

P.E.R.C. NO. 90-22

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Respondent,

-and-

Docket No. CO-H-88-334

COUNCIL OF NEW JERSEY STATE
COLLEGE LOCALS, NJSFT-AFT/AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the State of New Jersey (Office of Employee Relations) violated the New Jersey Employer-Employee Relations Act when it unilaterally removed the divisional administrators for general studies, arts and humanities, natural sciences and mathematics, and professional studies from the faculty unit at Stockton State College. The faculty unit is represented by the Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(OFFICE OF EMPLOYEE RELATIONS),

Respondent,

-and-

Docket No. CO-H-88-334

COUNCIL OF NEW JERSEY STATE
COLLEGE LOCALS, NJSFT-AFT/AFL-CIO,

Charging Party.

Appearances:

For the Respondent, Peter N. Perretti, Jr., Attorney
General (Melvin E. Mounts, Deputy Attorney General)

For the Charging Party, Bennett Muraskin, Staff
Representative

DECISION AND ORDER

On June 17, 1988, the Council of New Jersey State College
Locals, NJSFT-AFT/AFL-CIO ("Council") filed an unfair practice
charge against the State of New Jersey (Office of Employee
Relations). The charge alleges that the State violated the New
Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.,
specifically subsections 5.4(a)(1), (3), (4) and (5),^{1/} when it

^{1/} These subsections prohibit public employers, their
representatives or agents from: "(1) Interfering with,
restraining or coercing employees in the exercise of the
rights guaranteed to them by this act. (3) Discriminating in
regard to hire or tenure of employment or any term or
condition of employment to encourage or discourage employees

unilaterally removed the divisional administrators at Stockton State College from the Council's negotiations unit at the nine State colleges.

On September 2, 1988, a Complaint and Notice of Hearing issued. On September 19, the State filed an Answer claiming that the administrators were removed from the unit because they had acquired confidential duties as a result of a reorganization.

On November 3 and 16, 1988, Hearing Examiner Joyce M. Klein conducted a hearing. The parties examined witnesses and introduced exhibits. They filed post-hearing briefs and replies by January 31, 1989.

On April 19, 1989, the Hearing Examiner issued her report and recommendations. H.E. No. 89-32, 15 NJPER 242 (¶20099 1989). She found that the divisional administrators for natural and mathematical sciences, general studies, social and behavioral sciences, and professional studies are not confidential employees

1/ Footnote Continued From Previous Page

in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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.

and that the State violated subsections 5.4(a)(1) and (5) by unilaterally removing them from the Council's unit. She also found that the divisional administrator for arts and humanities is a confidential employee and that therefore the State did not violate the Act by unilaterally removing her from the Council's unit. She relied on Passaic Cty. Reg. H.S. Dist. No. 1 Bd. of Ed., P.E.R.C. No. 77-19, 3 NJPER 34 (1976).

On May 16, 1989, the State filed exceptions. It claims that the Hearing Examiner erred in focusing solely on the tasks actually performed by the divisional administrators between the time of the reorganization and the hearing. It urges that we also consider each employee's responsibilities and knowledge and the potential for conflict. It also urges that we rethink Passaic Cty. where we held that a petition for unit clarification is the most appropriate method for resolving unit placement disputes. It argues that Passaic Cty. forces employers to assign confidential duties before the employee is declared confidential. Finally, it argues that the Hearing Examiner erred in evaluating the work performed by three divisional administrators and labels the removal of only one administrator "bizarre." It claims that the absence of negotiations or grievances at the time of the reorganization should not diminish the importance of the assigned responsibilities in those areas.

On May 26, 1989, the State requested oral argument. It claims it inadvertently omitted this request at the time it filed exceptions.

On June 5, 1989, the Council filed a reply claiming that the request for oral argument is untimely.^{2/} It also urges adoption of the Hearing Examiner's report.

We begin every confidential employee case with the statutory definition. N.J.S.A. 34:13A-3(g) defines confidential employees as those:

whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties.

A determination that an employee is confidential and therefore excluded from the Act's protections, N.J.S.A. 34:13A-5.3, should not be based on speculation:

We scrutinize the facts of each case to find for whom each employee works, what he does, and what he knows about collective negotiations issues. Finally, we determine whether the responsibilities or knowledge of each employee would compromise the employer's right to confidentiality concerning the collective negotiations process if the employee was included in a negotiating unit. [State of New Jersey, P.E.R.C. No. 86-18, 11 NJPER 507 (¶16179 1985), recon. den. P.E.R.C. No. 86-59, 11 NJPER 714 (¶16249 1985)]

See also Wayne Tp. v. AFSCME, Council 52, 220 N.J. Super. 340 (App. Div. 1987); Sayerville Bd. of Ed., P.E.R.C. No. 88-109, 14 NJPER 341 (¶19129 1988), aff'd App. Div. Dkt. No. A-4297-87T1 (4/21/89);

^{2/} We deny the request for oral argument. The matter has been fully briefed. Passaic Cty. does not penalize an employer that unilaterally removes a confidential employee from a negotiations unit. While we believe that non-adversarial unit clarification proceedings are the most appropriate forum for resolving these disputes, we recognize that there may be circumstances where an employer needs to act unilaterally.

Ringwood Bd. of Ed., P.E.R.C. No. 87-148, 13 NJPER 503 (¶18186 1987), aff'd App. Div. Dkt. No. A-4740-86T7 (2/18/88). We therefore do not find it "bizarre" that individual determinations might lead to employees with confidential duties being deemed confidential and those without confidential duties being allowed to remain in a negotiations unit.

We begin with Marc Lowenstein, divisional administrator for general studies. His general duties include gathering information from faculty about the courses they plan to teach and compiling faculty workload records. In October 1988, the dean of his division, Geert Jan Colign, asked Lowenstein for his perspective on the role, function and compensation for the coordinator of the basic skills program. Colign was new on the contract administration committee and negotiations were to be reopened soon. The State argues that there is a conflict for an administrator to make such a recommendation even if it is not ultimately followed or the administrator is not told what position will be taken by the college in negotiations. We disagree.

While this type of preparation for negotiations is more than the collection of raw data or the gathering of background information, it is not a duty incompatible with membership in the Council's unit. This request for Lowenstein's opinion concerned a single employee and did not involve Lowenstein in the collective negotiations process or give him any knowledge of the employer's position on this or any other collective negotiations issue.

Barbara Rosenblatt is the divisional administrator for social and behavioral sciences. The college's reorganization plan

required changes in the faculty evaluation procedure. Charles Tantillo, vice president for management services, and John Searight, dean of social and behavioral sciences, drafted changes in evaluation procedures. Rosenblatt worked with Searight to put a draft and changes on the computer. Computer access to the drafts was limited to the secretary working on it at the time (1T73). Tantillo did not want the Council to see early drafts that might include objectionable procedures not included in the final draft. We agree with the Hearing Examiner that the record does not specifically indicate that the potentially objectionable proposals are mandatorily negotiable or that the parties intended to negotiate over the proposed changes. However, in general, evaluation procedures are mandatorily negotiable, and the college had an articulated interest in insuring the confidentiality of early drafts of new procedures before presenting them to the Council. Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38 (1982); Greater Egg Harbor Reg. H.S. Dist., P.E.R.C. No. 88-37, 13 NJPER 813 (¶18312 1987). Rosenblatt was involved in the preparation of the proposals for the new procedures, and, accordingly, we find that she is a confidential employee.

Nancy Messina is the divisional administrator for the division of arts and humanities. In addition to her general duties, she works on the divisional budget with the vice president for academic affairs. We agree with the Hearing Examiner that her budget duties do not implicate the collective negotiations process. Messina had no knowledge of the college's negotiations positions or proposals. We disagree, however, that Messina's knowledge of the

College's position regarding the discipline of one employee renders her confidential. Knowledge of an individual's potential discipline does not meet the statutory requirement of functional responsibilities or knowledge of the collective negotiations process. We note that supervisors, who have rights under the Act, can hire, discharge, discipline or effectively recommend the same. N.J.S.A. 34:13A-5.3.

Ruth Bye is the divisional administrator for natural sciences and mathematics. The employer has not specifically excepted to the Hearing Examiner's recommendation concerning Bye. We agree with the Hearing Examiner that her duties do not compromise the employer's position in labor relations.

Finally, we adopt the Hearing Examiner's recommendation regarding the fifth divisional administrator. The employer has not raised any specific exceptions concerning this administrator. There are sufficient differences in the duties and confidential status of the other administrators to preclude exclusion by virtue of holding an administrator's title.

Accordingly, we find that the employer violated subsections 5.4(a)(1) and (5) when it unilaterally removed Marc Lowenstein, Nancy Messina, Ruth Bye and the divisional administrator for professional studies from the Council's negotiations unit. Passaic Cty.^{3/}

^{3/} We recognize that some of the divisional administrators' duties may have changed after the close of the record. This decision is without prejudice to a new petition being filed should circumstances materially change.

ORDER

The State of New Jersey (Office of Employee Relations) is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by the Act, particularly by unilaterally removing the divisional administrators for general studies, arts and humanities, natural sciences and mathematics, and professional studies from the faculty unit at Stockton State College.

2. Refusing to negotiate in good faith with the Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO concerning terms and conditions of employment for the divisional administrators for general studies, arts and humanities, natural sciences and mathematics, and professional studies in the faculty unit at Stockton State College.

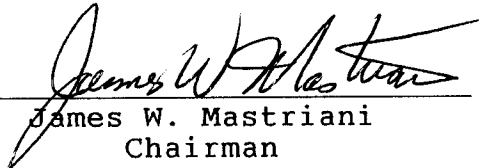
B. Take the following affirmative action:

1. Restore to the Council's faculty unit, the divisional administrators for general studies, arts and humanities, natural sciences and mathematics, and professional studies.

2. Make the Council and the employees whole for any benefits that would have accrued to them if the employees had remained in the faculty unit.

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Wenzler, Johnson, Reid and Ruggiero voted in favor of this decision. Commissioner Bertolino voted in favor of this decision, but opposed it as to Rosenblatt. Commissioner Smith was not present.

DATED: Trenton, New Jersey
September 29, 1989
ISSUED: October 2, 1989

H.E. NO. 89-32

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

In the Matter of

STATE OF NEW JERSEY,

Respondent,

-and-

Docket No. CO-H-88-334

COUNCIL OF NEW JERSEY STATE COLLEGE
LOCALS, NJSFT-AFT/AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the State of New Jersey violated subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when it unilaterally removed four of the five the divisional administrators at Stockton State College from the faculty unit. Relying on Passaic Cty. Regional H.S. Dist. No. 1, Bd. of Ed., P.E.R.C. No. 77-19, 3 NJPER 34 (1976), the Hearing Examiner finds that since the fifth divisional administrator is a confidential employee, the State did not violate the Act by removing that position from the faculty unit.

The Hearing Examiner further finds the divisional administrators for the divisions of natural and mathematical sciences, general studies, social and behavioral sciences and professional studies are not confidential employees and the divisional administrator for the division of arts and humanities is a confidential employee.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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-and-

Docket No. CO-H-88-334

COUNCIL OF NEW JERSEY STATE COLLEGE
LOCALS, NJSFT-AFT/AFL-CIO,

Charging Party.

Appearances:

For the Respondent, Carey Edwards, Attorney General
(Melvin Mounts, Deputy Attorney General)

For the Charging Party,
(Bennett Muraskin, Staff Representative)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On June 17, 1988, the Council of New Jersey State College
Locals, NJSFT-AFT/AFL-CIO ("Council") filed an unfair practice
charge alleging that the State of New Jersey ("State") violated
subsections 5.4(a)(1), (3), (4) and (5) of the New Jersey
Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.
("Act")^{1/} when it unilaterally removed the divisional

^{1/} These subsections prohibit public employers, their
representatives or agents from: "(1) Interfering with,
restraining or coercing employees in the exercise of the
rights guaranteed to them by this act. (3) Discriminating in
regard to hire or tenure of employment or any term or

administrators at Stockton State College ("Stockton" or "College") from a unit of teaching and non-teaching faculty at the nine State colleges.

On September 2, 1988, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On September 19, 1988, the State filed an Answer admitting that the divisional administrators were told that their positions would be removed from the unit, but denying that it violated the Act. The State asserts that the divisional administrators acquired confidential duties as a result of a reorganization at Stockton.

I conducted hearings on November 3 and 16, 1988. The parties examined witnesses, introduced exhibits and filed post-hearing briefs and reply briefs by January 31, 1989.

Based upon the entire record, I make the following

Findings of Fact

1. The State and Council are parties to a collective negotiations agreement effective from July 1, 1986 through June 30,

1/ Footnote Continued From Previous Page

condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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."

1989 (J-1).^{2/} Article XXVIII of the agreement provides for negotiations on local issues between each college and the Council (J-1). Article VII(C) provides that employees may informally present grievances to their immediate supervisors. If the dispute is not resolved informally, a formal grievance maybe filed. Written grievances are heard by the college president or his/her designee. If a grievance is not resolved at the college level, it is presented to the Chancellor of Higher Education and ultimately to an arbitrator.

2. Until 1981, deans and divisional administrators were excluded from the faculty unit. In 1981, Stockton replaced the deans with divisional chairpersons. Under the parties' agreement, both chairpersons and divisional administrators were included in the unit. A May 1984 independent consultant's report recommended removing chairpersons and divisional administrators from the negotiations unit and placing them on the academic vice president's staff (1T7). Two academic deans were added and chairpersons and the divisional administrators were retained in the initial reorganization (1T7; R-3).

In January 1987, Stockton asked the independent consultant for a second recommendation. In June 1987, the second report was received and circulated throughout the campus (R-5). The consultant

^{2/} 1T refers to the November 3, 1988 transcript and 2T refers to the November 16, 1988 transcript. C refers to Commission exhibits; J, to joint exhibits; CP, to charging party's exhibits and R to respondent's exhibits.

recommended retaining the divisional chair positions and removing them from the negotiations unit to avoid conflicts of interest (R-5). He also recommended a establishing a career path for divisional administrators and replacing the two deans created by the first reorganization with vice presidents for personnel policies and academic support services. The recommendations resulted in a reorganization plan which was approved by the Board of Trustees on December 9, 1987 (R-7).

Under the reorganization, chairpersons were replaced by divisional deans on July 1, 1988. Since deans participate in evaluation, promotion and retention procedures, they were removed from the unit.^{3/} Stockton removed divisional administrators from the unit because they have a "close working relationship with the deans" (1T21). The reorganization was designed to give management more assistance. The deans now supervise each division. Additionally, Geert Jan Colijn, dean of general studies and John Searight, dean of social and behavioral sciences sit on the contract administration committee with Charles Tantillo, vice president for management services.

3. On May 25, 1988, Tantillo met with the divisional administrators to discuss the reorganization. He explained that they would become confidential employees because they would assist the deans with labor relations (1T41, 1T87-88, 1T128-129; CP-5). The divisional administrators were given the opportunity to transfer

^{3/} The Council has not challenged the deans' unit removal.

to a unit position with no title change or loss of salary. After the meeting, the divisional administrators received a memo summarizing the meeting. The memo provides in part:

1. Non-unit Status. As a result of the College's reorganization, which created out-of-unit academic deans to replace in-unit chairpersons, the nature of the work performed by divisional administrators will change. This is the case because deans will be responsible for administering the Agreement and participating in the formulation of local and statewide negotiating positions.

It is expected, therefore, that you will be in a confidential status relationship to your supervisor (i.e. dean) in the discharge of these responsibilities. The change to a confidential status would occur as of the effective date of the reorganization, that is July 1, 1988. There will be no change in your title or range as a result of this change to a confidential status (CP-5). (Emphasis in original).

All of the divisional administrators chose to keep their present positions and became confidential.

4. Divisional administrators schedule courses, coordinate internships, research and analyze teaching load and program development. They plan, accumulate and organize data for faculty evaluations, curriculum planning and grants (CP-3). Divisional administrators ensure that promotion, retention and reappointment files are complete (1T31, 1T81). They may help develop the divisional budget (CP-3). Each divisional administrator also has specialized duties assigned by his/her supervising dean.

Neither an August 18, 1988 posting for a divisional administrator position nor earlier employment contracts specify that the positions are confidential (CP-3, CP-4, CP-6, CP-7, CP-8). The August posting does not mention contract administration or negotiations responsibilities.

5. Marc Lowenstein has been the divisional administrator for general studies for six years. Since July 1, 1988, he reports to Dean Colijn. Lowenstein gathers information from the faculty about the courses they plan to teach (1T24). He compiles information about necessary courses and matches them to faculty plans and to general studies course offerings taught by other divisions. Lowenstein uses this information to create a course schedule. He gives Colijn data on faculty in other divisions who teach courses in the general studies curriculum (2T125).

Lowenstein compiles faculty workload records by calculating the number of classes and teaching credits each year (1T25). He supervises the student evaluation of teaching (SET) program by distributing forms to faculty, explaining the procedures to them and ensuring that the forms are collected by a student and returned to the office (1T25). Evaluations are given to the vice president for academic affairs, computer scanned and then filed in the general studies office (1T26). Lowenstein coordinates the college's liberal studies program which allows students to create individual majors.

Lowenstein keeps records for the general studies committee of the faculty assembly (1T27). The committee recommends policies

and procedures for general studies. Lowenstein prepares advertisements for secretarial, administrative and instructor positions in general studies (1T32).

Lowenstein chaired the search committee for a new director of the writing skills lab. As chair, he screened applications, interviewed candidates and wrote the committee's recommendation to the divisional chairperson (1T33). At Stockton, staff who will work with the applicant serve on the search committee (1T33). Lowenstein has served on four or five search committees, all for staff positions included in the negotiations unit (1T34). When Lowenstein is a search committee member, he interviews candidates.

In October 1988, Colijn asked Lowenstein for his opinion about the role, function and compensation for the coordinator of the basic skills programs based upon the the local agreement between Stockton and the Council (1T28, 2T124). Colijn requested the information because negotiations would be reopened soon and he was "the new kid on the block" (2T124). Lowenstein prepared a memo for Colijn, but does not know what happened to his recommendation (1T30). Colijn has not discussed it with Lowenstein (1T29). Lowenstein does not know what Stockton's proposal will be with respect to the basic skills coordinator agreement or what the State is offering in negotiations with the State Colleges (1T35-36).

Stockton maintains two sets of personnel files. Access to the main personnel files, kept in the personnel office, is limited to management and confidential employees (2T62). Personnel files

kept in the divisional offices contain correspondence between the chairperson or dean and the faculty member, copies of annual contracts and correspondence received by the dean or chairperson (1T37). Lowenstein has access to Stockton's main personnel files (1T39). Colijn asked Lowenstein to examine old personnel files for guidance in tenure and reappointment cases (2T127). Colijn sent Lowenstein to check Stockton's practice with respect to evaluation procedures and to gather copies of reappointment letters Colijn wrote as chair (1T138).^{4/}

In August 1988, Elinor Learner, the Council president, asked Colijn for information about payment for faculty workshops (1T141). She also indicated that the Council wanted to negotiate over payment. Colijn told her he would discuss the matter with Tantillo (1T141). Colijn sent Lerner the information she requested and told her he could not negotiate for the College (2T141-142).^{5/}

At Colijn's direction, Lowenstein researched compensation for faculty workshops for the past five years (1T51, 2T143). To compile the history of workshop compensation, Lowenstein searched workshop files for memos from the general studies chairperson to the payroll office or the vice president for academic affairs

4/ These individuals were not being evaluated for promotion, tenure or reappointment (1T139).

5/ Stockton's alleged refusal to negotiate over compensation for workshops is currently the subject of a Complaint, Commission docket number CO-H-89-120.

(1T51).^{6/} Lowenstein gave the workshop compensation data to Colijn, but does not know what happened to it. Colijn did not ask for his opinion or participation in local negotiations over workshop compensation (1T52-55).

Colijn told Lowenstein that it was easier for Colijn to function with him out of the unit (2T145). Lowenstein has never been involved in processing grievances for Stockton (1T28).

6. Barbara Rosenblatt has been the divisional administrator for social and behavioral sciences for two years. She reports to Dean John Searight. In addition to her general duties,^{7/} she oversees the office staff and is responsible for the computers. She responds to students' or parents' complaints, schedules faculty to meet with visiting high school students, and prepares reports at the Dean's request (1T59).

Last summer, a faculty member approached Searight about a leave at the beginning of the fall semester. Searight asked the faculty member to put the request in writing. He responded to the request before leaving for vacation. Searight authorized Rosenblatt to discuss the situation with the individual or to contact Tantillo if the faculty member came into the office (2T156). Searight told Rosenblatt where to find the correspondence while he was on vacation. After Searight left on vacation, Tantillo asked

^{6/} The general studies chairperson was a unit member.

^{7/} For a complete description of a divisional administrator's general duties, see Findings 4 and 5.

Rosenblatt to bring him incoming correspondence concerning the requested leave (1T70, 2T60).^{8/} Rosenblatt never saw the correspondence because the faculty member, aware of Searight's absence, brought the correspondence directly to Tantillo (1T70). After Tantillo resolved the matter, he met with Searight and Rosenblatt to explain how he resolved the matter and how they should have dealt with the problem (1T78, 2T60, 2T157).

The reorganization plan required changes in the faculty evaluation procedure. Substantive changes in the evaluation procedure included adding qualifications for rank--which was changed to conform to the administrative code--and placing deans in the evaluation process (1T66, 2T85-86). Under the old evaluation process, the chairperson and faculty review committee made concurrent recommendations to the academic vice president (2T87). Now, the faculty review committee makes a recommendation to the dean who makes a comprehensive recommendation to the academic vice president (2T87; CP-9). Tantillo and Searight drafted changes in the procedure. Tantillo reviewed changes in the first draft with Rosenblatt so she could put them on the computer (2T52). Rosenblatt insured that computer access to the drafts was limited and worked with Searight to put the changes on the computer (1T73).^{9/} In

^{8/} Apparently, the faculty member threatened to file a grievance and other litigation.

^{9/} Computer access was limited only to the extent the computer entry code used for the evaluation procedures was not in general use. There is no evidence that actual access to the drafts was limited.

Searight's absence Rosenblatt reviewed the changes with Tantillo and, at his direction, she had the changes typed (1T66, 2T52). Rosenblatt proof-read the drafts (1T66-67). She made stylistic suggestions, but does not know if they were followed (1T75).

The College eventually discusses changes in evaluation procedures with the Council. Tantillo did not want the Council to see early drafts that might include objectionable procedures not included in the final draft (2T53-54).^{10/}

7. Nancy Messina is the divisional administrator for the Division of Arts and Humanities. She reports to Dean Margaret Marsh. Messina performs all of the general duties required of a divisional administrator.

Marsh works on the divisional budget with the vice president for academic affairs (1T82). Faculty members submit budget requests to Marsh (2T186). Marsh drafts budget requests and allocates funds, but the vice president makes final decisions (1T83, 2T186). Messina generates the data Marsh needs and gives her advice, particularly about performing arts allocations (1T106, 2T187). That data includes how much a program cost last year, anticipated spending projections, and salary projections for adjunct faculty and compensation for teaching overload (1T82).

^{10/} Tantillo testified that the new procedures would be discussed with the union (2T53), but there is no evidence that either party wanted to negotiate over changes in the procedure.

Tantillo, who was acting vice president for academic affairs over the summer, had a budget deadline while Marsh was on vacation. Tantillo and Messina determined the bottom line for Arts and Humanities spending and its apportionment. Tantillo asked Messina about actual expenditures for salaries and non-salary account needs and the capital account (2T69, 2T111). Messina projected salaries by calculating cost of living increases for the coming year (1T115). She does not know whether the budget includes the State's proposal to the Council for upcoming negotiations (1T115-116). Tantillo asked Messina to verify numbers and calculate how many staff hours were needed to staff the library (1T105, 2T112). Messina convinced Tantillo to include money in the budget for new pianos (1T105, 2T68).

Messina assists faculty members compiling reappointment, promotion and tenure files (1T84). She gathers information from the personnel files located in the arts & humanities divisional office for inclusion in the file. Student evaluation summaries, peer evaluations, other teaching forms and information faculty members choose to include and other letters from the personnel file are included in the files (1T85). When the file is completed, the faculty member signs-off. The file is closed and evaluated by a faculty review committee composed of faculty and students (1T85). Though neither Marsh or Messina are members of the faculty review committee, they attend its meetings (1T86).

One faculty member refused to sign-off and close the file. The faculty member objected to the ordering of the documents in the file (1T119, 2T62). In a meeting with Marsh and Tantillo, Messina asked Tantillo for advice (1T107). Tantillo told Messina to follow the past practice. Messina went to the personnel office and examined closed files to verify the past practice (1T116). After Marsh told the faculty member about the past practice, the file was closed and sent to the appropriate committee for consideration (1T120, 2T63).

At Marsh's direction, Messina asked Tantillo what to do if the faculty review committee lacked a quorum for elections (1T110). The Committee is composed of five faculty and five student members. If elections are held without a quorum, committee actions are open to challenge. Tantillo advised Messina of an alternate procedure (2T66). A quorum attended the meeting.

Messina supervises the division's computer operations (1T114, 2T99). A secretary approached Messina to complain about an individual's unauthorized use of the computer (1T95). Messina reported the incident to Marsh who told Tantillo (1T96). Messina met with Marsh and Tantillo and related what the secretary told her (1T97). During the meeting, Tantillo told Marsh and Messina how to handle the situation (1T99). Tantillo instructed them to collect as much information about the incident as possible (2T93). They

discussed potential discipline and the need to tighten computer security to prevent a recurrence.^{11/}

After the meeting, Marsh met with the individual. Messina was scheduled to attend the meeting, but a scheduling conflict prevented her attendance (1T102). Marsh told Messina that she had carried out Tantillo's directions. Messina was not asked for her recommendation.

8. Ruth Bye is the divisional administrator for natural sciences and mathematics. She reports to Dean Donald Plank. She performs the general duties required of a divisional administrator and supervises the clerical staff and the daily operations of the division. She maintains promotion and retention files (1T123). Bye prepares monthly reports for the Dean. The reports summarize which faculty members cancelled classes, used leave, attended a conference and the reasons given for absences (1T124).

Bye has access to the personnel files kept in the divisional office only with permission from a superior (1T125). These personnel files contain a resume, correspondence from the initial hiring, immigration papers and an employment contract (1T126). When Plank was away, she retrieved a form from one of these files at the personnel director's request (1T125). She does not know if these files contain grievance-related material. She has

^{11/} According to Tantillo, Messina was involved primarily because she was responsible for the computers in the divisional office (2T100).

not filed grievance documents.^{12/} Bye has not attended a management meeting concerning negotiations or grievance strategies. Plank has not asked Bye to get involved in labor relations matters, or told her that she would be involved in the future (1T123).

ANALYSIS

N.J.S.A. 34:13A-5.3 states in relevant part:

Except as hereinafter provided, public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity; provided, however, that this right shall not extend to elected officials, members of boards and commissions, managerial executives, or confidential employees....

Confidential employees, however, do not enjoy the Act's protections. N.J.S.A. 34:13A-3(d). N.J.S.A. 34:13A-3(g) defines a confidential employee as an employee

...whose functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process would make their membership in any appropriate negotiating unit incompatible with their official duties.

Here, the employer unilaterally removed five divisional administrators from the faculty unit. The employer asserts that their removal was necessary because a college-wide reorganization resulted in their assumption of confidential duties. The Commission addressed the circumstances under which an employer could unilaterally remove employees from a negotiations unit in Passaic

^{12/} No grievances were filed in natural sciences and mathematics since July 1, 1988.

Cty. Regional H.S. Dist. No. 1, Bd. of Ed., P.E.R.C. No. 77-19, 3 NJPER 34 (1976). There, the Commission found the employer did not violate the Act when it refused to negotiate over terms and conditions of employment for an employee it believed became confidential when circumstances changed. The Commission based its finding on the fact that the employee was confidential. The Commission cautioned:

It should be noted that a public employer's refusal to negotiate with the majority representative of a public employee in a collective negotiations unit is an act that a public employer takes at his peril. The legality of this action is wholly dependent upon the propriety of the public employer's judgment that the employee in question is not entitled to the protections of the Act. In the event that the public employer's judgment proves faulty in this regard, he will have committed a violation of the Act, regardless of any good faith belief that the action was justifiable. Any such violation of the Act may be fully remedied by the filing of an unfair practice charge and the issuance of a Decision and Order by the Commission, pursuant to its broad remedial authority.

On the other hand, even if the employer's judgment is correct, he still subjects himself to the inconvenience and expense of vindicating his action in an unfair practice proceeding if that action is challenged. If the matter is resolved by means of a unit clarification proceeding pursuant to N.J.A.C. 19:11-1.5 as opposed to an unfair practice proceeding, the possibility of an adverse decision in an unfair practice proceeding would be precluded and the dispute would be resolved in the context of a non-adversarial representation proceeding.

See Morris School Dist. Bd. of Ed. and Ed. Ass'n of Morris, P.E.R.C. No. 89-42, 14 NJPER 681 (¶19287 1988), app. pending App. Div. Dkt. No. A-2191-88T2.

I must determine whether any of the divisional administrators are confidential. The Commission's policy strictly construes the term "confidential employee." Brookdale Community College, D.R. No. 78-20, 4 NJPER 32 (¶4018 1977); State of New Jersey, P.E.R.C. No. 86-18, 11 NJPER 507 (¶16179 1985), mot. to reopen den. P.E.R.C. No. 86-59, 11 NJPER 714 (¶16249 1985) ("State of New Jersey"). In State of New Jersey, the Commission explained its approach in determining whether an employee is confidential:

We scrutinize the facts of each case to find for whom each employee works, what he does, and what he knows about collective negotiations issues. Finally, we determine whether the responsibilities or knowledge of each employee would compromise the employer's right to confidentiality concerning the collective negotiations process if the employee was included in a negotiating unit. [Id. at 510]

See also Ringwood Bd. of Ed., P.E.R.C. No. 87-148, 13 NJPER 503 (¶18186 1987), aff'd App. Div. Dkt. No. A-4740-86-T7 (2/18/88).

Finding confidential status requires a case-by-case examination of each employee's knowledge of information which would compromise the employer's position in the collective negotiations process, River Dell Regional Board of Education, P.E.R.C. No. 84-95, 10 NJPER 148 (¶15073 1984) aff'g D.R. No. 83-21, 9 NJPER 180 (¶14084 1983); Parsippany-Troy Hills Board of Education, D.R. No. 80-35, 6 NJPER 276 (¶11131 1980). Determinations of confidential status are based on individual situations, not on the position in general or a "fear of potential conflict". Ringwood Bd. of Ed. v. Ringwood Educational Office Personnel Ass'n, NJEA, App. Div. Dkt. No. A-4740-8677 (2/18/88), aff'g P.E.R.C. No. 87-148, 13 NJPER 503

(¶18186 1987); Cliffside Park Bd. of Ed., P.E.R.C. No. 88-108, 14 NJPER 339 (¶19128 1988). Rather than simply examining changes in the divisional administrators' responsibilities I will examine each position.^{13/}

The general duties performed by divisional administrators do not expose them to knowledge which would compromise their employer's position in negotiations or contract administration. Since faculty members work with divisional administrators to compile tenure, promotion and retention files, the contents of the files cannot be considered confidential.^{14/}

The divisional administrators use personnel files in the divisional office and the personnel office. Lowenstein and Messina both used closed personnel files to verify past practice and to gather other information for their superiors. Use of closed or non-active personnel files to determine how files were ordered, or to gather recommendation letters written by Colijn does not

^{13/} There are five divisional administrator positions. The record includes evidence concerning only four divisional administrators. Since the State has not proffered evidence that the fifth (divisional administrator for the division of professional studies) has any knowledge that would compromise the State's position in negotiations or contract administration, I find that the position is not confidential. See State of New Jersey, 11 NJPER at 510.

^{14/} The State does not assert that Lowenstein's efforts on search committees involved confidential information. See Salem Community College, D.R. No. 88-25, 14 NJPER 136 (¶19054 1988), holding that chairing a search committee is a temporary occurrence that does not, on its own, create an impermissible conflict of interest with unit members.

compromise the College's ability to administer the contract. Access to personnel files is insufficient to find confidential status. State of New Jersey.

Bye retrieved a document from the divisional office personnel files at the personnel director's request. Since she has no other duties that might compromise her employer's position in labor relations or contract administration, I find that the divisional administrator for natural sciences and mathematics is not a confidential employee.

Lowenstein prepared a memo for Colijn detailing his opinion about the role, function and compensation for the basic skills coordinator under the local agreement between the Council and Stockton. Lowenstein does not know what became of his recommendation or what the College will propose for the new basic skills coordinator agreement. Colijn wanted background information because he was "the new kid on the block". Lowenstein's research and recommendations concerning the basic skills coordinator agreement provided Colijn with raw data in the form of background information. The collection of raw data does not mandate confidential status. Montague Bd. of Ed., P.E.R.C. No. 87-36, 12 NJPER 773 (¶17294 1986). Colijn did not indicate that he will follow Lowenstein's recommendations or that he will tell Lowenstein what position he plans to take in negotiations. Lowenstein's recommendations concerning the future of the basic skills agreement do not compromise Stockton's position in future negotiations.

Lowenstein compiled data on compensation for faculty workshops. This information may be used in an unfair practice proceeding currently before this Commission. The information, however was compiled at the Council's request and given to Lerner. Lowenstein's compilation of that data does not compromise the State's position in the unfair practice proceeding. I find that Lowenstein, as the divisional administrator for general studies, is not a confidential employee.

The State asserts that Rosenblatt was fully informed of the progress of a pending faculty leave of absence case. Rosenblatt was free to examine the correspondence in Searight's absence. The correspondence included letters from the faculty member and letters Searight had already sent to the faculty member. Rosenblatt did not learn management's strategy or the resolution until after the matter was settled.

Rosenblatt read each draft of the revised evaluation procedure. Tantillo was concerned with the security of the drafts because they contained procedures the Council might have found objectionable. There is no evidence, however, that the potentially objectionable proposals are negotiable.^{15/} The substantive

^{15/} The record does not indicate whether the Council requested negotiations over changes in the evaluation procedures.

changes noted by Tantillo are not.^{16/}

Tantillo's concerns about potential conflicts which may arise if Rosenblatt is a unit member are premature. Rosenblatt does not have functional responsibilities or knowledge that warrant her exclusion from any negotiations unit.^{17/}

Messina's budgetary responsibilities require detailed knowledge of projected expenditures; but did not include projections beyond the existing collective negotiations agreement. She does not know what will be offered to the Council in future negotiations. Budget information which is not specifically relevant to the employer's bargaining position does not implicate confidential status. Orange Tp., D.R. No. 85-23, 11 NJPER 317 (¶16115 1985).

Messina's role in the dispute surrounding a faculty member's unauthorized use of the computer, however, warrants her exclusion from any unit. Messina attended meetings with Marsh and Tantillo and knew how they intended to approach the problem. Messina knew what settlement would be offered to the individual.

^{16/} See Rutherford Bd. of Ed., P.E.R.C. No. 85-96, 11 NJPER 223 (¶16086 1985) (Identity of evaluator is not negotiable). State v. State Supervisory Employees Ass'n., 78 N.J. 51, 93 (1978) (Statutory or administrative rules preempt negotiations over evaluation procedures). State of New Jersey, 11 NJPER at 516, n.3; Montague Tp. Bd. of Ed. (Knowledge of information about the employer's administrative operations does not make an employee confidential).

^{17/} The divisional administrators' responsibilities may, in the future, present conflicts of interest. Such conflicts are not justification for unilaterally removing a position from a negotiations unit. Passaic Cty. Regional H.S.

She also knew that the individual would be disciplined if the offer was not accepted. Her knowledge of the College's position before the affected individual was informed renders her membership in any collective negotiations unit incompatible with her duties. Tp. of Dover, D.R. No. 79-19, 5 NJPER 61 (¶10040 1979).^{18/}

CONCLUSIONS

1. The divisional administrators for the divisions of natural and mathematical sciences, general studies, social and behavioral sciences and professional studies are not confidential employees.

2. The State violated subsections 5.4(a)(1) and (5) when it unilaterally removed those positions from a unit of professional employees.

3. The Council has not alleged facts in support of its changes that the State violated subsections 5.4(a)(3) and (4). I recommend those charges be dismissed.

4. The divisional administrator for division of arts and humanities is a confidential employee. The State did not violate the Act when it removed the position from the faculty unit.

Recommended Order

I recommend that the State of New Jersey:

^{18/} Messina's participation in this case arose from her responsibility for the computers. Though it is not likely to recur, a finding of confidential status does not require regular or continuous involvement with confidential information. Tp. of Dover.

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., particularly by unilaterally removing divisional administrators for the divisions of natural and mathematical sciences, general studies, social and behavioral sciences and professional studies from the faculty unit at Stockton State College.

2. Refusing to negotiate in good faith with the Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO concerning terms and conditions of employment for the divisional administrators for the divisions of natural and mathematical sciences, general studies, social and behavioral sciences and professional studies in the faculty unit at Stockton State College.

B. Take the following affirmative action:

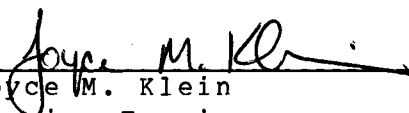
1. Restore the status quo ante by restoring the divisional administrators for the divisions of natural and mathematical sciences, general studies, social and behavioral sciences and professional studies to the Council's faculty unit.

2. Make the Council and the employees whole for any benefits that would have accrued to them if the employees had remained in the faculty unit.

3. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the

Commission shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be 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.

4. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.



Joyce M. Klein
Hearing Examiner

Dated: April 19, 1989
Trenton, New Jersey

NOTICE TO ALL 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 our employees in the exercise of the rights guaranteed to them by the Act, particularly by unilaterally removing divisional administrators for the divisions of natural and mathematical sciences, general studies, social and behavioral sciences and professional studies from the faculty unit at Stockton State College.

WE WILL cease and desist from refusing to negotiate in good faith with the Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO concerning terms and conditions of employment for the divisional administrators for the divisions of natural and mathematical sciences, general studies, social and behavioral sciences and professional studies in the faculty unit at Stockton State College.

WE WILL put the divisional administrators for the divisions of natural and mathematical sciences, general studies, social and behavioral sciences and professional studies in the faculty unit at Stockton State College.

WE WILL restore any benefits lost as a result of removing the divisional administrators for the divisions of natural and mathematical sciences, general studies, social and behavioral sciences and professional studies from the faculty unit at Stockton State College.

Docket No. CO-H-88-334State of New Jersey

(Public Employer)

Dated _____

By _____
(Title)

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 St., CN 429, Trenton, NJ 08625 (609) 984-7372.