

H.E. NO. 2005-15

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

In the Matter of

GLOUCESTER COUNTY COLLEGE,
Respondent,

-and-

Docket No. CO-H-2003-182

GLOUCESTER COUNTY COLLEGE
FEDERATION OF TEACHERS,
Charging Party.

SYNOPSIS

A Hearing Examiner recommends that Gloucester County College violated section 5.4a(1) and (5) of the Act by dealing directly with unit employees (faculty) regarding terms and conditions of employment; specifically, compensation for teaching an academic course. The Hearing Examiner also recommends that the College violated 5.4a(1) of the Act twice by engaging in conduct which tended to interfere with protected rights. A College representative contacted a member of the negotiations unit represented by the Federation to induce her to agree to teach an academic course for a specified rate of compensation and contacted that same unit member a short time later and inquired about a possible grievance.

The Hearing Examiner recommends that the College did not violate 5.4a(5) by assigning "unit work" to non-unit employees; the College had negotiated to impasse before assigning the disputed work to adjunct faculty. The Hearing Examiner also recommends that the College did not violate 5.4a(3) by assigning the disputed work to non-unit employees, rendering the terms and conditions of employment of unit employees more burdensome.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Report and Recommended 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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent, Archer & Greiner, attorneys
(David A. Rapuano, of counsel)

For the Charging Party, Jennings & Sigmond, attorneys
(Mary L. Crangle, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On January 22, 2003, Gloucester County College Federation of Teachers, AFT, AFL-CIO, filed an unfair practice charge against the Board of Trustees of Gloucester County College. The charge alleges that on or about December 17, 2002, a dean at the College, Yvonne Burgess, issued e-mail messages to full-time nursing faculty members concerning compensation for teaching a departmental course--Nursing 220 (NUR 220)--in the spring semester of 2003. Burgess allegedly also met individually with the full-time nursing faculty to persuade them to accept reduced compensation for teaching NUR 220. (In October, 2002, the

Trustees sustained a Federation grievance contesting compensation offered to nursing faculty who taught the course in spring 2002. The December 2002 College offer "reduced" the compensation which the Trustees had determined to pay). The Federation contends that the College's representatives "threatened bargaining unit employees in violation of the Act and negotiated in bad faith by unlawfully dealing directly with [them] with respect to terms and conditions of employment." The College also allegedly "unilaterally modified terms and conditions of employment and retaliated against employees for having engaged in protected activity by successfully utilizing the grievance procedure."

The charge also alleges that after December 17, 2002, the College unlawfully transferred bargaining unit work out of the unit by assigning NUR 220 to adjunct faculty not represented by the Federation. Finally, the charge alleges that the College retaliated against full-time nursing faculty (scheduled to teach NUR 220 in spring, 2003) by reassigning them to other teaching assignments, "with a resulting detrimental effect on their schedules, preparation time and other terms and conditions of employment." The College's actions allegedly violate sections

5.4a(1), (3) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13a(1), et seq.

On June 4, 2003, a Complaint and Notice of Hearing issued. On September 25, 2003, the College filed an Answer, admitting certain alleged facts and denying others. It denies any violation of the Act, contending that its business justifications outweighs any tendency to interfere with employee rights; that protected activity was not a substantial or motivating factor in its decisions; that the Federation did not allege that it implemented a new rule or change an old rule without negotiations; and that it engaged in no derivative violation of the Act.

On October 15 and December 22, 2003, and on April 7, 2004, I conducted a hearing at which the parties examined witnesses and presented exhibits. Briefs and replies were filed by September 21, 2004. Based on the record, I make the following:

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

FINDINGS OF FACT

1. The College and the Federation signed a collective negotiations agreement extending from July 1, 2001 through June 30, 2004 (CP-2).^{2/} The Federation is the "sole and exclusive negotiation representative" of all "full-time teaching staff, counselors, instructional technology coordinator, nurse and librarians." Excluded from the unit are the president, assistant to president, vice-presidents, deans, associate deans, directors, chairpersons and others.

Article III, "Faculty Assignments and Responsibilities" sets forth at 3.3-"faculty teaching assignments," sections (a) through (h). Sections (a), (b) and (h) provide:

- (a) The assigned base load shall be fifteen contact hours per semester where credit hours are equal to contact hours.
- (b) The assigned base load shall be no more than eighteen contact hours per semester where credit hours are less than contact hours. (Physical Education is to be excepted from this provision.)

* * * *

- (h) Acknowledging that innovation and change may require modification of work requirements, then in accordance with the provisions of Chapter 303, Public Law of New Jersey, 1968, and including

^{2/} "CP" represents Charging Party exhibits; "R" represents Respondent exhibits; and "C" represents Commission exhibits. "T" represents the transcript of the hearing, preceded by a "1", "2", or "3" representing the first, second or third day of the hearing, followed by the page number(s).

Chapter 123, Public Law, 1974, State of New Jersey, the following procedure shall be used for determining the appropriate compensation for those faculty members represented by the Federation:

1. At least twenty (20) working days prior to the change, the Federation shall notify in writing. Within ten (10) working days of the time of such notice of Federation President may request in writing a meeting with the College Representatives. This request shall be addressed to the President of the College.
2. Within five (5) working days of receipt of such a request a meeting will be scheduled at mutual convenience between a committee of three members of the Federation and three members of the College.
3. At this meeting, which is to be in session for normally no more than two hours duration, negotiations will be concerned with appropriate compensation and work requirements. The Federation and College Representatives shall supply the other party with relevant data.
4. If mutual agreement is not reached at this negotiations session then the Federation shall submit a final offer in writing within five (5) working days to the President.
5. Rejection or acceptance of the Federation's final offer by the President shall be in writing within five (5) working days. Rejection shall mean that a member of the bargaining unit will not be required to work any additional time.
6. Failure by the Federation to adhere to the time specifications in

subparagraphs (1) and (4) shall mean waiver of further claim, and failure by the President (or his/her designee, to adhere to the time requirement in paragraph (5) shall mean acceptance of the Federation's final offer. [CP-2]

2. The College "Curriculum Committee of the Academic Assembly" serves as a "review, advisory and recommending body to the appropriate vice-president in matters dealing with additions, modifications or deletions of credit courses and programs of study," according to the Assembly's constitution (R-2). The committee is composed of "full-time classroom faculty . . . and other full time professional staff and their administrators . . ." (R-2). The committee's recommendations are forwarded to Vanel Perry, vice-president of academic services, for review and eventual approval by the Board of Trustees (1T43; 2T64-65; R-2).

In December, 1999, the committee submitted to Perry an "establishment of a course" approval sheet for a nursing course, NUR 220, entitled "Transition to Practice" (CP-4). A "catalog description" on the sheet states:

This course provides students with an opportunity for concentrated clinical experience in a selected area with an individual registered nurse preceptor. Learning through experience is emphasized while preparing students for transition to registered nurse practice. Focus is on the student's integration of knowledge and critical thinking as they assume the roles of provider of care, manager of care, and member of the profession. [CP-4]

Four other courses, including two specified nursing courses were listed as prerequisites for students wishing to register for NUR 220, its first offering projected to be in "spring 2002" (CP-4). The "approval sheet" also specified that NUR 220 was a 3 "credit [hour]" course, comprised of 1 "lecture hour" and 6 "lab/studio/clinic/co-op" hours (see finding no. 3). Finally, the sheet sets forth the "approving signatures" of Yvonne Burgess, the then-Chair of the Nursing, Allied Health and Science Department; Michael Keith, a faculty member and then-Chair of the curriculum committee; and Perry, identified as "Dean of Academic Services" (CP-4; 1T42; 2T57; 2T178).

3. A "credit hour" is an accounting unit designated to a college course by which students may keep track of their progress towards an academic degree (2T62).

A "lecture hour" is a structured and planned sharing of information between faculty and students, and is the most important aspect of education at the College (2T63).

A "laboratory hour" or "clinical hour" is a period of practical application of knowledge in a structured environment intended to reinforce concepts presented in a lecture hour. A clinical hour is generally conducted in a hospital or medical facility with patients (2T60).

A "contact hour" is fifty minutes and functions as a "compensation unit" awarded to adjunct and full-time faculty for

their instruction of students. Contact hours awarded to a unit faculty member are added together to determine if he or she has met the required "base load" (2T58; 2T59). Full-time faculty are awarded 15 to 18 contact hours per semester for their instruction duties, representing a "base" teaching load (2T58). For example, if a faculty member taught only "laboratory" or "clinical" courses, the "base" teaching load would be set at 18. Relatively fewer laboratory or clinical hours assigned and relatively more lecture hours assigned reduces or "adjusts" to a number below 18 a faculty member's required base teaching load. The collective agreement sets forth a sliding scale chart for faculty teaching "Allied Health and lab-oriented courses" (CP-2; 1T46-47). "Contact hour" is not defined in any College document or in the parties' collective agreement.

4. On January 24, 2002, vice-president of academic services Perry issued a memorandum regarding NUR 220 to then-Federation president Joseph Manganello (CP-5). Perry wrote that he attached a "proposed sidebar agreement" for nursing faculty "involvement in coordinating" the course. He wrote that the assigned faculty member would be awarded "3 contact hours for the management of this 3-week capstone course." The cover memorandum specified that classroom meetings (totaling 15 hours) will be held to "advise students what is expected of them . . . and that the administration and grading of a final examination is included

in the 15 hours." The other described "component" is the assignment of each student to a "preceptor--a working health care professional,"--who will accompany the student for 25 hours per week in the "clinical setting." Perry wrote:

[T]he faculty member assigned to the course will have oversight of this experience, includ[ing] assisting in the identification of the preceptors, maintenance of regular contact with the preceptors and the students and conducting the summary evaluation of the experience. [CP-5]

The attached "memorandum of understanding" provides that it is "in accord with 3.3[h] of their collective agreement on compensation for extra services contracting" (CP-5). The document sets forth the specific responsibilities of nursing faculty "assigned to coordinate NUR 220." Dean of Nursing and Allied Health Services Yvonne Burgess solicited and compiled information from other schools offering a comparable course and then provided to Perry her suggestions for the faculty's responsibilities in NUR 220. Her suggestions were included in Perry's memorandum (3T16-18). In addition to the 15 hours of classroom instruction identified on the cover page, Perry wrote that faculty "administrative oversight" of students' 75 hours of "clinical" experience includes:

- periodic meetings with the student and his/her respective preceptor;
- regular and ongoing contact with each student enrolled in the class either in person or electronically;

- be[ing] responsive in a timely fashion to problems which may occur during the clinical experience;
- document[ing] and maintaining accurate records of contact with students, and intervention strategies, if appropriate. Providing an assessment of the overall clinical experience of each student assigned. Faculty will need to document a minimum of 60 hours of attention devoted to the students to include meetings with students and/or the preceptors face-to-face or electronically; designing and implementing strategies for the resolution of concerns or other situations which require administrative oversight; and meetings with the Chair, other faculty similarly assigned, counselors and/or other College or Medical Center personnel. [CP-5]

Other duties listed are recruiting and orientating preceptors and evaluating the program. Assigned faculty were to be compensated 3 contact hours.

Burgess testified that she saw the course description--i.e., the second and third pages of CP-5, "somewhere when all of this was occurring" but could not "affirm" that she saw it before January 24, 2002" (3T17). She also testified that in the spring of 2002, ". . . it was not my understanding that faculty would indeed need to spend 60 hours on clinical oversight responsibilities [in NUR 220]". . . (3T61). Asked how much time faculty would need to spend on those duties, she testified:

The amount of time that it would take to be in contact with the preceptor or student each day that the student was in the clinical area . . . three hours over three weeks. [3T61; 3T63]

Burgess admitted in her testimony that CP-5 was not an accurate assessment of the faculty's responsibilities (3T63). She

testified on cross-examination that the "intent" of the "60 hours of clinical oversight provision" was that the "faculty would document that the student had in fact, put in 60 hours" (3T20). Burgess's description is at odds with the plain meaning of the disputed provision which demands 60 hours of attention "devoted to the students..." Also at odds with this provision is Burgess's direct examination testimony that "nursing faculty are required to talk with the preceptors and not with the students" (2T185). I do not credit Burgess's testimony. Asked what she thought about the "60 hours of clinical oversight" description in CP-5 whenever she saw it, Burgess testified: "I never paid much attention . . . I probably just skipped it" (3T63). I credit Burgess's admission.

No evidence suggests that Perry ever disavowed or modified the "60 hours of clinical oversight" provision of the job or course description in any document or in any discussion or negotiations with Federation representatives.

Perry believed that NUR 220's "innovativeness" warranted an "extra services contract" under §3.3(h) because "this was the first nursing course where . . . students [went] out to a clinical facility without supervision by a full-time or part-time faculty member of the College" (2T72; 2T73).

5. On February 10, 2002, Federation chair of negotiations and grievances Tom McCormack issued a responsive memorandum to

College president William Anderson and vice-president Perry (Perry had discussed the matter with Federation representatives four days earlier, on February 6 (2T75)). McCormack wrote that his memorandum regarded "the union response to your NUR 220 proposal required, by agreement within 5 days of our Wednesday February 6 meeting" (CP-6). McCormack wrote: "The approved contact hours for the course are 7 contact hours. Those hours, as approved [by the curriculum committee, Perry and Board of Trustees], are for 1 lecture hour and 6 lab hours. It is inappropriate to alter that assignment for any professional professor . . ." (CP-6; 1T52).

McCormack also wrote that the union "asserts the right of our full-time faculty to have th[e] [NUR 220] assignment, if a member is qualified and does express their desire to teach [it] . . ." (CP-6). On behalf of the Federation, McCormack also wrote that the course might be "reformed" to be an "independent study" or "co-op study."

6. Perry disagreed with McCormack's views about "contact hours" for NUR 220. He believed that the course's "clinical hours" were not "instructional" duties for full-time nursing faculty; those responsibilities "would be provided by a professional nurse at the clinical facility" (2T76). Perry also disputed that the curriculum committee issued any recommendation about "contact hours" (2T77).

On February 18, 2002, Perry issued an e-mail memorandum to McCormack, Manganello and other Federation representatives. Acknowledging McCormack's February 10 memorandum, Perry disputed the proposed "relationship between the approval of a course by the curriculum committee and compensation language of the College/AFT agreement" (R-5). Perry wrote:

It is true in most cases [that] the required [credit] hours of the student on a proposed course to the committee equates to the contact hours of the unit members you represent. Clearly, however, there exists no language which establishes the committee approved document as the required contact hours awarded to faculty teaching/administering a course. This is especially true in the Nursing/Allied Health Division where, as our history shows, a variety of calculations have been employed to compensate full and part-time faculty for such assignments.

The "instructional" contact hours you reference in your response which should be automatically awarded to faculty are clearly by course design (and past practice) more related to the preceptor in this case, as opposed to the unit member assigned to oversee the experience. [R-5]

Perry also reiterated that the College "stands by its original position that a 3 contact hour award to a full-time unit member" was "fair and equitable" for the three-week course (R-5).

7. On February 24, 2002, McCormack issued an e-mail reply to Perry (R-6). He wrote that NUR 220 has "no new or innovative design"; that the Federation anticipates that full-time nursing faculty will be compensated 7 contact hours for the assignment;

and if none choose to be involved in the assignment, competent adjunct faculty will be compensated at the appropriate rate for 7 contact hours. McCormack also wrote of his objection to "the College [directly] approaching represented faculty" regarding compensation for NUR 220 and "threatening to go to non-unit personnel for the assignment unless the union agreed to [the College proposal]" (R-6). Federation negotiations chair Oron Nahom testified that an "extra-services" contract is appropriate when the College requires a unit member's services "outside the duties covered by the contract" (1T124).

8. On April 2, 2002, Perry issued an e-mail memorandum concerning compensation for NUR 220 to McCormack and other Federation representatives (R-7; 2T82). Perry wrote that the College was "offering the following counter-proposal: . . . the oversight of the students' experiences with the preceptors . . . will be compensated on an independent study calculation in accordance with existing contract language" (R-7). Perry testified that his memorandum was a "further explanation of how contact hours would be awarded" rather than a compromise offer (2T82). Perry and Federation representatives discussed reforming the compensation for the course to meet the requirements of an "independent study" or a "cooperative study" (2T83; see finding no. 5).

Nursing and Allied Health department dean Yvonne Burgess testified that she asked full-time nursing faculty member Linda Canonica to keep a "log" of the upcoming clinical portion of NUR 220. She acknowledged that she never subsequently asked Canonica for such "documentation", conceding that such writings were important. Canonica was not asked if she kept a "log" or whether Burgess requested it of her. I find that if Burgess asked Canonica to keep a log, it was not part of her duties in NUR 220. (3T33-34).

Perry also proposed in April that full-time faculty teach NUR 220 that spring while the parties continue negotiations over compensation. Perry was willing to pay "whatever the resolution was to the faculty after [the parties] reached a conclusion of negotiations" (2T81). The Federation agreed (2T81).

9. In or around May, 2002, full-time nursing faculty members and unit employees Linda Canonica and Carol Murtha, and an adjunct faculty member, Debra Frasier, taught NUR 220 to about 21 students (1T55; 2T7; 2T187). Canonica oversaw students assigned to several hospitals, including Virtua Health Systems, Cooper University, Underwood, and the JFK System (3T29). She drove to and among the facilities in order to meet with students and preceptors (1T212). Murtha oversaw a class of 13 students, 10 of whom were assigned to a "clinical area" at Cooper University Hospital in Camden (2T7; 2T8). She met with students

and their preceptors during each "clinical visitation," though she understood that her constant attendance was not required (2T20), Murtha discussed various topics with her students, including leadership, communications, decision-making and conflict resolution. Students were "in the care" of their respective preceptor nurses during the 6 clinical hours or about 75 clock hours over the course's three-week duration. (2T8; 2T192).

Full-time faculty were compensated 3 contact hours for NUR 220 in the spring of 2002. Canonica and Murtha knew that the parties were negotiating the number of contact hours which would be awarded for oversight of the course (2T8-9).

10. On or about July 24, 2002, Perry met with Federation representatives and offered to compensate Canonica and Murtha an added contact hour each for their "preparation in setting up [NUR 220] for the first time." The Federation rejected the offer (2T85; R-8).

On the same date, McCormack filed a contract grievance contesting the compensation paid to Canonica and Murtha for teaching NUR 220 in spring, 2002. He wrote that "the contract calls for pay equal to contact hours where all hours are not lecture hours." He wrote of an inapplicable compensation package--"Co-op," set forth in an appendix to the contract, when the "student assigned is 'for pay' or is an 'unpaid internship'"

(R-8). McCormack wrote: "The contact hours for NUR 220 are 7 contact hours. They were compensated at a lesser rate."

11. On October 11, 2002, the grievance committee of the College Board of Trustees issued a seven-page decision regarding the "Nursing 220 grievance -- Transition to Practice." The committee's decision followed a hearing it conducted two days earlier at which the Federation was represented by McCormack and the administration was represented by Perry (CP-7).

The committee recommended that Canonica and Murtha ". . . be compensated on the basis of seven (7) contact hours" and that the Board "approve the payment of the remaining four (4) contact hours to each of [them]. . ." (CP-7). The committee's written rationale was that the College had failed to "strictly adhere" to the five-day "deadline" for replying to a February 10, 2002 AFT proposal under §3.3[h] of the collective agreement. (See finding nos. 1 and 5). The Federation presented an argument to that effect at the hearing.

The decision otherwise rejected the Federation's substantive arguments. For example, the committee rejected:

. . . the AFT's assertion that the number of contact hours listed in the course curriculum or syllabus is, by contract or past practice, incorporated into the agreement as the contractual basis to determine contact hours for compensation purposes . . . [A]s a matter of coincidence, not as a matter of contract or past practice, it is true that the number of credit hours described in the course syllabus often equates to the number of

instructional contact hours awarded for compensation purposes to the faculty. [CP-7]

The grievance committee concurred with the "administration":

[T]he large part of the instruction given in NUR 220 is not imparted directly by the faculty member or even under his or her supervision--rather the majority of the instructional time is with the professional RN. Other than the one hour lecture, the function of the faculty member . . . is primarily oversight, which [this] committee believes is different than the traditional, instructional contact hour . . . 'On call' responsibility is not required to be treated as an instructional contact hour for compensation purposes. [CP-7]

Finally, the committee wrote that "the administration is free to involve §3.3[h] and engage in additional negotiations if Nursing 220 is offered this spring" (CP-7). The Board of Trustees formally adopted the committee's recommendation on November 6, 2002 (2T89). Canonica and Murtha were each compensated 4 added contact hours for their duties in NUR 220 (2T9; 2T89).

Sometime in October 2002, Dean of Nursing and Allied Science Yvonne Burgess began planning nursing course offerings for spring, 2003. She met with nursing faculty "team leader" Canonica. She scheduled Canonica, Murtha and Rider to again teach NUR 220 for 3 contact hours. She was aware that the College was negotiating with the Federation about compensation for the course (2T216; 2T217).

12. On November 11, 2002, Perry issued an e-mail "memorandum of understanding" to successor Federation president

Lalaji Deshbandhu regarding "course management of NUR 220."

Perry proposed: "[A]n additional 2 credit hours will be paid to one faculty member who coordinates the acquisition of preceptors to participate in course operations" (CP-8). In all other respects, the memorandum was identical to Perry's January 24, 2002 "memorandum of understanding" to former Federation president Manganello (2T90; 3T26; CP-5, see finding no. 4).

13. On November 19, Federation vice-president Michael Keith issued an e-mail memorandum to College vice-president of academic services Perry requesting a meeting about NUR 220 on November 26 (R-9). Representatives of the College and the Federation met on the 26th and did not agree upon compensation for NUR 220. Keith testified that the College offered an "extra services contract." College representatives asserted that NUR 220 did not "fit into the [f]old" of other courses covered by the contract and it needed "special attention." Keith disagreed and said that NUR 220 "does fit into the fold" (1T121). The Federation declined the offer because "the issue . . . was resolved after the grievance [was filed]" (1T59; 1T60).

14. On December 2, 2002, Keith issued a memorandum to Perry and College president William Anderson, more formally replying to the College's November 26 proposal (CP-10). Keith wrote that his memorandum regarded the "union response to your NUR 220 proposal required, by agreement, within 5 days of our Tuesday, November

26, 2002 meeting" (CP-10). Oron Nahom, Federation negotiations committee chair conceded in his testimony that the Federation was engaging in "dialogue" with the College under section 3.3[h] of the collective agreement (1T132). Asked the difference between "discussing" and "negotiating," Nahom testified: "Negotiating, I believe, implies concessions are to be made. We really had no intention of conceding on our point that NUR 220 is already covered by an existing contract and needs no further special agreement" (1T131).

Keith rejected the College proposal, writing that the "Board's resolution of NUR 220 clearly specifies the compensation requirements for NUR 220." He wrote: "The approved contact hours for the course are 7 contact hours." He reiterated the right of full-time faculty to teach NUR 220. He also wrote that nursing faculty had agreed at Article 3(d) of the 2001-2004 contract (signed May 1, 2002) to "an increased base load (greater than 15 per semester) for the mixture of teaching style hours that are not lecture hours" (CP-10).

15. On December 3, Perry issued an e-mail memorandum to Keith, advising that if his December 2 "counter proposal" was a "final offer," then the College was rejecting it and will proceed with "other arrangements for covering [NUR 220]." Perry wrote that if the Federation was amenable to a resolution, then the College was now proposing a "final offer," (amending his November

11 memorandum): "An additional 2 contact hours will be paid to each faculty member who coordinates the acquisition of preceptors to participate in course operations" [i.e., all qualifying nursing faculty would be compensated the 2 added contact hours]. Perry wrote that he wished to be advised of the Federation's "acceptance" or "rejection" of his proposal (R-10; see finding no. 12).

16. Perry testified that the College "needed to get the schedule for the spring [semester] finalized as soon as possible in the fall." A Christmas "break" was scheduled for December 22 through January 15 (1T64; 2T97). He testified that he "pressed the urgency" of the need [for a 'resolution' of the NUR 220 dispute] each time he met [with Federation representatives] and in writing" (2T97). Federation witnesses did not dispute Perry's testimony. Federation representative Keith admitted in his testimony that Perry had told him about the College's need for a prompt resolution of the NUR 220 compensation issue (1T76). None of Perry's writings to the Federation directly express that concern. I find that in fall, 2002, Perry told Federation representatives that the College needed a prompt resolution of the compensation dispute regarding NUR 220.

17. On December 11, College and Federation representatives, including Perry and Deshbandhu, met for a purpose unrelated to NUR 220 and discussed compensation for the course. Keith

testified that no agreement was reached on compensation and "at the end of the meeting, it was decided that [the Federation] would have until January 15, 2003 to complete a response . . ." (1T63-64). Keith's testimony was unrebutted; I credit it.

18. On December 17, 2002, Perry sent an e-mail memorandum to the Dean of Nursing, Allied Health and Science, Yvonne Burgess, directing her to send his attached "document" to "each faculty member who you currently plan to be involved in NUR 220" (2T99-100; CP-11). The document provides:

The Administration and the Union have reached a stalemate on negotiations regarding compensation for faculty involved in NUR 220. To that end, the Division needs to plan now who will be involved in the instruction and management of the course.

In light of the above, my plan is to give the full-time faculty the right of first refusal to the Administration's offer to the Union. The compensation offered is three (3) contacts (derived from one (1) contact hour for the lecture component and two (2) contact hours for the management oversight component while students are in clinical); and two (2) contact hours for each faculty member so assigned to arrange for preceptor participation.

I need to know now, prior to the end of this semester, whether you opt to accept or reject this final offer. Should no full-time faculty choose to be involved, I will need to realign the current Spring schedules to ensure appropriate load for all.

Please respond by Friday December 20. [CP-11]

Perry admitted in testimony that he "contacted the faculty, offering them the right of first refusal with the College's position" (2T99). He conceded that he "needed to know . . . whether they chose to teach or not teach the course . . . [in order to secure] closure on the schedules" (2T99). On cross-examination, Perry conceded: "[the Federation's] lack of movement [regarding compensation for NUR 220] gave me the right [to approach unit members individually]. And through frustration and not hearing from the union" (2T150). Asked on cross-examination why the College did not again agree with the Federation (as it had done initially in April 2002) to allow unit nursing faculty to teach NUR 220 while the parties [continued] negotiat[ing] compensation, Perry testified:

I have never had an experience with previous union situations where we did not agree that we both wanted to accomplish something, and that we both wanted this to take place; and that there would be movement on both sides; and that we understood this was negotiations --both sides gave. And throughout this whole process I attempted to give without giving away. And I anticipated moving, and in this last situation, this Nursing 220, there was absolutely no movement off; the original [Federation] position of February 10, 2002 was the position on December 20, 2002. And therefore, to say that why don't we continue to negotiate, I could see the union saying, 'When we did this the last time you paid them seven, so if we continue to negotiate and reach no agreement, you should pay seven again until an agreement is reached.' And I did not want to go through that again.
[2T153]

I credit Perry's testimony.

Sometime during the fall of 2002, Perry learned from Burgess that Cooper University Hospital, the clinical setting for the largest number of NUR 220 enrollees in 2002, advised her that it wanted to select its own nurse preceptors for the 2003 NUR 220 course (2T134). Perry testified that that part of his offer to Canonica, Murtha and Rider concerning preceptor selection, [i.e., the 2 contact hours "for each faculty member so assigned to arrange for preceptor participation"] ". . . could still be valid. If we were taking on additional clinical sites we would need faculty to set that up" (2T135). Although Perry's latest offer to the Federation added two contact hours of compensation to all unit nursing faculty members willing to select preceptors, I find that the opportunities to perform that work decreased in the fall through early winter in 2002-2003.

On the same date, Burgess summoned nursing faculty member Canonica to her office and told her that the Federation and College could not agree on compensation for NUR 220 and that "a final offer would be sent to [her] via e-mail from Mr. Perry" (1T160, 3T51). Burgess told "team leader" Canonica that the course was worth 5 contact hours--3 for the "course itself" and 2 for "helping to recruit and orient preceptors"--and that her reply was needed by December 20 (1T160). Canonica asked Burgess what would happen to the course if she did not teach it. Burgess

replied that adjunct faculty would teach NUR 220. She also remarked to Canonica that the course was not worth 7 contact hours. The meeting lasted less than one-half hour (1T160; 1T161).

Burgess also called nursing faculty member Carol Murtha to her office that day and spoke with her alone for about ten minutes, repeating much of what she told Canonica. Burgess told Murtha that NUR 220 was worth 3 contact hours. Murtha asked if that designated value had been negotiated with the Federation. Burgess said, "No, it was an offer from the administration which needed a reply by December 20" (2T10; 2T11). On December 18, Murtha and Canonica received Perry's forwarded e-mail messages (1T64; 2T12; CP-11). Burgess had instructed them to reply by e-mail to Perry and send a copy to her (3T52).

Also on December 17, Burgess called Joanna Rider--a first-year full-time nursing faculty member--to her office (2T36; 2T39). Burgess told Rider to expect an e-mail offer from Perry to teach NUR 220 for 3 contact hours (2T39-40). Rider asked Burgess if Canonica and Murtha will teach the course to which Burgess replied that she did not know. Burgess told Rider that NUR 220 was "not worth 7 contact hours" and that an assigned faculty member could maintain communication with her students "by phone" (2T40). Burgess also remarked that the NUR 220 course taught last year [spring 2002] was "a lot harder than it had to

be; that everything could have been handled over the phone" (2T41). She also directed Rider to review Perry's e-mail, respond to him directly and forward a copy to her (3T52).

Burgess conceded that she decided to meet with each nursing faculty member separately to advise them of Perry's e-mail offer. She told each of them that their decisions should be "considered" (3T51; 3T52).

Canonica, Murtha and Rider did not reply to Perry's December 17 e-mail offer regarding NUR 220 (1T165; 2T12, 2T41). They promptly issued e-mail messages to Federation representative Keith, advising him of their separate meetings with Burgess; and of Perry's offer to them and the date he expected their answers (1T65). Keith advised them not to reply to Perry or Burgess (1T66).

19. Michael Keith informed Federation president Deshbandhu of the nursing faculty's discussions with Burgess. Deshbandhu arranged a meeting with Perry for the next day (1T67). On December 18 or 19, 2002, Federation representatives Deshbandhu and Keith met with Perry and College Executive Director of Human Resources Nicholas Burzichelli (1T55; 1T67; 2T100). Perry apologized for his communications with unit members Canonica, Murtha and Rider and said that he "would cease and desist from any further communication with faculty on this [NUR 220 compensation] issue" (1T89-90; 2T100). Keith remarked that he

accepted the apology (1T90). Perry also said he acted because he had not heard from the Federation and the scheduling process needed a resolution (2T100). Perry reiterated that the College did not believe that an award of seven (7) contact hours was appropriate compensation for NUR 220; that the Federation's offer was rejected; and that the College would find "other ways" of covering the course (2T102).

NUR 220 is required for all nursing students seeking admission to a registered nursing program (CP-3; 2T156). Keith acknowledged on cross-examination that if NUR 220 was not taught in spring 2003, nursing students would not have graduated that year. He acknowledged that the College was obligated to have offered NUR 220 to students that spring even if the Federation did not consent to its membership teaching it (1T78).

Perry promptly informed Burgess about the meeting. He testified: "I communicated to her what happened in my office, the meeting with Dr. Deshbashu and Mike Keith, and indicated that regarding this issue--compensation, etc., we should not have any more conversations" (2T101). I credit his unrebutted testimony.

20. In the late afternoon of December 20, Dean Burgess phoned unit employee Rider at home. Burgess testified that she was "told by several people that [Rider] was very upset and I called her" (2T218). She testified that Rider answered the call and said that she was upset; that she wanted to teach NUR 220 but

was told by the Federation that "she had to do what they said or they would interfere with her getting tenure" (2T219). Burgess testified that she reassured Rider, explaining that "tenure was [measured] against certain criteria and that she was meeting those criteria . . ." (2T219-220). On cross-examination, Burgess testified that the reason she phoned Rider late that afternoon was that she "still thought Rider was thinking about teaching the course [i.e., NUR 220]" (3T79). On re-direct examination, she testified that a reason she called Rider was that "two grades were changed after she left. And I wanted to make sure that she knew of those grade changes" (3T87).

Also on cross-examination, Burgess testified that on December 20, she was in a "holding pattern" because no one was scheduled to teach NUR 220 (i.e., no responses were filed to her December 17 solicitations); that she was "going to have to get someone to teach the course"; that she had just learned that about 25 nursing students had failed first semester courses and ". . . that was going to impact the schedule [for the spring semester]"; that she was "going to have to spend a lot of time over Christmas break trying to find [base teaching] load" for faculty; and that she had wanted all full-time faculty to teach the course" (3T54; 3T69; 3T70; 3T78).

Burgess denied that she called Rider to persuade her to teach NUR 220 (3T78; 3T79); I do not credit Burgess's denial. I

find that Burgess called Rider on December 20 because she wanted her to agree to teach NUR 220, thereby shoring up one teaching vacancy at the start of the Christmas break. The circumstances Burgess conceded on that date indicate a pressure upon her as dean of the department to assign faculty and manage the distribution of teaching responsibilities for the impending spring, 2003 semester. I am not persuaded that she knew before her call that Rider was "upset" and that her motive for calling was to calm the first-year faculty member.

Burgess first asked Rider about final grades for two students (2T42; 3T87). Rider testified that Burgess told her an anecdote from earlier that day:

[Burgess] said that when Carol [Murtha] and Linda [Canonica] were leaving that day, Linda said: 'Have a nice holiday.' And she [Burgess] said: 'How can I have a nice fucking holiday when nobody responded to NUR 220'? and, '[My] whole holiday was going to be spent at the College trying to reconfigure [base teaching] load [for nursing faculty].'
[2T42-43]

Burgess admitted being "clearly frustrated" during her phone conversation with Rider; and that she was "pretty upset and have been known to swear when I'm upset" (2T221; 2T222). She did not deny Rider's testimony. I credit it.

Burgess testified that Rider said that she wanted to teach NUR 220 and wanted to go "outside" the union (2T220). She testified that Rider said that she had spoken with Linda

Canonica, who was "supportive of the union" to which Burgess "agreed that Linda was a supporter of the union" (2T222). Rider asked who was going to teach the course (2T43). Rider testified that Burgess answered that the course would have to be "farmed out" to adjunct faculty:

[Burgess] said that she hated the fucking union; that the union at her previous job sliced her tires and threatened her child. And that Linda Canonica was nothing but a fucking union ringleader. And Carol [Murtha] would do nothing to go against Linda or the union. [2T43]

Burgess conceded in later testimony that on December 20 she ". . . said things [to Rider] that I normally wouldn't say" and "expressed some definite frustration with unions . . ." (3T76). I credit Rider's testimony.

Rider testified that Burgess threatened her employment as a first-year faculty member. She testified:

[Burgess] told me I needed to think about my best interests at heart; that it doesn't look good for a first year-first semester teacher to refuse to teach a course when she was non-tenured. And it won't look good when I was going to get tenure. [2T43]

Rider did not respond to Burgess's remarks and phoned Murtha immediately afterwards and told her "the entire conversation" (2T44; 2T48).

Burgess testified that when Rider said that she wanted to teach the course and so move "outside" the union, she replied that "she really needed to talk that decision over with the

union" (2T220). Burgess also testified that she told Rider to "consider her decision [to go 'outside' the union] because it may have implications for her" (3T58). By "implications", Burgess later testified that she was "referring to implications for her-- she may have problems with her union and I didn't want that for her" (3T73). Burgess testified that she told Rider an anecdote from long ago in her teaching experience when she "was told that a faculty member was placed in her building for her own [physical] protection [from a union]" (3T72). Asked by respondent counsel if she "threatened Ms. Rider at that time," Burgess answered, "At no time did I intend--did I threaten Ms. Rider" (3T74).

Carol Murtha was Rider's "mentor" from the time Rider began teaching in the fall of 2002 (3T94). Murtha testified in rebuttal that she received a phone call from Rider on December 20 at around 5:30 pm (3T92). She testified that Rider was "very upset" and told her that Burgess asked her about grading in a class and that the dean had,

. . . kind of pleaded with her, begged her, badgering her about the [NUR]220 class, and why she would not just outright agree to teach the class.

[Rider] asked me again, 'Was I going to teach the class?' I said 'No; it was not in our contract. The course hadn't been okayed.' She went on to say that Burgess gave her the impression that she was a first-year faculty member and this wouldn't look

good for her if she didn't teach the course.
[3T93-94]

Murtha did not speak to any Federation representative about Rider's phone conversation with Burgess (3T97). I find that Murtha's testimony is credible and generally corroborates Rider's testimony about her December 20 phone conversation with Burgess.

I have found that Burgess phoned Rider to persuade her to agree to teach NUR 220. I infer from her remarks to Rider about Canonica and Murtha and from the fact that she did not call them on the same date, that she believed that Rider--a first year full-time faculty member--might be persuaded to teach NUR 220. I infer that the anecdote(s) Burgess told Rider about unions were intended to foment a disaffection with, rather than a reflexive fear of the Federation. I do not credit Burgess's testimony that she warned or counseled Rider to obey a Federation directive. I also find that Burgess at least alluded to the fact of a College-awarded tenure (i.e., superior in force to any Federation effort to block tenure) as a means to persuade Rider to teach the course, even if she did not "intend" to threaten the faculty member. Accordingly, I find that Rider's testimony, corroborated by Murtha, more accurately depicts the December 20 phone conversation between Rider and Burgess than does Burgess's version.

21. Also on December 20, Federation representative Oron Nahom issued a memorandum to Perry regarding the Federation's

"position on compensation for NUR 220" (CP-9; 1T122). The memorandum provides that, "on February 10, 2002, the AFT delivered a counter-proposal to the administration, asserting our position that compensation must be based on seven contact hours." (CP-9). Nahom wrote: "[We] consider our final offer, dated February 10, 2002, as a binding agreement, which governs all future compensation issues for AFT members assigned to teach the course as part of base load . . ." The memorandum, which included a chronology of negotiations, was also sent to Murtha, Canonica and Rider, among others.

22. On December 23, Burgess phoned Rider at her home (2T44; 3T58). On direct examination, Burgess testified that she called "to see how [Rider] was doing" and denied asking her if she had spoken with "anyone" about their December 20 phone conversation (2T223). She also denied instructing Rider not to tell anyone about that conversation (2T223).

On cross-examination, Burgess was again asked why she phoned Rider on December 23. She testified: "The conversation on the 20th was not the best conversation I've had. And I felt bad about it" (3T58-59). I infer from that reply that Burgess felt responsible for Rider's ill-feeling (if she had any), which explains why she called "to see how she was doing." She also conceded on cross-examination that she told Rider on December 23 of her knowledge that the Federation had just filed a grievance

and asked her if she had "related the [December 20] conversation to anyone" (3T59).

Rider testified that on December 23, Burgess asked if she told Federation representative Michael Keith about their December 20 phone conversation. She testified that Burgess said that she knew that he had filed a grievance and that "she wanted to make sure it wasn't me who said anything to him . . ." (2T45).

Murtha testified in rebuttal that Rider telephoned her on December 23 and told her that Burgess had called and asked her if she told anyone about their December 20 phone call. She conceded that she did not report Rider's call to the Federation (3T95).

I find that on December 23, Burgess called Rider and asked her if she had told "anyone" about their December 20 phone conversation. I also find that her admitted reference to a grievance recently filed implied that she was asking Rider if she had spoken to a Federation representative about that earlier conversation. I do not credit Burgess's direct examination testimony, which was contradicted on her cross-examination and was credibly rebutted by Rider and Murtha.

23. On or around January 7, 2003, Burgess met with Canonica, Murtha and Rider on campus at their request to discuss their spring 2003 teaching schedules (1T195; 2T225). She had provided the three faculty members a draft spring semester schedule (1T195). Burgess was concerned about "[being] able to

meet base load for faculty" because of the relatively high student failure rate in the first semester. In other words, fewer-than-expected contact hours were available for distribution to full-time nursing faculty, a problem exacerbated by the possibility that NUR 220 would not be assigned to them (2T224; 2T225). Canonica had been the nursing faculty "team leader" for years and had typically conferred with Burgess in October of each year regarding spring semester nursing faculty schedules (1T193-194).

On or around January 9, Burgess issued an e-mail message to Canonica, Murtha and Rider about revisions to the spring, 2003 nursing class schedule, incorporating suggestions from the meeting (1T19; 2T226; R-3). The document indicates a redistribution of students, and changes to the number of clinical and laboratory sections, etc. For example, students were required to pass NUR 218-01 (fall semester) in order to enroll in NUR 218-02 (spring semester). Ten of thirty students enrolled in NUR 218-01 did not obtain passing grades and were ineligible for NUR 218-02, creating a commensurate reduction in the need for a clinical grouping in the spring course (R-3; 1T198; 1T199). Canonica testified that Burgess tried to accommodate their suggestions and she believed that the dean had done her best to provide all faculty their "base [teaching] load" (1T196).

On January 9, Burgess issued printed teaching and instruction schedules to Canonica and Murtha for the spring 2003 semester (CP-12; CP-13). Canonica's required teaching load that semester was 17.4 contact hours and she was assigned 18.466 contact hours, representing a 1.066 contact hour "overload" for which she was fully compensated (CP-12; 1T189; 1T190). On her schedule, Canonica is assigned dates to teach NUR 218-01 and NUR 218-02. She testified that her spring 2003 schedule "lacked continuity," meaning, for example, that she taught NUR 218-02 on February 6 and NUR 218-01 on February 7 (1T170; 1T171; 1T172). Canonica testified that she "anticipated" teaching NUR 218 and NUR 219, a laboratory course, "but not in the configuration" on her schedule (1T180). She did not anticipate the assignments of NUR 122 and NUR 128, though she had taught the latter course in 2001 (1T180; 1T181).

Murtha testified that her spring 2003 teaching and instruction schedule was "very different" from and more "confusing" than previous spring terms (2T15; 2T16; CP-13). Murtha was assigned 18.142 contact hours of instruction, representing an increased workload, compared to previous spring terms (CP-13; 2T32). Murtha testified that she did not believe that Burgess ". . . was trying to punish me" (2T33).

Dean Burgess testified that she was able to schedule, with some "difficulty," minimum base teaching loads for full-time

nursing faculty in spring 2003. She testified that the spring 2003 nursing faculty schedules were "typical of the kind we come up with when we are short of base [teaching] load, short of contact hours" (2T225; 2T227). No evidence directly or circumstantially rebuts Burgess's testimony. Nor does the record indicate that Canonica's and Murtha's testimonies were inaccurate. Perry testified that he approved the spring 2003 nursing faculty schedules (2T104). I credit all their testimonies.

24. On January 10, 2003, College "nursing faculty", including Canonica, Murtha, and Rider issued a signed, comprehensive proposal on "NUR 220 and other faculty concerns" to the Federation (R-4; IT202; 2T26). Seeking a "permanent resolution" to the compensation dispute, the signators to the typed four-page single spaced document (excluding "attachments") proposed that NUR 220 be valued at 5 contact hours. Specifically, they proposed that "...this 3 credit course be redefined as 1 lecture hour and 2 precepted clinical hours. A precepted clinical hour could provide a 2:1 ratio for faculty contact compensation, but remain at a 3:1 ratio for the student clinical experience" (R-4).

The proposal reiterates that the course is a "capstone" course - the "final course before graduation." It provides that

"the clinical component of NUR 220 is different from other clinical courses:"

Nursing students are assigned individually to RN preceptors in community agencies and attend clinical [sic] according to a prescribed schedule. Nursing faculty are responsible for the planning and implementation of the course. This includes the recruitment and orientation of the RN preceptors as well as daily contact with students and preceptors at the clinical site. Faculty remain available via contact by beeper throughout all scheduled time. [R-4]

The document notes that in the upcoming spring 2003 semester, NUR 220 is not assigned to full-time faculty, resulting in a "compromised" quality of education. (R-4).

25. NUR 220 was taught by adjunct faculty and by department dean Yvonne Burgess in the spring 2003 semester. Adjunct faculty were compensated 2 contact hours for clinical oversight and 1 contact hour for lecture. Burgess and one adjunct faculty member each taught one lecture section (3T35). Another contact hour was awarded to Burgess and to an unspecified adjunct faculty member for "coordinating" or "putting the course together" (3T38; 3T39). Burgess also supervised a "clinical group" of about 5 to 8 students (2T193;2T196). Faculty was required to carry a pager or cell phone during student clinical hours in case of emergency (2T197).

Burgess asked the adjunct faculty members teaching NUR 220 to keep "logs", i.e., records of personal visits with students,

and of time spent on e-mail, phone and pager communications (2T198; 2T200). Cecile Acito, Jan Long, Mary Mishler and Linda Napieralski filed "faculty liaison sheets" or logs with Burgess detailing their communications with students enrolled in NUR 220 in spring 2003 (R-13; 2T201; 2T204; 2T206; 2T207). Burgess also compiled her faculty liaison sheet for the course. One other adjunct faculty member's sheet was misplaced (2T204; 2T207). The recorded time spent by each adjunct faculty member varied, as did the time spent in any given means of communication. The averaged amount of time for all adjunct faculty was about 8.3 hours per member (1T74; 2T211). Burgess estimated that the average represented about .56 contact hour, which, when added to the "lecture" contact time, totalled about 1.56 contact hours (2T211).

Burgess was unaware of any College document which altered the nursing faculty's responsibilities for NUR 220 as set forth in the proposed January 24, 2002 "memorandum of understanding" (3T22-28; CP-5).

25. Nuclear Medicine Technology is offered as a "major" in the "Allied Health, Nursing and Science" department. NMT 221, "Nuclear Medicine Practicum 1" is described in the catalog as a course of "clinical and therapy applications", emphasizing "radiopharmaceutical administration procedures" performed by nuclear medicine technologists (CP-3). The one-semester course

is comprised of "30 lab hours, 3 lecture hours and 6 credits." A faculty member teaching this course is compensated 3 contact hours (2T118). The lecture component alone is valued at 3 contact hours (2T219).

All laboratory hours are earned by a student "shadowing" a nuclear medicine technologist at a medical facility (2T119). A faculty member "sets up" the clinical or laboratory experience for the student; periodically discusses the student's progress with the technologist during the semester; and administers a final grade to the student, "certifying" that he or she has completed the laboratory component. No specific number of hours are assigned to the faculty member for these responsibilities; nor is the faculty member awarded any contact hours for performing these duties (2T120).

The Federation and the College negotiated that the assigned faculty member to this course is being compensated for a 35-hour work week and is not required to meet a minimum teaching "load" (2T122).

Perry was unaware of any course in which the instructor, working toward a minimum base teaching load, was not awarded contact hours based upon a compilation of the (assigned numerical values of) lecture, laboratory, clinical or cooperative education components of that course (2T123).

26. In the summer of 2002, Laura Sharkey, a full-time faculty member included in the unit, taught "Nuclear Medicine Practicum II" (NMT) 222, a course described in the catalog as worth "10 lab hours, 1 lecture hour and 2 credits" (2T159; CP-3). Sharkey was compensated one contact hour for "lecture" and one contact hour for "management oversight" (2T160). She was obligated to set up the clinical experience for the student and could elect to visit the off-site facility and speak with the student or preceptor (2T170). She was also responsible for assigning a final grade to the student (2T171).

In the summer of 2003, faculty member Michael Keith was the coordinator of the College Diagnostic Medical Sonography Program. During that summer, Keith taught Digital Medical Sonography (DMS) 116, "Introduction to Clinical Practicum", reported in the course catalog as worth "10 lab hours and 1 credit" (1T70; CP-3). He was compensated 1 contact hour (1T95). Summer courses are not considered "full-semester" courses (1T95). Employed as a salaried full-time 10-month faculty member, Keith received an "overload" contact hour for teaching DMS 116. Students in the course performed clinical or laboratory work at a health care facility under the guidance of practicing professionals (1T71). Keith conceded on the record that he did not accompany students "at all times" during their clinical or laboratory experiences (1T72). Keith instructed students in a portion of the course;

the College contracted with another regular or adjunct faculty member to teach the remainder (1T139).

Compensation for DMS 116 and NMT 222 was not collectively negotiated under "extra-services contracts" (2T173).

ANALYSIS

N.J.S.A. 34:13A-5.3 provides that the majority representative shall be the exclusive representative of all employees in the negotiations unit concerning terms and conditions of employment. Our Supreme Court has upheld exclusive representation as the cornerstone of the Employer-Employee Relations Act. D'Arrigo v. N.J. State Board of Medication, 119 N.J. 74 (1990); Lullo v. IAFF, 55 N.J. 409 (1970).

N.J.S.A. 34:13A-5.4a(5) prohibits a public employer from refusing to negotiate with the majority representative concerning terms and conditions of employment of unit employees. The Commission has found that an employer violated this subsection and 5.4a(1) by dealing directly with certain unit employees and signing memoranda of agreement affecting their terms and conditions of employment. Matawan-Aberdeen Reg. Schl. Dist. Bd. of Ed. and Matawan-Aberdeen Reg. Teach. Ass'n, P.E.R.C. No. 89-130, 15 NJPER 441 (¶20168 1989) [app. dism. App. div. Dkt. No. A-6054-88T5 (12/5/89)]. The Commission has also found that an employer's solicitation of employee suggestions for an attendance incentive program violated the exclusivity principle (emphasis

added). Newark Bd. of Ed., P.E.R.C. No. 85-24, 10 NJPER 545 (¶15254 1984). See also, Hillsborough Bd. of Ed., P.E.R.C. No. 2005-54, 31 NJPER 99 (¶43 2005).

College vice president of academic services Vanel Perry conceded on the record his December 17, 2002 issuance of an e-mail memorandum to unit employees Cannonica, Murtha and Rider, offering "compensation" of three contact hours for lecture and two contact hours for "management oversight" of the academic course, Nursing 220, in the spring 2003 semester. On behalf of the College, Perry had extensive collective negotiations and contract administration experience with the Federation, relevantly highlighted by the dispute over compensation for NUR 220 in the spring 2002 semester and by his "contact hour" proposals for the spring 2003 course offering to Federation representatives beginning November 11, 2002. "Even modest amounts of compensation can sufficiently affect the work and welfare of employees to trigger mandatory negotiability." In re Hunterdon Cty. and CWA, 116 N.J. 322, 332 (1989).

I find that the College's direct dealing with unit employees Cannonica, Murtha and Rider, ordered by Perry and implemented by his agent, Dean Burgess, violates 5.4a(5) and (1) of the Act. Perry's conduct is not legally excused by his frustration with the Federation's inflexible substantive proposal of seven contact hours; by its alleged or apparent unwillingness to negotiate

compensation, and by any exigency posed by a scheduling or catalog printing deadline for the spring semester, 2003. Perry's labor relations experience apparently counseled him against his conduct after the fact because he apologized to Federation representatives at the next opportunity.

Section 5.4a(1) prohibits public employers from interfering with, restraining or coercing employees in the exercise of their rights to have their majority representative negotiate their terms and conditions of employment.^{3/} In determining whether an employer has violated 5.4a(1), the Commission first determines whether the disputed action tends to interfere with the statutory rights of employees. New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). If the answer to that question is yes, the Commission must then determine whether the employer has a legitimate operational justification. If the employer has such a justification, the Commission must weigh the tendency of the employer's conduct to interfere with employee rights against the employer's need to act. Fairview Free Public Lib., P.E.R.C. No. 99-47, 25 NJPER 20 (¶30007 1998).

I find that Dean Yvonne Burgess's December 20 and 23, 2002 telephone calls with unit employee Joanna Rider violated 5.4a(1)

^{3/} The Commission does not need to decide if the action actually interfered or was intended to interfere with employee rights. Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd 10 NJPER 78 (¶15043 App. Div. 1983).

of the Act. On December 20, Burgess phoned Rider at her home to persuade the new unit employee to teach NUR 220 in the spring 2003 semester. Burgess scorned unit employee Cannonica as a "fucking union ringleader" and discounted unit employee Murtha as ineffectual to oppose Cannonica or the Federation. Burgess also "reminded" Rider that the College awards tenure, a fact she might consider in deciding whether to teach the course. I find that Burgess intended to interfere with and restrain Rider from calling upon her majority representative to negotiate terms and conditions of employment for NUR 220.

I disagree that the College was merely "commenting upon the activities or attitudes of the employee representative which it believes are inconsistent with good labor relations, which includes the effective delivery of government services. . . ." Black Horse Pike Reg. Bd. of Ed., 7 NJPER 502, 503 (¶12223 1981). Rider was not a Federation representative. Burgess, an employer representative, first plied her criticism of unions to alienate unit employee Rider from the Federation and then asserted the prospect of tenure as a "threat of reprisal." Black Horse Pike at 503. Even if Burgess did not intend to threaten Rider, her remarks to the new unit employee had no legitimate operational justification; all communications concerning terms and conditions of employment for NUR 220 should have been directed to the Federation.

On December 23, Burgess again phoned Rider at home and asked her if she had spoken with "anyone" about their previous phone conversation and mentioned that she had recently learned of the filing of a Federation grievance. I have found that Burgess impliedly asked Rider if she had spoken to a Federation representative about that grievance. Her conduct interfered with, or had a tendency to interfere with Rider's right to file a grievance, again violating 5.4a(1).

The Federation contends that the College violated 5.4a(5) of the Act by ". . . unilaterally effectively reducing the contact hours for Nursing 220 from seven to three and by unlawfully trying to use the guise of an extra-services-contract to vary the negotiated terms of the agreement" (post-hearing brief at p. 17). It also alleges that the College unlawfully transferred unit work by awarding the teaching of NUR 220 in the spring semester, 2003 to adjunct faculty, thereby violating 5.4a(5) and derivatively a(1) of the Act.

N.J.S.A. 34:13A-5.3 entitles a majority representative to negotiate on behalf of unit employees over their terms and conditions of employment. Section 5.3 also defines an employer's duty to negotiate before changing working conditions:

Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

See also, Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48 (1978). The Act requires negotiations, but not agreement. Hunterdon Cty.

The Federation asserts that ". . . there has been a clear, unequivocal and longstanding practice as to what constitutes 'contact hours'" (brief at p. 14). To prove an implied contractual commitment based on an established practice, the representative must prove that the practice has been "1) unequivocal, 2) clearly enunciated and acted upon and 3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties." Hill and Sinicropi, Management Rights, 23-24 (1986); Middletown Tp. and Middletown PBA Local 124, P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1998), aff'd 334 N.J. Super. 512 (App. Div. 1999), aff'd 166 N.J. 112 (2000). If the union succeeds, the public employer will be bound to maintain the established past practice during the life of the contract. Section 5.3's duty to negotiate over proposed modifications is not at issue because "there is nothing to negotiate--the representative claims it already has a binding contractual right." Middletown at 24 NJPER 29.

I find that the record does not demonstrate a practice among the parties which prescribes or determines the number of "contact" hours awarded to unit faculty teaching a "mixed" instructional credit hours course in the Allied Health and Life

Science department, such as NUR 220. Although "lecture" hours equal "contact" hours for most courses offered in the catalog, the one-to-one ratio does not apply to "laboratory" or "clinical" hours and contact hours when either of the former two are chiefly provided by professionals or technicians not employed by the College at a facility it neither owns nor operates. In such settings, unit faculty are responsible for "management oversight" of students.

NMT 221 and 222 and DMS 116 imperfectly illustrate the less-than-one-to-one credit hour/contact hour ratio. By imperfect, I refer to courses in the Allied Health and Life Science department which are either offered in the summer (NMT 222 and DMS 116) or the assigned unit faculty member is not compensated by an award of contact hours (NMT 221). In all three instances however, instructional credit hours far exceed the contact hours awarded or would be required for a full teaching load. In all three courses, the clinical or laboratory component was earned by students receiving instruction from professionals engaged in private practice at a facility not owned or operated by the College. In all instances, College faculty was responsible for "management oversight." Under these circumstances, I decline to find that the Federation has carried its burden of proof that the parties have a "clear, unequivocal and longstanding practice as to what constitutes 'contact hours.'"

The unit work rule provides that an employer must negotiate before using non-unit employees to do work traditionally performed by negotiations unit employees alone. In City of Jersey City v. Jersey City POBA, 154 N.J. 555 (1998), the New Jersey Supreme court stated that the unit work rule typically applies to required negotiations before workers in a negotiations unit are replaced by workers outside the negotiations unit. The objective of the rule is to provide a majority representative with an opportunity to negotiate over an acceptable alternative that would avoid a loss of jobs or a reduction in union membership. Id. at 576. However, the Court also ruled that the unit work rule cannot be applied on a per se basis. Instead, the negotiability balancing test set forth in Local 195, IFPTE v. State, 88 N.J. 393 (1982), must be applied to the facts of each particular unit work claim.

Local 195 states:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective

negotiations even though it may intimately affect employees' working conditions. [Id. at 404-405]

There is no preemption argument. Nor does the College dispute the negotiability of compensation ("contact hours").

Accordingly, any violation of the unit work rule hinges upon the College's compliance with its negotiations obligation before assigning NUR 220 to non-unit adjunct faculty in the spring 2003 semester. I note parenthetically that throughout the parties' negotiations in 2002, the Federation reiterated an entitlement to have its unit members teach NUR 220 and the College evidently asserted the prospect of hiring adjunct faculty, an option contemplated by Article III, section 3.3(h).

I find that the College negotiated in good faith over compensation for NUR 220 with the Federation, evidenced by its demonstrated interest in negotiating within a circumscribed but not unreasonably brief period of time;^{4/} and by its substantive concessions on or increased offers of compensation, including a "final offer", during that period.

In October, 2002, the College Board of Trustees sustained the Federation's grievance contesting compensation for the earlier 2002 course offering because the administration had failed to meet the "acceptance" or "rejection" deadline set forth

^{4/} My finding neither contemplates nor depends upon the applicability (or negotiability) of Article III, section 3.3(h) of agreement to the parties' dispute.

in the expedited "extra services" negotiations procedure in Article III, section 3.3(h) of the agreement. The Trustees also wrote that negotiations over compensation for teaching NUR 220 should ensue among the parties if the course were to be taught in the succeeding academic year.

On November 11, 2002, Perry issued a comprehensive negotiations proposal to the Federation for teaching NUR 220 in the spring 2003 semester, adding two contact hours of compensation for one unit faculty member who coordinates "the acquisition of preceptors . . ." The parties met on November 26 and discussed the proposal. On December 2, the Federation formally rejected the offer. Federation negotiator Nahom admitted that the Federation was engaging in "dialogue" with the College but not "negotiations", the latter requiring concessions, in his view. The next day, Perry issued a "final offer", proposing an added two contact hours to all unit faculty involved in securing preceptors. He also advised of the possibility of "other arrangements" for NUR 220 in the event that no agreement was reached. I infer that "other arrangements" means the assignment of adjunct faculty and that the Federation was aware of that meaning. On and before December 20, the Federation rejected the proposal and reiterated its demand of February 2002 for seven contact hours. Throughout the fall, College representative Perry told Federation representatives of the

urgency for a negotiated resolution on compensation for NUR 220 in order to "finalize" the 2003 spring semester schedule.

Considering these facts, I recommend that the College discharged its duty to negotiate in good faith and did not violate 5.4a(5) and (1) of the Act by assigning non-unit adjunct faculty to teach NUR 220 in the spring, 2003 semester. The Federation did not demand or offer to have unit personnel teach NUR 220 while a grievance over compensation was processed and the College was not obligated to propose that pendency, even though it had done so the previous year. The parties had reached an impasse, and the College was entitled to act unilaterally.

The Federation also alleges that the College "retaliated against employees for having engaged in protected activity by successfully utilizing the grievance procedure" and by "summarily reassigning full-time faculty members [Canonica, Murtha and Rider] during the spring 2003 semester to other teaching assignments with a resulting detrimental effect on their schedules, preparation time and other terms and conditions of employment." These actions allegedly violate 5.4a(3) of the Act.

Public employees and their organizations have a statutory right to avail themselves of negotiated grievance procedures. N.J.S.A. 34:13A-5.3. Retaliation for the exercise of that right violates the Act. N.J.S.A. 34:13A-5.4a(1) and (3). The standards for establishing whether an employer has violated those

subsections are set out in Bridgewater Tp., 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 unlawful motives 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.

The Federation has engaged in protected activity by filing a grievance in late July 2002 which was sustained in October and by

negotiating over compensation for NUR 220 with the College through 2002. The Federation also protested the College's direct dealing with unit faculty members in late December, 2002. The College was aware of all these activities.

I disagree that the Federation proved animus. The College engaged in good faith negotiations over compensation for NUR 220, pursuant to the decision of the Board of Trustees. Around the date the parties reached impasse, the College engaged in unlawful direct dealing with unit employees, the purpose of which was to employ them in NUR 220. Only after the Federation refused the College's "final offer" were adjunct faculty hired under the exigency of finalizing the spring 2003 semester schedule. I glean no animus from the College's decision not to employ unit faculty while the parties would process another grievance over compensation for NUR 220, as it had done the previous year. Nor does the evidence show that Burgess's distribution of course teaching assignments to Canonica, Murtha and Rider was motivated by animus. All three had to "make [teaching] load" and Burgess facilitated it. The Federation proffered no evidence indicating that Burgess could or should have selected more accommodating teaching schedules for them.

Accordingly, I recommend that all 5.4a(3) allegations be dismissed.

RECOMMENDATION

I recommend that the Commission ORDER:

A. That the College cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by this Act by dealing directly with unit employees Canonica, Murtha and Rider regarding mandatorily negotiable terms and conditions of employment, particularly compensation ("contact hours").

2. Interfering with, restraining or coercing employees in the exercise or rights guaranteed to them by this Act by interfering with and restraining unit employee Rider from calling upon her majority representative to negotiate terms and conditions of employment.

3. Interfering with, restraining or coercing employees in the exercise or rights guaranteed to them by this Act by interfering with and restraining unit employee Rider from filing a grievance contesting terms and conditions of employment.

4. Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment by dealing directly with unit employees.

B. That the College take this action:

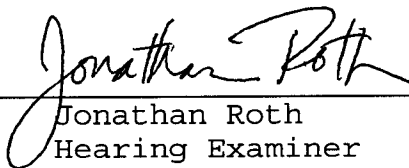
1. Negotiate in good faith exclusively with the Gloucester County College Federation of Teachers over mandatorily

negotiable terms and conditions of employment, particularly faculty compensation ("contact hours") for teaching courses.

2. Post in all places where notices to employees are customarily posted, copies of the attached notices marked as Appendix "A". Copies of such notice shall, after being signed by the Board'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 Chairman of the Commission within twenty (20) days of receipt what steps the Board has taken to comply herewith.

The remaining allegations in the Complaint are dismissed.


Jonathan Roth
Hearing Examiner

DATED: June 10, 2005
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by June 23, 2005.



RECOMMENDED



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 interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by this Act by dealing directly with unit employees Canonica, Murtha and Rider regarding mandatorily negotiable terms and conditions of employment, particularly compensation ("contact hours").

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise or rights guaranteed to them by this Act by interfering with and restraining unit employee Rider from calling upon her majority representative to negotiate terms and conditions of employment.

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise or rights guaranteed to them by this Act by interfering with and restraining unit employee Rider from filing a grievance contesting terms and conditions of employment.

WE WILL negotiate in good faith exclusively with the Gloucester County College Federation of Teachers over mandatorily negotiable terms and conditions of employment, particularly faculty compensation ("contact hours") for teaching courses.

Docket No. CO-H-2003-182

Gloucester County College
(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, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372