

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

KEAN UNIVERSITY,

Respondent,

-and-

Docket No. CO-2008-384

COUNCIL OF NEW JERSEY STATE
COLLEGE LOCALS, AFT, AFL-CIO,
KEAN FEDERATION OF TEACHERS,

Charging Party.

KEAN UNIVERSITY,

Respondent,

-and-

Docket No. CO-2009-158

COUNCIL OF NEW JERSEY STATE
COLLEGE LOCALS, AFT, AFL-CIO,
KEAN FEDERATION OF TEACHERS,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that Kean University violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.4a(5), by failing to negotiate in good faith with the Council of New Jersey State College Locals, AFT, AFL-CIO, Kean Federation of Teachers (KFT) over an increase in office hours. The Commission orders the University to negotiate prospectively in good faith with the KFT over the office hours and/or compensation for increased office hours for faculty and department Chairs. The Commission adopts the Hearing Examiner's recommendation dismissing the 5.4a(3) allegation in the Complaint that the University violated the Act by increasing office hours in retaliation for protected activity. The Commission finds that the University was motivated by a plan to increase graduation rates through enhanced student advisement time.

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

P.E.R.C. NO. 2013-64

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Appearances:

For the Respondent, Jeffrey S. Chiesa, Attorney General
(Geri Benedetto, Deputy Attorney General)

For the Charging Party, Mets, Schiro, and McGovern,
LLP, attorneys (Kevin P. McGovern, of counsel)

DECISION

This case centers around two issues. The first is whether Kean University (University) was required to negotiate with the Council of New Jersey State College Locals, AFT, AFL-CIO, Kean Federation of Teachers (KFT) prior to increasing office hours for faculty and department chairs. The second is whether the

University unilaterally increased faculty and chair's office hours in retaliation for protected conduct. A Hearing Examiner found that the University was required to negotiate with the KFT prior to increasing office hours, but did not find that the hours were increased in retaliation for protected activity. The Hearing Examiner found the University was motivated by a plan to enhance student advisement time. We affirm.

On June 17 and November 5, 2008 the KFT filed unfair practice charges, CO-2008-384 and CO-2009-158 respectively, alleging that the University violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4a(3) and (5)^{1/} (Act). In CO-2008-384, charging party alleges the University violated 5.4a(3) of the Act by retaliating against the KFT for its role in organizing a student/faculty demonstration or "Rally" held on May 5, 2008 to protest the University's decision to change the academic schedule. The Charging Party alleged two incidents of retaliation occurred on May 6, 2008. The first alleged incident occurred at a luncheon on May 6, 2008 when University President

^{1/} These provisions prohibit public employers, their representatives or agents from: . . ." (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. . . . [and] (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."

Dawood Farahi: (1) made angry, negative comments about participants in the demonstration; (2) distributed a Star-Ledger newspaper article at the luncheon that he claimed was bad publicity for the University; (3) disparaged faculty he considered overpaid and under productive; and (4) announced that certain faculty would have four-day work schedules and would have to provide eight hours of student advisement per week. In the second incident, the Charging Party alleged the University retaliated against it on May 6, 2008 when Director of Human Relations, Faruque Chowdhury, sent Dr. Charles Kelly, the KFT's chief negotiator, an e-mail and attachment notifying him of schedule, work assignment and office hour changes to be effective in September 2008, and later in May and early June 2008 when University officials issued additional memoranda requiring Department Chairpersons ("Chairs") to devote 20 hours per week as student academic support hours.

In CO-2009-158, the Charging Party alleges the University violated 5.4a(5) of the Act by failing to negotiate over unilateral changes to existing terms and conditions of employment. The Charging Party specifically alleged: (1) that on May 6, 27 and June 3, 2008, the University announced an increase in faculty office hours to assist students; (2) on May 27 and June 3, 2008, the University announced an increase in Department Chairperson office hours to assist students; (3) the University

unilaterally implemented these changes in September 2008 and (4) the University has responded to the Charging Party's requests to negotiate arguing that office hours for faculty and Chairs are not negotiable.^{2/}

As a remedy, KFT seeks an order rescinding the additional office hours that had been implemented and an order to negotiate over any increase in such hours.

A consolidated Complaint and Notice of Hearing was issued on February 24, 2010. The University filed an Answer on March 15, 2010, denying the allegations and listing several affirmative defenses, among them that it has acted with legitimate governmental and business justification for its actions.

Hearing Examiner Wendy Young conducted six days of hearing between April 14 and July 18, 2011. The parties examined witnesses and introduced exhibits. They filed post-hearing briefs and reply briefs by December 20, 2011.

On May 18, 2011, the Hearing Examiner issued her report and recommended decision. H.E. 2012-10, 39 NJPER 5 (¶2 2012). She recommended that the Complaint in CO-2008-384 be dismissed. She determined that when all the facts submitted by the KFT were viewed in total, they did not support a finding that the University violated 5.4a(3) of the Act. Specifically, the

^{2/} The Charging Party requested interim relief in CO-2008-384. That request was denied. Kean University I.R. No. 2009-5, 34 NJPER 232 (¶80 2008).

Hearing Examiner noted that the record established that faculty/Chair office hours was a major issue for the University dating back to 2003-2004. The Hearing Examiner also declined to find a violation regarding President Farahi's remarks at the luncheon absent the KFT pleading a 5.4a(1)^{3/} violation.

The Hearing Examiner did find a violation of 5.4a(5) of the Act finding that the increase in office hours concerned compensation for and the days and hours of work, the work week and work year which are all mandatorily negotiable terms and conditions of employment.

On June 11, 2012, the KFT filed exceptions to the Hearing Examiner's decision. On July 9, the University filed a response. The KFT asserts that:

The Hearing [Examiner]'s finding that Kean University decided to increase office hours "in January or February 2008" is not supported by the testimony in the record.

The Hearing [Examiner]'s finding that Kean University intended to increase office hours "in January or February of 2008" conflicts with the documentary evidence.

The Hearing [Examiner]'s finding that Respondent decided to increase faculty office hours "in January or February 2008" conflicts with her rejection of the employer's claims as to the creation and distribution of R-1, the "bulleted list"

^{3/} This provision prohibits 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."

The Hearing [Examiner]'s finding that University representatives attempted to provide a copy of the bulleted list to a Union representative on May 1, 2008 is contrary to the evidence and her other factual findings.

The Hearing [Examiner]'s remedy in connection with her finding of an a(5) violation is insufficient to address the harm done to the union.

We have reviewed the record. We adopt and incorporate the Hearing Examiner's extensive findings of fact (H.E. at 6-35). We briefly summarize the relevant facts and history of the parties' disputes over office hours.

The State and Council are parties to a collective negotiations agreement effective from July 1, 2007 through June 30, 2011, covering teachers and/or research faculty, department chairpersons and other positions at nine institutions including Kean University. The KFT is the local union representing the Council at Kean. The parties' most recent collective agreement does not contain any language regarding class schedules or faculty (and Chair) office hours.

The parties had previously litigated an unfair practice case concerning the negotiability of office hours in 2003. Docket No. CO-2004-119. The Hearing Examiner's report details the processing of that case which ultimately settled. It arose when the University proposed that all full-time faculty members provide two to three office hours per day over three days during

each week (a total of six to nine hours), and proposed that Department Chairs provide 14 office hours per week over four days. The University's justification for the increase was to provide better advisement for students, and it wanted to implement the changes for the 2004 Spring semester.

During this period, Dawood Farahi became the University President. His vision for the University was for it to become qualitatively superior to what it was ten years earlier. To do that, he believed, the University needed to provide better student advisement and learning support; improve graduation rates and increase course availability.

When his Presidency began in July 2003, Farahi became involved in the prior dispute over increasing faculty office hours. Dean Casale, the KFT's Interim President at that time, spoke to Farahi and asked for a Task Force to review the office hours issue and make a recommendation. A Task Force was formed.

The Task Force issued its report in November 2003. It recommended that full-time faculty should have a minimum of six posted hours per week scheduled across at least three different days, and that Department Chairpersons should post nine hours, with at least three hours for advisement spread over at least three days. Office hours for faculty and chairpersons remained unchanged during the 2003 Fall semester and the 2004 Spring semester.

On March 11, 2004, the charge in CO-2004-119 was settled and withdrawn when the parties agreed to meet and consult regarding items that included faculty office hours. A series of events therein happened that the Hearing Examiner's report details. Ultimately, the Provost issued a policy providing that full-time faculty must post a minimum of five office hours per week scheduled across a minimum of three days, and Chairs must post a minimum of eight office hours scheduled the same way. That policy was effective for the 2004 Fall semester.

The University expected that the increase in faculty and Chair office hours would enhance student services and increase graduation rates. By the end of 2007, however, the University had not achieved dramatic improvement in graduation rates. Research had indicated that interaction between faculty and students affected graduation rates, and the University concluded that five faculty office hours a week for students was not enough to make a material change in graduation rates. The University also determined that its classrooms and facilities use was inefficient. It realized that by having and offering more classes on Fridays and Saturdays it could increase its academic offerings making it easier for students to graduate in four years.

After reviewing considerable information the University decided it needed to do three things to improve its results.

First, it decided to integrate all student support systems in one place which led to the creation of the Center for Academic Success which was designed to provide learning support services for students. Second, the University realized that better student advisement was needed to direct students to take the necessary courses to graduate on time and avoid the time and cost of unnecessary courses. Third, the University realized that it needed to broaden the academic schedule and enhance course availability to make it possible for students to have easier and more frequent access to the classes they needed to graduate on time.

President Farahi believed that academic advisement was the key to student success in scheduling and sequencing courses to graduate on time. He believed that larger blocks of advisement time with professors trained in using the University's computer system would help the process.

The University began working on revising the academic schedule during the 2006-2007 school year, but most of the work was done in early 2008. The University sought input into the schedule from various elements of the campus community. Meetings were held over a two-month period from February into March 2008 with various University constituencies. A proposed new academic schedule was presented to the Council of Deans in early March 2008 with implementation intended for the 2009 Spring semester.

Several meetings were held with the Council of Deans and/or Department Chairs and Associate Provost Kenneth Sanders in late February and early March 2008. President Farahi scheduled a meeting with the Council of Deans for March 20, 2008 to review the plans he hoped to implement. He met with Connelly on March 17 to review his (Connelly's) notes to improve student advisement and academic services. From those notes Farahi prepared the two "bulleted pages" attached to the first page of the memorandum. The bulleted document contained two sections, one concerning the new schedule and the other concerning student academic support (SAS). The first bulleted item listed under SAS required every faculty member to provide at least eight office hours for advisement each week from September 1 to December 23 and January 2 to June 30. That item provided:

Every faculty member should be scheduled to provide such services [advisement services] to students in blocks of two hours or more four days a week. Additional hours should be posted during registration and advisement periods.

Farahi believed that the existing advisement system with shorter time blocks for students was not enough time for students to predict when faculty would be available. He envisioned that faculty needed to provide services to students in longer blocks of time.

Connelly explained that the University wanted to create a more even distribution of courses between the mornings,

afternoons and evenings and wanted to avoid faculty having a two-day schedule. Connelly noted the University wanted to end the concept of professors teaching back-to-back classes because that did not allow for enough interaction with students after class, and because of the stress such scheduling had on the faculty.

Farahi attended the March 20, 2008 meeting with the Council of Deans along with Connelly and Associate Provost/Associate Vice President for Academic Affairs Ken Sanders and others. Sanders took notes at the meeting. A number of topics were discussed including course scheduling; Chair office hours; posting office hours on the internet and doors; minimum office hour blocks of time; attendance policies; evening courses; when professors must arrive at class; class cancellations; class schedules and other topics.

Connelly testified that the bulleted items were included in the topics and issues that had been discussed prior to March 20, 2008 as ways the University could improve the delivery of student services. He said the subjects covered by the bulleted items which included the increase in faculty office hours were discussed at the March 20 meeting and the bulleted items were distributed. Connelly wanted the Deans to review the bulleted items and advise him of any recommendations or changes they may have had. Connelly testified that when he became aware of the KFT's April 2008 memo concerning the proposed schedule changes,

he concluded that one of the Deans had shared the information in the bulleted items with someone in the KFT.

Sanders, however, testified that the bulleted items were not presented to the Deans on March 20, and former Dean Carole Shaffer-Koros only recalls the class schedule being distributed on March 20, not the bulleted items. Koros thought she first received the bulleted items in May 2008.

Koros, however, recalled discussing faculty office hours on March 20, particularly having faculty posting their hours on-line and scheduling the hours in identifiable blocks of time. But she did not recall a discussion over increasing faculty office hours.

A Leadership Forum meeting was held on March 26, 2008. The University's vice presidents and various union leaders were present, including Connelly and KFT representatives. The changes to the Monday-Wednesday-Friday schedule and other issues were discussed, but there was no discussion over increasing faculty office hours.

On March 27 or 28, 2008, Connelly, Chowdhury and Thompson visited the KFT's Chief Negotiator, Charles Kelly, in his office to give him the proposed schedule changes, but they did not discuss changes in office hours. Kelly received the schedule changes and said that the schedule was a managerial prerogative and not negotiable. It wasn't clear to Kelly that there was any negotiable impact from the schedule changes and he did not seek

to negotiate any impact issues. Connelly did not give Kelly the bulleted items at that meeting.

On April 1, 2008, KFT President Maria del Carmen Rodriguez distributed a memorandum to KFT members concerning the new course scheduling proposal that was intended for discussion at that day's Senate Meeting. The memorandum noted that the scheduling proposal would affect the number of times courses met per week; extending classes to Fridays; eliminating back-to-back teaching schedules and extending office hours over more days. The memo also noted that

. . . managers can impose these massive scheduling changes as they fall under the category of managerial prerogative . . .
[CP-1]

and it encouraged members to attend the faculty meeting.

Rodriguez explained that the University had been circulating a new scheduling proposal throughout the campus community and that meetings have been held regarding the schedule. She acknowledged the schedule changes would extend office hours but she believed that was within the context of five office hours per week. Finally, she believed the University could impose the scheduling changes. There was no discussion of increasing faculty office hours during that Senate meeting.

On April 7, 2008, University Vice President Sanders sent an e-mail to all faculty inviting them to make comments on the proposed schedule changes. On April 9, 2008, KFT representatives

attended a University Planning Council meeting at which the new schedule was discussed. Later that day, the KFT held a general membership meeting at which the schedule changes were discussed. Charles Kelly explained why scheduling changes were not terms and conditions of employment, and he did not indicate the KFT was attempting to negotiate any aspect of the academic schedule.

The parties held a Labor Management meeting on April 10, 2008. Kelly and two other faculty members attended for the KFT, and Connelly, Chowdhury and Thompson attended for the University. The KFT was given a draft of the new academic schedule, and it was discussed, but Kelly did not attempt to negotiate any negotiable aspect of the new schedule. The University provided its justification for some of the proposed schedule changes, and the KFT responded suggesting the University offer some longer and greater credit courses, but the University did not accept those suggestions.

Connelly asked Kelly for any other input in the schedule, and he (Kelly) responded "it's not negotiable" and "good luck". The University representatives said nothing about increasing faculty or Chair office hours at the April 10th meeting, nor did they provide the KFT with the bulleted items.

On April 14, 2008, Kelly sent Connelly an e-mail related to their discussions about how best to use classroom space at the April 10th Labor Management meeting. Kelly noted that:

. . . the issue of scheduling is not a term or condition of employment and there is no legal obligation to negotiate scheduling.

but he went on to make a class scheduling suggestion and a recommendation for the adoption of a four credit course curriculum.

Kelly was not seeking to nor demanding to negotiate any aspect of the academic schedule. Connelly thought it significant that Kelly acknowledged the University had no obligation to negotiate the schedule issues.

On April 29, 2008, the KFT e-mailed its members a flyer announcing a demonstration on May 5, 2008 at the University Center Clock Tower regarding the schedule changes. A Leadership Forum meeting was held on April 30, 2008 but Connelly did not advise Kelly during that meeting about the need to increase faculty office hours.

The parties held a Labor Management Meeting on Thursday, May 1, 2008. Connelly, Sanders and Chowdhury attended for the University and Kelly, Irwin Nessall and Tim Sensor attended for the KFT.

Connelly, Sanders and Chowdhury testified that at the beginning of the meeting Connelly attempted to deliver a copy of the new schedule and the bulleted list to Kelly who was seated at a table. The schedule was on top of the bulleted list. All three witnesses testified that Kelly pulled away from the table

gesturing or raising his hands and would not accept the documents. Connelly and Sanders both said Kelly avoided looking at the documents and made a remark about it being a managerial prerogative. Sanders said he or Connelly separated the documents on the table but Kelly would not look at them.

Connelly testified that since Kelly did not accept the documents, he took them back, but made no reference to office hours nor did he tell Kelly that office hours may be increasing. Kelly testified no one offered him any documents that he refused to accept and that he never stepped back or raised his hands to anyone offering documents.

The parties then discussed a student advisement program, a pilot evaluation program, course credit and teaching load issues as well as faculty representation at the School of Visual and Performing Arts, and they agreed upon and signed a Letter of Agreement providing for a four-day work week in the Summer of 2008. There was no discussion about increasing faculty office hours. Later on May 1, 2008, the University approved the visitors parking lot for the demonstration to be held on May 5 rather than at the Clock Tower location.

On Friday, May 2, 2008, Connelly asked Chowdhury to send Kelly the new schedule and the bulleted list. Chowdhury couldn't send them that day. Chowdhury testified that on Monday, May 5, 2008, at approximately 10:30 to 11:00 a.m. he saw Kelly outside

the Administration Building and told him he wanted to give him a document. Kelly responded "send it to me via e-mail". Kelly testified that he saw Chowdhury near the demonstration which began approximately 3:00 p.m. on May 5, and Chowdhury told him (Kelly) he (Chowdhury) had something he wanted Kelly to look at. Kelly testified he told Chowdhury to send it by e-mail. Chowdhury had the bulleted list e-mailed to Kelly on Tuesday, May 6. The cover page was created the morning of May 5.

Kelly did not testify about whether he and Chowdhury spoke between 10:30-11:00 a.m. on May 5th, but Chowdhury testified he was not at the Rally. The cover page attached to which were the bulleted items, was created on May 5 at 10:13 a.m.. The cover was from Chowdhury to Kelly and begins with "Based on our conversation on 5/5/08." The Hearing Examiner found that since the cover page was created in the morning of May 5 and refers to a conversation held on May 5, the conversation between Chowdhury and Kelly was held before 10:13 a.m. on May 5 which was even earlier than Chowdhury had recalled.

The Rally was initially announced on April 29, 2008 to be held on Monday, May 5, 2008 at the Clock Tower to protest the planned schedule changes. The location was changed on May 1 to the visitors parking lot. Since the KFT had planned and obtained permission for the Rally, it posted new notices earlier on May 5 announcing the location as the Visitor's Parking Lot.

Students and some faculty began to gather at the appointed time for the Rally with some students marching from the student center to the visitors lot. Approximately 300 people attended the Rally, but not at the same time. They attended over the two-hour time frame. Faculty initially led the Rally, but students eventually took control and moved the crowd from the visitors lot to the clock tower and back to the parking lot where most of the time was spent. The Rally lasted two hours.

During the Rally there were some speakers; the KFT had brought a bullhorn which the students eventually used. There were signs and chanting that "the schedule doesn't work" and "we don't want this schedule". The Rally was peaceful but noisy. The visitors lot where the Rally was held was next to Kean Hall where various administrators have offices. Some in the crowd were outside Kean Hall and under Farahi's office window chanting "1, 2, 3, 4 throw that schedule on the floor", mocking Dr. Farahi and distracting some employees working in the building. Campus police asked Dr. Farahi if he wanted the protestors removed, but he declined. A staff writer for the Star-Ledger attended the Rally.

On Tuesday, May 6, 2008 the Star-Ledger published an article about the Rally. It mostly noted the University's explanation for the schedule changes, but it did indicate that some students

felt they had no input in the scheduling change, and certain professors expressed some reservations.

Several months prior to May 6, 2008, a luncheon had been scheduled for that day to honor and recognize certain faculty and students for their work in specific research projects and to recognize faculty release time for scholarship and research. Dr. Farahi was the primary speaker. During his speech, Farahi made comments concerning the rally which the Hearing Examiner details in her findings of fact. Farahi then explained the problem with low graduation rates which he believed was related to inadequate student advisement. He believed that the new academic schedule and increased advisement hours would improve the graduation rates.

Professor Mathew Halper attended the luncheon and testified Farahi remarked that faculty were now going to have eight office hours per week by scheduling two hours a day on four separate days. Farahi testified that while he was referring to increased office hours he did not know whether it would be more or less than eight hours per week at that time and did not use the number eight.

Farahi continued his address noting that despite the schedule changes faculty members would not be asked to teach more than four days per week, but he also stated that the University could no longer afford to pay two-day weekly schedules at

\$160,000, referring to some full professors making that much but who only had classes two days per week. Halper testified that Farahi then joked that there were some faculty members who were in their cars before students were in their cars. On direct examination, Halper thought it was "pretty funny". But on cross-examination he said "no one laughed", "everyone felt a little strange about the joke" and it was not "typical light banter".

At about that point in Farahi's presentation a copy or copies of CP-5, the Star-Ledger article, were passed around the room.

Although Chowdhury had e-mailed R-1 and the bulleted list to Kelly on Tuesday, May 6, 2008, Kelly (and the KFT) did not open that e-mail and receive the information therein until Thursday, May 8. KFT President Rodriguez first learned of the bulleted information and the University's intent to increase faculty office hours when she received the bulleted list on Friday, May 9, 2008.

The KFT did not directly respond to Chowdhury's e-mail or seek a meeting to consult over the items in the bulleted list. It considered its unfair practice charge and interim relief application its response.

On May 12, 2008, Rodriguez sent an e-mail to the faculty apparently attaching the bulleted list but also notifying members of the scheduling and office hour changes. That same day, May

12, Farahi sent a letter to the New Jersey Commission on Higher Education outlining the steps the University was taking to improve its graduation rates. Farahi particularly noted that inaccurate advisement, the lack of available required courses and the lack of flexibility in course scheduling were causing delays, and that it anticipated more success with courses that met three times rather than just twice each week. He explained that faculty would have an increased advisement role, required courses would be offered more frequently, classes would be offered six days each week and foundation courses would meet three times per week.

On May 19, 2008, Farahi presented the new academic schedule to the Board of Trustees at a public meeting. On May 20, leaders of the KFT met to discuss whether the changes were introduced in retaliation for the KFT's participation in the Rally. Steve Young, the Executive Director of the Council took a screen shot of the PDF document within which the e-mail cover of the bulleted list was created the morning of May 5, 2008. Young also explained that the bulleted list which he said was either scanned or taken from a word file on May 5th, but he did not know when the bulleted list was originally drafted, and agreed it could have been created earlier.

Associate Vice President Sanders testified that the substance in the bulleted list was discussed with the Deans on

March 20, 2008 and that the list itself was not created on May 5, but was scanned into the system at that time.

On May 27, 2008, the Council of Deans sent a memorandum to Farahi with recommendations regarding the scheduling policy and academic support hour. A faculty member gave that memorandum to the KFT. It noted that the class schedule needed to provide more course options and flexibility during the week and an increase in student access to academic support. It explained that student access to faculty fell under two activities, namely interaction in the classroom through direct teaching and learning activities and interaction outside the classroom through activities that support student academic success. Among the many recommendations, the Council of Deans suggested the following:

Effective fall semester 2008, academic support hours for full-time faculty should be a minimum of eight hours distributed over the four-day period. Department Chairpersons should hold a minimum of twenty hours of academic support hours distributed over a four day period to accommodate both faculty and student inter-action.

The KFT believed the above increase in hours was punitive and in retaliation for the KFT's participation in the May 5th Rally.

On June 2, 2008, the KFT facilitated a meeting of the Council of Chairs concerning the new academic schedule and the increase in office hours. The Chairs voted in favor of a motion of no-confidence in the University's new scheduling and advisement rules and in favor of a resolution delaying the

implementation of those rules. The next day, June 3, KFT President Rodriguez sent an e-mail to all KFT members advising them of the action taken by the Chairs.

At a meeting between the University and KFT on June 10, 2008, the University advised the KFT that the Deans recommendation would be the University's official policy regarding the new academic schedule. That same day June 10, Rodriguez sent an e-mail to the Chairs rescheduling their next meeting and asking them not to comply with the University's request for a new scheduling grid containing eight office hours for each faculty member.

On June 17, 2008, the KFT filed its request for interim relief to restrain the University from implementing the schedule changes and the office hours increase.

James Castiglione became the KFT President in the summer of 2008. On August 19, 2008, he sent Farahi a letter opposing the change in faculty and chairperson office hours and for the first time, formally requested negotiations over the subject.

Chowdhury responded by letter of August 26, 2008 stating in pertinent part:

The University is not in agreement that the increase of office hours for faculty and chairs is necessarily negotiable.

He then explained that since a charge had been filed over that issue he would hold the request pending the outcome of the

litigation. Connelly explained that Chowdhury gave that response because he believed that office hours were part of the faculty's contractual responsibility which had already been negotiated. Connelly specifically referred to the settlement agreement of the parties unfair practice case wherein he believed they agreed to consider the office hours issue a matter of consultation, not negotiations.

In that prior agreement, the parties agreed to consult regarding a number of issues including office hours, but that was after agreeing that the agreement was a concession by the Charging Party that the University did not violate the Act. The meaning of Section I was that each party reserved its right to argue over whether the university violated the Act by not negotiating over office hours but they, nevertheless, proceeded to "consult" over office hours until they, in fact, reached an agreement - five office hours for faculty each week.

On September 22, 2008, Castiglione sent Farahi another letter noting the interim relief matter had concluded and pointedly asked whether the University intended to negotiate over office hours. On September 26, Chowdhury responded noting the interim relief matter did not resolve the charge and renewing the University's position that it did not agree office hours were negotiable. It refused to negotiate at that time. Connelly

explained the University believed office hours were a matter for consultation, not negotiations.

The parties held a labor-management meeting on October 2, 2008. The KFT proposed an agenda for that meeting which included a request for additional office hour compensation among other items. The University's response at that meeting to the request for additional compensation was that faculty advisement that occurred during office hours was part of the faculty's job responsibilities for which they were already being compensated.

On October 7, 2008, Kelly e-mailed a letter of the same date to Connelly demanding to negotiate both the additional office hours assigned to faculty and Chairs and additional compensation. The KFT was seeking (1) credit of overload compensation for faculty scheduled for eight office hours and (4) credits of overload compensation for Chairs required to schedule twenty office hours.

Connelly responded with his own e-mail of October 10, 2008 (CP-13). Connelly wrote:

In response to the attached letter, I am advising you that it is the University's position that the issue of office hours is not negotiable. PERC has permitted University to implement the increase in office hours by denying the Union's motion for interim relief. The University expressly reserves its rights to argue at any hearing or for any other purpose that the issues of office hours and compensation therefore are not negotiable. With that reservation firmly in place, the University will be amenable to

discussing the Union's proposal at the labor-management meeting.

The University implemented eight weekly office hours for faculty and twenty such hours for Chairs in September 2008.

The KFT's exceptions primarily focus on the Hearing Examiner's dismissal of its a(3) case. It asserts that nowhere in the record did any witness testify that the decision to increase office hours was made in January or February 2008. The only testimony refers to the end of 2007 when it was determined that graduation rates remained too low and that office hours should be scheduled in larger blocks of time-but not increased. It further points to notes^{4/} from a meeting of the Deans on March 20, 2008. These notes only indicate a plan to increase office hours to 90 minute blocks, three days per week. KFT further relies on the "bulleted list" that contains the first written reference to an increase in office hours for faculty. Since the Hearing Examiner rejected the employer's claim that the list was created on March 17, 2008, KFT asserts that the Hearing Examiner's finding that the University representatives attempted to provide a copy of the bulleted list to Kelly on May 1, 2008 is contrary to the evidence because the document was concealed; the parties never discussed the office hours issues; and the

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employer's witnesses told different accounts of the events of May 1.

The University responds that the Hearing Examiner properly dismissed the a(3) allegations as the evidence demonstrated it was motivated by a 2004 office hours increase that should have, but did not, increase graduation rates. The Hearing Examiner credited the testimony of University witnesses that the totality of the evidence revealed that the University had decided long before the rally that it needed to increase office hours to provide more student advisement as part of the new academic schedule. The University points to the Hearing Examiner's determination that an e-mail notification sent to all KFT members on April 1, 2008 - prior to the scheduling of the rally - that indicates KFT was aware office hours would be extended. And, the University points to the Hearing Examiner's crediting of the testimony of Connelly, Sanders, and Chowdhury that on May 1, 2008, Connelly attempted to give Kelly the bulleted list.

Under In re Tp. of Bridgewater, 95 N.J. 235 (1984), 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.

We reject the KFT's exceptions. While the evidence of timing and Farahi's comments at the luncheon suggest there may have been some animus towards KFT for the rally, we must look at the record evidence as a whole. It is undisputed that the issue of increased office hours has been a part of the University's plan to increase graduation rates since 2003. While part of the reason for the increase may have been related to anti-union

animus, the substantial and motivating factor was clearly to increase student advisement time for improved graduation rates. We can not decide this issue in the vacuum of 2008 while ignoring the arching trend of the University's major initiatives since 2003. We find it significant that on May 12, 2008 - just days after the rally- Farahi sent a letter to Jane Oates, Executive Director of the New Jersey Commission on Higher Education. The letter was written in response to the New Jersey State Assembly's request for information on programs underway at universities aimed at improving graduation rates. In this letter, Farahi advises that inaccurate advisement is causing graduation delays. He informs the Commission of his plans for Fall 2008 to increase faculty advisement. We are confident in our review of the record that the University would have increased office hours regardless of the rally and affirm the Hearing Examiner's dismissal of the a(3) charge). See Borough of Haddon Heights, P.E.R.C. No. 2010-72, 36 NJPER 117 (¶49 2010) (Borough met its burden of proof that it would have implemented layoffs for economic reasons even absent any anti-union animus).

The KFT's other exception contests the remedy issued by the Hearing Examiner as insufficient to address the harm done to the KFT by the University's a(5) violation. It asserts the appropriate remedy for failing to negotiate a mid-contract change in the terms and conditions of employment is to restore the

status quo until a new agreement is reached. KFT relies on Middletown Tp. and PBA Local 124, P.E.R.C. No. 2007-18, 32 NJPER 325 (¶135 2006), aff'd 34 NJPER 228 (¶79 2008) and Toms River Bd. of Ed. and Toms River Ed. Ass'n, P.E.R.C. No. 92-71, 18 NJPER 62 (¶23027 1991).

These cases are distinguishable as Toms River involved a unit work issue and Middletown involved a 25-year practice of paying officers for travel time that was unilaterally ceased. Middletown was also issued prior to our decision in University of Medicine and Dentistry, P.E.R.C. No. 2010-98, 36 NJPER 245 (¶90 2010) (UMDNJ). In UMDNJ, we clarified the negotiations obligations of a public employer where the issue concerned a mid-contact change to non-contractual terms and conditions of employment. We determined that an employer must negotiate on demand, however, the Act does not require the employer to engage in impasse procedures prior to implementing mid-contract changes to non-contractual terms and conditions of employment.

It is undisputed that the KFT contract is silent as to office hours. The Hearing Examiner found that rolling back the office hour requirement from eight per week to five per week would create more harm to the process. We agree. The parties have lived with the new requirement for almost five years. To roll back the office hours provided to students in a matter that the employer always retained the right to unilaterally implement

upon impasse would not serve the public interest. This is especially true in light of the evidence in the record connecting faculty/student interaction with improved graduation rates. Should the University continue its refusal to negotiate, the KFT may seek enforcement of our Order.

ORDER

IT IS ORDERED:

A. That the University cease and desist from:

1. Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment particularly by refusing to negotiate with the Charging Party over an increase in office hours for faculty and department Chairs.

B. That the Respondent take the following affirmative action:

1. Negotiate prospectively and in good faith with the Charging Party on demand until agreement or impasse over the office hours and/or compensation for increased office hours for faculty and department Chairs.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix A. Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days.

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

3. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

C. That the 5.4a(3) allegations be dismissed.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Jones and Wall voted in favor of this decision. None opposed. Commissioners Eskilson and Voos were not present.

ISSUED: March 21, 2013

Trenton, New Jersey

NOTICE TO EMPLOYEES
PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,

We hereby notify our employees that:

WE WILL CEASE AND DESIST from refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment particularly by refusing to negotiate with the Charging Party over an increase in office hours for faculty and department Chairs.

WE WILL negotiate prospectively and in good faith with the Charging Party on demand until agreement or impasse over the office hours and/or compensation for increased office hours for faculty and department Chairs.

CO-2008-384
CO-2009-158

Docket No.

KEAN UNIVERSITY

(Public Employer)

Date: _____

By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"