

H.E. NO. 91-35

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

In the Matter of

BOARD OF TRUSTEES OF MIDDLESEX
COUNTY COLLEGE,

Respondent,

-and-

Docket No. CO-H-89-313

FACULTY UNION OF MIDDLESEX COUNTY
COLLEGE, LOCAL 1940, AFT/AFL-CIO,

Charging Party.

SYNOPSIS

The Hearing Examiner grants the College's Motion to Dismiss, made at the conclusion of the faculty union's case. The Hearing Examiner assumes as true all evidence and reasonable inferences favorable to the union's position and concludes that it has failed to show any evidence that the College's decision to restructure its nursing program was unlawfully motivated.

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Appearances:

For the Respondent, Jackson, Lewis, Schnitzler & Krupman,
Attorneys (Jeffrey J. Corradino, of Counsel)

For the Charging Party, Dwyer & Canellis, Attorneys
(Paul J. Burns, of Counsel)

HEARING EXAMINER'S RULING
ON MOTION TO DISMISS

On April 21, 1989, the Faculty Union of Middlesex County
College, Local 1940, AFT/AFL-CIO ("Local 1940" or "Union") filed an
unfair practice charge and request for interim relief alleging that
Middlesex County College ("College") violated subsections 5.4(a)(1),
(2), (3) and (5)^{1/} of the New Jersey Employer-Employee Relations

^{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. (2) Dominating or
interfering with the formation, existence or administration of

Act, N.J.S.A. 34:13A-1 et seq. Local 1940 alleged that on December 20, 1988, the College resolved to restructure its nursing program and gradually eliminate its current nursing faculty. The Union claimed that the College failed to negotiate the restructuring and decided to eliminate its nursing staff because it supported a Union job action in October 1988. The Union alleges that during an October 5, 1988 walkout, the College President "commented that she was surprised and disappointed in the support for the Union given by the nursing faculty."

On May 8, 1989, a Commission Designee denied the application for interim relief, concluding that the Union "failed to show that it has a substantial likelihood of prevailing at a full hearing on its (a)(3), or anti-union animus allegation." I.R. No. 89-18, 15 NJPER 315, 316 (¶20140 1989). The Designee also found that the College's decision to restructure the nursing school was a managerial prerogative.

On June 6, 1989, the Director of Unfair Practices issued a Complaint and Notice of Hearing assigning the case to Hearing Examiner Marc F. Stuart.

1/ Footnote Continued From Previous Page

any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

On June 16, 1989, the College filed an Answer admitting that it had resolved to restructure its nursing program but denying that it was unlawfully motivated or had an obligation to negotiate.

Hearing Examiner Stuart resigned from the Commission and the matter was reassigned to me. N.J.A.C. 19:14-6.4. I held a prehearing conference on December 6, 1989. On March 5, 1990, the College filed a Motion for Summary Judgment. The union filed a response on March 27, 1990. On April 19, 1990 the Commission transferred the matter to me for a ruling. N.J.A.C. 19:14-4.8(a).

I granted part of the motion and dismissed the allegations about the College's failure to negotiate the restructuring of its nursing program and its decisions to reduce force and to subcontract.^{2/} H.E. No. 90-46, 16 NJPER 331, 332 (¶21137 1990). I denied the motion as it related to the Union's allegation of unlawful motivation. I assumed as true the Union's allegations that the College President was aware of and disappointed in the nursing faculty's participation in a job action and that the College resolved to restructure its nursing program a short time after difficult negotiations. These allegations disputed affidavits submitted by the College claiming that its decision to restructure the nursing program was based on declining enrollment, increased drop out rates and poor test results. Given this fact-dispute, I concluded that the College was not entitled to a dismissal of the 5.4(a)(3) allegations. N.J.A.C. 19:14-4.8(d).

^{2/} IFPTE Local 195 v. State, 88 N.J. 393 (1982); Maywood Bd. of Ed. v. Maywood Ed. Assn., 168 N.J. Super. 45 (1979).

On July 30, 1990, I conducted a hearing. After the Union presented its case, the College moved to dismiss the remaining allegations of the Complaint.

A ruling on a motion to dismiss is not based on findings of fact. It does not involve a weighing of evidence. Rather, it is a determination of whether a charging party has presented evidence of a violation. The determination requires that all evidence and reasonable inferences supporting the charging party's position be assumed true. I now review the Union's evidence.

The parties began negotiations for their current contract in January 1988 by exchanging written proposals. They met later in January and continued negotiating through the spring and summer of 1988. Union President Josephine Lamela estimates that the parties met 20 times. By September 1988, the Union negotiating team felt that little progress had been made. At a September meeting the faculty authorized the Union executive council to call a strike. The Union also contacted College President Dr. Flora Edwards and asked her to take an active role in negotiations. It felt that Edwards' involvement would help resolve the impasse. Dr. Edwards advised the Union, however, that she would not participate. Faculty members attended a September 1988 Board of Trustees meeting and appealed to the Board to settle the contract. After this meeting College Vice President Bakum became involved in negotiations and, in Lamela's view, some progress was made. Despite the progress made after Vice President Bakum became involved in the process, the Union

decided in early October 1988 that a settlement was unlikely. It called a strike that lasted three days. Lamela estimates that 95% of the faculty supported the strike. All but one member of the nursing faculty picketed.^{3/} (T23-T27, T47-T48, T50).

Eleanor Bates was the Union's President in 1970 and 1971 and has served on its executive board and on several negotiating committees over the last 18 years. When asked if she was aware of "any negative reaction to the strike by the administration," she testified:

The only incident that I was aware of as I said, the strike headquarters member of the nursing faculty came into the headquarters the second day of the strike and said that Dr. Allen...had stopped at the gate and said that Dr. Edwards was surprised to see so many of the nursing faculty involved [given the problems in the nursing department at the time]. (T74-T75).

There is no evidence in the record corroborating Bates' testimony about Edwards' alleged remark. Bates' testimony is triple hearsay. I cannot conclude, therefore, that Edwards made the remark.^{4/}

When questioned about the nursing faculty's involvement in negotiations and grievance processing, Lamela replied that the nursing faculty has always had a representative on the negotiations committee and that, "12 or more years ago there was a grievance on

^{3/} Prior to the College's decision to restructure its nursing program, it employed 15 nursing faculty. College-wide there are about 200 faculty. (T32)

^{4/} In re application of Howard Savings Bank, 143 N.J. Super. 1 (App. Div. 1976).

behalf of the nursing faculty regarding the payment for preparation for clinical assignment." (T31). Lamela later explained that this grievance may be as old as twenty years but that many of the current nursing staff had been employed when it was filed. She added that, the grievance had a big economic impact. (T32, T41-T42). Lamela also pointed out that Eleanor Bates, a member of the nursing faculty, was president of the Union in the early 1970's. Lamela explained that the nursing faculty had two members on the negotiating team for the last contract and that the nursing faculty were strong supporters of the Union. (T44-T45).

Lamela testified that shortly after the strike in early October 1988 she met with College Vice President Bakum and they discussed "[t]he concern over the performance of the students on the nursing exam." (T27). According to Lamela, "Dr. Bakum indicated....the college's concern over the....68 [percent] pass rate on the licensing exam. [Lamela and Bakum also] discussed the fact that the program did have some shortcomings." (T28). On cross-examination Lamela explained that she had a similar meeting with Bakum in the Spring of 1988, "where [they] discussed the fact that the college was concerned about the performance of the licensing exam." (T46).

This poor performance on the licensing exam prompted the State Board of Nursing to place the College's program on conditional licensure in the fall of 1988. Under conditional licensure, the College would not have been permitted to admit a new class the next

school year unless at least 75% of its students taking the next exam passed. The State Board of Nursing also sent Dr. Judith Gavignon to review the College's nursing program. (T61-62; T79)

After her review, Gavignon recommended the College consider changes in admissions, student testing, faculty relations with students, and curriculum. Bates contended that Gavignon's recommendations were similar to those made by the nursing faculty in 1982, during an earlier review of the nursing program. (T54, T62-65).

In response to a request by the faculty, Edwards hired a consultant, Janet Ruffin, who had several meetings with faculty and administration from September to December 1988 (T71, T80). Bates' understanding of Ruffin's consultation was "that she was coming to work with faculty on interpersonal communications." (T60). Ruffin prepared a report in December 1988, with "recommendations for further action regarding faculty/staff team building and group process." (CP-4). She found a lack of constructive conflict resolution, a high tolerance for low productivity, and a lack of commitment and respect among the nursing staff. (Id). Before issuing her report, Ruffin discussed her observations with Edwards. Edwards received a copy of Ruffin's report in early January 1989. (T84-T86).

According to Lamela, the Board of Trustees, in November 1988, directed Edwards to prepare "a plan to address the difficulties" of the nursing program. (T28). On December 2, 1988,

Edwards prepared a memo to the nursing faculty, which states, in part:

...over the years, uneven performance of Nurse Education graduates in the licensing examination resulting this year in the conditional accreditation of the program raises a number of serious questions related to the instructional process. In addition, there exists the real possibility of a diminution in student enrollment and a concomitant reduction in force in the Nurse Education Department.

After due consideration of this serious issue, the Board of Trustees in the resolution adopted on November 22, 1988, a copy of which is attached, has directed me to develop a plan which addresses the following issues:

1. Assurance of academic quality in Nurse Education
2. Continuity in the provision of nurses to meet the health community we serve
3. The potential reduction in force due to a diminution of student enrollment.

[CP-1]

The memo invites members of the faculty "who have suggestions for addressing this problem to submit them to [Edwards] in writing [by] December 15." (Id., T30).

On December 20, 1988, Edwards submitted her monthly report to the Board of Trustees. The report discussed events occurring between November 22 and December 20, 1989. It also referred to a plan recommending "The exploration of an alternative structure for Nurse Education at the College, one which would be based on a collaborative effort with Rutgers University and UMDNJ." (CP-3).

Lamela attended the Board of Trustees meeting when Edwards presented her plan but did not make a statement for the record.

Lamela recalled a conversation she had with Bakum in early December 1988, in which she asked him if the nursing program might be eliminated. Lamela remembered Bakum vaguely remarking about the possibility of restructuring the nursing program with an outside organization. (T31-33).

The College adopted Edwards' plan and "several [reduction-in-force] notices went out indicating that jobs [would] not be available for the 89-90 academic year." (Lamela - T39).

ANALYSIS

In New Jersey Turnpike Auth., P.E.R.C. No. 79-81, 5 NJPER 197 (¶10112 1978), the Commission explained the standard for ruling on a motion to dismiss at the conclusion of a charging party's case. The Commission is guided by the Supreme Court's directive in Dolson v. Anastasia, 55 N.J. 2 (1969), that, when ruling on a motion for involuntary dismissal, a 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 Commission added that:

Unlike a number of other jurisdictions, New Jersey Courts have consistently held that before a motion for involuntary dismissal will be granted the moving party must demonstrate that not even a scintilla of evidence exists to support plaintiff's case. Thus, while the process does not involve the actual weighing of evidence (as that concept is traditionally understood) some consideration of the worth of the evidence presented may be necessary. This is particularly true in the administrative context where evidence, which would ordinarily be ruled inadmissible in a trial court may, under In re application of Howard Savings Bank, 143 N.J. Super. 1 (App. Div. 1976), be allowed in at an administrative hearing. This less rigorous

standard for ruling upon evidentiary questions of admissibility was not designed to encourage or sanction administrative decisions based upon incompetent or otherwise unreliable evidence. Rather, the Court in Howard Savings Bank, supra, stressed that "an administrative decision must be based on a residuum of legal and competent evidence and not on hearsay alone.

[New Jersey Turnpike Authority, 5 NJPER at 198-199.]

In ruling on the College's motion, I must accept as true all evidence supporting the union's position, give it the benefit of all reasonable inferences and deny the motion if there is a scintilla of evidence to prove a violation. Down Tp. Bd. of Ed., P.E.R.C. No. 87-154, 13 NJPER 576, 578 (¶18211 1987) f.n. 4.

The union's 5.4(a)(3) argument is that the College decided to restructure the nursing program in retaliation to the nursing faculty's support of the Union both before and during the job action in October 1988.

That the College decided to restructure its nursing program is undisputed. The question becomes, is there a scintilla of evidence to be found in the union's proofs and related reasonable inferences that the College's decision was motivated by union animus?

I conclude that no evidence of a violation has been presented and recommend that the Commission dismiss the remaining allegations of the charge.

I assume as true that negotiations began in January 1988 and that little progress was made by September 1988 when the Union asked Edwards to become involved. I assume that the Union then made a direct appeal to the Board of Trustees to settle the impasse but

that no settlement was reached by early October. I assume that nursing faculty participated in the strike. I assume that 15 to 20 years ago the Union filed a grievance on behalf of the nursing faculty which benefited nursing faculty and cost the College a great deal of money. I assume that the nursing faculty had representatives on the union's negotiating teams. I assume that the nursing faculty and the College had differences of opinion about curriculum, student testing and admissions that date to at least the early 1980's. I assume that some of Gavignon's recommendations about those subjects were similar to recommendations made by nursing faculty in the early 1980's. I assume that the nursing faculty requested the help of a consultant and that Edwards retained Ruffin who reported about communication and morale problems among the nursing faculty. I assume that the Board of Trustees directed Edwards, in November 1988, to prepare a plan addressing the difficulties of the nursing program and that Edwards proposed a restructuring of the program which would result in the eventual elimination of the existing nursing faculty.

I do not consider (because this is a motion to dismiss) evidence tending to support the College's defense. I do not, for example, rely on: testimony about conversations between Bakum and Lamela in the early spring of 1988 over the problem of test (NCLEX) scores; evidence about the College's conditional accreditation status, under which it would not have been permitted to admit students in the 1989-90 school year absent a pass rate of 75% in the

NCLEX; or testimony corroborating the College's assertion of a longstanding concern about enrollment and test scores.

I understand New Jersey Turnpike Authority and Downe Township to require that I make reasonable inferences from evidence favorable to the Union's position rather than weighing all the evidence. The standard also requires, however, some consideration of the worth of the evidence. Thus, I do not assume that Edwards stated or felt surprised or disappointed about the nursing faculty's involvement in the job action. Howard Savings Bank. Nor do I consider the 15-year old grievance as relevant. It is simply too remote in time.

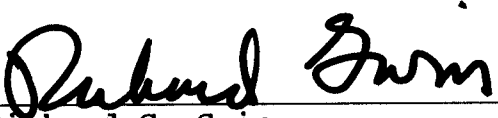
I infer from the Union's evidence that the tension between the nursing faculty and the College relates to longstanding disagreements about how the nursing program should be structured. I infer that the nursing faculty was frustrated by a perception that the College did not heed faculty suggestions about how to improve the program. Finally, I infer that the nursing faculty and the Union felt that the nursing program could have been improved without a reduction-in-force or a subcontracting of services.

I do not conclude, however, that the evidence favorable to the Union and the reasonable inferences drawn from it shows that the College retaliated against the Union or the nursing faculty, based on the exercise of rights protected by the Act. The record lacks any direct evidence of animus. Nor can I find a scintilla of evidence of the elements of circumstantial evidence required under

Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235

(1984) -- protected conduct, knowledge and hostility -- to conclude that the Union established its prima facie showing that the exercise of protected activity was a substantial or motivating factor in the College's actions. I therefore recommend dismissal of the Complaint in its entirety and direct the parties' attention to N.J.A.C.

19:14-4.7.


Richard C. Gwin
Hearing Examiner

Dated: March 25, 1991
Trenton, New Jersey