I.R. NO. 2005-1

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Respondent,

-and-

Docket Nos. CO-2005-040
CO-2005-041

COMMUNICATIONS WORKERS OF AMERICA,

Respondent,

-and-

PUBLIC SECTOR MANAGERS' ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Sector Managers' Association (PSMA) filed unfair practice charges against the State of New Jersey (State) and the Communications Workers of America (CWA). PSMA asserts that the State has violated the Act by engaging in a process calling for an umpire to determine whether titles sought in its Representation Petition should be included in any of the extant collective negotiations units currently represented by the CWA. PSMA claims that by participating in this process, the State has demonstrated favoritism for one employee organization over another and interfered with the formation and existence of PSMA in violation of the New Jersey Employer-Employee Relations Act. In its charge against the CWA, PSMA alleges that the CWA has conspired with the State to negotiate over titles sought in its Representation Petition. Applying Commission decisions in Middlesex Cty. and Bergen Cty. the Commission Designee found that PSMA met the requisite elements warranting the grant of interim relief and order that the State and CWA refrain from meeting for the purpose of resolving the collective negotiations unit placement of titles contained in PSMA's Representation Petition.

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Appearances:

For the Respondent, State of New Jersey
Genova, Burns & Vernoia, attorneys
(Andrew P. Oddo, of counsel)

For the Respondent, Communications Workers of America
Weissman & Mintz, attorneys
(Steven P. Weissman, of counsel)

For the Charging Party
Neidweske Barber, attorneys
(Lucille LaCosta-Davino, of counsel)

INTERLOCUTORY DECISION

On August 13, 2004, the Public Sector Managers' Association (PSMA) filed unfair practice charges with the Public Employment Relations Commission (Commission) against the State of New Jersey (State) and the Communications Workers of America (CWA) alleging that the State and the CWA 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), (2) and (7)[1/] and 5.4b(1) and (5)[2/], respectively. On August 20, 2004, PSMA amended its unfair practice charges against the State and the CWA, respectively. In its charge against the State, PSMA alleges that the State has interfered with its attempt to become the majority representative of employees identified in its separately filed Representation Petition (Docket No. RO-2004-051). PSMA asserts that the State has violated the Act by proceeding with a process calling for an umpire to determine whether titles sought in its Representation Petition should be included in any of the extant collective negotiations units currently represented by the CWA. PSMA asserts that by engaging in the process, the State has demonstrated favoritism for one employee organization over

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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; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (7) Violating any of the rules and regulations established by the commission."

2/ These provisions prohibit employee organizations, 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) Violating any of the rules and regulations established by the commission."

another and interfered with the formation and existence of PSMA in violation of the Act.

In its charge against the CWA, PSMA alleges that the CWA has conspired with the State to negotiate over titles sought in its Representation Petition. PSMA further contends that the CWA misrepresented the election process to certain State employees leaving them with the impression that they had no choice but to be included in one of the existing CWA collective negotiations units.

On August 31, 2004, PSMA filed an application for interim relief seeking to restrain the State and CWA from arbitrating the status of the disputed employees on September 10, 2004 before a designated umpire as agreed to by the State and the CWA. On September 1, 2004, I executed an order to show cause and set a return date for September 8, 2004. The parties submitted briefs, affidavits, and exhibits in accordance with the Commission's rules and argued orally on the scheduled return date. The following facts appear.

The State and the CWA are parties to a collective negotiations agreement covering the period July 1, 2003 through June 30, 2007. On June 1, 2003, as part of their negotiations, the State and the CWA agreed to the following provision:

> During negotiations for the 7/1/03-6/30/07 Agreements, CWA identified exempt titles to be included in CWA negotiations units. The parties agree that certain of the exempt

titles identified by CWA in ranges 30 and below, and in ranges 88, 98 and 99, will be included in appropriate CWA negotiations units. To determine the exempt titles to be included in CWA units, the following procedure will be used:

a) During the first six months of F/Y '04, CWA and OER will review the above titles in an effort to reach agreement on the titles to be included in the appropriate CWA negotiations units.

b) If the parties are unable to reach agreement on the titles to be placed in CWA negotiations units, the parties will designate James Mastriani as the Umpire to resolve all disputes relative to said exempt titles.

c) By July 1, 2004, the Umpire shall determine which titles are properly excluded as managerial executive or confidential titles and which titles are properly included in CWA negotiations units. The Umpire's decision shall be final and binding upon the parties and shall not be subject to challenge or appeal in any administrative, judicial or other forum.

Pursuant to the above-quoted provision, a meeting was scheduled for September 10, 2004 for the purpose of commencing that portion of the process involving the umpire.

The State contends that the agreement it reached with the CWA was entered into some six months prior to PSMA's representation petition. The State asserts that by attending the September 10, 2004 meeting pursuant to the terms of its agreement

with the CWA, it was merely attempting to satisfy its contractual obligation. The State claims that there was nothing illegal or inappropriate regarding its good faith attempt to comply with its lawfully negotiated agreement with the CWA. Accordingly, the State urges that it not be enjoined from proceeding with the scheduled meeting.

The CWA contends that the arbitration proceeding established pursuant to the agreement between it and the State is designed to determine whether certain titles, which it claims are performing the work of CWA unit members, are properly excluded as managerial executives or confidential employees or should be added to a negotiations unit currently represented by the CWA. CWA argues that the Commission's rules (N.J.A.C. 19:11-3.1 et seq.) encourage voluntary resolution of disputes over proper unit placement of titles. CWA asserts that any unit placement determination made by the umpire through the agreed-upon process would only be binding upon the State and CWA and not upon PSMA or the Commission. Thus, the CWA argues that as PSMA's representation petition moves forward, the Commission could remove any title that it would determine to have been wrongfully placed in one of the negotiations units represented by the CWA through the arbitration process.

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a

final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

It is the Commission's view that the proper action to be taken by any employer faced with knowledge of pending questions concerning representation of employees is to remain neutral in its position as between rival employee organizations. In Middlesex Cty. (Roosevelt Hospital), P.E.R.C. No. 81-129, 7 NJPER 266 (¶12118 1981), the Commission held that an employer with knowledge of a pending petition and question concerning representation violates N.J.S.A. 34:13A-5.4a(1) and (2) if it negotiates with the incumbent union before the Commission resolves the representation issue. The Commission stated:

> We believe that the proper action to be taken by an employer who is faced with and has knowledge of a pending question concerning representation to avoid the committing of an unfair practice pursuant to N.J.S.A. 34:13A-5.4a(1) and (2), is not to begin or if begun, to cease negotiations with the incumbent union until the representation issue has been properly determined. [Id. at 267.]

Thus, during the pendency of the representation question, the rights of all parties must be protected. No single party or combination of parties should be able to frustrate this process or the rights of employees. An employer's neutrality with respect to rival employee organizations, is paramount if its employees are to be accorded the opportunity to make a considered choice for a majority representative. In Bergen Cty., P.E.R.C. No. 84-2, 9 NJPER 451, 458 (¶14196 1983), the Commission reaffirmed its holding in Middlesex Cty. and stated:

> We steadfastly believe that the act of continuing to negotiate, despite pending representation proceedings, inevitably and unmistakably tends to transmit to unit employees a signal that their employer may prefer the incumbent to its rival and may be inclined to treat them more favorably if they agree with the employer's choice.
>
> We also believe that allowing an employer to negotiate with an incumbent organization during representation proceedings raises the unacceptable possibility that an employer may seek to influence the election process through its negotiations strategy. An employer which wishes to have an incumbent organization reelected can hasten the negotiations process and sweeten the terms of a collective agreement in order to appeal to undecided voters; an employer which wishes to have an incumbent organization defeated can retard the negotiations process and take a hard line stance in order to make the incumbent look ineffective. In either case, the election process can be turned into a contract ratification vote manipulated by the employer's strategy and preferences rather than an examination of the positions of competing organizations in an atmosphere of employer neutrality. We conclude, as we did

> in Middlesex Cty., at p.267, that '[t]he interests of a fair election where a pending question concerning representation exists can only be served by requiring employer neutrality.'

I find that the Commission's intent expressed in Middlesex Cty. and Bergen Cty. applies in the circumstances present here. The titles at issue in the State/CWA process are the same as those sought by PSMA in its Representation Petition. In a broad context, the process established by the State and the CWA to identify unrepresented titles for inclusion in one of the collective negotiations units currently represented by the CWA may constitute negotiations. Such negotiations could ultimately be found to violate the Act under Middlesex Cty. Thus I find that PSMA has established the requisite likelihood of success on its legal and factual allegations in this matter.

Regarding irreparable harm, it also appears likely that the operation of the arbitration process during the pending representation proceedings may transmit to employees a signal of employer preference. Once perceived by the employees, it would be difficult, if not impossible, to undo such perception. Moreover, it is conceded that even if the arbitration process resulted in the placement of a title in one of the CWA represented units, subsequent review by the Commission could result in its removal. Should titles be even temporarily included in a collective negotiations unit which the Commission

ultimately finds to be incorrectly placed, after the passage of time, the Commission will experience greater difficulty in realigning title assignments to other units as a title becomes embedded in the scheme of terms and conditions of employment associated with any particular collective negotiations unit. Accordingly, I find such circumstances to constitute irreparable harm under the particular facts in this case.

In weighting the relative hardship to the parties resulting from the grant or denial of interim relief, I find that the scales tip in favor of PSMA. The interim relief order is designed to maintain the status quo ante. There is little harm to the State or the CWA since the titles designated for review under their agreed-upon process are the same titles identified for review as part of the Commission's on-going representation proceeding. Stopping the arbitration also avoids the potential transmission of any employer preference to affected employees. The conveyance of any employer preference might cause significant hardship to PSMA.

The public interest is not injured by granting an interim relief order in this case. The public interest is fostered by requiring all parties to adhere to the tenets of the Act. The laboratory conditions necessary for the free and fair conduct of a Commission election, if any, are preserved under the order issued here.

The above-captioned matters will proceed through the normal unfair practice processing procedure.

ORDER

The State of New Jersey and the Communications Workers of America are restrained from engaging in further bi-lateral meetings for the purpose of resolving the collective negotiations unit placement of titles petitioned for in RO-2004-051 and identified by the CWA pursuant to terms of the State/CWA agreement cited in this decision. This interim order will remain in effect pending a final Commission order in the above-captioned matters.

Stuart Reichman
Commission Designee

Dated: September 17, 2004
Trenton, New Jersey