

H.E. NO. 2016-22

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-2014-193

COUNCIL OF NEW JERSEY STATE
COLLEGE LOCAL, AFT

Charging Party.

SYNOPSIS

A Hearing Examiner denies a motion and cross motion for summary judgment. She determined that although mandating faculty training was a managerial prerogative, the employer had to negotiate upon demand over additional compensation. The Hearing Examiner determined, however, that there were material disputed facts as to whether the parties had already negotiated compensation for training and whether, as the University claimed, the compensation was covered by the parties collective agreement. These facts were most appropriately determined at a plenary hearing. She also determined that depending on what the parties already negotiated the union might have waived the right to negotiate compensation for the term of the parties most recent collective agreement and/or that the University was acting consistently with past practice in not paying additional compensation for the 2014 and 2015 training because the training was first instituted in 2012. The facts as to the past practice were also more appropriately determined after a plenary hearing.

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Appearances:

For the Respondent,
Robert Lougy, Acting Attorney General
(Nicole DeMuro, Deputy Attorney General)

For the Charging Party,
(Bennett Muraskin, Staff Representative)

**HEARING EXAMINER'S DECISION ON
MOTION AND CROSS MOTION FOR SUMMARY JUDGMENT**

On February 24, 2014 and September 4, 2014, the Council of New Jersey State College Locals, AFT (Charging Party or Council) filed an unfair practice charge and amended charge against NJ/State(Kean University) (Respondent or University). The charge alleges that on October 11, 2013, the University announced that it planned to schedule mandatory professional training and development between January 13 and 17, 2014, a time when full-time faculty are not normally required to be on campus. On

October 14, 2013 and subsequently in December 2013 and January 2014, the Council demanded negotiations for compensation for attendance at the training and submitted an economic proposal, but the University did not respond to these proposals maintaining that compensation for mandatory training was not being considered.

The amended charge asserts that when the parties met for negotiations on February 26, 2014, the University's chief negotiator expressed a willingness to enter into negotiations for compensation for training. The parties, however, did not get to this agenda item on that day or at their next meeting on March 18, 2014. At the parties' subsequent negotiations session on April 22, 2014, the Council again placed the training compensation issue on the agenda, but University Executive Vice-President Philip Connelly then took the position that compensation for January training was not negotiable because it is part of normal faculty duties. By its actions, the Council contends that the University has refused to negotiate in violation of 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act (Act). N.J.S.A. 34:13A-1 et seq.^{1/}

^{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; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and
(continued...)

On October 28, 2014, the Director of Unfair Practices issued a Complaint and Notice of Pre-Hearing and assigned the matter to me for hearing. On November 6, 2014, the Respondent filed its Answer. Respondent admits that it mandated the January training for faculty but asserts that it had previously held similar training sessions, and that pursuant to the parties' collective negotiations agreement, faculty may be required to be on campus during this period of time. Respondent also maintains that it hosts winter courses, and that faculty are required to be in attendance. It admits that the Charging Party demanded negotiations, but denies that compensation for the training is legally negotiable. Respondent concedes that the parties met for negotiations in March and April 2014 but is without knowledge as to whether the Charging Party put the issue of compensation for January training on its agenda. Finally, Respondent denies that Connelly took the position that the matter had already been negotiated as part of the parties' negotiations for the 2011-2015 collective negotiations agreement. Respondent also raises various affirmative defenses, including but not limited to, legitimate governmental and business justifications, waiver, managerial prerogative, lack of jurisdiction and that the

1/ (...continued)
conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

parties' collective agreement delineates faculty responsibilities which covers training for which faculty are already compensated.

On August 10, 2015, Respondent filed a motion for summary judgment together with a brief, certifications of Deputy Attorney General Nicole M. DeMuro and University Executive Vice-President Philip Connelly as well as exhibits. On September 10, 2015, Charging Party filed a cross motion for summary judgment together with a brief, exhibits and certification of Kean Federation of Teachers (KFT) President James Castiglione. On October 7, 2015, Respondent submitted a reply brief in support of its motion for summary judgment.

On October 23, 2015, the parties were notified that the motion for summary judgment was referred to the Hearing Examiner pursuant to N.J.A.C. 19:14-4.8(a). I have conducted an independent review of the parties' briefs and supporting documents submitted in this matter. The following material facts are not disputed by the parties. Based upon the record, I make the following:

FINDINGS OF FACT

1. The University and Council are, respectively, public employer and public employee representative within the meaning of the Act (Connelly Certification). The Council represents nine State colleges including Kean University and negotiates a global collective agreement with the State on behalf of the nine

colleges. The Kean Federation of Teachers (KFT) is a local within the Council and negotiates local agreements with the University.^{2/}

2. Philip Connelly is Executive Vice-President for Operations and Chief Negotiator for Kean University (Connelly Certification). Dr. James Castiglione is president of the KFT (Castiglione Certification).

3. On May 29, 2008, the University e-mailed the faculty that it had established training on student advisement to be conducted between the end of the spring semester and the beginning of the fall semester. The e-mail stated in pertinent part:

As many of you already know, one of the single-most important factors in the success of our students is effective advisement. In order to enhance our effectiveness in this critical effort, over the month of June, the Office of Academic Affairs will sponsor a series of advisement-training sessions for all full-time faculty members. Attendance at a session is required on the part of all full-time faculty in order to assure the maximum benefit to our students. [Connelly Certification, Exhibit B]

4. On June 19 and August 28, 2008, the KFT filed a grievance and amended grievance against the University asserting that the University could not require faculty members to attend

^{2/} Although there is no certification to support these facts, I take administrative notice as to the Council and KFT's relationship and representational responsibilities.

training after undergraduate commencement which it characterized as beyond the academic year and in contravention of the parties' collective agreement at Article XII C requiring that faculty responsibilities other than teaching be performed within the academic year (Connelly Certification, Exhibits C and D). The grievant requested that the University cease such assignments outside of the academic year and compensate those who were assigned such duties.

5. In August 2010, the parties entered into an interim settlement agreement regarding the issues raised by the grievance. Management agreed to make efforts to schedule the training during the academic year, but the parties recognized that management had the right to schedule training between the end of the spring semester and June 30 and to require faculty attendance, although the University agreed to take no action against faculty who did not attend.

The parties further agreed to reserve their respective positions regarding the grievance and hold the grievance in abeyance pending negotiations over the successor master agreement. Finally, the parties agreed that the interim settlement agreement would not constitute a precedent or be considered as evidence in any proceeding with respect to any other matter between the parties except to enforce the interim settlement agreement (Connelly Certification, Exhibit E).

6. After entering into the settlement, the University and Council executed a collective negotiations agreement (CNA) on October 3, 2012 which was effective from July 1, 2011 through June 30, 2015 (Connelly Certification, Exhibit A).

Article XII entitled "Faculty Responsibilities", section (C) entitled "Other Responsibilities", states in pertinent part:

1. Non-teaching duties include scholarly research and artistic activities; service through sharing their professional expertise both within and beyond the College University; and the mentoring and advisement of the students in their courses and programs. During the period of instruction faculty shall be present on campus as necessary to their professional responsibilities and shall be accessible to students, faculty and staff colleagues through whatever normal, electronic, telephonic or written modes they find most convenient during the

2. Faculty responsibilities which have been traditionally performed by the faculty and are reasonable and consistent with sound academic practice shall be continued consistent with previous practice . . . These responsibilities shall be performed within the academic year, provided that assignments outside the thirty-two (32) weeks of instruction referred to above shall not be made individually or collectively on an inequitable basis.

Article XXXVIII entitled "Maintenance and Implementation of Agreement" states in pertinent part:

A. This Agreement incorporates the entire understanding of the parties on all matters which were the subject of negotiations. During the term of this Agreement neither party shall be required to negotiate with

respect to any such matter except that proposed new rules or modification of existing rules, including local rules, governing working conditions shall be presented to the UNION and negotiated upon the request of the UNION as may be required pursuant to the New Jersey Public Employer-Employee Relations Act.

Appendix V of the parties' CNA sets out salary schedules for all employees covered by the CNA by increment steps and ranges. There is no compensation delineated for specific duties or responsibilities in either Appendix V or Article XII.

7. In 2011, the University was re-accredited by the Middle States Commission on Higher Education (Connelly Certification). In response to the re-accreditation report, the University's Board passed a resolution on June 27, 2011 directing the University President to establish an annual assessment program for every employee, an area identified as in critical need of improvement (Connelly Certification, Exhibit F).

8. As part of the annual assessment program, the University established mandatory biennial assessment training and by e-mail on November 23, 2011 notified all faculty that they would be required to attend training the week of January 3 through 6, 2012. The training was in the areas of "institutional assessment, assessment of student learning and other related topics". Attendance, it was stated, was mandatory (Connelly Certification, Exhibit G). The University acknowledges that

prior to 2012, faculty had not been required to attend training during winter break (University reply brief at page 4).

9. According to Castiglione, faculty are required to be on campus during the fall and spring semesters to perform traditional faculty responsibilities such as teaching, holding office hours and participating in faculty committees (Castiglione Certification). The period between winter and spring semesters is known as winter break. It is a time when faculty have not been required to be on campus. Indeed, the University never scheduled any activity on campus for faculty during winter break until January 2012, when the three-day-faculty training session was scheduled and held (Connelly Certification, Exhibit H). This training was also conducted in January 2013 (Connelly Certification, Exhibits I and J).

10. The University never received a request to negotiate either the January 2012 or January 2013 training. By way of explanation, according to Castiglione, although the 2012 and 2013 training sessions were required and stated to be mandatory, the KFT did not view them as "mandatory", since no attendance was taken and no discipline was imposed for failure to attend (Castiglione Certification).

11. In September 2013, the University's Board of Trustees issued a resolution directing the University president to establish and implement a bi-annual employee training program

(once each semester) for all full-time University employees and requiring that participation in the program was mandatory. The Board ordered the President to ensure full participation (Charging Party Exhibit A).

12. As a result of the resolution, on October 11, 2013 all University faculty and staff were notified to mark their calendars for January 13 through 17, 2014 from 9:00 a.m. to 5:00 p.m. for professional development and training. The notice emphasized that the announced training was mandatory (Charging Party Exhibit B; Connelly Certification, Exhibit K).

13. On October 14, 2013, Castiglione sent a letter to University President Dawood Farahi on behalf of the KFT demanding to negotiate over compensation for and impact of attendance at this training (Charging Party Exhibit C; Connelly Certification, Exhibit L). On December 8, 2014, Castiglione sent a second demand to negotiate (Charging Party Exhibit D). Connelly, on behalf of the University, took the position that the matter of compensation for training had already been negotiated as part of the parties' collective agreement (Connelly Certification).

The training took place on January 13 through 17, 2014 (Connelly Certification, Exhibit M).

14. On November 6, 2014, the University sent an e-mail to all faculty notifying them of mandatory attendance at training for professional development on January 5, 6, 12 through 14, 2015

(Connelly Certification, Exhibit N). Castiglione sent President Faarahi a letter on December 8, 2014 demanding to negotiate over compensation for and the impact of attendance at the training (Castiglione Certification, Exhibit D).

The training was held on those dates (Connelly Certification, Exhibit O).

15. The University refused to negotiate upon the KFT's demand regarding compensation and impact of the January 2014 and January 2015 training sessions, maintaining that it had already negotiated this issue in its collective negotiations agreement (Connelly Certification; Castiglione Certification).

16. According to Connelly, training is an on-going responsibility of all full-time faculty at the University and is integrally tied to the University's assessment requirements (Connelly Certification).

ANALYSIS

Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954).

N.J.A.C. 19:14-4.8(d) provides:

If it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and that the movant or

cross-movant is entitled to its requested relief as a matter of law, the motion or cross motion for summary judgment may be granted and the requested relief may be ordered.

In considering a motion for summary judgment, all inferences are drawn against the moving party and in favor of the party opposing the motion. No credibility determinations may be made, and the motion must be denied if material factual issues exist. N.J.A.C. 19:14-4.8(e); Brill; Judson. The summary judgment motion is not to be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 182 (App. Div. 1981); UMDNJ, P.E.R.C. No. 2006, 32 NJPER 12 (¶6 2006).

The issue in this case is whether the University had an obligation to negotiate upon demand over additional compensation for mandatory faculty training scheduled during winter break during what was previously unassigned duty-free time. The Council maintains that it is entitled to judgment as a matter of law. It concedes that the University had a prerogative to mandate training over winter break during what was previously unassigned duty free time but asserts, that it was obligated to negotiate upon the union's demand over additional compensation for the increased workload caused by the imposition of the new duty, namely the mandated winter training.

In a recent decision addressing whether a University violated a collective agreement by failing to negotiate with the

faculty union over compensation for on-line training, the Commission cited numerous decisions holding that a public employer has a non-negotiable prerogative to require employee training. See generally, State of New Jersey, William Paterson University, P.E.R.C. No. 2016-072, ___ NJPER __ (¶__2016) and the cases cited therein. The Commission next considered whether the University could be required to separately negotiate over compensation and wrote in pertinent part that:

. . . employees may negotiate over whether they will be compensated during training. [citations omitted] Negotiating over compensation for training . . . to the extent adjuncts are not already compensated for such non-teaching duties, would not impair the managerial prerogatives implicated here.

Here, the Charging Party does not challenge the University's right to mandate faculty training during the winter break, and the University concedes that mandated winter training was imposed for the first time on faculty in 2012. It also acknowledges refusing to negotiate the issue of additional compensation when the union demanded negotiations in 2014 and again in 2015. If these were the only undisputed facts before me, I would have to grant the Charging Party's cross motion.

The University, however, contends that no negotiations obligation was triggered because the parties already negotiated over compensation for training during the academic year when they negotiated the most recent collective agreement, specifically

referring to Article XII(C)(2) covering other faculty duties and Appendix V salary schedules. The University also asserts that negotiations took place when the parties entered into a 2010 settlement of a grievance regarding faculty training at the end of the academic year. Finally, the University argues that its refusal to negotiate over additional compensation does not violate 5.4a(1) and (5), because the Charging Party waived its right to negotiate by not demanding negotiations in 2012 when mandatory training during winter break was first instituted.

As to whether the parties had already negotiated, there are material disputed facts whether the parties recent negotiations encompassed mandated faculty training during winter break, specifically whether the training is covered by Article XII(C)(2) as other faculty duties and Appendix V salary schedules. The Charging Party denies the University's claim that the parties negotiated over training or that the collective agreement covers that training. It asserts that Article XXXVIII requires that any new term or condition of employment imposed during the term of the collective agreement be negotiated by the parties. This dispute requires a plenary hearing to determine what the parties agreed to during negotiations concerning faculty training and whether they intended to agree that Article XII(C)(2) and the

salary schedule in Appendix V covered compensation for mandatory faculty training.^{3/}

Next, as to the University's waiver argument, it reasons that by waiting until the mandatory winter training in 2014 and again in 2015 to demand negotiations over additional compensation, the Council waived its right to negotiate because it never demanded negotiations in 2012 or 2013 when mandatory training was first instituted over winter break. Waiver can be found where a subject has been thoroughly discussed and explored during negotiations and the majority representative consciously yielded its position. UMDNJ, P.E.R.C. No. 2010-12, 35 NJPER 330, 332 (¶113 2009). That fact is in dispute here and requires a plenary hearing. However, even where the issue is raised in negotiations and the union consciously yields its position, the union does not waive its right to negotiations forever, but might be bound for the term of the parties' collective agreement. In this instance, the parties' now expired collective agreement was in place for the 2014 and 2015 training sessions. UMDNJ.

3/ The University's reliance on State of New Jersey (Department of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984) is misplaced. The issue is not a matter of contract interpretation more appropriately before an arbitrator but raises a question of what the parties intended to negotiate and whether the University has a valid defense to refusing to negotiate over additional compensation for the winter training.

Waiver can also occur when an employer acts consistently with a past practice. UMDNJ at 332. However, the waiver based on past practice ends when the union's acquiescence ends. UMDNJ at 332, citing Middletown Tp., 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). Thus, if it can be shown that the training mandate for 2014 and 2015 was the same as for 2012 and 2013, the University would have acted consistent with its past practice, and the union might have waived its right to demand negotiations over compensation for the term of the parties' now expired collective agreement. See Middletown Tp., (past practices generally binding for life of collective negotiations agreement; party seeking to modify practice must wait until negotiations for successor agreement to negotiate change to practice); Rutgers, the State University of New Jersey, P.E.R.C. No. 2016-31, 42 NJPER 255 (¶72 2015) (past practice binding for term of collective agreement where union never demanded negotiations over cost of obtaining medical certificate to verify sick leave, collective agreement was silent on issue, and employer acted consistently on numerous occasions). Contrast Piscataway Tp. Bd. of Ed., P.E.R.C. No. 2016-3, 42 NJPER 95 (¶26 2015) (Commission distinguished claim past practice contractually binding for life of collective agreement as opposed to claim that existing

employment condition could not be changed without prior negotiation).

However, if the 2014 and 2015 were new terms and conditions of employment, as the union contends, because for the first time there was a Board of Trustee's resolution mandating the training and attendance was taken, then the failure to request negotiations in the past would not bar a present right to negotiate upon demand. These facts are material and also disputed by the parties and require a plenary hearing.^{4/}

^{4/} As part of its waiver argument, the University asserts that an interim settlement agreement entered into by the parties in 2010 pertaining to faculty training at the end of the academic year put the union on notice that mandatory faculty training could occur anytime during the academic year. I agree with the union that the 2010 grievance settlement agreement is irrelevant because that agreement pertained to when training could be given during the academic year and what constitutes the academic year. That issue is not present here. The union has not challenged the University's decision to schedule training during the winter break, only its refusal to negotiate over additional compensation.

Based on the foregoing, I deny the motion and cross motion for summary judgment.^{5/}

/s/ Wendy L. Young
Wendy L. Young
Hearing Examiner

DATED: May 16, 2016
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-4.8(f) this ruling may only be appealed to the Commission by special permission in accordance with N.J.A.C. 19:14-4.6.

Any request for special permission to appeal is due by May 23, 2016.

^{5/} In its brief in support of its cross motion for summary judgment and in opposition to the University's motion, Charging Party writes "Based on the foregoing, the Union respectfully requests that its motion in opposition to the State's motion for summary judgment be granted, and the case proceed to plenary hearing." It is unclear whether the Union is requesting summary judgment in its favor or is simply arguing the merits of denying the University's motion. In either instance, I agree that a plenary hearing is appropriate.