P.E.R.C. NO. 78-13

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOARD OF TRUSTEES OF MIDDLESEX COUNTY COLLEGE,
Petitioner,

-and- Docket No. SN-77-32

LOCAL 1940, AMERICAN FEDERATION OF TEACHERS, (AFL-CIO),
Respondent.

LOCAL 1940, AMERICAN FEDERATION OF TEACHERS, (AFL-CIO),
Petitioner,

-and- Docket No. SN-77-37

BOARD OF TRUSTEES OF MIDDLESEX COUNTY COLLEGE,
Respondent.

SYNOPSIS

The Commission issues a Decision and Order in a consolidated scope of negotiations proceeding. The issues presented arise either from additions or modifications to an expired contract proposed by Local 1940 or the College's assertion that existing provisions are not mandatorily negotiable and could be excised by the college without the need to negotiate such changes. Initially the Commission analyzes the concepts of collegiality and collective negotiations, concluding generally that, collegiality does not require any extention of the duty to negotiate and that the college is obligated to deal exclusively with Local 1940 concerning only grievances and terms and conditions of employment. The Commission also primarily notes in response to arguments raised by the parties that as interpreted by the Commission in several recent decisions N.J.S.A. 34:13A-8.1 was amended by Chapter 123, Laws of 1974 to make explicit that all terms and conditions of employment are mandatorily negotiable to the extent of the employer's legal authority to negotiate. Statutes which limit such authority must be respected, but only those statutes which set specific limits may legitimately be claimed to restrict the duty to negotiate terms and conditions of employment. General statutes giving authority to employers are not considered a shield to nor a limitation on the duty to negotiate.

With respect to the disputed contractual demands the Commission finds the following to be required subjects for collective negotiations: the impact or effect on terms and conditions of

employment of the use of audio/visual equipment in presenting courses of study; blanket sabbatical leave policies with minimum limitations; the work schedules of faculty; the impact or effect upon terms and conditions of employment of decisions relating to class size; proposals relating to a faculty member's right to respond to charges made pursuant to a student grievance procedure and to present a defense; procedures for faculty evaluations; and demands relating to the replacement of unit faculty members with adjunct professors.

The Commission finds that the following issues relate to permissive, but not required subjects for collective negotiations: testing methodology; the method of presentation of educational materials including the use of audio/visual equipment in presenting courses of study; school calendar; the limitation of clinical supervision groups to a maximum of 10 students; limitation of laboratory sections to a fixed number of students; the existence of, composition and authorities of administrative committees performing strictly managerial functions; evaluation forms in so far as those forms relate to criteria for evaluations.

The Commission finds that the following issues relate to illegal subjects for collective negotiations for the reasons set forth in the Commission's decision: a blanket benefit of additional sick leave beyond what an employee had accumulated and restrictions on the initiation of student grievances.

The Commission further notes with reference to one of the issues in dispute between the parties that in a recent decision, In re P.B.A. Local 130, P.E.R.C. No. 77-59, 3 NJPER 124 (1977), Appeal pending, Docket No. A-3634-76, that a grievance procedure must "provide a forum by means of which public employees or their representatives may appeal the interpretation, application or violation of policies, agreements, and administrative decisions affecting them." It was noted that while the parties must include within the contract a mechanism for grieving all decisions, the actual procedure is a mandatory subject for negotiations and will not necessarily include any particular terminal step. The Commission further notes that the question of whether Local 1940 is the representative of adjunct professors with whom the College must negotiate can only be decided by the Commission in the context of either a representation petition, a clarification of unit petition or an unfair practice charge alleging a refusal to negotiate.

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Respondent.

Appearances:
For the College, Wilentz, Goldman & Spitzer, Esqs. (Mr. John A. Hoffman, Of Counsel; Mr. Gordon J. Golum On the Brief)

For the AFT, William D. Hackett, Jr., P.A. (Mr. Randall L. Pease, On the Brief)

DECISION AND ORDER

On April 19, 1977 the Board of Trustees of Middlesex County College (the "College") filed a Petition for Scope of Negotiations Determination with the Public Employment Relations Commission (the "Commission") seeking a determination as to whether certain matters in dispute are within the scope of collective negotiations pursuant to N.J.S.A. 34:13A-5.4(d). On May 25, 1977, Local 1940, American Federation of Teachers, (AFL-CIO) (the "AFT") - the exclusive representative of the faculty at the College - filed a Petition for Scope of Negotiations Determination raising additional matters in

dispute and requested consolidation with the College's petition. This request was granted by order dated May 27, 1977.

Briefs have been submitted by both sides, including a reply brief from the College which was filed on June 15, 1977. While initially oral argument had been requested, both the College and the AFT withdrew their requests for oral argument.

One factor raised by the AFT that must be dealt with preliminarily is the concept of "collegiality" which is urged upon the Commission as the basis for distinguishing the scope of negotiations in a college setting from that in secondary education. This argument has been raised before in In re Rutgers, The State University, P.E.R.C. No. 76-13, 2 NJPER 13 (1976). While recognizing that collegiality has traditionally meant the involvement of faculty in management decision making, the Commission distinguished the faculty qua faculty from its exclusive negotiations representative with which the University must negotiate terms and conditions of employment. Collegiality was held not to require any extension of the duty to negotiate. Applying Rutgers to the present petitions, the issues will be decided no differently from that suggested by our analysis in Rutgers.[1/]

Another argument raised by the AFT which must be considered prior to dealing individually with the items presented is the effect of the amendment of N.J.S.A. 34:13A-8.1 on the scope of negotiations. As enacted originally, §8.1 stated that no provision

1/ For a fuller discussion of the concept of collegiality and the relationship between collegiality and collective negotiations, see Rutgers, supra.

of the Act shall "annul or modify any statute or statutes of this State."[2/] Subsequently, that was modified to provide that the Act shall not "annul or modify any pension statute or statutes of this State."[3/] The AFT asserts that this means that all matters except pensions previously held not mandatorily negotiable must be reconsidered.

This Commission recently dealt with the effect of the amendment to §8.1 in two decision - In re Local 195, IFPTE and Local 518, SEIU, P.E.R.C. No. 77-57, 3 NJPER 118 (1977), Appeal pending, App. Div. Docket No. A-3809-76, and In re State Supervisory Employees Association, CSA/SEA, P.E.R.C. No. 77-67, 3 NJPER 138 (1977), Appeal pending, App. Div. Docket No. A-4019-76. As interpreted by the Commission, §8.1 as amended is not a repealer of any statutes. What it does do is make explicit that all terms and conditions of employment are mandatorily negotiable to the extent of the employer's legal authority to negotiate. Statutes which limit such authority must be respected, but only those statutes which set specific limits may legitimately be claimed to restrict the duty to negotiate terms and conditions of employment. General statutes giving authority to employers are not a shield to nor a limitation on the duty to negotiate.

Having responded to these general contentions, we will now consider the various items presented to us for determination.[4/]

2/ P.L. 1968, C. 303.
3/ P.L. 1974, C. 123.
4/ Among the items initially raised was the question of whether a proposal relating to minimum staffing for all theater productions and approval of all productions was mandatorily negotiable. The AFT states that it has withdrawn these demands and in its reply brief the College withdrew its request for a determination on these proposals. Therefore, the Commission will not rule on this issue, there being no dispute between the parties. See N.J.S.A. 34:13A-5.4(d).

The parties are currently in negotiations for a contract to succeed an agreement that expired June 30, 1977, and the issues presented arise either from proposed additions or modifications to the expired contract proposed by the AFT, or the College's assertion that existing provisions are not mandatorily negotiable and may be excised by the College without the need to negotiate such changes.

It is proposed by the AFT to amend Article III F of the old contract as follows:

> No faculty member shall be obligated by any administrative directive to use any particular method or approach to teaching or testing in his/her assigned course provided that the teacher follows the stated course objectives. (proposed modifications underlined)

The College argues that testing is a management right which need not be negotiated. It further argues that the existing clause impinges on the College's right to prescribe the use of audio/visual equipment in presenting courses of study. In addition to the above quoted paragraph, the recent Article III F provides that while audio/visual equipment may be used, it may not be used to reduce the number of teaching positions, and any change in teaching methods by use of audio/visual equipment must be reviewed by a committee including faculty members to determine whether the number of teaching positions would be reduced, and whether there would be modification of terms and conditions of employment. Said committee must approve by a 2/3 vote any such proposal before it may be implemented.[5/]

5/ The duty to negotiate the impact of the use of audio/visual equipment is conceded by the College.

In response the AFT claims that the right to use a teacher's own method of testing is a necessity for academic freedom, and that boards of trustees of community colleges, under N.J.S.A. 18A:64A-12(d), can only determine the "educational curriculum and program" as opposed to the more specific powers provided local boards of education under Title 18A. Further, the existing clauses relating to audio/visual equipment are stated to be a purely "impact" agreement.

We conclude that both the existing and modified versions of Article III F represent demands on subjects that are not mandatorily negotiable. The "educational curriculum and program" entrusted to the Board of Trustees in Title 18A contemplates the authority to establish the method of presentation of educational material as well as selection of courses and content. While collegiality may point to the wisdom of faculty impact for such decisions, and while academic freedom is a laudable goal, that is not the same thing as a duty on the part of the College to negotiate. Testing is not a term and condition of employment which is mandatorily negotiable.[6/] However, this proposed amendment to Article III F is a permissive subject of negotiations, there being no statute making it illegal.

As to the current language, we do not agree that it is an agreement only as to impact. The committee existing by virtue of this article has in effect a veto over the use of audio/visual

6/ This result is consistent with a decision of the Appellate Division in Chappell v. Commissioner of Education, 135 N.J. Super 565 (App. Div. 1975).

equipment, thereby effectively curtailing the management right to decide as a matter of policy that such use would be educationally beneficial. However, any proposal going to the impact of use of such equipment on terms and conditions of employment which does not include the right to control the basic decision to use it would be a mandatory subject of negotiations. Continuation of the current Article III F is a permissive subject of negotiations.

Although we have previously stated in dicta in In re Byram Township Board of Education, P.E.R.C. No. 76-27, 2 NJPER 143 (1976), aff'd App. Div. Docket No. A-3402-75 (June 16, 1977) approved for publication N.J.L.J. August 25, 1977 that the fact that a permissive subject of negotiations is included in a contract does not elevate that matter to a mandatorily negotiable subject in negotiations for a successor agreement, it is important to elaborate on that concept at this time. In Byram, the employee organization cited the inclusion of the subject which we found to be permissive as a factor favoring a determination that the subject was thereafter mandatorily negotiable. In this matter, the Board seeks to remove a permissive subject from the recently expired contract without negotiations. This action is potentially disruptive. It would be preferable for the employer to negotiate this provision out of the contract rather than simply refuse to negotiate with respect to it. Yet this fact does not change the extent of the duty

to negotiate which is limited to the obligation to negotiate concerning terms and conditions of employment.

In the 1976-1977 Agreement Article V A(1) provided for sick leave pursuant to N.J.S.A. 18A:30-1 et seq. and additional sick leave upon showing of physical inability to return to work and no record of abuse of sick leave. The College claims this provision calls for unlimited sick leave and is illegal. As correctly noted by the AFT, N.J.S.A. 18A:30-2 requires a minimum of 10 days of sick leave, but no maximum is imposed. Sick leave is unquestionably a term and condition of employment, being a form of compensation,[7/] and the only limit on negotiations as to the number of days of sick leave, consistent with the State of New Jersey decisions cited supra, is that the parties may not negotiate to provide less than ten days. Title 18A further allows for the accumulation of unused sick leave, not to exceed fifteen days a year, so that accumulation is mandatorily negotiable within the fifteen day maximum. What the College contends is that a blanket clause granting sick leave beyond what has been accumulated is barred by N.J.S.A. 18A:30-6 which requires case by case evaluation before sick leave may be allowed. In re Board of Education of Twp. of Rockaway, P.E.R.C. No. 76-44, 2 NJPER 214 (1976); In re Matawan Reg. School Dist. Bd. of Ed., P.E.R.C. No. 77-23, 2 NJPER 350 (1976).

Conceding that §18A:30-6 restricts local boards of education, the AFT points to N.J.S.A. 18A:64A-13 for the proposition that

7/ In re City of Somers Point, P.E.R.C. No. 77-48, 3 NJPER ___ (1977). City of Camden v. Juanita Dicks, 135 N.J. Super. 559 (Law Div. 1975).

community colleges are not so bound. §18A:64A-13 states that community college teachers shall "possess all the rights and privileges of teachers employed by local boards of education." This is construed to mean that only the benefits are the same, but that the constraints of §18A:30-6 are not passed along.

We do not agree. If the Legislature did not wish to include the limitations it would have restricted itself to the term "rights" - things such as the ten day minimum sick leave guarantee. By inclusion of the word "privileges" it would seem that the intent was to extend unchanged those possible benefits which a board of education could, but need not, extend to its faculty such as extended sick leave. Nothing is put forward by the AFT to explain why a clause equating the treatment of college faculty with that of teachers employed by local boards of education should be selectively interpreted to be more favorable to the college employees. §18A:30-6 gives the authority for granting extended sick leave - a privilege as opposed to a right - subject to certain requirements. To ignore the case by case requirement when dealing with community colleges would give their faculties greater privileges than those of local boards, in contravention of §18A:64A-13. Additionally, §18A:30-6 denies authority or discretion to boards of education to negotiate for extended sick leave on a blanket basis. An employer can only negotiate in those areas where he has authority or discretion to act. Consequently, consistent with Rockaway, supra, AFT proposals for extended sick leave not subject to the case by case discretionary limitations of §18A:3-6 are not legal subjects

of negotiations.[8/][9/]

Also proposed by the AFT is retention of provisions for granting sabbatical leaves upon request for a number of reasons (advanced study, exchange programs, etc.) and new language allowing leaves for up to two years for outside employment and one year for any reason. Under these proposals the only limitation is that no more than 10% of the eligible faculty may be on sabbatical at any one time. While the College relies on the same line of reasoning it advanced in regard to sick leave, there is one decisive difference. No statute comparable to N.J.S.A. 18A:30-6 is cited as a limitation on the ability to negotiate as to sabbatical and personal leave, conceded by the College to be mandatorily negotiable terms and conditions of employment. If the College believes that the AFT proposals might have a detrimental effect on the education being provided, it need not accede to them. As we have often stated in our scope of negotiations decisions, the duty to negotiate does not create a concommitant duty to agree, and the College is free to respond with counter-proposals it deems more suitable. However, this is a mandatory subject of negotiations.

8/ The College also argued that unlimited sick leave is a gift of public monies violative of N.J. Const. Art. VIII §III, par. 2, and attempted to distinguish Maywood Ed. Assn. v. Maywood Bd. of Ed. 131 N.J. Super. 551 (Ch. Div. 1974) holding to the contrary. We do not reach this argument and our holding is in no way based upon a finding that extended sick leave is a gift of public monies.

9/ On the subject of extended sick leave see Board of Ed. of Twp. of Piscataway v. Piscataway Maintenance & Custodial Association, Docket No. A-1449-76 (App. Div. August 12, 1977); also In re Rockaway Twp. Ed. Assn, P.E.R.C. No. 78- , decided this day.

The issue of negotiations concerning the academic calendar has been raised, but there is some confusion between the parties as to just what demands are at issue. In the 1976-77 contract a negotiated calendar was appended and the parties agreed to negotiate the 1977-78 calendar, and the College asserts that this has been done. What the College now refuses to do is agree to negotiate the 1978-79 calendar. On the other hand, the AFT primarily is concerned with the number of days to be worked and the length and timing of vacation periods. It concedes that the College may set the calendar if it does not infringe on terms and conditions of employment such as the number of days worked. Therefore, while the AFT brief states that all matters relating to the calendar must be negotiated, that does not seem to be what it actually sought.

It is well settled that the academic calendar is a permissive subject of negotiations and need not be negotiated by the College.[10/] However, any change in terms and conditions of employment must be negotiated, and included in that category are the number of days worked and vacation periods.[11/] The calendar may be adopted at the College's pleasure, but no changes in the terms and conditions of employment of individual AFT unit members may be made unilaterally.

10/ In re Rutgers, P.E.R.C. No. 76-13 2 NJPER 13 (1976); In re Green Brook Township Board of Education, P.E.R.C. No. 77-11, 2 NJPER 288 (1976) and cases cited therein.

11/ Burlington County College Faculty Assoc. v. Bd. of Trustees, Burlington County College, 64 N.J. 10 (1977); In re Cliffside Park Bd. of Ed., P.E.R.C. No. 77-2, 2 NJPER 252 (1976); In re Green Brook Twp. Bd. of Ed., P.E.R.C. No. 77-11, 2 NJPER 288 (1976); In re Borough of Ridgefield Bd. of Ed., P.E.R.C. No. 77-9, 2 NJPER 284 (1976).

The distinction between the academic calendar - which sets forth the times at which the educational program will be offered to the students - and the working schedule of the faculty must be respected and maintained.

Several proposals have been put forth by the AFT relating to the student/teacher ratio. Article II F(7) would limit clinic supervision groups to a maximum of ten students, and limit direct supervision of students to 300 minutes per clinic day. Further, Article IX H would limit laboratory sections to a number of students not exceeding the number of fixed stations (i.e., every student would have a full set of equipment simultaneously). The AFT's arguments are all couched in terms of possible safety problems if these limits are not maintained, and resultant harm to reputation from any accidents.

Rutgers, supra, held that class size is not a mandatory subject of negotiations, but that the impact upon terms and conditions of employment of a decision regarding class size must be negotiated. Here, as in In re Newark Firemen's Union of New Jersey, P.E.R.C. No. 76-40, 2 NJPER 139 (1975), safety problems may arise as a result of decisions regarding numbers, creating an impact to be negotiated, but leaving the basic decision as a permissive subject of negotiations. Although the AFT asserts that physical arrangements and facilities are terms and conditions of employment, this is true only as to non-educational facilities such as faculty lounges. Educational facilities relate to the means of providing an education to the students, and that is the College's

responsibility.[12/] Nothing bars negotiations on this point, so the proposals as to clinic and laboratory class size, and any as to the facilities (fixed stations), are permissive subjects.

It is not totally clear whether the proposal to limit contact time to 300 minutes means that students shall not receive more than 300 minutes a day or whether no faculty member shall have to supervise for more than 300 minutes a day. If it is the former, that is obviously an educational policy decision and only permissively negotiable; if the latter, it goes to the work day of the faculty - a term and condition of employment - and is mandatorily negotiable. In re State of New Jersey (Stockton State College), P.E.R.C. No. 77-31, 3 NJPER 62 (1977).

Included in the 1976-77 contract is a clause outlining a grievance procedure which includes in the definition of a grievance violation or mis-applications of any orders or rules of the Board of Trustees. The College now resists negotiations on continuation of that provision, claiming that N.J.S.A. 34:13A-5.3 requires only that a grievance procedure be negotiated as to terms and conditions of employment. This Commission recently considered the mandate of §34:13A-5.3 in In re P.B.A. Local 130, P.E.R.C. No. 77-59, 3 NJPER 124 (1977), Appeal pending Docket No. A-3634-76. Relying on Lullo v. Int'l. Assoc. of Fire Fighters, 55 N.J. 409 (1970) and the Act, we concluded that a grievance procedure must "provide a forum by means of which public employees or their representatives

12/ In re Byram Township Board of Education, P.E.R.C. No. 76-27, 2 NJPER 143 (1976), aff'd. as modified on other issues, __ N.J. Super. __ (App. Div. 1977).

may appeal the interpretation, application or violation of policies, agreements, and administrative decisions affecting them".[13/] As we noted therein, the statute does not compel any specific format for such a grievance procedure. While the parties must include a mechanism for grieving all decisions, the actual procedure is a mandatory subject for negotiations and will not necessarily include any particular step so that outside arbitration of policy decisions will occur only if the parties agree through negotiations to include arbitration within the process.[14/]

Article III AA of the existing agreement sets forth a student grievance procedure by which students may present a grievance against faculty members. Certain amendments limiting the student's ability to process the grievance have been proposed by the AFT. The College resists any negotiations on this topic, citing N.J.S.A. 18A:60-10 as providing that anyone may file tenure charges against a teacher for a local board of education, and arguing for the extention of that to community colleges.

We fail to see how a student grievance procedure can be a term and condition of employment of the faculty. Rather, it is a policy decision to allow students to raise questions relating to the quality of their education. What we do recognize is that charges raised may have a direct impact on terms and conditions of

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13/ P.E.R.C. No. 77-59 at p. 7.

14/ For example, in P.B.A. Local 130, supra, it was suggested that an employer and employee organization might agree to have binding arbitration for grievances concerning terms and conditions of employment, but have the grievance procedure end at the level of town council or board of education for administrative decision grievances.

employment by was of affecting continued employment and promotions. Thus, proposals relating to that impact must be negotiated, which would include the area of the right to respond to charges against faculty members and to present a defense. What is not negotiable, even permissively, are proposals relating to the student's ability to present and prosecute a grievance encompassing the procedure to be followed by the student. The AFT is not authorized to represent students for purposes of collective negotiations and it cannot legally negotiate with respect to non unit members or individuals.

In its proposals, the AFT has included Article IV A(10) binding the President to recommend and the Board of Trustees to promote those recommended by the College Wide Promotion Committee ("CWPC"). Article IV B would require faculty applications for promotion to go to a faculty selection committee which could make recommendations to the appropriate dean, who would make recommendations to the CWPC according to the faculty committee's list. The CWPC would consist of six bargaining unit members and five selectees of the Vice-President for Academic and Student Affairs, and would make its own recommendations by majority vote to the Vice-President who would pass them on to the President, who then would recommend the CWPC choices to the Board.

Board of Education of Twp. of North Bergen v. North Bergen Fed. of Teachers, 141 N.J. Super. 97 (App. Div. 1976) distinguished qualifications for promotions - a managerial decision - from procedures to be followed which are terms and conditions of employment. Rutgers,

supra, held that a proposal relating to composition of a selection committee goes beyond procedures and is not mandatorily negotiable. The AFT attempts to distinguish Rutgers on the basis of the difference between N.J.S.A. 18A:64A-12 giving community college boards of trustees the power "to appoint" as opposed to N.J.S.A. 18A:64-6 giving state college boards the power to "appoint, remove, promote and transfer...." We find no merit to that argument, believing that a promotion is in effect an appointment to a different position. 15/

The Rutgers decision dealt only with the composition of a committee similar to the CWPC herein, and not with the existence of such a committee. Both the existence and composition of such a committee relate to governance and collegiality; they do not relate to terms and conditions of employment. The college may choose to delegate certain of these responsibilities to committees which include unit members but these committees, if any, serve a management function. As presented to us, the AFT proposals are permissively negotiable. 16/

Another proposal by the AFT would bar the introduction or

15/ The AFT also says that as promotion has only one effect - higher wages - it is thereby mandatorily negotiable. Even if higher wages were the only impact of promotion, they are not one and the same thing. In any event, it is uncontroverted that promotion is a factor in the College's tenure criteria and so more than wages are involved.

16/ As presented, the AFT proposals would cover all those with academic rank, which includes some personnel not in the bargaining unit. N.J.S.A. 34:13A-5.3 limits negotiations rights of an employee representative to its unit members, and the later language therein simply bans discrimination between union and non-union members. In view of the above, even strictly procedural proposals are mandatorily negotiable only as to unit members.

implementation of faculty evaluation forms or procedures until the contents of the forms and their application have been negotiated and agreed upon. Relied upon is N.J.S.A. 18A:60-10 requiring a formal procedure for career development to be established by all colleges in conjunction with their faculty. The College replies that pursuant to §18A:60-10 and the Board of Higher Education's tenure guidelines - which have been reflected in the College's tenure policy under which evaluations are made - there is no duty to negotiate on this demand.

In In re Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO, P.E.R.C. No. 76-33, 2 NJPER 147 (1976), the Commission held that adoption of a college's tenure plan pursuant to the guidelines set forth by the Board of Higher Education is not mandatorily negotiable, although negotiations were not precluded and are therefore permissive. Only the impact of a tenure plan is a mandatory subject of negotiations. On the other hand, procedures regarding faculty evaluation are a required subject of negotiations. In re County College of Morris, P.E.R.C. No. 77-64, 3 NJPER 165 (1977). In Morris we distinguished procedures from the substantive evaluations themselves. So much of the AFT proposal as relates to procedures must be negotiated, but the proposed limitation on the forms to be used goes to the substance of the evaluations and is permissive only. Reliance on N.J.S.A. 18A:60-10 is misplaced, for as we noted in our discussion of collegiality, supra, the faculty has a separate identity from its negotiations representative,[17/]

17/ The College refers to the fact that the original demand to negotiate on this proposal came under the 1976-77 contract's (Continued)

although our decision must be and is consistent with the provisions of that statute.

The final issues relate to the use of adjuncts. In the existing Article X A the College is forbidden from replacing full-time faculty members with adjuncts and a limit is placed on the number of hours which adjuncts can work. The College maintains that limits on the use of adjuncts are outside the scope of negotiations, and that as to terms and conditions of employment of adjuncts such as the number of hours worked, the AFT is not the exclusive negotiations representative for adjuncts and therefore no duty exists to negotiate with the AFT as to those employees. While not claiming to represent adjuncts not otherwise in the unit, the AFT does advance a claim to represent full-time faculty members who also teach in an adjunct capacity.

Recognizing that the number of employees as it relates to a table of organization is a management prerogative,[18/] we believe that the AFT demands relating to the replacement of unit members with adjuncts are mandatorily negotiable. Replacement of unit members by new non-unit employees was considered by the National Labor Relations Board (the "NLRB") in American Needle and Novelty Co., 206 NLRB 534, 84 LRRM 1527 (1973). The NLRB found that the rationale of Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 703

17/ (Contd.) Article X D and asserts this was improper. As that contract has expired, the point is moot, and in any event in scope decisions we do not interpret contracts. We are treating this proposal as one put forth for inclusion in the 1977-78 contract.

18/ In re Weehawken PBA, Local 15, P.E.R.C. No. 77-63, 3 NJPER ___ (1977); In re Borough of Roselle, P.E.R.C. No. 76-24, 2 NJPER 142 (1976); Rutgers, supra.

(1964) - which held that subcontract of unit work to an independent contractor was mandatorily negotiable - also applied to shifting unit work to non-unit employees.

This Commission has previously adopted the Fibreboard decision as to subcontracting. In re Township of Little Egg Harbor, P.E.R.C. No. 76-15, 2 NJPER 5 (1976). In accord with the above analysis, we see no real difference created by the use of non-unit direct employees instead of a sub-contractor. This is not a situation in which an employer is asserting a right to reduce the level of services provided, but is merely a shifting to employees outside the unit. Other state labor relations agencies which have considered this issue have reached the same conclusion.[19/] We reiterate that there is no obligation for the employer to agree to AFT proposals.

The remainder of the dispute regarding adjuncts is not properly before us in a scope of negotiations framework. While the proposals limiting hours to be worked are clearly ones involving terms and conditions of employment, the question of whether the AFT is the representative with whom the College must negotiate can only be decided by the Commission in the context of either a representation petition seeking to add adjuncts to the unit, a clarification of unit petition if the AFT still maintains that it already

19/ In re Northport Union Free School Inst., 9 PERB 3002 (N.Y. Pub. Emp. Rel. Bd. 1976); In re Town of Hamden, Conn. St. Bd. of Labor Rel., Dec. #1441 (1976); Bloomfield Hills School Dist., 1975 MERC Lab Op. 709 (Mich. Emp. Rel. Comm.).

represents adjuncts, or an unfair practice charge under N.J.S.A. 34:13A-5.4(a)(5) alleging a refusal to negotiate. Our refusal to decide this issue herein is consistent with our decision in Rutgers, supra, as to summer session employees.

ORDER

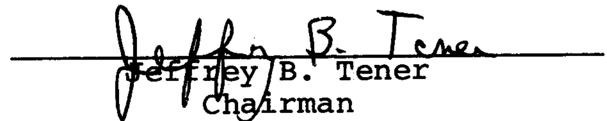
With respect to those matters which we have hereinabove determined to be mandatory subjects for collective negotiations, the Board of Trustees of Middlesex County College is hereby ordered to negotiate in good faith upon demand of Local 1940, American Federation of Teachers.

With respect to those matters which we have hereinabove determined to be permissive subjects for collective negotiations, Local 1940, American Federation of Teachers is hereby ordered to refrain from insisting,to the point of impasse, upon the inclusion of such matters in a collective negotiations agreement with the Board of Trustees of Middlesex County College.

With respect to those matters which we have hereinabove determined to be illegal subjects for collective negotiations, Local 1940, American Federation of Teachers is hereby ordered to refrain

from proposing the inclusion of such matters in a collective negotiations agreement with the Board of Trustees of Middlesex County College.

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Forst, Hartnett, Hipp and Parcells voted for this decision. Commissioner Hurwitz concurred in part and dissented in part.

DATED: Trenton, New Jersey
September 8, 1977
ISSUED: September 9, 1977