P.E.R.C. NO. 86-28

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(RAMAPO STATE COLLEGE),

Respondent,

-and- Docket No. CO-84-293-18

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

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the State of New Jersey (Ramapo State College) violated the New Jersey Employer-Employee Relations Act when it unilaterally reduced the work year and compensation of its Assistant Director of Career Planning without first negotiating with her majority representative, the Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO.

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Charging Party.

Appearances:

For the Respondent, Irwin I. Kimmelman, Attorney General
(Melvin E. Mounts, Deputy Attorney General)

For the Charging Party, Thomas H. Wirth, Staff Representative

DECISION AND ORDER

On April 23, 1984, the Council of New Jersey State College Locals ("Council") filed an unfair practice charge against the State of New Jersey (Ramapo State College) ("State" or "College"). The charge alleges that the State violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (5),[1/] when it unilaterally

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1/ These subsections 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; and (5) Refusing to negotiate in
(Footnote continued on next page)

reduced the work year of its Assistant Director of Career Planning and Placement, Sharon Rosengart, from 12 months to 10 months and also reduced her compensation accordingly.

On August 16, 1984, a Complaint and Notice of Hearing issued. The State then filed an Answer asserting that it had a contractual right to reduce Rosengart's work year.

On September 16 and 17 and October 2, 1984, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses and introduced exhibits. They filed post-hearing briefs by February 15, 1985.

On March 15, the Hearing Examiner recommended dismissal of the Complaint. H.E. No. 85-34, 11 NJPER ___ (¶_____ 1985) (copy attached). He found that the State had reduced Rosengart's work year pursuant to a managerial prerogative to abolish its summer program for career planning and placement and that, given this prerogative, the State had a contractual right to pay Rosengart the money contractually due 10 month employees.

On April 10, after receiving an extension of time, the Council filed its exceptions. It asserts that the Hearing Examiner erred in relying on a case, Newark Bd. of Ed., P.E.R.C. No. 84-156, 10 NJPER 445 (¶14199 1984) ("Newark"), aff'd App. Div. Dkt.

(Footnote continued from previous page)
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."

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No. A-5774-83-T7 (6/17/85), not briefed by the parties and allegedly inapplicable; finding that the College had altered or eliminated a portion of its career planning and placement program; and finding that the Council had contractually agreed to the application of the State Compensation Plan to Rosengart's situation.

On April 26, the State filed a response supporting the Hearing Examiner's recommendations.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-8) are generally accurate. We adopt and incorporate them here, but we will modify and supplement finding of fact no. 6 concerning the College's reasons for reducing Rosengart's work year and compensation.[2/] The College's employee coordinator gave this explanation:

> The college was in fiscal difficulty. They needed to cut back on their expenditures, particularly their salary expenditures, so the president asked his division heads to come up with plans for each of their units which addressed that issue, and they went off and did just that, presented to him a variety of suggestions. The dean of students suggested the plan that we are discussing here today, to cut back the program of replanning and placement to a 10-month position since the program serviced students, since students are not on campus during the months that the services of these two people who were in the unit were not being required, it seemed sensible to the dean to do that. So he made the suggestion for that and felt that the program could retain its integrity and proceeded to recommend that to the president.

2/ We also note that finding of fact no. 4 mistakenly lists Article 19 (F) instead of 17(F), as the contract provision concerning librarians and 12 month and 10 month positions.

in Rosengart's work year. Accordingly, only the second type of violation is at issue. In order for us to find such a violation, the Council bears the burden of proving: (1) a change (2) in a term and condition of employment (3) without negotiations. The State, however, may defeat such a claim if it has a managerial prerogative or contractual right to make the change.

It is undisputed that the College reduced Rosengart's work year without first negotiating with the Council. It is also clear, as the Courts and we have repeatedly held, that an employee's work year is a mandatorily negotiable term and condition of employment. Piscataway Twp. Bd. of Ed., P.E.R.C. No. 77-37, 3 NJPER 72 (1977), aff'd 164 N.J. Super. 98 (App. Div. 1978); Hackettstown Ed. Ass'n, P.E.R.C. No. 80-139, 6 NJPER 263 (¶11124 1980), aff'd App. Div. Docket No. A-385-80T3 (January 18, 1982), certif. den. 89 N.J. 429 (1982); Essex Co. Vocational Schools, P.E.R.C. No. 81-102, 7 NJPER 144 (¶12063 1981); East Brunswick Bd. of Ed., P.E.R.C. No. 82-11, 8 NJPER 320 (¶13145 1982); Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983). Thus, the Appellate Division in Piscataway stated:

> ...[T]here cannot be the slightest doubt that cutting the work year, with the consequence of reducing annual compensation of retained personnel who customarily, and under the existing contract, work the full year (subject to normal vacations), and without prior negotiation with the employees affected, is in violation of both the text and spirit of the Employer-Employee Relations Act. Cf. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978). Id. at 101.

Accordingly, the unilateral reduction of Rosengart's work year and compensation violated subsecton 5.4(a)(1) and (5) unless we find that the State had either a managerial prerogative or a contractual right to reduce her work year unilaterally.

The Hearing Examiner, relying on Newark, held that the State had a managerial prerogative to reduce Rosengart's work year unilaterally. We disagree.

Under Local 195 v. State, 88 N.J. 383 (1982) ("Local 195"), a matter which intimately and directly affects public employees, such as their work year, only becomes non-negotiable if it is preempted (not an issue here) or if negotiations would significantly interfere with the determination of governmental policy. Local 195 emphasizes that the interference must be significant to make a subject non-negotiable because most decisions of the public employer which affect the work and welfare of public employees impinge to some extent on the determination of governmental policy. To determine whether negotiations would significantly interfere with the determination of governmental policy, we must balance the interests of the public employer and the public employee.

Here, on the one hand, Rosengart has an important interest in having a say, through her majority representative, before her work year and compensation are reduced. Unilateral reductions in work year and compensation can lead to employee frustration, inefficiency and instability. Woodstown-Pilesgrove Regional School Dist. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Ass'n, 81 N.J. 582

(1980). On the other hand, the College has not identified any educational policy reason for the reduction in work year and compensation nor has there been any change in the delivery of counselling services to students, since students do not receive such counselling during the summer. Instead, the College's interest is budgetary: as its employee coordinator testified, it wished to save money by reducing Rosengart's salary even though she would be expected to perform the same work.[3/] Under all the circumstances of this case, and especially given the economic motivation for the reduction, we therefore hold that the College did not have a managerial prerogative to reduce Rosengart's work year without first discharging its negotiations obligation under section 5.3.[4/] Woodstown-Pilesgrove summarizes this case well: "There being no demonstration of a particularly significant educational policy, and the budgetary consideration being the dominent element, it cannot be said that negotiation and binding arbitration of that matter significantly or substantially trenched upon the managerial prerogative of the board of education." Id. at 594.

3/ While the employee coordinator alluded to "fiscal difficulty," the record is barren of evidence suggesting that a financial emergency necessitated this particular unilateral method of saving money.

4/ Again, this holding does not mean that the Council can forever block the State from reducing Rosengart's work year and accordingly her compensation. All it means is that the employer must negotiate in good faith until impasse with the Council before it makes any work year reductions.

Piscataway, Hackettstown, Essex County, East Brunswick, and Sayreville are the governing precedents. In all those cases, the public employers unilaterally reduced work years for budgetary rather than policy reasons and we found violations of the employer's negotiations obligations. Further, Hackettstown and East Brunswick involved reductions in the work years of guidance counselors who, like Rosengart, did not work with students during the summer and instead used that time to review the past school year and plan for the upcoming school year. Cf. Sayreville (reduction in work year of guidance counselor secretary)

Newark is inapplicable.[5/] There, a school board, faced with a $4,500,000 shortfall in anticipated revenues, made an educational policy decision to eliminate a summer teaching program for gifted students so that it would achieve the greatest good for the greatest number of students. Id. at p. 448, n. 7; the majority representative conceded that it was not contesting the Board's right to eliminate the summer program and we accepted that concession. Here, by contrast, there has been no educational policy decision to redistribute educational resources from gifted students to less gifted students. College students receive the same counselling services as before and the only change is that Rosengart is expected to accomplish all her other work besides student counselling in 10

5/ We commend the Hearing Examiner, however, for discussing cases not cited by the parties and reject the Council's exception to his doing so.

months instead of 12.[6/] Accordingly, we hold that the College did not have a managerial prerogative to reduce Rosengart's work year without negotiating with the Council.

We next consider whether the College had a contractual defense permitting it to reduce Rosengart's work year without negotiations. We hold it did not.

Because the policy of our Act favors negotiations before any change in terms and conditions of employment is made, a contractual waiver of a majority representative's right to negotiate such a change will not be found unless a contract clearly, unequivocally and specifically authorizes a unilateral change. Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122, 140 (1978); State of New Jersey, P.E.R.C. No. 77-40, 3 NJPER 78 (1977); Deptford Bd. of Ed., P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980).

Here, the parties' collective negotiations agreement contains only one provision, Article 17 (F), concerning movement between 10 and 12 month positions and that provision is limited to librarians. The contract's management rights clause does not specifically empower the College to reduce the work year unilaterally and instead acknowledges that the employer's powers are subject to the limitations imposed by the New Jersey Employer-Employee

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6/ She may well be able to do so and the College could certainly take that position in negotiations.

Relations Act. Article XXI, entitled "Salary and Fringe Benefits Agreement" provides that "[a]ll salary adjustments will be made consistent with the provisions, practices and policies of the STATE and in accordance with the STATE Compensation Plan effective at the time. That article, however, does not authorize work year reductions and there is no evidence that the State compensation plan, which was not introduced into evidence, does so either. Further, there is not a past practice of involuntary, unilateral work year reductions. While there was testimony that State Colleges have frequently appointed employees to 10 month positions after they leave 12 month positions in the same title, the Council proved that all these employees but one volunteered for or agreed to the appointments and the State did not show that the other employee had not. Under all these circumstances, we cannot find that the College has proved a clear, unequivocal and specific contractual right to reduce Rosengart's work year and compensation unilaterally. Thus, given that the Council does not have a contractual right to block any proposed work year reduction and given that the State does not have a contractual right to insist on one, the subject is appropriate for negotiations under section 5.3.

Accordingly, we hold that the College violated subsections 5.4(a)(1) and (5) when it reduced Rosengart's work year and compensation without first negotiating to impasse with the Council. As in Piscataway, the appropriate remedy is to order the State to

restore Rosengart's prior work year and compensation until such time as the State has discharged its negotiations obligation and to pay Rosengart the compensation she lost as a result of the illegal reduction, minus any money earned in other jobs during the time she otherwise would have been working for the College, together with interest on the difference. See also Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Ed. Sec's, 78 N.J. 1 (1978).

ORDER

The State of New Jersey (Ramapo State College) is ordered to:

A. Cease and Desist from:

1) Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, specifically by reducing the work year and compensation of Sharon Rosengart without negotiating with her majority representative, the Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO.

2) Refusing to negotiate in good faith with the Council concerning terms and conditions of employees, specifically the work year and compensation of Sharon Rosengart.

B. Take the following affirmative action:

1) Restore the work year and compensation of Sharon Rosengart until such times as the State negotiates in good faith with the Council concerning any proposed reductions in work year and compensation.

2) Pay Sharon Rosengart the compensation she would have received as a 12 month employee had the State not reduced her work year unilaterally, minus any compensation Rosengart may have received from other employment during the time she otherwise would have been working at Ramapo College, together with 12% simple interest per annum on the difference.

3) Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

4) Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent State has taken to comply herewith.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hipp and Johnson voted in favor of this decision. Commissioners Suskin and Wenzler opposed. Commissioner Graves abstained.

DATED: Trenton, New Jersey
August 27, 1985
ISSUED: August 28, 1985

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing our employees in the exercise of the rights guaranteed to them by the Act, specifically by reducing the work year and compensation of Sharon Rosengart without negotiating with her majority representative, the Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO.

WE WILL cease and desist from refusing to negotiate in good faith with the Council concerning terms and conditions of employment, specifically the work year and compensation of Sharon Rosengart.

WE WILL restore the work year and compensation of Sharon Rosengart until such times as the State negotiates in good faith with the Council concerning any proposed reductions in work year and compensation.

WE WILL pay Sharon Rosengart the compensation she would have received as a 12 month employee had the State not reduced her work year unilaterally, minus any compensation Rosengart may have received from other employment during the time she otherwise would have been working at Ramapo College, together with 12% simple interest per annum on the difference.

STATE OF NEW JERSEY (RAMAPO STATE COLLEGE)

(Public Employer)

Dated _____ By _____

(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

H. E. No. 85-34

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

In the Matter of

STATE OF NEW JERSEY (RAMAPO STATE COLLEGE),

Respondent,

-and-

Docket No. CO-84-293-18

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

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the State (College) did not violate the New Jersey Employer-Employee Relations Act when it appointed an employee to a ten rather than a twelve month position. The Hearing Examiner found that the College abolished the summer program leaving only ten month positions available for appointment. In addition, the Hearing Examiner found that since adequate notice was provided, and since the parties had previously negotiated over wages and benefits for ten month employees no additional negotiations were warranted.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decisions which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H. E. No. 85-34

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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STATE COLLEGE),

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-and- Docket No. CO-84-293-18

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Charging Party.

Appearances:

For the Respondent
Irwin I. Kimmelman, Attorney General
(Melvin E. Mounts, Jr., D.A.G., of Counsel)

For the Charging Party
Thomas H. Wirth, Staff Representative

HEARING EXAMINER'S
RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on April 23, 1984, by the Council of New Jersey State College Locals ("Council") alleging that the State of New Jersey through the actions of Ramapo College ("State" or "College") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). The Council alleged that the College unilaterally reduced the work year of employee Sharon Rosengart in

violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act.[1/]

The Council alleged that Rosengart was involuntarily and unilaterally changed from a twelve to a ten month employee, that the parties' collective agreement did not provide for such a change, and that the State did not negotiate with the Council regarding the change. The State denied committing any violation of the Act. In defense of its position the State alleged that the Council accepted as part of the collective agreement the State's right to establish both ten and twelve month positions, that the Council agreed to procedures for moving employees from twelve to ten month positions, and that the Council agreed to the rates of pay for both positions.

It appearing that the allegations of the Unfair Practice Charge may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on August 16, 1984. Hearings were held in this matter on September 18 and 19, and October 2, 1984, in Trenton, New Jersey, at which time the parties were given the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. Both parties filed

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an approrpriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

post-hearing briefs and reply briefs, the last of which was received on February 15, 1985.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act exists, and after hearing, and after consideration of the post-hearing briefs, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record I make the following:

Findings of Fact

1. The State of New Jersey (Ramapo State College) is a public employer within the meaning of the Act and is subject to its provisions.

2. The Council of New Jersey State College Locals is an employee representative within the meaning of the Act and is subject to its provisions.

3. The record shows that Sharon Rosengart held the twelve month position of Assistant Director, Career Planning and Placement, apparently for several years and that her last individual employment contract for that position expired on June 30, 1984.

On December 5, 1983, the Student Development Committee of the College Board of Trustees endorsed the appointment of Rosengart for a ten month position for the 1984-85 fiscal year in the same title she had previously held (Exhibit J-4). At that same time the Committee also endorsed the appointment of Rosengart's supervisor,

Rita Tepper, Director, Career Planning and Placement, for a ten month position. At the Board of Trustee meeting on December 14, 1983, however, there was no reference to Rosengart's appointment or any other similar personnel actions involving other employees. The parties stipulated that normally such actions would be included in Board minutes but were inadvertently omitted at that time (Transcript "T" 3 p. 5).

Subsequently, by letter dated December 15, 1983 (Exhibit J-2) College President George Potter advised Rosengart of her reappointment to her position (the twelve month position) subject to the availability of funds and the programming needs of the College.2/

However, on January 4, 1984, Rosengart received a memorandum and a letter from Potter regarding her position (Exhibit J-3). Potter indicated in the memorandum that J-2 did not reflect the Board of Trustees action on December 14 appointing her to a ten

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2/ That letter provided in pertinent part as follows:

> I am glad to advise you of your reappointment to the position of Assistant Director, Career Planning and Placement for the fiscal year 1984/85.
>
> As you are aware, appointments of all personnel are subject to the availability of funds and to the programmatic needs of the College. If any financial or programmatic adjustments have to be made prior to the effective date of this appointment, you will receive a further communication from me.

month position, and therefore, that J-2 was invalid. The letter of appointment to the ten month position was attached to J-3.[3/] The new appointment letter simply reiterated the appointment to a ten month position subject to funds and program needs.[4/]

Rosengart did not request nor voluntarily consent to her ten month appointment (T 1 p. 14).

4. The Council and the State are parties to a collective agreement effective July 1, 1983 through June 30, 1986 (Exhibit J-1). That agreement contains clauses covering employee reappointment or reassignment, and contains a clause covering the movement of librarians between ten and twelve month positions.

3/ The memo of January 4 provided as follows:

> I attach herewith a letter appointing you to the position of Assistant Director of Career Planning and Placement on a 10-month basis effective September 1, 1984.
>
> The letter that I sent to you dated December 15, 1983 did not properly reflect the action taken by the Board of Trustees on December 14, 1983 and is, therefore, invalid. You should disregard it in its entirety.

4/ The letter of January 4 provided as follows:

> I am glad to advise you of your appointment to the position of Assistant Director of Career Planning and Placement on a 10-month basis to be effective September 1, 1984.
>
> As you are aware, appointments of all personnel are subject to the availability of funds and to the programmatic need of the College. If any financial or programmatic adjustments have to be made prior to the effective date of this appointment, you will receive a further communication from me.

Article 13(C) deals with the appointment and retention of employees and provides in pertinent part that the College issue a letter of reappointment or non-reappointment by December 15 of the third, fourth or fifth years of service. Article 15(B)(2) provides that employees who are involuntarily reassigned between appointments must be provided one semester's advance notice. Article 19(F) provides that librarians may apply for a one year change in status from a twelve month to a ten month position, but the parties stipulated that Rosengart was not a librarian (T 1 p. 6) and therefore Article 19 did not apply herein.

Finally, Article 21(A)(1) provides as follows:

> All salary adjustments will be made consistent with the provisions, practices and policies of the STATE and in accordance with the STATE Compensation Plan effective at the time.

The parties stipulated that the State Compensation Plan includes the determination of salary and anniversary dates of employees moving between twelve and ten month positions (T 2 pp. 40-41).[5/] They also stipulated that over the last ten years the State has created a number of ten month titles corresponding to existing twelve month titles and vice versa (T 2 p. 41).

5/ The State Compensation Plan itself was not submitted as part of the record herein; however, the parties did clearly stipulate as to the content of the Plan regarding salaries for employees moving between twelve and ten month positions.

Finally, the parties stipulated that subsequent to the signing of J-1 there have been neither negotiations nor offers to negotiate over the subject of the instant Charge (T 1 p. 7).

5. The record shows that the parties' first collective agreement was reached in late 1974, and like J-1, included the State Compensation Plan. Frank Mason, the State's Director of the Office of Employee Relations, the office that negotiates on behalf of the State and State Colleges, testified that the Compensation Plan shows titles for the State Colleges as ten or twelve month positions, and describes the formula for adjusting wages of employees moving either way between ten and twelve month positions (T 1 pp. 6-7). Although the Council did not specifically dispute Mason's testimony, Council President Marcoantonio Lacatena testified that there were no negotiations about any State right to unilatlerally shift employees in either direction between ten and twelve month positions (T 3 p. 19).

6. The record further shows that the only reason for Rosengart's and Tepper's appointments to ten month positions rather than reappointment to their twelve month positions was because of the elimination of the summer program in Career Planning and Placement due to a College-wide fiscal problem (T 2 pp. 30-31). The facts show that the College President had asked division heads to reduce expenditures, and the Dean of Students suggested eliminating the summer program of Career Planning and Placement because that

program serviced students, and there were no students in need of that program during the summer months (T 2 p. 31). The College Board of Trustees adopted the Dean's suggestion which resulted in the creation of a ten month career planning and placement program, and the subsequent appointments of Rosengart and Tepper to ten month positions (T 2 pp. 31-32).[6/] The evidence showed that Rosengart and Tepper were the only professional employees in that program (T 2 p. 32).

7. Finally, the record shows that the State Colleges have frequently appointed employees to ten month positions after they have held twelve month positions in the same title. Employees Susan Newcomb (1980), Molly David (1981), Nevalia Ogletree (1981), David Young (1982), and Carlo Racamato (1983) were all involved in such appointments (T 2 pp. 19-20). Although the Council denied any prior knowledge of these appointments (T 1 p. 13), it did not deny that these appointments had been made, but it asserted that employees Newcomb, Ogletree, Young, and Racamato all volunteered for or agreed to the appointments (T 2 pp. 22, 27, 36). There was no evidence to show whether employee David agreed or disagreed with her appointment.

6/ The record shows that the Board of Trustees actually agreed to not reappoint Rosengart and Tepper to their previous (twelve month) positions, but rather, to appoint them to the new (ten month) positions. (T 2 pp. 31-33).

Analysis

Although the State maintained that the movement of employees between ten and twelve month positions was a managerial prerogative and therefore non-negotiable, the law does not support that contention. The Commission and the courts have frequently and consistently held that the length of an employee's work year is a mandatorily negotiable term and condition of employment, and in a number of cases has held that the unilateral reduction of an employee's work year from a twelve or eleven month position to a ten month position was a violation of the Act. In re Piscataway Twp. Bd. of Ed., P.E.R.C No. 77-37, 3 NJPER 72 (1977), aff'd 164 N.J. Super. 98 (App. Div. 1978); In re Hackettstown Ed. Ass'n., P.E.R.C. No. 80-139, 6 NJPER 263 (para. 11124 1980), aff'd App. Div. Docket No. A-385-80T3 (January 18, 1982), pet. for certif. den. 89 N.J. 429 (1982); In re Essex Co. Vocational Schools, P.E.R.C. No. 81-102, 7 NJPER 144 (para. 12063 1981); In re East Brunswick Bd of Ed., P.E.R.C. No. 82-11, 8 NJPER 320 (para. 13145 1982); In re Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (para. 14066 1983).

In addition, the Appellate Division in In re Piscataway, supra, held that even a legitimate economic motivation for such changes was not a sufficient defense to a unilateral work year reduction. That Court held at 164 N.J. Super. 101:

> The Board here argues that economy motivates the action complained of and that there is no material difference between the Board's right to cut staff and the right to cut months of service of staff personnel where the economy motive is common to both exercises.

> We disagree. While cutting staff pursuant to N.J.S.A. 18A:28-9 would be permissible unilaterally without prior negotiation..., there cannot be the slightest doubt that cutting the work year, with the consequence of reducing annual compensation of retained personnel who customarily, and under the existing contract, work the full year (subject to normal vacations), and without prior negotiation with the employees affected, is in violation of both the text and the spirit of the Employer-Employee Relations Act. Cf. Galloway Tp. Bd. of Ed v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978).

However, as an exception to that rule the Commission has recently held in In re Newark Bd. of Ed., P.E.R.C. No. 84-156, 10 NJPER 445 (para. 15199 1984), that where an employer exercises its managerial right to eliminate a portion of a program, it is not required to negotiate over that decision notwithstanding the reduction of the work year of employees employed in that program.

In Newark, supra, a particular high school operated on an eleven month basis and all employees worked eleven months. The eleventh month was included in the regular work year and was not a separate summer school. The employer chose to abolish the eleventh month (July) of the program due to fiscal problems and in order to provide other services. The Commission held:

> ...we must assume that the Board had a managerial prerogative to eliminate the eleventh month of the high school program, thus eliminating the need for employees to work during that month. It follows, as necessary consequences of that decision, that the Board had the right to reduce the work year of the high school employees and that the Board was not obligated to compensate the employees for the full month.... 10 NJPER at 447.

However, the Commission went on to find a violation in Newark because the Board implemented its decision to abolish the

summer program without giving the union adequate notice and an opportunity to negotiate the consequences of the decision.

Having reviewed all the facts herein I believe that Newark, and not Piscataway, is the controlling case in this matter. The uncontroverted facts are that the College abolished the summer program concerning career planning and placement as a result of fiscal problems, and because no students were in need of that program during the summer. As a result of the managerial decision to abolish that program during the summer, the College could not reappoint Rosengart (or Tepper) to a twelve month position because only ten month positions for that program were then available.

Piscataway and the other cases cited do not apply in this case because they are limited to situations where positions were reduced, rather than where programs were abolished. The Commission has established a distinction between the unilateral reduction of the work year, and the elimination of a program. A program elimination which may result in a reduced work year is a non-negotiable managerial prerogative, whereas, a work year reduction absent the elimination of a program or the actual abolishment of a position is mandatorily negotiable.7/ Here, like

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7/ Although employers have argued that the elimination of a twelve month position and establishment of a ten month position

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Newark, the summer months were part of the regular program, and here, like Newark, the College eliminated the summer portion of the program because of fiscal considerations. The resulting change in Rosengart's work year was therefore not negotiable.8/

Unlike the situation in Newark, however, there was no violation committed herein regarding notice or negotiations over consequences of the decision. First, the facts here show quite clearly that adequate notice of the abolishment of the program was provided, and the College attempted to follow the notice requirements in the parties' collective agreement. Rosengart was

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performing the same, or substantially the same functions is a managerial prerogative, the Commission in Piscataway, Hackettstown, and Sayreville, supra, has drawn a distinction between the actual abolition of a position which is a non-negotiable managerial right, and the use of the above procedure to reduce an employee's work year. Where the "new" position performs the same or substantially the same duties as the original position the Commission has maintained that there has been no abolishment in the position, but only a reduction in the work year.

The finding in the instant case is not based upon any alleged abolishment of Rosengart's title, but upon the College's elimination of the summer program.

8/ Tepper's appointment to a ten month position provides the actual proof that the summer program for career planning and placement was abolished. It would make little sense to employ a director for ten months if a program existed for twelve months. Similarly, it would make little sense to require that Rosengart be employed for twelve months while her supervisor is only employed for ten months.

notified on January 4, 1984 that she would not be employed for July and August of that year. This six month advance notice gave Rosengart the opportunity to obtain alternative employment during the summer months which was not an opportunity available to the employees in Newark.[9/]

9/ The facts show that the College had apparently intended to non-reappoint Rosengart to a twelve month position, and instead offer her an appointment to a ten month position (T 2 pp. 31-33). Although the College intended to endorse her ten month appointment on December 5, 1983, it inadvertently failed to place in the December 14 minutes either her twelve month non-reappointment, or her ten month appointment. In fact, the minutes of the December 5 meeting (Exhibit J-4) show that Rosengart was actually "reappointed" to a ten month position, which in itself was inappropriate since she could not be reappointed to a position she had just been appointed to. Consequently, on December 15 the College improperly offered Rosengart a twelve month appointment which it was forced to invalidate on January 4, 1984, at which time it also offered the ten month appointment.

It appears from these facts that the College never literally complied with Art. 13(C) of J-1 in that it did not provide Rosengart with notice of her non-reappointment to the twelve month position on December 15, 1983. At best, she was notified of her non-reappointment on January 4, at the same time she was advised of her ten month appointment. Despite the failure to comply with Art. 13(C) it appears that the College complied with Art. 15(B)(2) in that Rosengart had at least 45 days notice of her new assignment.

Under the circumstances of this case I do not believe that the technical violation of Art. 13(C) violated the Act. It was de minimis in scope. The College moved relatively quickly to correct its mistake, and Rosengart had adequate notice. Assuming, arguendo, that a technical violation of the Act were committed regarding Art. 13(C), any remedy thereto could not

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Second, unlike Newark, it appears here that the parties, by adopting the State Compensation Plan as part of their collective agreement, and by the content of other clauses in their agreement, have already "negotiated" over the salary and fringe benefits to be provided to ten month employees. The evidence presented shows that the State Compensation Plan describes the method for adjusting wages of employees moving from twelve to ten month positions, and Rosengart's salary can be determined by utilizing that previously agreed upon process. In addition, the remainder of Article 21 provides for salary increases and a variety of benefits for ten (and twelve) month employees, and Article 22 provides for vacation and sick leave for ten month employees.

Thus, it appears that the parties have already negotiated over the terms and conditions of employment affecting ten month employees, and the Council has not demonstrated that there were any remaining "negotiable consequences" of the College's decision to abolish the summer program. Although the Council relied upon an unreported 1973 Superior Court decision, and a 1981 Chancellor of Higher Education decision on a motion to dismiss, to support its position, neither decision is relevant to the instant matter.

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result in Rosengart's reassignment to the twelve month position since the twelve month program had been abolished.

Accordingly, based upon the entire record and the above analysis, I make the following:

Conclusions of Law

The State (College) did not violate N.J.S.A. 34:13A-5.4(a)(1) and (5) by appointing Sharon Rosengart to a ten rather than a twelve month position.

Recommended Order

I recommend that the Commission ORDER that the Complaint be dismissed in its entirety.10/

Arnold H. Zudick
Hearing Examiner

Dated: March 15, 1985
Trenton, New Jersey

10/ It must be noted that the decision herein is based upon the College's abolishment of the summer program for career planning and placement and is limited to its particular facts. This decision, like Newark, supra, represents an exception to the long line of cases cited hereinabove that find it unlawful for an employer to unilaterally reduce the work year of employees by moving them from twelve or eleven month positions to ten month positions. I find it unnecessary in this decision to make any determination as to whether or not the State would be entitled to reduce employees from twelve to ten month positions based upon past practice or based upon the parties' collective agreement and the State Compensation Plan.