

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Respondent,

-and-

Docket No. CO-78-263-84

RUTGERS UNIVERSITY COLLEGE
TEACHERS ASSOCIATION,

Charging Party.

SYNOPSIS

The Rutgers University College Teachers Association filed an amended unfair practice charge against Rutgers, The State University, which alleges the Act was violated in that Rutgers: (1) failed to rehire David Frost, the President of the Association, for the academic year 1978-79, due to his Association activities; (2) rehired Allen Hirsch, who is not a member of the Association, but failed to rehire other professors who were members of the Association and had more seniority; (3) unilaterally altered the past practice of rehiring Co-Adjutant faculty on the basis of seniority.

The Hearing Examiner found: (1) that the Association had failed to prove, by a preponderance of the evidence, that Rutgers was motivated by anti-union animus in its rehiring practices for the academic year 1978-79; (2) that seniority and priority practices do not attach to the management prerogative of hiring Co-Adjutant faculty for a given semester in an academic year; (3) that the cancellation of a given course for an academic year is a management prerogative which may be unilaterally implemented without prior negotiations.

The Commission, after a careful review of the record, finds the Association's exceptions to be without merit and adopts the Hearing Examiner's Recommended Report and Decision substantially for the reasons discussed therein although it does not reach the question of whether preference based on seniority among qualified candidates in consideration for employment from one semester to another is a required subject of negotiations. Accordingly, the Commission dismisses the Association's charge in its entirety.

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Docket No. CO-78-263-84

RUTGERS UNIVERSITY COLLEGE
TEACHERS ASSOCIATION,

Charging Party.

Appearances:

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

For the Charging Party, Joseph Fisch, Esq.

DECISION AND ORDER

On April 28, 1978, an Unfair Practice Charge was filed with the Public Employment Relations Commission by the Rutgers University College Teachers Association (the "Association") which alleges that Rutgers, The State University, ("Rutgers") engaged in an unfair practice within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"). Specifically, the Association alleges N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (4), (5) and (7) of the Act ^{1/} were violated

1/ These subsections provide that 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. (2) Dominating or interfering with the formation, existence or administration of 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. (4) Discharging or otherwise discriminating

(continued)

in that Rutgers: (1) failed to rehire David Frost, the President of the Association, for the academic year 1978-79, due to his Association activities; (2) rehired Allen Hirsch, who is not a member of the Association, but failed to rehire other professors who were members of the Association and had more seniority; (3) unilaterally altered the past practice of rehiring co-adjutant faculty on the basis of seniority.^{2/}

The charge was processed pursuant to the Commission's Rules, and it appearing to the Director of Unfair Practices that the allegations of the charge, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on June 19, 1978. In accordance with the Complaint and Notice of Hearing, hearings were held on August 30, 1978, October 18, 1978 and November 21, 1978 before Alan R. Howe, Hearing Examiner of the Commission, at which both parties were represented and were given an opportunity to present evidence, to examine and cross-examine witnesses, and to argue orally. Post-hearing briefs and reply briefs were filed by the Association by January 31, 1979. On March 1, 1979, the Hearing Examiner issued his Recommended Report and

1/ (continued)

against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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. (7) Violating any of the rules and regulations established by the commission.

2/ The second and third allegations were filed as amendments to the original charge.

Decision,^{3/} which included findings of fact, conclusions of law, and a recommended order. The original of the Report was filed with the Commission and copies were served upon all parties. A copy is attached to this Decision and Order and made a part hereof. Timely exceptions and a brief in support thereof were filed by the Association on March 8, 1979.

The Hearing Examiner found: (1) that the Association had failed to prove, by a preponderance of the evidence, that Rutgers was motivated by anti-union animus in its rehiring practices for the academic year 1978-79; (2) that seniority and priority practices do not attach to the management prerogative of hiring coadjutant faculty for a given semester in an academic year; (3) that the cancellation of a given course for an academic year is a management prerogative which may be unilaterally implemented without prior negotiations.

The Commission, after a careful review of the record, finds the Association's exceptions to be without merit and adopts the Hearing Examiner's Recommended Report and Decision substantially for the reasons discussed therein.

The Association, in its first exception, contends that the Hearing Examiner did not comprehend the true nature of its charge concerning the offering of a position to Allen Hirsch for the 1978-1979 academic year. The Commission finds this exception to be incorrect in that the Hearing Examiner did speak to the

3/ H.E. No. 79-35, 5 NJPER 95 (¶10053 1979).

question of whether Rutgers was motivated by anti-union animus in offering a position to Hirsch, who was not a member of the Association, while failing to offer positions to members of the Association who had more seniority than Hirsch. The Commission adopts the Hearing Examiner's finding that the Association failed to prove, by a preponderance of the evidence, that Rutgers' actions, in regard to Hirsch, were motivated by such animus. The Association's own witnesses testified that in the past they were given preference to teach the same course they had taught in the previous academic year. Dr. Greenblatt, witness for Rutgers, testified that the position was offered to Hirsch because he had taught the same course the year before.^{4/} Since Rutgers followed its normal practice in offering a position to Hirsch, no anti-union animus can be found.

In its next exception, the Association contends that Rutgers did not present sufficient evidence of legitimate economic exigencies to justify the budget cuts which resulted in the failure to hire Dr. Frost. It suffices to say that, in adopting the Hearing Examiner's Recommended Report and Decision, the Commission finds sufficient credible evidence to support the Hearing Examiner's finding. Specifically, the Commission refers to Exhibit R1 where Dean Pallone enumerated the different factors which were considered in deciding the budget allocations for co-adjutant faculty for 1978-79. Further Dr. Greenblatt testified that there was insufficient enrollment to justify the continuation of some courses.

^{4/} Tr. 11/21/78 pgs. 127-128, 149 and 150.

Next the Association challenges the Hearing Examiner's determination to credit the testimony of Dr. Greenblatt concerning the time sequence and the manner of preparation of the course schedules. The Commission notes that it is for the trier of fact to weigh the evidence and testimony based upon his observations of demeanor and the like. Absent the most persuasive evidence in the record, the Commission will not substitute its secondhand reading of the transcript. The Hearing Examiner found credible Dr. Greenblatt's testimony that she was not aware of the Association or Dr. Frost's position in the organization at the time she prepared the letter of February 14, 1978. The Commission finds nothing in the record to overturn this determination.

The Association takes exception to the Hearing Examiner's finding that Rutgers was not motivated by anti-union animus in failing to hire members of the Association who had seniority.^{5/} The Commission has already discussed the situation of Allen Hirsch. With regard to Dr. Frost, sufficient credible evidence was presented by Rutgers to support its decision to cancel the course taught by Dr. Frost. Further, since professors were given preference to teach the same course they had taught the year before, no animus can be inferred from the fact that Dr. Frost was not offered a position teaching another course.

^{5/} We wish to note that N.J.S.A. 34:13A-5.4(a)(3) states it is an unfair practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment" to discourage the exercise of rights guaranteed by the Act. Accordingly, where animus is proven, it is an unfair practice for an employer not to hire or rehire an applicant for employment due to this union activities. See Phelps-Dodge Corp. v. NLRB, 313 U.S. 177, 87 LRRM 439 (1941) and T.I.L. Sportswear Corp., 131 NLRB 176 (1961).

The Association also excepts to the Hearing Examiner's dismissal of the charge that Rutgers violated N.J.S.A. 34:13A-5.4 (a)(1) and (5) when it offered Dr. Hirsch a position for the 1978-79 academic year prior in time to when it offered Gerecht and Williams positions. This is alleged to constitute a unilateral change in a term and condition of employment. With respect to this claim, the Association attempted to establish that the past practice consisted of offering teaching positions to the qualified personnel with the greatest seniority.

The Hearing Examiner found, and the Association's own witnesses testified, that co-adjutant faculty are hired for one semester, and they have no right to employment the next semester. Rutgers' witnesses testified that employment for each semester was offered to the best qualified person based upon the opinion of the heads of the Departments. The College's witness did admit that many times the best qualified person coincided with the most senior. This is logical since it is to be expected that the most qualified person would be the one offered employment most frequently and would thus amass the most seniority.

The Hearing Examiner based his finding, in part, on his legal conclusion that co-adjutant faculty were hired anew each semester, and that determinations as to hiring, as opposed to re-employment or continued employment, are totally for management and non-negotiable. Thus no term and condition of employment was involved regardless of what the prior practice was. The Association characterized

the situation as a continuation of employment, or a reemployment situation analogous to job security, and argued that assuming all people are qualified, negotiations for job preference would be a term and condition of employment. The unique status of the University College and co-adjutant faculty makes it a very close question whether some preference for employment from semester to semester is a term and condition of employment for the employees or not. However, that question need not be reached in this case as we find that the Association has not established the factual premise for its argument by a preponderance of the evidence.

The Association concedes that both Williams and Gerecht, the two more senior people, were hired for 1978-79. Rather, it objects only to the fact that Dr. Hirsch was offered a position prior to Williams and Gerecht being offered theirs.^{6/} It is not clear in the record that had Dr. Hirsch accepted the offer of employment, that Gerecht and Williams would not have been offered some position. None of the three had taught the exact courses which they were offered for 1978-79, yet the record establishes that assuming a past practice existed, it appeared to exist only with respect to teaching the same course the succeeding semester. The record does not establish how selections were made when someone other than the prior instructor was offered a course, other than Rutgers' assertion that

^{6/} Thus, even if a violation were found, it would only be of a technical nature since any harm suffered was immediately remedied by offering the jobs to Williams and Gerecht, offers which were accepted. In such a situation, it is for PERC, not the charging party, to determine if the violation has become moot or requires a cease and desist order. Galloway Twp. Bd. of Ed. v. Galloway Twp. Ed. Assn., 78 N.J. 25 (1978).

all offers were made to the most qualified teachers available. Additionally, Rutgers' witnesses did testify that Dr. Hirsch had been highly recommended by one of the heads of the department who had taught with him the prior year. Based upon this conflicting evidence in the record, the Commission determines that the Association has not established the existence of a binding past practice in this type of situation, or that the offer of the position to Dr. Hirsch prior to offering it to Williams and Gerecht constituted a deviation from the way such situations had been handled in the past. The recommendations of the Hearing Examiner that the charges of a violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) be dismissed are therefore adopted.

The Hearing Examiner also found that the decision to eliminate a course is a non-negotiable management prerogative, assuming no anti-union motivation. It is not clear whether the Association included this part of the recommended decision in its exceptions to the dismissal of the (a)(5) charge; however, the Commission does specifically adopt the Hearing Examiner's conclusion of law that such a decision to eliminate a course for budget reasons or education policy reasons, is not a term and condition of employment.

In its next series of exceptions the Association alleges that the Hearing Examiner's finding of no union animus is against the weight of the evidence. Specifically, the Association refers to the sequence of events surrounding the failure to hire Dr. Frost, the offer of a position to Hirsch, the initial failure to offer positions to Gerecht, Corresponding Secretary of the Association, and Williams, a member but not an officer in the Association, and the announcement of the budget cut only after an Appellate Division decision affirming the Commission's decision that co-adjutant faculty are employees under the Act. While these events initially support the raising of certain inferences, these inferences are negated by the explanatory testimony of the witnesses for Rutgers, which the Hearing Examiner found credible, and the business justification presented.

Finally, the Association contends that the failure to rehire the Association President is inherently destructive, thereby eliminating the need for a finding of anti-union animus. In order for an employer's conduct to be inherently destructive it must constitute behavior which threatens the existence of the employee organization.^{7/} Employees have the right to representatives of their own choice. Dr. Frost can continue to represent the Association as its President even though he is not currently employed by Rutgers. Accordingly, the Commission concludes that the failure to rehire Dr. Frost is not inherently destructive.

^{7/} Swarco, Inc. v. NLRB, 303 F.2d 668, 50 LRRM 2262 (1962).

In a related manner the Commission finds that the failure to rehire Dr. Frost does not constitute an independent violation of N.J.S.A. 34:13A-5.4(a)(1):

The Commission in determining whether N.J.S.A. 34:13A-5.4(a)(1) has been violated applies the following general rule: It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or to coerce a reasonable employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial "business" justification. If an employer, pursuant to the above standard, does establish such justification, no unfair practice will be found under Section 5.4(a)(1) unless the charging party proves anti-union motivation for the employer's actions. In determining initially whether particular actions tend to interfere with, restrain or coerce a reasonable employee in the exercise of rights protected under the Act we will consider the totality of evidence proffered during the course of a hearing and the competing interests of the public employer and the employee organization and/or affected individuals.^{8/}

On balance, the Commission concludes that the College's actions, in failing to rehire Dr. Frost after the course he taught had been eliminated for legitimate reasons, and rehiring Hirsch to teach the same course he previously taught, rather than hiring Association members with more seniority, did not tend to interfere with the protected rights of unit employees; nor did this action "chill" protected rights. Permissible employer actions motivated by legitimate business justification and free from anti-union animus should not be delayed nor restrained solely because of their timing. Ultimately, Dr. Frost, for legitimate

^{8/} In re New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421 (14189 1978).

reasons, was the only Association member who was not hired for the 1978-79 academic year. This does not interfere with the Association's right to representation of its choice or the ability of Frost to function as President. Accordingly, the Commission is satisfied that none of the Association's members had their rights to engage in protected union activities chilled by the College's actions.

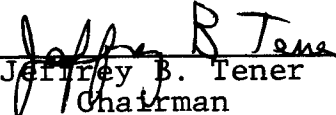
Finally, the Commission notes that no evidence was presented to support the Association's contention of violations of N.J.S.A. 34:13A-5.4(a)(2) and (7).

Accordingly, the Commission, in adopting the Hearing Examiner's Recommended Report and Decision, dismisses the Association's charge in its entirety.

ORDER

For the foregoing reasons and upon the entire record hereink it is hereby ORDERED that the complaint against Rutgers, The State University be dismissed in its entirety.

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Hartnett and Newbaker voted for this decision. Commissioners Graves and Hipp voted against this decision. Mr. Parcels was not present.

DATED: Trenton, New Jersey
May 22, 1979
ISSUED: May 23, 1979

STATE OF NEW JERSEY
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Respondent,

- and -

Docket No. CO-78-263-84

RUTGERS UNIVERSITY COLLEGE
TEACHERS ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss charges of unfair practices filed by the Association against Rutgers, which alleged that Rutgers was motivated by anti-union animus when it failed to rehire Dr. David Frost, and other Co-Adjutant faculty members at University College in New Brunswick and Newark, for the 1978-79 academic year. The charges of unfair practices had also alleged that Rutgers unilaterally changed a term and condition of employment, which was mandatorily negotiable, when it failed to follow its seniority or priority practice in its hiring decisions for Co-Adjutant faculty for the 1978-79 academic year.

The Hearing Examiner concluded that no anti-union animus was proven by the Association by a preponderance of the evidence and that seniority and priority practices do not attach to the management prerogative of hiring Co-Adjutant faculty for a given semester in an academic year. The Hearing Examiner also concluded that the cancellation of a given course for an academic year is likewise a management prerogative which may be unilaterally implemented without prior negotiation.

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

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Appearances:

For Rutgers, The State University
Pitney, Hardin & Kipp, Esqs.
(S. Joseph Fortunato, Esq.)

For Rutgers University College Teachers Association
Joseph Fisch, Esq.

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on April 28, 1978 by Rutgers University College Teachers Association (hereinafter the "Charging Party" or the "Association") alleging that Rutgers, The State University (hereinafter "Rutgers" or the "Respondent"), had 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. (hereinafter the "Act"), in that Rutgers had failed to rehire David Frost, the President of the Association, for the academic year 1978-79 on account of his activities on behalf of the Association and in order to interfere with the administration of the Association and because he filed a petition with the Commission in a representation case approximately two years ago, all of which was alleged

to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (4) and (7) of the Act. ^{1/}

It appearing that the allegations in the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on June 19, 1978. Pursuant to the Complaint and Notice of Hearing, hearings were held on August 30, October 18 and November 21, 1978 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. ^{2/} The parties filed post-hearing briefs by January 12, 1979. ^{2a/}

1/ These Subsections prohibit employers, their representatives or agents from:

"(1) Interfering with restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.

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

"(4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this Act.

"(7) Violating any of the rules and regulations established by the Commission."

The Association amended its charge on August 23, 1978 to allege additionally a violation of Subsection (a)(5) of the Act, which provides: "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." The basis for this allegation was that Rutgers was attempting to change unilaterally the terms and conditions of employment of certain Co-Adjutant faculty in the Chemistry Department of the University College by not employing them for the academic year 1978-79 based on their "seniority".

In a second amendment to the charge filed September 5, 1978, the Association alleged more specifically that Rutgers had failed to hire Co-Adjutant Bernard Williams, a member of the Association, but did hire one, Allen Hirsch, who was not a member of the Association, and who had less "seniority" than Bernard Williams. It was alleged further that the established practice at University College, with respect to Co-Adjutant faculty, is to offer first choice for teaching a course to the qualified person with the greatest "seniority".

2/ At the conclusion of the Charging Party's case on November 21, 1978, counsel for Rutgers made a motion to dismiss all allegations in the initial charge and the two amendments to the charge. After hearing argument, the Hearing Examiner dismissed the Subsection (a)(2) and (4) allegations, but reserved, with grave reservations, the Subsection (a)(3) and (5) allegations. The instant decision shall be deemed a resolution of the reserved motions to dismiss. Note: The Subsection (a)(7) allegation had been withdrawn by the Charging Party at the commencement of its case on October 18, 1978.

2a/ The Hearing Examiner requested reply briefs which were filed by January 31, 1979.

Unfair Practice Charges, as amended, having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and after hearing and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. Rutgers, The State University, is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Rutgers University College Teachers Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. Dr. David Frost, the President of the Association, has been a Co-Adjutant faculty member at University College in New Brunswick since 1953, but was not rehired for the 1978-79 academic year. Dr. Frost has most recently been teaching Principles of Physical Science (Course Nos. 890; 101, 102) in the Chemistry Department. The same Course has been offered in Newark and was taught by Dr. James Bohrer, a member of the Association.

4. Under date of February 14, 1978 ^{3/}, Dr. Martha Greenblatt, the Acting Chairperson of the Chemistry Department for the 1977-78 academic year, sent a letter to Dr. Frost, and all other Co-Adjutant faculty in the Chemistry Department, stating that due to severe cuts in the budget allocation for Co-Adjutant faculty for the academic year 1978-79 no commitment could be made for a teaching position for the said academic year (CP-1). Dr. Frost testified that it was "extraordinary" to get such a letter seven months in advance of the commencement of the academic year. ^{4/}

5. Under date of March 22 Dr. Frost replied to Dr. Greenblatt, indicating that he was of the opinion that the reason for such a letter addressed to him, "coming as it does during an active phase of 'union organizing', must be viewed as an unfair labor practice intended to injure those represented by R.U.C.T.A. (the Association)." (CP-2). Dr. Greenblatt, on instructions from Dean Nathaniel J. Pallone, did not answer Dr. Frost's letter.

3/ All dates hereinafter are 1978 unless otherwise indicated.

4/ Dr. Greenblatt justified sending out the early letter by referring to conversations (continued next page)

6. Dr. Greenblatt testified that she sent the letter of February 14 to Dr. Frost and all other Co-Adjutant faculty as a result of a memo dated February 9, 1978 from Dean Pallone, which outlined the available budget for Co-Adjutant faculty for the academic year 1978-79. The proposed budget represented a cut in available funds of in excess of 50% from the prior academic year and the number of sections to be taught was cut from 29 to 12 (R-1, R-2). ^{5/}

7. Dr. Greenblatt had in November 1977, based on the courses given during the 1977-78 academic year, prepared a "preliminary" course schedule for the 1978-79 academic year. After receiving the February 9 memo from Dean Pallone (R-1), Dr. Greenblatt made cancellations on the "preliminary" course schedule, one of the cancellations being Dr. Frost's and Dr. Bohrer's Course Nos. 890: 101 and 102. ^{6/} (See R-4 and R-5). Exhibit R-4 represents the "preliminary" course schedule prepared by Dr. Greenblatt with the cancellations noted by her after the receipt of the February 9 memo from Dean Pallone. Exhibit R-5 is a March 16 memo from Associate Dean James A. Coe to Dr. Greenblatt, confirming the cancellations in her "preliminary" course schedule (R-4). It is noted that the "preliminary" course schedule for the 1978-79 academic year was published and made available to students in or about March and that it contained Course Nos. 890: 101 and 102 but did not list Dr. Frost's or Dr. Bohrer's names (CP-3). ^{7/} This obviously was before the issuance of Associate Dean Coe's memo of March 16 (R-5).

8. Dr. Frost testified that the "practice" in his years at Rutgers' University College, at least since 1954, had been that Co-Adjutants in the Chemistry Department were given first choice in the course which they had taught in the previous academic year. This was corroborated by other Charging Party witnesses during the years that they had been on the Co-Adjutant faculty. Aaron L. Nelson, an

4/ (continued from page 3)

which she had with Charging Party witnesses Miriam Douglass, a Co-Adjutant in the Chemistry Department and Treasurer of the Association, and Dr. J. Fred Gerecht, also a Chemistry Co-Adjutant and Corresponding Secretary of the Association, in the summer of 1977. Douglass told Dr. Greenblatt of the practice in ranking Co-Adjutants by seniority, and the fact that Co-Adjutants should receive early notice in the event of the contingency of Rutgers' inability to rehire for a given academic year.

^{5/} A document similar to Dean Pallone's budget reduction memo to Dr. Greenblatt under date of February 9 (R-1) was sent to all department of Rutgers at the same time.

^{6/} These courses are not being taught at Rutgers during the 1978-79 academic year.

^{7/} Compare CP-4 for the 1976-77 academic year, which lists the course and Dr. Frost's name.

associate professor of chemistry, and the Chairman of the Chemistry Department, testified that there was no prior claim to a specific teaching position by Co-Adjutant faculty, but did admit on cross-examination that he had followed "seniority" in the hiring of Co-Adjutant faculty over the years since the particular Co-Adjutants have always been qualified for the position sought. He did stress qualification as the primary criterion.

9. The Co-Adjutant faculty does not have "tenure" such as is accorded to full-time faculty at Rutgers, who are represented by the American Association of University Professors. The witnesses for the Charging Party admitted on cross-examination that they are hired for the semester only, and that there is no right to expect a teaching assignment for the second semester in any given academic year.

10. Three of the present officers of the Association have been Co-Adjutants in the Chemistry Department: Dr. David Frost - President; Miriam Douglass - Treasurer; and Dr. J. Fred Gerecht - Corresponding Secretary. Of the three, Douglass and Dr. Gerecht were asked to teach and are teaching as Co-Adjutants during the 1978-79 academic year. Another Charging Party witness, Dr. Bernard Williams, who is a member but not an officer of the Association, is also teaching as a Co-Adjutant in the Chemistry Department during the 1978-79 academic year.

11. Although Dr. Allen Hirsch, a first year Co-Adjutant in the Chemistry Department, who is not a member of the Association, was tentatively assigned by Dr. Greenblatt on April 17 to teach during the 1978-79 academic year, he subsequently declined and is not currently employed by Rutgers.

12. Dr. Greenblatt testified credibly that while she knew of Dr. Frost early in 1978, she did not know that he was President of the Association nor did she know of the Association.

13. The Commission's certification of the Association as the negotiations representative for Co-Adjutants at University College was appealed by Rutgers to the Appellate Division, and on January 26 the Appellate Division affirmed the Commission's certification (CP-9). Under date of April 19 the New Jersey Supreme Court denied Rutgers' petition for certification from the Appellate Division decision (CP-11).

THE ISSUES

1. Did Rutgers violate Subsection (a)(3) of the Act, and derivatively Subsection (a)(1), when it failed to rehire Co-Adjutant Dr. Frost for the academic year 1978-79 after cancelling Principles of Physical Science and further, when it offered a teaching assignment to Co-Adjutant Dr. Hirsch before offering a teaching assign-

ment to Dr. Gerecht or Dr. Williams?

2. Did Rutgers violate Subsection (a)(5) of the Act, and derivatively Subsection (a)(1), when it offered a teaching assignment to Dr. Hirsch before making such an offer to Dr. Gerecht and Dr. Williams and further, when it cancelled Principles of Physical Science?

DISCUSSION AND ANALYSIS

Positions of the Parties

It is the position of the Association that Rutgers violated Subsection (a)(3) of the Act, and derivatively Subsection (a)(1), when it failed to rehire Association President, Dr. Frost for the academic year 1978-79 as a Co-Adjutant in the Chemistry Department, after cancelling the course which he had previously taught, Principles of Physical Science, Course Nos. 890: 101 and 102. It is further contended by the Association that these Subsections were violated by Rutgers when a teaching assignment was offered to Co-Adjutant Dr. Hirsch, who is not a member of the Association, before teaching assignments were offered to Co-Adjutant Dr. Gerecht, an Association officer, and Dr. Williams, an Association member, both of the latter of whom had taught at University College as Co-Adjutants for a longer period than Dr. Hirsch. The Association also contends that Rutgers violated Subsection (a)(5) of the Act, and derivatively Subsection (a)(1), by having unilaterally changed a University College practice of offering the first choice for teaching a course to the qualified person with the greatest "seniority", in the case of Dr. Hirsch, supra, and, further, that Rutgers violated the same Subsections of the Act when it cancelled Principles of Physical Science, supra, at New Brunswick and Newark for the academic year 1978-79.

Rutgers contends essentially that the Association, with respect to the Subsection (a)(3) violation, has failed to prove that there was any anti-union animus involved, and that its conduct was not inherently destructive of important employee rights, when it failed to rehire Dr. Frost after cancelling Principles of Physical Science for the academic year 1978-79, and by having offered a teaching assignment to Co-Adjutant Dr. Hirsch before making a like offer to Dr. Gerecht and Dr. Williams. Rutgers likewise urges that it has not violated Subsection (a)(5) of the Act since it did not unilaterally change any terms and conditions of employment, as a matter of law, under the statutes and court decisions cited by it. Rutgers argues that there is no proven "seniority" practice regarding the rehire of Co-Adjutants at University College and that decisions involving rehire and the

cancelling of courses are management prerogatives which can in no way involve terms and conditions of employment.

Rutgers Did Not Violate Subsection
(a)(3) of The Act, Nor Derivatively
Subsection (a)(1), By Its Conduct
Herein

At the hearing on November 21, in denying a motion to dismiss the Subsection (a)(3) allegation, the Hearing Examiner stated his reservations as to whether or not the Charging Party had met his burden of proof of anti-union animus, and further stated that he did not see this as a case involving conduct "inherently destructive" of important employee rights. ^{8/}

Following its decision in Haddonfield Borough Board of Education, P.E.R.C. No. 77-31, 3 NJPER 71 (1977), the Commission restated the test for a Subsection (a) (3) violation in City of Hackensack, P.E.R.C. No. 77-49, 3 NJPER 143 (1977), rev'd. on other grounds, 162 N.J. Super 1 (App. Div. 1978), pet. certif. granted, 78 N.J. 404 (1978), as follows:

"Under the Haddonfield decision, a Section 5.4(a)(3) violation may be found if the Charging Party can prove either that anti-union animus was one of the motivating factors for the discriminatory conduct or that the effect of the employer's actions was 'inherently destructive' of rights guaranteed to employees by the Act. Preliminarily, the Charging Party must prove that the employee was engaging in protected activities and that the employer knew or thought he knew of such activities..." (Emphasis supplied) (3 NJPER at 144).

The Hearing Examiner finds and concludes that the Charging Party has failed to meet its burden of proof by a preponderance of the evidence ^{9/} that any relevant conduct of Rutgers herein was either motivated by anti-union animus or was inherently destructive of important employee rights. In reaching this conclusion, the Hearing Examiner assumes arguendo that the Charging Party has met its preliminary burden of proving that Dr. Frost and other Co-Adjutants had engaged in activities protected by the Act and that Rutgers knew or thought it knew of such activity. Such an assumption gives the Charging Party all benefit of doubt.

^{8/} 3 Tr. 57, 58.

^{9/} N.J.A.C. 19:14-6.8.

The only proof that the Charging Party can possibly urge as supporting a finding of anti-union animus toward the Association, or the Co-Adjutant faculty in the Chemistry Department, is the fact that Dr. Greenblatt's letter of February 14 (CP-1) to Dr. Frost and other Co-Adjutants, and the subsequent cancellation of Principles of Physical Science for the academic year 1978-79, plus the teaching assignment offered to Dr. Hirsch, occurred in the context of Rutgers' appeal of the Commission's certification of the Association for Co-Adjutant faculty (see Finding of Fact No. 13, supra). The Hearing Examiner finds and concludes that such proof regarding anti-union animus is insufficient as a matter of law.

The Hearing Examiner finds and concludes that Rutgers has offered sufficient evidence with respect to the economic exigencies, which resulted in a budget reduction in excess of 50 per cent for the academic year 1978-79 for Co-Adjutant faculty at University College. It was this budget reduction which set in motion the following chain of events: Dr. Greenblatt's letter of February 14; the subsequent cancellation of Principles of Physical Science in the Chemistry Department and the failure to rehire Dr. Frost and others for the 1978-79 academic year; and finally, the initial offering of a teaching assignment to Dr. Hirsch before the offer of a teaching assignment to Dr. Gerecht and Dr. Williams.

Employer conduct or action may be engaged in or taken "...for any cause or no cause at all so long as it is not retaliatory". ^{10/} Rutgers conduct herein having been motivated by legitimate business considerations it can in no way be deemed as retaliatory in violation of Subsection (a)(3) of the Act.

The Hearing Examiner also notes that although Dr. Frost is the President of the Association, Dr. Greenblatt testified credibly that she did not at the time of her letter of February 14 know of the Association or that Dr. Frost was President. Thus, there was clearly no manifestation of anti-union animus by Dr. Greenblatt on February 14, or for that matter, on any subsequent date. It is noted too that Dr. Greenblatt justified sending out the early letter of February 14 on the basis of a conversation with Miriam Douglass, Treasurer of the Association, and Dr. Gerecht, Corresponding Secretary, in the summer of 1977 (footnote 4, supra).

The Hearing Examiner further notes that Dr. Hirsch was not employed by Rutgers for the 1978-79 academic year, having declined, and that Dr. Gerecht and Dr. Williams, as well as Miriam Douglass, were offered Co-Adjutant teaching positions for the 1978-79 academic year. As found previously, Miriam Douglass and

^{10/} Haddonfield, supra, 3 NJPER at 72; Linden-Roselle Sewerage Authority, P.E.R.C. No. 79-7, 4 NJPER 415, 416 (1978).

Dr. Gerecht are officers of the Association and Dr. Williams is a member of the Association (Finding of Fact No. 10, supra). Thus, except for the fact that Dr. Frost was not rehired for the 1978-79 academic year, due to the cancellation of Principles of Physical Science in the Chemistry Department, the evidence overwhelmingly demonstrates that Rutgers' conduct vis-a-vis the Association, its officers and members, has been singularly devoid of anti-union animus.

Accordingly, the Hearing Examiner will recommend dismissal of the alleged Subsection (a)(3) violation of the Act.

Rutgers Did Not Violate Subsection (a)(5) Of
The Act, Nor Derivatively Subsection (a)(1),
By Its Conduct Herein

The basic issue dividing the Association and Rutgers with respect to a possible Subsection (a)(5) violation is whether or not an alleged practice of following seniority or priority in the decision of Rutgers to hire Co-Adjutants in the Chemistry Department at University College is a term and condition of employment, a unilateral change in which would constitute a violation of the Act.

The Association states its position in this matter at pages 19, 20 of its Main Brief, as follows:

"It is the position of R.U.C.T.A. that the Respondent ~~changed the then prevailing terms and conditions of employment when they abandoned the seniority and priority system that had always existed with regard to hiring co-adjutant faculty.~~ The priority system clearly presupposed competence (merit and fitness) and given such competence appointments among co-adjutants were always made based on seniority..." (Emphasis supplied).

In support of its position, the Association cites Plumbers & Steamfitters Local No. 270 et al. v. Woodbridge Board of Education, 159 N.J. Super 83 (App. Div. 1978) and State of New Jersey v. State Supervisory Employees Association, 78 N.J. 54 (1978).

Rutgers contends, in this regard, that initial employee selection or hiring is a management prerogative and is not a term and condition of employment, citing at pp.25-30 of its Main Brief the cases and statutory authority which support its position. ^{11/} Thus, Rutgers argues that in hiring decisions no binding seniority

^{11/} The principal authorities cited are: Ridgefield Park Education Ass'n. v. Ridgefield Park Board of Education, 78 N.J. 144, 162 (1978); Edison Twp. Board of Education, P.E.R.C. No. 78-53, 4 NJPER 151, 152 (1978); Middlesex County Board of Freeholders, P.E.R.C. No. 78-90, 4 NJPER 261 (1978); Middlesex County College Board of Trustees, P.E.R.C. No. 78-13, 4 NJPER 47, 49 (1977) and N.J.S.A. 18A:65-25(h).

or priority practice can be imposed by the Association under the present state of the law. ^{12/}

Based upon a consideration by the Hearing Examiner of the contentions of the parties with respect to the alleged Subsection (a)(5) violation, the Hearing Examiner finds and concludes that Rutgers did not violate the Act when it failed to rehire Dr. Frost for the 1978-79 academic year, and further when it offered a teaching assignment to Dr. Hirsch, a one-year Co-Adjutant, before it offered assignments to Dr. Gerecht and Dr. Williams. Further, Rutgers did not violate the Act when it cancelled Principles of Physical Science at New Brunswick and Newark for the 1978-79 academic year.

It was conceded by all Charging Party witnesses that Co-Adjutants are hired for the semester only, and that there is no right to expect a teaching assignment for the second semester in any given academic year. Further, Co-Adjutant faculty at University College do not have "tenure", such as is accorded to full-time faculty at Rutgers, who are represented by the American Association of University Professors. (Finding of Fact No. 9, supra).

A hiring decision clearly does not involve a term and condition of employment and is, therefore, not mandatorily negotiable. ^{13/} A management decision on hiring must perforce be unfettered by any pre-conditions other than the qualifications which Rutgers has established for employment of Co-Adjutants at University College.

The Appellate Division decision in Plumbers & Steamfitters, supra, and the decision of the Supreme Court in State of New Jersey, supra, do not support the position of the Association. Plainly, these cases involve the right to continued employment, or recall from lay-off, in the context of an on-going employment relationship, unlike the Co-Adjutants herein, who are hired for a semester only, with no tenure and with no right to expect a teaching assignment for the subsequent semester in any given academic year.

Further, the Hearing Examiner is in agreement with the authorities cited by Rutgers in support of its position that the cancellation of a course is a management prerogative and is, therefore, in no way a term and condition of employment,

^{12/} Rutgers also briefs the issue as to whether or not the decision to cancel a course involves terms and conditions of employment, contending that it does not, and that this, too, is a management prerogative (see Rutgers' Main Brief, pp. 30-32).

^{13/} Dunellen Board of Education v. Dunellen Education Ass'n., 64 N.J. 17, 26 (1973).

as to which there must be mandatory negotiation before such cancellation. 14/

For all the foregoing reasons, the Hearing Examiner will recommend dismissal of the alleged Subsection (a)(5) violation of the Act.

* * * *

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

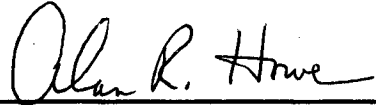
CONCLUSIONS OF LAW

The Respondent Rutgers did not violate N.J.S.A. 34:13A-5.4(a)(1), (3) and (5) by its conduct herein.

RECOMMENDED ORDER

The Respondent Rutgers not having violated the Act, supra, it is HEREBY ORDERED that the Complaint be dismissed in its entirety.

DATED: March 1, 1979
Trenton, New Jersey



Alan R. Howe, Hearing Examiner

14/ See footnote 12, supra.