

D.U.P. NO. 2014-2

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

STATE OF NEW JERSEY (OFFICE OF
EMPLOYEE RELATIONS),

Respondent,

-and-

Docket No. CO-2013-064

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

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by Council of New Jersey State College Locals, AFT, AFL-CIO, against the State of New Jersey (Montclair University). The charge alleges that the State violated 5.4a(1) and (5) of the Act when the State informed the Council that the terms and conditions of employment of two newly-created positions at Montclair University, which would only be used at Montclair University, should be negotiated at the local level rather than at the State level. Following the filing of the charge, Montclair representatives negotiated and reached a local written agreement with Council on the terms and conditions of employment for the two titles. Council did not wish to rescind that local agreement. The Director finds that the Council's execution of the local agreement renders its charge moot. Furthermore, Council cannot compel the State to negotiate, instead the State may designate an authorized representative of its choosing to negotiate these issues.

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Appearances:

For the Respondent
John J. Hoffman, Acting Attorney General of New Jersey
(Brady Montalbano Connaughton, of counsel)

For the Charging Party
Bennett Muraskin, Staff Representative

REFUSAL TO ISSUE COMPLAINT

On September 12, 2012, Council of New Jersey State College
Locals, AFT, AFL-CIO (Council) filed an unfair practice charge
against the State of New Jersey, Office of Employee Relations
(State). The charge alleges that the State violated 5.4a(1) and
(5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A.

^{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; (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
(continued...)

34:13A-1, et seq. (Act), when it informed a Council staff representative that the terms and conditions of employment for two newly-created positions at Montclair State University (Montclair) would be appropriately negotiated at the local level rather than at the State level. Council asserts that these new titles are similar to a lecturer position created at Kean University in 2010, and as such "OER is required to negotiate on behalf of both MSU and KU on this issue."^{2/}

The State denies violating the Act, contending that it has not failed to negotiate in good faith; that this matter is appropriate for local negotiations; that it informed Council of that fact; and that Montclair's representatives properly negotiated and have already reached an agreement with Council on the terms and conditions of these titles.

Subsequent to Council's filing of the charge, on February 18, 2013 representatives of Montclair and the local union executed an agreement setting forth various terms and conditions

^{1/} (...continued)
refusing to process grievances presented by the majority representative."

^{2/} The State's alleged refusal to negotiate with Council over the terms and conditions of employment of the title "lecturer" at Kean University was the subject of an unfair practice charge filed by Council (Docket No. CO-2011-272). In State of New Jersey (Kean University), P.E.R.C. No. 2012-43, 38 NJPER 291 (¶103 2012) the Commission adopted the deputy director of unfair practice's recommendation, sustaining the refusal to issue a complaint in that matter.

of employment regarding the instructional specialists and clinical specialist titles, including salary, benefits, and applicability of various provisions of local and statewide agreements to the titles.

On April 24, 2013, a Commission staff agent wrote to the parties, requesting their written statements of position on what effect, if any, that agreement has on the instant charge. On April 25, Council filed a reply, acknowledging the agreement negotiated between Montclair and the local union, as well as an agreement regarding the lecturer title, negotiated between Kean University and Council. The Council representative wrote, ". . . the only effect these agreement may have on [the current charge] is on the remedy sought. Council has no interest in disrupting the MSU or KU agreements." The Council also amended paragraph 1 of the "remedy sought" in its charge as follows:

The Charging Party seeks an Order requiring the Respondent to:

1. Negotiate in good faith with the Council over the terms and conditions of employment of the Lecturer, Instructional Specialists titles and other full-time non-tenure track faculty titles created within the State Colleges/universities Unit, in the context of the negotiations to succeed the current Agreement between the State of new Jersey and the Council of New Jersey State College Locals, set to expire June 30, 2015.

On May 2, 2013, the State filed a letter asserting that both Montclair and Kean have negotiated in good faith and signed

agreements memorializing the terms and conditions of employment of the lecturer, instructional specialist and clinical specialist titles. For this reason, the State requests that the charge be dismissed.

The Commission has authority to issue a complaint where it appears that the charging party's allegations, if true, may constitute unfair practices within the meaning of the Act.

N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I will decline to issue a complaint. N.J.A.C. 19:14-2.3. On July 19, 2013, I issued a letter to the parties, advising them of my tentative findings and conclusions and inviting responses. On July 29, 2013, Council filed a reply. Our review of the submissions reveals the following facts.

On July 26, 2012, Montclair passed a resolution creating two new positions, instructional specialist and clinical specialist. By letter dated August 15, 2012, a Council staff representative notified the deputy director of the Governor's Office of Employee Relations (OER) of the two new positions at Montclair and asserted that because of the similarities of the new positions with the lecturer position created at Kean University in 2010, this matter was inappropriate for a local agreement. The letter further quoted the following section of the Commission's decision in State of New Jersey (Kean University):

This statute [N.J.S.A. 18:64-21.1] requires that OER negotiate on behalf of all the State's colleges and universities, not to negotiate issues that affect a single university or college. Also, the parties regularly negotiate local agreements, which demonstrates that they have not interpreted the statute as compelling OER to negotiate an issue that implicates only one of the nine State colleges or universities.

Council reasons that, "since more than one college/university governed by N.J.S.A. 18:64-21.1 has established full time non-tenure track teaching positions, which are nearly identical in nature and function, the Commission mandated that OER is required to negotiate on behalf of both MSU and KU on this issue."

In two e-mails dated August 20, 2012, OER's deputy director replied to Council's demand to negotiate. The e-mails provide in pertinent part:

The position is that Montclair University is creating the positions and that negotiation, as may be required by law, regarding the terms and conditions of employment of the instructional specialist and clinical specialist position is appropriately negotiated at the local level...The [Commission's] decision [in State of New Jersey (Kean University)] also allows for a College/University to create titles and to negotiate the negotiable terms locally. That title is being utilized by MSU, thus, you should make your demand to negotiate to MSU as OER does [not] negotiate for one C/U it negotiates terms for the 9 State colleges/Universities. . .

The Council and State's collective negotiations agreement extends from July 1, 2011 through June 30, 2015. Nine state

colleges and universities are bound by the agreement, including Kean University. N.J.S.A. 18A:64-21.1 provides:

The Governor shall continue to function as the public employer under the 'New Jersey Employer-Employee Relations Act,' . . . and through the Office of Employee Relations act as the chief spokesperson on behalf of the State colleges with respect to all matters under negotiation. One representative of the State college sector shall be designated by the Governor as a member of the negotiating team, upon recommendation by the State colleges.

Pursuant the statute, OER negotiates the terms of an agreement on behalf of the colleges and universities, which, with few exceptions, apply to all nine of the colleges and universities. This agreement is called the master agreement.

Article XXXV of the master agreement provides: "Issues which have, in this agreement, been reserved for resolution between the Local Union and an individual College/University, shall, when resolved, be in the form of a memorandum of agreement which shall then become the policy of the College/University."

ANALYSIS

The gravamen of Council's charge is that OER's refusal to negotiate in good faith arises from the second instance (following the initial one at Kean University) of creating non-tenure track unit titles. In other words, Council contends that OER and not Montclair is obligated to negotiate the terms and conditions of employment for the two newly created titles because

the subject is not "local", that is, limited to a single state college.

In 2011, Council filed an unfair practice charge against the State of New Jersey alleging that OER refused to negotiate over the terms and conditions of employment of two non-tenure track unit titles created by Kean University. In State of New Jersey (Kean University), the Commission affirmed the deputy director's refusal to issue a complaint (D.U.P. No. 2011-7). The Commission wrote in relevant part:

[T]he Act expressly provides that a public employer may use 'designated representatives' to carry out its obligations and can be held responsible for the actions of its 'representatives or agents.' See, respectively, N.J.S.A. 34:13A-5.3 and 5.4a. Here, the Kean University officials who offered to negotiate with the Council, were and are the 'designated representative' of the OER authorized to negotiate terms and conditions concerning the new position. [Id., 38 NJPER at 292]

Neither the Act nor N.J.S.A. 18A:64-21.1 prohibit the parties from signing local agreements; OER is not precluded by the Act or the statute from asserting that an issue is appropriate for a local agreement rather than inclusion in the master agreement. It is undisputed that following the filing of Council's charge, Montclair representatives negotiated and reached a local written agreement with Council on the terms and conditions of employment for the instructional specialist and

clinical specialist titles. Council does not wish to rescind that local agreement.

I find that Council's execution of the local agreement renders its charge moot. In Ramapo-Indian Hills Reg H.S. Dist Bd of Ed., P.E.R.C. No. 91-38, 16 NJPER 581 (¶21255 1990), the Commission determined that resolution of a contract often moots disputes over alleged misconduct during negotiations, particularly when no evidence suggests that the successful completion of negotiations was affected by the alleged misconduct. The Commission stated:

We have often held that the successful completion of contract negotiations may make moot disputes over alleged misconduct during negotiations. We have so held irrespective of whether the charging party is a majority representative or a public employer. Continued litigation over past allegations of misconduct which have no present effects unwisely focuses the parties' attention on a divisive past rather than a cooperative future. See, e.g., Bayonne Bd. of Ed., P.E.R.C. No. 89-118, 15 NJPER 287 (¶20127 1989), aff'd App. Div. Dkt. No. A-4871-88T, (3/5/90); Belleville Bd. of Ed., P.E.R.C. No. 88-66, 14 NJPER 128 (¶19049 1988), aff'd App. Div. Dkt. No. A-3021-87T7 (11/23/88); Matawan-Aberdeen Reg. Sch. Dist. Bd. of Ed., P.E.R.C. No. 88-52, 14 NJPER 57 (¶19019 1987), aff'd App. Div. Dkt. Nos. A-46-87T1, A-2433-87T1, A-2536-87T1 (1/24/90); Rutgers, the State Univ., P.E.R.C. No. 88-1, 13 NJPER 631 (¶18235 1987), aff'd App. Div. Dkt. No. A-174-87T7 (11/23/88); State of New Jersey, P.E.R.C. No. 88-2, 13 NJPER 634 (¶18236 1987); State Bd. of Higher Ed., P.E.R.C. No. 84-69, 10 NJPER 27 (¶15016 1983); Oradell Bor., P.E.R.C. No. 84-26, 9 NJPER 595 (¶14251 1983); Rockaway Tp., P.E.R.C. No. 82-72, 8

NJPER 117 (§13050 1982); Union Cty. Reg. H.S. Bd. of Ed., P.E.R.C. No. 79-90, 5 NJPER 229 (§10126 1979); see also Asbury Park Bd. of Ed. v. Asbury Park Ed. Ass'n, 155 N.J. 76 (App. Div. 1977). Under all the circumstances, this case does not warrant an exception to our reluctance to resurrect pre-contract negotiations disputes. (16 NJPER at 581, 582).

The Commission has acknowledged that subsequent consummation of a collective agreement does not always moot an unfair practice charge concerning a prior refusal to negotiate. See State of New Jersey, P.E.R.C. No. 88-2, 13 NJPER 634 (§18236 1987). An exception lies in those cases where "there is a sufficient potential for recurrence of [the offending] conduct." Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25 (1978); State of New Jersey.

I do not believe that such considerations are present here. Council contends that the State violated the Act by refusing to negotiate in good faith regarding terms and conditions of employment of the lecturer and instructional specialist titles at Montclair; yet the representatives of Montclair and the local union participated in negotiations and concluded the negotiations with a signed agreement. Council has stated that they do not want to take any action to abrogate such agreement. Council has not alleged facts indicating that the process by which the local agreement was achieved was tainted by unfair practices, and no facts suggest that the local agreement is incomplete or does not

bind the parties to terms and conditions of employment which are the subject of the current charge. Consequently, continued litigation would only increase instability and hostility between the parties. See Matawan-Aberdeen Reg. Schl. Dist., P.E.R.C. No. 88-52, 14 NJPER 57 (¶19019 1987).

Furthermore, Council's requested remedy -- an Order requiring negotiations over the two titles in the successor collective negotiations agreement (for a term commencing January, 2016) -- is apparently premature because no facts suggest that successor negotiations have commenced. Similarly, there are no facts indicating that the State is circumventing their negotiations obligation by creating piecemeal new titles throughout the State colleges. It appears that Council wants to negotiate with the State and not Montclair. However, Council cannot compel OER to negotiate, as parties may choose their designated representative(s). State of NJ (Kean University); Middletown Tp. Bd. of Ed.

Finally, if the parties disagree about whether their local agreement violates the terms of their master agreement, either may seek resolution through their contractual grievance procedure. See State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

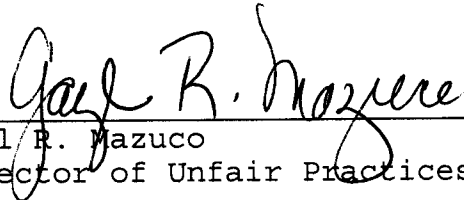
Based on the foregoing, I find that the State's conduct did not violate 5.4a(1) or (5) of the Act. I find that the

Commission's complaint issuance standard has not been met and I decline to issue a complaint on the allegations of this charge.^{3/}

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Gayl R. Mazuco
Director of Unfair Practices

DATED: August 23, 2013
Trenton, New Jersey

This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3.

Any appeal is due by September 3, 2013.

^{3/} N.J.A.C. 19:14-2.3.