

P.E.R.C. NO. 88-120

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNIVERSITY OF MEDICINE AND
DENTISTRY OF NEW JERSEY,

Respondent,

-and-

Docket No. CO-87-146-111

COMMITTEE OF INTERNS
AND RESIDENTS,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated to him by the full Commission, dismisses a Complaint based on an unfair practice charge filed by the Committee of Interns and Residents against the University of Medicine and Dentistry of New Jersey. The charge alleged UMDNJ violated the Act when it unilaterally terminated free parking benefits because the union did not agree to UMDNJ's negotiations proposals. The Chairman, in agreement with a Commission Hearing Examiner and in the absence of exceptions, finds that UMDNJ did not change a term and condition of employment because a third party modified the benefit.

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Appearances:

For the Respondent, Cary Edwards, Attorney General
(Alice J. Gutler, Deputy Attorney General)

For the Charging Party, John P. Ronches, Associate Director

DECISION AND ORDER

On December 16, 1986 and March 3, 1987, the Committee of Interns and Residents ("CIR") filed an unfair practice charge and amended charge, respectively, against the University of Medicine and Dentistry of New Jersey ("UMDNJ"). The charge, as amended, alleges that UMDNJ violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (3) and (5),^{1/} when it unilaterally terminated free parking benefits

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

for certain CIR unit members assigned to work at the Robert Wood Johnson University Hospital. These benefits were allegedly terminated in retaliation for CIR's refusal to agree to UMDNJ's negotiations proposals.

On March 4, 1987, a Complaint and Notice of Hearing issued. On March 17, UMDNJ filed its Answer. It denied the Complaint's allegations. As affirmative defenses, it stated that it does not own or control the parking garage and that an independent third party made the change in parking privileges.

On July 27, 1987, Hearing Examiner Stuart Reichman denied UMDNJ's motion for summary judgment.

On September 30 and November 17, 1987, the Hearing Examiner conducted hearings. The parties examined witnesses and introduced exhibits. They also filed post-hearing briefs.

On March 16, 1986, the Hearing Examiner recommended that the Complaint be dismissed. H.E. No. 88-45, 14 NJPER ____ (¶ ____ 1988). He concluded that UMDNJ did not change a term and condition of employment because a third party modified the coupon parking program and that the change was not in retaliation for CIR's negotiations conduct.

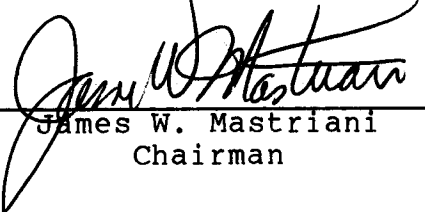
The Hearing Examiner served his report on the parties and informed them that exceptions were due on or before March 29, 1988. Neither party filed exceptions or requested an extension of time.

I have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-10) are accurate. I adopt and incorporate them here. Acting pursuant to authority delegated to me by the full Commission in the absence of exceptions, I agree that the Complaint should be dismissed.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

DATED: Trenton, New Jersey
May 5, 1988

H.E. NO. 88-45

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

In the Matter of

UNIVERSITY OF MEDICINE AND DENTISTRY OF
NEW JERSEY,

Respondent,

-and-

Docket No. CO-87-146-111

COMMITTEE OF INTERNS AND RESIDENTS,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the University of Medicine and Dentistry of New Jersey did not violate N.J.S.A. 34:13A-5.4(a)(1), (3) or (5) when the coupon parking program applicable to resident physicians employed by UMDNJ at the Robert Wood Johnson University Hospital was modified by the Hospital to allow for only four hours of free parking rather than unlimited free parking. The Hearing Examiner found that no violation of the Act can be ascribed to the University, the employer of the resident physicians, when the change in the parking program was made by the Hospital, an independent third party. The Hearing Examiner found that under the facts of this case the coupon parking program did not amount to an established past practice constituting a term and condition of employment.

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.

H.E. NO. 88-45

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

In the Matter of

UNIVERSITY OF MEDICINE AND DENTISTRY OF
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Docket No. CO-87-146-111

COMMITTEE OF INTERNS AND RESIDENTS,

Charging Party.

Appearances:

For the Respondent
Cary Edwards, Attorney General
(Alice J. Gutler, D.A.G.)

For the Charging Party
John P. Ronches, Associate Director

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on December 16, 1986, and amended on March 3, 1987 by the Committee of Interns and Residents ("CIR") alleging that the University of Medicine and Dentistry of New Jersey ("UMDNJ" or "University") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13a-1 et. seq. ("Act"). Specifically, the CIR alleges that UMDNJ violated

Section 5.4(a)(1), (3) and (5)^{1/} of the Act when UMDNJ unilaterally terminated the free parking benefits for certain unit members assigned to work at the Robert Wood Johnson University Hospital. Additionally, the CIR alleges that UMDNJ discriminated against certain unit members in retaliation for the CIR's refusal to accede to the University's negotiating demands during the recently concluded round of collective negotiations.

A Complaint and Notice of Hearing was issued on March 4, 1987, and hearing dates were scheduled. On March 17, 1987, UMDNJ filed an Answer denying that it has withdrawn free parking benefits, denying that it has taken any discriminatory or retaliatory action against the CIR or any of its unit members, and denying that it has taken any action against the CIR or any of its unit members because of the CIR's refusal to exceed to UMDNJ's negotiating demands. The Answer set forth numerous affirmative defenses to the unfair practice charge.

On June 15, 1987, UMDNJ filed a Motion for Summary Judgment with Supporting Brief and Affidavit pursuant to N.J.A.C.

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative

19:14-4.8. On July 1, 1987, Chairman James W. Mastriani referred the Motion to me, as Hearing Examiner, for consideration and disposition. On July 17, 1987, the CIR filed a Brief and Affidavit in opposition to the Motion. In a letter dated July 27, 1987, I denied UMDNJ's Motion for Summary Judgment and directed this matter to proceed to an evidentiary hearing.

Hearings were held on September 30 and November 17, 1987 in the Commission's offices in Newark, New Jersey at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. At the conclusion of the hearing a briefing schedule was established providing for the Parties to simultaneously submit post-hearing briefs on or before January 8, 1988. By mutual agreement of the Parties the brief submission date was extended to January 15, 1988. Both Parties timely submitted post-hearing briefs on January 15, 1988.

Upon the entire record, I make the following:

FINDINGS OF FACT

Robert Wood Johnson University Hospital ("RWJH" or "Hospital") is a privately-owned facility and serves as the main teaching hospital affiliated with Robert Wood Johnson Medical School. The Robert Wood Johnson Medical School ("RWJMS") is one of the primary medical education units of UMDNJ. The relationship between RWJH and UMDNJ is controlled by the

affiliation agreement (CP-5),^{2/} a lengthy document executed by RWJH and UMDNJ officials which sets forth the details of their working arrangement. It is clear from Article I of the Affiliation Agreement that RWJH is a self-governing entity, independent from UMDNJ. (CP-5).

In or about July 1982, the RWJH opened a fee-for-use parking deck containing a total of 589 parking spaces. The Hospital owns and controls the deck (TB5).^{3/} The University leases 250 parking spaces from RWJH, the maximum number allotted to the University from the Hospital. The Hospital has refused the University's request to lease additional spaces (TB14; TB58). The Hospital has advised the University on several occasions that the 339 parking spaces not leased to the University are primarily intended for patients and visitors (TB14).

UMDNJ employs resident physicians ("residents") to work at RWJH while they receive additional medical training. Certain residents are assigned to work at RWJH on a daily basis and routinely park in the Hospital's parking deck. These residents normally receive "key-cards." A resident possessing a key-card

^{2/} Exhibits offered by the charging party and received in evidence have been designated "CP." Exhibits offered by the respondent and received in evidence have been designated "R".

^{3/} Transcript designations are as follows: TA refers to the transcript dated September 30, 1987 and TB refers to the transcript dated November 17, 1987.

can park on the deck for an unlimited period of time without having to pay a parking fee.

There exists another category of resident who is not regularly assigned to RWJH and goes to the hospital only on a sporadic basis, e.g., to attend lectures, conferences or grand rounds. These residents are referred to as "visiting residents." Since the number of key cards available to each medical department is limited by the rotation schedule which sets the number of residents (TB54), visiting residents do not receive key-cards.

At least since August 1982, secretaries employed by UMDNJ and serving in the departments of Pediatrics, Surgery, Obstetrics and Gynecology and Medicine regularly issued parking coupons to visiting residents assigned to any of those departments who were required to appear at RWJH and parked in the deck (TA31-32; TA48-49; TA68-70). The parking coupon (which resembled a postage stamp) was affixed to the parking ticket which the visiting resident obtained at the entrance to the parking deck. Prior to October 1986, a parking ticket with the coupon affixed would be accepted by the parking deck attendant at the exit in complete satisfaction of any parking cost incurred by the visiting resident.

Nine clinical departments have residents assigned to them: Pediatrics, Surgery, Pathology, Psychiatry, Neurology, Medicine, Obstetrics and Gynecology, Anesthesiology and Family

Medicine (R-1; TB25). Four clinical departments -- Pediatrics, Surgery, Obstetrics and Gynecology and Medicine -- issued parking coupons to its visiting residents prior to October 1986 (TA96-97). However, the record contains no evidence establishing that the remaining five clinical departments issued parking coupons to its assigned visiting residents. Consequently, I conclude that the Departments of Pathology, Psychiatry, Neurology, Anesthesiology and Family Medicine did not issue parking coupons to visiting residents.

The various clinical departments obtained the parking coupons by purchasing them directly from RWJH. A book of 100 coupons cost \$200. Prior to October 1986, the University knew that the clinical departments were purchasing books of parking coupons from RWJH. The University believed that the departments were using the parking coupons to provide free parking for guest lectures and other outsiders and condoned the use of coupons for that purpose. Kevin Coyle, Director of Administrative and Financial Services for RWJMS issued an annual memorandum advising the chairperson of each clinical department that parking coupons could be used in order to pay the parking costs for guest lecturers speaking at RWJH (TB56). However, the University administration did not know that certain of the clinical departments were also using the parking coupons for visiting residents required to appear at RWJH. (TB70-71). For example, the Department of Pediatrics used a discretionary account to pay

for the parking coupons it issued to its visiting residents. The use of funds from the discretionary account is not known to UMDNJ administration (TB29; TB59). While it is logical to conclude that the secretaries who were serving in the four clinical departments which distributed parking coupons to visiting residents were doing so pursuant to approval granted by the respective department chairpersons, I also find that prior to October 1986, UMDNJ administration was unaware of such actions by those departments (TB70).

UMDNJ conducted a seminar concerning the various benefits provided to residents by the University. The record establishes that the University did not indicate that the coupon parking program was a benefit for visiting residents at RWJH.

RWJH has found that October is generally the month of heaviest use of the parking deck. In October 1986, Kevin McTernan, RWJH's Vice President for Administrative Services, received complaints from the Hospital's personnel assigned to manage the parking deck "that there were a lot of familiar faces coming through every day using free coupons for parking -- employees, students, residents..." (TB4). In response to these reports, McTernon personally observed the parking activity in the deck and concluded that the deck was not being used in accordance with RWJH policy. The Hospital intended the parking deck to be used primarily by patients and visitors (TB3-4). RWJH believed that in order to help develop the programs offered to the

public, convenient hospital parking was necessary. As an additional incentive provided to the public to participate in Hospital outpatient programs, RWJH provided parking coupons to the various clinical departments so that the cost of parking would not be borne by the patient. Additionally, parking coupons were to be used (1) to encourage attendance at Hospital and Medical School sponsored seminars and instructional classes and (2) to provide courtesy parking for visitors to various Hospital and Medical School departments (CP-2).

In an attempt to alleviate the over-crowded conditions that had developed in the parking deck and to eliminate a perceived abuse of the parking coupon system, McTernan issued a memorandum on October 16, 1986, to all RWJH departments heads and RWJMS clinical chairpersons advising them that as of November 1, 1986, the parking coupon, which previously provided free parking for the whole day, would, under the new program, only provide a maximum of four hours free parking (CP-2).

UMDNJ and the CIR were in the midst of collective negotiations for a successor agreement when McTernan's memorandum was issued. However, McTernan was neither aware that such negotiations were being conducted nor did he consult with UMDNJ prior to issuing his October 16, 1986 memorandum. UMDNJ did not ask McTernan to issue the memorandum (TB4-5; TB57).

A medical resident told the CIR about McTernan's memorandum shortly after it was issued. In response Dean DeHart,

a member of the CIR staff, sent a letter dated November 4, 1986, to Roger Hanos, Manager of Human Resources for UMDNJ, requesting information concerning changes in the parking program at RWJH. DeHart characterized any change as a unilateral change in conditions of employment. On November 12, 1986, Hanos responded denying that UMDNJ unilaterally altered terms and conditions of employment (CP-4). Later, John Ronches, Associate Director of the CIR, had a telephone conversation with Richard Reynolds, Senior Vice President for Academic Affairs of UMDNJ and Dean of RWJMS, regarding this matter. Reynolds told Ronches that the University was not responsible for any aspect of the parking program at RWJH. Reynolds also said that the nature of the relationship between the Hospital and University was such that the University could not dictate terms to the Hospital (TA76; TA81).

Collective negotiations for a successor to the agreement expiring June 30, 1986 (J-1) began on April 30, 1986 (TB20; CP-6) and concluded on April 28, 1987 (TA92; CP-8). UMDNJ's initial proposal concerning parking sought the replacement of Article XIX^{4/} of the collective agreement covering July 1, 1983 through June 30, 1986 (J-1) with language calling for the University to make reasonable efforts to provide adequate parking facilities

^{4/} Article XIX, Parking, stated the following: "Parking rights and obligations of bargaining unit members set forth in the August 3, 1982 letter from Mr. A. Monza [CP-1] shall continue in effect."

for unit members (CP-7). This proposal was rejected by the CIR. (TA39; TA84). Later, the University delivered a revised parking proposal providing for the continuation of the current parking program at all campuses except Newark and seeking the establishment of a parking advisory committee consisting of members of the faculty, staff and employee organizations (TA88; CP-6). While the CIR was agreeable to continuing the parking program, it rejected any change in the parking program at the Newark campus and rejected the idea of participating on a committee that merely had the authority to make recommendations to the University's administration (TA85-88; TB 20-21; CP-6). Ultimately, UMDNJ withdrew its parking proposals and the parties agreed to continue the language contained in the 1983-1986 collective agreement in the 1986-1989 successor agreement (TA86-87; J-2). The coupon parking issue was never raised at the negotiations table (TA89; TA97; TB24).

The CIR organized several public demonstrations during the year-long period of negotiations. The dispute concerning parking was a featured issue in the demonstrations (TA41; TB90; TB99).

Analysis

UMDNJ argues that upon the CIR's ratification of the 1986-1989 successor agreement it has waived for the life of the agreement the right to negotiate concerning the coupon parking program at RWJH. The University contends that since the

successor agreement specifically addresses the topic of parking and was ratified after the filing of this unfair practice charge, the Complaint must be dismissed.

In order to find a contractual waiver, the waiver must be "...clearly and unmistakably established, and the contractual language alleged to constitute a waiver will not be read expansively." Red Bank Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122, 140 (1978); Pennsauken Tp., P.E.R.C. No. 88-53, 14 NJPER 61 (¶19010 1987); Deptford Bd. of Ed., P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980), aff'd App. Div. Dkt. No. A-1818-80T8 (5/24/82); North Brunswick Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451 (¶4205 1978) aff'd. App. Div. Dkt. No. A-698-78 (4/11/79). Article XIX, continued unchanged in the 1986-89 agreement, refers to CP-1 in evidence. CP-1, in relevant part, provides

2. Housestaff assigned to Middlesex General Hospital [now RWJH] in New Brunswick shall, upon purchase of the appropriate parking sticker, be permitted parking in the garage annex at no additional cost to them. Parking spaces are not reserved to individuals but will be allocated on the basis of 'key cards' assigned to each department. UMDNJ will not reduce the total number of key cards or parking spaces assigned for use of the housestaff.

5. It is also understood that the parties have negotiated on this matter and that this agreement appropriately reflects the outcome of those negotiations.

6. This agreement is a full, final and binding agreement on both parties and does not alter, vary or contradict the terms of our collective bargaining agreement.

While Article XIX and CP-1 make reference to the parking program at RWJH, they make no specific reference to the coupon parking program. The parties' negotiations address only the key-card program.

In Deptford Bd. of Ed., supra., the Commission acknowledged that:

...the 'clear and unequivocal waiver test' was modified to allow the trier of fact to look at a variety of factors, such as the history of negotiations over the disputed contract provision, to determine if, in fact, there was a waiver of the right to negotiate. [Deptford Bd. of Ed., 7 NJPER at 36.]

Reading the contract language alleged to constitute a waiver narrowly, I find that the language contained in Article XIX of the agreement and CP-1 does not constitute a waiver with respect to the coupon parking program at RWJH. The language in the agreement is silent regarding the coupon parking program. Indeed, the testimony establishes that in 1982, when CP-1 was created, UMDNJ administration was not aware that the clinical departments were giving visiting residents parking coupons. Therefore, the coupon parking program could not even have been in contemplation when CP-1 was negotiated.

UMDNJ cites N.L.R.B. v. Nash-Finch Co., 33 LRRM 2898, 211 F.2d 622 (8th Cir. 1954), in support of its position that the CIR has waived its right to negotiate on the parking coupon issue. For many years, Nash-Finch provided health and life insurance and an annual Christmas bonus to its employees. A

representation election was conducted, resulting in the certification of an employee representative. During collective negotiations for the initial contract, the continuation of the insurance programs and the Christmas bonus were briefly discussed. A broad maintenance of benefits clause was proposed by the union. The parties reached an agreement on the contract which did not expressly provide for insurance or the Christmas bonus. Additionally, the broad maintenance of benefits clause was modified to reflect much narrower coverage. After the contract was implemented, Nash-Finch terminated the insurance programs and did not pay a Christmas bonus. The union filed an unfair labor practice charge and the NLRB found violations. However, the Eighth Circuit Court of Appeals denied enforcement of the NLRB's remedial order.

UMDNJ states in its brief that:

Nash-Finch has been cited in support of the generally accepted principle that once the parties have negotiated a collective bargaining agreement, the union has waived its right to bargain further over matters which were negotiated. See, e.g., NL Industries, Inc. v. N.L.R.B., [92 LRRM 2937,] 536 F. 2d 786 (8th Cir. 1976).

I agree with the above-quoted sentence, and it is precisely for the reason stated in the above-quoted sentence that Nash-Finch is distinguishable from this case. In Nash-Finch the parties raised the particular issue at the bargaining table. In this case the coupon parking issue was never brought to the table. The CIR cannot be held to have waived what it has not negotiated. N.L. Industries, supra.

UMDNJ argues that parol evidence is admissible in order to determine whether a waiver exists. See State of New Jersey, H.E. No. 85-30, 11 NJPER 179 (¶16079 1985), adopted P.E.R.C. No. 86-64, 11 NJPER 723 (¶16254 1985). The parol evidence cited by UMDNJ pertains to the parties' conduct of extensive negotiations concerning the general topic of parking. These negotiations occurred at the same time that the coupon parking issue arose. While the record establishes that the parties have never negotiated on the coupon parking issue specifically, the record also shows that both parties were aware of the coupon parking issue and could have raised that issue during the then on-going negotiations for a successor agreement. Since the CIR could have raised the coupon parking program during the negotiations and did not do so, and since the parties later reached an overall agreement, the CIR has waived its right to negotiate concerning the coupon parking program from the time negotiations concluded. North Caldwell Tp., H.E. No. 87-32, 13 NJPER 31 (¶18014 1986), adopted P.E.R.C. 87-71 13 NJPER 57 (¶18024 1986); Piscataway Tp. Bd. of Ed., P.E.R.C. No. 88-42, 13 NJPER 823 (¶18317 1987).^{5/}

^{5/} Below I find that parking cost and facilities are mandatory subjects of negotiations. I also find that the coupon parking program is not a term and condition of employment as to these parties. Since the coupon parking program is not a term and condition of employment as to these parties, the University had no obligation to negotiate a change in the coupon parking program prior to its implementation. However, by the CIR

N.J.S.A. 34:13A-5.3 requires that "[p]roposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established." Consequently, employers may not unilaterally alter prevailing terms and conditions of employment because such changes circumvent the statutory duty to negotiate. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25, 48 (1978). The duty to negotiate is not limited to only the period of negotiations for a new agreement but "...it applies at all times...", Id. at 49, n. 9, including "prior to [implementing] a proposed change in an established practice governing working conditions which [are] not explicitly or implicably included under the terms of the parties' agreement." New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84, 85 (¶4040 1978), mot. for recon. den. P.E.R.C. No. 78-56, 4 NJPER 156 (¶4073 1978), aff'd. App. Div. Dkt. No. A-2450-77 (4/2/79). In New Brunswick Bd. of Ed., supra., the Commission held that where an agreement is not clear as to an issue, past practice may be examined to try to determine if a contractual obligation arose through the conduct

5/ Footnote Continued From Previous Page

failing to raise the coupon parking program during negotiations, it is precluded from raising the issue after the parties enter into the successor agreement. I note that the successor agreement contains a comprehensive Complete Agreement clause. Therefore, a negotiations wiaver, rather than a contract waiver, attaches at the time the successor agreement is implemented.

of the parties. See Barrington Bd. of Ed., H.E. 81-20, 7 NJPER 7 (¶12003 1980), adopted P.E.R.C. No. 81-122, 7 NJPER 240 (¶12108 1981), appeal dismissed App. Div. Dkt. No. A-4991-80 (1982).

The Commission and the courts have held that the topics of parking facilities and parking cost constitute terms and conditions of employment and, therefore, are mandatory subjects of negotiations. See Byram Tp. Bd. of Ed., P.E.R.C. No. 76-27, 2 NJPER 143 (1976), aff'd. 152 N.J. Super 12, 3 NJPER 265 (1977); Jersey City Medical Center, H.E. No. 81-19, 6 NJPER 600 (¶11297 1980), adopted P.E.R.C. No. 81-89, 7 NJPER 97 (¶12039 1981). Consequently, the issue which must now be resolved is whether the coupon parking program put into effect in October 1986, amounts to a unilateral change in terms and conditions of employment of visiting residents, in violation of the Act.

Generally, a past practice which defines a term and condition of employment is entitled to the same status as a term and condition of employment defined by statute or by the provisions of a collective agreement. See Sussex Cty., P.E.R.C. No. 83-4, 8 NJPER 431 (¶13200 1982). If the agreement is silent or ambiguous on the particular issue in dispute, past practice controls. See Sussex Cty., supra., Rutgers, the State University, P.E.R.C. No. 82-98, 8 NJPER 300 (¶13132 1982); Barrington Bd. of Ed., supra. In United Transportation Union v. St. Paul Union Depot Co., 434 F.2d 220, 75 LRRM 2595 (8th Cir. 1970) the court said:

We think that an 'established practice'...was intended to include only prior conduct of the parties which has attained the dignity of a relationship understood by the parties to at least impliedly serve as if part of the collective bargaining agreement.

* * *

An 'established practice'...should demonstrate not only a pattern of understanding but also some kind of mutual understanding, either expressed or implied.

* * *

Whether prior conduct establishes a working practice...depends upon consideration of the facts and circumstances of the particular case. Among the factors one might reasonably consider would be the mutual intent of the parties, their knowledge of an acquiescence in the prior acts, along with evidence of whether there was joint participation in the prior course of conduct, all to be weighed with the facts and circumstances in the perspective of the present dispute. [Id. at 75 LRRM 2597.]

Citing Elkouri and Elkouri, How Arbitration Works, p. 391 (BNA 1973), the Commission, in Somerville Bor., P.E.R.C. No. 84-90, 10 NJPER 125 (¶15064 1984), described a controlling past practice as a course of events "...which is repeated, unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties." Id. at 126.

I find that under the particular facts of this case, the coupon parking program does not constitute an established past practice. The University did not have knowledge of the manner in which certain clinical departments were using parking coupons.

Even assuming that the department chairpersons approved the distribution of parking coupons in those departments which issued them to visiting residents, ^{6/} these actions cannot be ascribed to the University. The departments did not report the expenditure of funds used to purchase parking coupons to UMDNJ administration. In fact, the Department of Pediatrics paid for its parking coupons from funds contained in a discretionary account. Moreover, UMDNJ officials (Coyle and Hanos) gave uncontradicted testimony that they were not aware that the clinical departments were routinely giving visiting residents parking coupons to cover their parking costs at RWJH.

At the beginning of each year, Kevin Coyle, Director of Administrative and Financial Services, issued a memorandum to all clinical department chairpersons at RWJH advising them that it was University policy to use parking coupons only for visiting guest lectures and related limited uses. Thus, the use of parking coupons on a routine basis to reimburse visiting residents for the parking expense incurred at RWJH is contrary to published UMDNJ policy. Moreover, the fact that such memorandum was issued each year indicates that the University, on a consistent basis, did not acquiesce to the use of parking coupons for visiting residents. Clinical departments which issued

^{6/} While it is logical to make this assumption, I note that there is no direct evidence supporting the proposition that clinical department chairpersons at RWJH knew of the manner in which parking coupons were being distributed.

parking coupons to visiting residents did so contrary to written University directive.

Additionally, the issuance of parking coupons to visiting residents was not a uniform program among all of the clinical departments. Only four of the nine clinical departments issued parking coupons to visiting residents. Further, the clinical departments are not consistent in the way they administer the coupon parking program. For example, visiting residents in the departments of Neurology and Medicine must pay the cost of parking after four hours, but visiting residents in the Department of Pediatrics are reimbursed for all parking expenses insured, even beyond the 4-hour limit (R-1). Thus, the coupon parking program is not clearly enunciated and/or acted upon as required by the Somerville standard in order to constitute an established practice; equatable to a term and condition of employment.

As previously noted in this report, the parking deck is owned and controlled by RWJH. The Commission has already addressed a circumstance similar to the instant matter in Jersey City Medical Center, supra. The Commission briefly summarized the facts in Jersey City Medical Center as follows:

[e]mployees...were able to use a vacant lot across the street (known as the "Cornelison Avenue lot") to park their vehicles free of charge. This arrangement existed from 1960 until the end of September, 1979. During this entire period, the Medical Center did not own, lease or otherwise have control over the Cornelison Avenue lot which

was owned at different times by several private companies and public bodies. In September of 1979, the lot was owned by the New Jersey Economic Development Authority ("NJEDA") which closed the lot on September 29, 1979.

When the lot did not reopen as had been promised the next week, Medical Center employees threatened a job action. In response, the Medical Center entered into a lease arrangement with the NJEDA (which had been looking for a lessee for the property) whereby the Medical Center would pay an annual rental of \$12,000 and the sum of \$52,000 to pay for improvements previously made by the NJEDA. After estimating its break-even costs, the Medical Center imposed a fee of \$1.00 per pay. [Jersey City Medical Center, 7 NJPER at 97.]

The Hearing Examiner in Jersey City Medical Center said:

The most important fact in this case is that the Medical Center has absolutely no legal power over the Cornelison Avenue lot prior to October, 1979. Thus, the lot's owners at any time could have decided to charge persons wishing to use the lot. Indeed, NJEDA's desire to charge precipitated the instant controversy. In light of the Medical Center's complete lack of legal control, there can be no basis for finding an implicit agreement that the Center would provide free parking at the Cornelison Avenue lot as a benefit for its employees. Compare In re Mercer County Park Commission and PBA Local 288, P.E.R.C. No. 81-43, 6 NJPER 491 (¶11250 1980); In re City of Asbury Park and Asbury Park PBA Local No. 6, P.E.R.C. No. 79-101, 5 NJPER 260 (¶10148 1979) (contract proposals which do not relate exclusively to the employment relationship between unit members and their public employers and which attempt to control the actions of third parties are illegal). [Jersey City Medical Center, 6 NJPER at 602.]

The similarities between this case and Jersey City Medical Center are compelling. UMDNJ does not own or control the parking deck; the parking deck is owned, controlled and operated by RWJH. RWJH could have completely discontinued the coupon parking program without consultation with the University. The fact that the University has leased 250 parking spaces from the Hospital does not change the outcome. The 250 leased parking spaces are all reserved for key-card holders, comprised of non-visiting residents and faculty, and do not affect the manner in which the coupon parking program operated. As in Jersey City Medical Center, the University did not represent to its employees that free parking at RWJH was a benefit. The testimony demonstrates that the coupon parking program was not raised during the benefit seminar conducted by UMDNJ for residents.

Finally, it is undisputed that the parties never discussed and/or arrived at an agreement regarding the provision or continuation of the coupon parking program as a benefit for visiting residents. As in Jersey City Medical Center, the evidence shows only that UMDNJ did not prevent its visiting residents from taking advantage of the parking coupons distributed by certain clinical departments. Consequently, I find here, as the Commission found in Jersey City Medical Center, that the coupon parking program in effect prior to October 1986, constitutes merely a unilaterally enjoyed practice, and does not rise to the level of an implied agreement. "A unilateral

practice, standing alone, is not tantamount to an implicit agreement to make that practice a binding condition of employment." Ibid. Accordingly, I find that UMDNJ has not modified an existing rule governing terms and conditions of employment in violation of N.J.S.A. 34:13A-5.4(a)(5) or, derivatively, (a)(1).

The CIR alleges that the October 1986 change in the coupon parking program was made in retaliation for positions taken by the CIR during the then on-going successor collective negotiations. The CIR contends that the limitation of the parking coupon to four hours of free parking was timed to bring pressure upon the CIR's negotiators and membership to concede to the University's parking demands pertaining to use of key-cards. Further, the CIR argues that no UMDNJ official took steps to contact RWJH in order to investigate the Hospital's actions. The CIR asserts that rather than stopping the Hospital from implementing the 4 hour limit on the parking coupon, the University took the position that the program was entirely controlled by the Hospital. The CIR concludes that the timing of the implementation of the four hour limit for parking coupons, together with the University's alleged refusal to contact the Hospital in an effort to investigate and/or seek a rescission of the program, constitutes a violation of N.J.S.A. 34:13A-5.4(a)(3) and, derivatively (a)(1).

In re Bridgewater Tp., 95 N.J. 235 (1984), articulates the governing legal standards for considering allegations of discriminatory actions in violation of sections 5.4(a)(1) and (3) of the Act. The charging party must first establish a prima facie case demonstrating that the exercise of protected activity was a substantial or motivating factor in the disputed action. In some cases, that prima facie case may be made out by direct evidence of anti-union motivation; in other cases that case may be made out by circumstantial evidence. Id. at 246. If the charging party establishes a prima facie case, the burden shifts to the employer to prove, as an affirmative defense and by a preponderance of the evidence, that the action occurred for legitimate business reasons and not in retaliation for the protected activity. It is emphasized that these standards must be applied to the facts and their interrelationship in each particular case.

I find no evidence in the record to support the allegation that the University changed or conspired with the Hospital to change the coupon parking program in retaliation against the positions the CIR took during negotiations. The facts establish that RWJH's decision to change the coupon parking program was in response to its perception that the program was not being used pursuant to its design. The facts also demonstrate that the Hospital made an independent decision to modify the coupon parking program in October 1986 and did not

consult with UMDNJ at any time regarding the change. Additionally, the record shows that the Hospital was not aware that the CIR and UMDNJ were in the midst of collective negotiations for a successor agreement. While the timing of an employer's actions may be circumstantial evidence of union animus, Dennis Tp. Bd. of Ed., H.E. No. 86-6, 11 NJPER 549 (¶16192 1985), adopted P.E.R.C. No. 86-69, 12 NJPER 16 (¶17005 1985), and, while in this case the coupon parking program was modified during negotiations, the fact remains that any change in the coupon parking program was the result of action taken by RWJH, not the University. Accordingly, I find the positions taken by the CIR during collective negotiations for a successor agreement was not a substantial or motivating factor for changing the coupon parking program and, consequently, UMDNJ did not violate section 5.4(a)(3) or, derivatively, (a)(1) of the Act.

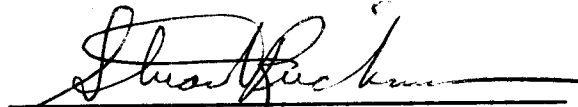
Accordingly, based upon the entire record and the analysis set forth above, I make the following:

CONCLUSIONS OF LAW

The University of Medicine and Dentistry of New Jersey did not violate N.J.S.A. 34:13A-5.4(a)(3), (a)(5) or, derivatively, (a)(1) when the coupon parking program in effect at Robert Wood Johnson University Hospital was modified by the Hospital to allow for only four hours of free parking rather than unlimited free parking.

RECOMMENDED ORDER

I recommend the Commission ORDER that the Complaint be dismissed.


Stuart Reichman
Hearing Examiner

Dated: March 16, 1988
Trenton, New Jersey