

H.E. No. 2012-10

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

In the Matter of

STATE OF NEW JERSEY (KEAN UNIVERSITY),

Respondent,

-and-

Docket No. CO-2008-384

COUNCIL OF NEW JERSEY STATE COLLEGE
LOCALS, AFT

Charging Party,

STATE OF NEW JERSEY (KEAN UNIVERSITY),

Respondent,

-and-

Docket No. CO-2009-158

COUNCIL OF NEW JERSEY STATE COLLEGE
LOCALS, AFT

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the Kean University violated the New Jersey Employer-Employee Relations Act by failing and refusing to negotiate with the Council of New Jersey State College Locals, AFT over the increase in office hours for faculty and Department Chairs. The Hearing Examiner, however, also found that the University did not violate the Act when it decided it needed to have increased faculty/Chair office hours to enhance student advisement time, because its decision was not in retaliation for the Council's exercise of protected conduct. The Hearing Examiner also found that the University did not violate the Act by the remarks made by President Farahi at the luncheon on May 6, 2008.

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 that 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,
Jeffrey S. Chiesa, Attorney General of New Jersey
(Geri Benedetto, Deputy Attorney General)

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

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On June 17 and November 5, 2008 the Council of New Jersey State College Locals, AFT, AFL-CIO (Charging Party, Council or the Kean Federation of Teachers (KFT)) filed unfair practice charges with the New Jersey Public Employment Relations

Commission (Commission), CO-2008-384 and CO-2009-158 respectively, alleging that the State of New Jersey, Kean University (State or University) violated subsections 5.4a(3) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). In CO-2008-384 the Charging Party claimed 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 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

^{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. (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.

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 memos requiring Department Chairpersons ("Chairs") to devote 20 hours per week as student academic support hours.

In CO-2009-158 the Charging Party claimed 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 requests to negotiate arguing that office hours for faculty and Chairs are not negotiable.

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). As a remedy in its two cases the Charging

Party 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.

At the pre-hearing conference, I granted Charging Party's motion to sequester witnesses over Respondent's objection. At the request of the parties, each side was granted two resource persons who could also be witnesses. Charging Party chose Council Representative Bennett Muraskin and KFT President James Castiglione. Respondent chose Employee Relations Coordinator Nicole Morgan from the Governor's Office of Employee Relations (OER) and Kean University Vice President of Operations Philip Connelly. These individuals were present throughout the hearing.

Hearings were held on April 14, 26, 28; June 24, 27; and July 18, 2011.^{2/} The University moved to dismiss the complaint at the conclusion of the Charging Party's case (2T208-2T213). The Charging Party opposed the Motion (2T213-2T217). The Motion

^{2/} The transcripts will be referred to as 1T (4/14/11); 2T (4/26/11); 3T (4/28/11); 4T (6/24/11); 5T (6/27/11); and 6T (7/18/11).

was denied (2T217-2T219). During the hearing I framed the issue in CO-2009-158 as:

Did the University unilaterally implement a change in a term and condition of employment and, upon demand, refuse to negotiate? (2T83).

After several mutual requests for extensions to file briefs, both parties filed post hearing briefs and reply briefs, the last of which was filed on or about December 20, 2011.

Based upon the entire record I make the following:

FINDINGS OF FACT

1. 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. (J-1)^{3/} The KFT is the local union representing the Council at Kean.

2. Prior to September 2004, faculty members were required to schedule three office hours per week on two or more teaching days (CP-37), and Department Chairpersons were required to schedule six office hours per week (6T45).

On May 14, 2003, Philip Connelly, then the University's Vice President for Administration and Finance, presented the KFT with proposals (CP-15; R-5), seeking to consult with the KFT over

^{3/} Exhibits are referred to as "C" for Commission; "J" for Joint; "CP" for Charging Party; and "R" for Respondent.

increasing student academic advisement with faculty by increasing office hours of both faculty and Department Chairpersons. 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 (CP-15). 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 (2T133-2T135, 2T186).

The KFT considered the office hours negotiable and responded there should be one office hour per week for each course that a faculty member was teaching which normally would mean four hours per week (2T136). The parties continued to discuss the issue at a meeting on June 10, 2003, but no agreement was reached and the KFT expected discussions to continue into the future (2T139).

On June 11, 2003, however, Connelly issued a memorandum to the KFT (CP-16), noting that following consultation with the KFT it was implementing an increase in the number of office hours faculty were required to offer each week and in the distribution of those hours during the day and week.

3. On July 1, 2003, 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 (4T75-4T80).

When his Presidency began in July 2003, Farahi became involved in the dispute over increasing faculty office hours (4T117). 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. Farahi apparently agreed not to implement the hours increase referred to in CP-16 (Connelly's earlier memorandum). He agreed, instead, to create a Task Force to study the issue and make a recommendation. Farahi did not agree he would implement the Task Force's recommendation, and he expressed that management had the prerogative to take action, but he supported the opportunity to work things out (2T141, 4T119-4T122).

On July 10, 2003, Casale sent Vice President Connelly a memorandum (CP-17) in response to CP-16. In CP-17 Casale noted that the initiative to implement the changes referred to in CP-16 were being suspended, and that a Task Force was being created to study the issue. Casale concluded CP-17 by reserving the KFT's right to negotiate over the hours issue if it found the Task Force recommendations unreasonable (2T142, 2T145). To preserve its rights the KFT filed an unfair practice charge over the hours issue in August 2003 (CO-2004-119) (2T145-2T146).

The Task Force issued its report in November 2003 (CP-18). 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 (2T148-2T149). Casale issued a memorandum to his membership with a copy of CP-18 on January 29, 2004 (CP-19). The KFT did not accept the Task Force recommendations set out in CP-18 (3T31). In CP-19, Casale advised his members there would be full negotiations over the issue before changes were implemented.

Office hours for faculty and chairpersons remained unchanged during the 2003 Fall semester and the 2004 Spring semester. After CP-19 was circulated the KFT renewed its negotiations position developed in early 2003 that linked the number of office hours to the number of courses a particular faculty member taught (2T152). About that same time (early 2004) the Provost had instructed the Chairpersons to implement the Task Force recommendations. But after discussions with Vice President Connelly, the Provost rescinded her directive and noted that an office hours policy would be announced on March 15, 2004 (CP-20; 2T154-2T155).

On March 11, 2004, the charge in CO-2004-119 was settled and withdrawn when the parties agreed to meet and consult regarding

the items listed in Connelly's original memorandum (CP-16) including faculty office hours (CP-21; 2T156-2T157, 3T33).

The agreement in CP-21 provided the following pertinent provisions:

I. Non-admission, Non-concession

The parties agree and acknowledge that this agreement shall not be construed as a concession or admission of wrongdoing or violation of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., or any other law, local, state or federal by the Board or its agents.

The parties agree and acknowledge that this agreement shall not be construed as a concession or admission by charging party that Board or its agents did not violate the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., or any other law, local, state or federal.

II. Enforcement

The parties agree and acknowledge they will mutually seek good faith compliance with the terms described herein, however, the parties further agree that enforcement proceedings regarding this agreement, if necessary, shall be brought before the Public Employment Relations Commission.

III. Reciprocal agreements

In resolution of the captioned matter(s), the parties hereby agree as follows:

1. The parties agree to meet, pursuant to Article XII section B subsection 5a., for purposes of consultation regarding the five changes to existing practices listed in the June 11, 2003 memorandum from the Vice President for Administration and Finance

(attached hereto). The consultation shall be conducted not later than May 14, 2004.

2. In consideration of the foregoing, CNJSL withdraws the captioned matter and withdraws its grievance and request for arbitration regarding the August 4, 2003 memorandum, docketed as docket no. 4238.

The parties' first meeting was held on April 21, 2004. It did not last long. Connelly merely noted that the University's proposal was the Task Force's recommendations (CP-18; 2T157-2T159). The following day, April 22, 2004, the KFT's Negotiations Chair, James Castiglione, sent a memorandum to Connelly concerning the April 21st meeting (CP-22). Castiglione explained the KFT did not consider the April 21st meeting as complying with the parties settlement agreement in CP-21, and requested other meetings. The parties met again on May 5 and 25 and June 10 and 22, 2004 (2T163). Castiglione believed the parties had reached an agreement on June 22 based upon the KFT's concept of one office hour for each course taught (2T164).

On June 24, 2004, Castiglione sent Connelly a memo as sample language for an agreement on office hours (CP-23). The memo noted that there was no expectation office hours would be used for advisement, and it linked the number of office hours to classes taught, generally four per week scheduled over three or more days.

On June 29, 2004, a June 28, 2004 memo from the Council of Deans to Department Chairs (CP-24) was circulated to the Chairs

and all faculty. That document noted that faculty would have a minimum of five office hours per week scheduled across at least three days, and Chairs would have eight hours a week to be scheduled over at least three days.

Castiglione and Connelly met and reviewed CP-24 on July 7, 2004. Connelly agreed to convey their discussion to Farahi (2T168). On July 19, 2004, Castiglione sent Connelly a memorandum summarizing the KFT's positions articulated at the July 7th meeting (CP-25; 2T169). Subsequently, KFT President Casale determined that since both parties had moved their positions and were now at impasse, the KFT accepted the University's office hours proposal (2T169-2T170).

On September 7, 2004, the Provost issued a memo entitled "Office Hours Policy" (R-6). It provided 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 (2T170, 3T34).

4. The University expected that the increase in faculty and Chair office hours would enhance student services and increase graduation rates (3T36). 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, and the University concluded

that five faculty office hours a week for students was not enough to make a material change in graduation rates (3T38). 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 (2T43-2T45).

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 (4T77-4T80, 4T82).

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 (4T82-4T83). I credit his testimony.

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 (3T47, 4T83). The University sought input into the schedule from various elements of the campus community (4T85-4T86). Meetings were held over a two-month period from February into March 2008 with various University constituencies (1T145-1T146). A proposed new academic schedule was presented to the Council of Deans in early March 2008 with implementation intended for the 2009 Spring semester (3T59).

5. 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 (R-8). 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 (3T93, 4T138). From those notes Farahi prepared the two "bulleted pages" attached to the first page of R-1. 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 (4T40). He envisioned that faculty needed to provide services to students in longer block of time (4T139-4T140).

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 (3T99). 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 (3T99-3T100). I credit his testimony.

Farahi attended the March 20 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 (CP-33). 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 (CP-33).

Connelly testified that the R-1 bulleted items were included in the topics and issues that had been discussed prior to March 20 as ways the University could improve the delivery of student services (3T96-3T97). He said the subjects covered by the bulleted items (which included the increase in faculty office hours quoted above) were discussed at the March 20 meeting and the bulleted items were distributed (3T97, 4T29, 4T35). Connelly wanted the Deans to review the bulleted items and advise him of any recommendations or changes they may have had (3T97). Connelly testified that when he became aware of CP-1, 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 (3T103).

Sanders, however, testified that the bulleted items were not presented to the Deans on March 20 (5T106), and former Dean Carole Shaffer-Koros only recalls the class schedule being distributed on March 20, not the bulleted items (6T15). Koros thought she first received R-1 with the bulleted items in May 2008 (6T15-6T16).

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 (6T19-6T20). But she did not recall a discussion over increasing faculty office hours (6T20).

While I cannot definitively resolve the dispute between Connelly and Sanders in particular and Koros over whether the bulleted items were distributed on March 20, it seems clear that faculty office hours were discussed to some extent that day. I cannot, however, find that the bulleted items were distributed to all the Deans that day. I find it likely, however, that a change in the amount of faculty office hours was discussed.

6. 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 (CP-26; 4T35-4T36). The changes to the Monday-Wednesday-Friday schedule and other issues were discussed, but there was no discussion over increasing faculty office hours (CP-26; 2T173, 4T39).

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 (CP-8), but they did not discuss changes in office hours (2T14-2T15). Kelly received CP-8 and said that the schedule was a managerial prerogative and not negotiable (2T58, 3T84-3T85). 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 (2T60-2T61).

Connelly did not give Kelly the bulleted items at that meeting (3T102, 4T41, 4T43; CP-32).

7. 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 (CP-1). CP-1 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 (1T31-1T34, 1T42).

Rodriguez explained that the University had been circulating a new scheduling proposal throughout the campus community and that meetings has 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 (1T76, 1T80-1T81). There was no discussion of increasing faculty office hours during that Senate meeting (1T44).

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 (R-9). On April 9, 2008, KFT representatives attended a University Planning Council meeting at which the new schedule was discussed (3T75). Later that day, the KFT held a general membership meeting at which the schedule changes were discussed (CP-7). Charles Kelly explained why scheduling changes were not terms and conditions of employment (2T12-2T13), and he did not indicate the KFT was attempting to negotiate any aspect of the academic schedule (2T61).

8. 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 (2T22, 2T62, 3T103). 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 (2T62). 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 (2T24, 2T62, 4T45).

Connelly asked Kelly for any other input in the schedule, and he (Kelly) responded "it's not negotiable" and "good luck" (3T104). 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 (2T24, 4T46, 5T33-5T35).

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.
[CP-9]

but he went on to make a class scheduling suggestion and a recommendation for the adoption of a four credit course curriculum (CP-9).

Kelly was not seeking to nor demanding to negotiate any aspect of the academic schedule (2T63). Connelly thought it significant that Kelly acknowledged the University had no obligation to negotiate the schedule issues (3T105).

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 (CP-2). 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 (4T59).

9. 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 (2T25, 3T107, 3T117, 5T15, 5T85).

Connelly, Sanders and Chowdhury testified that at the beginning of the meeting Connelly attempted to deliver a copy of the new schedule, CP-8, and the bulleted list to Kelly who was seated at a table (3T108, 3T110, 3T112, 4T49, 5T15-5T16, 5T85-5T87). The schedule, CP-8, was on top of the bulleted list (3T124, 4T50). All three witnesses testified that Kelly pulled away from the table gesturing or raising his hands and would not accept the documents (CP-32, CP-35; 3T114-3T115, 4T49-4T50, 5T15-5T17, 5T86-5T87). Connelly and Sanders both said Kelly avoided looking at the documents and made a remark about it being a managerial prerogative (3T114, 5T87). Sanders said he or Connelly separated the documents on the table but Kelly would not look at them (5T88).

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 (3T115, 4T51, 4T60). 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 (2T31-2T32).

Based upon the overwhelming testimony, I credit the University witnesses and find that Connelly attempted to give

Kelly the new schedule and bulleted list on May 1, but that Kelly refused to accept those documents. But I also find that on May 1, 2008, Kelly was unaware of the work hours information contained in the bulleted list, and Connelly did not verbally advise him of the content of the bulleted items at that time.

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 (CP-10; 2T27-2T30, 4T52). There was no discussion about increasing faculty office hours (2T30, 3T115-3T116, 4T51, 4T60). Later on May 1, 2008, the University approved the visitors parking lot for the demonstration to be held on May 5 (CP-3) rather than at the Clock Tower location (1T50-1T51).

On Friday, May 2, 2008, Connelly asked Chowdhury to send Kelly the new schedule, CP-8, and the bulleted list (3T119, 5T18-5T20). Chowdhury couldn't send them that day (5T20). 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" (3T121, 3T122, 5T21-5T23). 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 (2T37).

Chowdhury had the bulleted list e-mailed to Kelly on Tuesday, May 6 attached to the cover page marked as R-1. The cover page was created the morning of May 5 (CP-14, CP-15; 5T22-5T23).

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 (5T24). CP-14 shows that the cover page marked as R-1, attached to which were the bulleted items, was created on May 5 at 10:13 a.m.. R-1 was from Chowdhury to Kelly and begins with "Based on our conversation on 5/5/08." Since CP-14 proves when the cover page, R-1, was created, and since it was created in the morning of May 5 and refers to their conversation held on May 5, I must conclude that conversation between Chowdhury and Kelly was held before 10:13 a.m. on May 5 which was even earlier than Chowdhury had recalled (2T124). Consequently, I credit Chowdhury's testimony that he saw Kelly during the morning hours of May 5th and that is when they had the conversation they both testified about.

10. CP-2 had announced on April 29, 2008 that a demonstration (a "Rally") would be held on Monday, May 5, 2008 at the Clock Tower to protest the planned schedule changes. CP-3 issued on May 1 changed the Rally location 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 (CP-4; 1T44, 1T47-1T48, 2T35).

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 (2T36). 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 (1T55, 1T57, 1T61).

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" (1T55-1T56, 2T36). The Rally was peaceful but noisy (1T57-1T58). 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 (CP-34; 4T92, 5T90-5T92). Campus police asked Dr. Farahi if he wanted the protestors removed, but he

declined (CP-34; 4T92). A staff writer for the Star-Ledger attended the Rally (1T60).

11. On Tuesday, May 6, 2008 the Star-Ledger published an article about the Rally (CP-5). It was not critical of the University and 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 (4T96). Dr Farahi was the primary speaker. Since Farahi does many speaking events his office prepares a "talking points" document for him well in advance of an event so he can be prepared for his presentation. R-11 was his talking points document for the May 6th luncheon. Attached to those talking points was a list of the award recipients (4T98-4T100). R-11 reminded Farahi to discuss the research and scholarship programs, explain why he was making the awards, express the importance of collaboration among students and faculty and offer his congratulations.

When Farahi begins a speech he likes to "break the ice" with a remark before going into the content of his speech (4T107). On

May 6 he began by referring to the Rally the day before and said he was glad to see "friendly faces" and said "yesterday another group came under my window with a bullhorn and that was a little bit over the top," and he humorously asked if anyone had a bullhorn (CP-34; 4T107, 4T161-4T162). There was laughter from the crowd (4T108). He clarified that he thought the bullhorn, not the people were over the top (4T162). Farahi, in reference to the Rally, also noted people had the right to demonstrate, but he wished problems could be solved by talking (CP-34).

Farahi then began his address. He 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 (CP-34; 4T162-4T165).

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 (1T130). 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 (4T165-4T167). I credit Farahi. At that point on May 6, Kelly was not yet aware of the bulleted list which noted a need to increase office hours. The bulleted list did not literally say eight office hours per week, it said "blocks of two

hours or more each four days a week" which leaves open the exact amount of office hours that would be expected. Thus I believe Farahi's testimony was consistent with the bulleted list at that point. Halper's testimony on that point was more equivocal (1T130-1T131).

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 (CP-34; 1T123, 4T167-4T168). 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" (1T124). But on cross-examination he said "no one laughed", "everyone felt a little strange about the joke" and it was not "typical light banter" (1T146-1T147). I believe Halper testified "to the best of his recollection", but due to the inconsistency in his testimony I cannot conclude there was a negative reaction to Farahi's initial remarks.

At about that point in Farahi's presentation a copy or copies of CP-5, the Star-Ledger article, were passed around the room (1T125). Halper testified that in reference to the article Farahi called it negative publicity and that it shouldn't be

aired in public, a reference to the Rally (1T126). Halper also testified that Farahi said something like the Rally was not good for the University but that it (the Rally) had only a limited number of people and a handful of departments and their students (1T128, 1T130). I credit Halper's testimony on those points. There was no direct testimony by Farahi on those matters,

Farahi stated he was not angry when he spoke and did not make disparaging remarks (4T110; CP-34). When Halper was first asked about Farahi's demeanor he (Halper) said Farahi was "very solemn for sure, intense and maybe on the edge of anger", but "frustrated" (1T126). Later he (Halper) was asked how Farahi's demeanor changed as he continued to speak and Halper responded Farahi was more intense, more hand gestures, pacing, louder and he was angry, he was unequivocally angry (1T136-1T137).

While I generally found Farahi a reliable witness, and that Halper testified to the best of his recollection, not having witnessed Farahi's May 6th presentation, I cannot quantify or conclude whether Farahi was angry on May 6 given how subjective it is to determine such an emotion. I can conclude, however, that Farahi was loud, paced, appeared intense and frustrated while discussing issues Halper discussed.

12. 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 (1T67, 1T83, 1T101, 2T38, 2T42-2T43). 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 (1T65).

The KFT did not directly respond to Chowdhury's e-mail or seek a meeting to consult over the items in the bulleted list attached to R-1. It considered its unfair practice charge and interim relief application its response (2T92-2T93).

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 (CP-6; 1T66). 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 (R-12). Farahi particularly noted in R-12 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 (3T138-3T139). On

May 20 leaders of the KFT met to discuss whether R-1 and the bulleted list were issued 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 R-1 was created (CP-14) which showed R-1 was created the morning of May 5, 2008 (2T117-2T120). Young also explained that CP-14 included a screen shot of 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 (2T121-2T122, 2T125).

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 (R-13). Based on Sanders and Young's information I find the bulleted list was prepared well before May 5, 2008. In fact it was prepared before May 1, 2008 when Connelly attempted to show it to Kelly.

On May 27, 2008, the Council of Deans sent a memo to Farahi with recommendations regarding the scheduling policy and academic support hours (CP-11). A faculty member gave CP-11 to the KFT (2T46). CP-11 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 (CP-11; 2T47). 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. (CP-11; 2T47)

The KFT believed the above increase in hours was punitive and in retaliation for the KFT's participation in the May 5th Rally (2T48-2T49).

13. 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 (1T88-2T70). 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 (1T88-1T89, 2T71-2T72). 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 (R-2).

At a meeting between the University and KFT on June 10, 2008, the University advised the KFT that the Deans recommendation in CP-11 would be the University's official policy regarding the new academic schedule (3T142-3T143). 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 (R-10).

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.

14. 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 (CP-27; 2T177, 2T205). 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. [CP-28]

He then explained that since a charge had been filed over that issue he would hold the request pending the outcome of the litigation (CP-28; 2T178, 4T62-4T63). 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 (3T148-3T149). Connelly testified in pertinent part:

A. . . . And to negotiate something that's already been negotiated would have been redundant. So they're response for faculty advisement. And their full-time employed.

So, therefore, their only specific obligation is to teach 12 hours a week. There's a lot more time left that they're obligated to perform services. And the amount of time of advisement was within the time frame that we felt was appropriate.

Q. Now- -

A. So we didn't believe it was subject to negotiations. It was already negotiated that you must to do - do student advisement.

Q. What about all of that testimony that the Union had put forth about the 2003 and 2004 consultation and the task force and that whole course, what about that? Did that --

A. Well, they had already conceded that the hours were a matter of consultation, not negotiation, that was in one of the agreements we signed with the Union. [3T149]

Connelly specifically referred to Section III Paragraph No. 1 of CP-21 where in 2003 he believes the parties considered the office hours issue a matter of consultation, not negotiations (3T150).

In Section III Paragraph 1 of CP-21 the parties agreed to consult regarding a number of issues including office hours, but that was after agreeing to Section I 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.

Based upon the language in CP-21, I conclude that the Charging Party did not agree to consider office hours only a matter for consultation rather than negotiation.

15. 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 (CP-29; 2T179-2T180). On September 26, 2008, 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 (CP-30; 2T181). Connelly explained the University believed office hours were a matter for consultation, not negotiations (3T151-3T152).

16. The parties held a labor-management meeting on October 2, 2008 (2T73, 2T95). The KFT proposed an agenda for that meeting (R-3) which included a request for additional office hour compensation among other items (2T74-2T75). 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 (2T108, 3T154-3T155).

On October 7, 2008 Kelly e-mailed a letter of the same date to Connelly (CP-12) 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 (2T52-2T53).

Connelly responded to CP-12 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. (2T55-2T56, 4T65-4T67).

The University implemented eight weekly office hours for faculty and twenty such hours for Chairs in September 2008 (2T98).

17. The parties most recent collective agreement, J-1, did not contain any language regarding class schedules or faculty (and Chair) office hours.

ANALYSIS

CO-2008-384

The 5.4a(3) allegation in this case is that Farahi's remarks on May 6 and the University's implementation of increased office hours for faculty and chairpersons was in retaliation for the

KFT's organizing/participating in the Rally on May 5, 2008. In determining whether that allegation has been established the issues to be considered are: 1) when did the University formulate the bulleted list, (was it prepared/developed before or after the KFT announced the Rally in CP-2 on April 29, 2008) and was it in retaliation for the Rally and/or more accurately, did the University decide to increase office hours to improve advising opportunities, and 2) did Farahi's remarks, demeanor and the tone within which he delivered those remarks constitute retaliation?

In Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), the New Jersey Supreme Court set forth the standard for determining whether an employer's action violates 5.4a(3) of the Act. Under Bridgewater, no violation will be found unless the Charging Party has proven, 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 an illegal motive has been proven and if the employer has not presented 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 union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for the hearing examiner and Commission to resolve.

The decision on whether a Charging Party has proved hostility in such cases is based upon consideration of all the evidence, including that offered by the employer, as well as the credibility determinations and inferences drawn by the hearing examiner. Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115, 116 (¶18050 1987).

The KFT easily established the first two elements of the Bridgewater test. Rodriguez, Kelly and the KFT as an organization engaged in protected conduct by generally representing the interests of its members and particularly by planning for and participating in the Rally concerning the academic schedule. See, Orange Bd. of Ed., P.E.R.C. No 94-124,

20 NJPER 287 (¶25146 1994). Farahi, Connelly, Chowdhury and generally the University were aware of their protected conduct and particularly of their organizing and participating in the Rally on May 5, 2008. The focus of the charge, therefore, is on whether the University, Farahi, Connelly, etc. were hostile to the KFT because of the Rally.

The Charging Party based its case on one salient argument: that the University made the decision to increase office hours after learning of the KFT's intent to rally and demonstrate against the proposed class schedule. It, therefore, vigorously argued that the bulleted list (and the office hour increase) was not created in March or early to mid April, but only after the University learned of the KFT's intent to rally against the schedule changes.

The KFT relied upon a timing argument, a fair amount of circumstantial evidence and inferences it has drawn to prove its case. Essentially, the Charging Party expects me to conclude that the University increased the office hours in retaliation for a two-hour rally and that the hours increase had nothing to do with the University's need to enhance advising opportunities as one step in its effort to improve course selections and graduation results. I cannot reach that conclusion.

The Charging Party correctly argues that timing is an important factor in assessing motivation and may give rise to an

inference that an employer's action in close proximity to protected conduct was retaliation. See Warren Hills Reg. Bd. of Ed., P.E.R.C. No. 2005-26, 30 NJPER 439 (¶145 2004). It argues here that the protected conduct was the Rally and that the University's announcement of an increase in hours the day following the Rally was evidence of its retaliatory intent. In considering that argument I need to determine not just when the University prepared the bulleted list, but if and when it reached a conclusion that it needed to increase office hours to address course selection and graduation rates. It is not my responsibility to make this case for either side. It is my responsibility to follow the evidence to its logical conclusion. Consequently, where the evidence shows, as it does here, that the University reached the conclusion that it needed to increase faculty and Chair office hours to address its need for enhanced advising before April 29, 2008, the date the KFT first announced its plans for a Rally, the Charging Party's 5.4a(3) allegation regarding R-1 cannot be sustained.

The Charging Party relied to a large extent on the differences in Connelly's and Farahi's testimony and certifications, and Sanders notes regarding the bulleted list to make its case. It correctly cites those differences, particularly regarding the formulation of the bulleted list, and highlights Sanders notes from the March 20th meeting which refer

to far fewer office hours than those in the bulleted list. From that information, and the fact that Chowdhury wasn't aware of the bulleted list until much later, it draws several inferences to reach the conclusion in its post-hearing brief that:

. . . Kean University did not form the intent to increase office hours until after it learned of the Union's plan to protest the class schedule. [Charging Party post-hearing Brief at 64]

While certain facts might - with inferences - support that conclusion, I find a review of all the facts does not.

This record shows that faculty/Chair office hours was a major issue in 2003-2004. The Task Force recommended six faculty office hours per week. While the parties agreed to five, Farahi's testimony demonstrated that five hours were not enough to improve the University's graduation rate. By 2008 it became apparent to Farahi and others that significant changes were needed in both the class schedule and student academic support to improve graduation rates. Farahi testified that student advisement was the key to student success in scheduling and that larger blocks of advisement time needed to be made available to students (4T82). I credited that testimony, and there was no contrary evidence presented by the KFT.

With that evidence as a premise, it was obvious the University intended to seek more faculty/Chair office hours for advisement in 2008 and that conclusion was reached early in the

process in January or February 2008. In reaching that conclusion I am not finding that the University distributed the bulleted list at the meeting on March 20, nor am I able to determine when that list was actually created. But the list's creation is not the primary focus. The primary fact is that the University had decided well before the Rally that it needed to increase faculty office hours to provide more student advisement. I also, credited Connelly, Sanders and Chowdhury that Connelly attempted to provide a copy of the bulleted list to Kelly on May 1. Although Kelly did not accept the list at that time, having found the list existed on May 1, I infer it was created earlier than May 1. Could it have been created after the KFT's Rally notice CP-2, was issued on April 29, possibly, but that does not support a finding of hostility. An argument that the University formulated a need for increased office hours in response to the mere scheduling of a demonstration lacks viability.

While it settled for five faculty office hours in 2004, the University wanted six then, and it would not have sought fewer hours in 2008 as the Charging Party apparently argues relying on Sanders, March 20th notes which indicate only 4 1/2 office hours a week. I am not suggesting Sanders notes are wrong. That was only the minimum number of office hours, not an expression of the University's final position on the subject.

The Charging Party argued the hours increase was motivated by the Rally. Of course, it made that argument because that's the premise of its case, but that conclusion negates all the prior history and the relationship between student advisement and course selection. Considering the historical background, I find the motivation was educationally based. The University reached the decision it needed more office hours for enhanced advisement well before the KFT announced the demonstration over the schedule changes. Therefore, the R-1 element of the 5.4a(3) allegation must be dismissed.

The decision in Cumberland County College, P.E.R.C. No. 2011-65, 37 NJPER 74 (¶28 2011), is another example of an institution of higher learning making decisions based upon academic and educational needs which obviated a 5.4a(3) allegation. In Cumberland the College eliminated the position held by the union president. The union alleged a 5.4a(3) violation, but the Commission found that the College reorganized their academic departments to address educational concerns - increased enrollment - which resulted in enhancing the responsibilities formerly held by the union president and changed the nature of her job to the extent she was no longer fully qualified. The Cumberland decision is related to this case because here too, the University determined it needed to enhance its advisement responsibilities to address educational issues,

decreased enrollment and low graduation rates. It knew well in advance of the May 5th Rally that advisement hours had to be increased, and the Rally had no impact on that decision.

In reaching the conclusion in this case I am not suggesting the University's delay in sharing the bulleted list - or more particularly, its intent to have increased faculty/Chair office hours - with the KFT was acceptable practice or behavior. At the very least it was unhelpful and disruptive to the labor relations process. But that conduct is a more appropriate subject for the 5.4a(5) discussion in this consolidated case.

The second element of the 5.4a(3) case concerns Farahi's remarks at the luncheon on May 6, 2008. The KFT's theory of the case is that Farahi made these remarks and announced the office hour increase in retaliation for the Rally.

The Charging Party relies upon several Commission decisions to prove its case. It refers to Black Horse Pike Reg. Bd. Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981), the Commissions leading case on free speech rights to establish the point that an employer cannot convert its right to criticize into discipline or other adverse action. It cited from that decision as follows:

The Board may criticize employee representatives for their conduct. However, it cannot use its power as employer to convert that criticism into discipline or other adverse action against the individual as an employee when the conduct objected to is unrelated to that individual's performance as an employee. To permit this to occur

would be to condone conduct by an employer which would discourage employees from engaging in organizational activity. [7 NJPER at 504]

But the Commission also emphasized in that decision the degree to which a public employer could "criticize" an employee representative when it explained:

A public employer is within its rights to comment upon those activities or attitudes of an employee representative which it believes are inconsistent with good labor relations, which includes the effective delivery of governmental services, just as the employee representative has the right to criticize those actions of the employer which it believes are inconsistent with that goal. However, the employer must be careful to differentiate between the employee's status as the employee representative and the individuals coincidental status as an employee of that employer (citations omitted).

When an employee is engaged in protected activity the employee and the employer are equals advocating respective positions, one is not the subordinate of the other.

The obvious point the Commission made in Black Horse Pike was that free speech rights work for both management and labor and an employer may criticize and certainly complain about activity a union engaged in as long as it does not convert that criticism into adverse action.

Having already found that the University made the decision to increase office hours prior to May 1, 2008, unrelated to the Rally, I cannot find that Farahi's announcement about work hours

on May 6 constituted 5.4a(3) retaliation. It certainly was intemperate of Farahi to announce the hours increase in that setting prior to sharing its position with the KFT, but it was not discriminatory.

In Black Horse Pike the charging party alleged both a 5.4a(3) and 5.4a(1) violation of the Act. An employer independently violates subsection 5.4a(1) of the Act if its actions tend to interfere with an employer's statutory rights and lack a legitimate and substantial business justification. Orange Bd of Ed., P.E.R.C. No. 94-124, 20 NJPER 287 (¶25146 1994); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986). Proof of actual interference, intimidation, restraint, coercion or motive is unnecessary. The tendency to interfere is sufficient Mine Hill Tp.

The Commission found both a 5.4a(1) and a(3) violation in Black Horse Pike. The Charging Party also relied upon Township of Union, P.E.R.C. No. 2008-20, 33 NJPER 255 (¶95 2007); Orange Bd. Ed.; and Salem Bd. Ed. P.E.R.C. No. 84-153; 10 NJPER 439 (¶15196 1984) to support its position. In Orange the Commission found an independent 5.4a(1) violation when the school principal criticized the union leadership at a meeting. The criticism was over a rally or demonstration the union had conducted. The Commission also found a 5.4a(3) violation. Other 5.4a(1)

violations were found in Union Tp. and Salem which also included 5.4a(3) violations.

The Charging Party in this case argues that the Orange example, in particular, supports a finding in this case that Farahi's comments and tone at the May 6th luncheon violates the Act. But one significant difference between this case and Orange; Union Tp.; Salem and Black Horse Pike, is that in this case the Charging Party did not file for or make an independent 5.4a(1) allegation. While it's possible that Farahi's remarks on May 6 had the tendency to interfere with protected rights, the Commission in Ocean County College, P.E.R.C. No. 82-122, 8 NJPER 372 (¶13170 1982), made it clear that where a charging party does not contend that specific remarks constituted independent 5.4a(1) violations, doesn't amend their pleadings and relies upon the remarks only as evidence of anti-union animus (to support a 5.4a(3) allegation), the Commission will not go beyond the charging party's pleadings and theory of the case.

Here, the KFT did not allege that Farahi's remarks constituted 5.4a(1) conduct, rather, it relied on those remarks to support its contention that his presentation and remark about the hours increase constituted a 5.4a(3) allegation. Given the Commission's holding in Ocean County College, I will not consider whether Farahi's remarks violated 5.4a(1) of the Act.

In reviewing Farahi's remarks only in the context of a 5.4a(3) allegation, I find that his criticism of the Rally and his remark it may have created negative publicity; his reference to the high faculty salaries and that certain professors work only two days a week; his joke about certain faculty leaving campus before their students; and even his angry tone of voice all were well within his Black Horse Pike right to comment upon and/or criticize such things, none of which seem to rise to the 5.4a(3) level of discriminatory conduct.

Farahi's remarks about the increase in office hours may have had the tendency to interfere with protected rights under 5.4a(1), but in the 5.4a(3) context, since the decision to increase hours was not made in relationship to the exercise of protected conduct, those remarks did not violate the Act.

Based upon the above discussion I recommend that the complaint in CO-2008-384 be dismissed.

CO-2009-158

The 5.4a(5) allegation in this case generally is that the University failed to negotiate with the KFT over the increase in office hours. The University contends this was not an increase in hours, but a reorganization of work or a reallocation of the time spent in already existing job responsibilities.

Compensation for and the days and hours of work, the work week and work year are all fundamental mandatorily negotiable

terms and conditions of employment. Local 195, IFPTE v State, 88 N.J. 393 (1982); Woodstown-Pilesgrove Reg. Sch. Dist. Bd. Ed. v Woodstown-Pilesgrove Reg. Ed. Assn., 81 N.J. 582 (1980); Galloway Twp. Bd. Ed. v. Galloway Twp. Ed. Assn, 78 N.J. 1 (1978); Burlington Cty Coll. Fac. Assn. v Bd. of Trustees, 64 N.J. 10 (1973); Englewood Bd. Ed. v. Englewood Teachers Assn, 64 N.J. 1 (1973); Piscataway Twp. Bd. Ed. v. Piscataway Twp. Principals Ass'n, 164 N.J. Super. 98 (App. Div. 1978). An increase in workload is also generally negotiable. Burlington Cty Coll. Fac. Ass'n; In re Maywood Bd. Ed., 168 N.J. Super 45 (App. Div. 1979), certif. den 81 N.J. 292 (1979). Middletown Tp. Bd. Ed., P.E.R.C. No. 88-118, 14 NJPER 357 (¶19138 1988).

While a public employer has a prerogative to make additional work assignments such as handling additional cases, being assigned additional students or being assigned additional teaching periods which increases contact time with students, compensation for the additional work is negotiable. Watchung Hills Reg. Bd. Ed., P.E.R.C. No. 2007-39, 32 NJPER 399 (¶165 2006) (compensation for additional work time negotiable for guidance counselors assigned additional students); Willingboro Bd. Ed., P.E.R.C. No. 97-78, 23 NJPER 36 (¶28025 1996) (compensation for additional work time negotiable for child study team assigned additional cases); Rahway Bd.Ed., P.E.R.C. No. 88-

29, 13 NJPER 757 (¶18288 1987) (compensation arbitrable for teachers assigned additional teaching periods).

In this case the University unilaterally required three additional office hours per week for faculty (from 5 to 8 hours), and as many as twelve additional office hours per week for Chairs (from 8 to 20 hours). There was no contract language addressing that issue, consequently, absent clear and unequivocal contract language permitting the University to make such a change it appears to have been a unilateral change of a mandatorily negotiable term and condition of employment. Red Bank Reg. Ed. Ass'n v. Red Bank Reg. Bd. Ed. 78 N.J. 122, 140 (1978); Deptford Bd. Ed., P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980), aff'd App. Div. Dkt. No. A-1818-80T8 (5/24/82).

In Local 195, IFPTE the Supreme Court developed the standards for determining whether a subject is mandatorily negotiable.

[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 403-404]

In this case the University is not really arguing that negotiations over office hours would interfere with its prerogative to determine policy. Rather, it primarily argues the hours increase was merely a reallocation of time spent on already existing responsibilities. Absent a clear waiver, I reject that argument. Increased offer hours in this case seems no different than the employer actions in Watchung Hill, Willingboro and Rahway where the employers assigned additional work for which compensation was negotiable.

This case is similar to the result in UMDNJ, P.E.R.C. No. 2010-12, 35 NJPER 330 (¶113 2009). There the University unilaterally reduced, mid-contract, supplemental salaries for clinical work. The University apparently believed the union had waived its right to negotiate such salaries during the life of the agreement. The Commission, however, found that the Union had not clearly and unmistakably waived its right to negotiate regarding such salaries. It held that the University was obligated to negotiate - even mid-contract - over any effort to reduce those salaries. Comparing UMDNJ to this case, here the University claimed that it was just reallocating the faculty day and putting more emphasis on advisement time. By arguing, as Connelly and Chowdhury did, that the KFT had already negotiated

over student advisement, the University was arguing, in effect, that the KFT had waived the right to negotiate over that subject. But to the extent it negotiated and agreed to office hours over that subject in 2003, that did not mean the KFT waived the right to such negotiations again in 2008. While recognizing the University's need to deliver its services to its students, I see no difference, between a mandatory increase in office hours in this case, and the increase in additional work time and teaching periods in Watchung Hills, Willingboro and Rahway. Thus, here as in UMDNJ, the University was obligated to negotiate mid-contract over an increase in office hours.

While one could argue over whether the amount of advisement time faculty/Chairs needed to provide students was a prerogative, the office hours are a negotiable term and condition of employment. Nevertheless, it is clear that at some point in any given year the amount of office hours for advisement needed to be resolved within enough time to allow students to select courses based upon the course schedule the University had developed. There is a direct correlation between the creation of the schedule which is a prerogative, and the student's ability to select their schedules within enough time prior to any semester.

The 2003-2004 experience is the best example. Despite the University reserving the right to argue that office hours were not negotiable it did, at that time, in fact, "consult or

negotiate" with the KFT over office hours and reached an agreement within enough time to implement the change in the fall to assist student course selection for the spring semester. If no agreement had been reached would the University have been entitled to implement it's last best offer within enough time to benefit the students? I believe so. To be unable to do that would have interfered with the University's ability to deliver its governmental responsibility to the students as required by Local 195.

Using the 2003-2004 example as a model, therefore, I find the University had time between early 2008 when it decided it needed to provide enhanced student advisement, and September 2008 when students needed the enhanced advisement to select their courses for the Spring of 2009. The KFT had the right during that time to engage in negotiations over the amount of office hours for advisement and/or over additional compensation for increased hours. If no agreement had been reached by late August/early September 2008 the University could have implemented its last best offer. Compare, Readington Bd. Ed., P.E.R.C. No. 96-4, 21 NJPER 273 (¶26176 1995); Bayonne Bd. Ed., P.E.R.C. No. 91-3, 16 NJPER 433 (¶21184 1990); City of Jersey City, P.E.R.C. No. 77-58, 3 NJPER 122 (1977). The University's offer to consult with the KFT over office hours did not satisfy its negotiations obligation.

In UMDNJ, P.E.R.C. No. 2010-98, 36 NJPER 245 (¶90 2010), the Commission, in a supplemental decision to the earlier UMDNJ decision above, held that while UMDNJ was obligated to negotiate mid-contract over its intent to reduce supplemental salaries, it was not required to participate in mid-contract impasse procedures prior to unilaterally implementing mid-contract changes to non-contractual terms and conditions of employment. Since office hours for faculty and Chairs in this case are not contractual, the University here was obligated to negotiate over office hours mid-contract, but was entitled to implement changes without going through impasse procedures. Since the University did not fulfill its negotiations obligations, it must do that in good faith before implementing any future mid-contract changes.

Applying the above analysis to this case I recommend that the Commission find that the University violated 5.4a(5) of the Act by failing to negotiate over the office hours and/or compensation for the same throughout most of 2008. I do not, however, recommend that the faculty/Chair office hours be rolled back to 5 and 8 hours respectively as a result of this decision. On balance, to do so would create more harm to the process. Rather, I recommend that the University be ordered to negotiate with the KFT over office hours and/or compensation prospectively.

CONCLUSION OF LAW

1. The University violated 5.4a(5) of the Act by failing to negotiate with the Charging Party to impasse over an increase in office hours for faculty and Chairs.

2. The University did not violate 5.4a(3) of the Act by increasing office hours of faculty and Chairs. Its decision to increase such hours was not made in response to the exercise of protected conduct.

3. The University did not violate 5.4a(3) of the Act based upon remarks made by President Farahi at a luncheon on May 6, 2008.

RECOMMENDATION

I recommend that the Commission ORDER:

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:

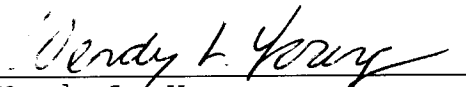
1. Negotiate prospectively and in good faith with the Charging Party on demand until agreement or impasse over the

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 Chairman 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.


Wendy L. Young
Hearing Examiner

DATED: May 18, 2012
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 May 29, 2012.



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.

Docket No. CO-2008-384 &
CO-2009-158

State of New Jersey
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, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372