

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

In the Matter of

BOARD OF TRUSTEES OF
OCEAN COUNTY COLLEGE,

Respondent,

-and-

Docket No. CO-2011-137

FACULTY ASSOCIATION OF
OCEAN COUNTY COLLEGE,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss a Complaint based on an unfair practice charge file by the Faculty Association of Ocean County College (Association). The charge alleges that the Board of Trustees of Ocean County College (College) violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq., specifically 5.4a (1) and (5) by 1) unilaterally establishing a tenure cap; (2) creating a non-tenure track "Lecturer" title with unilaterally established terms and conditions; and (3) unilaterally transferring instructional work from tenure-track/tenured faculty members to lecturers

The Hearing Examiner found that applying the negotiability balancing test as set forth in Local 195, IFPTE v. State, 88 N.J. 393 (1982), the College's interest in realigning educational goals and having administrative tasks adequately performed in order to meet its needs outweighs full-time faculty unit's interest in negotiating to control unit work. Accordingly, the College had a managerial prerogative to shift work to lecturers without negotiations.

The Hearing Examiner further found that even if under the Local 195 balancing test the assignment of instructional work to lecturers in these circumstances would be held to be mandatorily negotiable, unit work rule exceptions apply to defeat the Association's claim. City of Jersey City v. Jersey City POBA, 154 N.J. 555 (1998). With respect to the second exception, teaching courses has been historically been shared among Association unit employees and non-unit employees of the College. Therefore, the College had no obligation to negotiate the shifting of instructional work to the lecturer title. With respect to the third exception, the College reorganized the way it delivered services and therefore wasn't required to negotiate with the Association before transferring administrative work.

Lastly, the Hearing Examiner does not consider the Association's request to include lecturers in the Association's unit as a remedy because the appropriate mechanism to obtain such relief is a clarification of unit petition, which the Association voluntarily withdrew.

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.

H.E. No. 2022-5

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Appearances:

For the Respondent
Cleary, Giacobbe, Alfieri & Jacobs, LLC, attorneys
(Matthew J. Giacobbe, of counsel)

For the Charging Party
Detzky, Hunter & DeFillippo, LLC, attorneys
(Stephen B. Hunter, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On September 30, 2010, the Faculty Association of Ocean County College (FAOCC or Association) filed an unfair practice charge against the Board of Trustees of Ocean County College (College). The charge alleges that the College violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., specifically, section 5.4a(1) and (5)^{1/}, by (1) unilaterally

^{1/} These provisions prohibit public employer, their representatives or agents from: "(1) Interfering with,
(continued...)"

establishing a tenure cap; (2) announcing on or about September 2, 2010, a non-tenure track "Lecturer" title with unilaterally established terms and conditions; and (3) unilaterally transferring instructional work from tenure-track/tenured faculty members to lecturers.

PROCEDURAL HISTORY

On September 30, 2010, the Association's unfair practice charge was accompanied by an application for interim relief. On December 21, 2010, the Association's application was denied (I.R. No. 2011-27, 41 NJPER 73 (¶24 2010)).

On May 23, 2011, the Association filed a related clarification of unit petition (Dkt. No. CU-2011-035) seeking to clarify its collective negotiations unit of all full-time faculty members employed by the [College] Board of Trustees, including instructors, assistant professors, associate professors, professors, counselors and librarians to include the lecturer title.

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

On July 18, 2012, the Director of Unfair Practices issued a Complaint with a Notice of Hearing (C-1)^{2/}. On or about October 3, 2012, the College filed an Answer (C-2). On April 23, 2013, the case was reassigned to me. On January 15, 2016, the Association withdrew its clarification of unit petition (R-11).

Following unsuccessful efforts to informally resolve the matter, hearing dates were initially scheduled for June 13, 14 and 18, 2016 and then rescheduled to September 26-28, 2016. On June 13, 2016, Counsel for the College filed a substitution of attorney.

On August 26, 2016, the College filed a Motion for Summary Judgment together with a brief, certifications and exhibits. On September 22, 2016, the Association filed a cross-motion, together with a brief, certifications and exhibits. On February 23, 2017, the Commission issued Bd. of Trustees of Ocean Cty. College, P.E.R.C. No. 2017-047, 43 NJPER 334 (¶94 2017), denying both the College's motion for summary judgment and the Association's cross-motion for summary judgment. The Commission determined:

[T]he crux of this matter is whether the College's creation of the lecturer title was a semantic change in name only in order to camouflage an attempt to unilaterally change terms and conditions of employment and shift

^{2/} "C" represents Commission exhibits; "R" represents Respondent exhibits; "J" represents Joint exhibits; and "CP" represents Charging Party exhibits.

instructional work, even though lecturers perform the same job duties/responsibilities as tenure-track faculty members. [43 NJPER at 336]

The Commission noted the Association's withdrawal of its allegation that the College had unilaterally established a tenure cap. The case was remanded to me for a hearing.

On September 25 and 26, 2017, October 4, and 26, 2017, and December 8 and 19, 2017, I conducted a hearing at which the parties examined witnesses and presented exhibits. At the close of the Association's case, the College moved to dismiss the Complaint. I denied the College's Motion. On or about April 25, 2018, the parties submitted post-hearing briefs. On or about May 14, 2018, the parties filed reply briefs. On July 11 and 24, 2018, the parties filed memoranda regarding the applicability of the then-recently enacted "Workplace Democracy Enhancement Act," specifically, N.J.S.A. 34:13A-5.15, to this matter.

Upon the record, I make the following:

FINDINGS OF FACT

1. The College and the Association signed a collective negotiations agreement (CNA) extending from September 1, 2006 through August 31, 2010 (J-2). In November, 2015, the parties reached a successor agreement, effective from September 1, 2014 through August 31, 2019 (J-3).

Article I of the parties' CNA, entitled "Recognition," provides:

The College hereby recognizes FAOCC as the negotiating representative... for all Full-Time Faculty Members presently employed or hereafter employed by the College, including instructors, assistant professors, professors, counselors, and librarians. The term Full-Time Faculty Member as used in this Agreement applies to all the above specified academic ranks and Faculty Members represented by the FAOCC. (J-3).

2. Full-time faculty members are 10-month, tenure track employees. Under Article V, paragraph B of the parties' CNA, entitled, "Terms and Conditions of Employment", Full-Time Faculty Members shall:

teach classes; hold office hours; advise students; participate in student learning outcomes, assessment activities, and accreditation activities, monthly department meetings, academic discipline meetings, Fall and Spring colloquia, and the annual commencement scheduled no later than May 31. In addition, full-time faculty members are expected to serve on committees; participate in normal curriculum development and revision, and perform other professional duties (J-3).

3. Before July, 2010, all non-tenured instructional unit faculty employees were eligible to receive tenure upon satisfactory completion of five consecutive years of service with the College (C-1).

4. On July 26, 2010, the College adopted a tenure cap, pursuant to N.J.A.C. 9A:7-3.1 and N.J.A.C. 9A:7-3.2 (R-3, R-4).

5. As of September 30, 2010, the College employed 112 faculty members, of which 83 were tenured (1T24^{3/}).

6. In September, 2010, the College created the twelve (12) month, non-tenure track lecturer title. The promulgated "Position Description" for College Lecturer II; e-Learning, requires lecturers to:

- teach 36 credit hours of e-Learning classes annually; 15 credit hours in each the fall and spring and 6 credits hours during the summer; a 12-credit equivalent workload required for administrative supervisory duties;
- conduct classroom observations and evaluate faculty for reappointment decisions;
- conduct academic assessments for developing or improving new or existing on-line materials and programs; recommend the elimination of obsolete programs or courses;
- engage in e-learning strategic planning ; the accreditation process, orientation, student advising, commencement, clubs events, college and community liaison initiatives;
- author reports;
- develop ongoing relationships with school districts and identified educational contacts; and [perform]
- [perform] related projects and initiatives as assigned [R-15]

7. Chris Berzinski (Berzinski), a New Jersey Education Association (NJEA) field representative, represented the members of the Association. His employment with NJEA ended in 2016 (2T7-8).

3/ "T" represents the transcript, preceded by the chronologically numbered day of hearing and followed by the page number(s).

8. Berzinski first received information regarding the lecturer title in September, 2010, when he was advised by several members of the FAOCC that job postings for position(s) as lecturer were issued by the College (2T12-13).

9. Berzinski was a member the Association's negotiations team for the CNA extending from 2006 through 2010 (J-2). Negotiations for a successor contract began in November, 2009 (2T10). In negotiations, the College proposed a 12-month faculty position (2T12). By the summer of 2010, the 12-month faculty position proposal became a "sticking point," in part resulting in the parties seeking mediation services (2T12). Sometime in the fall of 2010, Berzinski sought a meeting with College President Dr. Larson. Berzinski testified that he wanted to see if a breakthrough was possible because mediation wasn't "going anywhere," the lecturer announcements had issued, and the 12-month faculty proposal was still being discussed (2T14-15). Berzinski testified that in a December 16, 2010 meeting with Larson, Larson admitted to him that the 12-month lecturer title was only being created to "bust" the Association (2T16).

Antoinette Clay (Clay), College Vice-President of Academic Affairs, testified that she hasn't been advised not to hire full-time faculty (6T14). Sarah Winchester (Winchester), College Executive Vice-President of Finance Administration, admitted on cross-examination that she has hired only one tenure-track faculty

member in the past seven or eight years (6T42). Like Clay, she also testified that she hasn't been advised that the College will no longer hire full-time faculty members (6T106). Winchester testified that the College hired lecturers to meet its past and current needs, stating that the College is looking for "balance" (6T107).

I do not credit Berzinski's testimony reporting Larson's alleged comment. I find it unlikely that if Larson said the remark, Berzinski wouldn't have reported it to others in the Association, and no other witness(es) corroborated hearing of the remark, nor was any document proffered (including an amended unfair practice charge) that reports or would have corroborated such an inflammatory utterance. College witnesses Clay and Winchester established, at a minimum, that the College hadn't hired full-time faculty over a cumulatively lengthy period and that lecturers were hired in order to meet the College's needs.

10. It is undisputed that the proposed 12-month faculty position was never agreed to, nor was it ever included in the parties' CNA (2T41-42).

11. It is undisputed that lecturers perform all of the duties of full-time faculty as set forth in Article V, paragraph B of the parties' CNA (4T114, 5T34-38); (see finding no. 2).

12. At the time of the hearing, the College employed 49 tenured faculty and 54 non-tenured lecturers (1T29).

13. In 2010, the College's student enrollment began to decline. Enrollment has a major impact on the College's financial budget, including the amount of State aid it receives (6T73-74)^{4/}. In or about late 2010, in order to address declining enrollment, the College proposed a restructuring plan (R-17). Part of the restructuring plan included the assigning of lecturers to perform certain administrative tasks that the College had previously been unable to accomplish (6T81).

14. David Bordelon (Bordelon) has been employed by the College since 1995 (1T20). He obtained faculty tenure in 2000 (1T21). Bordelon is currently employed as a professor and since 2014, he has been Association President (1T20-21).

15. Bordelon testified that there was essentially no difference between the duties and functions of non-tenure track lecturers and the duties and functions of tenured faculty (1T30). In support of his contention, Bordelon helped prepare and introduced exhibit CP-3, a chart entitled "Comparison of Lecturers versus FAOCC Faculty Duties and Activities" (1T76). Using CP-3, Bordelon testified that both lecturers and full-time faculty:

-have a teaching load of fifteen credits per semester (1T31). But Bordelon admitted that lecturers are required to teach six credits in the summer, while full-time faculty aren't required to

^{4/} The College's revenue is derived from county and State funds, from student tuition and fees, and grants (6T73-74).

teach in the summer (1T31). It is undisputed that teaching is not limited to tenured faculty and lecturers; adjunct faculty and administrators also teach students (1T83, 2T32). The Association has never objected to adjunct faculty teaching up to a 15-credit course load per semester (2T34);

-are required to hold office hours. On cross-examination, Bordelon admitted that full-time faculty are not required to hold office hours during the summer (1T134);

-advise students. On cross-examination, Bordelon admitted that full-time faculty are not required to advise students during the summer (1T33-34, 1T134). Full-time faculty are contractually obligated to advise 25 students per semester. There is no set number of students that a lecturer can be assigned to advise per semester (1T135; J-3). Clay testified that more students require advising than the contractual limit of 25 students per full-time faculty member set forth in the parties' CNA (6T17; J-3). She also testified that when she was a member of the College's negotiations team, she proposed increasing the cap on the number of students full-time faculty advise per semester, and that that proposal was rejected by the Association (6T18). As a consequence of the Association's failure to agree to increase the number of students full-time faculty advise per semester, the College has assigned lecturers to advise students (6T18-19). Marc LaBella (LaBella) and Lee Kobus (Kobus), both employed as lecturer II's by

the College, advise more than 25 students per semester. At the time of their testimony, LaBella was advising 37 students and advised students during the summer and Kobus was advising 60 students and advised students during the summer (5T30, 5T147). In the absence of any contradicting evidence, I credit Clay's testimony, together with the testimonies of LaBella and Kobus;

-participate in student learning outcomes and assessment activities. On cross-examination, Bordelon admitted that full-time faculty are not required to perform these duties during the summer (1T34-35, 1T134). Student learning outcomes and assessment is an assessment test given at the end of course instruction validating that the course addressed the stated learning objectives (4T53). Clay testified that although the parties' CNA requires full-time faculty to participate in student learning outcomes and assessment, the task wasn't performed (6T37). If full-time faculty did participate in assessment activities, they would receive release time to conduct them (6T37).

Association witnesses testified that they've participated in student learning outcomes and assessments, but admitted they've not done so for a number of years (6T165, 6T206). Accordingly, I credit Clay's testimony;

-participate in accreditation activities. On cross-examination, Bordelon admitted that full-time faculty are not required to perform these tasks during the summer (1T36, 1T134);

-attend discipline and College meetings (1T36-37). On cross-examination, Bordelon admitted that full-time faculty are not required to attend such meetings during the summer (1T134-135);

-attend colloquia (1T38);

-use strong communication and interpersonal skills (1T38-39);

-require a Master's degree (1T39);

-require two years' teaching experience at the college level (1T39-40);

-participate in curriculum development. On cross-examination, Bordelon admitted that full-time faculty are not required to perform these associated tasks during the summer months (1T40-41, 1T135). Alferd Longo (Longo), a lecturer II in E-learning for the College, who was previously employed by the College as a professor and included in the Association's unit and was a union member, testified that designing courses and curriculum development was not required of unit faculty during that period (4T39-40, 4T44-48). Longo also testified that full-time faculty are given a one or two credit stipend for course development, whereas it is a part of a lecturer's assigned duties (4T59-60). I credit Longo's testimony because it is consistent with Article V of the parties' CNA that identifies course development as an expectation, not a requirement, of full-time faculty (J-3). Winchester testified that lecturers were needed to develop new curricular options because full-time faculty weren't

doing it (6T132). Winchester stated that the purpose of new programs (i.e., curriculum development) is to "attract new students to the College and to better meet the needs of existing students" (6T84). I credit Longo's and Winchester's testimonies;

- classroom observation of adjuncts (1T41-43);
- prepare draft reports for Deans/VP (1T47-48);
- maintain technology skills (1T48);
- perform College-wide administrative duties (1T49).

Bordelon defined "College-wide administrative duties" as an instance where full-time faculty has responsibility for something that either touches on all aspects of the College, or touches on things that are outside of the classroom (1T49);

-participate in College governance (1T50-52). A number of the College's witnesses, including Henry Jackson, Executive Director of Academic Success for the College, Clay and Winchester, testified that tenured faculty didn't volunteer to serve on governance committees (5T130, 6T27, 6T102-104). The College was cited by the Middle States Commission, which is responsible for accreditation, with low faculty participation in governance committees (6T26-27). Without accreditation, the College would lose federal funding, and without federal funding, the College could not exist, financially (6T102-104). In order to address the deficiency, the College amended its senate bylaws to allow lecturers to be included on governance committees. By so

amending, and then assigning lecturers to participate in College governance committees, the College achieved the desired full participation on them (5T130-131, 6T27-28, 6T102-104).

Association witness Dan Baker (Baker), a professor included in the Association's unit, testified that although he didn't recall a time when no full-time faculty volunteered to perform governance tasks, there was a period when friction between the full-time faculty and the administration created "less enthusiasm" for volunteering. (6T167-168). It is undisputed that full-time faculty's service on governance committees is voluntary. I credit the College witnesses' testimonies that full-time faculty were quantitatively insufficiently participating on governance committees (J-3);

- are selected for director positions (1T53-54);

- develop and participate in workshops and special projects (1T54-56);

- collect and evaluate data and teaching material. On cross-examination, Bordelon admitted that full-time faculty are not required to perform these duties during the summer (1T56, 1T136). College Executive Director Jackson testified that when he was Dean of the School of Language and the Arts, he assigned lecturers to synthesize and analyze data because full-time faculty were not available for that work in the summers (5T137). In the absence of

any contrary testimony by any Association representative or witness, I credit Jackson's testimony;

-mentor adjunct faculty (1T57); and

-perform classroom observation of adjuncts and classroom observation of tenured and tenure track faculty. Bordelon conceded that only lecturers perform classroom observations of tenured and tenure-track faculty, although this duty was not assigned to lecturers until Fall, 2017 (1T44). Only two lecturers have been assigned to evaluate tenured faculty (1T44). Bordelon testified that although the College may claim that lecturers are responsible for some observations or evaluations of faculty, he does not consider those evaluations to be "official" (1T31). Bordelon's opinion testimony in this regard is of little probative value and I assign it little weight.

Lecturers evaluate adjunct faculty. The College employs between five hundred and six hundred adjunct faculty^{5/} per semester (1T42). According to the College's witnesses, lecturers are assigned and perform 10 evaluations of adjunct faculty per semester and 5 evaluations in the summer (4T37, 5T13, 5T94-95). Clay testified that her duties include assigning the evaluations of adjunct faculty. She credibly testified that full-time faculty do not evaluate adjuncts; she assigns lecturers to perform this

5/ Bordelon defined adjuncts as "part-time faculty who are brought in to fill in classes when there are not enough full-time faculty to fill those subjects" (1T41).

duty (6T9). Association witnesses Bordelon and Neil Schiller^{6/} admitted that they have never formally evaluated adjunct faculty (1T84, 6T176-178). Association witness Baker admitted on cross-examination that he hasn't evaluated any adjuncts in a number of years (6T22, 6T202). Clay relies on the adjunct evaluations in determining whether or not to retain adjunct professors and that the lecturers' role in evaluating adjunct faculty is essential to the College (6T10-11). In the absence of contrary testimony from any Association representative or witness, I credit Clay's testimony.

I credit Bordelon's testimony regarding CP-3 (his chart entitled, "Comparison of Lecturers versus FAOCC Faculty Duties and Activities") to the extent that many of the duties listed have been performed by both full-time faculty and lecturers. As more thoroughly delineated in this finding, full-time faculty are not contractually mandated to perform all of the duties identified in CP-3, nor have they quantitatively sufficiently performed those duties to meet the College's needs (specifically, curriculum development, college governance, advising students, student learning outcomes and assessment, collecting and evaluating data and teaching materials).

^{6/} Neil Schiller has been employed by the College for more than 25 years. Currently, he is employed as an associate professor.

16. College witness Sarah Winchester credibly testified that before the lecturer title was created, certain administrative functions were not being performed (6T86). Specifically, the College's restructuring plan (see finding no. 13) identified the following administrative tasks that were in fact not being performed by full-time faculty: the development of distance learning partnerships; the development of new curricular options; the development of new degrees; and the development of an accelerated BSN program in nursing (R-17; 6T82).

LaBella credibly testified that an "administrative component" that he's required to perform as a lecturer he wasn't required to do as a full-time faculty member (5T12, 5T38). He spends approximately 40 percent of his time on administrative functions (5T32). I credit LaBella's testimony regarding the administrative component required of lecturers; his testimony validates that portion of the lecturer job description requiring a 12-credit equivalent workload for administrative supervisory duties (R-15).

17. Examples of administrative work lecturers perform include:

- evaluations of adjunct faculty and full-time faculty (4T32-33, 4T37, 6T87).

- grant writing (4T41-42). College witness Winchester credibly testified that between 2012 and 2017, grant writing

increased dramatically, earning the College about a \$3 million dollar increase in grants^{7/} (6T91-92; R-18). Lecturers both write and administer grants (6T92, 6T11). Also, the College is not awarded every grant for which it applies (6T136). College witness Clay credibly testified that she assigns lecturers to work on grant opportunities (6T12). Association unit members are not required to write and/or administrator grants; if they do, they receive additional compensation (6T12, 6T184). Unit employee Baker has been involved in grant development, though he admitted on cross-examination that his "involvement" was about 10 years ago. Unit employee Schiller participated in grant development, most recently a couple of years ago (6T202-203). I credit Winchester's testimony regarding the increase of grant writing.;

-review textbooks and certify them for publication (4T42-43). Longo testified that he didn't perform these duties when he was a professor and Association unit member. Rather, he may have selected textbooks, but wasn't engaged, "to the same depth" that he is now, as a lecturer (4T43-44). Schiller credibly testified that he has worked with outside publishing entities concerning textbooks (6T207).;

-design courses and develop curricula, duties that aren't required of full-time faculty unit members (4T44-48; J-3).;

^{7/} For fiscal year 2012, the College received \$1,410,610.00 from grants compared to \$4,567,862.00 from grants for fiscal year 2017 (R-18).

- participate in the mentor program (4T57);
- facilitate cooperative partnerships (5T20);
- schedule projections for courses (when a courses will be offered) (5T31). LaBella testified that the Dean schedules "projections" for full-time faculty, and that faculty have limited "input" in that determination (5T62). Schiller testified that he prepared or worked on schedules within his department (6T205).;

- report writing (5T31);
- new student orientation and student advising, both of which occur during the summer (6T14);

- distance learning partnerships. College witness Executive Vice President of Finance Administration Winchester, asked on cross-examination whether tenure track faculty were incapable of developing distance learning partnerships, replied that full-time faculty did not do it (6T131). In the absence of contrary evidence or testimony by any Association representative or witness, I credit Winchester's testimony.

I credit the College witnesses' testimony that certain administrative duties are required of lecturers. But some of the administrative duties performed by lecturers have also been performed by full-time faculty, though they aren't contractually obligated to perform them.

ANALYSIS

As framed by the Commission in its earlier decision in this matter, the primary and pivotal question is whether “. . . the College’s creation of the lecturer title was a semantic change in name only in order to camouflage an attempt to unilaterally change terms and conditions of employment and shift instructional work, even though lecturers perform the same job duties/responsibilities as tenure-track faculty members.” 43 NJPER at 336.

Public employers are prohibited from “[i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.” N.J.S.A. 34:13A-5.4a(1). “[P]roof of actual interference, restraint or coercion is not necessary to make out a violation of N.J.S.A. 34:13A-5.4a(1) . . .” Commercial Tp. Bd. of Ed. and Commercial Tp. Support Staff Ass’n and Collingwood, P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff’d 10 NJPER 78 (¶15043 App. Div. 1983). The tendency to interfere is sufficient. Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986). This provision will be violated derivatively when an employer violates another unfair practice provision. Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004).

Public employers are also prohibited from “[r]efusing 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. . . ." N.J.S.A. 34:13A-5.4a(5). A determination that a party has refused to negotiate in good faith will depend upon an analysis of the overall conduct and attitude of the party charged. Teaneck Tp., P.E.R.C. No. 2011-33, 36 NJPER 403 (¶156 2010).

The Commission has held that the "unilateral removal of certain work previously performed by an employee in . . . [a] negotiations unit and reassigning that work to another employee in a title outside the . . . unit constituted a violation of N.J.S.A. 34:13A-5.4a(1) and (5)." Passaic County Reg'l High School Dist No. 1, H.E. No. 81-26, 7 NJPER 124 (¶12053 1981), aff'd P.E.R.C. No. 81-107, 7 NJPER 155 (¶12068 1981); see also, Deptford Bd. of Ed. and Deptford Ed. Ass'n, H.E. No. 81-13, 6 NJPER 538 (¶11273 1980), aff'd P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980), aff'd NJPER Supp. 2d 118 (¶98 App. Div. 1982) (finding that the board refused to negotiate in good faith when it effectuated a "semantic" change in the name of a position in order to unilaterally reduce the salary and benefits of an employee despite the fact that she performed all of the duties and maintained the same workload as unit members).

The unit work rule enables employees to seek protection of such interests as preserving their jobs; maintaining salaries, benefits, and overtime opportunities; and not having their collective strength eroded. The rule also promotes labor

stability since negotiations are premised on the expectation that unit employees will continue to perform and be paid for doing the same duties. Burlington Cty. Bd. of Social Serv., P.E.R.C No. 98-62, 24 NJPER 2 (¶29001 1997).

In City of Jersey City v. Jersey City POBA, 154 N.J. 555, 573-576 (1998), the New Jersey Supreme Court analyzed the City's redeployment of police officers and use of civilians to fill the vacated dispatching positions under the balancing test set forth in Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982). The Court found that because the City implemented the reorganization primarily for the purpose of improving the police department's effectiveness and performance, its actions constituted an inherent policy determination that would be impermissibly hampered by negotiations. Id. at 573-574. The Court also analyzed the case under the unit work rule, which contemplates three exceptions whereby the transfer of unit work is not mandatorily negotiable: "(1) the union has waived its right to negotiate over the transfer of unit work; (2) historically, the job was not within the exclusive province of the unit-personnel; and (3) the municipality is reorganizing the way it delivers government services." Id. at 577.

The Court cautioned that the unit work rule cannot be applied on a per se basis. Instead, the negotiability balancing

test as was set forth in Local 195, IFPTE v. State, must be applied to the facts of each particular unit work claim.

Local 195 provides in a pertinent part;

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 404-405]

The alleged loss of unit work to lecturers affects the unit employees' work and welfare because, first and foremost, it reduces opportunities for full-time faculty to acquire tenure, in light of the standard for acquisition set forth in the parties' CNA.

There is no preemption argument so I will balance the parties' interests.

The Association's unit has an interest in not being reduced in size or strength and in not disputing with the College expected work assignments. The Association avers:

The sole reason for the College's decision to hire non-tenure track lecturers is related to

the College's intention to effectively end collective negotiations between the [Association] and the College and to gradually render any negotiated agreement between the College and the [Association] a "nullity." [Association brief at 51]

The Association asserts that there are no discernable differences between the duties and functions of lecturers and the duties and functions of full-time faculty. The Association further claims that the hiring of lecturers is devoid of any educational justification and that less experienced instructional personnel have been exclusively hired as lecturers by the College to perform the same duties and responsibilities as full-time faculty.

The College asserts that it created the lecturer title to realign its educational goals. Unlike full-time faculty, lecturers are twelve (12) month employees. The College argues that twelve (12) month employees assist in prioritizing student learning over twelve (12) months as opposed to only the traditional nine (9) month academic year. The College also contends that the lecturer title was created to meet the College's administrative needs because full-time faculty are neither required to perform and were insufficiently performing such duties (J-3). The College's restructuring plan (R-17), identified the development of distance partnerships; the development of new curricular options and the development of new degrees as administrative tasks that were not being adequately performed by full-time faculty. The College argues these items are important

to attract new students to the College and to better meet the needs of its current students (6T84).

On this record, I find that the College's interest in realigning educational goals and having administrative tasks adequately performed to meet its articulated needs outweighs the full-time faculty unit's interest in negotiating to control instructional work. Acknowledging that only one faculty member has been added to the Association's unit over many years and that the unit has consequently attrited, I find that the College hasn't merely or simply reassigned work from unit employees to non-unit employees with the primary objective of reducing labor costs. See Bergen Pines Cty. Hosp., I.R. No. 91-16, 17 NJPER 236 (¶22102 1991). The administrative duties required of lecturers -- grant writing; curriculum development; cooperative and distance partnership development; evaluations of adjuncts and full-time faculty; college governance, etc. -- are not required of full-time faculty (J-3). These duties comprise a significant amount of lecturer work. Accordingly, I find that the College had a managerial prerogative to shift work to lecturers without negotiations.

Even if under the Local 195 balancing test the assignment of instructional work to lecturers in these circumstances would be held to be mandatorily negotiable, unit work rule exceptions apply to defeat the Association's claim.

In Town of Dover, P.E.R.C. No. 89-104, 15 NJPER 264 (¶20112 1989), recon. den. P.E.R.C. No. 89-119, 15 NJPER 288 (¶20128 1989), the Commission dismissed an unfair practice charge alleging that the Town had unilaterally shifted unit work to non-unit employees. The Town had shifted radio dispatching work from dispatchers included in a Teamster negotiations unit to police officers. The Commission concluded that because dispatching work had historically been shared with employees (police) outside the Teamster's unit, the Town could continue to shift work outside the Teamster's unit without negotiations. See also Jersey City, supra; and Essex County, H.E. 2004-12, 30 NJPER 149 (¶60 2004).

The Association argues that although adjuncts perform teaching duties, they do not participate in the "core expansive unit work" performed by full-time faculty. The College contends that teaching duties are not exclusively faculty unit work because the duties have historically been shared with other College employees, particularly adjuncts and administrators.

The parties don't dispute that non-unit employees, including adjuncts and administrators, historically taught academic courses. Also, the Association acknowledges that it hasn't objected to adjunct faculty teaching up to a 15-credit course load per semester. The Association argues in part that teaching hasn't historically been shared with non-unit employees because adjuncts teach a lesser quantity (up to 15 credits per semester) than full-

time faculty unit employees. The Association hasn't cited Commission precedent in which a distinction in the amount of work shared proved decisive. See e.g., Willingboro Tp., P.E.R.C. No. 94-49, 19 NJPER 585 (¶24279 1993); Monmouth Cty. Sheriff and Monmouth Cty., P.E.R.C. No. 93-16, 18 NJPER 447 (¶23201 1992). Here, teaching courses, regardless of the number of credits, has been shared work among Association unit employees and non-unit employees of the College. Accordingly, I find that the College had no obligation to negotiate the shifting of instructional work to the lecturer title.

With respect to the third exception to the unit rule, I find that negotiations were not required because the College was reorganizing the way it delivered services. In Township of Nutley, P.E.R.C. No. 86-26, 11 NJPER 560 (¶16195 1985), the Hearing Examiner (in H.E. No. 85-28, 11 NJPER 325 (¶16116 1985)) found that if the Township had merely reassigned the work of a patrolman in the unit to a non-unit employee with no change in the method or manner in which the work was performed, the charging party would have proved a violation of section 5.4a(5). However, the Hearing Examiner found that there was not a one-to-one change in the performance of job duties (i.e., that a civilian crossing guard performed the challenged work some of the time and other clerical duties some of the time) and therefore there was not a duty to negotiate based on the reorganization.

The Association argues that there has been no fundamental reorganization as to the way the College delivers governmental services because the administrative functions performed by lecturers are the same administrative duties performed by full-time faculty.

The College defends that it had a managerial prerogative to reorganize how it delivers services. The College contends that it shifted unit work to the newly created lecturer position in order to reorganize its workforce to meet administrative needs that were not being fulfilled by Association unit members. Specifically, “. . . approximately one-half of the duties assigned to lecturers are duties that FAOCC members cannot be required to perform.”

The facts show that the College created the lecturer title to support its realignment of educational goals. Lecturers are twelve-month employees who are assigned certain administrative duties/responsibilities that are contractually or otherwise not required of full-time faculty. I consider this to be a significant, distinguishing feature from cases cited by the Association, including County of Union, I.R. No. 2002-12, 28 NJPER 279 (¶33105 2002); Bergen Pines Cty. Hospital; and Rutgers, the State University and AFSCME; P.E.R.C. No. 82-20, 7 NJPER 505 (¶12224 1981), aff'd NJPER Supp. 2d. 132 (¶113 App. Div. 1983) Some of the duties that lecturers are required to perform (that full-time faculty are not), include evaluations of adjunct faculty

and full-time faculty; curriculum development; college governance; grant writing; collecting and evaluating data and teaching materials; and facilitating cooperative and distancing learning partnerships (J-3). Although the Association may contend that these administrative tasks fall under “. . . perform other professional duties” as set forth in the parties’ CNA, the “other professional duties” are “expected” and not required of full-time faculty. College witness Winchester credibly testified, without rebuttal from the Association, that the College’s restructuring plan, proposed to address declining enrollment, identified the development of distance partnerships; the development of new curricular options and the development of new degrees as administrative tasks that were not being performed by unit employees. These items are deemed important to attract new students to the College and to better meet the needs of current students. Not only was the College unable to require full-time faculty to perform those administrative tasks, unit employees weren’t quantitatively sufficiently performing elective administrative tasks. The College created the lecturer title with mandated duties to ensure that the administrative tasks would be performed to meet its needs. These circumstances show that the College reorganized the way it delivered services and wasn’t required to negotiate with the Association before transferring that work.

Unit Composition

Clarification of unit proceedings, “. . . resolve questions concerning the composition of a unit by interpreting the language which defines the existing unit in order to determine whether particular titles are includable or should be excluded from a unit whose representational status is already established.” Clearview Reg. H.S. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248, 250 (1977).

The Association avers that the recognition provision of the parties’ CNA sets forth language referring to the Association as the exclusive representative of full-time faculty, including not only individuals holding academic ranks, “. . . but also all faculty members, including lecturers, as defined in Article V, paragraph B of the parties CNA” (brief at 53). Further, it argues that if lecturers do not fall within the recognition provision of the parties’ CNA, lecturers, at minimum, possess a strong “community of interest” with full-time faculty that requires their inclusion in the Association’s negotiations unit.

The College argues that the proper method for the Association to seek the inclusion of lecturers in its unit is a Clarification of Unit Petition, not an unfair practice charge. The College asserts that lecturers cannot be included the Association’s unit because they are “supervisors” under the Act and are prohibited from inclusion in a unit with non-supervisory employees, as set forth in N.J.S.A. 34:13A-5.3.

The Association cannot achieve through this unfair practice proceeding a result it did not obtain or achieve through the representation process. See Warren Hills Regional Board of Education, H.E. No. 2005-2, 30 NJPER 298, 306 (¶105 204). The Association filed a clarification of unit petition, requesting the result it now seeks as a remedy to this charge, that it later voluntarily withdrew (R-11). That petition was the appropriate mechanism to seek a clarification of the Association's unit to include the lecturer title. Accordingly, I am constrained to consider only whether unit work was unlawfully transferred from full-time faculty to non-unit lecturers, as alleged in the unfair practice charge.

CONCLUSIONS OF LAW

Respondent Board of Trustees of Ocean County College did not violate section 5.4a(1) and (5) of the Act when it transferred unit work of full-time faculty to lecturers in and around September, 2010.

ORDER

I recommend that the Complaint be dismissed.^{8/}

/s/ Jonathan Roth
Jonathan Roth
Hearing Examiner

DATED: January 14, 2022
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 January 25, 2022.

^{8/} I don't believe that N.J.S.A. 34:13A-5.15 of the WDEA, N.J.S.A. 34:13A-5.11 et seq., should be applied retroactively to this matter. Bunk v. Port Auth., 144 N.J. 176, 193-194 (1996).