I.R. NO. 2011-27

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOARD OF TRUSTEES OF OCEAN
COUNTY COLLEGE,
Respondent,

-and- Docket No. CO-2011-137

FACULTY ASSOCIATION OF OCEAN
COUNTY COLLEGE,
Charging Party.

SYNOPSIS

The Ocean County College Faculty Association filed an unfair practice charge, accompanied by an application for interim relief, with the Public Employment Relations Commission, alleging that Ocean County College violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it shifted certain work performed by Faculty Association unit employees to employees outside that unit. More specifically, Charging Party contends that the College violated subsections 5.4a(1) and (5) of the Act when it created a new employment title (Lecturer) not included in the Association's unit and shifted instructional work from the Association's unit to the newly created Lecturer positions.

The College notes that while the shifting of unit work from employees within a unit to employees outside the unit is generally mandatorily negotiable, it is not mandatorily negotiable when unit employees have shared the job duties at issue with non-unit employees or where the shifting of unit work occurs as part of an employer's reorganizing how it delivers governmental services. The College asserted that it has reorganized how it delivers educational services to students and that Faculty Association unit instructional work historically has been shared with employees in two other negotiations units and with various administrators at the College.

The Commission Designee noted that shifting the work performed by employees in a specified negotiations unit to other employees of the same employer outside that negotiations unit is mandatorily negotiable. The Commission has noted three exceptions to the unit work rule -- the work was not within the

exclusive province of unit employees; the majority representative waived its right to negotiate over the shifting of unit work; or the employer had undertaken a reorganization and thus changed the way it delivers governmental services.

The Commission Designee noted that before applying the unit work rule to such claims, the negotiability balancing test in Local 195, IFPTE v. State, 88 N.J. 393 (1982), must first be applied. Under Local 195, a subject is mandatorily negotiable when (1) the item intimately and directly affects the work and welfare of employees; (2) the subject has not been preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy.

The Commission Designee concluded that although the allocation of unit work intimately and directly affects employee interests and has not been preempted, on this record, it is not clear that the employees' interest in negotiating concerning unit work outweighs the College's interest in realigning educational goals and creating a twelve-month learning environment for its students. The Commission Designee concluded that this circumstance did not appear to be a mere substitution of employees with no change in responsibilities and with the objective of merely reducing costs. The Commission Designee was unable to conclude under the balancing test that Charging Party has established a substantial likelihood of success that the allocation of (unit) instructional duties to Lecturers will be determined to be mandatorily negotiable.

Even assuming that such an assignment of unit work to non-unit Lecturers would be held mandatorily negotiable under the balancing test, an evaluation of the claim under the unit work rule indicates that Faculty Association instructional work has historically been shared with other employees outside the Faculty Association unit. Absent a determination that instructional work has been within the exclusive domain of the Faculty Association unit, no negotiations obligation could have arisen when the College shifted some of that instructional work to the newly created non-unit Lecturer positions. Therefore, as the Commission Designee was unable to conclude that there is a substantial likelihood of success on the merits of the case, the application for interim relief was denied.

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COUNTY COLLEGE,

Charging Party.

Appearances:

For the Respondent:
Berry, Sahradnik, Kotzas & Benson, attorneys
(John C. Sahradnik, Esq., of counsel; John C. Sahradnik and Lauren M. Dooley, on the brief)

For the Charging Party:
Detzky & Hunter, LLC, attorneys
(Stephen B. Hunter, of counsel and on the brief)

INTERLOCUTORY DECISION

On September 30, 2010, the Faculty Association of Ocean County College (Charging Party or Faculty Association or Association) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the Board of Trustees of Ocean County College (Respondent or College) violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it shifted certain work performed by Faculty Association unit employees to titles/employees outside that unit. More specifically, Charging Party contends that the

College violated subsections 5.4a(1) and (5)[1/] of the Act when it created a new employment title (Lecturer) not included in the Association's unit and shifted instructional work from the Association's unit to the newly created Lecturer positions.

The College contends that, in creating the new employment positions, it acted pursuant to its managerial prerogatives and that its actions in this matter did not constitute an unlawful shifting of unit work; thus, the College denies that it violated the Act.

The charge was accompanied by an application for interim relief. An Order to Show Cause was executed on December 3, 2010, scheduling a return date for a hearing on the Order to Show Cause for December 14, 2010. The parties submitted briefs, certifications and exhibits[2/] and argued orally on the hearing date.

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In Count I of its charge, the Association contends that on July 26, 2010, the College unilaterally adopted a fixed cap

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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. (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."

2/ Commission Exhibits C1-C6.

regarding the maximum number of instructional unit employees that could acquire tenure at 77% of the total number of (unit) employees then employed. Prior to that time, all non-tenured instructional unit faculty employees were eligible to receive tenure upon satisfactory completion of five consecutive calendar years of service with the College. The Association argues that these decisions will determine that many presently non-tenured instructional unit employees will not receive tenure, not necessarily due to deficient work performance but due to the application of an arbitrary tenure cap percentage.

In Count II, the Association alleges that in September 2010, the College unilaterally created several twelve-month, non-tenured, non-unit instructional positions denominated as Lecturers. The Association contends that the hiring of these Lecturers constitutes an illegal shifting of instructional unit work from the Faculty Association unit to the newly-created non-unit Lecturer positions.

The Association argues that these actions constitute unilateral changes in terms and conditions of employment and a refusal to negotiate in good faith in violation of subsections 5.4a(1) and (5) and 5.3 of the Act.

Finally, in Count III, the Association asserts that the College and the Association are presently in negotiations for a successor collective negotiations agreement. In those

negotiations, the College submitted and has maintained a proposal referencing creation of a twelve-month, tenure track, instructional unit lecturer position. The Association argues that when the College created a non-tenure track, non-unit Lecturer position while at the same time purporting to seek negotiations concerning an instructional unit lecturer position, the College engaged in bad faith negotiations.

The Association's interim relief application addresses Counts II and III of the charge and seeks to restrain the College from unilaterally assigning any instructional unit work to the full-time, non-unit, non-tenure track, twelve-month Lecturers. The Association asserts that the Commission has prohibited employers from shifting negotiations unit work to non-unit employees. Citing City of Jersey City v. Jersey City POBA, 154 N.J. 555 (1998), the Association argues that the shifting of unit work from employees within a negotiations unit to other public employees outside that unit is a mandatorily negotiable subject. Accordingly, the Association argues that the College's unilateral shifting of instructional unit work to non-unit employees (Lecturers) is a violation of subsections 5.4a(1) and (5) of the Act and further, that such a unilateral change in terms and conditions of employment during the pendency of negotiations constitutes irreparable harm. Citing Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n., 78 N.J. 25 (1978), the Association

contends that the unilateral change made here during contract negotiations creates a chilling effect on negotiations and on employees' exercise of protected rights. Based upon the foregoing, the Association argues that it has met the substantial likelihood of success and irreparable harm standards for a grant of interim relief.

In its response, the College contends that it has a managerial prerogative to create new employment positions -- including the four twelve-month, non-tenure track, non-unit Lecturer positions at issue herein. Further, pursuant to N.J.S.A. 18A:3B-6(f), the College argues it has the managerial prerogative to create tenure policies concerning its employees.

The College cites Atlantic Cty. Coll., H.E. No. 97-30, 23 NJPER 376 (¶28172 1997), and contends that the Commission has held that the shifting of unit work from employees within a unit to employees outside the unit is mandatorily negotiable except where any one (or more) of three circumstances exists: (1) when unit employees have shared job duties with non-unit employees; (2) when the majority representative has not objected to previous instances of shifts in unit work; or (3) when an employer reorganizes how it delivers services. The College contends that in any of these three circumstances, an employer is not obligated to negotiate the shifting of unit work.

The College asserts that its establishment of a twelve-month non-unit Lecturer position was done in furtherance of the educational goals of the College to prioritize student learning and establish a twelve-month learning environment for all students. The College argues that these goals are more difficult to achieve with traditional ten-month faculty positions. The College contends that the twelve-month Lecturer positions provide the College with the flexibility to recruit qualified personnel with expertise in various academic programs such as certain federal and state grant-funded programs. The College also notes the non-tenure track twelve-month Lecturer position has certain duties that are not included within the responsibilities of current faculty unit employees -- mentoring adjunct faculty, mentoring students and tutoring students. Further, the College asserts that the twelve-month Lecturers will have office hours throughout the year (including summer months), thus providing improved student access to faculty. Finally, the College asserts that the creation of the four non-unit Lecturer positions will not diminish opportunities for instructional unit faculty to teach summer overload courses or otherwise impinge upon their employment opportunities. The College notes that in the summer of 2010, only 55% of the current full-time faculty accepted overload teaching opportunities; the remaining summer overload teaching opportunities were filled by adjunct faculty. The

College also asserts that it has proposed to negotiate the creation of a full-time, twelve-month, tenure-track unit lecturer position with the Association but the Association has declined to discuss the proposal

In this matter, the College contends that instructional work has historically been and is currently shared between employees in the Faculty Association's instructional unit and various other employees of the College. The College notes that instructional work at the College has historically been performed by not only Faculty Association unit employees but also by employees in the Adjunct Faculty Association unit, the Administrative Supervisors Association unit and by various non-unionized administrators at the College.

The College contends that in these circumstances, it did not unilaterally change any terms and conditions of employment or refuse to negotiate in good faith. The College contends that its assignment of instructional duties to the newly-created Lecturer positions was consistent with its historical practice of assigning instructional duties to various employees outside the Faculty Association unit. Based upon that historical practice, the College argues that its assignment of instructional duties to the non-faculty unit Lecturer positions without first negotiating with the Association was not a violation of subsection 5.4a(5) of the Act. The College further asserts that its creation of the

Lecturer positions was part of its implementation of educational policy goals including the establishment of a twelve-month learning environment for students.

Based upon the above, the College contends that the Association has not established a substantial likelihood of success on the merits of its charge and accordingly, argues that the Association's request for interim relief should be denied.

* * * *

The Faculty Association of Ocean County College is the statutory majority representative of a collective negotiations unit comprised of, among others, all full-time faculty holding positions denominated as either Instructor, Assistant Professor, Associate Professor or Full Professor. There are approximately 112 faculty members employed by the College, 83 of whom are tenured; 29 are not tenured. The College and the Association are parties to a collective negotiations agreement covering the period from August 20, 2006 through August 30, 2010. The parties are presently in negotiations for a successor agreement. During their contract negotiations, the parties met approximately ten times for negotiations and have had three meetings with a Commission mediator.

In September, 2010, the College announced that it was creating a new employment title and would hire four employees into the newly created title of Lecturer. The Lecturer position

is a full-time, twelve-month, non-tenure track, non-bargaining unit teaching position. Four Lecturer positions have been created; applicants were hired to fill two of the four vacancies and are scheduled to commence employment in January 2011. It appears that the Lecturers will be assigned, in part, instructional duties similar to those presently performed by Faculty Association unit instructional employees. Lecturers will also be assigned additional duties that are not now performed by Faculty Association unit employees.

The College is presently making efforts to "realign its educational goals" (Strada Certification, para. 3) by: (a) developing new degree programs and redesigning certain existing degree programs; (b) developing greater on-line program capabilities; and (c) developing new partnership learning programs with other educational institutions. By establishing a twelve-month learning environment for students, the College is seeking to reorganize the way it delivers educational services. The College asserts that the Lecturer position was created as part of its initiative to help achieve those educational goals.

Presently, in addition to Faculty Association instructional unit employees, there are several other groups of employees at the College who have performed and continue to perform the same instructional work as do Faculty Association unit employees. These employees include the following: Adjunct Faculty

Association unit employees (there are presently over 500 adjunct faculty employees), Administrative Supervisors Association unit employees and various College administrators not included in any negotiations units.

During the summer of 2010, approximately half of Faculty Association unit employees accepted offers to teach summer overload courses. Adjunct faculty members filled the remaining summer-overload opportunities.

The Association contends that the College's creation of four full-time, non-unit instructional Lecturer positions and its unilateral assignment of Faculty Association unit work to those positions is an unlawful shifting of unit work in violation of subsections 5.4a(5) and a(1) of the Act. The Association further contends that by taking these actions during ongoing successor contract negotiations, the College has created a condition which imposes irreparable harm on the Association and Association unit employees.

The College contends the creation of the Lecturer position was part of its effort to create and implement certain educational policy goals. The College further contends that its assignment of Faculty Association unit instructional work to the Lecturers was not an unlawful shifting of unit work inasmuch as such work has historically been performed by various College employees outside the Faculty Association unit.

* * * *

ANALYSIS

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a 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. De Gioia, 90 N.J. 126, 132-134 (1983); 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).

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

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

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

Mandatorily negotiable subjects are those which intimately and directly affect employees' work and welfare, but do not

significantly interfere with governmental policy determination. Ridgefield Park Ed. Ass'n. v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 156 (1978); Woodstown-Pilesgrove Reg. H.S. Bd. of Ed. v. Woodstown-Pilesgrove Reg. Ed. Assn., 164 N.J. Super. 106 (App. Div 1979), aff'd 81 N.J. 582 (1980).

Shifting the work performed by employees in a specified collective negotiations unit to other employees of the same employer outside that negotiations unit is a mandatorily negotiable issue. Rutgers, The State University, P.E.R.C. No. 79-72, 5 NJPER 186 (¶10103 1979), recon. den. P.E.R.C. No. 79-92, 5 NJPER 230 (¶10128 1979), aff'd 6 NJPER 340 (¶11170 App. Div. 1980); Borough of Belmar v. PBA Loc. No. 50, P.E.R.C. No. 89-73, 15 NJPER 73 (¶20029 1988), aff'd NJPER Supp.2d 222 (¶195 App. Div. 1989). Thus, an employer's shifting of unit work without negotiations may violate subsection 5.4a(5) of the Act. City of Jersey City v. Jersey City POBA, 154 NJ 555 (1998).

The Commission and the Courts have recognized three exceptions to the applicability of the unit work rule -- that is, that the transfer of unit work is mandatorily negotiable -- (1) where, historically, the unit work at issue was not within the exclusive province of unit employees -- its performance was shared with non-unit employees; (2) where the majority representative has waived its right to negotiate over the shifting of unit work; or (3) where the employer has undertaken a

reorganization and thus has changed fundamentally the way in which it delivers specified governmental services.

However, the Court has also ruled that the unit work rule cannot be applied on a per se basis. Instead, the negotiability balancing test as was set forth in Local 195, IFPTE v. State, 88 NJ 393 (1982), must be applied to the facts of each particular unit work claim.

Local 195 states:

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 404-405]

No preemption argument was asserted in this matter regarding the assignment of instructional work to the newly-created Lecturer position.

Loss of unit work may intimately and directly affect the work and welfare of employees. The Faculty Association unit as a whole has an interest in maintaining its size and strength -- in

not having unit positions taken away -- and in not having a demonstrated expectation of work assignments disrupted. The record in the instant matter does not indicate any loss of unit positions is imminent due to the assignment of instructional work to Lecturers. Further, as to the potential interruption of future work assignments, the record indicates that almost half of Faculty Association unit employees have been offered certain overload teaching assignments and have declined to accept them; those overload assignments were filled by Adjunct Faculty unit employees.

The College asserts that it created the Lecturer position in furtherance of its educational goals to prioritize student learning and establish a twelve-month learning environment for students. The College notes that these goals are more difficult to achieve with traditional ten-month faculty positions. The College notes that the twelve-month Lecturer positions provide flexibility to attract qualified personnel for certain types of academic programs. Further, the twelve-month Lecturer positions include duties that are not performed by current faculty unit employees; and the Lecturer positions will have office hours year round (unlike current Faculty Association unit employees) to provide students with access to faculty through the summer months.

The Commission has determined that when the same amount of work is being performed and the employer has simply reassigned work from unit employees to non-unit employees, negotiations over preserving unit work does not significantly interfere with governmental policy determination.

However, on this record, it is not clear that the employees' interest in negotiating to control instructional work outweighs the employer's interest in realigning educational goals and creating a twelve-month learning environment for students. This circumstance does not appear to be a mere substitution of employees with no change in the responsibilities or duties attendant to positions and with the overarching objective of merely reducing costs. Thus, in this proceeding, I cannot conclude that Charging Party has established by substantial likelihood of success that the assignment of instructional duties to Lecturers will be determined to be mandatorily negotiable.

However, even assuming a determination under the balancing test that the assignment of instructional work to Lecturers in these circumstances would be held to be mandatorily negotiable, an evaluation of these circumstances under the unit work rule (and the three exceptions thereto) would then be necessary.

In Town of Dover, P.E.R.C. No. 89-104, 15 NJPER 288 (¶20128 1989), the Commission dismissed an unfair practice charge alleging that the Town had unilaterally shifted unit work to non-

unit employees -- it shifted radio dispatching work from dispatchers included in a Teamster negotiations unit to police officers. The Commission concluded that because dispatching work had historically been shared with employees (police) outside the Teamster's unit, the employer could continue to shift work outside the Teamster's unit without negotiations. See also Jersey City, supra; and Essex County, H.E. No. 2004-12, 30 NJPER 149 (¶60 2004). In State of New Jersey (Division of State Police), I.R. No. 92-1, 17 NJPER 371 (¶22172 1991), a Commission Designee denied a request for interim relief where a charging party sought to restrain the employer from unilaterally shifting unit work (dispatching work formerly performed by Communications Operators) to State Troopers. The Commission Designee determined that a factual dispute existed concerning whether the dispatching work performed by Communications Operators had been shared with State Troopers. See also, State of New Jersey (Division of State Police), P.E.R.C. No. 94-78, 20 NJPER 74 (¶25032 1994); and County of Hudson, I.R. No. 97-6, 22 NJPER 383 (¶27204 1996).

In the instant matter, Charging Party alleges that the Respondent violated subsections 5.4a(1) and a(5) of the Act when it unilaterally and without negotiations shifted Faculty Association unit instructional work to employees in a newly-created job title outside the Faculty Association unit; because this action occurred during the parties' ongoing contract

negotiations, Charging Party seeks to restrain the Respondent from shifting the Faculty Association unit work to the newly-created Lecturer positions.

However, the record in this matter indicates that Faculty Association unit instructional work has historically been shared with other employees outside the Faculty Association unit -- it appears that it has been shared with Adjunct Faculty Association unit employees, Administrative Supervisors Association unit employees and various College administrators not included in any negotiations unit. Absent a determination that instructional work has been within the exclusive province of the Faculty Association unit, no obligation to negotiate would have arisen when the College shifted some of that instructional work to the two newly-created Lecturer positions. Based upon the foregoing, the record in this interim relief proceeding does not support a conclusion that there is a substantial likelihood of success of establishing the asserted violations of the Act in a plenary hearing.

* * * *

Having considered all of the facts and arguments presented in this matter, I conclude that one of the requirements for securing interim relief -- a substantial likelihood of success on the merits of Charging Party's case in a plenary hearing -- has not been met.

ORDER

The application for interim relief is denied. The charge will be forwarded to the Director of Unfair Practices for processing in accordance with the Commission's rules.

Charles A. Tadduni
Commission Designee

DATED: December 21, 2010
Trenton, New Jersey