

P.E.R.C. NO. 2017-47

STATE OF NEW JERSEY
BEFORE THE 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 Public Employment Relations Commission denies a motion and cross-motion for summary judgment filed by the College and Association, respectively, in an unfair practice case alleging that the College violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (5), by unilaterally establishing a tenure cap, creating a non-tenure track "Lecturer" title with unilaterally established terms and conditions of employment, and unilaterally transferring instructional work from tenure-track/tenured faculty members to Lecturers. The Commission finds that there are genuine issues of material fact regarding the pertinent collective negotiations history, the rationale for creating the Lecturer title, and the job duties/responsibilities of the position as well as tenure-track/tenured faculty members, adjunct faculty, and College administrators.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

P.E.R.C. NO. 2017-47

STATE OF NEW JERSEY
BEFORE THE 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.

Appearances:

For the Respondent, Cleary, Giacobbe, Alfieri
& Jacobs, LLC, attorneys (Matthew J.
Giacobbe, of counsel and on the brief;
Gregory J. Franklin, of counsel and on the
brief)

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

DECISION

This case comes to us by way of a motion for summary judgment filed by the Board of Trustees of Ocean County College (College), and by way of a cross-motion for summary judgment filed by the Faculty Association of Ocean County College (Association), in an unfair practice case filed against the College by the Association. The unfair practice charge alleges that the College violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), specifically

5.4a(1) and (5),^{1/} by (1) unilaterally establishing a tenure cap, (2) creating a non-tenure track "Lecturer" title with unilaterally established terms and conditions of employment, and (3) unilaterally transferring instructional work from tenure-track/tenured faculty members to Lecturers.

PROCEDURAL HISTORY

On September 30, 2010, the Association filed the underlying unfair practice charge accompanied by an application for interim relief. On December 21, Commission Designee Charles A. Tadduni issued a decision [I.R. No. 2011-27] denying the Association's application.

On July 18, 2012, the Director of Unfair Practices issued a complaint with a notice of hearing. On October 1, the College filed an answer.

On March 2, 2016, the Hearing Examiner scheduled a hearing in this matter for June 13, 14 and 18. On June 8, the Hearing Examiner rescheduled the hearing to September 26, 27 and 28. On June 13, counsel for the College filed a substitution of attorney.

^{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 employees in that unit, or refusing to process grievances presented by the majority representative."

On August 26, 2016, the College filed a motion for summary judgment supported by a brief, exhibits, the certification of Richard P. Strada (Strada), Executive Vice President of Instruction and Interim Vice President of Academic Affairs, and the certification of George Buchanan (Buchanan), Senior Advisor to the President of the College.^{2/}

On September 22, 2016, the Association filed a cross-motion for summary judgment supported by an opposition brief, exhibits, the certification of Professor David Bordelon (Bordelon), Association President and tenured Associate Professor of English at the College, and the certification of Chris Berzinski (Berzinski), NJEA UniServ Field Representative.

On November 4, 2016, in response to the Association's cross-motion, the College filed an opposition brief, exhibits, the certification of Lisa A. DiBisceglie, Ed.D. (DiBisceglie), Associate Vice President of Academic Affairs, the certification of Sara Winchester (Winchester), Executive Vice President of Finance and Administration, the certification of Antoinette M. Clay, Ed.D. (Clay), Assistant Vice President of Academic Affairs, the certification of Teresa Walsh (Walsh), Dean of the School of Nursing and Health Sciences, and the certification of Jon Larson, Ph.D. (Larson), President of the College.

^{2/} The requests for oral argument are denied. The issues have been fully briefed by the parties.

On November 23, 2016, the Association filed a reply brief, exhibits, and the supplemental certification of Bordelon. On December 12, the College filed a reply brief, exhibits, the supplemental certification of DiBisceglie, and the supplemental certification of Winchester.

On December 15, 2016, the College's motion for summary judgment and the Association's cross-motion for summary judgment were referred to the Commission for a decision pursuant to N.J.A.C. 19:14-4.8(a).

FACTS

The Association is the majority representative for all full-time faculty members employed by the College including instructors, assistant professors, associate professors, professors, counselors, and librarians. The College and the Association were parties to a collective negotiations agreement (CNA) in effect from September 1, 2006 through August 31, 2010. In November 2015, the parties reached a successor agreement effective from September 1, 2014 through August 31, 2019. However, the Lecturer title was not added as a title represented by the Association and the unfair practice charge was not withdrawn.^{3/}

^{3/} We note that on May 23, 2011, the Association filed a related clarification of unit petition (CU-2011-035) seeking to include all Lecturer positions within the negotiations unit. However, the Association withdrew its petition on January 15, 2016.

Prior to July 2010, all non-tenured instructional unit faculty employees were eligible to receive tenure upon satisfactory completion of five consecutive years of service with the College. On July 26, 2010, the College adopted a tenure cap pursuant to N.J.A.C. 9A:7-3.1^{4/} and N.J.A.C. 9A:7-3.2.^{5/} Under

4/ N.J.A.C. 9A:7-3.1, entitled "Monitoring proportion of tenured faculty," provides:

In order to maintain the flexibility of the institution to respond to the changing educational needs of future generations of students, each college board of trustees shall take appropriate steps to achieve a future balance of the proportion of faculty ultimately tenured. The board of trustees shall annually monitor the projected proportion of tenured faculty and the progress being made to achieve the institutional goal of limiting the proportion of tenured faculty.

5/ N.J.A.C. 9A:7-3.2, entitled "Establishment of internal policies," provides:

(a) Each community college board of trustees shall establish internal policies which indicate that it will impose either specific restrictions or more intensive and rigorous review procedures for any reappointment conferring tenure which brings the proportion of individuals in a department (or other major academic sub-unit) or in the college as a whole above the level deemed necessary by the board of trustees to maintain an appropriate balance between tenured and non-tenured faculty.

(b) Reappointments conferring tenure which raise the proportion of tenured faculty above the level deemed appropriate by the board of trustees shall be made only when judged by

(continued...)

the tenure cap, the maximum number of instructional unit employees that can acquire tenure was fixed at 77% of the total number of instructional unit employees.^{6/}

In September 2010, the College created the non-tenure track Lecturer title and the Association subsequently filed the underlying unfair practice charge.

The parties have submitted conflicting certifications regarding the pertinent collective negotiations history, the reasons for creating the Lecturer title as well as the job duties/responsibilities of the position. In sum, Strada certifies that the Lecturer title was created to provide the College with institutional flexibility and was not an attempt to end the hiring of full-time tenure track faculty. DiBisceglie certifies that there are substantial differences between the duties and functions of Lecturers and tenure-track faculty members.^{7/} In contrast, Bordelon certifies that all of the duties performed by tenure-track/tenured faculty members are also

5/ (...continued)

the college board of trustees as being in the best interests of the college.

6/ On January 30, 2012, the College increased the tenure cap to 85% in order "to ensure that more faculty employees would have the opportunity to attain tenure if eligible to achieve such status."

7/ The College did not submit a certification from anyone who has served - or is serving - as a Lecturer or as a tenure-track/tenured faculty member.

performed by Lecturers. He asserts that the College created the Lecturer position in order to avoid having these faculty members acquire tenure and to permit the College to deny them the rights and benefits they would otherwise have under the CNA.

LEGAL ARGUMENTS

The College argues that its motion for summary judgment should be granted, contending that the only genuine issues of material fact relate to the Association's cross-motion. Specifically, the College maintains that it had a non-negotiable managerial prerogative to adopt a tenure cap in accordance with N.J.A.C. 9A:7-3.1 and N.J.A.C. 9A:7-3.2(a).^{8/} The College also maintains that it had a managerial prerogative to create a new title as part of its efforts to realign educational goals, particularly given that Lecturers provide the necessary flexibility to prioritize student learning. The College asserts that it was permitted to shift instructional unit work to Lecturers without negotiations due to its realignment of educational goals and because adjunct faculty and College administrators have historically performed the same instructional work as unit employees. Moreover, the College reiterates that the Association never raised the issue of representing Lecturers and rejected the College's proposal to establish a twelve-month

^{8/} We consider this issue moot and will not address it further given that the Association has withdrawn the related aspects of its unfair practice charge.

faculty position throughout extensive collective negotiations and ratification of the parties' successor agreement.

The Association argues that its cross-motion for summary judgment should be granted, contending that the only genuine issues of material fact relate to the College's motion. Specifically, the Association maintains that the Lecturer title was solely intended "to rename a faculty rank" in order to permit the College to unilaterally establish terms and conditions of employment and to avoid the parties' CNA. The Association also maintains that the College was prohibited from unilaterally establishing a new job title or position that parallels the duties and responsibilities of existing unit positions without negotiating the terms and conditions of employment with the appropriate labor organization. Further, the Association asserts that the College has illegally shifted instructional work that has exclusively been performed by tenure-track/tenured faculty members. The Association contends that the College's claim of educational reorganization is unjustified given that Lecturers perform the same job duties/responsibilities as tenure-track/tenured faculty members while - to the College's advantage - they are less experienced, disinterested in acquiring tenure, and subject to unilaterally established terms and conditions of employment. Similarly, the Association contends that the College's claim that the same instructional work has historically

been shared among tenure-track/tenured faculty members, adjunct faculty, and College administrators is unsubstantiated. The Association maintains that adjunct faculty and College administrators have "never participated in the core expansive [instructional] work performed by tenure track faculty members...."

STANDARD OF REVIEW

We note that summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); see also, Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954).^{9/} In determining whether summary judgment is appropriate, we must ascertain "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 523. "Although summary

^{9/} N.J.A.C. 19:14-4.8(e) provides:

If it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and that the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross-motion for summary judgment may be granted and the requested relief may be ordered.

judgment serves the valid purpose in our judicial system of protecting against groundless claims and frivolous defenses, it is not a substitute for a full plenary trial" and "should be denied unless the right thereto appears so clearly as to leave no room for controversy." Saldana v. DiMedio, 275 N.J. Super. 488, 495 (App. Div. 1995); see also, UMDNJ, P.E.R.C. No. 2006-51, 32 NJPER 12 (¶6 2006). We have denied summary judgment when the facts in the record do not definitively answer whether a public employer has or has not committed the unfair practices alleged. See, e.g., Hillsborough Tp. Bd. of Ed., P.E.R.C. 2006-97, 32 NJPER 232 (¶97 2006). We have also denied summary judgment when credibility determinations need to be made. See, e.g., New Jersey State (Corrections), H.E. No. 2014-9, 40 NJPER 534 (¶173 2014).

Public employers are prohibited from "[i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act." N.J.S.A. 34:13A-5.4a(1). "[P]roof of actual interference, restraint or coercion is not necessary to make out a violation of N.J.S.A. 34:13A-5.4a(1). . . ." Commercial Tp. Bd. of Ed. and Commercial Tp. Support Staff Ass'n and Collingwood, P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd 10 NJPER 78 (¶15043 App. Div. 1983). The tendency to interfere is sufficient. Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986). This provision will also be violated

derivatively when an employer violates another unfair practice provision. Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004).

Public employers are also prohibited from “[r]efusing 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. . . .” N.J.S.A. 34:13A-5.4a(5). A determination that a party has refused to negotiate in good faith will depend upon an analysis of the overall conduct and attitude of the party charged. Teaneck Tp., P.E.R.C. No. 2011-33, 36 NJPER 403 (¶156 2010).

The Commission has held that the “unilateral removal of certain work previously performed by an employee in . . . [a] negotiations unit and reassigning that work to another employee in a title outside the . . . unit constituted a violation of N.J.S.A. 34:13A-5.4(a)(1) and (5).” Passaic County Reg’l High School Dist No. 1, H.E. No. 81-26, 7 NJPER 124 (¶12053 1981), adopted P.E.R.C. No. 81-107, 7 NJPER 155 (¶12068 1981); see also, Deptford Bd. of Ed. and Deptford Ed. Ass’n, H.E. No. 81-13, 6 NJPER 538 (¶11273 1980), adopted P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980), aff’d NJPER Supp.2d 118 (¶98 App. Div. 1982) (finding that the board refused to negotiate in good faith when it effectuated a “semantic” change in the name of a position in order to unilaterally reduce the salary and benefits of an

employee despite the fact that she performed all of the duties and maintained the same workload as unit members).

In *City of Jersey City v. Jersey City POBA*, 154 N.J. 555, 573-576 (1998), the New Jersey Supreme Court analyzed the City's redeployment of police officers and use of civilians to fill the vacated positions under the Local 195, *IFPTE v. State*, 88 N.J. 393, 404-405 (1982) balancing test. The Court found that because the City implemented the reorganization primarily for the purpose of improving the Police Department's effectiveness and performance, its actions constituted an inherent policy determination that would be impermissibly hampered by negotiations. *Id.* at 573-574. The Court also analyzed the case under the unit work rule, which contemplates three exceptions whereby the transfer of unit work is not mandatorily negotiable: "(1) the union has waived its right to negotiate over the transfer of unit work, (2) historically, the job was not within the exclusive province of the unit-personnel, and (3) the municipality is reorganizing the way it delivers government services." *Id.* at 577.

ANALYSIS

The crux of this matter is whether the College's creation of the Lecturer title was a "semantic" change in name only in order to camouflage an attempt to unilaterally change terms and conditions of employment and shift instructional work even though

Lecturers perform the same job duties/responsibilities as tenure-track/tenured faculty members. See Passaic County Reg'l High School Dist No. 1; Deptford Bd. of Ed. and Deptford Ed. Ass'n; City of Jersey City.

Given the conflicting certifications, we find that there are genuine issues of material fact regarding the pertinent collective negotiations history, the rationale for creating the Lecturer title, and the job duties/responsibilities of the position as well as tenure-track/tenured faculty members, adjunct faculty, and College administrators. The parties' respective arguments, to be accepted, require a thorough consideration of competing evidence and credibility determinations - tasks that cannot be resolved through motions for summary judgment. See Hillsborough Tp. Bd. of Ed.; New Jersey State (Corrections).

ORDER

The Board of Trustees of Ocean County College's motion for summary judgment and the Faculty Association of Ocean County College's cross-motion for summary judgment are denied. This matter is remanded to the Hearing Examiner for a hearing.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Eskilson, Jones and Voos voted in favor of this decision. None opposed. Commissioners Bonanni and Wall recused themselves.

ISSUED: February 23, 2017

Trenton, New Jersey