

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

In the Matter of

ATLANTIC COUNTY COLLEGE,

Respondent,

-and-

Docket No. CO-H-96-107

ATLANTIC COUNTY COLLEGE
ORGANIZATION OF SUPERVISORY &
ADMINISTRATIVE PERSONNEL,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that a Complaint filed by the Atlantic Community College Organization of Supervisory and Administrative Personnel ("ACCOSAP") against Atlantic Community College be dismissed. She finds that ACCOSAP did not prove a violation of section 5.4 (a) (3) of the Act, under In Re Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984). It failed to prove that the affected employees engaged in protected activity or that the College knew of any protected activity. Further, she finds that ACCOSAP did not show that the College violated section 5.4(a) (5) or (1), when it abolished four ACCOSAP positions, and failed to retain the affected employees. She finds the College carried out a legitimate reorganization, and had the right to transfer certain duties from ACCOSAP's unit. In the absence of an illegal motive, the College has the right to select anyone to fill positions. Finally, the Hearing Examiner recommends dismissal of the section 5.4(a) (2) and (7) allegations. ACCOSAP did not show that the College dominated or interfered with the administration of the union, or violated any other Commission rule.

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 decision which 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 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.

H.E. NO. 97-30

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Appearances:

For the Respondent, Louis J. Greco, attorney

For the Charging Party, Bergman & Barrett, attorneys
(Michael T. Barrett, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On October 17, 1995, the Atlantic Community College Organization of Supervisory and Administrative Personnel ("ACCOSAP") filed an unfair practice charge against Atlantic Community College. The charge alleges that the College violated subsections 5.4(a)(1), (2), (3) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act")^{1/} when it terminated four

^{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; (2) Dominating or

administrators and abolished their positions, while simultaneously creating five new titles, thereby shifting unit work from the unit, without negotiations.^{2/} The charge alleges that the College further violated the Act by not selecting the displaced administrators to fill the new positions. Finally, the charge alleges that these actions violated the parties' collective negotiations agreement.

A Complaint and Notice of Hearing was issued on February 20, 1996, (C-1).^{3/} The College filed an Answer on February 27, 1996, denying it violated the Act (C-2). It asserts that it abolished positions as part of a reorganization and reallocation of

1/ Footnote Continued From Previous Page

interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; and (7) Violating any of the rules and regulations established by the commission."

2/ The Charging Party did not plead a violation of section 5.4(a)(5) of the Act on the face of its charge, but referred to it in the text of the charge. This subsection prohibits public employers and their representatives from "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."

3/ Exhibits received in evidence marked as "C-" refer to Commission exhibits, those marked "CP-" and "R-" refer to the Charging Party's and Respondent's exhibits, respectively. Those exhibits marked "J-" refer to joint exhibits.

resources; that it has an inherent managerial prerogative to select applicants, and disagrees that the agreement gives unit members peremptory reemployment rights. On June 4 and 5, 1996, I conducted a hearing at which time the parties examined witnesses and introduced exhibits.^{4/} Post-hearing briefs were filed by September 12, 1996. Based upon the entire record, I make the following:

FINDINGS OF FACT

1. There are four negotiations units at the College: administrators, chief educators, faculty and support staff (2T71). ACCOSAP represents full-time professional, supervisory and administrative personnel (J-1, Art. I).^{5/} The College and ACCOSAP had a collective negotiations agreement, effective from July 1993 to June 1996 (J-1).

2. Mark Turner, Thomas Celandine, Thelma Duterte and Marion Pool were employees of the College and members of ACCOSAP's negotiations unit. Turner was Director of Tutoring and Assessment Centers, Academic Support Services; Celandine was Director of Media Services, Academic Support Services; and Duterte was Director,

^{4/} The transcript citation "1T-" refers to the transcript developed on June 4, 1996; "2T-" refers to the transcript developed on June 5, 1996.

^{5/} Excluded from the unit are: President's staff, associate deans, controller, deans, director of personnel, executive director of physical plant, director of public relations, resident director of casino career institute, security supervisor and supervisory/administrative personnel/ACA.

Testing Services (1T21, 1T73, CP-2, CP-9, CP-16). All three reported to Theresa DeFranco, Associate Dean for Academic Planning, Resource Development and Support Services in the academic support area of the College (1T18-1T19). Marion Pool was Registrar (CP-14) and reported to Bill Donaldson, Director, Enrollment Services and Judicial Review in the Dean of Students area (CP-15).

3. On July 26, 1995, Turner, Celandine, Duterte and Pool received letters from President John May, informing them that, "due to a reorganization and reallocation of resources in the Academic Support Services [and] Dean of Students area[s] of Atlantic Community College," their positions were eliminated, effective immediately (CP-4, CP-5, CP-6, CP-7). The affected employees were offered the option of continuing to serve in a productive capacity with the college, i.e., hold a job or perform some function during the one-year notice period provided in J-1 (1T116, 1T145-1T146, 2T25, J-1, Art. VIII, A.). No termination was due to poor performance (2T37-2T39). They remained on the payroll until they accepted other employment or until the one-year notice period expired (1T19, 1T35, 1T86-1T87, 1T116, 1T145-1T146). Effective July 1996, Celandine became a full-time assistant professor teaching study skills and developmental English (1T108-1T109, 2T26-2T27, 2T94). Turner has not been re-employed by the College (2T27).

4. With respect to its impact on individuals, the charge only concerns Turner and Celandine. Pool was hired by the College and withdrew her claim. Duterte died in July 1996, and no relief is

sought for her. However, the allegations in this charge relate to the employer's duty to the majority representative. Accordingly, some of the facts surrounding Pool and Duterte will be considered insofar as they illuminate the issues herein.

5. At the same time the College abolished the above positions, it posted advertisements for these new positions:

Director of Instructional Support Services
(1T23-1T24, CP-2)

Director of Assessment and Tutorial Services
and Vocational Education Funding (1T49, CP-3)

Director, Academic Support Services (CP-10)

Coordinator of Assessment and Research
Services (CP-17)

Coordinator of Tutoring and Vocational
Education Grant Programs (CP-11)

The three directors were placed unilaterally in the ACCOSAP unit; the two coordinators are in the support staff unit (1T53, 1T81). The net change to the ACCOSAP unit was one less position (2T72).

6. Mark Turner's duties as Director of Tutoring and Assessment Centers included:

supervises tutors and supports tutorial and
assessment center services;

oversees the daily operation of the
assessment center for credit programs,

hires and supervises tutors for credit and
non-credit programs;

completes monthly tutoring and assessment
center reports;

maintains timesheets for part-time staff and
budget;

orders materials, upgrades technology center, and supports classroom instruction, based on faculty feedback; and,

evaluates tutoring and assessment center services each semester.

Turner also coordinated the vocational education "tech-prep" program (1T73).

7. The new Director of Assessment and Tutorial Services and Vocational Education Funding ("Director of Assessment," CP-3):

hires, supervises and trains staff in the administration of: testing and assessment services, policies and contracts;

oversees and assists with testing, assessment and tutorial support of students;

integrates technological support into testing and assessment services;

prepares monthly testing and assessment reports and vocational education funding support reports and resubmissions;

serves as the liaison for vocational education funding support activities and for all external testing and assessment services;

monitors activities, timeliness and budgets related to vocational education funding support, and testing and assessment services.
(1T49, CP-3)

8. The new Coordinator of Tutoring (CP-11), is in the support staff unit (1T80-1T81). Its duties are:

reports to the Director of Assessment and Tutorial Services and Vocational Education Funding (CP-3)

attends meetings and consults regularly with faculty and grant facilitators;

coordinates tutoring schedules to accommodate students in Mays Landing and Cape May County;

maintains timesheets for tutoring programs and grant-funded vocational activities (Tech-Prep, Perkins, Adult Education, etc.);

drafts tutoring and grant-funded vocational education reports;

serves as a member of the grants writing team;

monitors status of all vocational education grants;

provides support for students and faculty requesting tutoring services (one to one, group, electronically) in Mays Landing and Cape May County.
(CP-11)

9. Both of the above positions (CP-3 and CP-11) overlap Turner's former position. The new Director of Assessment (CP-3) is closer to Turner's position in job content and level of responsibility than is the new Coordinator of Tutoring (CP-11, 1T88-1T91). Both positions are in the ACCOSAP unit. The Director of Assessment (CP-3) and the Director of Tutoring (CP-9) are both responsible for the oversight, hiring and supervision of the tutoring and assessment programs. The Coordinator of Tutoring does not hire or supervise tutors, has no testing or assessment oversight, and reports on only some portions of the vocational education program. The new Coordinator position (CP-11) is supervised by the Director of Assessment (CP-3). It coordinates schedules, drafts reports, timesheets and monitors status of grants. Turner performed all of the duties in the Coordinator's

job, but admitted that he also supervised tutoring and assessment, which are above and beyond the Coordinator's duties (1T71-1T74, 1T76-1T77, 1T80-1T81).^{6/}

10. The Director of Assessment also oversees testing, which was formerly Thelma Duterte's responsibility (Director of Testing, CP-16); policy and contract responsibility, and greater vocational education responsibility than Turner had (1T73-1T74).

11. Turner's supervision of tutoring at the Atlantic City center was assigned to the Director of Academic Support Services, another ACCOSAP position (1T90-1T91, CP-10, CP-9).

12. In June 1996, Turner asked DeFranco about CP-8, a job opportunity posting which appeared on the bulletin board on about June 26, 1995.^{7/} Turner was concerned because the new job was very similar to his job. He asked DeFranco whether the new position would affect him, and whether he should apply. DeFranco told him to consider his qualifications and stated anyone could apply (1T36, 1T59, 1T61-1T62). She was equivocal or misleading as to whether his current position would be affected by the new Director of Assessment. She did not advise Turner not to apply, but he had the

^{6/} In making this determination, I relied heavily on the job opportunity postings in the record. Neither party called the new Director of Assessment and Tutorial Services, or Coordinator of Tutoring and Vocational Education as witnesses, even though the positions had been filled for 11 months prior to the hearing (1T78).

^{7/} CP-8 became CP-3; the corrected title is Director of Assessment and Tutorial Services and Vocational Education Funding (1T71-1T72, CP-8, CP-3).

(mistaken) impression that the new position would not affect his job (1T69, 1T84-1T85).^{8/} Turner stated he did not apply for CP-3 in reliance on DeFranco's statements (1T81).

13. No evidence in the record shows that Turner participated in collective negotiations, contract administration or grievance processing on behalf of ACCOSAP.

14. Turner did not apply for the Director of Assessment and Tutorial Services and Vocational Education Funding (CP-3); Director of Academic Support Services (CP-10), or the Coordinator of Assessment and Research (CP-17), all of which were posted around June-July 1995 (1T75, CP-10). After Turner received his termination notice, he applied for the Coordinator of Tutoring and Vocational Education (1T75, CP-11). He was not selected and was not given an explanation for why he was not selected (1T78-1T80).

15. Some of the duties performed by Thelma Duterte as Director of Testing Services (CP-16) were transferred to Director of Assessment (1T130-1T133, 1T143, CP-3). The supervision and oversight of testing, integration of technological support in testing and assessment, and administration of budgets relating to

^{8/} DeFranco and Turner disagreed about whether DeFranco misled Turner. While I do not find, based on all the testimony, that DeFranco intentionally misled Turner, I credit Turner's recollection of this conversation as more reliable because he recalled more specifically the details of their meeting: that he went to see DeFranco at 8:15 a.m. on June 27, 1995, the day immediately after he saw the posting; that they met for 45 minutes and DeFranco explained how CP-8 would not affect him (1T68). DeFranco recalled the meeting less clearly.

testing became part of the Director's job and remained in the ACCOSAP unit (CP-3, 1T130-1T132). Some of Thelma Duterte's duties (preparing and maintaining statistical reports and ordering testing materials) were transferred to the Coordinator of Assessment and Research Services (CP-17), a support staff unit position (1T132-1T134).

16. Tom Celandine was Director of Media Services (CP-12). He oversaw the operation of the multimedia support service in Mays Landing and Cape May County; supervised and recommended hiring of instructional support staff; prepared reports on area services; evaluated the program, ordered technology to support classroom instruction; provided technology support for faculty and administrators in Mays Landing and Cape May County; provided training for faculty, staff and students (1T99-1T101) CP-13); incorporated new services into Mays Landing and Cape May County operations, and served on the instruction technology support team (1T101-1T102, CP-13).

17. A new ACCOSAP unit position, Director of Instructional Support Services, was assigned these duties and supervision of learning assistance centers and language labs (CP-13, CP-12, 1T97-1T98, 1T103).

18. Celandine applied for the Director of Instructional Support Services, but was not selected (1T96-1T98).

19. Marion Pool was Registrar, Enrollment Services (CP-15). When the Registrar was abolished, Bill Donaldson,

Director, Enrollment Services and Judicial Review, assumed the duties (1T117-1T118, 1T122). Donaldson had been Pool's supervisor; his position is in the ACCOSAP unit (1T118).

20. Dr. John May was appointed President of the College in 1993 (2T5-2T7, 2T13). Both May and his predecessor, Orth, were under a mandate from the College's Board of Trustees to reduce administrative staff (2T5-2T7). Enrollment at the College increased 50 percent between 1988 and 1992 (2T8). As a result, administrative staff reductions in the Dean of Students' area were less than those in the academic area (2T8). And, there were no substantial increases in staff (2T8).

21. The staff of administrators assigned to Dean of Students Patricia Luciano, has been reduced from 11 to 6 since 1987, as part of a gradual reorganization (1T150). Luciano has been Dean for 14 years (1T147). In program year 1990, her staff went from 11 to 7 (1T152). Only part of the reduction occurred as the result of the abolishment of positions. Three positions were moved to other areas (academic and marketing), two were downgraded in rank, and one hierarchical tier was eliminated (1T151-1T155). The Director of Testing was moved from the Dean to another area (1T152). In 1988, President Orth directed Luciano to "flatten" her part of the organization (1T154).

22. In 1993, the Director of Student Life and Director of Enrollment Services positions were eliminated (1T156-1T157).

23. In 1994, Luciano was permitted to add a new support staff position and filled the Director of Enrollment and Judicial Review position, which absorbed Marion Pool's duties as former Registrar (CP-15, 1T161-1T162, 1T158-1T159). In 1995, she added a grant-funded position, the Director of Special Services (1T159).

24. The Director of the Cape May Extension Center, Marion Holt, an ACCOSAP unit member, was not renewed (2T10-2T11). Another position funded by a Small Business Development grant was abolished and the employee, Jake Stinger, was laid off (1T11).

25. Clerical support was reduced dramatically because of the acquisition of network computers and laser printers; the number of staff went from 7 to 2 (2T11-2T12).

26. The Director of Childcare Center position was eliminated when the entire Center was subcontracted (2T12).

27. The Dean of Institutional Development was eliminated, and the functions were divided among other staff (2T14). The incumbent, Dr. Armayo, became Dean of Academics (2T13).

28. Three associate deans in the academic area were affected; one was eliminated (2T14).

29. All of the reductions in upper management, clerical and mid-management, were supported by the Board of Trustees and reflected its direction (2T14).

30. R-1 is a letter dated July 24, 1995, from Luciano to May with the recommendation to eliminate the Registrar position and reassign its duties to the Director of Enrollment Services (R-1). It states, in relevant part:

...during the past year, I have been looking at the entire Dean of Students area as it relates to reengineering staff needs against present staffing. The process has been to identify our major tasks, analyze management of these tasks, and to develop a more concise and efficient method for delivery.

With the possible changes in Cape May and Atlantic City, this may be the time where new positions may become available through the human resource area giving the staff member possible options within the institution.

(R-1)

31. May had reviewed Luciano's staffing recommendations prior to June 1995 (2T15, R-1). He approved the decisions which led to the abolishment of Turner, Celandine, Duterte and Pool's former positions (2T15)

32. Over the previous six years, Atlantic City's College center has grown faster than the main campus (2T21). The College intends to establish a complete branch campus in Atlantic City; this goal resulted in the addition of an ACCOSAP unit position (2T22). At the same time jobs were opening up due to the "changes in Cape May and Atlantic City," a position was eliminated at Mays Landing (2T22).

33. May endorsed the recommendation that the College use any advantage gained by technology to perform more efficiently by reducing positions, and shifting to lower level employees tasks which they could perform effectively, even where higher level staff had performed them (R-1, 2T16). May asserted that there is a trend in higher education that tasks exclusively performed by supervisors

will be performed by support staff because of the effects of technology and new management techniques (2T41).

34. May also approved recommendations made in DeFranco's support services area (2T16-2T17). He believed DeFranco's managerial span of control had become too broad. He believed an appropriate level of subordinate areas, professional and supervisory staff is between five and ten, and noted that DeFranco's span of control is around 13 (1T59, 2T18-2T19). However, May would not approve an additional supervisory level, which would conflict with the goal of a less bureaucratic organization.

35. May approved every staff action in Luciano and DeFranco's areas (2T22-2T23). He understood that the result would mean that several staff members would lose their positions (2T23-2T24).

36. DeFranco created job descriptions for new titles, CP-1 and CP-3, which were reviewed by the Dean (1T39-1T40). In creating a new Director position, DeFranco considered the expansion of technology, turning the Atlantic City center into a branch campus; legislative changes, Federal government changes, State funding opportunities and the policies being advanced by the College's President and Board (1T43-1T45).

37. The salaries proposed by the College for the five new positions were less than the salaries for the four abolished positions (2T32-2T33).

38. Over seven years, only two employees whose positions were abolished were actually terminated, despite the mandate to cut staff and/or reduce supervisory levels (2T48-2T49).

39. The College's Office of Personnel screens applications; convenes search committees; schedules interviews; meets with directors, faculty and deans; and communicates to those not selected (2T73-2T74). The committees' recommendations are sent to the directors of the position being filled, who in turn recommend their choices for hiring to higher level deans, to the President and Board of Trustees, the ultimate hiring authority (1T32).

40. DeFranco reviewed two candidates for the Director of Instructional Support Services (1T32-33). Celandine was not reviewed. DeFranco did not know whether Celandine had applied for the Director Instructional Services before she made a recommendation; she does not have the authority to select a candidate who has not applied to the personnel office (1T33-1T36).

41. There was no selection committee for the Director of Assessment and Tutorial Services and Vocational Education Funding (CP-3), the ACCOSAP position that Turner did not apply for; only one person applied for that position (1T54).

42. According to May, Turner and Celandine were not selected because they were not the best qualified (2T42). Turner did not apply for any ACCOSAP unit positions.

43. Article VIII of J-1 contains the following, in relevant part:

A. Contracts

1. ACCOSAP members shall receive contracts of employment renewable each year. The conferring of the initial annual contract carries an expectation of renewal if his/her work meets predetermined standards. ACCOSAP members will not be denied renewal for arbitrary, capricious or frivolous reasons...[or] for reasons not related to known standards of performance...When the Board does not intend to reappoint an ACCOSAP member,...A full year's notice will be given to ACCOSAP members who have completed five years of employment.

If notification is not possible by all dates shown, and the ACCOSAP member is forced to leave, the College shall compensate the ACCOSAP member at the per-diem rate (i.e. base pay) until the date is achieved (e.g. Feb 1 notification date obligates the College to five calendar months of notice or 100 working days)...Grant-funded positions are excluded from this provision.

B. Reclassification

Should an ACCOSAP member's job description be changed or expanded, he/she may apply for reclassification or upgrading of position...

D. Retraining may be made available to an ACCOSAP member with three or more years of service if his/her contract is not renewed and a position becomes available within one year of notice of non-renewal and for which they [sic] could reasonably be qualified after retraining.

Article XI.E., "Management Rights," states:

1. The Board has the responsibility and authority to manage and direct all College operations and activities to the full extent authorized by law. The exercise of these powers, rights, duties, responsibilities and

authority by the Board and the adoption of such rules, regulations and policies as it may deem necessary, shall only be limited to the specific and expressed terms of this agreement.

Analysis

Charging Party alleges that the College shifted unit work from the ACCOSAP unit to non-unit employees without negotiations, violating both the Act and its agreement (J-1). The charge does not specifically plead section 5.4(a)(5), but I find that the issue was fairly and fully litigated, and, therefore, is part of the charge.^{9/} The College asserts that it reorganized and reallocated resources in response to changes in technology, reductions in funding sources and a policy goal of a less hierarchical organization (fewer supervisory levels). It asserts that it has an inherent managerial prerogative to select applicants for positions, abolish and creation positions, and classify positions, without first negotiating with ACCOSAP. Under all the facts of this case, I agree with the College.

^{9/} Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd 10 NJPER 78 (¶15043 App. Div. 1983). The charge specifically alleges that the College "unilaterally and arbitrarily reclassified and downgraded [two] position[s] from the supervisory and administrative personnel unit to the support staff unit...in derogation of th[e] statute and the agreement between the parties...all of the actions of the College...were taken unilaterally, without negotiation and in bad faith." The College introduced evidence justifying its contested reorganization. Under these circumstances, I find that the College knew that its assignment of ACCOSAP unit duties to support staff unit personnel was at issue and that it presented a defense to its action.

The alleged shift of ACCOSAP unit work to the Support Staff unit

N.J.S.A. 34:13A-5.3 allows majority representatives to negotiate on behalf of their members over negotiable terms and conditions of employment, and defines an employer's duty to negotiate before changing working conditions:

Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

See also Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 338 (1989); Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48 (1978).

Mandatorily negotiable subjects are those which intimately and directly affect employee work and welfare, but do not significantly interfere with governmental policy determination. Ridgefield Park Ed. Ass'n. v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 156 (1978); Woodstown-Pilesgrove Reg. H.S. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Assn., 164 N.J. Super 106 (App. Div. 1979), aff'd 81 N.J. 582 (1980), the Court stated:

The nature of the terms and conditions of employment must be considered in relation to the extent of their interference with managerial prerogatives. A weighing or balancing must be made. When the dominant issue is an educational goal, there is no obligation to negotiate....

On the other hand, a viable bargaining process in the public sector has also been recognized by the Legislature in order to produce stability and further the public interest in efficiency in public employment. When this policy is pre-eminent then bargaining is appropriate.

The shifting of unit work from employees within a unit to other employees outside the unit is mandatorily negotiable.

Rutgers, The State University, P.E.R.C. No. 79-72, 5 NJPER 186 (¶10103 1979), recon. den. P.E.R.C. No. 79-92, 5 NJPER 230 (¶10128 1979), aff'd 6 NJPER 340 (¶11170 App. Div. 1980); Borough of Belmar v. PBA Loc. No. 50, P.E.R.C. No. 89-73, 15 NJPER 73 (¶20029 1988), aff'd NJPER Supp.2d 222 (¶195 App. Div. 1989) However, there are exceptions to the unit work rule. When unit employees have shared job duties with non-unit employees in the past, an employer may shift more of those duties to non-unit employees. When a majority representative has not objected to previous instances of shifts in unit work; and when an employer reorganizes the way it delivers services, it need not first negotiate the transfer of duties.^{10/} Where an economic reason for shifting unit work is asserted, the subject is mandatorily negotiable before a change may be implemented. See Monroe Tp. Bd. of Ed., P.E.R.C. No. 81-145, 7 NJPER 357 (¶12161 1981); Passaic Cty. Reg. H.S. Dist., P.E.R.C. No. 81-107, 7 NJPER 155 (¶12068 1981).

If the College's proffered reasons for shifting unit work to non-unit employees and for reorganizing and reallocating resources, were pretexts for a predominantly economic reason, then

^{10/} See, 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); Nutley Tp., P.E.R.C. No. 86-26, 11 NJPER 560 (¶16195 1985) and Monmouth Cty. Sheriff, P.E.R.C. No. 93-16, 18 NJPER 447 (¶23201 1992).

the College has a duty to negotiate with ACCOSAP before transferring work historically and exclusively performed by ACCOSAP employees.

The ACCOSAP argues that the College had a duty to negotiate before reassigning duties performed by its members to the support staff unit. The facts show that the duties performed by Tom Celandine as Director of Media Services were transferred to the new Director of Instructional Support Services (CP-2), which is also an ACCOSAP unit position. The duties that were performed by Marion Pool as Registrar were transferred to the Director, Enrollment Services and Judicial Review (CP-15), also an ACCOSAP unit position. Therefore, no violation occurred as to these two positions because work was not transferred out of the ACCOSAP negotiations unit.

The situation is somewhat different with respect to the positions held by Mark Turner and Thelma Duterte. Some of their duties were transferred to coordinator positions which are part of the support staff negotiations unit. Their primary and highest level duties (supervision and oversight) remained in the ACCOSAP unit. Turner's testimony and the ACCOSAP's assertion is that CP-11, the Coordinator, most closely resembles his job. I do not agree. The transferred duties of the (former) Director of Tutoring and Assessment Centers (CP-9) include: coordinating tutoring schedules in Mays Landing and Cape May County; maintaining timesheets for tutoring and grant-funded vocational activities (Tech-Prep, Perkins, Adult Education, etc.); drafting tutoring and grant-funded

vocational education reports; serving as a member of the grants writing team; monitoring the status of vocational education grants; and providing support for students and faculty requesting tutoring services in Mays Landing and Cape May County.

The transferred duties of the former Director of Testing include preparing and maintaining statistical reports and ordering testing materials.

The College offered both economic and business efficiency reasons for its reorganization. President May testified that the Board of Trustees' mandate was to reduce administrative staff and realize efficiencies available through the expanded use of technology. Fewer staff means cost savings. President May stated that he (and the Board) endorsed the idea of shifting to lower level employees tasks which they could perform effectively, even where higher level staff had performed them. May predicts a trend in higher education where, in the future, more tasks exclusively performed by supervisors will be performed by support staff. And, he admitted that each of the five new positions which opened up at the time that four ACCOSAP positions were abolished had a salary that was less than the four abolished positions.

However, the testimonies of May, DeFranco and Luciano more strongly support the non-economic bases for the changes: the desire for fewer managerial and supervisory levels and the reduction of an overbroad span of control. DeFranco referred to an increased expansion of technology; the transformation of the Atlantic City

Center into a branch campus; legislative changes, Federal government changes, State funding opportunities and the policies advanced by the College's President and Board. Luciano stated that her staff went from 11 to 7, and only part of the reduction occurred by abolishing positions. Three positions were moved to other areas (academic and marketing), two were downgraded in rank, and one hierarchical tier was eliminated. Many of the changes in Luciano's area bolster the assertion that these changes had been ongoing for some time. Beginning in 1988, President Orth directed Luciano to flatten her part of the organization. President May's concern was that the span of control in academic support services would diminish the College's ability to effectively manage, control and sustain growth. May believed that it was an untenable situation requiring remedial action. The solution could not be the addition of yet another management level ie., an additional associate dean. That would have conflicted with the objective of having a less hierarchical organization. May wanted to exhaust all other options before adding another level to the table of organization.

The transfer of scheduling, monitoring and ordering supplies, from ACCOSAP unit members to staff support unit employees was part and parcel of the College's reorganization. While I find that there were both economic and non-economic reasons for the title changes made by the College in 1995, I conclude that the policy and management efficiency reasons were predominant. Having to negotiate over the assignment of the duties above would impermissibly

interfere with the College's ability to carry out its organizational objectives which were distinct from its economic objectives. I recommend that the College did not have an obligation to negotiate over the transfer of the few duties formerly assigned to ACCOSAP members to coordinator positions in the support staff unit.

The Allegation that the Collective Negotiations Agreement was Violated

Charging Party alleges that the College violated certain contractual provisions concerning employment renewal, job reclassification and retraining. In its post-hearing brief, the College raised defenses to its interpretation of the contract. The parties differ as to how the agreement should have been applied to the circumstances which led to these unfair practice allegations. The College may have violated the agreement; the union may have misinterpreted the agreement.

While an employer's mere violation of an agreement is not an unfair practice, its repudiation of an agreement violates the Act. ACCOSAP did not allege repudiation, nor does this record contain sufficient facts from which to infer repudiation within the meaning of section 5.4(a)(5) of the Act. The agreement contains a grievance procedure (Art. VII) which provides for binding arbitration. Charging Party should pursue its contract violation claims in that forum. State of New Jersey (Department of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984)

The section 5.4(a)(3) allegation

The standards for proving a 5.4(a)(3) violation are set forth in Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984). No violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

ACCOSAP did not allege or produce any evidence that any of the employees adversely affected by the College's actions were engaged in collective negotiations, grievance processing or contract interpretation on behalf of ACCOSAP, or individually, or that the College or its representatives knew of any protected activity by any ACCOSAP member. Thus, the first two tests under Bridgewater have not been met. I have already found, based on the record, that the reasons underlying the Colleges actions were both economic and for managerial efficiency. The record is devoid of facts from which I could infer that the College or its representatives were motivated by hostility toward anyone's protected activity. Even if I found that DeFranco had intentionally misled Turner, I would not conclude that DeFranco was motivated by animus toward Turner's protected activity. That the College did not select any of the charging party's members for the new positions would only be a violation of

the Act if the College was motivated in doing so by anti-union animus. It is not for the Commission to second guess an employer's hiring, promotion or termination decisions, absent a finding of an illegal motive. The question of whether Turner or Celandine were the most qualified is for the College to determine. Accordingly, the Charging Party has not met its burden of proof as to this allegation, and I recommend it be dismissed.

The section 5.4(a)(2) allegation

The record contains no evidence demonstrating that the College interfered with the ACCOSAP's internal practices, activities or organization. The Charging Party has not met its burden of proof as to this allegation, and I recommend it be dismissed.

The section 5.4(a)(7) allegation

Finally, ACCOSAP has failed to cite a specific Commission rule which has been breached. Therefore, I recommend the section 5.4(a)(7) allegation be dismissed.

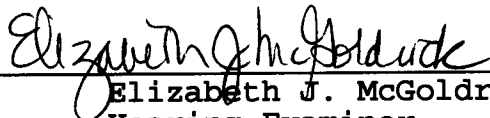
Accordingly, I make the following:

Conclusions of Law

The College not violate the Act when, in July 1995, it created five new positions and abolished four positions in the ACCOSAP negotiations unit, as part of a reallocation of resources and reorganization. Further, its failure to select displaced ACCOSAP members did not violate the Act.

Recommendation

I recommend the complaint be dismissed.


Elizabeth J. McGoldrick
Hearing Examiner

Dated: May 2, 1997
Trenton, New Jersey