P.E.R.C. NO. 92-64

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(WILLIAM PATERSON COLLEGE),

Respondent,

-and- Docket No. CO-H-88-276

IFPTE, LOCAL 195, AFL-CIO,

Charging Party.


SYNOPSIS

The Public Employment Relations Commission dismisses a complaint based on an unfair practice charge filed by IFPTE, Local 195, AFL-CIO against the State of New Jersey (William Paterson College). The charge alleged that the employer violated the New Jersey Employer-Employee Relations Act when the college reclassified parking lot attendants as clerks, rather than guards, to exclude them from Local 195's negotiations unit. An amendment alleged that the employees were later classified as guards, but assigned less than 20 hours of work per week to exclude them from Local 195's unit. The Commission finds that even if these employees' hours had not been reduced, they would not have come within Local 195's contractual recognition clause. Accordingly, the Commission dismisses the allegations of anti-union animus and failure to negotiate in good faith.

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Charging Party.

Appearances:

For the Respondent, Robert J. Del Tufo, Attorney General (Stephan M. Schwartz, Deputy Attorney General)

For the Charging Party, Balk, Oxfeld, Mandell & Cohen, attorneys (Arnold S. Cohen, of counsel)

DECISION AND ORDER

On April 27 and October 18, 1988, IFPTE, Local 195, AFL-CIO filed an unfair practice charge and amended charge against the State of New Jersey (William Paterson College). The charge alleged that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (2), (3), (5) and (7),[1/] when the College reclassified parking lot

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 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

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attendants as clerks, rather than guards, to exclude them from Local 195's negotiations unit. The amendment alleges that the employees were later reclassified as guards, but assigned less than 20 hours of work per week to exclude them from Local 195's unit.[2/]

On February 1, 1989, a Complaint and Notice of Hearing issued. On February 17, the employer filed its Answer denying that it had violated the Act and asserting that the College had a legitimate business justification for designating the employees as part-time clerks, and later as 17 1/2 hour guards.

On February 28 and March 18, 1991, Hearing Examiner Arnold H. Zudick conducted a hearing.[3/] The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs and replies by June 24, 1991.

On August 16, 1991, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 92-5, 17 NJPER 437 (¶22210 1991). He found that the College's actions were legitimately based and taken in good faith.

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1/ Footnote Continued From Previous Page

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. (7) Violating any of the rules and regulations established by the commission."

2/ An allegation concerning subcontracting was withdrawn.

3/ The hearing was delayed because of predominant interest proceedings at the Office of Administrative Law.

On September 26, 1991, after an extension of time, Local 195 filed exceptions. It argues that the sole motivation for reducing the guards' hours was to exclude them from Local 195's unit for anti-union reasons. Specifically, it claims that the College attempted to masquerade these employees as clerks to undermine Local 195; encouraged these employees to join the clerical union but then, after they were reclassified as guards, failed to inform them about Local 195; and unilaterally reduced their hours because of animus toward Local 195.

On September 30, 1991, the employer filed a reply urging adoption of the recommended decision. It argues that Local 195 did not prove that the College systematically attempted to keep the guards out of that union. It also argues that since the parties' collective negotiations agreement does not list these employees' proper classification -- intermittent guards --, that agreement bars Local 195's representation of these employees during its term.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 3-14) are accurate. We incorporate them with this clarification. It appears from Department of Personnel ("DOP") documents (R-1, J-4) that intermittent employment is defined as employment characterized by unpredictable work schedules on a less than year-round basis.

Given the facts found by the Hearing Examiner, there is no indication that the College converted the attendants to clerks and then to intermittent guards, or reduced their hours, because of

hostility to Local 195. The College was required by Executive Order No. 145 to convert special services positions, such as parking lot attendant, into regular employment categories. A DOP employee directed the College's payroll supervisor to place the attendants into a clerk title. There was no discussion about whether, as a result of the conversion, the attendants would be in a negotiations unit. Because the conversion meant that the salaries for the attendants would increase by $1.34 per hour, and because part-time employees were normally capped at fifty percent of full-time hours, the College capped the attendants' hours at 17 1/2 per week, fifty percent of the regular work week for clerks. When that conversion took place, the College informed the former attendants that they might be eligible for inclusion in the administrative and clerical negotiations unit represented by the Communications Workers of America. Local 195 then filed this charge and an appeal with DOP over the placement of the attendants in the clerk title.

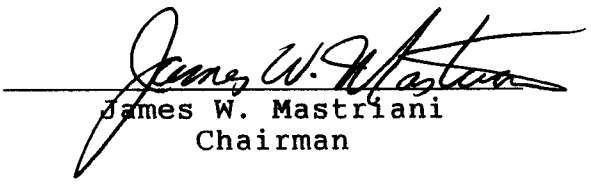
DOP granted the appeal and reclassified the former attendants as guards. It noted that the College raised an issue regarding the annual time worked by the former attendants. These employees traditionally worked no more than 32 weeks per year. But DOP found that insufficient information was provided to determine whether they were intermittent, temporary, ten or twelve month employees. It also noted that the College could appeal. It did and DOP reclassified the employees as intermittent guards.

Local 195 claims that the College reduced the attendants' hours to exclude them from Local 195's unit. But these employees would be classified intermittent even if they worked more than 20 hours per week. Therefore, even if these employees' hours had not been reduced, they would not have come within the contractual recognition clause. Accordingly, we dismiss the allegations of anti-union animus and failure to negotiate in good faith.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Grandrimo, Regan, and Wenzler voted in favor of this decision. Commissioner Smith voted against this decision.

DATED: November 25, 1991
Trenton, New Jersey
ISSUED: November 26, 1991

H.E. NO. 92-5

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

In the Matter of

State of New Jersey,
William Paterson College,

Respondent,

-and- Docket No. CO-H-88-276

IFPTE, Local 195, AFL-CIO,

Charging Party.

## SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the State of New Jersey, William Paterson College did not violate the New Jersey Employer-Employee Relations Act by reducing the hours of parking lot attendants to below 20 hours per week, or by seeking to convert their title to clerk, then intermittent guard. The Hearing Examiner concluded that the College's actions were legitimately based and done in good faith. The Charging Party failed to meet its burden of proof in both the 5.4(a)(3) and (a)(5) context.

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.

H.E. NO. 92-5

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

In the Matter of

State of New Jersey,
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-and-

Docket No. CO-H-88-276

IFPTE, Local 195, AFL-CIO,

Charging Party.

Appearances:

For the Respondent, Robert Del Tufo, Attorney General (Stephan M. Schwartz, D.A.G.)

For the Charging Party, Balk, Oxfeld, Mandell & Cohen, Attorneys (Arnold S. Cohen, of Counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (Commission) on April 27, 1988 and amended on October 18, 1988, by IFPTE, Local 195, AFL-CIO (IFPTE) alleging the State of New Jersey, William Paterson College (State or College) violated subsections 5.4(a)(1), (2), (3), (5) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).[1/] In the original charge IFPTE alleged that the

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with,

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College designated certain employees as clerks, rather than guards, to exclude them from its negotiations unit. In the amended charge IFPTE recounted the allegations of the original charge, explained that the employees were reclassified as guards, but alleged the College assigned them to less than 20 hours of work per week to exclude them from its negotiations unit. IFPTE also alleged that since March 1988 the College unilaterally subcontracted guard work performed after 2:00 p.m.

A Complaint and Notice of Hearing (C-1) was issued on February 1, 1989. The State filed an Answer (C-2) on February 17, 1989 denying it violated the Act and asserting several affirmative defenses. The State argued the College had legitimate business justification for designating the employees as clerks, and later for designating guards to fewer than 20 hours per week.

A hearing was originally scheduled for March 2, 1989. Due to procedural matters that hearing was cancelled and hearings were

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restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or 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. (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. (7) Violating any of the rules and regulations established by the commission."

not held until February 28 and March 18, 1991 in Trenton, New Jersey.[2/] At the March 18th hearing IFPTE withdrew the portion of the amended charge alleging a subcontracting violation of the Act (2T5). The parties filed post-hearing briefs and reply briefs by June 24, 1991.

Based upon the entire record I make the following:

Findings of Fact

1. The State and IFPTE were parties to a collective agreement effective July 1, 1986 - June 30, 1989 (J-1) covering all employees in the statewide Operations, Maintenance and Services and Crafts Unit, and Inspection and Security Unit.[3/]

The recognition clause, Article I, Section B(1) of J-1 explains that part-time employees who are regularly scheduled to work 20 or more hours per week for 40-hour fixed work week titles are included in the unit. That section provides:

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2/ On February 14, 1989 the hearing was rescheduled for April 1989, but in March 1989 the State filed a discovery motion and by April 6, 1989, the State filed a predominant interest motion resulting in the transfer of this case to the State Office of Administrative Law (OAL) for a predominant interest determination. The OAL matter, and the underlying cases from other agencies that lead to the predominant interest proceedings, were withdrawn or resolved by November 15, 1990, and the matter transferred back to me by copy of a stipulation of withdrawal I received on November 19, 1990 (C-3). By letter of November 21, 1990 I rescheduled the hearing for February and March 1991.

The transcripts will be referred to as 1T and 2T respectively.

3/ The parties did not have a copy of their 1986-89 agreement, thus J-1 is actually a copy of their 1989-92 agreement. The parties stipulated that the 1989-92 agreement has the same pertinent clauses as the 1986-89 agreement (2T4).

> Included in this unit are all full-time permanent (including probationary) provisional and unclassified employees of the State of New Jersey listed in Appendix III A, B and C and all permanent part-time employees who are regularly scheduled to work twenty (20) or more hours per week for forty (40) hour fixed work week titles and seventeen and one-half (17 1/2) hours per week for thirty-five (35) hour fixed work week titles and who are included in the classifications listed in Appendix III A, B and C.

Thus, part-time employees who are regularly scheduled to work less than 20 hours per week in a 40-hour per week title are not included in IFPTE's unit (2T40).[4/]

Appendices III, A, B, and C of J-1 list the titles that are included in IFPTE's unit. The title "parking lot attendant" is not listed in any appendix. Appendix III-C of J-1 lists two guard titles in IFPTE's unit with Title Codes 32312 and 32322. Those titles are 40-hour fixed work week titles.[5/] Employees performing guard duties less than 20 hours per week in an unpredictable work schedule fall within an intermittent guard title which has Title Code 32323 and is not included in IFPTE's unit (2T40, R-5).

2. For several years prior to 1988 the College employed approximately 15 "special service employees" with the informal title of "parking lot attendant" to monitor and patrol the College parking lots (2T48). Special service employees were part-time, temporary

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4/ In paragraph 3, section 4 of the amended charge IFPTE alleged that its unit for permanent part-time employees does not include employees who work fewer than 20 hours. The State admitted that fact in its Answer, thus, I find it a fact here.

5/ CP-3 is the November 5, 1986 job description for those two guard titles and shows that they are 40-hour positions.

hourly employees who worked irregular work schedules to fill special or short-term needs. Most special service employees had clerical titles (2T45).

Prior to 1988 parking lot attendants worked only when the College was in session, but no more than 32 weeks per year (1T23; 2T67, 2T68; R-4). They were not included in any negotiations unit. They worked five days a week, approximately from 8:00 a.m. - 2:30 p.m., and on average worked 27 hours per week or somewhere between 35 and 55 hours per two-week period, and earned $4.25 per hour (1T21-1T23, 1T47, 1T54, 1T56, 1T61).

On August 26, 1986, Governor Kean issued Executive Order No. 145 (J-2) ending special services employment; requiring the Department of Treasury and Department of Civil Service (now Department of Personnel (DOP)) to prepare regulations and procedures covering intermittent, part-time and temporary employees, and the creation of job categories within which special services employees could be placed in either the classified or unclassified service. The Departments had a 24-month phase-out period within which to implement J-2.

DOP was required to establish designations for specific titles where the work assignment was determined to be on an intermittent basis.

On September 21, 1987, DOP issued a Salary Administration Memo (R-1) establishing the procedures to phase out special services and convert special service employment to regular employment

categories. Special services positions had to be converted to one of the following:

I. Regular Positions - which include
   A. Full-Time Employment
   B. Part-Time Employment
   C. Intermittent Employment

II. Temporary Positions - which include
   A. Summer seasonal employment
   B. Student Assistant
   C. Special Project Overtime

R-1 defined Intermittent as "employment characterized by unpredictable work schedules on a less than year-round basis.[6/] That subcategory required the establishment of a specific intermittent title.

3. Muriel Orlovsky, College Personnel Officer, was responsible for complying with J-2 on behalf of the College. Orlovsky had to convert employees who were in positions that involved more than six months of work, into permanent titles. Orlovsky was assisted by Betty Ann Parrella, Supervisor of Payroll (2T45-2T46).

The bulk of the special services titles subject to conversion were clerical, and were converted into exactly the same permanent titles, i.e., clerk typist, clerk steno, senior clerk typist and senior clerk steno. The pay rates were the same (2T47, 2T105). The employees holding parking lot attendant titles, however, had no comparable classified civil service title to which they could be converted (2T48, 2T105).

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6/ "Intermittent" referred to positions with "an irregular work schedule of less than 52 weeks a year." (2T52).

Parrella was assigned to contact DOP to ascertain where to place the parking lot attendants. She contacted the DOP classification division and an employee there directed her to place the parking lot attendants into a clerk title because it was one of the lowest paid titles in the range. Parrella reported the result to Orlovsky (2T105-2T107; 2T110-2T111). Parrella had no conversations with DOP officials or Orlovsky about whether the parking lot attendants would be in a negotiations unit. There were no discussions about unionized employees (2T63, 2T107).

Special services positions had no hourly limitations, but the clerk title was a fixed 35-hour work week position (2T110). The College practice was a fifty percent cap on hours for part-time employees, thus Parrella recommended to Orlovsky that the attendants (clerks) be capped at 17 1/2 hours per week (2T58, 2T88).

But Parrella also recommended the hours cap because the clerk title paid $5.59 per hour which was $1.34 per hour more than the attendants had been receiving (2T54; 2T58). The money to pay the attendants was generated from the sale of parking decals to students, thus, there was a limit on how much money was available for the attendants, as clerks, at a higher pay rate (2T53-2T54). At the time of the conversion the College was approximately halfway through its budget year and Orlovsky believed that the attendant (clerk) account would not have sufficient funds for the balance of the year unless the hours were reduced (2T54-2T55; 2T58).

Orlovsky agreed with Parrella's recommendations and obtained College Vice President Spiridon's approval to convert the attendants to clerks and limit them to 17 1/2 hours per week, or 35 hours bi-weekly at the higher pay rate (2T58-2T59). On February 2, 1988, Orlovsky sent a memorandum (R-2) to Acting Chief Ryerson of the College Police, with copies to the eleven attendants (clerks) employed in the position at that time (2T81), informing him (and them) of the conversion, and hours and pay change (2T56-2T57). The pertinent language in R-2 provides:

> As I recently advised you over the telephone, we will be converting these parking attendants to the regular payroll on Bi-Weekly 4 (January 30-February 12, 1988).
>
> I also informed you that the only title we were able to request from the Department of Personnel (formerly Civil Service) is Clerk. The current hourly rate for Clerk is $5.59 per 35 hour work week.
>
> Therefore, effective January 30, 1998, the above listed employees will only be authorized to work a maximum of 35 hours in a Bi-Weekly pay period.
>
> If a parking attendant is permitted to work beyond 35 hours in a Bi-Weekly, he will be entitled to overtime compensation. Therefore it is important for you to notify these employees of their increased hourly rate of pay, and the decrease in the Bi-weekly work week to 35 hours. In view of the substantial hourly salary increase <u>overtime will not be authorized</u> for these parking attendants.

Orlovsky intended R-2 to be a cap on hours for clerks (attendants)(2T59). A copy of R-2 was sent to Sergeant Robert Jackson of the College Police who supervised the attendants (clerks). Parrella and Orlovsky also telephoned Jackson, informing him of the conversion and the limit of 17 1/2 hours per week for

these employees (1T24-1T27). At the time of the conversion there were 15 budgeted clerk (attendant) positions (1T29; 2T63).

4. When the time attendants were converted to clerks, Orlovsky realized that those clerks might be eligible for the Communications Workers of America (CWA) Administrative and Clerical negotiations unit since that unit included clerk titles. She wrote to each clerk (formerly attendants) informing them of the conversion and explaining they might be eligible for CWA's unit (2T64).[7/] Shortly thereafter at least some of those clerks received form letters from the CWA asking them to join that union presumably because those employees now held titles included in CWA's unit (2T15-2T17).[8/]

At least six of the clerks (attendants)(2T10) then contacted William O'Brien, a College employee who was IFPTE's Chapter President at the College (2T6), and told him they had received the CWA letter (2T8, 2T15). O'Brien knew that the parking lot attendant title was going to be converted into a permanent title and expected it to be converted into a title in IFPTE's unit, presumably guard (2T8, 2T17). After the conversion O'Brien asked Sgt. Jackson why attendants were converted to clerk, but Jackson was unaware of the process or reasons for the conversion (1T46-1T47; 2T18-2T19). O'Brien did not contact Orlovsky or Parrella, nor did Orlovsky contact him about the conversion (2T18-2T19; 2T68).

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7/ That letter was not offered for evidence, but Orlovsky admitted she sent such a letter (2T64).

8/ That form letter was not offered for evidence.

On or about March 14, 1988 a job description (work assignments and performance standards)(CP-1) was prepared (presumably by Sgt. Jackson (2T23)) for "Clerk (Traffic Attendant)" which outlined the duties of the former parking lot attendants, now clerks, as they existed both before and after the conversion (1T21).[9/] As a result of the conversion Jackson reduced the hours and changed the scheduling of the clerks. The reduction of hours meant reduced manpower for Jackson to cover the lots. The conversion did not result in a change of traffic flow (1T27, 1T28). Jackson eliminated working Friday even though school was in session; changed Monday to 8:00 a.m. - 12:00 p.m.; and changed Tuesday, Wednesday and Thursday to 8:00 a.m. - 12:30 p.m. (1T29). The job duties were the same both before and after the conversion (1T54, 1T61). Jackson did not schedule clerks to work when class was not in session (1T39-1T42), and sometimes clerks worked 35 hours in one week and off the next week to limit their time to 35 hours bi-weekly (2T31). After the conversion the affected employees received a benefit package paid by the College costing approximately twenty-five percent of the base salary (1T48, 2T97).

After learning of the title conversion and talking to the clerks, O'Brien, on April 6, 1988, sent a memorandum (CP-2) to IFPTE Vice-President Don Buchanan listing the subject as "part-time security officers" and stating:

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9/ The duties of clerk as contained in CP-1 included issuing and filing summonses, monitoring parking, lot counts and surveys, and assisting visitors.

> Listed below are the names of the permanent part-time security parking lot attendants and gate guards, at Wm. Paterson College. In their pay checks on March 31, 1988 they were paid $5.59 per hour.
>
> ...
>
> Further, I understand the supervisor was instructed to write a job description geared towards a Clerk/Lot Attendant. (Whatever that is!?!)

Buchanan received CP-2 on April 7, and apparently questioned O'Brien about the job description. O'Brien sent Buchanan a copy of CP-1, the job description referred to in CP-2, which was received by him on April 15, 1988 (2T20).

On April 27, 1988 IFPTE filed the original unfair practice charge. On May 6, 1988 Buchanan sent Judy Winkler, DOP Personnel Management Systems Administrator, a letter (CP-4) appealing the placement of the attendants in the clerk rather than guard title, and notified Winkler that the charge had been filed (2T32-2T33).[10/] In CP-4 Buchanan said in pertinent part:

> I am writing this letter in reference to William Paterson College and their absurd placement of the 14 permanent, part-time Guards in the title of Clerk.
>
> Judy, as you can see by reading the enclosed PAR, these 14 people were put in the wrong title. They should have been placed in the title of Guard. Local 195 has filed an Unfair Labor Practice with PERC, and we are appealing to you to place these people in the proper title of Guard.

Buchanan alleged that the College violated the Act first by placing the attendants in the clerk title, and then by cutting their

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10/ Copies of CP-1 and CP-2 were attached to CP-4 and the language "enclosed PAR" in CP-4 referred to CP-1 (2T32-2T33).

hours as guards (intermittent guards) to keep them out of IFPTE's unit (2T37). But no one at the College told him they were trying to exclude the attendants from IFPTE's unit, in fact, he had no conversations with anyone at the College from the time O'Brien contacted him to the time he sent CP-4 (2T37-2T38). He reached his conclusion that the College's handling of the attendants was illegally motivated based upon the historical/legal relationship between IFPTE and the College (2T38). There were no specific facts of this case, or anything said between the time O'Brien talked to him (Buchanan) and May 6, 1988, that led Buchanan to believe the College had an anti-union motive (2T38-2T39). He appealed the clerk designation to DOP because DOP had the authority to place employees in the proper titles (2T39).

By letter of September 12, 1988 (J-3) Winkler granted IFPTE's appeal and informed Orlovsky and Buchanan that the former attendants would be classified as guards. Winkler also explained that the College raised an issue regarding the annual time worked by the former attendants, but noted insufficient information was provided to make a determination whether the former attendants were intermittent, temporary, 10- or 12-month employees. Winkler thus concluded that for now they were placed in a 12-month title. She also explained that the College could appeal and request the guards

status be revised, but that any such request would be considered prospectively.[11/]

The College did not have 52 weeks of work for the guards (formerly attendants), thus on October 21, 1988 it requested that DOP revise their status. By letter of December 9, 1988 (J-4) Winkler approved the College's request and reclassified those employees as "Intermittent Guards."[12/] The process reclassifying those employees to intermittent guards was completed by July 1989, and the affected employee's salary increased to $6.24 per hour (and then to 6.58 per hour (R-5)), the guard title base pay rate, which the intermittent guards were paid retroactive to April 23, 1988 (2T54-2T55, R-5). IFPTE received a copy of J-4 (2T35-2T36), but there is no evidence that it appealed Winkler's decision.

Sometime after J-4 was issued Orlovsky sent a letter to the affected employees informing them of their conversion to

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11/ Orlovsky did not believe that the J-3 conversion of clerk to guard was a final binding determination at that time because Winkler had given the College the opportunity to appeal that determination (2T76-2T79). Although I do not discredit Orlovsky's "belief," I find that J-3 was a binding determination at that time, thus clerk was converted to guard on September 9, 1988, and that any appeal or request for revision would be effective prospectively.

12/ In J-4 Winkler explained that the College had conclusively shown that the employees should be reclassified as intermittent guards, but she also indicated that the College now had to make a specific request for that title. That process was completed by July 1989 (as evidenced by R-5, a Position Action Request) and made retroactive to April 23, 1988 when the attendants were first classified as clerks (2T54-2T55, 2T114-2T116).

intermittent guard and advising them of a higher pay rate. That letter made no reference to IFPTE or any other union or whether the employees would be eligible or ineligible for any negotiations unit.[13/] (2T64, 2T75-2T76, 2T79).

5. Orlovsky prepared lists showing the amount of hours intermittent guards worked for pre-session and summer session for 1988, 1989, and 1990 (R-3).[14/] During those sessions some guards worked more than 35 hours in a bi-weekly pay period, but some worked less (2T90-2T93, R-3). Money was available to pay the employees for extra hours because not all 15 intermittent guard positions were filled, and some guards were not working a full 17 1/2 hours a week (2T61). Although Orlovsky originally thought R-2 would be a cap on hours, it actually became a target rather than a maximum (2T62).

Analysis

The State did not violate the Act by the manner in which parking lot attendants were converted to clerks, guards or intermittent guards, nor by fixing their work hours at 17 1/2 hours

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13/ Orlovsky testified that she sent a second letter to the employees but neither party offered that document to prove when it was sent, or what it specifically said, nor was Orlovsky specifically asked whether it was sent before or after J-4. Orlovsky testified that she wrote the second letter to advise the employees of their conversion to intermittent guard (2T64, 2T75), which had to occur after J-4. Thus, at the time that letter was sent Orlovsky knew that intermittent guards only worked 17 1/2 hours per week and were therefore not included in IFPTE's unit (2T64).

14/ The pre-session is a four-week academic session that does not run consistent with pay periods (2T90-2T91).

per week. The State's actions were devoid of union animus, were legitimately based, and there was no obligation to negotiate with IFPTE.

In its post-hearing brief IFPTE argued that the College's conversion of attendants to clerks and its fixing of their hours to 17 1/2 per week violated the Act. IFPTE relied on the test in Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984) (Bridgewater) to support its case. That test is used in determining whether an employer's actions violate subsection 5.4(a)(3) of the Act; motive is a necessary element. Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence, that conduct protected by the Act was a substantial or motivating factor in the adverse action. This may be done by direct or circumstantial evidence showing that the employee engaged in activity protected by the Act, that the employer knew of this activity, and that the employer was hostile toward the exercise of the protected activity. Id. at 246.

If a charging party satisfies those tests, then the burden shifts to the employer to prove that the adverse action would have occurred for lawful reasons even absent the protected conduct. Id. at 242. The burden will not shift to the employer, however, unless the charging party proves that anti-union animus was a motivating or substantial reason for the employer's actions.

That test is not applicable in this case. Although on the face of its original charge IFPTE noted that the State violated subsection 5.4(a)(3) of the Act, IFPTE did not allege in the charge that attendants or intermittent guards were discriminated against because of their exercise of rights guaranteed by the Act. In fact, IFPTE did not allege that the employees engaged in any protected activity. Similarly, IFPTE noted in the charge that the State violated subsections 5.4(a)(2) and (7) of the Act but it did not allege that: it was attempting to organize the employees; the College dominated or interfered with the formation, existence or administration of any employee organization; or that the College violated any Commission rule or regulation.

Even assuming that Bridgewater was the appropriate test in this case, IFPTE failed to prove a prima facie case. It did not prove that any attendant(s)/intermittent guard(s) engaged in protected activity, or that the College was aware of -- or hostile to -- any such activity. Thus, under Bridgewater, the burden did not shift to the College to prove the basis for its action. Having reviewed the record, however, the evidence shows that the College had legitimate reasons for converting the attendants to clerks, for appealing DOP's determination they were guards, and for scheduling and keeping their hours at 17 1/2 per week or 35 biweekly. The evidence did not show a nexus or illegal motive between the State's actions and IFPTE.

IFPTE did not present evidence contradicting Parrella's testimony that a DOP employee directed her to place attendants in a clerk title and that union affiliation played no part in that determination. Similarly, IFPTE did not contradict Orlovsky's testimony that the clerks' hours were limited to 35 hours bi-weekly because of the College's policy on capping part-time employment (full-time clerks worked 35 hours per week), and that it was kept at 35 hours bi-weekly from the time the employees were converted to clerks due to financial concerns. The intermittent guards were paid the same salary they would have received as guards. Thus, the College did not try to save money by changing the employees' salary, rather, it kept their hours of work at the level first established when they were converted to clerks which was done prior to any documented IFPTE involvement in representing these employees.

IFPTE cited several cases to support its Bridgewater argument: Mt. Olive Tp. Bd. of Ed., P.E.R.C. No. 90-66, 16 NJPER 128 (¶21050 1990); City of Trenton, P.E.R.C. No. 90-1, 15 NJPER 487 (¶20198 1989); Borough of Tinton Falls, P.E.R.C. No. 89-108, 15 NJPER 270 (¶20117 1989); Camden Bd. of Ed., P.E.R.C. No. 89-78, 15 NJPER 94 (¶20042 1989); and UMDNJ-Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987), but those cases are distinguishable from this case. In Mt. Olive, Trenton, Tinton Falls and Camden, the respective employers took action against specific employees. The employees involved in those cases had engaged in protected activity. In Mt. Olive and Tinton Falls the Commission

found violations holding that the employers were motivated by animus or hostility, but in Trenton and Camden it dismissed complaints finding that the employers' actions were either not illegally motivated or that the action would have occurred for legitimate reasons even absent the protected activity.

The facts of this case are entirely different. There was no evidence the employees participated in protected activity or that the College was aware of such activities, and even Buchanan acknowledged there were no specific facts or anything said here that would demonstrate an anti-union motive.

In UMDNJ the Commission dismissed a complaint but explained that if a prima facie case is established the employer must show, based upon the whole record, that it would have taken the same action for legitimate reasons even absent the protected activity. That holding is not applicable here. IFPTE did not establish a prima facie case, thus, the burden did not shift to the State to prove why it took that action. Thus, I recommend the 5.4(a)((2), (3) and (7) allegations be dismissed.

The charge here alleges a 5.4(a)(5) and derivative (a)(1) violation more than anything else. The (a)(5) standard requires that employers act in good faith, but it is necessary for the charging party to prove its case by a preponderance of the evidence. Although proof of motive is not specifically required for an (a)(5) finding, it is a relevant factor.

In its post-hearing brief IFPTE made several arguments to support its claim that the College purposely attempted to exclude the employees from its unit. First, it argued that the College attempted to "masquerade" the employees as clerks. That argument inaccurately portrays the facts. The College made no such attempt. A DOP employee directed Parrella to request a clerk title for the attendants and that was done without reference to any negotiations unit. DOP's subsequent designation of those employees as intermittent guards is not evidence that the College (or DOP) acted in bad faith in initially requesting they be converted into clerks.

Second, IFPTE argued that the College "attempted to place these employees into a different union." That allegation also inaccurately portrays the facts. Those employees were not in any unit at that time and Orlovsky only "advised" the employees that they "might" be eligible for the CWA unit. She took no action to place them in any unit.

The College could have notified the employees after J-3 issued that they might be eligible for IFPTE's unit, but it chose not to because it was appealing Winkler's decision, and it was under no obligation to so advise the employees. Orlovsky did notify the employees of their conversion to intermittent guard after J-4 issued, but she did not mention IFPTE because intermittent guards are not included in their unit. There was no evidence of animus in this case, thus, I conclude that Orlovsky's notices to employees were done in good faith and without any unlawful motive toward IFPTE.

Third, IFPTE argued that the College violated the Act by unilaterally reducing "the guards" hours which resulted in DOP reclassifying those employees as intermittent. That argument lacks merit. The College did not change the guards' hours. The College changed the attendants' hours at or before their conversion to clerks. Neither attendants nor clerks were in IFPTE's unit, thus, the College was under no obligation to negotiate that change with IFPTE.

Whether there was enough work to justify attendants/clerks working more hours, or whether Sgt. Jackson approved of the hours reduction, is irrelevant. The College reduced the hours to conform to its cap policy and to keep the hours within the projected budget for that work. Union affiliation, or lack thereof, was not a factor in that decision. The hours were reduced well before any documented IFPTE involvement in seeking to represent these employees. IFPTE did not show by a preponderance of the evidence that the College acted in bad faith by reducing the hours, thus, I recommend that the 5.4(a)(5) and derivative (a)(1) allegations be dismissed.

In its post-hearing briefs IFPTE relied upon New Jersey Dept. of Higher Education, P.E.R.C. No. 85-77, 11 NJPER 74 (¶16036 1985) to support its argument. In that case the employer reduced the hours that six employees worked per week from 20 to 15 because they engaged in protected activity. The Commission found a 5.4(a)(3) violation and ordered the hours restored. But the Commission dismissed a 5.4(a)(5) allegation. It found that the

employer was not obligated to negotiate over the hours reduction with the union representing 20 hour a week employees, because that union was not the majority representative of those employees at the time of the incident even though those employees might be appropriate for inclusion in that unit.

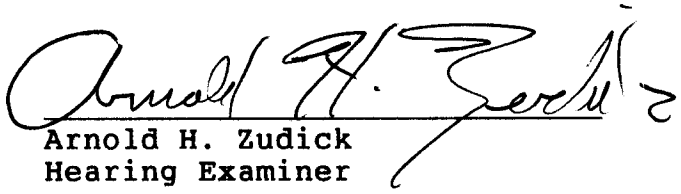
In relying on that case IFPTE argued that the Commission considered several factors in determining that the employer had no legitimate business justification for reducing the hours. They included: the lack of calculations showing the amount of money saved, and little evidence of fiscal planning. IFPTE argued that if the same factors were considered here, it would result in a finding that the College had not demonstrated a legitimate business justification for its actions.

IFPTE's reliance on that case is misplaced. Although the Commission considered the factors mentioned above and found there was insufficient evidence in that case to justify the employer's actions, the Commission performed that task only after the charging party there met the elements of the Bridgewater test. Here, IFPTE failed to meet any of the Bridgewater elements, thus, the burden did not shift to the State to establish why it took that action.

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

## RECOMMENDATION

I recommend the Complaint be dismissed.



Arnold H. Zudick
Hearing Examiner

Dated: August 16, 1991
Trenton, New Jersey