smith had a genuine appreciation of Baril's activities within the College. It is also easy to see why the dean of Baril's and Abel's institute did not necessarily share Smith's opinion of Baril. None of the criteria mentioned relate to the traditional criteria of promotion within a university, that is, academic excellence and scholarship.

The undersigned is not convinced that there was a conscious decision to replace Abel with Baril. As noted above, Abel was one of only two associate professors who were highly recommended by Frey to full professorships and [although Smith admits but for the need for balance within the institution as a whole Smith would have promoted Abel to a full professorship] there was no way for Smith to know from the material submitted to him by Frey that Abel was the most deserving of all those recommended for promotion. ^{8/} Smith also testified that he felt there should be some balance in the number of promotions from institute to institute. Again, this does not seem unreasonable, Therefore, in maintaining the same number of promotions to full professorship as recommended by Frey, there was in effect a 50-50 chance that Abel would lose out when Smith decided to grant Baril a promotion.

Smith also testified as to why he had a past history of always following the recommendations of his deans in the past. When he first came to the College in 1974 he arrived in the spring and was in no position to second-guess any selection of the institute deans. Similarly, in the following year he did not vary from the recommendations of his deans. It was only in his third year, the year in question, that he felt he knew the staff well enough to form his own opinions

^{8/} Vol. III, transcript, pp. 50-51.

and could independently evaluate the staff. It is significant that there were three other associate professors at the College who were highly recommended for promotions by their respective deans but were not promoted this same year that Abel was not promoted. Admittedly, two of these three others were granted sabbatical by Smith, but even discounting the two who received sabbaticals there was another person besides Abel who was highly recommended for promotion to full professorship but was turned down.^{9/} The hearer cannot find that Abel's denial of a promotion was so unique that it was inherently destructive of employee's rights. The Charging Party brought to the attention of the Hearing Examiner the matter of Endress v. Brookdale Community College, supra. In that decision the court found that Smith's testimony was not credible. Under the New Jersey Rules of Evidence, specifically Rule 47, "a trait of character offered for the purpose of drawing inferences as to the conduct of a person on a specified occasion may be proven only by: (a) testimony in the form of opinion; (b) evidence of reputation; or (c) evidence of a conviction of a crime which tends to prove a trait. Specific instances of conduct not the subject of a conviction of a crime shall be inadmissible..." (emphasis supplied). Accordingly, the undersigned cannot consider the court's finding as to Smith's credibility since the court's finding in the Endress case above is a specific instance of conduct.

On balance, taking into account the marked imbalance between the occupational and liberal arts branches of the College, the apparently limited number of promotions to full professor and Smith's obvious appreciation of Baril, I find that the College has established legitimate business justification for its action in promoting Baril over Abel. Accordingly, I find that the College did not violate § 5.4(a)(3) of the Act.

However, Article 12C of the contract between the College and the Brookdale Faculty Association provides that evaluations serve as a primary basis for promotion within the university. Smith's testimony made it clear that he did

^{9/} The undersigned does not know the total number of associate professors who were highly recommended for promotion from the other two institutes, so it is difficult to draw any conclusions as to the entire size of the pool of associate professors who were highly recommended; but if the general pattern of having only two associates from each institute highly recommended for promotion holds, this pool could not have been very large and the total number of highly recommended associates must be very small. Admittedly, the undersigned is indulging in hypotheticals but again the burden of proof is upon the Charging Party to prove every allegation of his charge.

not rely upon these evaluations as a regular or primary basis for his own evaluation. When asked on cross-examination whether he looked at the evaluations of Mr. Abel or Mr. Baril, his answer was: "I requested to see some from the personnel office. I can't recall if I looked at Mr. Abel's or not." Nor could he answer positively whether he looked at Mr. Baril's. ^{10/} Accordingly, one can deduce from this testimony that Smith did not look at every individual's evaluation yet if evaluations are in fact to be the primary basis for promotions, it would seem incumbent upon him to have in fact done so.

The Commission has long held that evaluation procedures, where they do not abrogate the major educational policy decisions of an educational institution, relate to the terms and conditions of employment of its employees and they are therefore terms and conditions of employment. See In the Matter of Ridgefield Park Board of Education, P.E.R.C. No. 77-71, 3 NJPER ____ (1977). In the instant matter the failure of President Smith to follow the negotiated terms of the collective negotiations agreement concerning procedures for promotions is in effect a failure to follow the negotiated rules governing working conditions and is accordingly a unilateral alteration of the rules and as such interferes with the rights of said faculty members guaranteed by § 5.4(a)(1) of the Act. See Piscataway Township Board of Education, P.E.R.C. No. 77-54 2 NJPER 162 (197); H.E. No. 77-77, 2 NJPER 347 (197). The undersigned, accordingly, finds that Smith's failure to evaluate Abel constitutes a violation of the Act. As noted above, the undersigned is satisfied that Smith acted in good faith and although Smith did admit that Abel would qualify for a promotion but for the factors he named, it is clear that the promotional guidelines in the contract would leave room for Smith to weigh his guidelines in such a promotion process. The language of the contract states that evaluations serve the primary basis but not the sole basis. Nonetheless, the undersigned will recommend to the Commission that they order the College and Dr. Smith to re-evaluate Abel in accordance with the terms of the contract and, further, it is recommended that Dean Frey and Chairperson Kudile play an active consultative role in such an evaluation. It is further recommended that if the College finds that Abel should be promoted that such promotion should be retroactive

^{10/} Tr. III, p. 65, lines 9 to 19.

to the beginning of the 1976-1977 academic year. Accordingly, for the reasons stated above it is hereby recommended that the Commission issue the following ORDER:


The Brookdale Community College shall

1. Cease and desist from

(a) Interfering with employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, specifically by failing to follow the negotiated procedures for evaluations in the collective negotiations contract.

2. Re-evaluate George Abel in conformance with the collectively negotiated procedures in the contract between the parties in effect for the 1975-1976 academic year. During this evaluation Dean John Frey and Chairman Ron Kudile shall play an active consultative role. The results of such evaluation shall be retroactive to the commencement of the 1976-1977 academic year.

3. Post the attached Notice.


Edmund G. Gerber
Hearing Examiner

DATED: Trenton, New Jersey
January 27, 1978

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 employees in the exercise of the rights guaranteed to them by the New Jersey Public Employer-Employee Relations Act, specifically by failing to follow the negotiated procedures for evaluations in the collective negotiations contract.

WE WILL re-evaluate George Abel in conformance with the procedures in the 1975-1976 collective negotiations contract. During this evaluation Dean John Frey and Chairman Ron Kudile shall play an active, consultative role. The results of such evaluation shall be retroactive to the commencement of the 1976-1977 academic year.

BROOKDALE COMMUNITY COLLEGE

(Public Employer)

Dated _____

By _____ (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with Jeffrey B. Tener, Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780