

I.R. NO. 2009-5

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

KEAN UNIVERSITY,

Respondent,

-and-

Docket No. CO-2008-384

COUNCIL OF NEW JERSEY STATE  
COLLEGE LOCALS,

Charging Party.

SYNOPSIS

Kean Federation of Teachers (KFT) sought to restrain Kean University from increasing student advisement hours and making changes to the faculty schedules based on its assertion that these changes were being made in retaliation for a rally that KFT held to protest changes to the student course schedule. The Commission Designee found that KFT did not establish a substantial likelihood of success as there were several disputed issues of material facts regarding the timing of the University's intent to increase student advisement hours and make changes to the faculty schedules. Accordingly, the Commission Designee denied KFT's application for interim relief.

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Appearances:

For the Respondent, Anne Milgram, Attorney General of the State of New Jersey (Geri Benedetto, Deputy Attorney General, of counsel)

For the Charging Party, Mets, Schiro & McGovern, LLP, (Kevin P. McGovern, of counsel)

INTERLOCUTORY DECISION

On June 17, 2008, Kean Federation of Teachers<sup>1/</sup> (KFT) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that Kean University (University) violated 5.4a(3)<sup>2/</sup> of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act) when it

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1/ KFT is one of the local unions that comprises the Council of New Jersey State College Locals. KFT represents faculty, librarians and professional staff at Kean University.

2/ This provision provides that public employers are prohibited from discriminating in regard to hire or tenure of employment or any term and condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act.

increased student advisement hours required of faculty and made changes to the faculty schedule in retaliation for a rally that KFT held to protest changes to the student course schedule.

The unfair practice charge was accompanied by an application for interim relief seeking to restrain the University from implementing the increase in student advisement hours and the changes to the faculty schedule. An Order to Show Cause was executed on June 25, 2008, setting forth a briefing schedule and return date. At KFT's request, the briefing schedule was extended, and the return date changed to August 11th, at which time the parties presented an in-person oral argument. At the University's request, the record remained open until August 19th, at which time it supplemented previously submitted certifications and submitted an additional certification. KFT requested until August 22nd to respond, which it did in the form of supplementing a previously submitted certification as well as submitting an additional certification.

The following pertinent facts appear:

In early April, 2008, KFT asserts that it became aware that the University was planning to make changes to the student course schedule, beginning in the Spring 2009 semester. The University asserts that the changes were being made as part of its overall initiative to improve its academic excellence and four-year graduation rates.

On April 1, 2008, Maria del Carmen Rodriguez, then President of KFT, sent an email to all KFT members. In the email, Rodriguez set forth "drastic changes" proposed by the Administration, including "reducing the length of time that faculty allocate for office hours on any given day so that office hours get extended over more days per week." Rodriguez went on to state that a consequence of the new scheduling is that "the preparatory time for each faculty will be practically eliminated."

After obtaining permission from President Dawood Farahi's Office and Campus Police, KFT held a rally on May 5, 2008 to protest the changes. KFT contends that the rally included approximately seventy five students, faculty members and KFT activists, and it ended with a demonstration outside the President's office in which the participants loudly chanted "one, two, three, four, stomp that schedule on the floor."

The day after the rally, on May 6, 2008, during a luncheon meeting to address faculty who had been awarded release time for research, President Farahi made comments about the rally and also made reference to increased hours of student advisement, as well as changes to the academic schedule. Also on May 6th, Faruque Chowdhry, the University's Director of Human Resources, sent an e-mail to Charles Kelly, Chief Union Negotiator, with a document attached containing a bulleted list of changes (the Bulleted

List), over which he wished to consult with Kelly. Those changes included, inter alia, that the following would be required of faculty: 1) requirements of eight student advisement hours per week (previously five hours were required); 2) four-day faculty work schedules (previously three-day work schedules were required) and 3) requiring certain work from the faculty in January and after commencement until June 30th.

On May 27, 2008, the President issued a memo to the Council of Deans outlining scheduling policy recommendations. The memo recommended, inter alia, that effective with the Fall 2008 semester, faculty should conduct eight hours of student advisement per week scheduled over a four day period and department chairpersons should hold a minimum of 20 student advisement hours, also over a four day period. The memo also recommended that faculty not teach two full 2 hour and 40 minute classes back-to-back, and that any such schedule requirements should require a Dean's approval. At a June 10th labor-management meeting, KFT was advised that the recommendations in the May 27th memo would be adopted as the University's official policy.

#### ANALYSIS

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in final Commission decision on its legal and factual allegations and that

irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. DeGioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

KFT asserts that while it was aware of the University's intent to change student course schedules, the first time the University communicated its plans to increase student advisement hours and to change faculty schedules was on May 6, 2008, the day after the rally, and that those changes were made in retaliation for the rally. The University contends that the increase in student advisement hours and the change to faculty schedules were being contemplated well before the rally as part of the University's overall initiatives to improve its academic excellence and graduation rates. The University further contends that Philip Connelly, its Vice President of Administration and Finance, attempted to give to Kelly the Bulleted List outlining the University's intent to increase student advisement hours and make changes to the faculty schedules on May 1st, several days before the rally, but that Kelly refused to accept the document.

Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984), is instructive in determining whether KFT has a substantial likelihood of success in a final Commission decision. In Bridgewater, the New Jersey Supreme Court set the standard to determine whether a public employer's action violates 5.4a(3) of the Act. Under Bridgewater, a charging party must prove that the protected conduct was a substantial or motivating factor in the employer's adverse action. This may be done by direct or circumstantial evidence showing that the employer knew of this activity and the employer was hostile toward the exercise of protected rights. Id. At 246. The timing of events is an important factor in determining whether or not hostility or union animus can be inferred. Tp. of W. Orange, P.E.R.C. No. 99-76, 25 NJPER 128 (¶30057 1999).

Here, a material factual dispute exists between the parties concerning whether the University first intended to increase student advisement hours and make changes to faculty schedules before or after the May 5, 2008 rally. This timing issue is critical to whether KFT has a substantial likelihood of success in a final Commission decision. KFT submitted the certification of James Castiglione, current President of KFT, who stated that although KFT was in regular contact with the Administration regarding the changes to the student course schedule, the first time the University advised KFT of its intent to increase to

student advisement hours and make changes to faculty schedules was on May 6th, the day after the rally. Castiglione further certified that when the University expressed intent to increase student advisement hours in 2003, there was a lengthy process involving negotiations and the creation of a Task Force. Castiglione asserts that the difference between the process implemented in 2003 and the University's current actions evidences that the University acted in retaliation for the rally.

The University submitted a supplemental certification from President Farahi setting forth that the increase in student advisement hours and changes to the faculty schedules were being contemplated since March 2008 in preparation for discussion at a Deans Meeting on March 20th. It also submitted a certification from Kenneth B. Sanders, Associate Vice President for Academic Affairs, stating that the "substance of the items" contained in the Bulleted List were discussed well before the May 5th rally at the Deans Meeting on March 20th. Moreover, Rodriguez's April 1st email to all KFT members, which pre-dated the rally by over one months time, included as one of the "drastic changes" being proposed by the Administration "reducing the length of time that faculty allocate for office hours on any given day so that office hours get extended over more days per week" and that a consequence of the new scheduling is that "the preparatory time for each faculty will be practically eliminated." Rodriguez's



comments indicate that KFT was aware pre-rally that the University was considering making changes in some form to student advisement hours. Her comments also indicate that she was aware that the proposed changes would result in an increased workload for faculty since she asserted that preparatory time would be "practically eliminated."

There is also a dispute of a material fact regarding whether the University attempted to inform KFT of its intent to increase student advisement hours and make changes to the faculty schedule before the rally. KFT submitted a certification from Kelly setting forth that no attempt was made to give him the Bulleted List on May 1, 2008. KFT also submitted a computer print out of the document properties for the Bulleted List, created in Adobe in Portable Document Format (PDF), indicating that the Bulleted List was not created until May 5th, the day of the rally. KFT argues that it is not possible that the University attempted to give Kelly the Bulleted List on May 1st since the document was not created until May 5th. Additionally, KFT submitted a certification from Bennett Muraskin, Staff Representative of the Council of New Jersey State College Locals, who stated that on July 17th he submitted an Open Public Records Act (OPRA) request for "all written memos and communications, whether in hard copy or email, from any Kean University administrators and managerial employees regarding University plans announced in April and May,

2008 to change faculty schedules, expand faculty work load and/or extend the faculty work year beyond commencement." Muraskin certifies that no documents in the University's response were dated earlier than May 6th.

In response, the University submitted a supplemental certification from Connelly stating that he personally handed Kelly the Bulleted List on May 1, 2008, but that Kelly physically pulled away and declined to touch the list. Sanders certification sets forth that he observed Connelly attempt to hand Kelly the list on May 1st, but that Kelly gestured that he would not touch the list. Moreover, Sanders certified that while the information contained in the Bulleted List was converted to PDF in Adobe reader on May 5th, such files cannot be created in Adobe, but must be previously saved in another format. Thus, Sanders contends that the date the document was created in PDF format in Adobe does not equate to the date that the Bulleted List was originally authored.

Based upon the evidence presented I find several disputes of material facts regarding the timing of the University's intent to increase student advisement hours and change faculty schedules. The resolution of these issues will likely be determinative as to whether the University acted properly. However, at this juncture, the factual disputes serve to undermine KFT's ability to establish the requisite substantial likelihood of success.

Consequently, I decline to grant KFT's application for interim relief. This case will proceed through the normal unfair practice processing mechanism.

ORDER

KFT's application for interim relief is denied.

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Christine Lucarelli-Carneiro  
Commission Designee

DATED: August 28, 2008  
Trenton, New Jersey