

H.E. NO. 2021-1

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-2018-260

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

Charging Party.

SYNOPSIS

A Hearing Examiner recommends the Commission dismiss a complaint based upon an unfair practice charge filed by the Council of New Jersey State College Locals, AFT, AFL-CIO (Council) against the State of New Jersey, Kean University (University). The charge alleged the University violated Section 5.4a(3) of the New Jersey Employer-Employee Relations Act by increasing faculty office hours to 12 per week in retaliation for the Council's demands to negotiate a prior office hour increase of 5 to 8 hours per week. The Hearing Examiner found that the Council failed to satisfy its burden of proving that the increase to 12 office hours was motivated by hostility towards the Council's negotiations demands over the 5 to 8 office hour increase.

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,
Gurbir S. Grewal, Attorney General
(Jana R. DiCosmo, Deputy Attorney General)

For the Charging Party,
(Bruce Howard, Staff Representative)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On May 9, 2018, the Council of New Jersey State College Locals, AFT, AFL-CIO (Charging Party or Council) filed an unfair practice charge with the New Jersey Public Employment Relations Commission (Commission) alleging that the State of New Jersey, Kean University (Respondent or University) violated subsections 5.4a(1), (3), and (5)^{1/} of the New Jersey Employer-Employee

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in
(continued...)"

Relations Act^{2/}, N.J.S.A. 34:13A-1 et seq. (Act). The Charging Party alleges that on November 13, 2017, the University announced a unilateral increase in required faculty office hours from eight (8) hours to twelve (12) hours per week ("12 hour requirement") effective September 2018, and refused to negotiate in good faith with the Council over the increase in office hours and over compensation for the increase. The Charging Party also alleges that the University's 12 hour requirement was in retaliation for the Council's demand on October 9 and 10, 2017, to negotiate over a prior increase in office hours of 5 to 8 hours per week, which was the subject of the Commission's decision in State of New Jersey (Kean University), P.E.R.C. No. 2013-64, 39 NJPER 449 (¶143 2013) (Kean I).

On July 5, 2018, the Charging Party filed an application for interim relief. The Commission designee concluded that a final Commission decision on the merits would likely conclude that the University violated the Act's prohibition against unilateral

1/ (...continued)
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."

2/ The (a)(1) allegation was pled and litigated as derivative of the alleged (a)(3) and (5) claims.

changes under Section 5.4a(5) and derivatively, a(1) of the Act, and that there would be irreparable harm to the negotiations process if the University increased its office hours to twelve given the on-going dispute between the parties over the prior office hours increase discussed in Kean I. On August 7, 2018, the application for interim relief was granted, and the University was restrained from implementing the 12 hour requirement. State of New Jersey (Kean University), I.R. No. 2019-2, 45 NJPER 61 (¶17 2018).

On January 10, 2019, a Complaint and Notice of Pre-Hearing issued. The University filed its Answer on January 29, 2019, denying the allegations and asserting it acted for legitimate policy reasons. The Charging Party withdrew its (a)(1) and(5) claims.

On September 19 and 25, 2019, I conducted a hearing at which the parties examined witnesses and introduced exhibits. Post-hearing briefs were filed by the Council and University on November 15, 2019. Upon the record,^{3/} I make the following:

FINDINGS OF FACT

1. Respondent is a public employer within the meaning of the

^{3/} Abbreviations used in this decision are as follows: "1T" for the September 19 hearing's transcript; "2T" for the September 25 hearing's transcript; "C" for the Commission exhibits; "CP" for Charging Party's exhibits; and "R" for Respondent's exhibits.

Act. (C-1, C-2). The Council is the exclusive majority representative of faculty, librarians and professional staff at the University and eight other state colleges. (C-1, C-2; 1T34-35). Kean Federation of Teachers (KFT) represents the University's local negotiations unit of faculty, librarians and professional staff. (C-1).

2. The University and Council are parties to a collective negotiations agreement (Agreement) effective from July 1, 2015 through July 30, 2019. (C-1, C-2).

3. Unless otherwise noted, the following individuals are representatives of the University: Dawood Farahi, University President; and Kenneth Green, Chief Labor Counsel. Unless otherwise noted, the following individuals are representatives of the Council: KFT President Dr. James Castiglione; KFT Vice President Dr. Patrick McManimon; Council President Dr. Tim Haresign and Staff Representative Bennett Muraskin. (1T39, 41, 90, 92, 110).

4. Castiglione is employed as an associate professor of physics by the University and has been president of KFT since 2008. (1T41-42). McManimon is an assistant professor of criminal justice at the University and serves as the head of a KFT local negotiations committee. (1T92).

5. I take administrative notice of the following pertinent

findings of fact and conclusions of law adopted by the Commission in Kean I. In Kean I, the Council filed an unfair practice charge contesting a decision by the University to increase faculty office hours from 5 to 8 hours per week. Kean University, P.E.R.C. No. 2013-64, 39 NJPER 449 (¶143 2013) (C-1). In that case, the Council claimed that the University violated the Act by failing to negotiate with it before announcing on May 6, 2008, that faculty would be required to hold eight office hours per week and chairpersons twenty office hours per week effective September 2008, and that the increase was in retaliation for the KFT's role in organizing a student/faculty demonstration protesting academic scheduling changes on May 5, 2008. Before September 2004, faculty members were required to hold three office hours per week, while department chairpersons were required to hold six per week. In May 2003, the then-Vice President for Administration and Finance sought to increase student academic advisement by increasing faculty office hours, and proposed to the KFT weekly office hour requirements of 6-9 for faculty and 14 for department chairs for implementation in the Spring 2004 semester. The parties entered into discussions over the proposed increase but no agreement was reached.

University President Farahi began his tenure on July 1, 2003, and soon became involved in the on-going office hours dispute. He thought one way to improve the University's standing

would be to have better student advisement, and he supported the creation of a task force to study the office hour dispute and make a recommendation. To preserve its rights, the Charging Party filed an unfair practice charge in August 2003, Docket Number CO-2004-119.

In November 2003, that task force recommended a minimum of six hours per week for faculty and nine hours for department chairpersons. The Council did not accept the recommendations. On March 11, 2004, the parties settled the charge in CO-2004-119 by agreeing to meet and consult regarding the increase. After the parties met on multiple occasions, the Charging Party ultimately accepted the University's proposal, which required a minimum of five office hours for faculty and eight office hours for chairs effective for the Fall 2004 semester.

When significant improvements in graduation rates did not occur following this change, the University concluded that it needed to offer students additional office hours. In credited testimony, Farahi explained that academic advisement was crucial to student achievement and that such advisement needed to be in larger blocks of time. Therefore, in early January or February 2008, the University decided effective the Fall 2008 semester, faculty would be required to hold 8 office hours per week and chairpersons would hold 20 office hours per week, in an effort to improve student advisement. The Council filed unfair practice

charges on June 17 and November 5, 2008, alleging retaliation and refusal to negotiate claims. The Charging Party also filed for interim relief on June 17, 2008, and formally requested negotiations on August 19, 2008. The application for interim relief was denied on August 28, 2008.

On May 18, 2012, a Hearing Examiner concluded that the University did not act in retaliation for the May 2008 rally, but instead sought to increase student advisement time, although it was required to negotiate over the increase and/or compensation for the increase in office hours. State of New Jersey (Kean University), H.E. No. 2012-10, 39 NJPER 5 (¶2 2012). The Commission adopted the Hearing Examiner's findings of fact and conclusions of law on March 21, 2013. Kean I. In its decision, the Commission explained:

It is undisputed that the issue of increased office hours has been a part of the University's plan to increase graduation rates since 2003. While part of the reason for the increase may have been related to anti-union animus, the substantial and motivating factor was clearly to increase student advisement time for improved graduation rates. We cannot decide this issue in the vacuum of 2008 while ignoring the arching trend of the University's major initiatives since 2003. [Kean I., P.E.R.C. No. 2013-64, pp. 28-29 of Slip Opinion].

6. At the hearing in this case, Castiglione testified that the union unsuccessfully attempted to negotiate with the University pursuant to Kean I before it made "one last demand" to

negotiate in October 2017. (1T43). This demand to negotiate was memorialized in a letter dated October 9, 2017, to Farahi from Castiglione, which included an attachment entitled "Faculty Office Hours Proposal: October 2017." (CP-4; 1T43-45). The attachment constituted the then-current KFT proposal to Kean for the 5 to 8 hour increase that was the subject of Kean I. (CP-4; 1T45-45).^{4/} Castiglione also sent a copy to Green as well as Haresign and other union representatives. (CP-4). Although the heading of Castiglione's proposal only referenced faculty office hours, the specifics of the proposal addressed office hours for both faculty and chairpersons. (CP-4).

7. The October 9 letter from Castiglione was prompted by ongoing discussions regarding faculty job descriptions, which implicated the office hours dispute. Green received a separate letter dated October 9, 2017 from Haresign regarding a proposed faculty job description that Green had proposed by email on March 15, 2017. (R-1; 1T107-110). In his letter, Haresign complained that the faculty job description imposes additional job duties,

^{4/} Among other items, the October 2017 proposal sought the following: three (3) teaching credit hours of compensation per semester for faculty and proportional compensation increases for chairpersons who were impacted by the increase; reduction of office hours from eight (8) to three (3) per week during the semester for faculty and from twenty (20) to five (5) for chairpersons; faculty would retain full discretion in determining the increments of time; and an additional office hour per week during the student registration period.

such as the eight office hours requirement and attendance at professional development days, and that the KFT sought additional compensation for these duties. (R-1). Haresign advised Green that "[t]o begin the process of negotiations, the Local Union will provide a proposal on office hours to be followed by additional proposals on other issues encumbered by the job description document." (R-1; 1T107-110). Castiglione was copied on this communication.

8. Although the specific timing of the union's activity before October 2017 is unclear, it is undisputed that at some point during the four and a half years following the Kean I decision, the Charging Party sought negotiations over the increase for at least faculty members. Based on the record, I find that the Council sought negotiations at some point regarding faculty office hours before Green's arrival in December 2014, and then again shortly after his arrival in early 2015.

9. Council representatives attended a local negotiations session on October 10, 2017. (R-2; 1T120-122). Green, Muraskin and McManimon were in attendance. (1T120-122; R-2). At the session, McManimon said "here is the faculty office hours proposal attached to a letter sent to Farahi" and the notes contain a reference to an attachment. (R-2). Green testified that he understood McManimon to be referring to Castiglione's October 9, 2017 letter to Farahi that included the most recent

office hours proposal. (1T122) Green subsequently testified that he had no specific recollection of receiving the October 9, 2017 letter to Farahi but probably opened it the date he received it or within a few days of receiving it. (1T130). Since Green attended the October 10, 2017 negotiations session, based on the minutes I find that Green received a physical copy of the proposal attached to the October 9 letter at the October 10 meeting, and therefore knew of the Council's renewed negotiations efforts over the prior office hours increase at that time.

10. The parties held another negotiations session on October 24, 2017. (R-5; 1T131-135). According to meeting minutes for the session, Green, Muraskin and McManimon attended this meeting. On the last page of the meeting minutes there appears a heading that reads "Office Hours," and below that heading there is a bullet point that reads "Attorney's Response to Office Hours (see attached)." However, the exhibit does not include the attachment. (1T134). It is unclear from the record the significance of that bullet point, and whether the office hours dispute from Kean I was otherwise discussed at this meeting.

That same day, Green also communicated with McManimon, Castiglione and Muraskin by email regarding the Faculty Job Description dispute. (R-4). In the email, Green thanks them for reminding him that he had not yet responded to Haresign's October 9, 2017 letter regarding the faculty job descriptions. (R-4;

1T128-130). Green asks whether he should respond to Haresign directly, or whether he should direct his response to McManimon, Castiglione and Muraskin. (R-4; T129). Green does not expressly reference Castiglione's October 9 letter regarding office hours. (R-4).

11. The parties also participated in regular Leadership Council meetings. (1T55). The Leadership Council includes campus leaders from both labor and non-labor organizations who attempt to "try to get issues at the university addressed, exchange information, but also to try to resolve problems, and generally make the university run more smoothly." (1T55). During the 2017-2018 academic year, Leadership Council meetings were scheduled to occur every month and those dates were memorialized in an email to its participants at the start of that year. (R-3). One of those meetings was scheduled for October 26, 2017. (CP-8).

Shortly before the October 26 meeting, Castiglione sent an email seeking eight enumerated items to be placed on the agenda for the meeting. (CP-8; R-3; 1T56, 123-127). The third and fourth items he listed were "contemplated increases in student advising hours" and "plans for hiring certified academic advisors" respectively. (R-4). Castiglione added the third and fourth items because he believed the University was seeking to increase student advisement duties. (1T56). He believed that during the summer of 2017, the University sought to hire adjuncts

in the summer specifically to provide student advisement and referenced a document that set forth a minimum of 20 hours of student advisement at an hourly rate of \$55.00 per hour. (1T56-57). Castiglione concluded that "from this document it was clear that the University was making student advisement a bigger priority." (1T56-57). Castiglione further explained that KFT "heard discussion and rumors on campus" that the University was considering requiring faculty to have two thirty-minute advisement meetings with their students each semester. (1T 56-57). Castiglione also wanted to put the issue of certified academic advisors on the agenda because the "University was placing greater importance on sound advisement" and he thought the University therefore should create these full-time positions since students may have health, family or financial aid issues that a faculty member could not address. (1T60-61).

At the October 26 meeting, both of the issues Castiglione identified were discussed. (CP-8). Regarding the student advisement issue, Castiglione testified that the University Vice President Felice Vazquez told him that the University had data indicating that students were delaying their graduation because they were taking incorrect courses. (CP-8; 1T56-58). He memorialized this assertion in his hand-written notes on the meeting minutes, which provide "Felice has data on students delaying grad b/c taking the wrong courses." (CP-8). The sixth

item on the agenda addressed Castiglione's suggestion of hiring certified academic advisors. (CP-8; 1T59-61). Castiglione testified that in response to his suggestion of hiring certified academic advisors, he was told that Kean uses the "faculty advisement model." (CP-8; 1T60-61). He also memorialized this response in a hand-written note on the meeting minutes. (CP-8; 1T60-61) The specific issue of office hours was not addressed at this meeting. (1T61).

I credit Castiglione's testimony and find the Council was aware in October 2017 that the University was seeking to increase student academic advisement to address concerns by University administrators over graduation rates.

12. Green has been Chief Labor Counsel for the University since December 2014. (1T102). Green testified that over a week before the Charging Party's October 9, 2017 demand to negotiate the 5 to 8 office hour increase, he had a meeting with Farahi on September 28, 2017, in which Farahi advised that faculty office hours would increase to 12 per week beginning in the Fall of 2018. (1T182-183, 189-190). Green conceded that he did not keep minutes or otherwise reduce this directive to writing, and that Farahi did not give him any written documents regarding his decision. (1T189-191). However, Green also credibly explained that he does not create written memorializations of his meetings

with Farahi, and that he does not receive his assignments or directives in writing. (1T190-191). Green testified that the University sought an increase of 4 more hours because it wanted to make sure there were sufficient hours available to students for faculty advice during peak periods, such as registration and the weeks before exams. (1T61-62). He further explained that during non-peak times faculty could use those hours to complete their regular work duties. (1T61-62).

Green testified that he knew he had a meeting on September 28, 2017 with President Farahi because he has access to a calendar that showed a meeting date with President Farahi of September 28, and that he never had an unscheduled meeting with Farahi during his entire time working for the University. (1T190-191). He testified that he recalled knowing about the increase weeks before the October 26 Leadership Council meeting, and that the only meeting he had with Farahi prior to that Leadership Council meeting was the one that occurred on September 28, 2017. (1T190-191). Although Green never attended Leadership Council meetings, he was aware of the October 26 meeting because Vazquez forwarded Castiglione's email to him that identified items regarding student advisement and academic advisors for the agenda. (R-3; 1T124, 126, 195). Green testified that he was forwarded the email chain because Castiglione's requested agenda items pertained to advisement. (1T124). Green could not identify

with certainty the particular date he was forwarded the email, but testified that he knew he had a meeting with Vazquez before October 26 and that he received it before then, most likely October 23. (1T126-127). Green testified that he discussed office hours with Vazquez when she forwarded Castiglione's email regarding agenda items for the October 26 Council meeting because that was an issue he was working on at the time. (1T192-193). Green was thoroughly cross-examined regarding why he would view Castiglione's Leadership Council email to be related to the office hours dispute. (1T191-193). Green explained that Castiglione's reference in his email to "contemplated increase for student advisement hours" was viewed as a reference to office hours, and that from the University's perspective the two issues are the same. (1T192-193).

I credit Green's testimony that during a September 28, 2017 meeting, Farahi informed him that the University would be increasing faculty office hours to twelve per week effective September 2018. Green's testimony on the September 28th meeting was not rebutted by any witness or documentary evidence and it is plausible that Green would meet with Farahi about assignments and not reduce to writing every directive or discussion he had with Farahi.

I further credit Green's un-rebutted testimony that, during October 2017, he was aware of the University's concerns about the

adequacy of student advisement by Vazquez and Farahi and the 12 hour requirement was designed to address those concerns.

13. Green did not conduct a study to examine the impact of the 8 office hours requirement on graduation rates. (1T198-199). Nor did the University evaluate the office hours policies at other state colleges. (1T201). Green explained that the University has long-viewed faculty advisement and student contact as key components to students' success, especially for the particular student demographic that the University primarily serves, but conceded there was no specific study that he was aware of that would show a direct correlation. (1T185, 199-205). He explained that office hours were one of President Farahi's initiatives in particular, and that graduation rates were considered in the determination to increase office hours. (2T40-41, 56). He conceded that while he could not establish a causal relationship, Green testified that when office hours increased there was a measurable increase in graduation rates at Kean. (2T41-42). Green stated that when Farahi started at the University, graduation rates within six years were in the low forties, but then increased to over 50% before decreasing slightly. (2T42). He defended the decision-making approach taken by the University as ultimately a "policy call" reflecting its judgment that one way to help students succeed is by increasing the number of opportunities they have to meet with their

professors by providing access. (2T55-56, 58). Green denied that the he or the University's representatives, including the President, had a retaliatory motive in further increasing office hours. (1T185-187).

Green testified that the decision had also been based on anecdotal information from students' experiences. (2T54-55). Green testified that he mentors students, and has advised students when they have been unable to get assistance or guidance from professors. (2T56-57). He spoke to about 20 students regarding office hours and the difficulty students had in meeting with professors. (2T56-57). Green referenced an incident involving one of his family members who attends the University. (2T57-58). He testified that his family member was working full-time with a young child and was told she had the wrong hours when she sought tutoring help from a faculty member. (2T57-60).

In un-rebutted testimony, Castiglione asserted that the faculty office hours required by the University are more than those required at other state colleges. (1T70-72). Green conceded that other state colleges may serve a similar demographic of students with less office hours. (1T200-202). However, he explained that the University recognizes that there are different approaches that may be taken to achieve student success and that the University viewed "a student-centric approach, with many touch points with the students" to be the

right approach. (1T202-203). From the University's perspective, Green explained that office hours help students because it increases their opportunity to access and obtain support from their professors. (2T55-59). While advisement can occur outside of office hours, it also can occur during office hours (1T97; 2T34-35).

I find Green's testimony about the purpose and rationale for the 12 hour requirement credible and do not see Castiglione's testimony on the faculty office hours requirements at other state colleges and universities as discrediting Green's testimony that the University's objective was to increase office hours and student academic advisement and improve graduation rates.

14. On November 13, 2017, Green first responded to Haresign's October 9, 2017 communication regarding faculty job descriptions in an email at 11:30a.m. to Haresign with a copy to Muraskin and McManimon. (R-7). Green responded to each of the six enumerated comments that Haresign had outlined in his October 9 communication. In response to Haresign's fifth comment, which pertained to the Council's reservation of rights to negotiate additional compensation for issues like professional development day attendance and the eight office hours requirement, Green wrote "noted." (R-7; 1T143-144). He advised that he did not view the job description itself as negotiable, although he conceded it may reference separate negotiable issues. (R-7). Green advised

that the University would stay the implementation of the job description pending discussions with the Council, and he explained that he included Castiglione on the email to invite discussion that he hoped would lead to an amicable resolution with the Council.

Green then sent a second email to McManimon, Muraskin and Haresign at 11:46a.m. with the subject "Letter Dated October 9, 2017: Demand for Negotiations Regarding Office Hours." (1T47-49; CP-5; R-8). In the email, Green rejected the demand for negotiations over the office hours increase. Green explained that after he arrived at the University, he engaged in negotiations with KFT in early 2015 and those negotiations produced informal proposals that had been exchanged and reviewed by both sides. (CP-5; R-8). Green claimed that those proposals were unsuccessful and that no further proposals or discussions took place since then. (CP-5; R-8). He then identified four separate justifications for rejecting the demand. (CP-5; R-8) First, he claimed that the impact of the increase had been negotiated. Second, Green claimed that the Union waived its right to negotiate due to inactivity on the issue for over two years. Third, Green claimed that the Charging Party never presented evidence of impact due to the increase in office hours. Fourth, Green claimed that "[t]he matter is moot and/or the Union will be permitted to address concerns regarding management's re-

prioritizing of faculty workload in response to the University re-prioritizing faculty workload communication that will be forthcoming." (CP-5; R-8). Green did not elaborate on his reference to the "re-prioritizing of faculty workload" in this email, but I infer the forthcoming "re-prioritizing" communication was in reference to the 12 office hours requirement and the affect, if any, that would have on faculty workload.

Four minutes later, at 11:50a.m., Green sent his third email to the KFT, McManimon, and Muraskin announcing that the University will require faculty to post and hold 12 office hours per week effective the Fall 2018 semester. (R-9; CP-6). He testified that the purpose of the email was to provide notice to the Charging Party about the change. (1T157). Green notified the Charging Party of new office hours requirement for the first time in this November 13 email. (1T50, 105, 195).

15. On November 14, 2017, KFT and the University held a local negotiations session attended by Green and McManimon. (CP-12; 1T194). The Charging Party introduced the meeting minutes for that session, which were taken by Green's assistant. (CP-12). Green testified that he keeps those meeting minutes in the normal course of business. (1T194). The minutes contain the heading "new office hour policy." It records the Charging Party's objection to Green's November 13 announcement that faculty hours were increasing to 12 hours. (CP-12).

16. On November 16, 2017, Muraskin responded to Green's November 13 email regarding the faculty office hour increase, and asked for the basis for the change and any "objective evidence" that could be shared to show that the then-current requirement of eight office hours per week was not adequate. (R-10). Green provided the following response later the same day:

While we are very proud of what we do and what we achieve, we (everyone) can always develop further. Our graduation rates are improved but we will not rest on our achievements merely because we did better. So, it is coming from, among other places, a place of advisement being one if not the most critical function associated with retention/graduation rates and a desire to continue improving. As a matter of framing the legal portion of this, I will be taking the initial position that the "why" of our decision, albeit obvious, is not the proper subject of negotiations. We acknowledge that impact may be negotiable (there is no impact in re-prioritizing workload) and we will agree to negotiate negotiable issues regarding the move to 12 hours. We also are willing to discuss and entertain any good faith proposal that will enhance the quality and amount of advising in such a way that will benefit our students. I look forward to working with you on this matter. (R-10)

Minutes later, Muraskin replied and asked whether the proposed increase was "based on any study or data." (R-10.) He specifically sought information about how many students were attending under the then-current 8 hours system and whether there were students who complained about faculty being unavailable. (R-10). Green replied ten minutes later:

I am personally aware of multiple faculty, including union officials, who are not present during office hours let alone providing good advisement during those time periods. I am personally aware of a lack of good and arguably no advisement being provided. So, just as an aside, my personal knowledge of the circumstances supports the move. That being said, the October 9, 2017 letters of both Presidents Haresign and Castiglione make it clear that a demand for negotiations will be forthcoming or is arguably been blankedly requested already. As such, for all practical purposes, our discussion is part of the negotiation process. As such, I want to be clear that the "why" of our decision is not subject to mandatory negotiations and I am not inclined to enter into discussions regarding reasoning that was fully vetted in a hearing and decision. The "impact" of our decision may well be negotiable assuming there is any impact and the University stands ready and will [sic] to negotiate any negotiable issues. Should the Union wish to engage and provide good faith discussion regarding alternatives to implementation of 12 hours (not the impact), the University is willing to do so. However, to be clear, we are moving towards 12 hours advisement (or an alternative that provides equal or greater value to students) and that is not going to be the subject of negotiations. Impact, if any, will be negotiated and discussions are always welcome. (R-10).

Green provided an explanation in an effort to provide context to his responses in his November 16 email exchange with Muraskin. It is clear that Green was relying on the same reasoning the University provided in Kean I as the basis for its prior increase in office hours to eight. (1T205-206). He testified that "[t]he purpose of the response was to highlight the fact that this is about advisement, the relationship between office hours and advisement, the relationship between advisement and student success." (1T162). Green was aware of the University

President's prior testimony in Kean I regarding the link between advisement and student success. (1T206). Green explained that in Kean I, Farahi testified that he sought to improve student advisement and that office hour requirements were one way to reach that objective. (1T206).

Green further testified that in his view an increase in office hours was not additional work but a restructuring of work that did not increase the work day and thus did not trigger a duty to negotiate. (1T162). Green explained that the increase in office hours did not necessarily translate to an increased workload since professors would not be advising students every hour. (1T200, 218). Instead, he viewed the change as representing an increase in faculty availability. (1T216-218). He believed at the time that KFT needed to demonstrate that the announced change resulted in additional work. (1T218).

I find Green's testimony on the policy rationale for increasing office hours to twelve credible and do not find that the absence of scientific or empirical data to support the objective validity of the link between office hours and graduation rates as a basis for discrediting that testimony.

17. By letter dated December 19, 2017, Castiglione responded to Green's November 13 emails. (CP-7). Castiglione copied McManimon and other Council representatives on his letter.

(CP-7). Castiglione described two rounds of negotiations and asserted Kean never provided a written counterproposal. (CP-7). Castiglione also attached to his letter a copy of a KFT proposal for faculty office hours dated June 24, 2016, as proof that negotiations on the subject had not been abandoned by KFT for over two years as Green had claimed. (CP-7). He then requested from Green a written proposal for compensation for the prior office hours increase and for the new increase scheduled for Fall 2018. (CP-7). Castiglione also made an information request for "all information about any investigations that the university conducted regarding the inadequacy of the current office hours, and any studies, data, etc., that it has generated or used in its processes." (CP-7). He explained that "President Farahi has asserted in various public forums that faculty advisement is the most important factor for determining retention and graduation of our students, and [KFT] wish[es] to be provided with the investigations, studies, data, information, etc., on which he bases this assertion." (CP-7). Finally, he attached another proposal for the increased office hours prospectively. (CP-7). Castiglione and McManimon testified that they did not receive the requested information from the University. (1T53, 96).

After receiving Castiglione's December 19, 2017 response, Green replied by email the next day. (R-11). In his December 20 email, Green advised that he had no recollection of ever

receiving or discussing the 2016 proposal Castiglione included in his response, and requested a copy of the transmittal document or the negotiation date on which it was transmitted for verification. (R-11). On the stand, Green did not rule out that he may have previously received that proposal but that his records did not show it had been provided to him. (1T170). He advised that the Charging Party's request for a formal proposal for additional compensation for the prior eight hour requirement that was the subject of Kean I was premature because it did not provide any evidence that the changes had any impact or increased workload. (R-11). Green advised that the University agreed to negotiate the 12 hour requirement, and that "the result of the 12 hour negotiations should very well inform the parties as to what would be expected in any 5-8 hour negotiations." (R-11).

Green explained that his position at the time was that so long as he did not increase the faculty's overall 35 hour work week, that it made no difference whether the University required faculty to be present for office hours. He viewed the change to mean that "[i]nstead of doing the 35-hour week, eight office hours and 27 other, you were going to do 12 office hours and 23 others." (1T174-178).

I credit Castiglione's testimony about the 2016 proposal and find that Green received the proposal.

18. It is unclear from the record what further communications the parties had regarding the 12 hour requirement, if any, until the instant charge was filed and the interim relief decision was rendered on August 7, 2018. Based upon a history summarized in a December 21, 2018 email from Green to the Charging Party's representatives memorializing its last best offer, it appears that the University offered its initial proposal on August 28, 2018. (R-12). The Council did not respond until October 3. (R-12). The parties exchanged another round of proposals through October and November 2018. (R-12). The Council did not make a counterproposal to the University's November proposal and did not respond to the University's December 4 email seeking to have another negotiations session before the year's end. (R-12). Given that the increase in office hours would take effect in the Spring of 2019, that the parties were 40-50 million dollars apart on compensation, and the lack of movement, Green advised in his December 21 email that impasse was reached on all issues. (R-12). The last best offer imposed by the University following impasse required 12 office hours per week with significant reductions for the weeks prior to and during exams, provided additional compensatory time off to unit employees, and provided faculty reimbursement up to \$750 per year for approved development expenses incurred. (R-12). The Council did not rebut Green's assertion that impasse was reached.

19. Green, both in his December 21 email and in his testimony, claimed that he provided research data regarding the benefits for increased advisement. (R-12). Green's email makes clear that the University believed there was a causal relationship between student contact time with faculty and student success, explaining "[t]he message is clear: a strong, positive and ongoing relationship with faculty members is critical for student success - review of four year graduation rates indicate a 38% improvement as of summer of 2018 with most recent estimates climbing in excess of 20% since the University started implementing enhanced advisement." (R-12). In his email, Green wrote that he "incorporate[s] by reference the previous testimony of the President and supporting evidence that indisputably establishes the link between advisement and student success." (R-11). Green testified that it was his intention in this December 21 email to provide " a full and complete justification to include all references that we were relying on and any probative data that would support that decision." (1T182). At the hearing however, Green acknowledged that he never included any data from the University's own records in response. (2T50). Ultimately though the University was not in a position to provide some of the requested information. For example, Green explained that there was no way to track the number of students who visited professors during office hours,

but that the University did have plans for a technology system that would help track such advisement. (2T53-54).

20. Castiglione responded to Green's December 21 email on the same day. (CP-13; 2T11). Castiglione attached the KFT's most recent counter-proposal regarding faculty office hours, which was not provided with this exhibit. (CP-13). His email makes clear that the proposal had been formulated before Green's email from earlier in the day. (CP-13). Castiglione also claimed that the University had not provided information showing that more office hours lead to better retention/graduation rates, and he linked to a news article regarding Kean's freshman retention rates, which was produced at the hearing. (CP-13, CP-14; 2T11). The article is entitled "The 10 N.J. colleges where freshman are most likely to drop out." (CP-14). It appears to be from NJ.com and is dated May 29, 2018. (CP-14). Both in his December 21 email and at the hearing, Castiglione mistakenly claimed that the May 29 article shows that Kean's freshman retention rates fell to the very bottom while office hours increased. (CP-13; 2T15). The article instead demonstrates that Kean ranked second to last on a list of New Jersey four-year colleges with the lowest freshman retention rates among full-time first year students in the fall of 2015 only. (CP-14). The list does not provide any information regarding how the rates compare to prior years and solely focuses on the retention rates of full-time freshman as a measurement for

student success. This evidence is not probative of whether the University's justification for increasing office hours again in 2017 hours was pre-textual. Much of the letter challenges the wisdom of Respondent's decision to increase office hours as a means to improve student outcomes and urges Respondent to take different measures, including the use of full-time counselors and advisors. (CP-13). According to Castiglione, KFT offered a modified proposal where faculty would receive a mixture of pay and time-off for every additional office hour. (CP-13).

I find that even if the University's policy rationale that increased office hours would result in increased graduation and retention rates was flawed and lacked support in data, the policy was not pre-textual and was based on the good faith belief by the University that office hours and student retention and graduation rates were linked. This finding is further buttressed by the holdings in Kean I that the University was justified in believing graduation rates and student advisement through expanded office hours availability were linked.

ANALYSIS

The principal issue in this case is whether the University's decision to increase faculty office hours from 8 to 12 per week following the Union's demands to negotiate over an office hour increase of 5 to 8 hours per week violated section 5.4a(3). I

find the Council has not satisfied its burden of proving, by a preponderance of evidence, that the Council's negotiations demands were a "substantial reason" or "motivating factor" behind 12 hour requirement. In Re Bridgewater Tp., 95 N.J. 235, 244-245. I recommend the Commission dismiss the Council's Complaint.

Section 5.4a(3) of the Act prohibits public employers from discriminating against an employee in regard to his or her hiring, tenure of employment and/or any term or condition of his or her employment to encourage or discourage that employee from exercising rights under the Act. N.J.S.A. 34:13A-5.4a(3). To prove a violation of Section 5.4a(3), a Charging Party ". . . must make a *prima facie* showing sufficient to support the inference . . ." that protected activity ". . . was a motivating factor or a substantial factor in the employer's decision." Bridgewater, 95 N.J. at 242. "Mere-presence of anti-union animus is not enough." Id. The Charging Party ". . . must establish anti-union animus was a motivating force or a substantial reason for the employer's action." Id.

A Charging Party can make a *prima facie* showing of discrimination in one of two ways: by either presenting direct evidence of anti-union motivation for an adverse employer action^{5/}

^{5/} "Direct evidence" of anti-union animus is where an employer representative communicates that an adverse personnel action was taken because of protected activity. See Borough of

or by presenting circumstantial evidence of anti-union animus. In the circumstantial case, a Charging Party must show that an employee engaged in protected activity, that the employer knew of this activity, and that the employer was hostile toward the exercise of that protected activity. 95 N.J. at 246. If a Charging Party establishes a *prima facie* case of discrimination, the burden of proof then shifts to the employer to demonstrate by a preponderance of evidence that the same adverse action would have occurred in the absence of protected activity. Id. at 242. Critically, "this shifting of proof does not relieve the charging party of proving the elements of the violation but merely requires the employer to prove an affirmative defense." Id. The burden of proving a Section 5.4a(3) violation begins and ends with the charging party. Id.

Timing is an important factor in assessing employer motivation. Borough of Glassboro, P.E.R.C. No. 86-141, 12 NJPER 517 (¶17193 1986). But it is not the only factor. Even where an employer's adverse personnel action is close in time to the exercise of protected activity, the Commission has dismissed Section 5.4a(3) claims based on a charging party's failure to

5/ (...continued)
Chester, I.R. No. 2002-8, 28 NJPER 162 (¶33058 2002), recon. den. P.E.R.C. No. 2002-59, 28 NJPER 220 (¶33076 2002) (Police Chief's memorandum stating that a "union grievance was to blame" for an adverse scheduling change was direct evidence of animus).

prove the employer was acting out of hostility towards protected activity, or that the protected activity was a substantial reason or motivating factor behind the adverse personnel action.

Ridgefield Park Bd. of Ed., P.E.R.C. No. 86-32, 11 NJPER 587 (¶16206 1985) (Commission dismisses (a) (3) complaint because charging party failed to prove protected activity was a substantial reason for custodian's transfer despite closeness in time between transfer and custodian's participation in collective negotiations); Jackson Tp. Bd. of Ed., P.E.R.C. No. 93-94, 19 NJPER 241 (¶24118 1993) (Commission dismisses (a) (3) complaint for charging party's failure to prove hostility to protected activity of organizing a union despite closeness in time between union organizing and employer's abolishment of union organizers' positions); Mendham Bd. of Ed., P.E.R.C. No. 97-126, 23 NJPER 300 (¶28138 1997) (Commission dismisses (a) (3) complaint for failing to prove protected association activities were a substantial factor behind termination of employee despite closeness in time between employee's collective negotiations activities and termination); Clark Tp. Bd. of Ed., H.E. No. 2019-2, 45 NJPER 279 (¶73 2019) (final agency decision) (Hearing Examiner dismisses (a) (3) complaint and notes that timing alone did not support an inference of hostility to protected activity). In these cases, the Commission has examined the entire record and the broader context in which the alleged hostile action occurred in assessing

whether the union has satisfied its burden of proving anti-union animus was a substantial reason for an adverse action. Id.

The weight of the evidence in this case supports the conclusion that Green's November 13 announcement of the 12 hour requirement was part of an ongoing process by the University to expand office hours, increase student academic advisement and improve graduation rates. In 2003 and 2004, Farahi and the University's former Vice President for Administration and Finance initiated efforts to increase faculty office hours and improve student academic advisement, which they viewed as a factor in students graduating on time. When those efforts did not yield significant improvements in graduation rates, the University again increased office hours to eight per week in 2008. After the Council challenged that increase by filing an unfair practice charge, the Commission held that "while part of the reason for the increase may have been related to anti-union animus, the substantial and motivating factor was clearly to increase student advisement time for improved graduation rates." Kean I, P.E.R.C. No. 2013-64, pp. 28-29 of Slip Opinion.

And following that increase to eight hours, according to Green's un-rebutted testimony, Green was made aware by Vazquez and by Farahi that while graduation rates had improved to somewhere in the 40s/low 50th percentiles, there was room for improvement in graduation rates and increasing office hours was a

way to achieve that goal. Castiglione acknowledged in his testimony that during the summer of 2017, “. . . it was clear that the University was making student advisement a bigger priority” and that Vazquez informed him at a October 26, 2017 meeting that students were delaying graduation because they were taking incorrect courses. (1T56-58). Furthermore, Green’s un-rebutted testimony establishes that on September 28, 2017, he had a conversation with Farahi and Farahi informed Green the University intended to increase office hours to 12 per week.^{6/}

This trend, and Green’s awareness of Farahi’s and Vazquez’s concerns about the need to improve graduation rates by increasing office hours, was at least part of the motivation behind Green notifying the Council on November 13, 2017 of the 12 hour requirement. Even if Green beared some animus towards the Council, the “mere presence of animus” does not satisfy the Council’s burden of proving a Section 5.4a(3) violation.

Bridgewater, 95 N.J. at 242. Rather, the Council’s burden was to prove the October 9 and 10 negotiations demands were a substantial reason for the 12 hour requirement^{7/}, and the record

^{6/} On rebuttal, the Council could have called Farahi to testify about whether the September 28 conversation with Green took place. They did not. Absent conflicting testimony or evidence, I credit Green’s assertion that the September 28 conversation with Farahi took place.

^{7/} The University does not dispute the October 9 and 10 negotiations demands were protected activity and Green was

does not bear that out.

Other facts concerning the context in which negotiations took place over office hours and when the 12 hour requirement would go into effect indicate Green's November 13 announcement of the 12 hour requirement was not substantially motivated by anti-union animus.

First, while the Council contends the timing between the Council's negotiations demands over the 5 to 8 hour increase and Green's announcement of the 12 hour requirement justifies an inference of hostility, the timing in this case does not necessarily justify such an inference. Knowing that the University intended to increase office hours to 12, Green had to disclose that fact to the Council prior to negotiating over compensation for the 5 to 8 hour increase in order to fulfill his duty to negotiate in good faith. This proposition is sound when one considers what would have happened had Green waited to disclose the 12 hour requirement until negotiations over the 8 hour requirement were completed. If, after reaching agreement with the Council on compensation for the 8 hour requirement, Green notified the Council that office hours would be increasing to 12, the Council would have a legitimate claim against the

7/ (...continued)
aware of those demands at the time of his November 13 communication regarding the 12 hour requirement.

University for negotiating in bad faith by withholding information that would have changed how the Council negotiated over office hours. Plainly stated: the Council could argue they would have asked for more money if they had known that the 5 to 8 hour increase was going to be a 5 to 12 hour increase. Hiding a managerial decision in an effort to extract concessions from a union is bad faith negotiations. Teaneck Tp., H.E. No. 2017-10, 44 NJPER 51 (¶16 2017) (final agency decision) (Hearing Examiner notes that an employer may negotiate in bad faith if it "hides an already made decision to subcontract" while negotiating benefits and extracting concessions from affected employees). So while the timing of Green's announcement of the 12 hour requirement prior to negotiations over the 5 to 8 hour increase may appear suspicious, it is also consistent with his duty to negotiate in good faith by keeping the Council apprised of what it was the parties were actually negotiating over in terms of office hours.

Second, the timing between the announcement of the 12 hour requirement and its proposed implementation almost one year later undercuts the Council's argument that Green's announcement was motivated by anti-union animus or intended to "punish" the Council for its negotiations demands. (Council Brief, pp. 4-6). An employer motivated by anti-union animus will normally act in a unanticipated and "reactionary" manner without much notice of an adverse personnel action. Bridgewater, 95 N.J. at 239 (employee

engaged in protected activity was transferred and demoted by employer without providing the employee the requisite 30 days notice per the employer's "employee handbook"); Mendham Tp. Bd. of Ed., P.E.R.C. No. 97-126, 23 NJPER 300 (¶28138 1997)

(Commission notes that in cases "where the timing of a personnel action establishes hostility toward protected activity, the personnel action is often unanticipated and is taken at a time or in a manner inconsistent with the ordinary course of business" and that in those types of cases the Commission has "found that these unorthodox actions were 'reactions' to protected activity and satisfied the charging party's obligation to prove anti-union discrimination").

Green's November 13 announcement of the 12 hour requirement does not fit within this type of "reactionary", unanticipated, hostile action motivated by anti-union animus. To begin with, the Council and University have been engaged in an ongoing dialogue about improving graduation rates by increasing faculty office hours since 2003, and Castiglione acknowledged the Council was aware in the summer of 2017 that student academic advisement and graduation rates were a top priority and concern for the University. The University's third attempt in 17 years to improve graduation rates through increased office hours was part of an ongoing process the Council was aware of to ensure students were graduating on time. Far from being "unorthodox" or

"unanticipated", the November 13 announcement was part of an ongoing labor relations narrative between the Council and University.

Moreover, the claim that Green's announcement was motivated by hostility towards the Council for attempting to negotiate over the 5 to 8 hour increase is attenuated by the fact that the proposed 12 hour requirement was not scheduled to take effect for almost one year. The November 13 announcement provided the 12 hour requirement would take effect in September 2018, almost 11 months subsequent to the announcement. Nothing in the record suggests the University could not have implemented the 12 hour requirement sooner, if not immediately. Unlike other (a)(3) violations based on the timing of an adverse personnel action, Council unit members were provided a significant amount of advance notice of the increase in office hours.

Green's conduct subsequent to the October 9 and 10 negotiations demands also suggests the November 13 announcement was not motivated by hostility to the Council. Green participated in a negotiations session with Muraskin and McManimon on October 24, 2017 and on that same day acknowledged by email to Castiglione the Council's concerns over office hours and other matters related to the University's faculty job description. In un-rebutted testimony, Green explained that the 12 hour requirement was intended to be a "re-prioritization" of

faculty workload that would not measurably increase the number of hours worked or duties performed by faculty, and added that faculty were not precluded from performing other duties during assigned office hours when students did not seek advisement. The University, through Green, also negotiated with the Council over the impact of the 12 hour requirement and reached an impasse in negotiations. The Council does not contend those negotiations were conducted by the University in bad faith or that the impasse reached was not genuine. These factors, in total, all indicate the November 13 announcement was not motivated by anti-union animus towards the Council for its October 9 and 10 negotiations demands.

The Council argues in its post-hearing brief that the lack of empirical studies or data to support the University's assertion of a link between office hours and improved graduation rates proves the University violated Section 5.4a(3). The premise of this argument is that since this educational policy judgment is flawed, it must be pre-textual and motivated by anti-union animus. I disagree. It is not the Commission's role to evaluate the wisdom of a public employer's policy proposals. Carteret Bd. of Ed., P.E.R.C. No. 2009-71, 35 NJPER 213 (¶76 2009). The test under Section 5.4a(3) is not whether an employer's policy is empirically sound, but if it was motivated by anti-union animus. And the Council has not satisfied this

standard.

For these reasons, I find the Council has not satisfied its burden of proving the 12 hour requirement was substantially motivated by hostility towards the Council for making negotiations demands over the prior increase in office hours.

RECOMMENDED ORDER

I recommend the Commission dismiss the Council's complaint.

/s/Ryan M. Ottavio

Ryan M. Ottavio
Hearing Examiner

DATED: July 23, 2020
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 August 6, 2020.

