

H.E. NO. 95-6

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

In the Matter of

UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY,

Respondent,

-and-

Docket No. CO-H-94-159

UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY COUNCIL
OF AMERICAN ASSOCIATION OF
UNIVERSITY PROFESSORS CHAPTERS

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission denied a Motion for Summary Judgment and Cross-Motion to Dismiss. After reviewing the standards for such motions, the Hearing Examiner first determined that negotiations over guaranteed and reserved parking fees for employees was a mandatory subject of negotiations. After reviewing the parties' submissions, the Hearing Examiner also concluded that material factual issues were in dispute that could not be resolved by these motions. The Hearing Examiner concluded that a plenary hearing was needed.

H.E. NO. 95-6

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

In the Matter of

UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY,

Respondent,

-and-

Docket No. CO-H-94-159

UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY COUNCIL
OF AMERICAN ASSOCIATION OF
UNIVERSITY PROFESSORS CHAPTERS

Charging Party.

Appearances:

For the Respondent, Deborah T. Poritz, Attorney General
(Anne Marie Kelly, Deputy Attorney General, of counsel)

For the Charging Party, Sterns & Weinroth, P.A.
(Mark D. Schorr, of counsel)

HEARING EXAMINER'S DECISION ON MOTION FOR
SUMMARY JUDGMENT AND CROSS-MOTION TO DISMISS

An unfair practice charge was filed with the Public Employment Relations Commission on November 24, 1993, by University of Medicine and Dentistry of New Jersey Council of American Association of University Professors Chapters (AAUP) alleging that the University of Medicine and Dentistry of New Jersey (UMDNJ or University) violated subsections 5.4(a)(1), (3) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), by unilaterally promulgating a policy governing guaranteed and reserved parking spaces offered to unit members. The AAUP essentially argued that during negotiations for a successor

agreement, UMDNJ, on May 24, 1993, unilaterally set the rate for guaranteed and reserved parking (premium parking) for unit members for fiscal year 1994. The AAUP seeks an order declaring that UMDNJ unlawfully implemented parking rates for guaranteed and reserved parking; ordering UMDNJ to reimburse unit members presumably for the difference between the new and old rates; and ordering UMDNJ to negotiate over such rates with the AAUP.

UMDNJ filed a statement of position in opposition to the charge on December 27, 1993. It argued that while the parties have negotiated over "general" parking rates, the AAUP never negotiated over "premium" parking rates in the past, and had not sought to negotiate over premium rates in the recent negotiations, and therefore, it was not obligated to negotiate over those rates.

A Complaint and Notice of Hearing issued on May 5, 1994. On June 2, 1994, the AAUP filed a Motion for Summary Judgment with supporting documentation with the Commission's Chairman seeking judgment in its favor. By letter of June 20, 1994, the Chairman's Special Assistant, pursuant to N.J.A.C. 19:14-4.8, referred that Motion to me for determination.

On July 1, 1994, UMDNJ filed a brief in opposition to the AAUP's Motion together with its own Motion to Dismiss the charge with supporting documentation. The AAUP responded to that Motion on July 13, and with a supplement on July 25, 1994. UMDNJ filed a reply on July 25, followed by a final AAUP response filed on July 27, 1994.

Summary judgment practice before the Commission is guided by N.J.A.C. 19:14-4.8, by the Court's decision in Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 73-77 (1954), and by developing case law. In considering a motion for summary judgment all inferences or doubts are drawn against the moving party and in favor of the party opposing the motion. No credibility determinations may be made, and the motion must be denied if material factual issues exist.^{1/} A motion for summary judgment should only be granted with extreme caution, and the summary judgment procedure is not to be used as a substitute for a plenary trial. Baer v. Sorbello, 117 N.J. Super. 182 (App. Div. 1981); Essex Cty. Ed. Services Comm., P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982); N.J. Dept. of Human Services, P.E.R.C. No. 89-52, 14 NJPER 695 (¶19297 1988).

In Judson the Court explained that the role of a judge in a summary judgment procedure:

... is to determine whether there is a genuine issue as to a material fact, but not to decide the issue if he finds it to exist. 17 N.J. at 73.

^{1/} N.J.A.C. 19:14-4.8(d) explains that summary judgment may be granted only if there are no material facts in dispute. That rule provides:

(d) If it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross-motion for summary judgment may be granted and the requested relief may be ordered.

The Court further explained that:

Issues of credibility are ordinarily for the trier of fact, and the judge does not function as a trier of fact in determining a motion for summary judgment. 17 N.J. at 75.

The motion to dismiss standards are similar in some respects to the summary judgment standards. Favorable inferences must be drawn in favor of the opposing party, and the motion cannot be granted if material facts are in dispute. See Dolson v. Anastasia, 55 N.J. 2 (1959); North Bergen, P.E.R.C. No. 78-28, 4 NJPER 15 (¶4008 1978); N.J. Turnpike Auth., P.E.R.C. No. 79-81, 5 NJPER 197 (¶10112 1979).

I have read all of the parties' submissions. The AAUP argued that UMDNJ violated the Act because it unilaterally changed premium parking rates during negotiations for a successor collective negotiations agreement. The AAUP maintains that since UMDNJ did not dispute the assertion that it unilaterally changed premium parking rates it (AAUP) is entitled to summary judgment. UMDNJ argued, however, that it was not obligated to negotiate the premium parking rates; that the AAUP did not propose negotiations over those rates during the recent negotiations, mediation and fact-finding sessions; that the AAUP did not demand negotiations over those rates after UMDNJ changed the rates; and separately argued that the setting of premium parking rates was a managerial prerogative. UMDNJ maintains that since the AAUP did not dispute the assertion that it did not raise premium parking during the mediation and fact-finding process, it is entitled to dismissal of the charge.

Pertinent Facts

Certain facts are not in dispute. There were specific fees for guaranteed and reserved parking, UMDNJ unilaterally changed those fees in May 1993, and the AAUP did not make proposals regarding those fees in mediation or fact-finding.

There are, however, significant differences of opinion regarding important factual questions. In the AAUP's supporting affidavit, Joyce Orenstein represented (in ¶ 3) that the parties had negotiated over premium rates in the predecessor contract and cited to Article 14 of the agreement as support. Orenstein had said:

For the predecessor contract, the University and the AAUP agreed to University-wide parking rates, including rates for guaranteed and reserved parking. The rates for guaranteed and reserved spaces under the expired contract were \$600 and \$1,200, respectively.

The pertinent part of Article 14 of the agreement provides:

The parties agree that parking fees will be established as a result of negotiations between the University and the Parking Advisory Committees for the various campuses.

In UMDNJ's supporting affidavit of Robert D'Augustine, however, he represented (in ¶ 3) that Article 14 of the prior agreement only referred to general parking fees, and he further represented (in ¶ 6) that during recent negotiations only general parking fees were discussed. D'Augustine had said in pertinent part:

3. Article 14 of that contract which provided for negotiations of parking fees with the Parking Advisory Committee (PAC) referred to general parking fees only.

6. As part of the negotiations with the AAUP, only general parking fees were discussed.

ANALYSISNegotiability

UMDNJ's argument that premium parking rates are non-negotiable lacks merit. Both the courts and Commission have held that the cost of parking for employees was a mandatory subject for negotiations. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 30, 3 NJPER 265 (App. Div. 1977); Jersey City Medical Center, P.E.R.C. No. 89-24, 14 NJPER 577 (¶19244 1988); Jersey City Medical Center, P.E.R.C. No. 90-99, 16 NJPER 302 (¶21124 1990). UMDNJ argued that negotiations over premium parking did not meet the first and third tests of negotiability established by the Court in In re IFPTE Local 195 v. State, 88 N.J. 393, 402 (1982), which provided 1) that the item intimately and directly affect employees work and welfare, and 3) that a negotiated agreement would not significantly interfere in the determination of governmental policy.

UMDNJ's argument regarding the first test is not supported by the law. Byram and the Jersey City Medical Center cases have clearly determined that the cost of parking for public employees intimately and directly affects them and is negotiable. Those cases do not distinguish between the types of parking available to employees and I do not believe a distinction is relevant. If premium parking is available to employees and there is a fee for that parking, then the cost of that parking meets the first IFPTE test and is negotiable upon demand.

UMDNJ's argument regarding the third IFPTE test was stated in its brief (p. 9) as follows:

To compel the University to negotiate these fees would seriously impact on the University's managerial prerogative to determine its fiscal policies.

That statement, however, is insufficient basis to find that negotiations over premium parking fees would interfere with UMDNJ's ability to determine governmental policy. Rather, at most, it is an acknowledgment that such negotiations impacts on the University's financial considerations. The Commission in Jersey City Medical Center, 14 NJPER at 578-579 addressed a similar concern in that case when it said:

We recognize the Center's strong interest in rationalizing the distribution of scarce parking spaces, just as an employer with financial problems has a strong interest in rationalizing the distribution of scarce dollars. But that interest, while it may make an alleged agreement unwise, does not make it illegal. The employer may protect itself in negotiations by saying no when appropriate. (emphasis added).

The result here is the same. UMDNJ's financial considerations can best be addressed by it taking good faith, but firm, positions during the negotiations process in order to protect its fiscal policies.

The Factual Dispute

The real focus of the matters before me must be on the facts. The parties disagree on whether Article 14 covered premium parking. Although the AAUP cited Article 14 to support Orenstein's affidavit, none of the language in Article 14 that was presented to me supports her representation. That Article said nothing about premium parking fees. Since Orenstein claimed that Article 14

supported her testimony, and D'Augustine claimed it did not cover premium fees, a dispute exists on a material fact. That fact - whether Article 14 covered premium fees - is material because it raises a series of related questions that could affect the outcome of this case.

Have the parties, for example, ever negotiated over premium parking fees; if they did not, did the University unilaterally set those fees in the past; and if so, has the AAUP ever clearly demanded negotiations over such fees? The answers to those - and perhaps other related - questions are relevant because if the prior practice was for UMDNJ to unilaterally set premium parking fees then, absent a demand, it would not have been obligated to initially negotiate over such fees and the AAUP may have waived its right to expect the University to negotiate prior to setting new fees. So. River Bd. of Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986), aff'd App. Div. Dkt. No. A-5176-85T6 (2/10/87); Phillipsburg Bd. of Ed., P.E.R.C. No. 90-35, 15 NJPER 623 (¶20260 1989). In So. River, the Commission said:

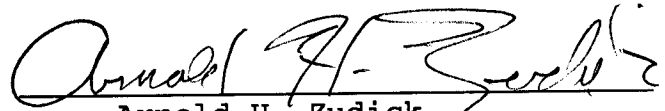
...if the employee organization has been apprised of proposed changes in advance and declines the opportunity to negotiate, or has routinely permitted the employer to make similar changes in the past, it may have waived its right to negotiate those changes. (emphasis added).
12 NJPER at 477.

If the parties had negotiated over the premium parking fees in the past, however, and Article 14 covered those fees, then UMDNJ may have been obligated to initiate negotiations over those fees

prior to establishing new fees. See Hunterdon Cty Bd. of Chosen Freeholders v. CWA, 116 N.J. 322 (1989), aff'g App. Div. Dkt. No. A-5558-86T8 (3/21/88), aff'g P.E.R.C. No. 87-35, 12 NJPER 768 (¶17293 1987). New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1978), aff'd App. Div. Dkt. No. A-2450-77 (4/2/79); Upper Pittsgrove Tp. Bd. of Ed., P.E.R.C. No. 90-34, 15 NJPER 621, 622 (¶20259 1989).

Having reviewed the parties' submissions, I am convinced that material factual issues exist that require a plenary hearing to resolve this matter.

Accordingly, the parties' Motions are denied.^{2/}


Arnold H. Zudick
Hearing Examiner

DATED: August 9, 1994
Trenton, New Jersey

^{2/} Unless otherwise agreed upon, the hearing shall commence as scheduled on August 25, 1994.