

P.E.R.C. NO. 2010-25

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BERGEN COMMUNITY COLLEGE FACULTY
ASSOCIATION, BERGEN COMMUNITY
COLLEGE SUPPORT STAFF ASSOCIATION
and BERGEN COMMUNITY COLLEGE
PROFESSIONAL STAFF ASSOCIATION,

Charging Parties,

-and-

Docket No. CO-2008-210

BERGEN COMMUNITY COLLEGE,

Respondent.

SYNOPSIS

The Bergen Community College Faculty Association, Bergen Community College Support Staff Association, Bergen Community College Professional Staff Association and Bergen Community College filed cross-motions for summary judgment on an unfair practice charge filed by the Associations. The charge alleges that the College violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it refused to negotiate before adopting a no-smoking policy banning the use of tobacco anywhere on College property and subjecting employees to discipline for violating the policy. The Commission holds that the College had a managerial prerogative to create a smoke-free campus and was therefore not required to negotiate over the smoking ban. The Commission further holds that the College violated the Act when it refused to negotiate over the new disciplinary procedures in the smoking policy.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

P.E.R.C. NO. 2010-25

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BERGEN COMMUNITY COLLEGE FACULTY
ASSOCIATION, BERGEN COMMUNITY
COLLEGE SUPPORT STAFF ASSOCIATION
and BERGEN COMMUNITY COLLEGE
PROFESSIONAL STAFF ASSOCIATION,

Charging Parties,

-and-

Docket No. CO-2008-210

BERGEN COMMUNITY COLLEGE,

Respondent.

Appearances:

For the Charging Parties, Selikoff & Cohen, P.A.,
attorneys (Joel S. Selikoff and Keith Waldman, on the
briefs)

For the Respondent, DeCotiis, Fitzpatrick, Cole &
Wisler, LLP, attorneys (Jonathan D. Ash, on the briefs)

DECISION

This case comes to us by way of cross-motions for summary judgment. The charging parties are the Bergen Community College Faculty Association, Bergen Community College Support Staff Association, and Bergen Community College Professional Staff Association ("Associations"). The respondent is Bergen Community College ("College"). The Associations allege that the College violated the New Jersey Employer-Employee Relations Act, N.J.S.A.

34:13A-1 et seq., specifically 5.4a(1) and (5),^{1/} by refusing to negotiate before adopting a no-smoking policy banning the use of tobacco anywhere on all College property and subjecting employees to discipline for violating that policy.

The parties stipulated to the facts and filed cross-motions for summary judgment on April 17, 2009. The following are the stipulated facts:

1. At all times material herein Charging Party Bergen Community College Faculty Association (BCCFA), having its principal mailing address c/o Alan Kauffman and Tobyn De Marco at Bergen Community College, 400 Paramus Road, Paramus, New Jersey 07652, has been and is the majority representative organization for a negotiating unit consisting of employees of Bergen Community College ("College" or "Respondent") in the following job titles: all full-time faculty including those assigned to the Ciarco Learning Center, holding the academic ranks of Professor, Associate Professor, Assistant Professor, Instructor, or Associate Instructor, and of all full-time employees bearing the titles of Library Associate, Professional Assistant, or Technical

^{1/} These provisions 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. . . ."

Assistant, whether said faculty and employees are on contract for a full calendar year or for a full academic year or any part thereof, or on leave, excluding the President of the College, Vice Presidents, and Deans. The most recent collectively negotiated agreement between BCCFA and the College runs through June 30, 2011. See Exhibit A.

2. At all times material herein Charging Party Bergen Community College Support Staff Association (BCCSSA), having its principal mailing address c/o A. Legge, President, at Bergen Community College, 400 Paramus Road, Paramus, New Jersey 07652, is and has been the majority representative organization for a negotiating unit of certain employees of Bergen Community College. This unit consists of all current and future regularly employed full-time (12 month) employees, child care assistant (10 and/or 12 month) employees, and regularly employed part-time (20 hours per week minimum) employees assigned to a salary range, employed part-time (20 hours per week minimum) employees assigned to a salary range, employed on campus or on leave, all of which collectively are designated as the Bargaining Unit. The most recent collectively negotiated agreement between BCCSSA and the College runs through June 30, 2011. See Exhibit C.

3. At all times material herein Charging Party Bergen Community College Professional Staff Association (BCCPSA), having its principal mailing address c/o Frank Reilly, President,

at Bergen Community College, 400 Paramus Road, Paramus, New Jersey 07652, is and has been the majority representative organization for a negotiating unit consisting of all current and future regular full time employees employed on the campus of the College or on leave in the job classifications listed in Exhibit A of the Appendix to the collectively negotiated agreement. The most recent collectively negotiated agreement between BCCPSA and the College runs through June 30, 2011. See Exhibit D.

4. BCCFA, BCCSSA, and BCCPSA (collectively "the Associations") are, pursuant to N.J.S.A. 34:13A-1 et seq., the New Jersey Employer-Employee Relations Act ("Act"), exclusive majority representatives of the above-mentioned negotiating units consisting of the employees referred to above in paragraphs 1, 2, and 3 who are employed by the College. As such, the Associations are "representatives" within the meaning of the Act.

5. Respondent College is a public institution of higher education organized pursuant to N.J.S.A. 18A:64A-1 et seq. and "offer[s] programs of instruction, extending not more than two years beyond the high school. . . ." As such, it is a public employer within the meaning of the Act, is subject to its provisions, and is the employer of all employees involved in this proceeding. It has three campuses, the main one being located at 400 Paramus Road, Paramus, New Jersey 07652.

6. The campuses of the College are composed of both buildings (enclosed structures) and "open air" (unenclosed)

facilities. The unenclosed, open air facilities include but are not limited to facilities for parking, athletic fields, and undeveloped land both landscaped and non-landscaped. Those members of the Associations' negotiating units who drive their own vehicles to work at the College are assigned parking spaces in the College's parking facilities.

7. The College has had a No Smoking Policy since at least 1992 (referred to as the "1992 Policy"). That policy, adopted by the College on or about August 7, 1991, prohibited smoking in all College buildings and in College-owned vehicles. The 1992 Policy provided "as of January 1, 1992, . . . College facilities are smoke free. Smoking is not allowed in any building on campus. We are required by statute to enforce this policy." The 1992 Policy also contained a disciplinary provision titled "enforcement procedures" providing procedural and substantive provisions for imposition of discipline for those alleged to have violated said policy. A true copy of the 1992 Policy is attached hereto and made a part hereof as Exhibit D of the Appendix.^{2/}

8. The 1992 policy allowed smoking in five designated

2/ We add that the policy's enforcement procedures did not differentiate between employees, students, or other persons alleged to have violated the policy. The procedures called for an initial warning, a second warning, and the filing of charges in municipal court for subsequent offenses within specified periods. Any person could issue warning notices and copies of notices were kept in the records of the Public Safety Department.

outdoor areas. This was included as part of the Policy after the Board of Trustees received input from members of the public including but not limited to students, employees and their representatives.

9. Both sides rely on various statutory and regulatory provisions to support their arguments on the issue of whether the subject matter of this case is mandatorily negotiable. The Associations rely on various portions of the New Jersey Smoke-Free Air Act, N.J.S.A. 26:3D-55 et seq. The College relies in part on the New Jersey Department of Health and Human Services's creation of a Comprehensive Tobacco Control Program, as well as various reports of the President's Advisory Council; a survey it conducted in 2007; and literature on the subject of the effects of exposure to tobacco smoke, both second and third hand.

10. In or about fall, 2007, after learning of the College's plan to consider adopting a different anti-smoking policy from the 1992 Policy, a request was made on behalf of the Associations that collective negotiations be held before any changes to the 1992 Policy were adopted. The College through its President, Board of Trustees, Executive Vice President, and Director of Human Resources did not agree that the changes were required to be collectively negotiated. Those changes, which were to become effective January 2, 2008, involved but were not limited to altering the application of that portion of the 1992 Policy which

allowed a restricted right to smoke as described above in paragraph 8 and changed the "enforcement procedures," i.e., the substantive and procedural provisions pertaining to discipline of those alleged to have violated the 1992 Policy. In taking this position, the College maintained that no aspect of the new 2008 Policy was negotiable.

11. The Associations' 2007 request to negotiate before the College made and implemented changes to the 1992 Policy smoking ban which included the restricted right to smoke as described in paragraph 8 above, was in part based on the fact that a number of their members had communicated with Association officers, some of whom stated that they were habitual smokers who were addicted to smoking and had a need to smoke and others who said they were casual smokers who had a desire to also continue to smoke as allowed under the College's application of the 1992 Policy.

12. On or about October 3, 2007, the College through its Board of Trustees, following an open session for public input, adopted its new smoking policy (the "2008 Policy") in the form of an amendment to its original policy dated August 7, 1991, without negotiating with the Associations over any aspects thereof. The 2008 Policy prohibited smoking in all buildings and areas of college property . . . which included [G]rounds, playing fields, walkways, roadways, parking lots and in and around the perimeter of any building and also included a discipline procedure titled

"sanctions against violators." A true copy of the 2008 Policy is attached as Exhibit E to the Appendix.^{3/}

13. By its terms, the 2008 Policy was to become effective January 1, 2008. However, the College applied the 2008 Smoking Policy to members of the units represented by the Associations for the first time on January 21, 2008, the date on which employees returned from winter vacation. Until that date, the 1992 Policy between the Associations and the College referred to above in paragraphs 7 and 8 remained in effect.

14. The 2008 Policy bans the use of tobacco (including smokeless tobacco) anywhere on all College property both outdoors and indoors and provides for a broad disciplinary component against anyone found to be in violation thereof including members of the Associations. It therefore eliminated the 1992 Policy referred to above in paragraphs 7 and 8.

^{3/} The Introduction to the 2008 policy states that the New Jersey Legislature and the New Jersey Department of Health have found that tobacco smoke is a substantial health hazard to both the smoking and non-smoking public and that, as such, on-campus smoking is strictly prohibited. The part of the policy entitled "Sanctions Against Violators" differentiates between employees, students, and other individuals alleged to have violated the policy. It states that employees "shall be subject to appropriate disciplinary action"; students shall be subject to discipline in accordance with the Student Code of Conduct; other individuals may be asked to leave College premises; and all violators are also subject to sanctions provided by applicable laws and regulations. The policy calls for posting signs designating the College as a smoke-free campus.

15. On January 29 and February 5, 2008, the Associations filed an unfair practice charge and amended charge respectively. They alleged that the College violated N.J.S.A. 34:13A-5.4(1) and (5) when it adopted and then implemented its 2008 Policy the provisions of which altered its 1992 Policy as applied as regards the prohibition against smoking and provisions for disciplinary action applicable to alleged violators, without first collectively negotiating about those intended changes. With the unfair practice charge and amended charge, the Associations also filed an application for interim relief seeking an order restraining the College from implementation of the 2008 Policy insofar as that policy altered its application of its 1992 Policy, until the College engaged in collective negotiations with the Associations over the continued implementation of those changes. A copy of the charge and amended charge are attached to the Appendix as Exhibits F and G.

16. Respondent filed its Answer to the Unfair Practice Charges bearing the date of February 13, 2008 which is attached to the Appendix as Exhibit H.

17. On February 1, 2008, a designee of PERC signed an Order to Show Cause filed by the Associations directing the College and Associations to appear on February 21, 2008 for a hearing on whether PERC should issue temporary restraints against the College's continuing implementation of those portions of the 2008

Smoking Policy which changed provisions of the previously implemented 1992 Policy, without first engaging in collective negotiations. A copy of the Order to Show Cause is attached to the Appendix as Exhibit I.

18. On March 10, 2008, Commission Designee Don Horowitz issued an interlocutory decision denying the Associations' motion for interim relief in the nature of a suspension of the implementation and enforcement of those portions of the 2008 Policy which changed the 1992 Policy as that policy was implemented by the College. A copy of that Decision is attached to the Appendix as Exhibit J.

19. On October 7, 2008, PERC issued a Complaint and Notice of Hearing in this matter. Copy thereof is attached to the Appendix as Exhibit K.

20. In entering into this stipulation, the parties recognize that the facts as stipulated shall constitute the complete factual record to be submitted to the Commission. The Charging Parties are on notice that to the extent that the stipulated facts are insufficient to sustain their burden of proof by a preponderance of the evidence, the Complaint may be dismissed by the Commission.

21. Similarly, the Respondent is advised that it too must rely upon the sufficiency of the stipulated record to sustain any affirmative defenses it has asserted or to rebut or disprove the

existence of a prima facie case established by the Charging Parties.

22. The Associations maintain that the College's adoption and implementation of its 2008 Policy constituted unlawful unilateral changes in the subjects of (a) the change in and withdrawal of the unit members' restricted right under the 1992 Policy to smoke at designated places on College premises both outdoors and inside parked vehicles, and of (b) the elimination of the 1992 Policy's substantive and procedural disciplinary provision titled "enforcement procedures" and substitution of the disciplinary provision in the 2008 Policy titled "sanctions against violators." The Associations maintain that the preceding subject matters are "mandatorily negotiable."

23. The College maintains the following: the new policy constitutes managerial prerogative and is essentially a governmental policy that is not subject to any negotiation; that the College, as a public institution, has an obligation, as supported by the New Jersey Department of Health and Human Services, to protect the public and especially college-aged individuals, from the harmful effects of tobacco; that the College has merely implemented one of the policy recommendations of the State that is based on factual findings and real statistics; and that such governmental action for the benefit of the public is not subject to mandatory negotiation.

24. Both the Associations and the College shall be allowed to file legal briefs in support of their positions to complete the record in this matter in accordance with a schedule to be determined by the Commission.

The parties have submitted the briefs referred to in the last stipulation. We summarize the arguments set forth in these briefs.

The College argues that its no-smoking policy does not affect the work and welfare of public employees because it is assertedly unrelated to the employment relationship and applies universally to employees and the public alike. Citing Livingston Bd. of Ed., P.E.R.C. No. 91-8, 16 NJPER 440 (¶21189 1990), aff'd NJPER Supp.2d 267 (¶220 App. Div. 1991), which held non-negotiable a smoking ban in a K-12 school district, the College further argues that negotiations over its smoking ban would significantly interfere with its governmental policymaking decision to respond to a serious health problem on its campuses. The College cites studies reported in the Journal of the American Medical Association that found that the number of college-aged smokers increased by 28% between 1993 and 1997, Wechsler, Rigotti, and Gledhil-Hoyt, Increased Levels of Cigarette Use Among College Students, Vol. 280 J.A.M.A. No. 19 (November 18, 1998); that the prevalence of smoking increased faster in public colleges than private colleges, id.; and that tobacco use among

college students was not limited to cigarettes and could lead to lifelong nicotine dependence. Rigotti, Lee, and Wechsler, U.S. College Students Use of Tobacco Products, Vol. 284 J.A.M.A. No. 6 (August 9, 2000). The College also cites a 2006 report of the Surgeon General, The Health Consequences of Involuntary Exposure to Tobacco Smoke, describing the dangers of second-hand smoke and recommending smoking bans on college campuses. These recommendations were echoed by the New Jersey Department of Health and Senior Services in its "Strategic Plan for a Comprehensive Tobacco Control Program"; this plan was aimed at decreasing the initiation of tobacco use by college-aged individuals and increasing the number of colleges with smoke-free campuses. The College also argues that employees are entitled to a safe, smoke-free environment, and that the charging parties are violating their duty of fair representation by arbitrarily representing the interests of some, but not all unit members.

The Associations argue that being allowed to smoke at work is a term and condition of employment intimately and directly affecting employees and that Livingston does not control this case since it involved students who were minors rather than adult students who, pursuant to N.J.S.A. 9:17B-1 to -3, should be considered responsible for making their own decisions about smoking. The Associations also argue that having to negotiate before the removal of the five outdoor smoking areas would not

have significantly impaired the College's ability to improve its health climate since its campuses were already smoke-free save for those five areas and since negotiations might have resulted in designating more isolated parts of campus where smoking could occur. Even if the decision to adopt a no-smoking policy is not mandatorily negotiable, the Associations argue that the College must negotiate over the impact of that decision, given their assertion that there are alternative areas for smoking that are remote and undeveloped and outside the view of students. The Associations also assert that their duty of fair representation does not depend on the employer's subjective belief that a negotiations position is not a fair or beneficial one for the represented employees. Finally, the Associations argue that disciplinary disputes and sanctions are mandatorily negotiable under New Jersey Turnpike Auth. v. New Jersey Turnpike Supervisors Ass'n, 143 N.J. 185 (1996), and other cases and that the College violated its obligation to negotiate when it changed the disciplinary rules and procedures applicable under the 1992 policy for alleged infractions.

N.J.S.A. 34:13A-5.3 requires that proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. N.J.S.A. 34:13A-5.4(a)(5) makes a violation of this obligation an unfair practice. Thus, this case turns on

whether the changes in the no-smoking policy involve a mandatorily negotiable term and condition of employment.

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulates the standards for determining whether a subject is mandatorily negotiable:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

[Id. at 404-405]

We apply these three tests in order.

The College's replacement of its 1992 smoking policy with a total smoking ban intimately and directly affects the work and welfare of the employees represented by the Associations. In addressing the negotiability of workplace smoking restrictions, we have consistently recognized that employees have a legitimate interest in seeking to negotiate before restrictions and sanctions are imposed. See Livingston; Warren Hills Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 82-8, 7 NJPER 445 (¶12198 1981),

aff'd NJPER Supp.2d 126 (¶105 App. Div. 1982), certif. den. 93 N.J. 308 (1983); Pine Hills Bd. of Ed., P.E.R.C. No. 79-77, 5 NJPER 190 (¶10108 1979). Workplace smoking restrictions and bans bear on such employee concerns as health, safety, stress, comfort, and potential discipline. A majority representative does not violate its duty of fair representation by seeking to negotiate over such concerns unless the evidence demonstrates that it has taken its positions arbitrarily, discriminatorily, or in bad faith. Saginario v. Attorney General, 87 N.J. 480 (1981); Vaca v. Sipes, 386 U.S. 171 (1967). No such evidence exists. It is for the majority representative, not the employer, to determine in good faith what negotiations positions it will take and whether they are fair and beneficial to the represented employees.

The parties do not claim that any statute or regulation mandates either that county college employees be prohibited from smoking on campus or that they be allowed to smoke. Contrast N.J.S.A. 26:3D-58b (prohibiting smoking "in any area of any building of, or on the grounds of, any public or nonpublic elementary or secondary school, regardless of whether the area is an indoor public place or is outdoors"). The College does assert that the 2008 no-smoking policy satisfies its common law duty to provide a safe, smoke-free workplace, but the case it relies upon, Shimp v. New Jersey Bell Telephone Co., 145 N.J. Super. 516

(Chan. Div. 1976), involved smoking in a confined, indoor office area where employees did their work rather than the outdoor and remote areas that the Associations assert could be used for smoking without danger to non-smokers.

We now proceed to examine the College's interests in making its campuses smoke-free and to balance those interests against the employees' interests in negotiating over that decision insofar as it applies to them. Preliminarily, we note that Livingston does not, as a matter of binding precedent, predetermine the outcome of this case. In Livingston, we held not mandatorily negotiable a school board's policy covering a K-12 district and prohibiting smoking "anywhere on school premises including athletic fields, sidewalks, parking lots and other areas contiguous to the school buildings themselves anytime during the course of the day or night." Id. at 440. Accord Egg Harbor Tp. Bd. of Ed., D.U.P No. 91-10, 16 NJPER 513 (¶21224 1990). We presumed that the prohibition covered areas within student view and concluded that "school boards have an overriding interest in shielding students from that activity, especially when students and the public are also prohibited from smoking." Id. at 441. But we did "not decide the issue of smoking on school premises, outside school buildings, but beyond the view of students." Id. at 442 n. 3. The Appellate Division affirmed substantially for the reasons stated in our opinion. Livingston thus differs from this case in these regards: it did not involve

college students or adults and it did not involve a smoking ban in outdoor areas where students would not see employees smoking.

Livingston nevertheless underscores the significance of an educational institution's interests in adopting no-smoking policies applicable to all elements of the educational community. Those interests involve both the safety of the community and the educational mission of the employer. Since Livingston was decided 19 years ago, the dangers of second-hand smoke have become much better understood and more and more colleges have designated their campuses as smoke-free as a way to protect student health and to educate their students about the dangers of developing a lifelong addiction to nicotine. While county college students are adults by law, N.J.S.A. 9:17B-1 to -3, that legal status does not confer a legal right to smoke where they want nor does it negate the College's interests in protecting them from second-hand smoke or educating them about health hazards. The age cohort of college students has been determined to be a group at risk for initiating tobacco use and becoming addicted to nicotine. Publicly declaring a campus to be completely smoke-free is a powerful educational tool, one that would be weakened by carving out exceptions for employees or other affected groups.^{4/} In adopting that tool, the College has

^{4/} In Warren Hills, decided 28 years ago, we held that a school board's educational interests in having smoke-free buildings
(continued...)

made an educational policy decision that outweighs the interests of employees in negotiating over the ban on smoking. Further, the impact issue identified by the charging parties - the possibility of permitting employees to smoke in remote, undeveloped areas where students would not see them - cannot be severed from the policy decision to declare College campuses free of smoke and is therefore not mandatorily negotiable itself. See Piscataway Tp. Ed. Ass'n v. Piscataway Tp. Bd. of Ed., 307 N.J. Super. 263 (App. Div. 1997), certif. den. 156 N.J. 385 (1998); In re Maywood Bd. of Ed., 168 N.J. Super. 45 (App. Div. 1979), certif. den. 81 N.J. 292 (1979).^{5/} It would significantly

4/ (...continued)

were outweighed by the employees' interests in negotiating over being able to continue to smoke in faculty lounges. But the Legislature has since banned smoking in all elementary and secondary school buildings, thus negating the holding of Warren Hills. Moreover, we held in Livingston that the school board's interests in persuading students not to smoke or to begin to smoke and in having adults in schools act as "role models" for students outweighed the employees' interests in negotiating over the smoking ban in that case. Given the studies conducted in the last 28 years and other societal developments seeking to discourage smoking, we give more weight to the College's educational interests in this case than we gave to the school board's educational interests in Warren Hills.

5/ The Associations rely on University of Alaska Classified Employees Ass'n, APEA/AFT, AFL-CIO v. University of Alaska, 1995 WL 1785389, a case in which the Alaska Labor Relations Agency found that a smoking ban would have been negotiable had the union not waived its right to negotiate. The agency stated that "[a]llowing bargaining . . . would not interfere with the essential educational mission of the University. The effect on students is not a motivation in this case. These smokers are adults and smoking is permitted in the

(continued...)

interfere with the educational policy decision to have a smoke-free campus if employees were nevertheless permitted to smoke, even if only in designated areas. That interference outweighs any personal interest an individual employee may have in smoking while on campus. We accordingly grant the College's cross-motion for summary judgment and deny the Associations' cross-motion with respect to these issues and dismiss those portions of the Complaint.

While the College was not required to negotiate over its decision to adopt a total smoking ban, it was required to negotiate before changing the disciplinary procedures and consequences for violating its new policy. N.J.S.A. 34:13A-5.3 requires negotiations over disciplinary disputes and review procedures. See also New Jersey Turnpike Auth. We disagree with the College's assertion that there was no change triggering the

5/ (...continued)
residential facilities in the non-public areas to accommodate smokers in their home." We are not bound by scope of negotiations decisions in other states, Ridgefield Park Ed. Ass'n. v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 159, n.2 (1978), and in any event the Alaskan case did not involve an educational decision to declare a campus to be completely smoke-free. Further, a recent decision of the Pennsylvania Labor Relations Board requiring negotiations over a smoking ban on State college campuses involved one issue only - the employer's incorrect assertion that a statute compelled it to ban smoking. Association of Pennsylvania State Colleges and University Faculties v. Pennsylvania State System of Higher Ed., 40 PPER 43, 2009 PPER (LRP) LEXIS 48 (2009). The employer did not claim a managerial prerogative to act unilaterally for governmental policy reasons.

duty to negotiate. Under the 1992 policy, alleged infractions of the smoking policy were handled outside the channels normally used for imposing discipline on employees. Employees were treated in the same fashion as any other alleged violators; first and second violations resulted in warnings that were recorded in the Public Safety Department (not an employee's personnel file) and subsequent violations within specified periods resulted in charges being filed in municipal court (not in adverse personnel actions). Further, any person on campus (not just an employer representative) could issue a warning notice. Under the 2008 policy, employees are differentiated from other alleged violators and alleged violations subject employees to disciplinary action through the employer's disciplinary channels. We hold that the College committed an unfair practice when it did not negotiate before adopting the provision of the 2008 policy concerning employee discipline. We therefore deny the College's cross-motion for summary judgment and grant the Associations' cross-motion with respect to this issue and enter the following remedial order.

ORDER

Bergen Community College is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the

Act, particularly by refusing to negotiate with the Bergen Community College Faculty Association, Bergen County College Support Staff Association, and Bergen Community College Professional Staff Association before adopting the provision of the 2008 no-smoking policy concerning employee discipline.

2. Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment, particularly by refusing to negotiate with the Bergen Community College Faculty Association, Bergen County College Support Staff Association, and Bergen Community College Professional Staff Association before adopting the provision of the 2008 no-smoking policy concerning employee discipline.

B. Take the following action:

1. Rescind the provision of the 2008 no-smoking policy concerning employee discipline.

2. Negotiate with the Associations before adopting a provision concerning employee discipline for violating the 2008 policy.

3. 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 60 consecutive

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

4. Within 20 days of receipt of this decision, notify the Chairman of the Commission of the steps the Respondent has taken to comply with this Order.

The remaining allegations in the Complaint are dismissed.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Branigan, Buchanan, Fuller and Joanis voted in favor of this decision. None opposed. Commissioners Colligan and Watkins were not present.

ISSUED: October 29, 2009

Trenton, New Jersey

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 refusing to negotiate with the Bergen Community College Faculty Association, Bergen County College Support Staff Association, and Bergen Community College Professional Staff Association before adopting the provision of the 2008 no-smoking policy concerning employee discipline.

WE WILL cease and desist from refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment, particularly by refusing to negotiate with the Bergen Community College Faculty Association, Bergen County College Support Staff Association, and Bergen Community College Professional Staff Association before adopting the provision of the 2008 no-smoking policy concerning employee discipline.

WE WILL rescind the provision of the 2008 no-smoking policy concerning employee discipline.

We WILL negotiate with the Associations before adopting a provision concerning employee discipline for violating the 2008 policy.

Docket No. CO-2008-210

BERGEN COMMUNITY COLLEGE

(Public Employer)

Date: _____

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, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372