H.E. NO. 2022-6

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

NEW JERSEY STATE (KEAN UNIVERSITY),

Respondent,

-and- Docket No. CO-2016-033

IFPTE LOCAL 195,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss a Complaint based on an unfair practice charge filed by IFPTE Local 195 (IFPTE). The charge alleges that New Jersey State Kean University (Kean) violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(3) and (5), when Kean subcontracted work performed by unit members in the titles of senior building maintenance worker and grounds worker while retaining control of working conditions of the contractor's employees, thereby making Kean and the contractor joint employers, and further, by not responding to IFPTE's request to negotiate terms and conditions of employment of the contractor's workers who assumed the duties of the former unit members.

Kean filed a motion for summary judgment, which the Commission denied but dismissed the 5.4a(3) charge, leaving only the 5.4a(5) charge pending.

The Hearing Examiner found that Kean did not violate section 5.4a(5) of the Act when it subcontracted work performed by unit members in the titles of senior building maintenance worker and grounds worker and did not respond to IFPTE's request to negotiate terms and conditions of employment of the workers who assumed the duties of the former unit members, as there is not a joint employer relationship between Kean and the contractor.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Charging Party.

Appearances:

For the Respondent,
Andrew J. Bruck, Acting Attorney General
(Peter H. Jenkins, Deputy Attorney General)

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

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On September 16, 2015, IFPTE Local 195 (IFPTE) filed an unfair practice charge against New Jersey State Kean University (Kean). The charge alleges that Kean violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(3) and (5),[1/] when Kean subcontracted work

1/ These provisions prohibit public employers, their representatives or agents from: "(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
(continued...)

performed by unit members in the titles of senior building maintenance worker and grounds worker while retaining control of working conditions of the contractor's employees, thereby making Kean and the subcontractor joint employers, and further, by not responding to IFPTE's request to negotiate terms and conditions of employment of the contractor's workers who assumed the duties of the former unit members.

On August 2, 2016, a Complaint and Notice of Hearing was issued (C-1).[2/] On August 12, 2016, Kean filed an Answer denying IFPTE's allegations (C-2). On December 20, 2016, Kean filed a motion for summary judgment. On January 31, 2017, the motion for summary judgment was referred to the Commission. N.J.A.C. 19:14-4.8(a). On May 25, 2017, the Commission denied Kean's motion for summary judgment and dismissed the §5.4a(3) charge, leaving only the §5.4a(5) charge pending (J-2).

Specifically, the Commission decision provides as follows:

> After securing an outside evaluation of its facilities in 2013 that reported deficiencies in housekeeping and maintenance of the University campus and buildings, Kean issued in 2014 requests for proposals (RFPs) to outsource the provision of those services.

1/ (...continued)
concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ Commission exhibits are marked "C-", while Joint, Charging Party and Respondent exhibits are marked "J-", "CP-", and "R-", respectively.

GCA Education Services (GCA), a national provider of facilities services incorporated in Tennessee, submitted a response to both requests. In February 2015, at Kean's request, the same consultants that performed the facilities evaluation analyzed GCA's response to the RFPs and reported that the University's estimated labor costs savings if it outsourced both services to GCA would be approximately $3.45 million annually.

In March 2015, the University's Board of Trustees approved the subcontracting of campus-wide housekeeping and grounds maintenance services to GCA. On April 7, 2015, Kean and GCA entered into a housekeeping services contract and a separate grounds maintenance services contract, each of which incorporates the applicable RFP and GCA proposal. [Footnote omitted.] Each contract has a term of one-year with the option of two, one-year renewals, and recites, among other things, that GCA was an independent contractor and that neither it, nor its employees, are to be considered employees of the University.

As a result of the subcontracting, on April 30, 2015, Kean eliminated 55 positions and laid off 4 supervisors in facilities, 14 grounds workers, and 37 senior building maintenance workers. The latter 2 titles had been in IFTPE's negotiations unit.

The Local President certifies that he is employed by Kean as an auto mechanic and that after May 2015, he personally witnessed GCA employees using the University's equipment, such as water tanks, lawnmowers, line trimmers, a tractor, John Deere Gator Number 1, Black Metal Two, behind trailers, and a Toro vac, and driving a University vehicle. He further asserts that GCA employees have the University's logo on their jackets and shirts and that the University's director of facilities, before leaving its employ in December 2016, worked with and gave directions to GCA supervisors and gave daily

> job duties to and approved overtime for GCA employees. Lastly, he states that he has seen the University's current acting director of facilities riding in a Kean vehicle accompanied by GCA employees.

P.E.R.C. No. 2017-65, 43 NJPER 443 (¶124 2017) (J-2).

A hearing was held in this matter on January 16, 2018.[3/] The parties submitted post-hearing briefs by May, 2018.

Based upon the record, I find the following facts:

FINDINGS OF FACT

1. IFPTE is a public employee organization within the meaning of N.J.S.A. 34:13A-1 et seq. It is the duly authorized representative for all employees in the state-wide Operations, Maintenance and Services and Crafts unit regularly employed by Kean. (J-1; T11-1 to -6).

2. Kean is a public employer within the meaning of N.J.S.A. 34:13A-1 et seq., and the rules and regulations of the Public Employment Relations Commission promulgated in accordance therewith (T10-18 to T10-24).

3. IFPTE and Kean are parties to a CNA dated July 1, 2011 to June 30, 2015 (J-1).

4. Kean and GCA are parties to two contracts dated April 7, 2015: one for housekeeping services (R1), and one for grounds maintenance services (R2).

3/ "T" represents the transcript, followed by the page and line number(s).

5. Both contracts contain a provision entitled "4. Contractor Employees" that provides as follows:

> It is understood and agreed that [GCA] is an independent contractor and not an employee of [Kean], nor are the employees of [GCA] to be considered employees of [Kean]. [R1, R2.]

6. Steven Pinto was hired by Kean in November 1980 as an auto mechanic trainee in the facilities department, and was then promoted to auto mechanic in the facilities department two years later, in or about 1982. (T17-11 to -20).

7. As an auto mechanic, Pinto was responsible for the diagnosis, repair, and maintenance of all Kean equipment and vehicles. (T17-21 to -25). That equipment and those vehicles include snow equipment, lawn equipment, generators, pumps, all law and public safety vehicles, grounds vehicles, trolleys, buses, student organization vehicles, and the president's vehicle. (T18-1 to -15).

8. Pinto was laid off from his position as an auto mechanic employed by Kean on January 31, 2017, when the work of the automotive shop was outsourced. (T18-21 to T19-4).

9. During the last 15 years that Pinto was employed by Kean as an auto mechanic until the time of his separation, Pinto served as president of IFPTE. (T20-1 to -14).

10. Pinto began employment as an organizing representative for IFPTE after his employment ended with Kean in January 2017. (T20-19 to T21-2).

11. While Pinto served as IFPTE president at Kean, the titles represented by IFPTE at Kean included building maintenance workers, repairs, ground workers, motor vehicle operators, operating engineer repairs, operating engineers, crafts, including locksmith, auto mechanics, carpenters, plumbers, electricians, painters, masons, security officers, public safety telecommunications. (T21-3 to -18).

12. In 2015, Kean subcontracted all housekeeping and groundskeeping work to GCA, which affected approximately 50 Kean employees. (T21-19 to T22-2).

13. Although Dereck Davis was the Director of Facilities who oversaw GCA's work for Kean, Davis was not himself a Kean employee, but rather an employee of outside contractor McKeon Grano. (CP-1; T22-21 to T23-7; T103-21 to T105-21).

14. Ken Kimble was a Kean employee who was a manager in the facilities office who reported to Dereck Davis. (CP-1; T24-13 to T25-3).

15. While GCA performed work at Kean, GCA employees used Kean grounds equipment, including line trimmers/weed wackers, lawn mowers, water tanks with pumps used for irrigation, John Deere Gator utility vehicles, Caterpillar bucket/backhoe combination equipment, a Ford Ranger, and two Dodge pickup trucks. (T25-8 to T28-1).

16. In his position as an auto mechanic, Pinto interacted with GCA employees when they used Kean equipment and brought it to Pinto for repair when the equipment was not working properly. Pinto would tell the GCA employees that he needed to receive instruction from his supervisor to fix the equipment, and then GCA employees would advise Pinto that they had been told by Davis to bring the equipment to Pinto. Pinto would then contact Davis to confirm, and Davis would advise Pinto that Pinto needed to fix the equipment. This occurred at least a couple of times per week. (T28-2 to T29-7).

17. GCA employees also used Kean housekeeping equipment to perform GCA services, including floor scrubbers and burnisher machines for waxing floors. (T29-18 to T30-1).

18. Davis also instructed GCA employees to clean up debris and pick up dead plants in campus flower beds, and worked with GCA employees to shovel dirt and leaves, to pick up wooden horses used for traffic. (T30-7 to T31-8).

19. GCA employees also used a piece of Kean grounds equipment called a Toro Debris vac to vacuum leaves along curbs and fences, and Davis would ride alongside the GCA employees in a Kean pickup truck to instruct the GCA employees about what areas to vacuum. (T31-14 to T32-5).

20. During the transition month of April 2015 when Kean grounds and housekeeping crews were being transitioned out of

employment, and GCA employees were being transitioned into the performance of grounds and housekeeping tasks, Davis communicated directly with GCA employees regarding the performance of those tasks. (T32-10 to T33-25).

21. Davis also communicated directly with GCA employees to assign work and to discuss what overtime was needed on a particular day. (T34-1 to T37-8).

22. Kimble also occasionally directed GCA employees in groundskeeping work. (T50-2 to -8).

23. Once Davis retired, Kimble assumed Davis' position and continued Davis' supervision of GCA employees' groundskeeping work. (T52-11 to T53-7).

24. Davis also verbally reprimanded GCA employees when they damaged Kean equipment. (T39-20 to T40-23).

25. GCA employees wore blue shirts and jackets at work that were a shade of blue referred to as "Kean blue," and the jackets and shirts had both the Kean logo and the GCA logo on them. (T43-2 to -19).

26. GCA employees used supplies that were stored in a Kean trailer, the Kean annex building, and a Kean warehouse. (T44-14 to -22).

27. Kenneth Green is employed by Kean as chief labor counsel, and has served in that position since December 2014. (T88-11 to -14, T89-2 to -4).

28. As chief labor counsel, Green's duties include the handling of all labor-related matters, including contracts, employee discipline, and interaction with human resources regarding terms and conditions of employment. (T88-15 to T89-1).

29. Kean is not involved in any way in the hiring, firing, training or discipline of GCA employees. (T90-1 to -8, T91-11 to -18).

30. GCA employees' performance is not evaluated by Kean in any way through Kean's performance evaluation system. (T91-19 to T92-3).

31. GCA employees receive no Kean compensation or benefits, and they do not interact with Kean human resources in any way. (T92-4 to T93-7).

32. Kean has no information about or involvement in GCA employee compensation systems, salary structure, promotions, demotions, or travel and business expenses. (T93-5 to -17).

ANALYSIS

N.J.S.A. 34:13A-5.3 guarantees to all public employees the right to engage in union activities, including the right to form or join a union, negotiate collectively and make their concerns known to their employer. Specifically, it provides that:

> [a] majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interest of all such employees without

> discrimination and without regard to employee organization membership.
>
> [N.J.S.A. 34:13A-5.3.]

N.J.S.A. 34:13A-5.3 also defines when a public employer has a 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. . . . In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment.

N.J.S.A. 34:13A-5.4a(5) prohibits public employers from "refusing to negotiate in good faith with a majority representative concerning terms and conditions of employment." Consistent with the Act, the Commission and courts have held that changes in negotiable terms and conditions of employment must be achieved through the collective negotiations process. See, e.g., Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28, 29-30 (¶29016 1997), aff'd, 334 N.J. Super. 512 (App. Div. 1999), aff'd, 166 N.J. 112 (2000); Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 338 (1989); and Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 52 (1978). For the Commission to find a 5.4a(5) violation, the charging party must prove: (1) a change; (2) in a term or condition of employment; (3) without negotiations. State of New Jersey (Ramapo State College),

P.E.R.C. No. 86-28, 11 NJPER 580 (¶16202 1985); Willingboro Bd. of Ed., P.E.R.C. No. 86-76, 12 NJPER 32 (¶17012 1985).

As described by the Commission it its summary judgment decision,

> it is well settled that public employers have a non-negotiable managerial prerogative to contract out work or subcontract and to reduce the workforce for economy or efficiency. Local 195, IFPTE v. State, 88 N.J. 393, 407-08 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 88 (1978). That is true whether the work is contracted out to private employers, as here, or to other public employers as, for example, in Union County, P.E.R.C. No. 2014-32, 40 NJPER 256 (¶98 2013) (replacement of teachers assigned to detention center by employees of educational services commission) and Cape May Cty. Bridge Commission, P.E.R.C. No. 92-8, 17 NJPER 382 (¶22180 1991) (elimination of bridge commission's maintenance department as a result of its entry into a interlocal services agreement pursuant to which a county took over the performance of the maintenance work).

P.E.R.C. No. 2017-65, 43 NJPER 443 (¶124 2017) (J-2).

After a public employer subcontracts unit work, it has no continuing negotiations obligation to the contractor's employees who assume responsibility for the performance of the former unit work, as these employees are no longer employed by the public employer. Nevertheless, invoking the theory that Kean is a joint employer with GCA, IFPTE seeks an order compelling Kean to negotiate with IFPTE over the terms and conditions of GCA's

employees who provide housekeeping and grounds maintenance services at the campus and its facilities.

In its summary judgment decision, the Commission also addressed the issue of joint employment relationships, which typically arise where both employers are public employers:

> The Commission has recognized joint employment relationships for purposes of labor relations and collective negotiations under the Act only in cases involving public employers. Typically, the issue arises where a public official or entity is granted statutory authority to hire its employees but another governmental unit bears fiscal responsibility for the employees. See, e.g., Monmouth Cty. Bd. of Recreation Comm'rs, E.D. No. 76-36 (Commission Executive Director adopts Hearing Examiner's decision that found county and county recreation commission were joint employers of recreation commission employees); In re Bergen Cty. Pros'r and Mercer County Pros'r, P.E.R.C. No. 78-77, 4 NJPER 220 (¶4110 1978), aff'd (as to Bergen County), 172 N.J. Super. 363 (App. Div. 1980) and (as to Mercer) 172 N.J. Super. 411 (App. Div. 1980) (county prosecutors, rather than the counties, were the public employers, for the purposes of negotiations, of public employees working in prosecutors' offices); Mercer County Sup't of Elections, P.E.R.C. No. 78-78, 4 NJPER 221 (¶4111 1978) (under N.J.S.A. 19:32-27, as it then read, superintendent of elections and county were not joint employers of election workers); Salem Cty., P.E.R.C. No. 2014-87, 41 NJPER 54 (¶14 2014) (declining to review decision of Deputy Director of Representation holding that surrogate and county were joint employers of probate clerk and deputy surrogate). Cf. Bergen County Sheriff, P.E.R.C. No. 84-98, 10 NJPER 168 (¶15083 1984) (under then-controlling statutes, county and sheriff were joint employers of sheriff's officers and correctional officers)

> to Bergen County PBA Local 134 v. Donovan, 436 N.J. Super. 187 (App. Div. 2014)(sheriff, not county executive, is the exclusive employer and hiring authority for the sheriff's office and its employees, and can solely negotiate the collective negotiations agreement for those employees). [Id.]

The Commission then examined the first of three prior cases involving the issue of a joint employer where one employer was a public employer and one was a private employer:

> In only three prior cases has a joint employer argument been advanced where both employers were not public employers, but instead a public and a private employer. [Footnote omitted.] In Association of Retarded Citizens, Hudson Cty. Unit (ARC), P.E.R.C. No. 94-57, 19 NJPER 593 (¶24287 1993), we considered an argument that the State and ARC, a private, non-profit organization, were joint employers for purposes of collective negotiations. Before the case came to us, a Regional Director of the National Labor Relations Board (NLRB) declined jurisdiction over an unfair practice charge filed by the union alleging that ARC discriminated against one of its employees for engaging in protected activity. He found that ARC was not an "employer" within the meaning of the Labor Management Relations Act and, therefore, the person against whom ARC had allegedly discriminated was not an "employee" under the federal statute. He also noted that ARC's dependence on the State for the majority of its funding together with State regulation of and control over ARC employees' wages and fringe benefits precluded ARC from engaging in meaningful bargaining with the union. The union then filed an action in New Jersey Superior Court, demanding an election to represent ARC's employees. The Court referred the matter to us. We found that the State was not a joint employer and noted that we had never found joint employer status when one entity was a

> private sector employer, over which we lack jurisdiction, and the other entity was a public employer, but not a party in the case before us. We concluded that ARC's employees had no rights under the Act, noting that our conclusion was consistent with the ARC-State contracts, which specified that ARC was the employer, and labor relations practices involving ARCs in other counties, where ARC and its employees negotiated without the State's participation. [Footnote omitted.] [Id.]

The Commission then distinguished this matter from ARC:

> Unlike ARC, the public employer claimed to be a joint employer in this case is a party. However, unlike ARC, it is doubtful that the NLRB would decline jurisdiction over GCA. We note that GCA or its affiliate named in the parties' contracts [footnote omitted] has been deemed subject to the Labor Management Relations Act, see Bldg. Serv. 32BJ Health Fund v. GCA Servs. Grp., Inc., 15 Civ. 6114, 2017 U.S. Dist. LEXIS 15950, (Feb. 3, 2017), recon. denied, 2017 U.S. Dist. LEXIS 52627 (S.D.N.Y., Apr. 5, 2017), and it has entered into private sector collective bargaining agreements with various unions. See, e.g., Jimenez v. GCA Servs. Grp., Civil Action No. 16-1871, 2016 U.S. Dist. LEXIS 160861 (D.N.J. 2016). Therefore, this case, in contrast to ARC, implicates no concern that employees may be left without a mechanism to exercise their organizing and negotiating rights under our State Constitution or the federal private sector labor relations law. Moreover, while the record has not been fully developed, there is no suggestion here that GCA is so dependent upon University funding that the two are joint employers. [Id.]

[Emphasis added.]

The Commission then addressed Black Horse Pike, the second case involving a public and a private employer:

> In the second case, Black Horse Pike Reg'l School Dist., P.E.R.C. No. 2010-23, 35 NJPER 371 (¶125 2009), the Director of Representation declined to issue a complaint on unfair practice charges filed against the district by a substitute teacher who alleged that he was terminated in retaliation for trying to form a union for substitutes. The Director found that the school district subcontracted its substitute teacher staffing to a private company and that the charging party was employed by it, thereby making him a private sector employee over which the Commission lacks jurisdiction. On review, we remanded the case to the Director to issue a complaint, concluding that if the substitute could prove that the contractor and the district were joint employers, then his allegation that the district terminated him in retaliation for protected activity might constitute an unfair practice. We acknowledged that our remedial authority would not extend to the private employer. [Footnote omitted.]
>
> Black Horse Pike is also distinguishable from this case. The concern there was being able to address the substitute's allegation that he was terminated on account of his organizing efforts. In contrast, IFPTE seeks an order compelling the University to negotiate over the terms of employment of GCA employees. In remanding the unfair practice case in Black Horse Pike to give the substitute a chance to prove his case, we specifically noted we were not addressing whether we would certify a majority representative in a case involving public and private employers. We need not decide that point now, but we do note that compelling a public employer to negotiate terms of employment of a private sector employer's employees raises a host of issues, some legal, including jurisdictional questions, others practical. And our concern in ARC over the absence of a necessary party is just as manifest here, where the private employer is not a party before us. [Id.]

The Commission then examined the third case involving joint employer with a public and private employer, Burlington County Board of Social Services, P.E.R.C. No. 98-62, 24 NJPER 2 (¶29001 1997), a consolidated scope of negotiations proceeding and unfair practice case:

> The board of social services requested a restraint of binding arbitration of a grievance challenging, as a contract violation, the board's subcontracting of its home energy assistance program to a private company, Kelly Temporary Services. The board asserted that it had a managerial prerogative to subcontract the program work. The CWA's unfair practice charge alleged that the board violated the Act by shifting unit work from represented income maintenance workers to Kelly personnel. It contended that the board so controlled Kelly personnel that they should be viewed as joint employees of the board and Kelly. We did not address the joint employment argument. Rather, we followed and applied Local 195, supra, restrained arbitration, and dismissed the unfair practice charge, noting that the case was primarily about contracting to hire extra temporary personnel for seasonal work rather than eroding a negotiations unit.
>
> While we have reservations about the viability of IFPTE's claim, particularly from a jurisdictional standpoint, we need not decide it now. [Footnote omitted.] A determination of the degree of control Kean exerts over GCA's employees depends upon the facts. [Id.]

The Commission then denied summary judgment "so that a full record can be developed," but added:

> For the parties' guidance, we add that the observations of the Local President, assuming they are accurate, fall far short of

> establishing that the University controls the economic or non-economic conditions of GCA employment. The use of private sector employees to provide services does not relieve a public employer of its responsibility to ensure that the outsourced activities are carried out properly and in compliance with applicable laws. We would not consider it an indicator of joint employment, but rather an effort to address the risks associated with subcontracting, for a contract between the public employer and contractor to include provisions setting standards for contract performance and to provide for ongoing monitoring of service providers, even if this means the private employer retains some degree of supervisory control over the vendor and its employees. We also think that effective programs for managing subcontracting risks would include, as an element of oversight and monitoring of service providers, contracts that clearly define the scope of work of the vendor and its responsibilities with regard to its employees who will perform the outsourced functions. After all, public services are funded by public dollars regardless of who provides them. Therefore, the use of Kean equipment to provide grounds maintenance services, the supervision of GCA supervisors or its workers, the wearing of Kean insignia, and so forth, none of these, singularly or in combination, show that the University controls the working conditions of GCA's employees. [Id.] [Emphasis added.]

The issue in this matter is whether Kean and GCA are joint employers of GCA's employees, as IFPTE argues, and if so, whether Kean's refusal to negotiate the terms and conditions of employment of the GCA employees who assumed the duties of the former unit members constitutes a violation of section 5.4a(5) of the Act. Kean, as it argued in its summary judgment motion,

argues here that GCA's employees are not Kean employees, but solely those of GCA, and therefore IFPTE is not the majority representative of GCA's grounds maintenance and housekeeping employees, and Kean does not have to negotiate with IFPTE over their terms and conditions of employment.

Furthermore, as the Commission noted in its summary judgment decision, "the use of Kean equipment to provide grounds maintenance services, the supervision of GCA supervisors or its workers, the wearing of Kean insignia, and so forth, none of these, singularly or in combination, show that the University controls the working conditions of GCA's employees." Most of the facts demonstrated in this matter fall into these non-joint-employer categories: GCA employees' use of Kean housekeeping and groundskeeping equipment; Davis and Kimble's supervision of GCA supervisors and employees in their groundskeeping work; and GCA employees wearing shirts and jackets with Kean insignia on them. Although Davis' close day-to-day supervision of GCA employees' groundskeeping work was at the core of Pinto's testimony, on cross-examination, Pinto conceded that as Davis was the Director of Facilities who oversaw GCA's work for Kean, it was Davis' responsibility to ensure that the Kean campus was being appropriately maintained by GCA's groundskeeping employees. (T61-7 to -14, T67-25 to T68-3.)

One area of testimony that could fall outside of those non-joint-employer categories would be the assignment of overtime. Pinto testified that he observed Davis boasting about or discussing overtime for GCA employees, but on cross examination, Pinto admitted that he never actually saw Davis assigning overtime to any GCA employee, nor had Pinto ever witnessed Davis filling out a time sheet for a GCA employee. (T64-6 to T66-3).

Notably, IFPTE did not call Davis, who himself was employed not by Kean but by an outside contractor, or any GCA employee to testify. Nor did IFPTE provide any testimony or evidence regarding GCA's dependence on Kean funding, or Kean's control over the economic or non-economic conditions of GCA employment. To the contrary, the only testimony regarding Kean's control over the economic or non-economic conditions of GCA employment came from Green, who testified that Kean is not involved in any way in the hiring, firing, training, discipline, performance evaluations, compensation or benefits of GCA employees.

Thus, I do not find that there is a joint employer relationship between Kean and GCA. Under all these circumstances, I do not find that Kean violated section 5.4a(5) of the Act.

CONCLUSIONS OF LAW

Kean did not violate section 5.4a(5) of the Act when it subcontracted work performed by unit members in the titles of

senior building maintenance worker and grounds worker to GCA and did not respond to IFPTE's request to negotiate terms and conditions of employment of GCA's workers who assumed the duties of the former unit members, as there is not a joint employer relationship between Kean and GCA.

ORDER

I recommend that the Complaint be dismissed.

/s/ Lisa Ruch
Lisa Ruch
Hearing Examiner

DATED: January 26, 2022
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3.

Any appeal is due by February 7, 2022.