

H.E. NO. 2004-2

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

In the Matter of

GLOUCESTER COUNTY COLLEGE,

Respondent,

-and-

Docket No. CO-H-2001-54

GLOUCESTER COUNTY COLLEGE FEDERATION
OF TEACHERS, AFT, AFL-CIO,

Charging Party.

GLOUCESTER COUNTY COLLEGE,

Charging Party,

-and-

Docket No. CE-H-2001-4

GLOUCESTER COUNTY COLLEGE FEDERATION
OF TEACHERS, AFT, AFL-CIO,

Respondent.

SYNOPSIS

A Hearing Examiner recommends that a public employer "dealt directly" with a unit employee and not the majority representative, concerning terms and conditions of employment, violating 5.4a(5) and derivatively a(1) of the Act. The Hearing Examiner recommends that a second allegation of employer "direct dealing" with another unit employee be dismissed.

The Hearing Examiner also recommends dismissing other portions of a Consolidated Complaint alternately alleging that the Federation and the College had negotiated in bad faith. The Hearing Examiner found that the parties had followed a negotiated procedure for determining compensation and job responsibilities for employees undertaking duties that differed from those normally performed. Following that procedure was not evidence of bad faith, according to the Hearing Examiner.

Finally, the Hearing Examiner recommends that the employer had not retaliated against negotiations unit employees by withdrawing interim assignments because the majority representative had sought to negotiate terms and conditions of employment.

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Respondent.

Appearances:

For the Respondent/Charging Party, Gloucester County
College
Genova, Burns & Vernioia, attorneys
(Sandro Polledri, of counsel)

For the Charging Party/Respondent, Federation of
Teachers
Sagot, Jennings & Sigmond, attorneys
(Mary L. Crangle, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On September 11, 2000, Gloucester County College Federation
of Teachers, AFT, AFL-CIO filed an unfair practice charge
(CO-2001-54) against the Board of Trustees of Gloucester County

College. The Federation alleges that beginning on June 1, 2000, the College negotiated in bad faith by unlawfully dealing directly with bargaining unit members regarding terms and conditions of employment. The charge specifically alleges that College representatives dealt directly with Leon Hughes and Kathy Urban about extra services contracts for interim appointments, thereby ensuring that no agreement could be reached unless the Federation accepted the College's offer. The charge also alleges that the College retaliated against Hughes and Urban by withdrawing the interim assignments because the Federation sought to negotiate the terms and conditions of employment of the assignments and that the College engaged in conduct intended to discourage union activities and disparaged and demeaned the role of the Federation. The College's actions allegedly violate 5.4a(1), (3) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

^{1/} These provisions 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; (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."

On December 26, 2000, the College filed an unfair practice charge (CE-2001-4) against the Federation (or AFT). The College alleges that beginning on or about June 29, 2000, the AFT negotiated in bad faith by insisting to impasse upon contract provisions concerning non-negotiable subjects. The charge specifically alleges that the AFT unlawfully insisted that the College agree not to reorganize the Department of Student Services during any interim assignment of unit member Hughes. The charge also alleges that the AFT unlawfully insisted that in the event unit member Urban received a promotion to a Director position, the College must fill her vacated counselor position " . . . on a full-time basis within two months. . . ." The AFT's actions allegedly violate 5.4b(1), (3) and (5)^{2/} of the Act.

On March 8, 2001, an Order Consolidating Cases together with a Consolidated Complaint and Notice of Hearing issued.

On March 22, 2001, the College filed an Answer, denying the AFT's allegations and setting forth several defenses. On March

^{2/} These provisions prohibit employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit; (5) Violating any of the rules and regulations established by the commission."

30, the AFT filed an Answer, denying the College's allegations and setting forth several defenses.

On August 31, 2001, the College filed a Motion for Summary Judgment, together with a supporting brief and exhibits. On September 5, 2001, the Motion was referred to me for a decision. On September 24, 2001, the AFT filed a brief opposing the Motion, together with an affidavit. On October 3, 2001, the College filed a reply.

On April 10, 2002, I issued a decision (H.E. No. 2002-14, 28 NJPER 167 (¶33060 2002), denying the College's Motion.

On November 18, 2002, I conducted a Hearing on the Consolidated Complaint at which the parties examined witnesses and presented exhibits. Post-hearing briefs were filed by March 14, 2003.

Based on the record, I make the following:

FINDINGS OF FACT

1. The parties signed a collective negotiations agreement extending from 1998-2001 for a negotiations unit of full-time teaching staff, counselors and others and excluding the President, Vice Presidents, Directors and other specified titles (CP-1).^{3/}

^{3/} "CP" refers to Charging Party (Federation) exhibits; "R" refers to Respondent (College) exhibits; and "C" refers to Commission exhibits.

Article III, Faculty Assignments and Responsibilities, at 3.3 Faculty Teaching Assignments, includes a section (g) prescribing a procedure for determining compensation in particular circumstances. It states:

- (g) Acknowledging that innovation and change may require modification of work requirements, then in accordance with the provisions of Chapter 303, Public Law of New Jersey, 1968, and including Chapter 123, Public Law, 1974, State of New Jersey, the following procedure shall be used for determining the appropriate compensation for those faculty members represented by the Federation:
1. At least twenty (20) calendar days prior to the change, the Federation shall be notified in writing. Within ten (10) calendar days of the time of such notice the Federation President may request in writing a meeting with the College Representatives. This request shall be addressed to the President of the College.
 2. Within five (5) calendar days of receipt of such a request a meeting will be scheduled at mutual convenience between a committee of three members of the Federation and three members for the College.
 3. At this meeting which is to be in session for normally no more than two hours duration, negotiations will be concerned with appropriate compensation and work requirements. The Federation and College Representatives shall supply the other party with relevant data.
 4. If mutual agreement is not reached at this negotiation session then the Federation shall submit a final offer in writing within five (5) calendar days to the President.

5. Rejection or acceptance of the Federation's final offer by the President shall be in writing within five (5) calendar days. Rejection shall mean that a member of the bargaining unit will not be required to work any additional time.

6. Failure by the Federation to adhere to the time specifications in subparagraphs (1) and (4) shall mean waiver of further claim, and failure by the President (or his designee) to adhere to the time requirement in paragraph (5) shall mean acceptance of the Federation's final offer. [CP-1]

2. Dr. Gail Mellow was President of Gloucester County College from November 1997 until July 1, 2000 (T141).^{4/} Her "cabinet" was comprised of four vice presidents, including the Vice President of Student Affairs, an Executive Assistant to the President for Human Resources and an Assistant to the President for Public Affairs (T162). Cabinet positions reported directly to the President (T143).

On a date Mellow could not recall, she learned that Evelyn Webb, Vice President of Students Affairs (a title excluded from the negotiations unit), intended to retire from the College (T142; T161). Webb's retirement "papers" were filed sometime in May 2000 (T197). The position is responsible for the recruitment and enrollment of students; the provision of academic support and services to students; the creation of a campus environment, etc.

^{4/} "T" represents the transcript of the hearing; the number following the "T" refers to the page number(s) of the transcript.

(T143). At the time of Webb's retirement announcement, the College was reviewing her position's responsibilities because enrollment had declined, owing at least in part to a failure to retain students (T144). The College had hired a consultant to assess the problem (T144).

Mellow determined that Webb's successor would be an interim Vice President of Student Affairs because no decision had been made about what skills were necessary to improve student recruitment, development and retention (T145).

In or about the same period of time, the person holding the position of Director of Student Development, Advising and Registration (also excluded from the negotiations unit), tendered her resignation (T215; CP-13). On or around June 10, 2000, Mellow and Executive Assistant to the President for Human Resources Charles McClain "identified" Kathy Urban, a counselor and AFT unit employee, as the likely Interim Director for an indeterminate period, following the resignation (T240). No evidence suggests that any College representative contacted Urban to solicit her interest in the position or to discuss terms and conditions of employment. Mellow told McClain a salary amount for the position to include in a proposal to the AFT, specifically known as an "extra services contract" (T241).

3. Joseph Manganello has been employed at the College for 34 years. He is an assistant professor of psychology.

Manganello was the Federation president from 1999 through June 2002. He also was President at other times and has served on the negotiations and grievance committees (T25; T27-T28).

On August 12, 1999, Manganello sent a letter to College President Mellow requesting to receive a copy of all "communications" issued by the College to the Federation (CP-2; T29). On August 25, Assistant to the President for Human Resources Charles McClain sent a letter to Manganello and the AFT executive committee, agreeing to provide all such communications. McClain also wrote of his concerns about Manganello's requests for "formal meetings" with certain administrators, citing a provision of the collective agreement. McClain requested that Manganello provide him with a "clarification" of the meetings' purposes, together with a list of administrators with whom he met or intended to meet. He also wrote that in some of the meetings ". . . your demeanor . . . might be construed as threatening . . . Academic dialogue of all sorts should not be unduly hampered by intimidation, hostility or the creation of unnecessary negativity" (CP-3). Manganello did not reply to McClain's letter (T32).

On September 20, 1999, McClain again wrote to Manganello and the Executive Committee, repeating his request for particulars about Manganello's meetings with administrators (CP-4). On September 26, Manganello wrote to McClain, addressing his August

12 letter "paragraph by paragraph," noting preliminarily that the Assistant to the President was "misguided," "misunderstanding" and had "unacceptably used innuendo and inflammatory rhetoric . . ." (CP-5). In the body of the letter, Manganello rhetorically questioned McClain's tactics and returned the accusation of employing "intimidation, hostility and the creation of unnecessary negativity" (CP-5).

McClain did not reply to Manganello's letter (T35).

4. On or before May 25, 2000, College President Mellow met privately with Associate Professor of Sociology Leon Hughes, a faculty member whose title was included in the negotiations unit represented by the Federation (T36; T116; T147; T150; CP-19). The Federation was not notified of the meeting (T38; T112). Mellow wanted to know if Hughes was interested in the position of interim vice president of student affairs (T147). She knew that Hughes had some experience with the administration of student services (T164).

In their 30-minute meeting conducted in the President's office, Hughes asked Mellow about the job, including salary (T149-T150). They spoke ". . . in general about what would need to be negotiated [and] the conditions under which he could leave [and be returned to] that position . . ." (T148). Mellow told Hughes that the compensation would "benefit him" and ". . . there would be no loss of compensation in any way [compared with his

current salary] and that . . . those issues would be negotiated with the union" (T165-T166). They also talked about the position as part of the President's "cabinet" (T166). Hughes was excited at the prospect of becoming the interim vice president of student affairs and remarked that it was "something he wanted to do his whole life" (T147).

On an undisclosed date soon after her meeting with Hughes, President Mellow told her assistant Charles McClain that she had met with the professor (T198). McClain testified that Mellow said that she had "explored the opportunity" of the interim position with him. He also testified that he was directed to "find out if [Hughes] was still interested" (T198). I do not credit McClain's testimony about the purported and limited purpose of the meeting, an appointment which would have been superfluous in light of Mellow's admission that Hughes expressed to her a profound eagerness to assume the responsibility. I find that Mellow instructed McClain to discuss in detail the circumstances under which Hughes would be willing to serve in the interim position.

Sometime near the end of May 2000, McClain asked Hughes to come to his office. They met for about 10 minutes. McClain said that Mellow told him ". . . to continue the conversation about [Hughes'] interest in the position" (T198-T199). Hughes said that he was interested, provided that he would receive one-half

of the salary paid to retiring Vice-President Webb (T200). McClain replied that he could not discuss terms and conditions of the "extra services contract" between the College and the Federation (for the performance of certain duties "outside of a normal job" by unit employees) (T37; CP-1).

I strongly suspect that McClain's testimony, ". . . continue the conversation about [Hughes'] interest in the position" glosses over the substance of their exchange. President Mellow testified that in May 2000 Hughes told her that he had wanted the position "his whole life[long]," apparently settling the matter of his "interest." I infer that the circumstances under which Hughes would accept the position were discussed. That McClain may have mentioned a prohibition against direct dealing did not preclude such discussion.

On Friday, June 2, 2000, McClain asked Hughes to come to his office, where they met again for about five minutes (T199; T102; T233). McClain told Hughes that Mellow was desirous of his appointment and that he (McClain) would negotiate with representative(s) of the Federation regarding the College's interest in hiring Hughes as interim vice president of student affairs (T200; T201). I infer that McClain had reported to Mellow the results of his first meeting with Hughes and that Mellow directed McClain to (re)confirm to Hughes her interest in appointing him to the interim position. I find that Mellow's

interest in Hughes from the meetings was based in part on at least a general agreement or understanding with the professor of the circumstances under which he would assume the interim position and then return to teaching duties. I further find that the circumstances included salary and benefits ranges.

Later on June 2, McClain unexpectedly saw Federation negotiations committee member Thomas McCormack on campus and told him a "thumb-nail sketch" of the College's interest in Hughes for the interim appointment (T236). McClain also mentioned that he wished to speak with Federation President Manganello (T201). After exchanging messages over the weekend, McClain and Manganello spoke for the first time about the possibility of Hughes' appointment on Tuesday, June 6, 2000 (T202). Manganello asked McClain if he had been negotiating directly with Hughes, which McClain denied. Manganello also asked if the Board of Trustees would vote on Hughes' appointment at its next meeting, scheduled for the following day, June 7 (T203). McClain also denied that question. The Federation President said: "We need to get a proposal from you." McClain replied that he would promptly deliver such a proposal (T204).

5. On June 8, 2000, McClain sent a proposed memorandum of understanding together with a cover memorandum regarding an "extra services contract for Leon Hughes to serve as Interim Vice President of Student Services from July 10, 2000 through December

31, 2000" to Manganello (T40; T238; CP-6). McClain wrote that the College wanted to "move this action" to the Trustees at their July 5 meeting, provided that the Federation concurred. The cover memorandum also advised that if Manganello wished to discuss the interim position, he should contact President Mellow's office (CP-6).

The attached (proposed) memorandum of understanding specifies that it is "in accord with 3.3g of the College/Federation agreement," and sets forth nine enumerated responsibilities of the interim position. It proposes that Hughes receive a "base salary of \$48,750 for assuming the responsibilities of the Interim Vice President position" during the period of July 10 through December 31, 2000 (CP-6).

6. On June 14, McClain issued a proposed memorandum of understanding to Manganello regarding the assignment of unit member Kathy Urban to the interim position of Director of Student Development, Advising and Registration, together with a cover memorandum to Manganello (T58; T239; CP-13). McClain's cover memorandum proposed that Kathy Urban serve in the position from July 10, 2000, until a permanent Director is hired. It proposed to pay Urban a stipend of \$750 per month during her interim position. It also proposed to "move the action" at the July 5 Trustees meeting and offered that College representatives were

available to meet with the Federation "to discuss the interim position assignment" (CP-13).

The Federation negotiations team spoke with Hughes soon after receiving the College's proposal (T113-T114). Federation team member James Sloan testified that Hughes told the team that in early June he was told that his salary for the interim position ". . . would be equal to the amount [paid to] the person holding the current position" (T115). I infer that "early June" refers to a date soon after McClain's second meeting with Hughes. Sloan wrote notes during the team's questioning of Hughes. The notes corroborate his testimony that in their second meeting, Hughes told McClain of his interest in knowing the salary and duration of the interim position and whether he would be provided "release time" (T116; CP-19).

7. On June 16, Manganello wrote a memorandum to President Mellow, acknowledging receipt of McClain's June 8 proposal for Hughes and requesting a meeting with College representatives (CP-7). Copies were issued to members of the Federation negotiations committee and to McClain. On the same day, McClain issued a memorandum replying to Manganello, proposing two alternate dates later in the month for a meeting to discuss the interim position (T43; CP-8). On June 19, Manganello issued a memorandum to President Mellow requesting a meeting to discuss the College's June 14 proposal regarding Urban's possible

appointment to Interim Director of Student Development, Advising and Registration (CP-14).

8. On June 27, representatives of the College and Federation met (T45; T206). The Federation was represented by Manganello, Thomas McCormack, James Sloan and Barbara Nienstedt. The College was represented by McClain, Vice President for Academic Affairs Perry and by Evelyn Webb, the retiring vice president for Student Affairs (T45; T120, T206).

The Federation had prepared a counterproposal to the College's offer (T118; CP-19). Among its "nine points" was a demand that the College not reorganize the Department of Student Services (T46; T123; T207). Other "points" concerned salary, vacation benefits, professional development, "readjustments" upon Hughes' return to teaching, incentives, the need for administrative assistants, etc. (T122). All nine items were discussed by the teams on June 27 (T124; T207). Federation negotiations committee member Sloan testified about the College team's reply to the "no reorganization" proposal:

. . . [T]hey understood and they would expect [that] the new person that they were [] in the process of hiring [would] have to carry out that reorganization In other words, the tone that I heard was that they didn't expect him [Hughes] to do the reorganization, that it would be left to the person who would be the full time vice president. [T124-T125]

The College team did not accept or reject the "no reorganization" proposal (T243). Nor did the College team state that the "no reorganization" proposal was a "deal breaker" (T49; T125).

Manganello believed that the parties had a "meeting of the minds" on the matter, meaning an agreement that a reorganization would not be implemented during an interim vice presidency. No other evidence supports such a claim; I credit Manganello's belief without finding a "meeting of the minds" (T49). I infer that Manganello's belief was based on the College negotiations team's empathic understanding of Federation concerns.

The teams also discussed whether Hughes would remain in the Federation negotiations unit during the period of his interim vice-presidency and what his role might be within the College President's "cabinet" (T207). The Federation proposed that upon his appointment, Hughes should be paid the same salary that Webb received, including a scheduled increase on July 1, 2000 (T127). The College team was non-committal, and jotted down the Federation demands. The overall tone of the meeting was cordial, professional, and "open" (T45; T72; T125; T242).

After a brief break during which Webb left the gathering, the teams discussed terms and conditions of employment (in an extra services contract) for Kathy Urban as an Interim Director of Student Development, Advising and Registration (T60; T130). They discussed job duties, and a stipend for Urban. The

Federation team also demanded that a full-time counselor be hired within two months if the College determined that Urban's interim appointment was to be upgraded to permanent (T61; T85; T132; T244). An unspecified College negotiations team member replied either that the College was concerned about maintaining adequate counseling services or that it wanted to keep the number of counselors constant (T132; T244). The Federation also proposed that Urban's interim position shall be included in the negotiations unit (T85). At the meeting's end, the Federation team agreed to submit a written proposal regarding both positions (T146).

9. On June 29, Manganello issued a memorandum to McClain regarding the "extra services contract for Ms. Kathy Urban" (CP-15). The memorandum proposed that Urban be assigned to the interim post for not less than 4 months at a monthly stipend of \$1,297. It proposed that she remain in the unit and that if she was "promoted into this position . . . on a full time basis" her vacated counselor position would be filled within 2 months of the date of promotion (CP-15).

McClain kept President Mellow "fully informed" of "anything that was going on" regarding the interim appointments (T152). I infer that they discussed Manganello's June 29 proposal. On July 5, 2000, McClain issued a memorandum to Manganello, ". . . in response to [his] letter dated June 29, 2000," regarding the

extra services contract for Urban. The counterproposal offered a monthly stipend of \$850 for a minimum of 4 months, and conceded that Urban "will retain her status [in the Federation Unit]" (CP-16).

Also on June 29, Manganello sent a memorandum to McClain concerning an "extra services contract for Leon Hughes." It proposed release from his "prior duties" until December 31, 2000; a base salary of \$52,728; 13 vacation days and 6 sick days; notice in the event that the College wished to extend the period of Hughes' appointment beyond December 31; and that, "[T]here will be no reorganization of the Department of Student Services during Mr. Hughes' interim assignment" (T50; T126; CP-9).

On July 5, 2000, McClain issued a second memorandum to Manganello, replying to the June 29 Federation proposal for Hughes' appointment (T209; CP-10). McClain proposed a \$48,750 salary; 12.5 vacation days and 6 sick days; 14 days' notice in the event that the College wished to "extend Mr. Hughes' interim status"; upon his return to teaching duties, Hughes would receive the salary owed him as if he had not been employed in an interim position; and he would "retain his status as represented [by the Federation]" (CP-10). On cross-examination, Manganello conceded that the College's counterproposal showed "significant movement" in many respects, though the parties disagreed over salary and the "reorganization" (T76-T78). Manganello also conceded in

cross-examination that he does not have a "really good understanding" of what is negotiable or not negotiable in public sector collective negotiations (T91).

10. On July 7, 2000, Manganello issued two memoranda to McClain, each setting forth a Federation "final proposal" for an extra services contract, "according to 3.3 of the College/Federation agreement . . ." (CP-11; CP-17). Manganello testified that the Federation was following that contract provision and wanted to "adhere to this clause as closely as we could" (T67; T87). The proposals concerned unit employees Hughes and Urban and set forth terms and conditions of employment for their appointments to Interim Vice President of Student Services and Interim Director of Student Development, Advising and Registration, respectively (CP-11; CP-17). Manganello could not recall another occasion (apart from the disputed circumstances of this case) that either party issued a "final proposal" (T89-T90).

The "final proposal" for Hughes demanded ". . . no reorganization of the Department of Student Services during Mr. Hughes' interim assignment." It demanded a base salary of \$50,728; demanded (agreed to) McClain's July 5 proposal for 12.5 vacation days and 6 sick days; demanded (agreed to) notice in the event the College wished to extend the period of the extra-services contract; demanded that if the extension notice was not provided by November 3, 2000, the "renewal period" would run from

January 1, 2001 to June 30; demanded that his salary upon return to his teaching duties will be that which he would have received on September 1, 2000, if he had not accepted the interim vice presidency; and demanded that Hughes remain in the negotiations unit (CP-11).

The "final proposal" for Urban demanded a monthly stipend of \$1,195; that the assignment to the interim position last at least 4 months; "that if Urban is promoted into this position or a similar position on a full time basis her current position will be filled as a full time position within two months of her promotion;" and that she remain in the unit (CP-17).

11. President Mellow and McClain discussed the "final proposals." They were surprised to have received them because "[the College and Federation] were making progress, exchanging offers and we thought that would continue" (T211). McClain had not been presented a "final proposal" in the eight years he had worked for the College (T212). They agreed that the Federation "no reorganization" proposal was unacceptable (T153; T212).

Mellow testified:

Although we hadn't come to a final resolution, we did not feel that it was appropriate for the College to be limited in its ability to undertake what we thought was a serious and thoughtful attempt to improve services. [T154]

She later testified: "[T]he primary issue was requesting that the College would not fully use Hughes as an interim vice president

and therefore not undertake any reorganization" (T182). A secondary issue was salary; the College proposal "was not exactly the same as the salary Webb would have received if she remained in the position" (T184). Mellow also testified that the demand for no reorganization of Student Services was "an element" of the College's decision to reject the Federation's final proposal (T154).

Mellow and McClain also discussed the final proposal for Kathy Urban's extra services contract (T220). They agreed that the Federation demand that the vacated full-time counselor position be filled within two months of Urban's permanent appointment as Director was unacceptable (T158-T159; T220, T244). Mellow testified:

[The proposal] would limit our ability to structure or restructure the area in a way that we determined was effective in order to deliver services. Since we were in the process of thinking about how to reorganize within that area, this would have bound us to an old structure and limited our ability to undertake activities [T159]

She also testified that the Union was demanding that the College "specify how her position that she was leaving would be replaced" (T190). Mellow and McClain testified that the parties also had "differences [over] salary" (T190; T220). I credit their testimonies. Mellow and McClain understood that the College must either accept or reject a final proposal; that ". . . it was

really the end of the negotiations that had gone back and forth between us" (T159; T177-T178; T21).

12. On July 10, 2000, McClain issued a memorandum to Manganello, acknowledging the College's receipt of the Federation "final proposal" for an extra services contract for Hughes. The memorandum states: "After further review by the President and members of her cabinet, unfortunately, we are unable to accept your final proposal for Mr. Hughes." McClain wrote that the College was disappointed not to have reached agreement to staff the position with "the AFT member we have identified" (CP-12; T213).

On July 12, 2000, McClain issued a memorandum to Manganello, acknowledging the College's receipt of the "final proposal" regarding the extra services contract for Kathy Urban. The College was "unable to accept [the] final proposal for Ms. Urban" and was "disappointed" not to have reached an agreement to staff the position with "the AFT member we have identified" (CP-18).

13. Hughes did not receive the interim appointment. Urban was hired as the full time Director in December 2000. The Director title is not included in the Federation negotiations unit (T96). Hughes has remained employed as a sociology professor (T105).

ANALYSIS

N.J.S.A. 34:13A-5.3 provides that the majority representative shall be the exclusive representative of all employees in the negotiations unit concerning terms and conditions of employment. In Lullo v. IAFF, 55 N.J. 409 (1970), our Supreme Court upheld exclusive representation as the cornerstone of the Employer-Employee Relations Act.

In Newark Bd. of Ed., P.E.R.C. No. 85-24, 10 NJPER 545 (¶15254 1984), the Commission found that a public employer's solicitation of individual employee suggestions for an attendance incentive program violated 5.4a(5) and derivatively a(1) of the Act (emphasis added). (The Commission found another violation of the Act in the employer's unilateral imposition of the incentive program). The solicitation had ". . . undermined the Union's right to exclusive representative status." Id. at 10 NJPER 548. A necessary component of the Commission's decision was a finding that the reward program concerned mandatory subjects of negotiations.

The Commission later delineated an employer's right to solicit individual employee "input into matters which did not pertain to mandatory subjects of negotiations." State of N.J. (Trenton State College), P.E.R.C. No. 88-19, 13 NJPER 720, 721 (¶18269 1987). The Commission dismissed an allegation that the employer had violated 5.4a(2) of the Act. In any event, the

Commission has found that an employer is prohibited from dealing directly with unit employees and entering into memorandums of agreements affecting their terms and conditions of employment. Matawan-Aberdeen Reg. Dist. Bd. of Ed., P.E.R.C. No. 89-130, 15 NJPER 411 (¶20168 1989).

I have found that President Mellow and Executive Assistant to the President for Human Resources McClain spoke directly with unit employee Leon Hughes on three occasions about salary and benefits for an interim position and about the same or similar subjects upon his projected return to teaching, all without the Federation's knowledge and consent. Salary and attendant benefits are mandatory subjects of negotiations. See, e.g., Englewood Bd. of Ed. v. Englewood Teachers Ass'n, 64 N.J. 1 (1973).

I find that the College's direct dealing with Hughes violates 5.4a(5) and (1) of the Act. The unlawful conduct is not cured by the probability that Hughes was not intimidated or coerced in his discussions with Mellow and McClain; nor by the absence of a written memorandum between Hughes and the College; and not by the College's subsequent negotiations with the Federation about Hughes' projected stipend and benefits. The College however, did not deal directly with unit employee Kathy Urban regarding the interim Director position. Accordingly, I recommend that that portion of the Complaint be dismissed.

A determination that a party has refused to negotiate in good faith depends upon "an analysis of the overall conduct and/or attitude of the party charged." The object of the analysis is to determine whether "the respondent brought to the negotiating table an open mind and a sincere desire to reach an agreement, as opposed to a pre-determined intention to go through the motions, seeking to avoid rather than reach, an agreement." State of New Jersey, E.D. No. 79, 1 NJPER 39, 40 (1975), aff'd sub nom. State v. Comm. of N.J. State College Locs., 141 N.J. Super. 470 (App. Div. 1976). Also see Borough of Flemington, P.E.R.C No. 88-82, 14 NJPER 240 (¶19087 1988).

The facts show that in June 2000, the parties began negotiations over the interim appointments. The College's June 8 proposal referenced the procedure at section "3.3g of the College/Federation agreement." The Federation June 16 reply sought a meeting and did not object to the referenced procedure, which limits negotiations to "appropriate compensation and work requirements." The parties met on June 27; the Federation team proposed nine "points," including a prohibition against reorganizing the Department Student Services during the period of Hughes' interim appointment. The Federation also offered terms and conditions of Urban's interim appointment, including a demand that her vacated position be filled within two months (if she was hired into a permanent directorship). The College team did not

accept or reject the proposals, though it was generally supportive of the Federation's concerns. Perhaps bolstered by such rhetoric, the Federation did not immediately seek a response; it agreed to submit written proposals for both interim positions.

The Federation written proposals retained the demands for "no reorganization" and the filling of the (permanently) vacated counselor position within two months. These demands are not mandatorily negotiable. See, e.g., Freehold Reg. H.S. Bd. of Ed., P.E.R.C. No. 85-69, 11 NJPER 47 (¶16025 1984) (Board had prerogative to reorganize supervisory structure for custodians with consequence that some unit work was shifted outside negotiations unit); Tenafly Bd. of Ed., P.E.R.C. No. 83-123, 9 NJPER 211 (¶14099 1983); City of Brigantine, P.E.R.C. No. 95-8, 20 NJPER 326 (¶25168 1994) (Employer has prerogative not to hire employees to fill vacancies created by promotion of unit employees to non-unit positions); N.J. Sports & Exposition Auth., P.E.R.C. No. 90-62, 16 NJPER 46 (¶21022 1989).

The College's July 5 written reply and counterproposal increased Urban's monthly stipend by \$100 for a minimum of 4 months and conceded her title's inclusion in the negotiations unit. The College's counterproposal regarding Hughes also increased proposed salary and benefits; and conceded the interim title's inclusion in the unit, which Federation President

Manganello described as "significant movement." The College reply did not refer to the Federation's non-mandatorily negotiable demands.

The Federation elected to submit a "final offer," pursuant to Article III, 3.3(g)4 of the agreement. It included the demands over non-mandatorily negotiable subjects. The College was obligated to accept or reject the final offers within five calendar days, pursuant to the succeeding paragraph of that contract provision. The College promptly rejected the offer, finding unacceptable both Federation stipend proposals and its demands over non-negotiable subjects. Neither Hughes nor Urban received the appointments, a conclusion consistent with the portion of the contract provision stating that the College's rejection means "that a member of the bargaining unit will not be required to work any additional time."

Considering all the circumstances, I decline to find that the College or the Federation negotiated in bad faith. Although the parties met one time only, they subsequently exchanged written proposals and offered concessions. Their strict adherence to a collectively negotiated procedure to achieve agreement on two "extra services contracts" prematurely truncated negotiations. Either party might have suggested to the other jettisoning the mandates of Article III in order to continue negotiations. They instead abided by "final proposals" and

"rejections" within the specified five-day limit. Following the procedure is not evidence of bad faith.

I also do not find that the parties negotiated to "impasse," as the term has been defined in Commission cases. See Bayonne Bd. of Ed., P.E.R.C. No. 91-3, 16 NJPER 433 (¶21184 1990); Berkeley Heights Bd. of Ed., P.E.R.C. No. 89-61, 15 NJPER 23 (¶20008 1988). Immediately prior to the Federation "final proposal," the College increased its stipend proposal and agreed to include the interim titles in the negotiations unit. Although the Federation effectively terminated the parties' give and take, the College only passively resisted the Federation's two non-mandatorily negotiable demands. It could have rejected the proposals not to reorganize the Department of Student Services and to fill a counselor vacancy within two months or it could have filed a scope of negotiations petition in order to protect its managerial prerogatives. Under these circumstances, I do not find that the Federation "insisted to impasse" on negotiating non-mandatorily negotiable subjects.

The Federation's charge also alleged that the College retaliated against Hughes and Urban "by withdrawing their interim assignments because of the involvement of the Federation" (post-hearing brief at 14). The College's actions allegedly violate 5.4a(3) of the Act. The Federation asserts that the College's direct dealing, summary rejection of the Federation final offers,

including the "pointed references" to AFT membership; and its "affront" at receiving the final offers demonstrate unlawful discrimination and retaliation. It contends that the College's unlawful motivation is revealed by the inconsistency of President Mellow's view that the College was obligated to negotiate "only in limited areas" regarding the extra service contracts and that the parties had agreed to those areas, and the summary decision to deny Hughes and Urban the interim positions.

In Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), the New Jersey Supreme Court set forth the standard for determining whether an employer's action violates 5.4a(3) of the Act. Under Bridgewater, no violation will be found unless the Charging Party has proven, 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.

If an illegal motive has been proven and if the employer has not presented any evidence of a motive not illegal under our Act, or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both

motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the Charging Party has proved, on the record as a whole, that union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for the hearing examiner and Commission to resolve.

No direct evidence demonstrates that the College "withdrew" interim assignments" because the Federation sought to negotiate terms and conditions of employment for the positions of Interim Director of Student Affairs and Interim Director of Student Development, Advising and Registration. The circumstantial evidence does not demonstrate animus, notwithstanding my finding that the College had dealt directly with unit employee Hughes in violation of 5.4a(5) and (1) of the Act.

The evidence does not show that the parties had reached agreement on the interim positions; the exchange of written proposals shows that the Federation and College had not agreed upon stipends. Nor were the College's "summary rejections" of the final proposal indicia of animus - the College had followed the contractual procedure prompted by the Federation's "final

proposals." The College's concessions in the negotiations, including its agreeing to include the interim posts in the unit, do not suggest the presence of animus. I do not believe that the Federation has proved that union animus was a motivating or substantial reason for not appointing Hughes and Urban to the interim posts.

Accordingly, I recommend that the remainder of the Consolidated Complaint be dismissed.

CONCLUSIONS OF LAW

1. The College violated 5.4a(5) and derivatively a(1) of the Act by dealing directly with unit employee Leon Hughes regarding terms and conditions of employment.

2. The College did not violate 5.4a(5) and derivatively a(1) of the Act by dealing directly with unit employee Kathy Urban regarding terms and conditions of employment.

3. The College did not violate 5.4a(3) and derivatively a(1) of the Act by retaliating against Hughes and Urban because the Federation sought to negotiate terms and conditions of employment for the positions, Interim Vice President of Student Affairs and Interim Director of Student Development, Advising and Registration.

4. The Federation did not violate 5.4b(3) and derivatively b(1) of the Act by insisting to impasse upon contract provisions concerning non-negotiable subjects.

RECOMMENDATION

I recommend that the Commission ORDER:

A. That the College cease and desist from:

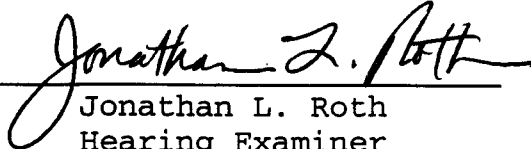
1. Interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by this Act by dealing directly with unit employees regarding terms and conditions of employment.

2. 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 by dealing directly with unit employees regarding terms and conditions of employment.

B. That the College take the following action:

1. 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 materials.

Within twenty (20) days of receipt of this decision, notify the Chair of the Commission of the steps the Respondent has taken to comply with this order.


Jonathan L. Roth
Hearing Examiner

DATED: July 3, 2003
Trenton, New Jersey



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 employees in the exercise of the rights guaranteed to them by this Act by dealing directly with unit employees regarding terms and conditions of employment.

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 of employees in that unit by dealing directly with unit employees regarding terms and conditions of employment.

Docket No. CO-H-2001-54; CE-H-2001-4

Gloucester County College
(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