I.R. No. 2008-10

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BERGEN COMMUNITY COLLEGE,

Respondent,

-and- Docket No. CO-2008-210

BERGEN COMMUNITY COLLEGE FACULTY ASSOCIATION; BERGEN COMMUNITY COLLEGE SUPPORT STAFF ASSOCIATION; and BERGEN COMMUNITY COLLEGE PROFESSIONAL STAFF ASSOCIATION,

Charging Parties.

SYNOPSIS

A Commission Designee denies an application for interim relief filed by the Bergen Community College Faculty Association, Bergen Community College Support Staff Association, and the Bergen Community College Professional Staff Association.

The Charging Parties allege that Bergen Community College violated the Act when it unilaterally modified the College's smoking policy to ban smoking and the use of tobacco products anywhere on the College Campus and when it announced that employees violating the policy would be subject to discipline. Previously employees were allowed to smoke in designated outdoor areas and in their own vehicles.

The designee concludes that as Livingston Bd. of Ed., P.E.R.C. No. 91-8, 16 NJPER 440 (¶21189 1990), aff'd NJPER Supp.2d 267 (¶220 App. Div. 1991) held that a ban on smoking was, on balance, a non-negotiable issue of educational policy, he cannot hold that the charging parties are likely to succeed on their claim that the College was obligated to negotiate with the Associations before imposing the total ban. While he concludes that the imposition of discipline on employees for smoking in areas where that activity was previously permitted is a mandatorily negotiable issue, he denies that aspect of the interim relief application because the threat or imposition of discipline, does not constitute irreparable harm.

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Appearances:

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For the Respondent, DeCotiis, Fitzpatrick, Cole & Wisler, LLP, attorneys (George Frino, of counsel and on the brief, Jonathan Ash, on the brief)

For the Charging Parties, Selikoff & Cohen, P.A., attorneys (Keith Waldman, of counsel)

INTERLOCUTORY DECISION

On January 29 and February 5, 2008 the Bergen Community College Faculty Association, the Bergen Community College Support Staff Association, and the Bergen Community College Professional Staff Association (Charging Parties or Associations), filed an unfair practice charge and amended charge against the Bergen Community College. The charge alleges that the College engaged in unfair practices in violation of the New Jersey Employer-Employee Relations Act, specifically N.J.S.A.

34:13A-5.4a(1) and (5), when it announced and then implemented changes in an existing policy regarding smoking on campus. The change bans smoking and the use of tobacco products anywhere on campus and provides that employees who smoke or use tobacco products anywhere on the College's grounds would be subject to discipline.[1/] Since at least 1992, employees could smoke in designated exterior areas and in their own vehicles.

The charge was accompanied by an application for interim relief. N.J.A.C. 19:14-9.1 et seq. The Associations seek an order directing the college to suspend implementation and enforcement of the new smoking policy and to engage in collective negotiations with the Associations over the portions of the policy pertaining to employee health, safety and discipline.

On February 1, 2008, an order to show cause was executed and a return date was scheduled for February 21, 2008. The Associations' application was accompanied by a letter brief, a certification and exhibits. On February 13, the College filed an Answer and the next day it submitted a brief and appendix opposing the Associations' application. After hearing the

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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; (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."

parties' arguments via telephone conference call, I orally denied the interim relief application. This opinion contains my findings, analysis and conclusions and an order denying the Association's request for interim relief.

The College and the Associations are parties to collective negotiations agreements effective from July 1, 2007 through June 30, 2011. Since at least 1992, the College has maintained a policy banning smoking in all campus buildings and in College-owned vehicles. However, the College designated five outdoor areas where smoking was permitted. Employees were also allowed to smoke inside their own parked vehicles. The 1992 policy also contains progressive disciplinary sanctions (warning, letter, and initiation of municipal court complaint for three or more violations within four months).

On October 3, 2007, the College adopted a policy designating the entire campus as "smoke-free." Effective January 1, 2008 smoking (including using smokeless tobacco) would be banned on the College's campus, and that employees who violate the policy shall be subject to "appropriate disciplinary action."[2/]

The Associations allege that the College refused to negotiate over the changes in the smoking policy before adopting it. The College maintains that the changes are non-negotiable.

2/ Because the College was on a break on New Year's Day, enforcement of the policy actually began on January 22.

ANALYSIS

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).

In applying these standards, a Commission designee must be cognizant of and apply pertinent Commission and court precedent. The party seeking interim relief must establish that the Commission is substantially likely to sustain its position.

N.J.S.A. 34:13A-5.3 provides:

> Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

This statutory language embodies the Act's duty to negotiate over issues that are mandatorily negotiable. Galloway Tp. Bd. of Ed v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 35-36 (1978). Mandatorily negotiable issues are those matters that: 1) intimately and directly affect the work and welfare of public

employees; 2) have not been fully or partially preempted by statute or regulation; and 3) on which a negotiated agreement would not significantly interfere with the determination of governmental policy. In re IFPTE Local 195 v. State, 88 N.J. 393, 404 (1982). Where a statute, expressly, specifically and comprehensively fixes a term and condition of employment, the public employer lacks discretion to make an agreement that deviates from the statutory mandate and no obligation to negotiate exists. Bethlehem Tp. Bd. of Ed. and Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 45-46 (1982). But, where the statute or regulation establishes a floor, ceiling, or range, negotiations over proposals within those limits are mandatory. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978).

The Associations argue that the "Smoke Free Air Act," N.J.S.A 26:3D-55 et seq. only preempts smoking in indoor public places, workplaces and government buildings and represents a conscious legislative decision not to go any further. They reason that the extension of the smoking ban to the entire campus is not authorized by that Act.[3/] They conclude that the ability of employees to smoke at the designated outdoor locations and in

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3/ The Associations acknowledge that N.J.S.A. 26:3D-58b prohibits smoking "in any area of any building of, or on the grounds of, any public or nonpublic elementary or secondary school, regardless of whether the area is an indoor public place or is outdoors." They argue that by its terms, this statute would not apply to a community or county college.

their personal vehicles is a term and condition of employment that has not been preempted and could not be unilaterally changed by the College without prior negotiations with the Associations. The Associations also argue that the threatened imposition of discipline on employees who smoke in areas where that activity was formerly permitted, is mandatorily negotiable.

The College responds that the smoking ban involves educational and governmental policy, not whether smoking on its campus has been preempted in whole or in part by statutes or regulations. It cites Livingston Bd. of Ed., P.E.R.C. No. 91-8, 16 NJPER 440 (¶21189 1990), aff'd NJPER Supp.2d 267 (¶220 App. Div. 1991). It notes that the disciplinary portion of the 1992 smoking policy was not negotiated with the Associations' and, accordingly, the College can unilaterally change that policy.

Livingston involved the negotiability of a total smoking ban at all facilities of a K-12 district, both inside and outside school buildings. Like the ban imposed by the College, the policy applied to students, employees and the public and barred smoking in parking lots, sidewalks, athletic fields and other areas contiguous to school buildings. At that time, the law banned smoking inside school buildings but did not mandate a ban on all public school property. The Commission noted that smoking outside school buildings had not been fully or partially preempted by the Legislature. But it reasoned that the

district's educational policy objectives outweighed the employees' interests and concluded that the smoking ban was not mandatorily negotiable. The Board's objective was to promote public health by persuading students not to smoke or begin smoking. The Commission recognized those reasons as a non-negotiable educational policy decision, agreeing that, as adults in schools act as "role models" for students, they should not smoke on school grounds because it sets a bad example.4/

Livingston was not a preemption case. The fact that the statutes comprising the "Smoke Free Air Act," do not expressly ban smoking on the grounds of community or county colleges is not determinative. I conclude that the present case requires application of the balancing test. The interests to be measured in this case are similar to those weighed in Livingston, with one difference: the age of the student body. It is likely that most of the students at the College are 18 or older and are therefore adults. Adulthood is a legally significant event. But, as these adults are still students, would their age diminish or counterbalance the educational objectives that the College is

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4/ The Commission did not address whether smoking outside school buildings and out of the view of students would be a matter of educational policy or a mandatorily negotiable term and condition of employment. 16 NJPER at 441, n.3. The Legislature's subsequent adoption of N.J.S.A. 26:3D-58b has made it unnecessary for the Commission to answer that question in a public elementary and/or secondary school context, as that law bans smoking on the grounds of all school districts.

pursuing with regard to use of tobacco products? Without relying on the terms of the then existing legislation, the Commission concluded in Livingston, where a portion of the pupils were only a year younger than those at the College, that the ban on smoking imposed was, on balance, a non-negotiable matter of educational policy. An appellate court affirmed that reasoning.

The Associations have not persuaded me that at the end of the case, the Commission would be substantially likely to distinguish this dispute from Livingston. The focus of their argument, concerning the unilateral adoption of the non-disciplinary aspects of the policy, is that the College has gone beyond what the Legislature has mandated. But that still subjects the issue to the balancing test. I cannot conclude with the requisite degree of certainty that the Commission would not follow Livingston and would reach a different result because the educational facility is a community college, rather than an elementary and/or secondary school district. The application does not establish a substantial likelihood of success on the merits of the unfair practice charge relating to the College's unilateral extension of a smoking ban to all of its facilities and grounds. Accordingly, I need not address the claims that the affected employees and the Associations suffered irreparable harm as a result of that change.

I reach a different conclusion on the negotiability of the disciplinary aspects of the policy. The conditions warranting the imposition of discipline and procedures for review of any sanctions imposed are mandatorily negotiable. See N.J. Tpk. Auth. and N.J. Tpk. Supervisors Ass'n, 143 N.J. 185 (1996); N.J.S.A. 34:13A-5.3. Even if the 1992 policy, including its disciplinary provisions, was adopted without negotiations, to the extent it applies to the discipline of employees represented by the Associations, any changes in those provisions are nonetheless mandatorily negotiable. Cf. Morris Cty., P.E.R.C. No. 83-31, 8 NJPER 561, 562 n.3 (¶13259 1982), aff'd 10 NJPER 103 (¶15052 App. Div. 1984), certif. den. 97 N.J. 672 (1984). Thus it is likely that the College violated the Act when it subjected employees to disciplinary action for smoking or using tobacco products in areas where such activity was previously permitted, without first negotiating with the Associations over discipline.[5/]

However, the implementation and imposition of disciplinary sanctions does not constitute irreparable harm. See State of New Jersey Judiciary, I.R. No. 2007-14, 33 NJPER 138, 141 (¶49 2007) (although showing made that reprimand was issued in response to protected health and safety complaints, sanctions could be

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5/ The record does not establish whether the College has actually changed the disciplinary sanctions listed in the 1992 policy. However, it is clear that employees are now subject to some form of discipline for conduct that was previously permitted.

remedied at end of case). Cf. Allentown Bor., I.R. No. 2001-14, 27 NJPER 264 (¶32094 2001) (no irreparable harm where discipline based on alleged protected activity could be contested through review procedure); Sayreville Bor., I.R. No. 93-14, 19 NJPER 166 (¶24083 1993) (filing of, and proceeding to hearing on, disciplinary charges not irreparable, given available hearing and appeal procedure). Accordingly, the Associations have not established entitlement to an interim remedy with regard to the College's unilateral changes in the 1992 policy that affect the discipline of employees represented by the Associations.

ORDER

The Associations' application for interim relief is denied.

BY ORDER OF THE COMMISSION

Don Horowitz
Commission Designee

DATED: March 10, 2008
Trenton, New Jersey