

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COLLEGE OF MEDICINE AND
DENTISTRY OF NEW JERSEY,

Respondent,

-and-

Docket No. CO-80-231

HOUSESTAFF ORGANIZATION OF THE
COLLEGE OF MEDICINE AND DENTISTRY
OF NEW JERSEY/COMMITTEE OF INTERNS
AND RESIDENTS,

Charging Party.

SYNOPSIS

The Special Assistant to the Chairman, in an Interlocutory Decision and Order, grants the request of the Committee of Interns and Residents for interim relief. The basis of the unfair practice charge was a claim by the C.I.R. that Dr. DiBeneditto was terminated as a resident because he had filed a grievance alleging certain violations of the collective negotiations agreement between the C.I.R. and the College and because he had requested and obtained union representation concerning his grievance relating to access to his personnel file. The Special Assistant concluded that the C.I.R. had established that there was a reasonable likelihood that it would be able to establish at the conclusion of this case that the College was motivated in whole or in part, in discharging DiBeneditto, by a desire to punish him for the exercise of protected rights under the Act. The College was ordered to immediately reinstate Dr. DiBeneditto to his position as a first year Otolaryngology resident at the College and was further ordered to refrain from discharging, suspending or otherwise disciplining Dr. DiBeneditto because of his exercise of protected rights under the New Jersey Employer-Employee Relations Act, during the pendency of the instant unfair practice proceeding.

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Charging Party.

Appearances:

For the Respondent, John J. Degnan, Attorney General
(Mr. Melvin E. Mounts, Deputy General Counsel)

For the Charging Party, Irwin Geller, Esq. and
Karen S. Schwartz, Esq., Attorneys for Committee
of Interns and Residents

INTERLOCUTORY DECISION AND ORDER

An unfair practice charge was filed with the Commission on February 5, 1980 by the Housestaff Organization of the College of Medicine and Dentistry of New Jersey/Committee of Interns and Residents ("C.I.R.") alleging that the College of Medicine and Dentistry of New Jersey ("College") had engaged in certain unfair practices within the meaning of the Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act").

The charge alleges that the College violated N.J.S.A. 34:13A-5.4(a)(1), (a)(3) and (a)(7),^{1/} when agents and repre-

^{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; (3) Discriminating in regard to hire or tenure of

(continued)

representatives of the College first threatened to terminate Dr. Joseph DiBeneditto, a first year resident in the College's training program in Otolaryngology, and then terminated Dr. DiBeneditto on or about January 30, 1980 because he had filed a grievance alleging certain violations of the collective negotiations agreement between the C.I.R. and the College, and because he had requested and obtained union representation concerning his grievance relating to access to his personnel file.

The C.I.R.'s charge was accompanied by a request for interim relief along with affidavits submitted in support of the C.I.R.'s contentions in the instant unfair practice charge. The C.I.R. prayed for affirmative injunctive relief from the Commission that would direct the College to reinstate Dr. DeBeneditto to the position which he held prior to January 30, 1980 during the pendency of the unfair practice proceeding. The undersigned, as Special Assistant to the Chairman, having been delegated the authority to act upon requests for interim relief on behalf of the Commission, executed an Order to Show Cause on February 9, 1980, made returnable on February 15, 1980. Subsequently, the return date of the Order to Show Cause was rescheduled for February 26, 1980 pursuant to the joint agreement of the parties.

1/ (continued)

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; and (7) Violating any of the rules and regulations established by the commission.

Pursuant to the Order to Show Cause, the College filed a brief in opposition to the C.I.R.'s motion for a temporary injunction along with counter affidavits in support of the College's position in the instant matter. Both parties, represented by counsel, appeared at the Order to Show Cause hearings conducted on March 4, 12, 26 and 28 and April 9, 1980.^{2/} The parties during the course of this hearing were given an opportunity to call and examine witnesses and to present all relevant evidence. At the conclusion of the aforementioned hearing the undersigned reserved judgment on the C.I.R.'s application for interim relief until the parties had filed post hearing briefs. All post hearing briefs were received by the Commission on or before April 28, 1980. This interlocutory decision is therefore being prepared, in accordance with N.J.A.C. 19:14-9.5, to set forth the undersigned's determination relating to the C.I.R.'s request for interim relief.

After careful consideration of the written submissions of the parties, and in further consideration of the entire record including exhibits developed during the course of the Show Cause hearing, the undersigned has concluded that the relief requested by the C.I.R. in the instant matter should be granted, and that an interim order must be issued enjoining the College from discharging Dr. DiBeneditto and ordering him reinstated to the position which he held prior to being discharged on or before January 30, 1980.

^{2/} The Show Cause hearing conducted on February 26, 1980, was devoted entirely to the exploration of settlement possibilities with the parties.

The undersigned has concluded that the C.I.R. has satisfied the Commission's standards that have been developed, on a case-by-case basis, for evaluating the appropriateness of interim relief. These standards were intended to parallel the tests applied by the State judiciary when confronted with similar applications for ad interim relief. Essentially, the test applied by the Commission in the past has been two-fold: the likelihood of success on the legal and factual allegations set forth in the charge in the final decision issued by the Commission; and the irreparable nature of the harm that will occur, if the relief sought is not granted.^{3/}

The above-cited standards, however, are not immutable. The very nature of the interim relief process as it has evolved through numerous judicial and administrative decisions necessitates a flexible approach concerning the weight accorded to the likelihood of success and irreparable harm components of the injunctive relief standard. The New Jersey Supreme Court has recognized that although injunctive relief is

^{3/} See for example, In re Township of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 36 (1975); In re State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); In re Township of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975); In re City of Jersey City, P.E.R.C. No. 77-13, 2 NJPER 293 (1976); In re Ridgefield Park Board of Education, P.E.R.C. No. 78-1, 3 NJPER 217 (1977); In re Newark Redevelopment and Housing Authority, P.E.R.C. No. 78-15, 4 NJPER 52 (¶4024 1978); In re Union County Regional High School Board of Education, P.E.R.C. No. 78-27, 4 NJPER 11 (¶4007 1978); In re Willingboro Education Association, P.E.R.C. No. 78-64, 4 NJPER 168 (¶4083 1978); In re Jackson Twp. Board of Education, P.E.R.C. No. 79-48, 5 NJPER 62 (¶10041 1979); and In re Parsippany-Troy Hills Board of Education, P.E.R.C. No. 80-125, 6 NJPER ____ (¶____ 1980).

normally withheld where the existence of substantial and material factual disputes casts doubt upon the validity of a complainant's asserted cause of action, such a rule has, as its exception, the situation where the court must intervene to protect the subject matter of the litigation from destruction, loss or impairment, such that the final decree of the court would be futile, or inefficacious in operation. Ferraiuolo v. Manno, 1 N.J. 105, 108-109 (1948).^{4/} The Supreme Court indicated that this relief was particularly appropriate "where it appears that the damage resulting to the complainant by a continuance of the alleged wrong may prove to be irreparable." 1 N.J. at 109.

Interim relief rules and exceptions to those rules, as noted above, must be flexible enough to embrace the particular merits of each individual application for interim relief.

In the instant matter, the undersigned for the reasons to be enunciated hereinafter has been impressed by the irreparable nature of the harm aspects of the C.I.R.'s application for interim relief. This is not to say, however, that the undersigned believes that there is considerable doubt as to the validity of the C.I.R.'s assertive cause of action. To the contrary, for the reasons to be set forth in this decision, the undersigned

^{4/} See e.g., Naylor v. Harkins, 11 N.J. 435 (1953); Haines v. Burlington County Bridge Commission, 1 N.J. Super. 163 (1949); General Electric Co. v. Gem Vacuum Stores, 36 N.J. Super. 234 (1955) and Pfaus v. Fedor, 88 N.J. Super. 468 (1965).

believes that the C.I.R. has established the likelihood of success on the legal and factual allegations set forth in the charge. Nevertheless, it is important to note that the undersigned has heavily weighed the evidence that Dr. DiBeneditto could not be made whole for the harm suffered to his career if relief would be denied to him until after a plenary evidentiary hearing before a Commission Hearing Examiner, the probable filing of exceptions, the issuance of the final Commission decision, and any subsequent judicial appeals.^{5/}

The undersigned has concluded that Dr. DiBeneditto would be irreparably harmed if any affirmative relief from the Commission were to wait the final outcome of a plenary proceeding. The evidence proffered during the course of the Show Cause process establishes that unless Dr. DiBeneditto is reinstated immediately he would be required to start his first year of the Otolaryngology program at the College from the beginning and lose any credit for the seven months of residency work that he completed if the C.I.R.'s charge is subsequently sustained by the Commission and/or the State judiciary. The potential loss to Dr. DiBeneditto is considerably more than the monetary loss which accompanies the discharge of an employee in a more typical situation. Dr. DiBeneditto would lose time, i.e. at

^{5/} In a matter relating to charges that City firefighters would be denied promotions because of their exercise of protected rights under the New Jersey Employer-Employee Relations Act, City of Hackensack v. Winner, et al, 82 N.J. 1 (1980), the Supreme Court issued its decision in that case almost three years after the issuance of the Commission's decision.

least a year of his life, that would be impossible to make up if not reinstated at once. The New Jersey Supreme Court in Naylor v. Harkins, supra, indicated that in particular instances where irreparable harm had been established concerning the imminent loss of employment of certain individuals, injunctive relief would be warranted notwithstanding the failure to establish the probability of success on the merits of that case. The Naylor v. Harkins case interestingly enough did relate to a labor relations matter albeit one involving primarily internal union affairs.^{6/}

^{6/} The federal judiciary in applying traditional equity principles in the context of national labor relations policy has developed and applied flexible standards in evaluating union applications to enjoin the implementation of managerial decisions, including discharge matters, pending arbitrations relating to those decisions. To obtain an injunction, a union besides establishing irreparable harm and that the balance of potential hardships to the parties is in its favor, need only establish that there is a reasonable, or at least some likelihood of success in ultimately prevailing on the merits of a case. There is no requirement to establish that the relevant facts and the laws are clearly or uncontrovertibly in the petitioner's favor. Newspaper Printing Pressmen's Union No. 9 v. Pittsburg Press Co., 343 F. Supp. 55 (1972), aff'd 479 F.2d 607 (1973); Hoh v. Pepsico, 491 F.2d 556 (1974); Local 174 Utility Workers Union v. South Pittsburgh Water Co., 345 F. Supp. 52 (1972); United Steelworkers of America v. Fort Pitt Steel Casting, 598 F.2d 1273 (1979).

Concerning the issue of irreparable harm, the federal courts have often determined that in a traditional layoff situation --- where an employee unlike DiBeneditto normally does not face the loss of at least a year of his training and the effective loss of a career in his chosen profession --- the loss of wages, with attendant losses in seniority, recall rights, pension and vacation credits, and accident and health benefits automatically constitutes irreparable harm for the purposes of granting injunctive relief. Food Employees Union, Local 590 v. National Tea Co., 346 F. Supp. 875, remanded 474 F.2d 1338 (1972); Technical Office & Professional Workers Union, Local 757 v. Budd Company, 345 F. Supp. 42 (1972); Communications Workers v. Western Electric Co., 430 F. Supp. 969 (1977).

The undersigned has considered the issue of any harm that may be suffered by the Respondent College and the public interest if the relief sought was granted in the instant matter. The undersigned is, however, convinced that the irreparable harm that would be suffered by Dr. DiBeneditto if he is not reinstated at this time far outweighs any harm that may be suffered by the College and the public interest. In this regard, approximately one week after the College's Medical Education Committee voted to discharge DiBeneditto, this Committee voted to rescind their earlier decision and to reinstate DiBeneditto on probationary status.^{7/} The subsequent action of the Medical Education Committee casts considerable doubt on the College's contention that any reinstatement of DiBeneditto would be harmful from the standpoint of patient care and public interest.

In further regard to the issue of the alleged harm to the public, it should be noted that the evidence establishes that none of the three attending physicians that evaluated DiBeneditto's performance at College Hospital for his four month stint there rated him poorly in the area of patient care.^{8/} One physician rated him "very good" in that area and the other two attending physicians rated him "fair" in that category. Dr. Ki

^{7/} The administration of the College refused to approve this recommendation.

^{8/} DiBeneditto's evaluations will be referred to in somewhat greater detail at a later point in this decision.

Hyun Han, Director of Otolaryngology for United Hospitals, who had been involved in at least 30 operations with DiBeneditto and saw him almost everyday that he was assigned to United Hospitals, testified that on January 11, 1980, almost seven months after DiBeneditto had started his internship, but only 19 days prior to his termination, he had informed DiBeneditto that he was a "good resident". Chief Resident, Dr. Peter Gerley, who spend more time with DiBeneditto than any of the attending physicians evaluated him highly in all facets of his residency training.

I must further conclude that there is a likelihood that the C.I.R. will prevail on the merits of this case in any final decision by the Commission.

The record establishes to the undersigned's satisfaction that prior to January 11, 1980, only 19 days before DiBeneditto's discharge, DiBeneditto's record as a resident was a satisfactory one. DiBeneditto was evaluated based on his four month performance at College Hospital by three attending physicians. Dr. Raz, an attending physician who appeared to have greater exposure to Dr. DiBeneditto's work performance, and whose evaluation would normally be accorded more weight because of his prior experience as a director of the ENT program at Martland Hospital, rated DiBeneditto as being very good in the areas of patient care, operating room skill, surgical knowledge, teaching ability, maturity and

responsibility and dependability.^{9/} Dr. LaBagnara evaluated DiBeneditto as being very good in the area of responsibility and dependability, average in maturity, fair in patient care and teaching ability, and poor in the areas of operating room skill and surgical knowledge. Dr. Behim, the third attending physician rated DiBeneditto as fair in patient care, operating room skill and surgical knowledge and poor in teaching ability, maturity and responsibility and dependability. Dr. Behim and Dr. LaBagnara recommended counseling and Dr. Behim stated that DiBeneditto was delinquent regarding patient records. An examination of these three evaluation reports compiled by the attending physicians reveals that at least two of the three attending physicians rated DiBeneditto from fair to very good in every one of the six substantive factors considered in the evaluation. As stated before, Dr. Han testified that on January 11, 1980 he informed Dr. DiBeneditto that he was a "good resident". Testimony further reveals that DiBeneditto came highly recommended to the Otolaryngology residency program and that a pre-employment evaluation of him by Dr. Han had been laudatory. Moreover, Chief Resident, Dr. Peter Gerley, signed a letter positively praising Dr. DiBeneditto's abilities, diligence and technical competence.

^{9/} Residents in the Otolaryngology program were rated one through five in the above six areas. Five signified outstanding; four - very good; three - average; two - fair; and one - poor. In addition, the attending physicians noted whether the resident was delinquent regarding patient records and commented upon whether the resident needed counseling of an unspecified sort.

Prior to January 14, 1980, DiBeneditto was involved in two incidents germane to this proceeding. On two occasions he had not immediately reported to the emergency room to handle what he perceived to be non-emergency matters, including in one case an "earwax" problem and in the other case a "nose-bleed" that had apparently stopped bleeding. Both of these incidents occurred in December of 1979 and Dr. DiBeneditto was informed by Dr. Han that he was to report to the emergency room whenever requested regardless of the circumstances. No further instances of this kind occurred after Dr. Han counseled him concerning this matter on January 11, 1980.

The record supports the conclusion that a dramatic change began to occur in the relationship between DiBeneditto and Dr. Han and Dr. Myron Shapiro, the Director of Otolaryngology for CMDNJ, when DiBeneditto on January 16, 1980 sought access to his personnel file. DiBeneditto sought such access after having been informed that an incident report initiated by a patient complaint accusing DiBeneditto of threatening conduct during the course of an interview with a patient, would be included within his personnel file. During the course of this January 16, 1980 conference with Drs. Han and Shapiro, reference was also made by Dr. DiBeneditto to seeking the assistance of the C.I.R. concerning what DiBeneditto perceived to be a mistaken assessment of his actions concerning this incident (hereinafter referred to as the "patient C" incident).

The undersigned finds that DiBeneditto sought access to his personnel file as per his contractual right. Once he sought the help of the C.I.R., his union representative, in protecting his right to gain access to his personnel file, the perceptions of Drs. Han and Shapiro toward DiBeneditto were dramatically altered. The record establishes to the undersigned's satisfaction that a decision was made during the period between January 16, 1980 and January 23, 1980 to compile evidence against Dr. DiBeneditto that could serve to buttress any decision to discharge or otherwise discipline him that could be made in the future.

Two incidents are relied upon by the College that occurred after the January 16, 1980 conference between DiBeneditto and Drs. Han and Shapiro, in support of the College's decision to discharge DiBeneditto. Shortly after that conference, DiBeneditto prescribed Ampicillin, the drug of choice, for a patient with a sinus condition. The patient had claimed an allergy to the medication, but when questioned about any allergic symptoms had described a reaction that DiBeneditto recognized as being a normal reaction to that medication, not an allergic reaction to Ampicillin. When a nurse objected to prescribing this particular medication, which apparently the patient had agreed to take, DiBeneditto spoke to an attending physician who stated that although the reaction described was not an allergic symptom,

it would be better to prescribe an alternative drug. Subsequently, DiBeneditto prescribed an alternative drug for the patient.^{10/} Dr. Han discussed this particular incident with DiBeneditto and suggested that he not prescribe a drug that a patient believed he or she was allergic to, regardless of the description of the reaction to that drug, until he had at least tested that person for an allergic reaction with a small dose of the medication.

The other post January 11, 1980 incident that was purportedly heavily weighed by the College in its discharge decision has been alluded to earlier. A patient who Han described as being beaten up and suffering from trauma initiated the filing of an incident report against DiBeneditto accusing him of engaging in threatening conduct during the course of an interview with him. The incident report alluded to the patient's perception that DiBeneditto was acting in a threatening fashion, but no allegation was made in the report or subsequently that DiBeneditto touched the patient or even raised his voice to him.^{11/} The College also negatively evaluated DiBeneditto's request that patient C's roommate, who apparently was released from the hospital shortly thereafter, step outside while DiBeneditto

^{10/} Subsequent questioning of the patient revealed that she also suffered from allergic symptoms and DiBeneditto subsequently apologized to the nurse.

^{11/} The incident report alluded to DiBeneditto becoming very flustered, getting close to the patient, and looking him in the face.

spoke with "patient C". DiBeneditto testified that he wished to tell patient C in private the name of the doctor who was directly responsible for his care but whom had apparently neglected this patient's treatment. With regard to this incident, DiBeneditto stated that he had remained calm and had simply reiterated the limited nature of his role in treating this patient even after the patient threatened to hit the doctor with a baseball bat, a remark that the patient himself referred to in the incident report that was filed.

DiBeneditto on January 16, 1980 was confronted by Han and Shapiro about the incident report. He requested access to his personnel file and alluded to the need for possible union representation when it appeared that the incident report which he considered to be completely inaccurate could be included in his personnel file that was subject to review by any prospective employers. DiBeneditto testified in part that Shapiro became angry and stated that the union had no business in this matter. At this time, it is uncontroverted that Shapiro, after hearing DiBeneditto's denial, referred to two alternatives wherein DiBeneditto could confront "patient C" before the incident report would be included in his file. Instead Drs. Han and Shapiro made efforts to interview patient C's roommate for possible corroboration purposes. When the roommate failed to make a

scheduled appointment, both Drs. Han and Shapiro travelled to the roommate's home to interview him. Han's testimony revealed that the roommate was not talkative, could not corroborate "patient C's" story and did not hear any shouting inside the room although he remained outside the door.

Specific essentially undisputed facts to be referred to at this point establishes to the undersigned's satisfaction that the "Ampicillin" and "patient C" incidents did not precipitate apparently the first firing of an otolaryngology resident in CMDNJ history but were used to establish a pretextual base for DiBeneditto's discharge. These facts, in addition to those referred to earlier,^{12/} include the following:

(1) The extraordinary action of two extremely busy program directors interviewing patient C's roommate at his home after DiBeneditto had requested access to his file and union representation as a result of the patient C matter. It would have taken far less time to arrange a meeting between DiBeneditto and "patient C", as per Shapiro's earlier suggestion, to clarify matters.

^{12/} The undersigned makes specific reference to the evidence summarized earlier relating to DiBeneditto's post January 11, 1980 performance. The record also establishes that DiBeneditto was one of the few residents designated by Shapiro to work on more than one research project and was the only resident selected to prepare an article on the ENT program for the United Hospitals Newsletter.

(2) Han repeatedly refused to allow DiBeneditto to examine his personnel file. Han testified that he told DiBeneditto that his file was "not available at this time" -- although it was clearly available -- because it was Han's philosophy that he did not want residents to see evaluations that could arguably disturb the professional relationships with attending physicians. Significantly, Han also testified at several points in the record that he would let a resident see a personnel file if discipline was contemplated concerning that individual. Inasmuch as Han repeatedly denied DiBeneditto access to his file up until January 23, 1980, one may conclude that no decision had been made to discipline DiBeneditto until that date when John Ronches, a contract administrator for the C.I.R., hand delivered a step one grievance letter ^{13/} relating to the "access to personnel file" issue to Dr. Han.^{14/}

(3) Shortly after the aforementioned grievance was dropped off by Ronches at Han's office, DiBeneditto was paged to Han's office. Ronches and another C.I.R. contract administrator accompanied DiBeneditto to Han's office for a meeting that lasted about one hour. Dr. Shapiro joined Dr. Han approximately 15 to 20 minutes after the meeting started. Han denied much

^{13/} A copy of this grievance letter is attached to this Interlocutory Decision and Order and marked as Exhibit A.

^{14/} Han testified that the original purpose of the January 23, 1980 meeting was to generally review with DiBeneditto the "ampicillin" and "patient C" incidents. There was nothing in Han's testimony to indicate that prior to the January 23, 1980 meeting with DiBeneditto and the C.I.R. representatives any disciplinary action against DiBeneditto was being seriously contemplated.

of that which was attributed to him and Shapiro by Ronches and DiBeneditto, e.g., Han denied saying or hearing Shapiro say that DiBeneditto was creating an adversarial relationship, or that DiBeneditto was painting himself into a corner, or that DiBeneditto was making it impossible for the doctors to continue to have an amicable relationship with him. Han did make certain significant admissions. Han testified that he did think about having Ronches thrown out of the hospital as a result of statements contained within the grievance. Han admitted that both he and Shapiro were angry about the nature, tone and substance of the grievance letter and that he did press Ronches to find out about how many residents told Ronches that they were denied access to their personnel files.

More significantly, Ronches and DiBeneditto testified that Han at one point stated the following: "I had hoped that we could let all of this go, but after today --- [and then his voice trailed off]." Han did not deny making this type of statement and in fact recalled that remark clearly. Han stated that he made this statement in reference to DiBeneditto's request for his personnel file, i.e., Han did not want to release the file for his philosophical reasons, but in light of the contract article in effect would have to make the file available. The undersigned, in consideration of all the testimony proffered concerning this meeting, finds that it is much more reasonable to interpret the above remarks in the manner that the C.I.R. and DiBeneditto did, i.e., that Han had hoped that the "patient

C" and "ampicillin" incidents could be resolved without a major incident, but in light of the grievance and the statements disseminated to all the residents,^{15/} the intervention of the C.I.R. in this matter, and the confrontational situation then existing between DiBeneditto, Han and Shapiro, that could not be the case.^{16/}

(4) Although the January 23, 1980 meeting lasted approximately one hour, Han testified that virtually all that was discussed during that meeting related to the merits of the grievance, i.e., the issue of access to personnel files relating to DiBeneditto and other residents. Han testified that there was little, if any, discussion at that meeting of the "patient C" and "Ampicillin" incidents or about DiBeneditto's performance as a resident, although that was the alleged purpose of calling DiBeneditto down on January 23, 1980. As referred to earlier, Han denied that there was any discussion about DiBeneditto being treated differently because of his filing of a grievance and of his seeking of union representation. The undersigned finds it difficult to credit testimony that for one hour all that was discussed among the parties was the grievance and the accuracy of statements contained

^{15/} Copies of the grievance letter were sent to, among others, all members of the ENT Housestaff.

^{16/} It is reasonable to assume that Han and Shapiro suspected on January 23, 1980 that DiBeneditto had supplied Ronches with what they perceived was false information concerning access to personnel files being sought by others. DiBeneditto later testified that he did supply Ronches with this information that he asserted was reliable.

therein. DiBeneditto's and Ronches' account of the substance of that January 23, 1980 meeting is a more credible account of that conference given in part its duration.

(5) Testimony established that a decision was not made to check out DiBeneditto's experience as a resident at Nassau County Medical Center until after the grievance was filed with Han and the meeting involving Han, Shapiro and the C.I.R. representatives had commenced.

(6) The Medical Education Committee, the body that was responsible for the original decision to discharge DiBeneditto was informed of the aforementioned negative incidents involving DiBeneditto and the grievance situation. Han stated that some members of the Medical Education Committee expressed surprise at the filing of the grievance. The Medical Education Committee made the decision to discharge DiBeneditto at a special meeting convened a week after the January 23, 1980 conference and just one week before the regularly scheduled monthly meeting of the Medical Education Committee.

At the regularly scheduled February meeting, one week thereafter, the Medical Education Committee voted to reinstate DiBeneditto and place him on some type of probationary status. As referred to earlier, the College did not rescind the earlier discharge decision.

In consideration of the entire record, the undersigned concludes that the C.I.R. has established at the very least that there is a reasonable likelihood that it will be able to establish at the conclusion of this case that the College, in discharging DiBeneditto, was motivated in whole or in part ^{17/} by a desire to punish DiBeneditto for the exercise of protected rights under the Act in violation of N.J.S.A. 34:13A-5.4(a)(3) and derivatively N.J.S.A. 34:13A-5.4(a)(1).^{18/} There is considerable evidence, as referred to above, to establish that DiBeneditto was discharged because he had violated residency protocol and procedures by challenging a position taken by the Director of the Otolaryngology program at United Hospital concerning access to personnel files, by filing a grievance, and by bringing the union into a situation that was considered to be exclusively an in-house matter by the College administration.

One additional comment is in order at this time concerning a point repeatedly raised by the College during the course of this proceeding. The undersigned has not challenged the medical judgments of Drs. Han and Shapiro relating to the "emergency room", "ampicillin" and other medical incidents involving DiBeneditto, i.e., that DiBeneditto made mistakes of judgment concerning these incidents. However, the undersigned is still satisfied that the College through its agents

^{17/} See In re Haddonfield Boro Bd of Ed, P.E.R.C. No. 77-36, 3 NJPER 71 (1977).

^{18/} The C.I.R. has not attempted to establish how N.J.S.A. 34:13A-5.4(a)(7) has been violated. The undersigned would conclude that this aspect of the C.I.R.'s charge should be withdrawn or dismissed.

and representatives discharged DiBeneditto in whole or in part because of the exercise of protected rights under the Act and that the enunciated reasons for his discharge were pretextual.

It must also be emphasized that the decision and order in this interim relief decision is not intended and does not have the effect of directing the College to permit Dr. DiBeneditto to complete his residency. He has completed approximately seven months of a 36 month residency program. Those physicians and other CMDNJ personnel responsible for evaluating Dr. DiBeneditto's progress in that program are able to continue to monitor his performance and remain able to council, discipline or even discharge him for any legitimate reason.

A Complaint and Notice of Hearing will be issued in this matter, which will proceed to a hearing before a Commission hearing examiner. It is anticipated that such further proceedings will be completed before Dr. DiBeneditto completes his residency. It is the finding of the undersigned that given the evidence presented on this record and standards utilized in such interim relief proceedings, as set forth herein, that pending the completion of the unfair practice proceeding, Dr. DiBeneditto should be permitted to continue his residency rather than be compelled to abandon his professional goals and career.

ORDER

In light of the foregoing, I THEREFORE ORDER that the College of Medicine and Dentistry of New Jersey immediately reinstate Dr. Joseph P. DiBeneditto to the position of a first

year Otolaryngology resident at the College which he held prior to being discharged on or about January 30, 1980.

IT IS FURTHER ORDERED that the College of Medicine and Dentistry of New Jersey refrain from discharging, suspending or otherwise disciplining Dr. Joseph P. DiBeneditto because of his exercise of protected rights under the New Jersey Employer-Employee Relations Act, during the pendency of the instant unfair practice proceeding.

BY ORDER OF THE COMMISSION

A handwritten signature in black ink that reads "Stephen B. Hunter". The signature is written in a cursive style and is positioned above a horizontal line.

Stephen B. Hunter
Special Assistant to the Chairman

DATED: Trenton, New Jersey
April 30, 1980

EXHIBIT "A"

HAND DELIVERED

January 23, 1980

EDWARD T. GLICKMANN
EXECUTIVE DIRECTOR
DAVID STOLOW
SENIOR CONTRACT ADMINISTRATOR
DOREEN COPPES
CAROL DAVIS
CORNELIUS LEHANE
ROBERT WOLK
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THIRD VICE PRESIDENT
DR. LINNEA LACEFIELD
SECRETARY-TREASURER
DR. JENNIFER RUDD
OFFICER-AT-LARGE
DR. STEPHANIE SEREMETIS
OFFICER-AT-LARGE

Dr. Ki Han
Director, ENT
United Hospital
15 S. 9th Street
Newark, N.J. 07107

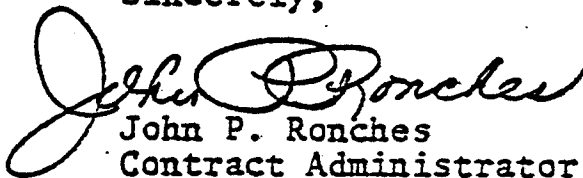
Re: J. DeBeneditto M.D.
et al

Dear Dr. Han:

We are outraged by your deliberate and persistent violation of our Collective Bargaining Agreement in refusing Dr. DeBeneditto's request to examine and copy of his personnel file. We have also learned that other ENT residents have been denied access to their personnel files and told that they would have difficulties if they attempted to exercise their right to examine their file. In accordance with Article XIII of the Agreement, this is our step one grievance.

We insist that you immediately arrange Dr. DeBeneditto to review and photocopy his file and further, that you notify each ENT resident, in writing, that you will honor requests for review and/or copies of documents contained in their personnel file.

Sincerely,


John P. Ronches
Contract Administrator

JPR/pt

cc: ENT Housestaff
Dr. Bergen
Dr. A. Levy
Dr. Shapiro
Ms. Davenport