I.R. No. 2010-14

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,
(KEAN UNIVERSITY),

Respondent,

-and- Docket No. CO-2010-200

COUNCIL OF NEW JERSEY
STATE COLLEGE LOCALS, AFT, AFL-CIO,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief seeking to restrain Kean University from implementing additional or more comprehensive student evaluations of faculty. The Council had asserted the parties did not reach impasse and the University did not properly follow Commission implementation requirements. The University disputed those assertions. The Designee could not conclude that a substantial likelihood of success existed on the underlying charge based upon the record submitted. While denying the application, the Designee nevertheless, ordered the parties to make one last good faith effort to resolve the matter.

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Appearances:

For the Respondent, Paula T. Dow, Attorney General
(Geri Benedetto, Deputy Attorney General, of counsel)

For the Charging Party, Mets, Schiro & McGovern, LLP
(Kevin P. McGovern, of counsel; Bennett Muraskin,
Council Staff Representative on the brief)

INTERLOCUTORY DECISION

On November 25, 2009, Council of New Jersey State College Locals, AFT, AFL-CIO (Council) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the State of New Jersey, Kean University (University) violated 5.4a(1), (3) and (5)[1/] of the New Jersey

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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. (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

(continued...)

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). The Council alleged that on October 21, 2009, the University unilaterally nullified previously negotiated letters of agreement (LOAs) on a variety of topics, and declared impasse over negotiations to require students to provide additional evaluations of faculty, and the University's announcement that it intended to implement the student evaluations. The Council asserted that both the University's nullification of the LOAs and its declaration of impasse and intent to implement the additional student evaluations was a failure to negotiate in good faith and done in retaliation for the Council asserting its rights to negotiate.

The unfair practice charge was accompanied by an application for interim relief. An Order to Show Cause was executed on December 10, 2009 scheduling a telephone conference call return date for January 20, 2010. By the parties' agreement, the return date was rescheduled for March 16, 2010. The parties submitted briefs, affidavits and exhibits in support of their respective positions and argued orally on the return date. The interim relief application was limited to the University's declaration of impasse and intent to implement the additional student

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1/ (...continued)
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."

evaluations. The University has rescinded its written nullification of the LOAs. That matter appears resolved.

The Council contests the propriety of the University's declaration of impasse and notice of implementation and seeks to restrain the implementation of the additional new student evaluations. The Council argues it is entitled to, at least, one more negotiations session regarding that subject. The University argues it acted properly in asserting the declaration of impasse and its intent to implement its last best offer. It disputes the Council's assertion that the declaration of impasse and stated intent to implement was in retaliation for the Council's exercise of protected conduct.

The following pertinent facts appear:

The University and Council are parties to a collective negotiations agreement effective July 1, 2007 - June 30, 2011. Apparently, Article XXXV of the agreement authorizes local issue negotiations with a particular College/University.

The parties held several negotiation sessions regarding student evaluations between October 2008 and September 2009. On March 26, 2009, the University provided the Council with its proposal on additional student evaluations in the form of proposed LOA No. 115. The Council made a counter-proposal but the record does not indicate when that counter-proposal was made.

In Mid-June 2009, the Council's chief negotiator, Charles Kelly and the University's chief negotiator, Philip Connelly,

exchanged emails to reschedule additional negotiation sessions. In his email of June 18, 2009, Connelly said:

> And we need to bring student evaluations to a conclusion. There is a lot that must be accomplished.

The parties met on July 7 and 16, 2009, but not again until September 29, 2009.

The Council's agenda for the September 29th session did not include the student evaluation issue, but that issue was indeed discussed at that session. Apparently, the University's position was that its student evaluation proposal was mandatory for all courses in all sections. The Council's position was that evaluations should be voluntary.

On September 29, the Council apparently modified its proposal and offered to agree to a mandatory evaluation but for only one course of a faculty members' choosing. The University rejected that proposal. In his certification, Connelly indicated that after rejecting the Council's proposal he confirmed at that session that the University's "last official position had remained unchanged since previously stated on March 26, 2009." The University's Director of Human Resources, Faruque Chowdhury, confirms that statement.

By email with attached letter of October 21, 2009 (sent at 10:55 a.m.) involving a number of negotiable issues, the Council (Kelly) also asked the University for a written response to its (the Council's) counter-proposal regarding additional student

evaluations. At 2:32 p.m. that same day (October 21, 2009), the University (Chowdhury) responded with the following e-mail:

> In reference to the Student Evaluations, we have been negotiating this with the KFT since 2007. We are declaring an impasse; therefore, the student evaluations will be implemented in the spring of 2010. The results of the Student Evaluations will be used as deemed necessary by the University.

On October 30, 2009, the Council conditioned future negotiations regarding a number of topics on the University's recision of its emails nullifying the LOAs and declaring impasse over student evaluations. The Council argues there was an agreement to rescind both emails.

Later on October 30, 2009, the University (Connelly) by email, rescinded its prior email nullifying the LOA's. The University disputes any "agreement" by it to rescind the declaration of impasse regarding student evaluations. Connelly noted that position to Kelly by email on November 6, 2009.

The parties exchanged a number of emails between December 6 and 8, 2009 regarding the scheduling of subsequent negotiation sessions on other matters. In a December 8, 2009 email to Kelly, Connelly said:

> Since April 7, 2007 and continuing at meetings on November 20, 2007, April 20, 2008, May 20, 2008, June 25, 2008, July 8, 2008, October 2, 2008, November 4, 2008, December 3, 2008, February 26, 2009 and March 26, 2009, we have attempted to reach agreement on the student evaluation proposal. None of the counter-proposals that have been presented by the KFT of these sessions have

> been persuasive enough for us to believe that an agreement would ever be reached. Therefore, we are implementing our last position on this issue which is in the attached Letter of Agreement.

There was no letter attached to this email in the University's submissions, but in the Council's submission of this same email was attached a document entitled "Letter of Agreement #11x" "Student Evaluation Process." In my cursory examination of proposed LOA 115 and proposed LOA 11x, I saw no material difference.

Both Connelly and Chowdhury dispute the Council's retaliation claim. They assert that the University made the declaration of impasse in response to the Council's request for a response to its (the Council's) counter-proposal on student evaluations. They also assert the University has not refused to negotiate. The University intends to implement the additional student evaluation process in April 2010. Student evaluations are due by the last week in April.

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 City of Jersey City, P.E.R.C. No. 77-58, 3 NJPER 122 (1977) and subsequent cases, Bayonne City Bd. of Ed., P.E.R.C. No. 91-3, 16 NJPER 433 (¶21184 1990); Red Bank Bd. Ed., P.E.R.C . No. 81-1, 6 NJPER 364 (¶11185 1980), aff'd NJPER Supp.2d 99 (¶81 App. Div. 1981); Rutgers, The State University, P.E.R.C. No. 80-114, 6 NJPER 180 (¶11086 1980), the Commission established the standards that would allow an employer to implement its last best offer. In implementation cases in Fredon Twp. Bd. Ed., P.E.R.C. No. 96-5, 21 NJPER 275 (¶26177 1995) and Readington Twp. Bd. Ed., P.E.R.C. No. 96-4, 21 NJPER 273 (¶26176 1995), the labor organizations challenged whether the respective Boards of Education had reached impasse and whether they implemented their last best offers. The Commission made its decision in these cases after assessing the particular facts of each case which had been developed at plenary hearings.

As did the labor organizations in Fredon and Readington, the Council here challenged whether the parties had reached impasse over student evaluations and it questioned what the University considered to be its last best offer. The Council also argued that since September 29, 2009, it moved closer to the University's position, it would have expected the University to

counter with what it was offering as its last best offer, and it (the Council) claims the University failed to make such a counter. The Council further argues that it was entitled to at least one more negotiations session regarding student evaluations after the University made a last best offer on that topic, but no such session has taken place.

Despite the Council's vigorous argument, the facts as presented to date are insufficient to conclude that the Council has a substantial likelihood of succeeding on the merits of its case. That is not to say it has a weak case. But, as in Fredon and Readington, a plenary hearing is required to assess all of the facts.

Regarding the 5.4a(3) retaliation claim, the University's certifications directly dispute the Council's assertion that the University declared impasse in retaliation for its (the Council's) exercise of protected conduct. Only a full hearing can resolve that issue.

Regarding the 5.4a(1) and (5) failure to negotiate in good faith claim which encompasses the Council's argument about whether impasse was reached, what was the last best offer and whether an additional negotiations session is warranted, Connelly's statement at the conclusion of the September 29th session, his email of October 21 declaring impasse and his email of December 8, 2009 attaching the University' last position, must all be considered in concluding whether - and if so - when the

University declared impasse with notice to the Council, and whether it adequately conveyed its last best offer. Interim relief is not the appropriate place to assess the weight, reliability, value and meaning of such facts. A full hearing is required to make such determination.

Since I cannot find a substantial likelihood of success at this time, the interim relief standards cannot be met. Therefore, the request for a restraint is denied.

However, that does not end my examination of the current posture of this case. From the record and oral argument, it is not apparent to me that the parties have made any further effort to resolve this matter. The Council responded affirmatively when asked during oral argument if at least one thing it was seeking here was one more attempt to negotiate a resolution of this matter. Given the fact that there is still time for the parties to meet, when asked during oral argument what harm there would be to the University if it met with the Council on this matter, the University responded that absent a restraint, it would be the preparation, time spent and pressures of negotiations.

I have considered the parties positions. Both parties are aware of the Legislature's expressed intent in our Act that one of the Commission's primary goals is to resolve labor disputes. Resolution of the application only accomplishes part of that goal in this case. Even assuming that the parties may continue to litigate the merits of the underlying charge, there is still time

for one more good faith effort to resolve this matter with little or no harm to either party. See Borough of North Arlington, I.R. No. 2006-16, 32 NJPER 62 (¶32 2006).

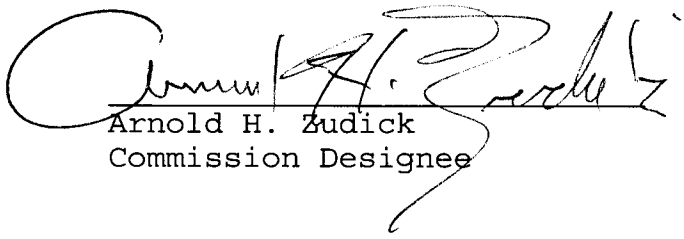
For these purposes, I assume the parties are at impasse on student evaluations and the University proposed LOA No. 115 is its last best offer. The parties shall meet within two weeks of this decision in one last good faith effort to resolve this matter.

I do not retain jurisdiction.

ORDER

1. The parties are ordered to meet within two weeks in one last good faith effort to resolve the student evaluation matter.

2. The application for interim relief is denied.[2/]



Arnold H. Zudick
Commission Designee

DATED: March 22, 2010
Trenton, New Jersey

2/ This charge will be returned to the Director of Unfair Practices for further processing.