P.E.R.C. NO. 93-114

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY (SCHOOL
OF OSTEOPATHIC MEDICINE),

Respondent,

-and- Docket No. CO-H-92-20

COMMITTEE OF INTERNS AND RESIDENTS,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the University of Medicine and Dentistry of New Jersey (School of Osteopathic Medicine) violated New Jersey Employer-Employee Relations Act by denying the Committee of Interns and Residents the right to represent employees at investigatory interviews that they reasonably believe might lead to discipline and by denying CIR information about disciplinary actions.

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COMMITTEE OF INTERNS AND RESIDENTS,

Charging Party.

Appearances:

For the Respondent, Robert J. Del Tufo, Attorney General (Vicki A. Mangiaracina, Deputy Attorney General)

For the Charging Party, Carol G. Dunham, attorney

DECISION AND ORDER

On July 16, 1991, the Committee of Interns and Residents ("CIR") filed an unfair practice charge against the University of Medicine and Dentistry (School of Osteopathic Medicine) ("UMDNJ"). The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (5),[1/] by preventing CIR

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

from representing residents at disciplinary proceedings and withholding from CIR notices of discipline and information about discipline, both of which CIR needs to fulfill its obligations as majority representative. The dispute specifically centers on the suspension and termination of an osteopathic intern, Steven Tenner, but CIR does not seek any specific relief regarding him.

On May 15, 1992, a Complaint and Notice of Hearing issued. On June 3, the employer filed an Answer denying the allegations and asserting, in part, that matters concerning academic and medical judgments and performance are not disciplinary matters under the collective negotiations agreement.

On July 30, 1992, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and introduced exhibits. CIR argued orally and both parties filed post-hearing briefs.

On March 29, 1993, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 93-20, 19 NJPER 202 (¶24095 1993). He found that Tenner was not denied his Weingarten[2/] right to union representation during an investigatory interview, either because he had already been suspended at the time of the interview or because CIR waived that right pursuant to the parties' collective negotiations agreement.

On April 19, 1993, after an extension of time, CIR filed exceptions. It claims the Hearing Examiner erred by finding that:

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2/ NLRB v. Weingarten, 420 U.S. 251 (1975)

Tenner was not entitled to a representative at the interview; CIR waived its members' Weingarten rights; CIR was denied the opportunity to be present at an interview with Tenner because Tenner was entitled to be accompanied by a faculty member, intern or student; and CIR abandoned its statutory right to obtain data when it was granted a number of rights under the contract but not the right to request such data. CIR further claims that the Hearing Examiner failed to confront the issue of the employer's refusal to provide CIR with notices of discipline and information pertaining to that discipline.

On April 29, 1993, after an extension of time, the employer filed a reply. It contends that disciplinary matters are contractually grievable and matters involving academic or medical judgments are not. It further contends that since this case involves an intern being suspended and ultimately terminated because of failures and deficiencies related to his medical performance, it does not involve a disciplinary matter and CIR therefore failed to produce any facts to support the allegations in its unfair practice charge. The employer claims that Weingarten does not apply since the matter was not disciplinary, but that if CIR thought it did, it should have pursued a grievance through all the steps of the grievance procedure including arbitration. The employer also claims that Weingarten does not apply because the "action" had already been imposed at the time of the interview. It also agrees with the Hearing Examiner that its obligation to provide notice of discipline

and information about discipline arises only in connection with grievable disciplinary matters.

We have reviewed the record. We incorporate the Hearing Examiner's undisputed findings of fact (H.E. at 2-8).

Article 1, paragraph 19 of the New Jersey Constitution provides that "[p]ersons in public employment have the right to organize, present to and make known...their grievances and proposals through representatives of their own choosing." The New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., implements those constitutional rights and establishes specific rights and obligations for public employees, employee organizations and employers. N.J.S.A. 34:13A-5.3 provides, in part, that once an employee organization is selected as majority representative, a public employer must negotiate grievance and disciplinary review procedures and include them in the collective negotiations agreement.

This employer negotiated a grievance procedure providing for binding arbitration of contractual grievances. Non-contractual grievances terminate with a decision by UMDNJ's president. The grievance procedure also provides that "[i]n no event shall matters concerning academic or medical judgement [sic] be the subject of a grievance under the provisions of this Article." In addition to the grievance procedure, there is a separate provision entitled "Disciplinary Action." It provides that housestaff officers, including interns:

> may be disciplined or discharged for cause, however, these actions shall be grievable, and in the event the involved Housestaff Officer files a

> grievance, the burden of proving just cause shall be upon the University.
>
> The University shall give five (5) working days advance notice, in writing, of any intended disciplinary action to the affected Housestaff Officer and the CIR. The notice shall state the nature and extent of discipline, the specific charges against the Housestaff Officer and describe the circumstances upon which each charge is based.

On December 21, 1990, Steven Tenner received a letter notifying him of his summary suspension from UMDNJ's internship program, effective immediately. The stated reasons were "continued acts, statements, professional conduct, and continued poor performance which is detrimental to the delivery of quality patient care." Tenner was advised in the letter that he was entitled to the procedural rights outlined in his Internship Manual. That manual's article on "Corrective Actions" begins:

> In compliance with the Agreement between UMDNJ and the CIR,. this Article will not apply to terms and conditions of employment. Actions regarding terms and conditions of employment will be subject to the provisions of the Agreement between UMDNJ and Housestaff Organization of UMDNJ/Committee of Interns and Residents (CIR). The intern is entitled to action as specified in the Agreement between UMDNJ and the CIR.

The manual's section on Routine Corrective Action includes provisions on Requests and Notices, Investigation, Records and Procedural Rights. The provision on Procedural Rights provides that "[a]ny recommendation for suspension or termination of internship entitles the intern to the procedural rights." There are also sections on Summary Suspension, Automatic Suspension, and Remediation.

On December 28, 1990, CIR's contract administrator requested a conference with UMDNJ, pursuant to the contract, to discuss the charges against Tenner. On January 3, 1991, Tenner was notified that his suspension would continue pending an investigation and interview. On January 7, CIR's contract administrator wrote to UMDNJ stating that: neither Tenner nor CIR had been provided with a copy of the documentation of the charges against Tenner; CIR had been denied the right to be present at Tenner's interview and denial of his Weingarten rights might taint the whole process; the Internship Manual's section on procedural rights fails to clearly identify those rights; and if Tenner's case is one of first impression, CIR is entitled to negotiate with UMDNJ over the proper procedure to be followed in disciplinary matters.

On January 15, 1991, UMDNJ responded that when temporary suspensions occur due to academic or medical reasons, as in the case involving Tenner, CIR has no role in the process. The letter acknowledged that the rules and regulations governing the training program are silent as to which procedures are appropriate, but that in related programs, students facing dismissal for academic reasons are provided with an opportunity to be heard.

As a result of UMDNJ's investigation, Tenner was placed on probation from January 9 to March 9, 1991. He successfully completed the probationary period. In April 1991, Tenner was again notified of a summary suspension. He was again invited to attend an investigation. On May 8, Tenner was notified that he was terminated effective immediately.

The Complaint raises two issues. Did the employer violate the Act by precluding CIR from representing Tenner at disciplinary proceedings and did it violate the Act by withholding information pertaining to that discipline? We hold that in both instances it did.

Whatever the employer's reasons, its decisions to suspend, place on probation, and terminate Tenner were disciplinary. Because they were disciplinary, they triggered certain statutory rights and obligations.

In East Brunswick Bd. of Ed., P.E.R.C. No. 80-31, 5 NJPER 398 (¶10206 1979), aff'd in pert. part, App. Div. Dkt. No. A-280-79 (6/18/80), we adopted the holding in NLRB v. Weingarten. Under Weingarten, an employee is entitled to have a union representative present at an investigatory interview which the employee reasonably believes might result in discipline. Here, Tenner was summarily suspended. He was then denied CIR representation at the investigatory interview which resulted in his being put on probation. He was also denied representation at the interview which resulted in his termination.

John E. Runnells Hosp., P.E.R.C. No. 85-91, 11 NJPER 147 (¶16064 1985), held that an employee did not have a right to a representative at a meeting held solely for the purpose of informing the employee that he was being terminated. That holding may be relevant to the decisions to suspend Tenner before the investigatory interviews. But it has no bearing on the interviews with Tenner

that led to his being placed on probation and being terminated. Those were investigatory interviews which Tenner had reason to believe might lead to further discipline and which in fact did.

Nor do we believe that CIR waived Tenner's right to union representation. The Hearing Examiner found a waiver based on a provision in the grievance procedure excluding matters concerning academic or medical judgment from coverage by that grievance procedure. But pre-discipline investigatory interviews are different from post-discipline grievance proceedings. Even if the union had agreed to limit an employee's right to pursue a substantive claim through a particular grievance procedure, that agreement would not constitute a clear waiver of an employee's procedural right to representation at an interview that an employee reasonably believes might lead to discipline.[3/]

We conclude that CIR did not waive Tenner's Weingarten rights and that the employer's refusal to allow a CIR representative at the investigatory interviews violated subsection 5.4(a)(1).[4/]

Similarly, we find that the employer's refusal to provide information concerning Tenner's discipline violated subsections

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3/ We express no opinion on what contractual procedures may or may not be available to CIR for review of disciplinary determinations.

4/ There is a factual dispute which the Hearing Examiner did not resolve concerning whether Tenner requested representation. See Finding no. 15. Nevertheless, we find that the employer's January 15, 1991 letter to CIR stating that CIR had no role in the process constitutes a blanket refusal to allow representation in such proceedings.

5.4(a)(1) and (5). The refusal to provide a majority representative with information relevant to contract administration is a refusal to negotiate in good faith. New Jersey Transit Bus Operations, Inc., P.E.R.C. No. 89-127, 15 NJPER 340 (¶20150 1989); State of New Jersey, P.E.R.C. No. 88-27, 13 NJPER 752 (¶18284 1987), recon. den. P.E.R.C. No. 88-45, 13 NJPER 841 (¶18323 1987), aff'd App. Div. Dkt. No. A-2047-87T7 (12/27/88). The employer believed that Tenner's discipline was based on academic or medical reasons and was not subject to the contractual grievance procedure. CIR was denied any information about the basis for the suspension and had no way of determining for itself the validity of the employer's belief. Even if the employer was correct and some other procedures applied, it was still obligated to provide information to CIR so that CIR could responsibly decide how it wished to proceed. Perhaps CIR could have filed a grievance, but that fact does not relieve the employer of its responsibility to provide CIR with the basic information about Tenner's discipline that CIR requested.

UMDNJ and CIR have unresolved disputes over what procedures were required before, during, and after Tenner's suspension, probation, and termination. Those disputes turn on interpretations of the parties' contract, interpretations that we need not make to decide this case. We simply hold that for purposes of the invocation of Tenner's statutory right to representation and CIR's statutory right to information, Tenner was disciplined and reasonably believed that he faced further discipline. He had a

right to representation at his investigatory interviews and CIR had a right to information so it could determine how to exercise its right and duty to represent him.

ORDER

The University of Medicine and Dentistry (School of Osteopathic Medicine) is ordered to:

A. Cease and Desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by denying the Committee of Interns and Residents the right to represent employees at investigatory interviews that they reasonably believe might lead to discipline and by denying CIR information about disciplinary actions.

2. Refusing to negotiate in good faith with CIR concerning terms and conditions of employment of employees in its unit, particularly by refusing to provide CIR with information about disciplinary actions.

B. Take this action:

1. Provide CIR with any relevant information about Steven Tenner's discipline that it may not have already provided.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days.

Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

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

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Grandrimo, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: June 24, 1993
Trenton, New Jersey
ISSUED: June 25, 1993

# NOTICE TO EMPLOYEES

## PURSUANT TO

AN ORDER OF THE

## PUBLIC EMPLOYMENT RELATIONS COMMISSION

AND IN ORDER TO EFFECTUATE THE POLICIES OF THE

## NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by denying the Committee of Interns and Residents the right to represent employees at investigatory interviews that they reasonably believe might lead to discipline and by denying CIR information about disciplinary actions.

WE WILL cease and desist from refusing to negotiate in good faith with CIR concerning terms and conditions of employment of employees in its unit, particularly by refusing to provide CIR with information about disciplinary actions.

WE WILL provide CIR with any relevant information about Steven Tenner's discipline that it may not have already provided.

Docket No. CO-H-92-20

UNIVERSITY OF MEDICINE AND DENTISTRY OF NEW JERSEY (SCHOOL OF OSTEOPATHIC MEDICINE)

(Public Employer)

Dated: _____ By: _____

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

H.E. NO. 93-20

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

In the Matter of

UMDNJ, SCHOOL OF OSTEOPATHIC MEDICINE,

Respondent,

-and- Docket No. CO-H-92-20

COMMITTEE OF INTERNS AND RESIDENTS,

Charging Party.

**SYNOPSIS**

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss a complaint which alleged that the Respondent had violated the Act by having refused a "Weingarten" interview to an Osteopathic Intern, who was summarily suspended on December 21, 1990, for reasons involving "medical judgment." The Hearing Examiner concluded the union had "clearly and unmistakably" waived the right to grieve matters concerning "academic or medical judgment" in its collective negotiations agreement. Thus, the Hearing Examiner recommended that the Commission reconsider its contract waiver Weingarten decisions, beginning with Camden Cty. Vo-Tech School, P.E.R.C. No. 82-16, 7 NJPER 466 (¶12206 1981).

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

H.E. NO. 93-20

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

In the Matter of

UMDNJ, SCHOOL OF OSTEOPATHIC MEDICINE,

Respondent,

-and- Docket No. CO-H-92-20

COMMITTEE OF INTERNS AND RESIDENTS,

Charging Party.

Appearances:

For the Respondent, Hon. Robert J. Del Tufo, Attorney General of New Jersey (Vicki A. Mangiaracina, D.A.G.)

For the Charging Party, Committee of Interns and Residents (Carol G. Dunham, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on July 16, 1991, by the Committee of Interns and Residents ("Charging Party" or "CIR") alleging that the UMDNJ, School of Osteopathic Medicine ("Respondent" or "UMDNJ") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"), in that since in or about mid-January 1991, and continuing to date, the Respondent's stated policy is to preclude CIR from representing residents in disciplinary proceedings and to withhold from CIR notices of discipline and information pertaining to discipline, each of which

is necessary for CIR to fulfill its obligations as the collective negotiations representative; all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act.[1/]

A Complaint and Notice of Hearing was issued on May 15, 1992, following which a hearing was held on July 30, 1992 in Newark, New Jersey. The parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Only the Charging Party elected to argue orally (Tr 136-139). Each party filed a post-hearing brief on September 24, 1992, and a reply on October 27, 1992.

Upon the entire record, I make the following:

## FINDINGS OF FACT

1. The UMDNJ, School of Osteopathic Medicine is a public employer within the meaning of the Act, as amended, and the Committee of Interns and Residents is a public employee representative within the meaning of the same Act.

2. The relevant collective negotiations agreement between the parties was effective during the term July 1, 1989 through June

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

30, 1992 (J-1). Article XIII, "Grievance Procedure," provides under Section A, "Purpose," that while the procedure is to assure "...prompt, fair and equitable resolution of disputes concerning terms and conditions of employment..." it is stated in the next sentence that "...In no event shall matters concerning academic or medical judgement (sic) be the subject of a grievance under the provisions of this Article..." (Emphasis supplied). (J-1, p. 17).

3. Article XIII is to be contrasted with Article XIV of J-1 where, in a provision entitled "Disciplinary Action," it is provided that discipline or discharge for cause "...shall be grievable..." and that the burden of proof is upon the University. Further, five working days advance notice shall be given of any intended disciplinary action to the affected Housestaff employee and the circumstances upon which the discipline is based shall be described. [J-1, p. 21].

4. A number of "Union Rights" are accorded CIR in Article XV such as Representation Lists, Membership Packets, Bulletin Boards, Distribution of Literature, Transmittal of Materials and Access to Premises. [J-1, pp. 21-23].

5. Steven Tenner commenced an internship with UMDNJ on June 25, 1990, at the School of Osteopathic Medicine, specifically, at the Kennedy Memorial Hospital and the University Medical Center (Tr 52, 64).

6. Jay Yanoff, the Associate Dean for Education at UMDNJ, School of Osteopathic Medicine, who has the responsibility for

administering the internship program at the School, testified without contradiction, regarding various failures of performance by Tenner during the period June 1990 through early December 1990, based on data provided by Drs. George Charney and John Fitzharris (Tr 50, 64-73). These deficiencies in Tenner's performance between June and December 1990 included the writing of inappropriate notes on patients' charts, changes of mind with respect to charts, difficulty in relations with the nurses, as memorialized at one point in a memorandum from Charney on August 14, 1990 (R-1; Tr 66). A two-week leave of absence requested and granted to Tenner created additional problems for him (R-2; Tr 66-69). In early December 1990, Fitzharris telephoned Yanoff with a complaint about Tenner's performance, stating that he had met with Tenner (Tr 72, 73).

7. On December 21, 1990, Charney sent a letter to Tenner, stating that the letter was notification of Tenner's "...summary suspension from the current Internship Program, effective immediately..." (R-3; Tr 73-77). Charney's stated reasons for this summary suspension were Tenner's "...continued acts, statements, professional conduct, and continued poor performance which is detrimental to the delivery of quality patient care..." etc. (R-3; Tr 77, 78). Yanoff testified credibly that Charney's concern had originated with a report from Fitzharris, who, as the Medical Director at the Cherry Hill Division, was sufficiently concerned about Tenner's performance, especially, his need for supervision (Tr 77, 78). Tenner was advised by Charney in his December 21st letter

that he was entitled to all of the procedural rights outlined in the "Internship Manual" (J-2).

8. Article 9, "Corrective Actions," of the "Internship Manual," contains a comprehensive codification of the manner in which the performance of interns is to be corrected upon the determination of deficiencies.

(a) Under "Purpose" in Section 9.1, it is stated, in significant part, that "...In compliance with the Agreement between UMDNJ and the CIR, this Article (of J-2) will not apply to terms and conditions of employment. (Emphasis supplied). Section 9.2 of the same Manual, "Routine Corrective Action," states, in part, that "...Whenever an intern engages in...or exhibits acts, statements...or professional conduct...and the same is...reasonably likely to be detrimental to patient safety or to the delivery of quality patient care...corrective action against the intern may be initiated."

(b) Section 9.3 of the Manual describes the procedure to be followed when an intern is summarily suspended. A summary suspension is "...effective immediately upon imposition..." As soon as is practicable, the Dean and Chief Executive Officer "...will discuss and recommend continuation, modification, or termination of the suspension..." Unless the suspension is terminated or modified to a lesser sanction, "...the intern will remain suspended..." until the conclusion of the investigation under Section 9.2-2 of the Manual. Upon the completion of the investigation, a written recommendation is made to the Dean and Chief Executive Officer.

(c) The intern is permitted to be accompanied either by another student/intern or a faculty member during the investigatory meeting(s).

[See J-2, Section 9, supra, and Tr 60-63, 113-116].

9. The suspension of Tenner, having occurred on December 21st, the commencement of the Christmas vacation period, there was no opportunity for either Tenner or the CIR to obtain a meeting with the administration until in or around January 3, 1991 (Tr 24-29, 80; J-3).

10. Pursuant to the procedures contained in Section 9 of the Internship Manual, supra, Dean Frederick J. Humphrey, II, appointed Thomas W. Allen, the Associate Dean for Academic and Clinical Affairs, to investigate the summary suspension of Tenner. Allen then asked three other individuals to assist him. [Tr 81, 82]. On January 3, 1991, Allen wrote to Tenner, advising him of his designation to conduct an investigation under Section 9.2-2 of the Internship Manual. Tenner was also told that his summary suspension would continue until the completion of Allen's investigation. [R-4].

11. Tenner appeared before Allen and his committee on January 8th. On January 10, 1991, Allen sent Tenner a letter advising him that he was being placed on probation from January 9th through March 9, 1991, following which a review would be made of Tenner's performance. Allen then outlined certain conditions under which Tenner's performance would be evaluated. [Tr 83; R-5].

12. On December 28, 1990, and again on January 7, 1991, Debra Friedman, CIR's Contract Administrator, had written first to Yanoff and then to Humphrey, requesting in the December letter a conference to discuss the charges against Tenner and then, in the January letter, requesting that a CIR representative be at the meeting of the Allen investigating committee on behalf of Tenner. She also stated that the failure to accord Tenner his "Weingarten" rights[2/] might taint the entire investigative process. [J-3, J-4; Tr 29, 36-41]. CIR's request to participate in the investigative process was denied (Tr 36, 87).

13. Tenner successfully completed his probationary period on March 10, 1991, and he was sent a letter confirming this fact by Allen (R-6; Tr 84).

14. Exhibits R-7 through R-10 demonstrate that as of April 10, 1991, Tenner was again placed on summary suspension by Charney based on his performance (R-7). On April 12th, Allen advised Tenner that an investigation on his suspension would be held on April 17th and he was invited to attend (R-8). On the same date, April 12th, Tenner was advised by Acting Dean R. Michael Gallagher that his suspension would remain in effect during the investigation (R-9). Finally, on May 8th Gallagher advised Tenner that he concurred in the unanimous recommendation of the panel that he be terminated (R-10).

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2/ See extended discussion of Weingarten hereinafter.

15. Friedman and Yanoff contradicted one another as to whether or not Tenner ever requested the assistance of or representation by CIR in Allen's investigation (Tr 36-38, 85, 86, 91, 92). However, for the purpose of this decision, I will assume, arguendo, that Tenner requested representation by CIR during the investigative phase of his suspension and that this request was denied by UMDNJ.

16. On January 15, 1991, counsel for UMDNJ, Julie Kligerman, responded to Friedman's letter of January 7th (J-5; J-4). She took the position that under Article XIII(A) of the contract, matters of academic and medical judgment may not be the subject of a grievance. [See Tr 29].

**ANALYSIS**

The question with which I am confronted, based upon the allegations in the Unfair Practice Charge, the summary suspension of Tenner on December 21, 1990, and the record evidence is whether the Respondent violated our Act, specifically, the rule of NLRB v. Weingarten, 420 U.S. 251, 88 LRRM 2689 (1975).[3/] In Weingarten the United States Supreme Court held that an employee is entitled to the presence of his union representative at an investigatory interview where the employee reasonably believes that discipline may result.

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3/ The Commission adopted the holding of Weingarten, following its decision in E. Brunswick Bd. of Ed., P.E.R.C. No. 80-31, 5 NJPER 398 (¶10206 1979), aff'd in part, rev'd in part, App. Div. Dkt. No. A-280-79 (1980).

More specifically, I will also consider (1) whether or not Weingarten applies where Tenner's suspension was imposed before the investigatory meeting occurred on January 8th, and (2) whether CIR contractually waived any Weingarten rights which Tenner might have asserted following his summary suspension.[4/]

The Respondent UMDNJ Did Not Violate Either Section 5.4(a)(1) Or (5) Of The Act When It Refused To Grant CIR's Request To Represent Tenner In The Investigatory Process Regarding His Summary Suspension Of December 21, 1990.

My conclusion that UMDNJ did not violate the Act as alleged is supported by the following Findings of Fact:

1. Tenner's summary suspension was based upon various failures and deficiencies related to his medical performance as an intern during the period June through December 1990. [Finding of Fact No. 6].

2. The relevant collective negotiations agreement between the parties provides in Article XIII, "Grievance Procedure," Section A "...In no event shall matters concerning academic or medical judgement (sic) be the subject of a grievance under the provisions of this Article..." [Emphasis supplied]. [Finding of Fact No. 2].

3. This provision in Article XIII is to be contrasted with Article XIV, where under "Disciplinary Action" it is provided

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4/ Since I am deciding this case solely on whether or not a Weingarten violation occurred, I need not reach the contention of UMDNJ that this case is also governed by the "Family and Educational Privacy Act" and the regulations promulgated thereunder [20 U.S.C.A. 1232 et seq. and 34 CFR 99.1 et seq.].

that Housestaff Officers may be disciplined or discharged for cause but, however, such actions shall be grievable and the burden is upon the University to prove "just cause." [Finding of Fact No. 2].

4. The summary suspension letter from Charney to Tenner, dated December 21, 1990, makes clear that his action was based upon matters of professional conduct and poor performance that were detrimental to the delivery of quality patient care and safety. Clearly, this falls within the ambit of "...matters concerning academic or medical judgement..." This action triggered the procedural requisites found in Section 9.3 of the Internship Manual (J-2).

5. The investigatory process undertaken by Allen, upon appointment of Dean Humphrey, was governed by the Internship Manual, and he so stated in his letter of January 3, 1991 to Tenner (R-4). Recall that Article 9 of J-2 provides the investigatory framework for a proceeding such as that which involved Tenner. Recall, also, that Article 9.1, "Purpose," provides specifically that, pursuant to the "Agreement" between UMDNJ and CIR, Article 9 will not apply to terms and conditions of employment.

6. Tenner was entitled to be accompanied to the January 8th investigatory meeting by a student, an intern or a faculty member. [Finding of Fact No. 8(c)]. Thus, UMDNJ declined the written requests of CIR (1) for a conference to discuss the charges against Tenner and (2) that a CIR representative be present at the January 8th meeting of Allen's committee on behalf of Tenner. [Finding of Fact No. 12].

* * * *

It remains only to discuss the various "Weingarten" decisions of the Commission and those in the private sector, which bear upon my conclusion that UMDNJ did not violate the Act. Contrary to CIR, I cannot agree that this case involves the failure of UMDNJ to have provided CIR with certain data relevant to an independent determination by it as to whether or not the Tenner matter was grievable. Tenner's suspension does not appear to have been grievable under a fair reading in pari materia of Articles XIII and XIV[5/] of J-1 and Article 9 of J-2. [CIR's Main Brief, pp. 5-7].

In Camden Cty. Vo-Tech School, P.E.R.C. No. 82-16, 7 NJPER 466-468 (¶12206 1981) the Commission restated its adherence to Weingarten, supra. The Commission noted that private sector case law indicated that this "right" is an employee's right and may only be invoked by the employee -- not by the employee's representative.

See also: D'Arrigo v. N.J. State Board of Mediation, 119 N.J. 74 (1990); State of N. J. (Dept. of Human Services), P.E.R.C. No. 89-16, 14 NJPER 563, 565 (¶19236 1988), adopting H.E. No. 88-55, 14 NJPER 374, 377, 378 (¶19146 1988); Jackson Tp., P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988), adopting H.E. No. 88-49, 14 NJPER 293, 304, 305 (¶19109 1988); Dover Municipal Utilities

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5/ CIR has been granted more than a few "Rights" under the collective negotiations agreement, specifically, six in number, which, however, fail to include requests for data (J-1, Article XV, pp. 21-23).

Authority, P.E.R.C. No. 84-132, 10 NJPER 333, 339, 340 (¶15157 1984); Stony Brook Sewage Authority, P.E.R.C. No. 83-138, 9 NJPER 280, 281 (¶14129 1983); East Brunswick Tp., P.E.R.C. No. 83-16, 8 NJPER 479 (¶13224 1982), adopting H.E. No. 82-59, 8 NJPER 400, 401 (¶13183 1982); Camden Cty. Vo-Tech School, supra; and Cape May County, P.E.R.C. No. 82-2, 7 NJPER 432 (¶12192 1981).

A few significant exceptions to Weingarten have arisen over the years since 1975. An example appears in John E. Runnells Hospital, P.E.R.C. No. 85-91, 11 NJPER 147 (¶16064 1985), adopting H.E. No. 85-22, 11 NJPER 8 (¶16005 1984) where the Commission held that a public employee did not have the right to union representation at a meeting, which was held solely to advise him that he was terminated. UMDNJ contends, and I agree, that a valid analogy exists between the facts in Runnells and the situation presented by Tenner, who on December 21, 1990, was advised in writing that he was summarily suspended, "effective immediately." Further, this suspension was reiterated on January 3rd. Tenner's appearance at the investigative meeting on January 8th changed nothing, notwithstanding that on January 10, 1991, he was advised that he was being placed on probation through March 9, 1991. Weingarten does not appear to aid Tenner on the facts as found above.[6/]

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6/ See, for example: Baton Rouge Water Works Co., 246 NLRB No. 161, 103 LRRM 1056, 1058 (1979) and Barmet of Indiana, Inc., 284 NLRB No. 106, 125 LRRM 1338, 1339 (1987).

Assuming, arguendo, that the Runnells holding does not carry the day, then I turn finally to whether or not Tenner's Weingarten rights were contractually waived by CIR in Article XIII of the agreement (J-1). The Commission in Camden Cty Vo-Tech, supra, held that Weingarten rights "...belong to the employees and not to the employee representatives and as such can only be waived by an individual public employee..."[7/]

Given the Commission's reliance in Camden Cty. upon early NLRB decisions on the issue of contract waiver, I will recommend that it reconsider Camden Cty. and like Weingarten decisions in the light of the plenary decision of the Fifth Circuit in Prudential Insurance Co. v. NLRB, 661 F.2d 398, 108 LRRM 3041 (5th Cir. 1981)[8/] where the Court held that Weingarten provided no clear indication as to whether or not a contractual waiver of the right to representation was permissible. The contract language in Prudential stated that the union agreed "...that neither the Union nor its members shall interfere with the right of the Employer..." to

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7/ Citing Red Bank Reg. Ed. Assn. v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122 (1978). The Commission also stated that Section 5.3 of our Act guarantees employees the right to have their grievances initiated by the majority representative and that this right may not be waived. I respectfully suggest that the proposition stated has nothing whatever to do with the issue of whether the majority representative may contractually waive an individual employee's Weingarten right.

8/ Compare New York Telephone Co., 219 NLRB No. 136, 89 LRRM 1723 (1975) [no appeal taken] and Georgia Power Co., 238 NLRB 572, 99 LRRM 1574 (1978), enf'd. 5th Cir. 1979 without opinion, 87 CCH LC ¶11593.

interview any Agent with respect to any phase of his work without the grievance committee being present.

The NLRB in Prudential had found a violation, concluding that there was no clear and unmistakable waiver of the employee's Weingarten right.[9/] The Court of Appeals, in denying enforcement, stated that the courts had recognized many instances of contractual waiver where a union could legally bargain away employee rights such as the right to strike, concessions in collective negotiations, or even certain statutory rights. The Court then added that since "...the Supreme Court has recognized the right of a contractual waiver for other such fundamental rights (to strike), it would appear that a contractual waiver of the Weingarten right is possible..." [108 LRRM at 3043]. Noting the necessity that such waivers must be "clear and unmistakable," the Court concluded that the bargaining history of the parties, as incorporated into the current Prudential contract, constituted a clear and unmistakable waiver of Weingarten rights.

Significantly, following the Court's remand in Prudential Insurance Co., the Board accepted the remand and altered its original conclusion, finding that there had been a contractual waiver of Weingarten rights by the union: 275 NLRB No. 30, 119 LRRM 1073 (1985).

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9/ 251 NLRB 1591, 105 LRRM 1159 (1980).

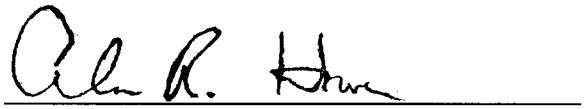
Based upon the entire record, and the arguments of the parties, I make the following:

**CONCLUSION OF LAW**

The Respondent UMDNJ did not violate N.J.S.A. 34:13A-5.4(a) or (5) by its conduct herein since Steven Tenner, an Osteopathic Intern, was not denied his "Weingarten" rights during the period of his summary suspension, commencing December 21, 1990, and continuing through January 10, 1991, either under John E. Runnells Hospital, supra, or because his claim to such rights had been waived by CIR, his collective negotiations representative, pursuant to Article XIII, Section A of the collective negotiations agreement in effect at that time.10/

**RECOMMENDED ORDER**

I recommend that the Commission **ORDER** that the Complaint be dismissed.



Alan R. Howe
Hearing Examiner

Dated: March 29, 1993
Trenton, New Jersey

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10/ Due to a "sea change" in federal sector holdings since the Commission's decision in Camden Cty. Vo-Tech School, supra, which relied, in primary part, upon early NLRB decisions on the issue of contractual waiver of Weingarten rights, I would urge a reconsideration of Camden Cty., particularly in the light of Prudential Insurance Co. and the Board's complete acceptance of the Court's remand.