

E. D. NO. 79

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,  
Respondent,

- and -

Docket No. CO-12

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

SYNOPSIS

Based upon the unfair practice charge, stipulations of fact, and the parties' legal positions, the Executive Director refuses to issue a complaint in an unfair practice proceeding. The employee organization alleged that the public employer refused to negotiate in good faith by proposing no increase in existing salaries and fringe benefits due to a fiscal crisis. Viewing the totality of the parties' conduct throughout their negotiations on all issues, the Executive Director is unable to conclude that the public employer's adamant position on economic issues illustrated an intention not to reach an agreement.

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REFUSAL TO ISSUE COMPLAINT

An Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") by the Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO (the "Council") on February 7, 1975 alleging that the State of New Jersey (the "State") has refused to negotiate in good faith in violation of N.J.S.A. 34:13A-5.4(a)(5).<sup>1/</sup> The case was processed in accordance with the Rules of the New Jersey Public Employment Relations Commission.<sup>2/</sup>

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<sup>1/</sup> That subsection prohibits employers from "refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning the terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

<sup>2/</sup> The processing phase of this case has been particularly extensive due in part to an amendment of the Commission's Rules on Unfair Practice Proceedings during the pendency of the charge. Initially, when the charge was filed, N.J.A.C. 19:14-1.6 provided for the Commission or its named designee to "cause an investigation to be conducted into the matters and allegations set forth" in the charge. Evidence was to be submitted along with the statements of position of the parties, and the Charging Party had to meet a burden of establishing a prima facie case before a complaint would be issued. N.J.A.C. 19:14-2.1. Effective April 1, 1975 N.J.A.C. 19:14-1.6 was amended to modify the initial burden and to change the initial step from one of "investigation" of the charge to a "processing" of the charge. Also, N.J.A.C. 19:14-2.1 was amended to provide that a complaint would issue if the "allegations of the charging party, if true, may constitute (cont.)"

Upon receipt of the charge, the parties were requested to submit written statements of position concerning the allegations contained in the charge. The parties were requested to submit copies of their contract and any further documentation they deemed important to their respective positions. Following receipt of this information, a conference was scheduled between the parties for the purpose of clarifying the respective positions of the parties with reference to the issues raised by the charge. N.J.A.C. 19:14-1.6(c), formerly N.J.A.C. 19:14-1.7. This conference was held on April 9, 1975 at the offices of the Commission. At the conclusion of the conference, it was agreed that briefs would be submitted by both sides.

It became apparent at that conference that the parties differed very little, if at all, with respect to the facts which surrounded the dispute. It was agreed that after receipt of the briefs, a second conference might be held to attempt to develop stipulations of fact which would be used to assist the Commission or its named designee in determining if a complaint should issue.<sup>3/</sup> A second conference for this purpose was held on May 21, 1975 at the offices of the Commission, and lengthy stipulations were agreed upon

<sup>2/</sup> (cont.) unfair practices on the part of the respondent." The assigned staff member can still hold a conference with the parties prior to a decision being made on whether a complaint is warranted by the charge, but now the conference is an "exploratory conference" (N.J.A.C. 19:14-1.6(c)) rather than an "investigatory conference" (N.J.A.C. 19:14-1.7, no longer in existence). Additionally, the parties herein have entered into extensive stipulations of fact. This has resulted in the compilation of an unusually thorough record for the pre-complaint stage of a case.

<sup>3/</sup> This agreement was confirmed by letter from the Director of Unfair Practices and Representation to the parties dated April 14, 1975.

which set forth the factual circumstances of the case to that date. The stipulations of fact prepared at the May 21, 1975 meeting were reduced to writing and transmitted to the parties. Both parties indicated in writing that the stipulations were acceptable, with some minor corrections of typographical errors, and that they accurately set forth the complete factual background of the case.

N.J.A.C. 19:14-2.1 sets forth the standard for the issuance or non-issuance of a complaint in an unfair practice proceeding:

After a charge has been filed and processed, if it appears to the Commission or its named designee that the allegations of the charging party, if true, may constitute unfair practices on the part of the respondent, and that formal proceedings in respect thereto should be instituted in order to afford the parties an opportunity to litigate relevant legal and factual issues, the Commission or its named designee shall issue<sup>4/</sup> and cause to be served on all parties a formal complaint...

The undersigned, as the Commission's named designee,<sup>5/</sup> has considered the Council's factual allegations as contained in the charge, the parties' stipulations of fact, and the legal arguments advanced by the parties in their briefs, and has determined that it does not appear that an unfair practice has been committed, that no useful function would be served by the institution of formal proceedings to further litigate the legal and factual issues raised, and therefore declines to issue a complaint.

In its charge the Council alleges that the State delivered an "ultimatum" on January 15, 1975, repeated on January 24, 1975, to the effect that "there would be no increases for next year, there would be no annual increments, there would be no new benefits, and there would be no job security." The charge further alleges that this position "is also a violation of the

<sup>4/</sup> Amended as of April 1, 1975. See, note 2, supra.

<sup>5/</sup> See, 7 N.J.R. 78(a) (February 6, 1975).

'back-to-work' agreement made by Lewis Kaden, Counsel to Governor Byrne, on November 27, 1974." It is alleged that the agreement provided, among other things, that "negotiations would be held on all issues properly raised."

The stipulated facts are as follows. The parties' current contract was entered into on February 22, 1974 and expires on June 30, 1976. The contract contains a reopener clause for the negotiation commencing no later than October 1, 1974 of salaries and fringe benefits to become effective on or after July 1, 1975. The Council submitted the bulk of its proposals to the State on September 30, 1974.

Negotiating sessions were held on five occasions beginning October 9, 1974 and ending November 14, 1974. The State made no offer with regard to salaries prior to November 18, 1974, and the Council conducted a strike from November 18, 1974 to November 27, 1974.<sup>6/</sup> On November 27, 1974 a statement by Lewis Kaden, Counsel to the Governor, was issued on behalf of the State, and accepted by the Council, as the basis for the termination of the strike and the resumption of collective negotiations. The statement concluded with the provisions that "negotiations will continue until an agreement is reached", and that if an agreement is reached prior to the budget submission date, the proposed budget would reflect the agreement. However, if negotiations had not been completed as of the budget submission date, the terms of the agreement, when reached, would be submitted to the Legislature as a supplementary item to be put in the budget prior to its adoption. The statement called for negotiations to commence immediately under the supervision of a mediator, and accordingly a mediator was appointed by the Commission on December 7, 1974 to assist in the negotiating process.

<sup>6/</sup> Several of the Council's legal arguments are addressed to certain alleged conduct of the State occurring prior to November 27, 1974. As the conduct referred to is neither alleged in the charge nor contained in the stipulations of fact, it is not properly before the undersigned for consideration.

To date more than 18 mediation sessions have occurred. The mediator has scheduled the sessions and determined their length, anywhere from six to sixteen hours. The parties have negotiated and reached tentative agreement in several areas, and at least one of these settled issues has already been implemented.<sup>7/</sup> Other items initially raised by the Council have been removed or modified during the course of the negotiations on those issues which have been settled. A dispute has arisen concerning the negotiability of certain other items as terms and conditions of employment or as being within the scope of the reopener clause of the contract. Still other items are argued to be negotiable and negotiations continue on them.

The State made its first economic proposal on salaries and fringe benefits on January 14, 1975, prior to the budget submission date. The offer consisted of maintenance of salaries and fringe benefits at their present levels for the 1975-76 fiscal year, with no salary increments for that year. The State maintained that this proposal was based upon the severe fiscal restraints confronting it, including the large anticipated shortfall in revenue and the allocation of governmental priorities by the Governor. At the time the State made this offer it explained that this was its salary proposal for the immediate future, but that this position might be re-evaluated in or about March, depending primarily on some remedy being found for the fiscal crisis in which the State found itself. The Council rejected this proposal at the

<sup>7/</sup> By Letter of Agreement V, appended to the contract, the parties were to continue to negotiate certain matters pertaining to State college librarians. Several parts of this question have been resolved. Agreement has also been tentatively achieved on the issue of a grant compensation program, subject to a question on travel restrictions. An expanded sabbatical eligibility program has been negotiated and implemented. All of these items have been negotiated and resolved during the course of the negotiations which are the subject of the instant charge.

January 14, 1975 meeting and requested the State to reconsider its position. Mediation sessions continued, and as of May 21, 1975, the date of the stipulations, the State had maintained the same position on salaries and fringe benefits.

The parties have expressly stipulated that there are no other factual issues.

As of May 21, 1975, and as of the date of this decision, neither party has requested the invocation of fact-finding.<sup>8/</sup> In fact, an additional mediation session was held on May 28, 1975, at which time the State did make a proposal with regard to paying some salary increments for the ensuing year. Although the proposal was less than the total money allotted for increments in the past year, it represented an increase from its former position of no increments. The State also offered a small increase in summer salaries, which was the first increase in summer pay offered in seven years.<sup>9/</sup> Another mediation session was held on June 6, 1975 and mediation continues to date.<sup>10/</sup>

<sup>8/</sup> The Council had filed a Request for Invocation of Fact-Finding on October 29, 1974 but that request was closed out on November 14, 1974. The parties, as stated, agreed to mediation and that process has been on-going since December 7, 1974.

<sup>9/</sup> At the conclusion of the May 21st conference, it was agreed that the parties would submit statements of the events of the May 28th mediation session as part of the stipulations of fact. Although the statements submitted by the parties are not identical, the above recitation is taken from the statement submitted by the Council's President, dated May 29, 1975.

<sup>10/</sup> During the preparation of the instant determination the Council filed additional materials on August 4 and 5, 1975 concerning alleged conduct on the part of the State occurring in July, 1975. The Council has requested the acceptance of these additional materials as an amendment to the instant charge, pursuant to N.J.A.C. 19:14-1.5. Proof of service upon the State was not submitted, as required by N.J.A.C. 19:14-1.4. More importantly, however, the parties have previously agreed that the instant determination would be based upon the charge and the stipulations of fact. The proposed amendment is accordingly disallowed. The Council is certainly not precluded from filing a separate charge with respect to these matters.

In determining whether a complaint should issue herein, the undersigned does not hesitate to draw upon established principles of labor law universally accepted in both the private and public sectors with respect to the evaluation of conduct in terms of the obligation to negotiate (or bargain) in good faith. Nothing in the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1, et seq. (the "Act") would appear to manifest a contrary intention on the part of the Legislature.<sup>11/</sup>

It is necessary to subjectively analyze the totality of the parties' conduct in order to determine whether an illegal refusal to negotiate may have occurred.<sup>12/</sup> The Council argues that such a subjective analysis will reveal bad faith on the part of the State.<sup>13/</sup> The State contends that the totality of its conduct cannot yield such a finding.

<sup>11/</sup> See, Lullo v. Int'l Assn. of Fire Fighters, 55 N.J. 409, 424 (1970).

<sup>12/</sup> Although a refusal to negotiate can, under certain circumstances, be found without a subjective analysis of "good faith," the Council does not argue that such a "per se" violation is presented herein. Per se violations of the duty to negotiate occur, for example, upon an employer's complete circumvention of the majority representative or of the negotiating process.

<sup>13/</sup> One of the Council's arguments relates to the method by which such a subjective analysis is to be made. Instead of viewing the parties' conduct in one lump sum, the Council suggests segmenting the analysis into three separate time periods as follows: 1. September 30, 1974 (the Council's submission of the bulk of its proposal) through November 27, 1974 (the conclusion of the strike); 2. November 27, 1974 (date of the Kaden statement) through January 14, 1975 (the State made its first economic proposal on salaries and fringes); 3. January 14, 1975 to date. The undersigned considers the suggested segmentation to be inconsistent with the "totality of conduct" approach utilized herein and advanced by the Council in its memorandum of law. Individual events viewed in isolation do not necessarily reveal the intentions or motives of a party. Furthermore, even if this segmented approach were acceptable, we could not consider the alleged occurrences during the first proposed time period for purposes of finding an independent violation, as the earliest date referred to in the charge is November 27, 1974. To the extent that the stipulations refer to events pre-dating November 27, 1974 they will be considered in viewing the parties' total conduct.



A determination that a party has refused to negotiate in good faith will depend upon an analysis of the overall conduct and/or attitude of the party charged. The object of this analysis is to determine the intent of the respondent, i.e., whether the respondent brought to the negotiating table an open mind and a sincere desire to reach an agreement, as opposed to a pre-determined intention to go through the motions, seeking to avoid, rather than reach, an agreement.

The "totality of conduct" presented in this case does not reveal a fixed determination on the part of the State to avoid, rather than reach, an agreement. It is admitted by the Council that negotiations have taken place and continue at the present time. Concessions have been made by both sides and tentative agreements have been reached on several issues. In fact, at least one such agreement has been implemented. Neither party has requested the invocation of fact-finding and mediation is continuing.

The Council argues strenuously that the State's January 14, 1975 proposal of no increase amounts to a refusal to negotiate in good faith. The Council does not contest the existence or seriousness of the fiscal crisis upon which the State relied to justify its position at that time that it could not offer a pay increase. Instead, in a statement of position received by the Commission on February 18, 1975 the Council argues that the State's fiscal crisis should not preclude normal negotiations: "[T]he State could negotiate fairly with its employees and incorporate the results of such negotiations into the budget in asking the Legislature to provide additional new revenues to cover the expenditure." The Council in effect argues that the negotiations process may proceed in a vacuum without reference to the public employer's fiscal position. The undersigned is not prepared to characterize as bad faith a public employer's consideration of its overall economic position in the context of its collective negotiations conduct.

Although the charge characterizes the State's January 14 position as an "ultimatum," and the Council argues that the State has taken a "take-it-or-leave-it" stance from January 14 on, the stipulations of fact indicate otherwise. The stipulations reveal a willingness on the part of the State to negotiate and make concessions in all areas except salary. With respect to that major area of dispute, the stipulations characterize the State's January 14 position as its first economic proposal and indicate that the State coupled this proposal with the prospect of a later re-evaluation of its position if and when the fiscal crisis was resolved. The Council acknowledges that at the May 28th meeting the State made an improved monetary offer with respect to summer salaries and increments. Thus, the Council does not maintain that the State was unbending even in this area. It stipulates that the State's first offer carried with it the possibility of future movement, and concedes that in fact, some limited movement has occurred. Given this set of facts, the undersigned is unable to conclude that such conduct illustrates an intention not to reach an agreement.<sup>14/</sup>

It is well established that the duty to negotiate in good faith is not inconsistent with a firm position on a given subject. "Hard bargaining" is not necessarily inconsistent with a sincere desire to reach an agreement. An adamant position that limits wage proposals to existing levels is not

<sup>14/</sup> The Council also maintains in its brief that the status quo salary proposal of January 14 was an unfair practice because the reopener clause requires that salaries be increased and the State's offer, in violation of the intent of the reopener clause, manifests bad faith. The Council cites no legal authority for this proposition, nor does it point to contract language establishing that negotiations pursuant to the reopener clause were to result in an increase. The reopener clause has a proviso that it could be waived by mutual agreement, thus allowing for the possibility that existing salaries might be maintained. The Council's exercise of the reopener obligated the State to negotiate, but not to agree to any particular proposal.

necessarily a failure to negotiate in good faith. Were the State to have been inflexible on the salary issue, which it appears not to have been, a refusal to negotiate in good faith would not be found without an evaluation of its conduct throughout the negotiations on all issues.

There is a significant difference between a refusal to discuss or negotiate salary, regardless of the reason, and the formulation of a proposal based upon the economic realities as viewed by the public employer. In the first, there may be a refusal to negotiate in fact; the employer has refused to meet with the employee organization on the issue. In the second, the situation presented herein, the public employer is willing to meet with the employee organization and negotiate on salary and all other issues. The fact that the negotiating position reflects the severe economic crisis which the public employer feels exists, does not negate the intention to reach an agreement. It is rather a reflection of the duty imposed on the employer. Good faith collective negotiations do not require one party to adopt the position of the other; they only require a willingness to negotiate the issue with an open mind and a desire to reach an agreement. The fact that the two parties approach negotiations with different priorities does not mean that either side is not negotiating in good faith.

The stipulated facts show a willingness on the State's part to negotiate on all issues, a willingness to make concessions on various issues, and even a willingness to implement at least one agreed-upon subject prior to the conclusion of the total agreement. There is no allegation of any attempt to undermine the employee organization in its relationship with its members or to partake

of any of the other activities often cited as factors pointing to a lack of good faith. The State has been adamant on one issue — salaries — and while this is concedely a major issue, it has given its reasons for its position. On the facts presented herein, the undersigned cannot find that the State has exhibited bad faith by taking into consideration the reasons cited in formulating its position on salaries.

The undersigned, having considered the parties' total conduct, can find no indication of a desire or intention not to reach an agreement on the part of the State, nor of any other conduct which might constitute a refusal to negotiate in good faith. The undersigned accordingly hereby refuses to issue a complaint herein, and the instant case is hereby closed.

BY ORDER OF THE EXECUTIVE DIRECTOR

  
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Jeffrey B. Tener

DATED: Trenton, New Jersey  
August 14, 1975



**STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION**

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September 18, 1975

**ERRATUM**

The date on page 11 of E. D. NO. 79, In re State of New Jersey,  
should be August 14, 1975, not August 14, 1974.