I.R. NO. 2000-14

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-2000-336

COMMUNICATIONS WORKERS
OF AMERICA,

Charging Party.

SYNOPSIS

In an application for temporary restraints, the CWA sought to restrain the State of New Jersey from refusing to recognize and denying access to CWA, Local 1033 President Rae Roeder, and from directing its managers and supervisors to cease communicating with her, because of her conduct and remarks that may have exceeded the realm of protected activity. The Commission Designee granted temporary restraints noting that the employees selection of Roeder as their representative outweighed the harm her remarks caused, but firmly stated that Roeder would not be allowed to act with impunity in the future. The TRO is in effect until the return date on the application for interim relief scheduled for May 24, 2000.

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Appearances:

For the Respondent
John J. Farmer, Jr., Attorney General
(Michael L. Diller, Sr. DAG, of counsel)

For the Charging Party
Weissman & Mintz, attorneys
(Steven P. Weissman, of counsel)

Interlocutory Decision on Application for Temporary Restraints

On April 26, 2000, the Communications Workers of America ("CWA") filed an unfair practice charge with the Public Employment Relations Commission ("Commission") alleging that the State of New Jersey, Office of Employee Relations ("State") committed unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act") by violating

N.J.S.A. 34:13A-5.4a(1), (3) and (5).[1/] The unfair practice charge was accompanied by an application for interim relief with temporary restraints.

On April 28, 2000, an order to show cause was executed setting a return date of May 24, 2000 on the interim relief application, and a return date of May 2, 2000 on the request for temporary restraints. The parties submitted affidavits. I heard oral argument on May 2, 2000.

The charge alleges that by letter of April 20, 2000, the CWA was notified that the State would no longer recognize Rae Roeder, President of CWA Local 1033, "as an authorized representative of CWA for conducting business with the State nor grant Roeder access to premises as an authorized representative of CWA." The State referred to "unacceptable altercations with management representatives and employees" by Roeder as the basis for its letter.

In its proposed order, the CWA seeks to temporarily restrain the State from:

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

1. refusing to recognize Roeder as an authorized representative of CWA for purposes of conducting union business with the State;

2. denying Roeder access to premises as an authorized representative of CWA, in accordance with the provisions of the collective negotiations agreements between CWA and the State; and

3. directing managers in the Departments of Treasury, Education, Law and Public Safety, Military and Veterans Affairs, Banking and Insurance and Transportation and in the Office of the Public Defender, not to communicate with Roeder concerning disciplinary appeals, grievances and other union-related matters.

The parties' claims currently before me indicate that Roeder, who is on leave from her position as an employee in the State Department of Education, has been a recognized and active union representative on behalf of Local 1033 for many years. She has been in numerous state facilities to conduct union business and has filed grievances, represented employees at grievance and disciplinary hearings, and communicated with state managers and other state representatives in various departments of the state and the Office of Employee Relations.

Beginning in 1996, and proceeding throughout most of 1997, Roeder was involved in a number of verbal altercations with various State representatives while conducting union business. The State alleges that in some of those encounters Roeder became abusive and made remarks beyond those protected by the Act.

In late 1997 the State filed an unfair practice charge against the CWA regarding Roeder's conduct. That charge has been amended on several occasions.

The State also alleges that in 1998, Roeder attempted to enter a State facility without permission, and in early 1999 her conduct and remarks to officials at the Office of the Public Defender exceeded reasonable bounds. No specific events were complained of between the 1999 events and the events of March and April 2000 that gave rise to the State's action here.

On February 23, 2000, Roeder represented an employee in the first day of a disciplinary hearing. There was no suggestion her conduct was inappropriate that first day. The hearing reconvened on March 22, 2000. During a hiatus between the hearing dates, Roeder and the State's manager handling the case had discussions regarding witnesses and other procedural matters. On March 22, an argument arose between Roeder and the State manager regarding witnesses for the hearing. Roeder was yelling and her remarks may have been offensive and profane. The hearing officer separated the parties and, subsequently, cancelled the hearing for that day. A lengthy hearing was held on March 29, 2000 during which Roeder frequently pressed the hearing officer regarding his rulings and, according to the State, acted rudely and antagonistically toward him.

According to affidavits filed by the State, on several occasions in 1999 and again after March 22 and 29, 2000, the

Director of the State's Office of Employee Relations (OER) had conversations with CWA officials regarding ways to remedy Roeder's conduct. Apparently, no resolutions were reached and based upon an accumulation of information regarding Roeder's conduct, the State issued its letter of April 20, 2000. This is the first time the State has issued such a ban on a union representative.

Article I, Paragraph 19 of the New Jersey Constitution provides that public employees have the right to present proposals to their employers and make known their grievances "through representatives of their own choosing." In Dover Twp., P.E.R.C. No. 77-43, 3 NJPER 81 (1977), the Commission held that the Act at N.J.S.A. 34:13A-5.3 implemented this constitutional provision through the selection of majority representatives chosen by employees in an appropriate unit. The Commission explained that public employees are guaranteed the right to negotiate and present grievances through representatives they choose.

The Commission has applied the rights expressed in Dover with a balanced approach. In City of Hackensack, P.E.R.C. No. 78-74, 4 NJPER 214 (¶4107 1978), the City had implemented a work rule which required non-auditing department employees to obtain permission to contact the auditing department in order to avoid disrupting their work. Two non-department union representatives were disciplined for calling and visiting that department without permission to check on certain pay and insurance discrepancies affecting employees. The Commission found that the work rule was

reasonable and that the employees' actions were not protected. It held in pertinent part:

> [A]n employee may not act with impunity even though he may be engaged in what might constitute protected activity in certain circumstances. An employee's rights under the Act must be balanced against the employer's right to maintain order in its operations by punishing acts of insubordination. [4 NJPER at 215.]
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> The claimed shield of protected activity is not a license to flagrantly disregard an employer's work rules. Id. All employees including union officers and activists are expected to adhere to such rules. Where...a rule places reasonable limits on the actions of a union representative (and all other employees), those representatives cannot violate the rule under the guise of serving in their representative capacities. [Id. at 216.]

Soon thereafter the Commission in Hamilton Twp. Bd. Ed., P.E.R.C. No. 79-59, 5 NJPER 115 (¶10068 1979), set certain parameters to protect an employee's conduct under the Act. Relying on Crown Central Petroleum Corp. v. NLRB, 430 F.2d 724, 74 LRRM 2855 (7th Cir. 1965), the Commission held:

> As long as the activities engaged in are lawful and the character of the conflict is not indefensible in the context of the grievance involved, the employees are protected under...the Act." [5 NJPER at 116.]

In Hamilton, the employee had filed a grievance over a reprimand for failing to have lesson plans. During the grievance meeting the employee forcefully struck the table with his fist and moved around the small room while angry and shouting in what some believed was an intimidating fashion. Disagreeing with the hearing examiner's

recommendation, the Commission found that the employee's conduct was protected. By those two cases, the Commission established that while vigorous actions may fall within the realm of protected activity, that realm was not limitless, and employees and union representatives will be expected to adhere to a standard of reasonableness.

The Commission took another step in Black Horse Pike Reg. Bd. Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981), a case involving free speech, when it held in pertinent part:

> A public employer is within its right to comment upon those activities or attitudes of an employee representative which it believes are inconsistent with good labor relations.... [7 NJPER at 503.]

Relying on the Black Horse Pike language, the Commission in New Jersey Dept. of Ed., P.E.R.C. No. 85-85, 11 NJPER 130 (¶16058 1985) upheld the employer's reprimand of a union steward because of insulting and intimidating behavior. The Commission held:

> [A]n employee is not insulated from adverse action by his or her employer for impermissible conduct simply because the employee is a union representative. [11 NJPER at 131]

The point the Commission established is that free speech neither justifies nor protects abusive speech or conduct in the labor relations arena.

In Atlantic County Judiciary, P.E.R.C. No. 93-52, 19 NJPER 55 (¶24025 1992), aff'd 21 NJPER 321 (¶26206 App. Div. 1994), the Commission did not find a violation when an employee was transferred due to offensive and disrespectful speech which it found was outside

the bounds of protected activity. But in Atlantic County, P.E.R.C. No. 98-8, 23 NJPER 466 (¶28217 1997), the Commission found a violation after the County denied access to the terminated union president. The Commission adopted the hearing examiner's recommendation that the County's absolute ban on union access interfered with protected rights.

Perhaps the case with the most impact here is the interim relief decision in Salem County, I.R. No. 86-23, 12 NJPER 546 (¶17206 1986). That case demonstrates the Commission's intent to balance the right of union representatives to have access and to represent employees, with the employer's right to be free of abusive and inappropriate conduct by such representatives. There, the County refused to negotiate with the union's negotiating team because its president had been suspended for allegedly punching his foreman. The Commission Designee found that the president's actions were disputed. He held that the County's actions had a chilling effect on the negotiations process resulting in his finding that there was a substantial likelihood of success and irreparable harm. He ordered the County to negotiate with the union president and his team. The Commission Designee, however, firmly disagreed with the union's argument that it had an absolute right to have any representative of its choosing at the negotiations table. The Designee held that the union:

> ...may not have an absolute unfettered right to have anyone it so chooses represent it in negotiations. 5.4(b)(3) of the Act makes it an unfair practice for an employee organization to

> refuse to negotiate in good faith with a public employer. Opprobrious conduct on the part of an employee representative might strip an employee representative of this right. [12 NJPER at 547.]

Since the Commission Designee was concerned about the union president's conduct, he retained jurisdiction to vacate the order in the event the union president engaged in any inappropriate conduct during the negotiations process.

These cases demonstrate the Commission's preference for a result that preserves the rights of both parties. In light of the parties' submissions, I note three specific areas in which the parties' interests must be balanced in determining the propriety of representational conduct. The State's April 20, 2000 letter may be consistent with the proposition expressed in case law that it may be entitled to take appropriate action under the right circumstances, but at this juncture, an absolute withdrawal of recognition and access does not appear to be warranted.

First, Roeder's entitlement to access to premises is subject to the terms of the parties' collective agreement. The parties' access clause, Article 25, Section A(1), provides in relevant part:

> Union officials and duly authorized union representatives, whose names and identifications have been previously submitted to and acknowledged by the State, shall be admitted to the premises of the State on union business. Requests for such visits shall be directed with reasonable advance notice to State officials who shall be designated by the State and shall include the purpose of the visit, proposed time and date and specific work areas involved. Permission for such visits shall not be

> unreasonably withheld. Provided that requests have been made pursuant to this paragraph, such Union officials shall have the opportunity to consult with employees in the unit before the start of the work shift, during lunch or breaks, or after completion of the work shift. The State shall designate appropriate places for such meetings at its facilities.

The State is entitled to deny access to Roeder or any union representative who does not comply with the provisions of this clause. I also note the State cited Article 2, Section C.6, providing that: "It is agreed that verbal and/or physical harassment of an employee is inappropriate." This quote sets a standard applicable to the employee organization and its representatives as well as the employer.

Second, labor organizations and their representatives, just like public employers and their representatives, are obligated to conduct themselves and negotiate in good faith. It is unclear to me at this juncture whether Roeder's conduct falls within the boundary of good faith. As the Commission Designee noted in Salem County, it would violate 5.4b(3) of the Act if an employee organization--through its representative--refused or failed to negotiate in good faith due to the representatives' opprobrious conduct.

In its oral presentation, the State argued that Roeder's conduct violates both the 5.4b(3) good faith provision of the Act, as well as the unlawful interference/coercion provision in 5.4b(2). If Roeder's or any union representative's conduct at a meeting violates either provision, that individual's conduct is outside the

bounds of activity protected by the Act and the State may properly discontinue the meeting, take any appropriate disciplinary action, or seek an unfair practice remedy before the Commission. If the union representative engages in egregrious misbehavior which warrants terminating a representational proceeding, it is the employee being represented who loses out by not receiving the representation he or she is entitled to under the Act.

Third, as demonstrated by the decisions in City of Hackensack, New Jersey Department of Education, and Atlantic County Judiciary, an employer is entitled to take disciplinary or other appropriate action against an employee/union representative whose conduct is outside the bounds of protected activity. If Roeder's or any union representative's conduct exceeds the bounds of protected activity in a given context, the State's representative(s) may end the conversation, meeting or hearing, ask the union representative to leave or have that person escorted from the State facility, and condition future access to that facility upon an assurance that future conduct will not be improper.

I am not deciding here the specific type or level of behavior that would allow the State to act in restricting Roeder's access. The State must be guided by the cases and the circumstances in a given context.

The State's submissions focus on Roeder's alleged misbehavior on March 22 and 29 and an alleged pattern of egregious misconduct. These submissions raise legitimate concerns, but do not

appear at this juncture to warrant a total ban on Roeder's interactions with the State since that ban would have such a dramatic effect on the employees' choice of representative. I note in this regard that CWA recognized in oral argument that I have the authority to limit my order to include a procedure for a return date on short notice to dissolve some or all of the restraints in the event Roeder engages in conduct outside the bounds of protected activity. I believe that such a procedure is preferable to a total ban and will both protect the employees' right to have the representative of their choice represent them and protect the employer's right to maintain decorum and order in its operations.

In light of this Decision, Roeder has an opportunity. She can engage in good faith relations with representatives of the State and begin anew to ensure that her conduct conforms to that which is protected by the Act in order to effectively represent the employees in her local. But if she engages in conduct similar to some of which was presented by the State in its oral argument and affidavits, then her current right to engage in representational activities with the State may be restricted or even lost. In accordance with the language in City of Hackensack, a union representative may not misbehave with impunity.

Accordingly, consistent with the above discussion, I issue the following:

ORDER

The State of New Jersey is temporarily restrained from: refusing to recognize Rae Roeder as an authorized CWA representative

for purposes of conducting union business with the State; denying Roeder access to premises as an authorized CWA representative in accordance with the provisions of the parties' collective agreements; and directing managers in the Departments of Treasury, Education, Law and Public Safety, Military and Veterans Affairs, Banking and Insurance, Transportation and in the Office of the Public Defender, not to communicate with Roeder concerning disciplinary appeals, grievances and other union related matters. This order is subject to a motion for dissolution or modification of some or all of the restraints on two day's notice based upon new circumstances as discussed above.

This interim order will remain in effect pending the return date on the Order to Show Cause, on May 24, 2000.

Arnold H. Zudick
Commission Designee

Dated: May 4, 2000
Trenton, New Jersey