

H.E. NO. 2018-2

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

In the Matter of

STATE OF NEW JERSEY,  
(KEAN UNIVERSITY),  
Respondent,

-and-

Docket No. CO-2014-193

COUNCIL OF NEW JERSEY  
STATE COLLEGE LOCALS, AFT,  
Charging Party.

SYNOPSIS

A Hearing Examiner determines that the University violated 5.4a(1) and (5) of the Act when it refused to negotiate upon demand over mandatory winter-break training in 2014 and succeeding years. Despite having acquiesced to such training in 2012 and 2013 by not making a negotiations demand, she determined that any waiver based on acquiescence ended when the KFT's acquiescence ended and it demanded negotiations. The Hearing Examiner also rejected the University's claim that the parties' collective agreement already provided compensation for training finding that the parties' negotiations' history did not support this contention. She dismissed the University's assertion that the collective agreement barred negotiations because the University acted consistently with prior practice. In rejecting this argument, the Hearing Examiner determined that when the University doubled the number of mandated-training hours and added personnel actions as consequences for failure to attend, it increased the workload and changed the nature of the training.

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  
Christopher S. Porrino, Attorney General  
(Marolhin D. Mendez, Esq., DAG)

For the Charging Party  
Bennett Muraskin, Staff Representative

**HEARING EXAMINER'S REPORT**  
**AND RECOMMENDED DECISION**

On February 24, 2014 and September 4, 2014, the Council of New Jersey State College Locals, AFT (Charging Party or Council) filed an unfair practice charge and amended charge against the State of New Jersey (Kean University) (Respondent or University). The charge alleges that on October 11, 2013, the University announced its intention to schedule mandatory training for faculty during winter break, specifically from January 13 to January 17, 2014, a time when faculty are not normally required

to be on campus. On October 14, 2013 as well as in December 2013 and January 2014, the Council demanded negotiations for additional compensation as well as impact related to the mandatory training. The Council contends that the University did not respond to its request to negotiate.

The amended charge asserts that although the University's Chief Negotiator Philip Connelly expressed a willingness to enter into negotiations for compensation at subsequent negotiations sessions over the next few months, the parties either did not get to that agenda item or when it was discussed, Connelly took the position that compensation for the training was not negotiable because it is a part of regular faculty responsibilities for which faculty were already compensated. These actions, the Council contends, violate 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq.<sup>1/</sup>

On October 28, 2014, the Director of Unfair Practices issued a Complaint and Notice of Pre-hearing (C-1)<sup>2/</sup> and assigned the

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<sup>1/</sup> 5.4 a Public employers, their representatives or agents are prohibited from: (1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative.

<sup>2/</sup> Exhibits are marked C- for Commission, J- for joint, CP- for (continued...)

matter to me for hearing. On November 6, 2014, the Respondent filed its Answer (C-2) admitting that it mandated the January 2014 faculty training but asserting that it had done so in the past, and that under the parties' collective negotiations agreement, faculty may be required to be on campus during winter break such as for winter courses. Although Respondent admits that Charging Party made a demand to negotiate, Respondent denies that such compensation is legally negotiable. Finally, it denies that Connelly took the position that compensation had already been negotiated as part of the parties' most recent collective agreement (2011-2015). Respondent raise various affirmative defenses, including but not limited to, business justification, waiver and managerial prerogative and that faculty responsibilities delineated in the parties' collective agreement covers training for which they are compensated.

On August 10, 2015, Respondent filed a motion for summary judgment together with a brief, certifications and exhibits. On September 10, 2015, Charging Party filed a cross motion together with a brief, exhibits and a certification. On October 23, 2015, the motion and cross motion were referred to me pursuant to N.J.A.C. 19:14-4.8(a). On May 16, 2016, I issued a decision denying the motions. I determined that although mandating

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2/ (...continued)  
Charging Party and R- for Respondent.

faculty training was a managerial prerogative, negotiations upon demand over additional compensation and impact is required. However, I found that there were material disputed facts as to whether the parties had negotiated upon demand; whether the parties' collective agreement already covered compensation for training; whether under Article XIIC, the University was acting consistently with past practice when it refused to negotiate regard to the 2014 training and thus not required to negotiate; and, finally, whether the union waived its right to negotiate by not demanding negotiations the first two years winter-break training was mandated.

A hearing was held on February 8 and March 20, 2017.<sup>3/</sup> The parties examined witnesses and presented documentary evidence. Briefs were submitted by May 26, 2017. Based on an examination of the record, I find the following:

#### **FINDINGS OF FACT**

##### **The Parties' Stipulations**

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

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<sup>3/</sup> Transcript cites refer to the days of hearing as 1T and 2T, respectively.

Federation of Teachers (KFT) is a local within the Council and negotiates local agreements with the University (1T14).

2. Philip Connelly was the executive vice president for operations and chief negotiator for Kean University during the time in question. Dr. James Castiglione is president of the KFT (1T14-1T15).

3. On May 29, 2008, the University emailed the faculty that it had established training on student advisement to be conducted between the end of the spring semester and the beginning of the fall semester.

The email stated in pertinent part:

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

(1T15).

4. On June 19 and August 28, 2008, the KFT filed a grievance against the University asserting that the University could not require faculty members to attend training after undergraduate commencement which it characterized as beyond the academic year and in contravention of the parties' collective agreement at Article XIIC requiring that faculty

responsibilities, other than teaching, be performed within the academic year.

The grievant requested that the University cease such assignments outside of the academic year and compensate those who were assigned such duties (1T15-1T16).

5. In August 2010, the parties entered into an interim settlement agreement regarding the issues raised by the grievants (J-3; 1T17). The agreement stated in pertinent part:

Management will exercise every effort to schedule training between the start of the fall semester and the end of the spring semester.

Management has the right to direct faculty to attend training sessions between the end of the spring semester and June 30.

The University will take no action against faculty members who do not attend training sessions between the end of the spring semester and June 30. [J-3]

The parties further agreed that the settlement would not constitute a precedent or offered into evidence with respect to any other matter between the parties except as necessary to enforce J-3.

6. J-1 is the parties' collective negotiations agreement effective from July 1, 2011 through June 30, 2015. J-2 is the parties collective agreement effective from July 1, 2007 through June 30, 2011.

Both agreements contain an Article XII entitled "Faculty Responsibilities" with a sub-paragraph C entitled "Other Responsibilities."<sup>4/</sup>

J-2 at Article XIIC states:

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

J-1 at Article XIIC at paragraph 2 contains the same language as J-2 but adds a paragraph 1 which states the following:

Non-teaching duties include scholarly, research and artistic activities; service through sharing their professional expertise both within and beyond the College/University; and the mentoring and advisement of the students in their courses and programs. During the period of instruction faculty shall be present on campus as necessary to their professional responsibilities and shall also be accessible to students, faculty and staff colleagues

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<sup>4/</sup> Although the parties did not read the specific language of Article XIIC from J-1 or J-2, I take the liberty of quoting the pertinent language here because this Article is mentioned in the parties' stipulations 4 and 5 and the parties agreed to stipulate these collective agreements as joint exhibits.



through whatever normal, electronic, telephonic or written modes they find most convenient during the academic year. Nothing contained herein shall in any way affect the terms and/or continued application of any locally negotiated agreements and/or previous practices pertaining to non-teaching responsibilities, nor shall anything contained herein affect the rights of the College/University, UNION or Local Union under the New Jersey Employer-Employee Relations Act.

7. In 2011, the University was re-accredited by the Middle States Commission on Higher Education. In response to the re-accreditation report, the University Board of Trustees passed a resolution on June 27, 2011, directing the University's president to establish an annual assessment program for every employee, an area identified as in critical need of improvement (1T18).

J-4 is the resolution passed by the University Board directing the president and/or his designees to establish and implement a program of student outcome assessments.

8. As part of the annual assessment program, the University established mandatory bi-annual assessment training and by e-mail on November 23, 2011, notified all faculty that they would be required to attend the week of January 3 through 6, 2012 (J-5). The training was in the areas of institutional assessment, assessment of student learning, and other related topics. Attendance, it was stated, was mandatory. The University

acknowledges that prior to 2012 faculty had not been required to attend training during winter break (1T20-1T21).

9. As a result of the resolution, by e-mail dated October 11, 2013, all University faculty and staff were notified to mark their calendars for January 13 through 17, 2014, from 9:00 a.m. to 5:00 p.m. for professional development and training. The notice emphasized that the announced training was mandatory (J-6; 1T21-1T22). Specifically, J-6 stated in pertinent part:

Please note, as established by resolution of the Kean University Board of Trustees, participation in biennial [sic] training is mandatory. Requests for exceptions should be submitted to your manager for consideration.

10. Training is an on-going responsibility of all full-time faculty at the University and is integrally tied to the University's assessment requirements (1T24).

**Facts Adduced from Witness Testimony**

11. Charging Party presented two witnesses in addition to KFT President James Castiglione, namely Dr. Patrick McManimon and Steve Young. As stated in Stipulation 2 above, Castiglione is KFT president and more specifically has been employed for twenty years by Kean University and is currently an associate professor of physics (1T33). He has served as the president of the KFT for the past nine years (1T33). McManimon has been employed by the University for thirteen years as an assistant professor and coordinator of the criminal justice program (1T60). He is also

the KFT vice-president and chief negotiator for the years when the KFT made its demands to negotiate over compensation for the winter-break training (1T60). Young is employed by the Council of New Jersey State College Locals as executive director and lead negotiator negotiating the master agreement for the Council of State Colleges (1T67).

12. Respondent called two witnesses Dr. Philip Connelly and Kenneth Green. Connelly was first employed by the University in 2002 as vice president of administration. In July 2008, his title changed to executive vice president of operations. Since 2016, he has held the title of executive vice chancellor for Wenchou Kean University in China (2T6-2T7).<sup>5/</sup>

As executive vice president of operations, Connelly was the chief labor negotiator for the University which required him to interact with all the University's various collective negotiations units including the KFT (2T8). He usually conducted labor-management meetings once a month with the KFT but the union was not available in the summer months (2T9). Connelly took part in negotiations for the last two collective agreements (1T9-1T10).

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<sup>5/</sup> Connelly testified via Skype from China. With the time difference, it was approximately nine or ten in the evening for Connelly.

Green has been employed by the University since 2014 as chief labor counsel and chief negotiator replacing Philip Connelly in this role (2T52-2T53).

13. According to Castiglione and corroborated by the other witnesses, the academic year runs from September 1 through June 30 with July and August designated as vacation for faculty. During the year, faculty are required to be on campus for thirty-two (32) weeks of instruction that take place over a Fall and Spring semester. Between the semesters is a three to four week period known as winter break.

14. During winter break, faculty have no instructional responsibilities and are normally not required to be on campus although they are still considered to be in a work status. Faculty perform such non-teaching duties including, but not limited to, research and scholarship, attendance at conferences, service to the university and community, grant writing, curriculum development, program development, participation in university governance and service on outside boards and organizations as well as training (J-1 at Article XIIIA; 1T33-1T35, 1T48, 2T12-2T13, 2T28-2T29). They also finish course work from the Fall semester and prepare for Spring semester courses (1T34-1T35, 2T29).

15. In January 2012, the University for the first time scheduled mandatory on-campus training for faculty during winter

break; such training was scheduled every year thereafter during winter break (1T35). For the first two years (2012 and 2013), the training was scheduled for two and a half days, while for 2014 and thereafter the training was scheduled for five full days (1T36). The purpose of this training was to upgrade skills and keep faculty abreast of requirements to maintain the University's accreditation status (2T13).

16. The KFT did not demand to negotiate after the winter-break training was scheduled for 2012 and 2013, because the KFT concluded that even though the training was mandatory, the University would not discipline faculty for non-attendance, namely because there was no statement issued that attendance would be kept or used for disciplinary purposes or other personnel decisions (J-5, J-6; 1T36, 1T50). Specifically, Castiglione concluded that even though attendance at the training was mandatory, it would not be used to discipline or for other personnel actions because in one of the follow-up emails announcing the training, faculty were asked to RSVP (1T49). Although he never received an email stating that the attendance requirement was no longer obligatory, Castiglione surmised that the RSVP negated the mandatory requirement (CP-11; 1T51-1T52).

Connelly testified that as far as he knew the winter-break training was always mandatory, and that the only reason the faculty were asked to RSVP in the follow-up email was to learn

exactly how many faculty needed to be provided breakfast and lunch. The email did not change the mandatory attendance requirement (CP-11; 2T17, 2T48). I credit Connelly that the mandatory requirement was not changed by the RSVP email and find that attendance by faculty at the training was mandated from the first January training in 2012.

17. In the fall of 2013, the University's Board passed a resolution that, in Castiglione's view, changed the nature of the winter-break training (CP-1; 1T36, 1T53). The training was now called professional development days and was going to be conducted over five days (35 hours) during winter break. The Board's resolution made clear that not only was attendance mandatory as it had been for previous training sessions, but that participation would have an impact on personnel decisions such as annual employment reviews, reappointment, tenure, promotion, range adjustment, and reclassification (CP-1; 1T37-1T38, 1T54, 1T63). Castiglione concluded that non-attendance might also affect benefits such as money for conference travel, assignment of overload teaching and summer teaching (1T37).

Also, he surmised that even though attendance was taken at each training since 2012 by sign-in sheets,<sup>6/</sup> no discipline had

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<sup>6/</sup> Castiglione testified that he was not aware of any attempt during the 2012 and 2013 training to keep attendance (1T37). I do not credit this testimony since he also testified that he was aware attendance was taken by sign-in sheets. Other  
(continued...)

as yet been imposed for non-attendance. It seemed to him that the Board was now serious about requiring attendance. In fact, discipline was eventually imposed for the first time after the January 2016 winter-break training when Green imposed an electronic swipe system having found the sign-in sheets an inaccurate reflection of actual attendance (1T54, 1T58-1T59, 2T53).<sup>7/</sup>

Based on this testimony, I find that the January winter-break training was mandatory from its inception in 2012. The Board resolution passed in September 2013 did not change the mandatory attendance requirement (CP-1; 2T15-2T16). However, starting in January 2014, the scope of the training was broadened. The training extended from two and a half days to five days (thirty-five hours) and broadened in scope to areas of assessment such as campus safety and technology as well as areas

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6/ (...continued)  
witnesses testified that sign-in sheets were used to take attendance.

7/ When the winter-break training first started, attendance was taken by sign-in sheets at the entrance to the training rooms (2T19). Not everyone signed in which created a problem as to how to discipline faculty who ignored the mandatory attendance requirement (2T19). When Green was hired he was tasked with reviewing the mandatory attendance at the January professional development training (2T53). He determined that sign-in sheets were ineffectual to support discipline so he instituted an electronic swipe system as of the January 2016 training (2T53). As a result, the first discipline imposed for non-attendance was after the January 2016 training (2T56).

of training specific to each college within the University (2T15-2T16). Also, for the first time, the Board explained that non-attendance would impact personnel decisions (CP-1; see also Fact No. 16).

18. As a result of the 2013 Board resolution, the KFT filed a demand to negotiate "over compensation for attendance at this training and over the impact and other negotiable aspects of these changes" (CP-2). Castiglione made similar demands to negotiate in 2014, 2015, and finally in 2016 for the 2017 January winter-break training (CP-2 through CP-5).

19. According to Castiglione, there is a long history of faculty receiving compensation and/or release time from load for performance of non-teaching duties (1T45). For example, there is an agreement negotiated between the KFT and University that faculty receive extra compensation for duties associated with coordinating an academic program, namely between two and five teaching credits per semester (1T45, 1T47). Another example is an agreement negotiated between the KFT and University that provides one teaching credit of compensation for faculty to take on the additional responsibility of being an assessment coordinator for a particular program or department (CP-6; 1T45).

20. Despite this history, according to Castiglione, the University refused to negotiate after each demand for additional compensation in regard to this mandatory winter-break training



(1T55). Castiglione was not the chief negotiator for the KFT, but he knows that after the KFT proposed additional compensation, the University made no counter-proposal (1T55).

In this regard, McManimon, the KFT's chief negotiator confirms that on January 9, 2014, he sent Connelly a letter demanding to negotiate compensation for the mandatory training scheduled to take place during winter break between January 13 through 17, 2014 (CP-7). McManimon reminded Connelly that the KFT originally demanded negotiations in October 2013 and then by email in December 2013 in which McManimon requested the University make a compensation proposal at the next scheduled negotiations session (CP-7; CP-12). The University responded verbally to McManimon that the issue of compensation for training had already been negotiated in the parties' master agreement, presumably Article XIIC2 and the salary schedule in Appendix V of the parties' collective agreement (1T62).<sup>8/</sup>

McManimon disagreed with the University's position. During winter break, McManimon maintains that faculty are not assigned any duties although they have other responsibilities such as completing grading from the previous semester, preparing for the upcoming semester, and engaging in scholarly and/or professional development which may include conferences or writing as well as

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<sup>8/</sup> Appendix V of the master agreements (J-1; J-2) lists salaries for ten and twelve month employees by increment step and range in each year of the collective agreements.

training (1T64-1T66). He admitted on cross examination that professional development is a responsibility of faculty during winter break and generally includes training, but explained that none of these activities in the past required attendance on campus; therefore, he considered the mandatory five-day training an increase in workload (1T64-1T66)).

In this regard, Connelly admitted that at no time were faculty informed that they were relieved of their off-campus professional duties during the winter break while they attended the mandated on-campus training (2T32). Therefore, while attending the training, faculty could not perform other duties such as travel abroad or out of State for research, do on-campus community service, attend off-campus conferences, prepare for the Spring semester, develop new course material or curriculum outlines (2T33-2T34).

21. Connelly disagrees that the University refused to negotiate. Connelly recalls that his initial response to the KFT's demand was that the University was willing to negotiate but believed that compensation for such training was already included as compensation for faculty set out in the parties' collective negotiations agreement, specifically for professional development (2T20-2T21). Basically, The University's response to the negotiation demand was a zero-pay position (2T21-2T22). He denies ever refusing to negotiate and states that after he told

the KFT what his position was he never heard back from them (2T21-2T22). According to Connelly, the University was prepared to respond if the KFT has made a counteroffer to the University's zero-pay position (2T22).

On cross examination, Connelly was asked whether he ever took the position, when the KFT demanded negotiations, that an interim settlement agreement (J-3; stipulations 3 through 5) in another matter preempted negotiations with the KFT over the January mandatory training compensation (2T39). Connelly did not recall this even when shown an email (CP-13) describing Connelly taking this position at a February 2014 negotiations session (2T40-2T42).

I find that Connelly's recollection was faulty, and that the email confirms that he took this position on at least one occasion in response to the KFT's negotiations demand. However, I also find that the University took the position that compensation for professional development had already been negotiated, citing Article XIIC2 to support their zero-pay position in response to the KFT's request to negotiate additional compensation for the mandatory training. Therefore, I find that the University did not engage in negotiations taking the position that it had already done so and/or that the interim settlement agreement preempted negotiations.

22. Castiglione admits that training is a faculty responsibility together with research and other scholarly work for which faculty do not receive additional compensation (1T55).

On cross examination, Castiglione responded as follows:

Q. Scholarly research and artistic activities are not compensated for because they have already been negotiated as part of the collective agreements, those are duties, nonteaching [sic] duties such as training. Is that correct?

A. Yes. [1T57]

23. J-1, the 2011-2015 collective negotiations agreement was executed by the parties on July 7, 2012. According to Steve Young who was lead negotiator for the Council in the negotiations for this agreement, in 2011 proposals were exchanged with the University pertaining to Article XIIC of the master agreement (1T68). The University proposed deleting the paragraph dealing with non-teaching duties in its entirety (CP-8). The union counter-proposed adding language about performing non-teaching duties between the end of the Spring semester and June 30<sup>th</sup> of each year (CP-9). The union again proposed modifying the Article XIIC language adding training and other related responsibilities as the University deemed appropriate or necessary to faculty responsibilities (CP-10). Basically, all proposals regarding Article XII were withdrawn, and the language remained unchanged from the prior collective agreement (J-1, J-2; 1T72).

Young testified that Article XIIC2 does not address the issue of compensation for faculty who are assigned work on campus during winter break (1T78). Moreover, according to Young, the State never brought up the issue of mandatory faculty training during the winter break (1T73). Young states that only Kean mandates faculty training on campus during winter break (1T73). Faculty at other universities that hold non-mandatory training during the month of January receive extra compensation (1T76-1T77). The Respondent presented no witnesses who participated in these negotiations, so I credit Young's testimony.

24. On cross examination, Young was also asked about the language in Article XIIC that faculty responsibilities "which have been traditionally performed by the faculty and are reasonable and consistent with sound academic practice shall be continued consistent with previous practice" [J-1]. Specifically, he was asked whether "duties" include professional development and whether professional development would fall under duties that would be continued consistent with prior practice (1T75). Young admitted that they would if there was a prior practice (1T75). Also, Young confirmed that Article XIIC2 non-teaching duties include faculty training during the academic year which includes the month of January (1T79).

24. Based on the testimony regarding Article XIIC2, I find that non-teaching duties defined in that article, specifically professional development, include training such as was provided during the winter-break. I also find based on the witness testimony that in at least two instances -- coordinating academic programs and assessment coordinator -- extra compensation or release time was negotiated for non-teaching duties (see fact no. 19). Indeed, I also credit Young's testimony that other Universities compensate faculty for attendance at non-mandatory training.

#### **ANALYSIS**

Charging Party asserts that the University violated 5.4a(1) and (5) of the Act when it refused to negotiate upon demand over additional compensation as well as impact of its mandatory winter-break training announced in October 2013 and scheduled for January 2014 and in years thereafter. Respondent contends that training is part of normal faculty duties already compensated by the parties' collective agreement, namely Article XIIC2 as well as the appended salary schedule. It also asserts that the union waived its right to negotiate over the January 2014 training because it made no demand to negotiate when mandatory winter-break training took place in January 2012 and January 2013. Finally, Respondent denies that it refused to negotiate

asserting that its zero-pay offer fulfilled its negotiations obligation.

On May 16, 2016, I issued a decision denying the parties' motion and cross motion for summary judgment determining that although mandating faculty training was a managerial prerogative, the employer had to negotiate upon demand over additional compensation. See generally, State of New Jersey (Kean University), H.E. No. 2016-22, 42 NJPER 573 (¶160 2016) and cases cited therein. I found, however, that there were material disputed facts as to (1) whether the parties had negotiated upon demand over compensation for training; (2) whether compensation for the professional development training was already covered by the parties' collective agreement; (3) whether the union's acquiescence to the mandatory training in 2012 and 2013 without demanding negotiations constituted a waiver and/or relieved the University of its duty to negotiate over the January 2014 training because it was acting consistently with past practice.

After reviewing the testimony and parties' exhibits, I conclude that the Council proved that the January mandatory winter-break training represented a workload increase, that the KFT demanded negotiations over additional compensation and impact, that the University refused to negotiate, and that the KFT's acquiescence to the 2012 and 2013 training without demanding negotiations was not a waiver its right to demand

negotiations regarding the 2014 training. Finally, there is no defense to the University's refusal to negotiate under the terms of the parties' collective agreement, specifically Article XII, namely that the January 2014 training was consistent with prior practice or because the compensation for mandatory training was already compensated as non-teaching duties in Appendix V of the salary guide attached to the parties' collective agreement.

First, as to the University's waiver argument,<sup>9/</sup> even if the KFT acquiesced to the University's unilateral action mandating training during winter break in 2012 and 2013 by not demanding negotiations, any waiver of the right to negotiate over the training ended when the KFT's acquiescence ended and it demanded negotiations. A failure to request negotiations in the past does not amount to a waiver of a present right to do so. Moreover, the workload increase in January 2014 extinguished any waiver claim as to the 2014 training and the training in the following years. University of Medicine and Dentistry of New Jersey, P.E.R.C. No. 2010-12, 35 NJPER 330 (¶113 2009).

Next, the University mistakenly relies on language in Article XIIC2 that faculty responsibilities which have been traditionally performed by faculty, like training, shall be continued consistent with prior practice. It argues that since faculty training was mandated in 2012 and 2013, it was continuing

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<sup>9/</sup> Respondent cited no cases in support of its argument.



the practice.<sup>10/</sup> However, the training in 2014 doubled the required on-campus participation and the resolution of the Board of Trustees linked attendance to personnel decisions such as annual performance reviews. Clearly, the increased hours and attendance impact on personnel decisions was not consistent with the prior practice. Moreover, the mandatory on-campus participation increased workload which is a mandatory subject of negotiations.<sup>11/</sup>

In State of New Jersey (Kean University), H.E. No. 2012-10, 39 NJPER 5 (¶2 2012)<sup>12/</sup>, I considered whether the University violated the 5.4a(5) of the Act when it unilaterally increased faculty office hours from three to eight hours. There like here, the University argued that office hours were included in faculty duties already covered by the parties' agreement. Basically, it asserted, as it does here, that the mandatory training was merely

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<sup>10/</sup> I agree with the University that the KFT was mistaken in concluding that the 2012 and 2013 training was not mandatory because there was an email requesting faculty to RSVP and because attendance would not lead to discipline. Attendance was taken by sign-in sheets and the announcements to faculty unequivocally stated that the training beginning in 2012 was mandatory.

<sup>11/</sup> I reject the KFT's argument that for the first time in 2014, the training became mandatory. The facts support that the training was mandatory from its inception in 2012. Only the method of taking attendance changed.

<sup>12/</sup> No exceptions were filed to the H.E. report. Therefore, the decision became a final Commission decision pursuant to N.J.A.C. 19:14-8.1(b).

a reallocation of time spent on already existing responsibilities, and, therefore, that it did not have to negotiate upon demand over the increase in hours.

In rejecting this argument, I determined that since there was no specific contract language addressing the issue of the number of office hours, absent a clear waiver, negotiations was required over the additional work.<sup>13/</sup> See generally, Watchung Hills Reg. Bd. of Ed., P.E.R.C. No. 2007-39, 32 NJPER 399 (¶165 2006 (compensation for additional work time negotiable for guidance counselors assigned additional students); Willingboro Bd. of Ed., P.E.R.C. No. 97-78, 23 NJPER 36 (¶28025 1996) (compensation for additional work time related to extra cased assigned to child-study team negotiable); Rahway Bd. of Ed., P.E.R.C. No. 88-29, 13 NJPER 757 (¶18288 1987) (grievance regarding additional compensation for extra teaching periods is arbitrable). See generally, Somerset Hills Board of Education, P.E.R.C. No. 2015-34, 41 NJPER 249 (¶82 2014) (teacher workload is mandatorily negotiable and claims for workload increase compelled by educational policy determinations are severable).

Here, there is also no clear contract language addressing the specific hours allowed for training, although the testimony

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<sup>13/</sup> Like my previous decision in Kean cited herein, the University posits no argument that negotiations would interfere with its prerogative to mandate training during winter break.

supports that training is contemplated as part of professional development referenced as a non-teaching duty. However, there is no reference in either Article XIIC covering non-teaching duties or in the Appendix V salary guides as to number of permissible hours of training (mandatory or non-mandatory). Witness testimony supports that the negotiations for neither the master agreement nor any local agreement did not include compensation for training and that non-mandatory training is compensated separately at other State universities.<sup>14/</sup> Also, there is a history at Kean of providing compensation for non-teaching duties that is separate from the compensation negotiated in the salary schedule attached to the parties' collective agreement. Therefore, when the University mandated winter-break training during what was previously unstructured work time which did not require faculty to be on-campus, it increased their workload by taking time away from other non-teaching duties.

Finally, the University asserts that it did negotiate upon demand. 5.4a(5) makes it an unfair practice for an employer, its

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<sup>14/</sup> Castiglione's testimony detailed in Fact No. 22, namely that scholarly research and artistic activities do not receive extra compensation because it has already been negotiated and that training is also a non-teaching duty, does not refute the credible testimony of either the Council's Chief Negotiator Steve Young or the KFT Chief Negotiator Patrick McManomon that compensation for mandatory winter-break training was not the subject of negotiations for the master agreement or local agreements. Even Castiglione testified on direct, that there are local agreements covering extra compensation for non-teaching duties.

representatives, or agents not to negotiate in good faith with a majority representative concerning terms and conditions of employment. The standard of review in determining whether good faith negotiations have occurred is the totality of the parties' conduct. The object is to determine the intent of the Respondent - e.g. whether the Respondent brought an open mind to the negotiations table and a sincere desire to reach an agreement or whether the Respondent was just going through the motions and engaging in surface bargaining. State of New Jersey, E.D. No. 79, 1 NJPER 39 (1975), aff'd 141 N.J. Super 470 (App. Div. 1976). See also Downe Tp. Bd. of Ed., P.E.R.C. No.86-66, 12 NJPER 3 (¶17002 1985).

The University argues that its zero-pay response to the union's negotiation's demand fulfilled its 5.4a(5) obligations. This position is disingenuous because the University's response to the KFT's negotiations demand was that it had no duty to negotiate since the parties' collective agreement covers training as a non-teaching duty for which compensation was already provided and/or that an interim settlement agreement of a grievance relieved it of its negotiations obligation. I have already discussed that the parties' collective agreement does not cover compensation for training.

The uncontroverted testimony of Steve Young, the lead negotiator for the Council, confirms that negotiations for the

current master agreement, specifically Article XIIC covering non-teaching duties, did not encompass compensation. Also, the parties' interim settlement agreement covered the issue of training between the end of Spring semester and June 30. It does not address the issue of compensation for training during winter-break. Basically, the University refused to negotiate mistakenly believing that it had no obligation to do so.

Based on the foregoing, I recommend that the Commission find that the University violated 5.4a(5) and derivatively a(1) of the Act by failing to negotiate upon demand over compensation and impact regarding mandatory winter-break training beginning in January 2014 and thereafter.

#### **CONCLUSIONS OF LAW**

1. The University violated 5.4a(5) and derivatively a(1) of the Act by refusing to negotiate upon demand with the KFT over additional compensation and the impact of mandating training during winter break beginning in January 2014 and thereafter.

#### **RECOMMENDATION**

I recommend that the Commission ORDER:

A. That the University cease and desist from:

1. Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by refusing to negotiate upon demand with the KFT over additional compensation and the impact of mandating

training during winter break beginning in January 2014 and thereafter.

2. Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment particularly by refusing to negotiate upon demand with the KFT over additional compensation and the impact of mandating training during winter break beginning in January 2014 and thereafter.

B. That Respondent take the following affirmative action:

1. Negotiate in good faith with the Charging Party on demand over additional compensation and impact regarding the mandatory winter-break training from January 2014 and thereafter.

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

3. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

/s/Wendy L. Young

Wendy L. Young  
Hearing Examiner

DATED: August 28, 2017  
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 September 7, 2017.



RECOMMENDED



# NOTICE TO EMPLOYEES

**PURSUANT TO  
AN ORDER OF THE  
PUBLIC EMPLOYMENT RELATIONS COMMISSION  
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE  
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,  
AS AMENDED,**

**We hereby notify our employees that:**

**WE WILL** cease and desist from interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by refusing to negotiate upon demand with the KFT over additional compensation and the impact of mandating training during winter break beginning in January 2014 and thereafter.

**WE WILL** cease and desist from refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment particularly by refusing to negotiate upon demand with the KFT over additional compensation and the impact of mandating training during winter break beginning in January 2014 and thereafter.

**WE WILL** negotiate in good faith with the Charging Party on demand over additional compensation and impact regarding the mandatory winter-break training from January 2014 and thereafter.

Docket No. CO-2014-193

State of New Jersey (Kean University)  
(Public Employer)

Date: \_\_\_\_\_

By: \_\_\_\_\_

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372