P.E.R.C. NO. 88-23

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Respondent,

-and- Docket No. CO-86-194-176

AFSCME, COUNCIL 52, LOCAL 1761,

Charging Party.

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RUTGERS, THE STATE UNIVERSITY,

Respondent,

-and- Docket No. CO-86-195-177

AFSCME, COUNCIL 52, LOCAL 888,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that Rutgers, The State University violated the New Jersey Employer-Employee Relations Act when it unilaterally implemented a merit bonus system for AFSCME, Council 52, Local 1761 employees. The Commission, however, dismisses a Complaint based on an unfair practice charge filed by AFSCME, Council 52, Local 888 concerning the merit bonus system. The Commission finds that this charge is barred by the six-month statute of limitations set forth in N.J.S.A. 34:13A-5.4(c).

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RUTGERS, THE STATE UNIVERSITY,

Respondent,

-and- Docket No. CO-86-195-177

AFSCME, COUNCIL 52, LOCAL 888,

Charging Party.

Appearances:

For the Respondent, Frances E. Loren, Esq.

For the Charging Parties, Oxfeld, Cohen, Blunda, Friedman, LeVine & Brooks, Esqs. (Sanford R. Oxfeld, of counsel)

DECISION AND ORDER

On January 24, 1986, AFSCME, Council 52, Local 1761 and AFSCME, Council 52, Local 888 filed unfair practice charges against Rutgers, The State University ("Rutgers"). Both charges allege that Rutgers violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(2), (3),

(5) and (7),[1/] when it unilaterally implemented a merit bonus system for employees in the Department of Housing represented by Council 52, Locals 1761 and 888.

On May 6, 1986, Complaints were issued, the cases were consolidated, and a hearing was directed.

On June 3, 1986, Rutgers filed its Answers. It admits that it did not negotiate with Local 1761, but contends that it offered to do so. It contends that it did negotiate with Local 888 prior to implementing the plan. As affirmative defenses, it contends both Complaints are barred by the statute of limitations set forth in N.J.S.A. 34:13A-5.4(c) and both Complaints fail to set forth facts sufficient to constitute violations of subsections 5.4(a)(2), (3) or (7) of the Act.

On July 17 and October 23, 1986, Hearing Examiner Marc F. Stuart conducted hearings. The parties examined witnesses, introduced exhibits and argued orally. They also filed post-hearing briefs.

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1/ These subsections prohibit public employers, their representatives or agents from: "(2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; (7) Violating any of the rules and regulations established by the commission."

On July 8, 1987, the Hearing Examiner issued his report and recommended decision. H.E. No. 88-4, 13 NJPER ___ (¶_____ 1987). He concluded that Rutgers violated subsection 5.4(a)(5) when it unilaterally implemented the merit bonus system for Local 1761 employees. He therefore recommended that Rutgers be ordered to stop such action and negotiate with Local 1761 concerning its proposal to implement the incentive program. He recommended dismissal of the subsection 5.4(a)(2), (3) and (7) allegations. He also recommended dismissal of Local 888's charge, finding that it was barred by the six month statute of limitations in N.J.S.A. 34:13A-5.4(c).

The Hearing Examiner served his report on the parties and informed them that exceptions were due on or before July 23, 1987. Neither party filed exceptions or requested an extension of time. However, on July 29, 1987, Rutgers advised us that it intended to comply with the Hearing Examiner's recommended order, adding that the incentive plan is no longer in effect and Rutgers has no proposals pending to implement a new one.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-10) are accurate. We adopt and incorporate them here. We also adopt the Hearing Examiner's conclusions of law. We slightly modify his recommended remedy to delete the requirement that Rutgers negotiate concerning the plan. We do not believe that is necessary since the plan is no longer in effect;

Local 1761 did not object to its termination (compare Hunterdon Cty, P.E.R.C. No. 87-35, 12 NJPER 768 (¶17293 1986), and Rutgers has no proposal for implementing another plan. Therefore, we believe the appropriate remedy is to order Rutgers to negotiate prior to implementing a similar plan. Finally, we agree with the Hearing Examiner that the unfair practice charge filed by Local 888 should be dismissed.

ORDER

Rutgers, The State University is ordered to:

A. Cease and desist from:

Refusing to negotiate in good faith with AFSCME, Council 52, Local 1761 concerning terms and conditions of employment of employees in that unit, particularly by unilaterally implementing an incentive program where employees represented by Local 1761 may earn jackets and other gifts in exchange for earned bonus points.

B. Take the following affirmative action:

1. Negotiate in good faith with AFSCME, Council 52, Local 1761 prior to implementing any merit incentive program.

2. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

The unfair practice charge filed by AFSCME, Council 52, Local 888 is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Smith and Wenzler voted in favor of this decision. None opposed. Commissioner Reid abstained.

DATED: Trenton, New Jersey
August 19, 1987
ISSUED: August 20, 1987

H.E. NO. 88-4

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

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Respondent,

-and- Docket No. CO-86-194-176

AFSCME, COUNCIL 52, LOCAL 1761,

Charging Party.

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RUTGERS, THE STATE UNIVERSITY,

Respondent,

-and- Docket No. C0-86-195-177

AFSCME - COUNCIL 52, LOCAL 888,

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that Rutgers, The State University violated §§5.4(a)(5) when it implemented an incentive program in the Housing Department without negotiating with Local 1761 or Council 52.

The Hearing Examiner further recommends that the Public Employment Relations Commission find that Rutgers, The State University did not violate §§5.4(a)(5) with regard to the charge filed by Local 888 and Council 52, as these charging parties failed to file their charges within the six-month limitation period.

The Hearing Examiner further recommends that the Public Employment Relations Commission find that there is no basis for finding that Rutgers, The State University violated §§5.4(a)(2), (3) or (7) by any of its actions connected with the implementation of the incentive program in the Housing Department.

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. 88-4

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

In the Matter of

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RUTGERS, THE STATE UNIVERSITY,

Respondent,

-and- Docket No. C0-86-195-177

AFSCME - COUNCIL 52, LOCAL 888,

Charging Party.

Appearances:

For the Respondent,
(Frances E. Loren, Esq. of Counsel)

For the Charging Parties,
Oxfeld, Cohen & Blunda, Esqs.
(Sanford R. Oxfeld, Esq., of Counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On January 24, 1986, AFSCME, Council 52 and Local 1761 and Local 888[1/] filed Unfair Practice Charges with the Public Employment Relations Commission ("Commission") against Rutgers, The

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1/ The employee representatives will be referred to individually, or as "Charging Parties".

State University ("Rutgers"). Council 52 and Locals 1761 and 888 alleged Rutgers violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.4(a)(2)(3)(5) and (7)[2/] by unilaterally implementing a merit bonus system for employees in the Department of Housing without negotiations with Charging Parties.

A Complaint and Notice of Hearing and an Order Consolidating Cases was issued by the Director of Unfair Practices on May 6, 1986. On June 3, 1986, Rutgers filed an Answer to the Complaint admitting that it did not negotiate with Local 1761 before including its members in the incentive plan, but asserting Local 1761 and Council 52 waived their right to negotiate when Rutgers' offer to do so and was refused; asserting the charges were filed beyond the six month statute of limitations contained in N.J.S.A. 34:13A-5.4(c); and asserting that the charge did not set forth facts sufficient to constitute a violation of subsections (2)(3) and (7). I conducted a hearing in this matter on July 17, and October 23, 1986. The parties examined witnesses, presented exhibits and argued

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2/ These subsections prohibit public employers, their representatives or agents from: "(2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; (7) Violating any of the rules and regulations established by the commission."

orally. Both parties filed briefs, and Rutgers filed a reply brief which was received on December 30, 1986.

Based upon the record, I make the following

Findings of Fact

1. Rutgers, the State University is a public employer within the meaning of the Act and is subject to its provisions. (TA5)

2. AFSCME, Council 52 and Locals 1761 and 888 are public employee representatives within the meaning of the Act and are subject to its provisions. (TA5)

3. Local 1761 is the majority representative of all clerical, office, laboratory and technical employees. About 15 of the over 1700 employees represented by Local 1761 work in the Department of Housing and were eligible for bonus gifts under the housing incentive program. (T15) Local 1761 and Council 52 negotiate with Rutgers on behalf of the unit of clerical, office, laboratory and technical employees. Local 1761 is an affiliate of Council 52. The AGREEMENT clause of the recently expired agreement reads as follows:

> This Agreement, made and entered into the 24th day of January, 1984 by and between RUTGERS, THE STATE UNIVERSITY (hereinafter called "Rutgers") and the AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO; Council 52; and its affiliate LOCAL UNION No. 1761 (hereinafter called the "Union"). (J-1A)

4. Local 888 is the majority representative of all service and maintenance employees. Over 200 of the approximately 1200 employees

represented by Local 888 work in the Department of Housing and were eligible for bonuses under the housing incentive program. (T15) Local 888 and Council 52 negotiate with Rutgers on behalf of this unit. Local 888 is an affiliate of Council 52. (T51-52) The Agreement clause of their recently expired contract states:

> This Agreement, made and entered into this 11th day of April 1984 by and between RUTGERS, THE STATE UNIVERSITY (hereinafter called "Rutgers") and the AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO; Council 52, with its office at 516 Johnston Avenue, Jersey City, New Jersey; and its affiliate LOCAL UNION NO. 888 (hereinafter called the "Union") has as its purpose the promotion of harmonious relations between Rutgers and the Union; the establishment of procedures for the presentation and resolution of grievances; and the determination of wages, hours, and other terms and conditions of employment. (J-1B)

On January 20, 1984 Rutgers and Council 52 and Local 888 entered into an agreement to resolve unfair practice charges CO-84-167 (CP-1) and CE-84-11. Council 52 alleged that Rutgers was negotiating with Local 888 without representatives of Council 52 present. Rutgers alleged that Council 52 refused to negotiate. Local 888 was not a party to either charge, but was named in the settlement. That agreement provides in part:

> The parties hereby agree to commence negotiation on January 26 at 10:00 AM. Negotiations will be conducted in good faith by both parties. Any contractual provisions or modifications thereof will be made with all contractual signatories present. [CP-2]

Richard Gollin, Associate Director of Council 52, signed off on the agreement for Council 52. Christine Mowry, Assistant Vice President for Staff Affairs and Director of the Office of Employee Relations, signed off on the agreement for Rutgers. (CP-2)

Gollin and Anthony Papi, President of Local 888,[3/] had an openly hostile relationship. There were several outbursts between them at negotiations and hearings in the presence of others. Julian Amkraut, Associate Director of the Office of Employee Relations at Rutgers University, observed these outbursts. (TB59) Gollin did not trust Papi. He felt Papi was working with Rutgers because Papi had advance knowledge of proposals before they were put on the table at negotiations. Gollin testified that Papi tried to convince the Council to accept the proposals even though they were ill advised. (TB62)

5. Gollin and Arlene Hartley, President of Local 1761, negotiated Local 1761's 1983-1986 agreement with Rutgers. (J-1A) Gollin and Papi negotiated Local 888's 1983-1986 agreement with Rutgers. (J-1B) Hartley signed off on the agreement for Local 1761. Papi signed off on the agreement for Local 888. Gollin signed off on the agreements for Council 52. Mowry signed off on the agreements for Rutgers.

6. In 1984, Rutgers decided to implement an experimental incentive program in the housing department on the New Brunswick campus. The program allowed employees to earn merit points which could be exchanged for Rutgers jackets or merchandise at a local store. In July 1984, Mowry and the associate director of housing

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3/ Papi was President of Local 888 until December 1984. When he retired, Mattie Gillus then became President.

met with Papi and explained the incentive program in great detail. (TA42, TB4) They told him about the point system, how points would be awarded, and that points could be converted into jackets and certificates. (TB5) Papi expressed concern about the fairness of the program and his ability to bring members complaints of unfair treatment back to Rutgers. (TB5) Papi did not mention bringing the program back to the membership for approval or a desire to inform Council 52. (TA44-TA45) Papi never informed Local 888's executive board about the program. (TA 122) Neither the executive board nor the membership of Local 888 voted to accept the housing incentive program. Papi never voiced objection to the program or demanded negotiations. (TB6) Nothing was given to Papi in writing and no written agreement was executed.[4/] On July 23, 1984, Mowry sent Papi the following letter:

> This letter is to confirm that Division of Housing plans to begin implementation of the Employee Incentive Program, which we shared with you on July 2. The program will be experimental for approximately two years.
>
> As we discussed, because one of the purposes of the Program is to improve employee morale, Division of Housing will investigate any charges of unfairness or arbitrariness that might arise, even though nothing about the Plan is grievable. Your comments on the program as it progresses will be welcome. (R-1)

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4/ Charging Parties assert the above testimony by Mowry should not be credited because Rutgers did not examine Papi and did not state why. They argue that failure leads to the inference that his testimony would have been harmful. Since charging parties were free to examine him and did not, I do not find their argument persuasive.

This letter was not sent to Council 52 or to Local 1761. (TA47) Mowry testified that it was common practice to copy Council 52 when Rutgers reached an agreement with Locals 1761 or 888 directly in order to solve problems outside the grievance procedure. (TA102-103)

Amkraut testified that he had several casual discussions with Papi in his office about the housing incentive program. Papi regularly came to Amkraut's office to discuss union business, including the incentive program. (TB42)

7. The program was implemented on an experimental basis from January 1, 1985 through December 31, 1986. Employees in both units were receiving points by May 1985. (TA14) The program was publicized through a "kick off" luncheon and repeated mention in "Housing Headlines", an internal Division of Housing publication for its employees designed to inform employees about the incentive program and about general department news. (R-2 - R-6) "Housing Headlines" was given to foremen to distribute to housing employees. The record is void of testimony that anyone other than Mowry and Amkraut ever saw the publication. Mowry receives every issue of "Housing Headlines", but Gillus, Hartley, and Gollin testified they have never seen an issue of "Housing Headlines" (TA124, TA130, TA147)

8. While Papi knew about the incentive program as early as July 1984, other representatives of Local 888 were not informed until after it was implemented. Gillus learned about the program at a February 1985, meeting with Amkraut and various members of the

Housing Department. (TA125-126, 153; TB6-10)[5/] They met to familiarize Gillus, who was then the new President of Local 888, with the divisions represented by the Local. In the Spring of 1985, Alfred Brady, Director of the Physical Plant met with Gillus and other individuals who represented physical plant employees. The possibility of instituting a similar plan for the physical plant was discussed. (TB43-TB45)

9. Elizabeth Baker, a staff representative for Council 52, initially heard about points at Pauline Graylock's grievance hearing. She assumed it was a method of evaluating work and that Greylock had a lot of points. She did not see a need to ask further

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5/ The Charging Parties assert in their brief that although Gillus was advised of the housing incentive program in February 1985, "[a]t no time was there any indication made that the points had any bearing on an incentive plan which involved an economic component." However, upon rebuttal, Gillus admitted she was told in February 1985, that employees "would be given points and on the accumulation of points they would receive a red jacket" (TB53). Thus, Gillus was certainly aware that an economic benefit was to be received. Gillus' testimony is somewhat contradictory on this point. Initially she testified she first became aware of the program at the February 1985, meeting, but had no details, and, according to arguments contained in Charging Parties' briefs, had no knowledge of an economic component, and that such knowledge of jackets and other merchandise was not acquired until January, 1986; however, she later contradicted this testimony by testifying on rebuttal that she was advised, during the February 1985 meeting, of the receipt of merit points and jackets for accumulated points (TB53). Amkraut, however, testified, without contradiction, that Gillus was thoroughly briefed on the housing incentive program during the February 1985, meeting (TB6-10). Thus, I credit Amkraut's testimony on this point, and find that Gillus was advised of the economic component of the housing incentive program at the February 1985, meeting.

questions. There was no indication that points were exchanged for gift certificates or jackets. (TA116-117)

Council 52 learned about the incentive program when Baker attended Local 888's general membership meeting in December 1985. At that meeting, Bruce Smith, a shop steward, complained about the point system (TA113) Smith explained the system and told her about the certificates. Other members discussed the gifts they received in exchange for points. After the meeting, Baker spoke with Gollin, Gillus and Hartley. She then called the Office of Employee Relations and asked Amkraut to discontinue the program. He refused. (TA115)

Hartley, who has been president of Local 1761 since 1980, works in the registrar's office and was not aware of the housing incentive program until Baker called her and questioned her about it in January 1986. No one from Rutgers informed her that there was an incentive program in the Housing Department. (TA129) Gollin also learned about the incentive program when Baker informed him in January 1986. (TA131)

10. Mowry did not discuss or negotiate the incentive program with representatives of Local 1761 or Council 52. (TA18, TA40) Mowry discovered that she had not negotiated with Local 1761 in early 1986 when she prepared to respond to this charge. (TA39, TA67) The program was rescinded with respect to Local 1761 in April 1986. (R-7) Mowry testified that she offered to negotiate with Council 52 and Local 1761 over the program at the exploratory

conference in this case. (TA84) Gollin testified that Mowry may have made that offer in caucus, but that offer was never conveyed. (TA148) On April 15, 1986, Mowry wrote a letter to Gollin offering to negotiate with Council 52 over the program, rescinding the program with respect to Local 1761 and suggesting some possible dates for negotiation. (R-7) A week later, Gollin called Mowry. According to Mowry, he refused to negotiate over the subject. They discussed Mowry's feeling that it was improper for Gollin to refuse to negotiate and to pursue the unfair practice charge. Gollin responded that he was not refusing to bargain but that he was unavailable on the dates Mowry suggested and that he would have to check with Hartley for an appropriate date. Subsequently, Gollin replied to Mowry by letter stating the program should be negotiated as part of an overall successor agreement. (TA87, CP-3) Mowry replied that she would come to the already scheduled negotiating session and would like to negotiate at that time. (TA88, R-8)

Mowry attended negotiations on May 28, although another staff member negotiated for Rutgers. (TA89, TA98) At the close of the negotiating session, Mowry approached Gollin and asked to negotiate over the incentive program. Gollin refused, insisting that it be negotiated as part of the successor agreement. (TA-141) In the following negotiations sessions, Rutgers did not make a proposal about the incentive program. (TA-142)

Analysis

N.J.S.A. 34:13A-5.3 [6/] requires that public employers negotiate over a proposed change in terms and conditions of employment before it is implemented. It is also well established by case law that an employer must negotiate with the majority representative before it unilaterally implements a change in terms and conditions of employment. Hunterdon Cty. Bd. of Chosen Freeholders, P.E.R.C. No. 87-35, 12 NJPER 768 (¶17293 1986), aff'd as modified, P.E.R.C. No. 87-150, 13 NJPER ___ (¶_____ 1987), appeal pending App.Div. Dkt. No. A-_____; Hudson Cty. Bd. of Chosen Freeholders, P.E.R.C. No. 78-48, 4 NJPER 87 (¶4041 1978), aff'd App. Div. A-2444-77 (4/9/79); New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1978), mot. for recon. den. P.E.R.C. No. 78-56, 4 NJPER 156 (¶4073 1978), aff'd App. Div. No. A-2450-77 (4/2/79). Since neither party disputes that the incentive program

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6/ N.J.S.A. 34:13A-5.3 provides in pertinent part:

> Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment. Nothing herein shall be construed as permitting negotiation of the standards or criteria for employee performance.
>
> When an agreement is reached on the terms and conditions of employment, it shall be embodied in writing and signed by the authorized representatives of the public employer and the majority representative.

is mandatorily negotiable,[7/] I must determine who Rutgers was required to negotiate with. Specifically, did Rutgers have an obligation to negotiate with Council 52, with Locals 1761 and 888, or with all three.

N.J.S.A. 34:13A-3(e) defines the term "representative" to include, "any organization, agency or person authorized or designated by a public employer, public employee, group of public employees or public employee association to act on its behalf and represent it or them."

Local 1761 is an affiliate of Council 52. The contract provides that Rutgers negotiate with the "Union". The Agreement clause of the contract defines the "Union" as the Council and the Local collectively. Both Council 52 and Local 1761 are signatories to the contract covering representation of the clerical unit. I therefore find that Rutgers is obliged to negotiate with both Council 52 and Local 1761 over terms and conditions of employment of employees covered by their agreement. (J-1A)

Rutgers admits it did not negotiate with Local 1761 and Council 52 with respect to implementation of the program for housing employees in the clerical unit. Rather, it argues that its failure to negotiate with Local 1761 was inadvertent. Once Mowry realized that she failed to negotiate the program with Local 1761, she

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7/ See Hunterdon Cty Bd. of Chosen Freeholders, P.E.R.C. No. 87-35, supra.

offered to do so. Rutgers asserts that since the charging parties refused that offer, they waived their right to negotiate.

Once the employer unilaterally alters the terms and conditions of employment, an employee is free to file an unfair practice charge without first requesting negotiations over the issue. Monroe Tp. Bd. of Ed., P.E.R.C. No. 85-35, 10 NJPER 569, 570 (¶15265 1984). See also Hudson Cty. Bd. of Chosen Freeholders and New Brunswick Bd. of Ed., supra.

Rutgers' duty to negotiate arose when it decided to implement the incentive program. It violated subsection (a)(5) when it implemented the incentive program in January 1985, without requesting negotiations with Local 1761 and Council 52. Once the program is implemented, Charging Parties no longer have an obligation to negotiate before filing a charge.[8/] Rutgers asserts that Local 1761 and Council 52 waived its right to negotiate once Rutgers offered to negotiate. Local 1761 and Council 52 never refused to negotiate the issue. Rather, they stated the incentive program should be negotiated as part of a successor agreement. The fact that Mowry and Gollin disagreed as to the appropriate forum for negotiation over the incentive program does not lead to the

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8/ In fact, under certain circumstances, the employer's termination of a unilaterally imposed term and condition of employment can constitute an unfair practice, see ex., Hunterdon County Board of Chosen Freeholders, P.E.R.C. No. 87-150, 13 NJPER ___ (¶_____ 1987); however, Charging Parties do not make such an allegation in this matter.

conclusion that Council 52 and Local 1761 waived their right to negotiate the issue. Council 52 and Local 1761's failure to acquiesce to Rutgers' demand to negotiate the incentive program separately from the successor agreement does not mean that they waived their right to negotiate the issue at all.

Local 888 is an affiliate of Council 52. The contract provides that Rutgers negotiate with the "Union". The Agreement clause of the contract defines the "Union" as the Council and the Local collectively. The settlement of the 1984 unfair practice charges with Rutgers and Council 52 provides that Rutgers will negotiate with all signatories to the contract present. Both Council 52 and Local 888 are signatories to the contract.

Rutgers argues that it fulfilled its obligation to negotiate through its discussions with Papi. It argues that Papi, as president of Local 888 is an agent of the "Union", and that Rutgers was justified in believing that Papi had apparent authority to negotiate on its behalf.

The Commission initially set out the standard for determining the existence of apparent authority in Bergenfield Bd. of Ed., P.E.R.C. No. 90, 1 NJPER 44 (1975) and East Brunswick Bd. of Ed., P.E.R.C. No. 77-6, 2 NJPER 279 (1976), mot. for recon. den. P.E.R.C. No. 77-26, 3 NJPER 16 (1977). In East Brunswick, the Commission adopted basic principles of agency law to determine the existence of apparent authority:

> The test which has been applied by the courts in determining whether apparent authority existed

> as to the third party who had transacted business with an agent, is whether the principal has, by his voluntary act, placed the agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business involved, is justified in presuming that such agent has the authority to perform the particular act in question.
>
> While all authority must derive from the principal, apparent authority may derive from a principal's adoption of or acquiescence in similar acts done on other occasions by an agent. Acquiescence by a principal in an extension of the authority he gave an agent may be sufficient to create an appearance of authority beyond that actually given said agent....

There, the Commission found the Board violated subsection (a)(6) when it did not sign and implement a collective negotiations agreement that had been reduced to writing and agreed upon by the parties authorized representatives. In Randolph Tp. Bd. of Ed., P.E.R.C. No. 82-119, 8 NJPER 365, 367 (¶13167 1982), aff'd App. Div. No. A-5077-81T2 96/24/83), the Commission applied that standard and found the Board was entitled to rely on the apparent authority of the Association's Acting Chairman who signed an agreement as "Representative" of the Association. In Mount Olive Bd. of Ed., P.E.R.C No. 84-73, 10 NJPER 34 (¶15020 1983), the Commission found the employer reasonably believed that he was dealing with the authorized representatives of the union when it dealt with shop stewards where they had previously participated in contract negotiations and the union had never specifically disavowed their authority to represent employees at initial grievance discussions.

Here, Rutgers had little reason to believe Papi had authority to reach agreement with respect to the incentive plan. Papi had previously entered into agreements on behalf of the "Union" in order to resolve problems informally and to establish a sexual harassment program. (R-9) Council 52 however had filed an unfair practice charge over who Rutgers was obligated to negotiate with. That charge, together with a charge filed by Rutgers against Council 52 resulted in a settlement signed by Mowry for Rutgers and Gollin for Council 52 where both parties agreed to negotiate only with all signatories to the contract present. The unfair practice charges were filed by Rutgers and Council 52, without the participation of Local 888. Additionally Rutgers was aware of the acrimonious relationship between Council 52 and Local 888.

Under these circumstances, I find Rutgers belief in Papi's apparent authority unjustified and that Rutgers had an obligation to negotiate over the housing incentive plan with both Council 52 and Local 888. Given that, I now turn to the issue of whether Rutgers discharged its obligation to negotiate over the program with Local 888.

I do not find Mowry's discussions with Papi to constitute negotiations. Mowry never requested negotiations with Local 888 or Council 52. Mowry informed Local 888, but did not tell Council 52 about the program. She met with Papi, explained the program and how it would work to him and, on July 23, 1984, sent him a letter confirming their conversation. In her letter Mowry specifically

welcomed Papi's comments but also stressed that problems developing out of the program were not subject to the grievance procedure. She did not mention negotiations. Mowry testified that she did not remember Papi mentioning the need to discuss it with the membership or the executive board of the Local. She did not ask him for input. She did not request negotiations. There were no negotiations, certainly with regard to Council 52.

Mattie Gillus learned about the program in February 1985, after she was already President of the Local. Amkraut told her about the program in a meeting designed to familiarize Gillus to housing programs and personalities. At that time the program had already been implemented. Gillus and Amkraut did not discuss whether the program had been negotiated.

Rutgers relies on N.J.S.A. 34:13A-5.4(c) to argue that even if it failed to negotiate with Charging Parties before it implemented the housing incentive program, the charge is not timely filed. Subsection 5.4(c) requires that an unfair practice charge be filed within six months of the occurrence of an alleged violation unless the charging party was prevented from filing the charge. Salem Cty. Bd. of Chosen Freeholders, P.E.R.C. No. 87-159, 13 NJPER __ (¶_____ 1987). The program was implemented on January 1, 1985. There is a possibility that members of Local 888 were aware of the program as early as July 1984, or arguably, as late as February 1985. Papi was informed of the program both orally and by letter in July 1984. The program began in January 1985. Mattie

Gillus, who succeeded Papi as President of Local 888, knew about the program in February 1985. This Charge was not filed until January 24, 1986.

Local 888 is an affiliate of Council 52. Local 888 and Council 52 are referred to collectively as the "Union" in the agreement with Rutgers. Gollin signed off on a settlement on behalf of Council 52 where Local 888 was named. No other representative of Local 888 signed the agreement. Though there is evidence that the relationship between Local 888 under Papi and Council 52 was acrimonious, there is no evidence that Council 52 had a similar relationship with Local 888 once Gillus succeeded him as President, and there is direct evidence of Gillus' knowledge of the program in February, 1985.

There is no evidence that Local 888 was in any way prohibited from filing an unfair practice charge over Rutgers unilateral implementation of the housing incentive program. It is immaterial that Papi or Local 888 did not tell Council 52 about the program, or that the relationship between the two was acrimonious. Council 52 can be presumed to have constructive knowledge that employees in the unit represented by Local 888 were affected by Rutgers unilateral implementation of the housing incentive program

by February 1985, this being the date the new Local President was informed.9/

However, since Council 52 had no actual independent knowledge of the program, this finding cannot extend to Council 52 with respect to its relationship with Local 1761. The record is void of evidence of any member and/or the Local 1761 President having actual or constructive knowledge of the program prior to the six-month limitation period. It is undisputed that Local 1761 and Hartley were not informed of the incentive program until December 1985. Therefore, I recommend that the §§(a)(5) charge be dismissed only with respect to the unit represented by Council 52 and Local 888, based on their notice of the incentive program and their failure to file a charge within the six-month limitation period. I further recommend that Council 52 and Local 1761's §§(a)(5) charge be sustained in accordance with the reasons expressed above.

Commission cases dealing with §§(a)(2) claims generally involve organizational rights or the actions of an employee with a conflict of interest caused by his membership in a union and his position as an agent of an employer. Union County Regional Bd. of

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9/ Although the record reveals that the program began in January 1985 (TA14), and that by at least May 1985, there were points earned (TA14), there is no direct evidence as to which employees earned points, or whether they were members of Local 888 or Local 1761. Thus, notice to the Council cannot be imputed from the program's commencement alone, but can be imputed from the Local 888 President's actual knowledge of the program, based on the affiliation of Local 888 with the Council.

Ed., P.E.R.C. No. 76-71, 2 NJPER 50 (1976); Middlesex County (Roosevelt Hospital), P.E.R.C. No. 81-129, 7 NJPER 266 (¶12118 1981); Camden County Board of Chosen Freeholders, P.E.R.C. No. 83-113, 9 NJPER 156 (¶14074 1983). While motive is not an element of an (a)(2) offense, there must be a showing that the acts complained of actually interfered with or dominated the formation, existence or administration of the employee organization. Cf., Charles J. Morris (editor), The Developing Labor Law; The Board, The Courts and the National Labor Relations Act (B.N.A. 2nd ed. 1983), p. 279, citing Garment Workers (Bernard Altman Texas Corp.) v. NLRB, 366 U.S. 731 (1961). Apart from findings of refusal to negotiate terms and conditions of employment, I find no evidence of interference with or domination of any employee organization. Thus, I find no basis for an (a)(2) claim.

The Charging Parties also allege a violation of §§(a)(3). Such claims are governed by the Supreme Court's decision in Tp. of Bridgewater, 95 N.J. 235 (1984). Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for us to resolve.

Here, the record does not support the finding that protected conduct was a substantial or motivating factor in the adverse action. Therefore, I find no basis for a §§(a)(3) violation.

Moreover, the Charging Parties offer no facts to support a finding of a §§(a)(7) violation and I, therefore, conclude that none exists.

## CONCLUSIONS OF LAW

I conclude Rutgers violated N.J.S.A. 34:13A-5.4(a)(5) when it failed to request negotiations with Council 52 and Local 1761 before it implemented an incentive program in the Housing Department.

I recommend that Council 52 and Local 1761's Unfair Practice Charge alleging a violation of N.J.S.A. 34:13A-5.4(a)(2),

(3) and (7) be dismissed.

I further recommend that Council 52 and Local 888's Unfair Practice Charge alleging a violation of N.J.S.A. 34:13A-5.4(a)(2), (3), (5) and (7) be dismissed.

RECOMMENDED ORDER

Rutgers is ordered to:

A. Cease and desist from:

Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit by unilaterally implementing an incentive program whereby employees may earn jackets and other gifts in exchange for earned bonus points.

B. Take the following affirmative action:

1. Immediately engage in good faith negotiations with AFSCME Council 52 and Local 1761 over Rutgers' proposal to implement an incentive program including bonus points for work performed, allowing employees to earn jackets and other gifts, in exchange for accumulated bonus points.

2. Notify the Chairman of the Commission within twenty (20) days of receipt what steps have been taken to comply herewith.

Marc F. Stuart
Hearing Examiner

Dated: July 8, 1987
Trenton, New Jersey