

STATE OF NEW JERSEY  
BEFORE A HEARING EXAMINER OF THE  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE BOARD OF HIGHER EDUCATION,

Respondent,

-and-

Docket No. CO-83-249-81

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

Charging Party.

SYNOPSIS

In an Interlocutory Decision a Hearing Examiner of the Public Employment Relations Commission denies the Respondent's Motion To Dismiss the Complaint issued in this case, which involves the Respondent's alleged obligation to negotiate the modification of regulation, which would change the present regulation regarding notice of layoff from "as soon as possible" to "45 days prior to date of layoff." The Motion To Dismiss set forth four grounds, all of which were rejected as follows: (1) the Complaint should not be dismissed under the doctrine of res judicata merely because the Charging Party first sought temporary relief in court since the burden at the temporary relief stage is entirely different from that at the plenary hearing stage; (2) the Supreme Court held in State College Locals v. State Board of Higher Education, 91 N.J. 18 (1982) that when an employer/regulator issues a regulation involving terms and conditions of employment it is only presumptively preemptive and, thus, the Charging Party should have an opportunity before the Commission to rebut the presumption, utilizing one or more of eight factors which the Supreme Court set forth in its decision, supra; (3) the matter before the Commission is "ripe" for determination, notwithstanding that the proposed change in the regulation is not to become final until July 5, 1983 since the Commission's function is to decide whether the regulation is entitled to preemptive effect; and (4) the Respondent does not have an unfettered right to issue a preemptive regulation in its capacity as employer-regulator under the Supreme Court decision, supra.

In the absence of the granting of an appeal from this Interlocutory Order the case will now proceed to hearing.

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Appearances:

For the State Board of Higher Education  
Irwin I. Kimmelman, Attorney General  
(Grey J. Dimenna, DAG)

For the Charging Party  
Sauer, Boyle, Dwyer & Canellis, Esqs.  
(Christopher M. Howard, Esq.)

DECISION AND ORDER ON RESPONDENT'S  
MOTION TO DISMISS

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on March 15, 1983 by the Charging Party alleging that the Respondent has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that, notwithstanding that Article XXXV of the current agreement provides for at least 195 days' written notice of retrenchment or layoff, the Respondent on March 18, 1983 unilaterally issued a memorandum proposing an amendment to N.J.A.C 9:2-3.7 (sic), which would change the present regulation regarding notice from "as soon as possible" to "45 days prior to date of layoff" without negotiations with the Charging Party contrary to the decision of the New Jersey Supreme Court in State College Locals v. State Board of Higher Education,

91 N.J. 18 (1982), all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (3) and (5) of the Act.<sup>1/</sup>

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on April 7, 1983. Before the commencement of the hearing, the Respondent filed a Motion To Dismiss on May 16, 1983, as to which the Charging Party responded, and on May 19, 1983 there was oral argument by counsel for the parties. This decision issues on the basis of the written submissions by the parties and the oral argument.

#### DISCUSSION AND ANALYSIS

The Respondent's first argument in support of its Motion To Dismiss is that the matter is res judicata. This is because of the fact that the Charging Party first proceeded in the courts for a restraint of the issuance of the amended regulation in issue, supra, and failed to obtain judicial relief. The Commission's designee, Edmund G. Gerber, likewise denied interim restraints, primarily because of the decision of the Superior Court, which denied restraint. This, however, was at the temporary injunction or interim relief stage. There the burden is heavy in having to establish a substantial likelihood of success on the merits together with irreparable harm. There is no such impediment before the instant Hearing Examiner inasmuch as the matter is now at the plenary hearing stage. The Hearing Examiner rejects the Respondent's argument that the Complaint is barred by res judicata.

The Respondent's next point is that the Commission lacks jurisdiction because only the Appellate Division can review the action of a State agency in proposing to

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<sup>1/</sup> 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.

"(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 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.

issue a regulation, citing Petrucelli v. Department of Civil Service, 28 N.J. Super. 572, 575 (App. Div. 1953). If the Respondent is correct in this contention, then the decision of the New Jersey Supreme Court in State College Locals v. State Board of Higher Education, supra, would have no meaning in the context of administering our Act. The Supreme Court, said, inter alia, that if a State agency acts in the dual capacity of employer and regulator then its regulations, which establish terms and conditions of employment, are only presumptively preemptive (91 N.J. at 28). The Supreme Court then listed eight factors, which could be utilized in rebutting the presumption of preemption (91 N.J. at 28, 29). Obviously, this contemplates a plenary hearing before the Commission on a charge of unfair practices, namely, that the Respondent, in promulgating the proposed regulation, acted in bad faith, or with unfairness, or did not solicit comment from the employees or their representatives, etc. The Hearing Examiner concludes that, for the foregoing reasons the Commission has jurisdiction to adjudicate a challenge to the action of the Respondent in proposing a regulation, the preemptive effect of which is rebuttable.

The Respondent's next argument is that the Complaint should be dismissed because the Charging Party's challenge to the proposed regulation is premature and is not ripe for determination. In this connection the Respondent cites Federal and State court decisions under the doctrine of "ripeness." The Respondent argues that it would be an "unwarranted intrusion into the legislative function" of the State Board of Higher Education for the Commission to intervene prior to the effective date of the proposed regulation (N.J.A.C. 9:2-3.8) now set to become final on July 5, 1983. An analogy is made to the deliberations of the State legislature prior to the enactment of a law. Again the Hearing Examiner concludes that if the Supreme Court decision in State College Locals, supra, is to have any meaning where, as in this case, the parties are in ongoing negotiations for a successor agreement, the Commission must be able to adjudicate during the promulgation process, if that can indeed be done. The Commission's function is to decide whether the regulation is entitled to preemptive effect, which turns on the Charging Party's proofs seeking to rebut the presumption

by utilizing the eight factors that the Supreme Court set forth (91 N.J. at 28, 29). Thus, the ripeness doctrine does not forestall a plenary hearing on the merits of the Unfair Practice Chargs.

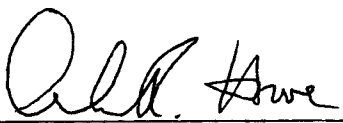
The Respondent's last point is that the State Board of Higher Education has the authority to adopt a regulation, such as is herein involved, and that in so doing the regulation would preempt negotiations on that subject, i.e., the layoff notice of 45 days. The Respondent begs the question. If it has the unfettered authority to issue a preemptive regulation in its capacity as employer/regulator, then it is plain as a pikestaff that State College Locals, supra, has no meaning whatsoever. The Supreme Court said that if a regulation is issued by an employer/regulator, involving terms and conditions of employment, it is only entitled to the presumption that its effect will be preemptive. If the State Board of Higher Education could issue such a regulation without having to incur a hearing over whether or not the preemptive effect of the regulation was rebutted, then the Supreme Court's language would be rendered nugatory. It is true that the Supreme Court did not indicate the forum in which the rebutability would adjudicated. However, in the absence of the Supreme Court indicating that the Commission's forum is not appropriate, the Hearing Examiner has no problem in proceeding with this case in plenary hearings unless and until restrained.

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Based on all of the foregoing, the Hearing Examiner enters the following:

ORDER

For the foregoing reasons, the Hearing Examiner DENIES the Respondent's Motion To Dismiss.

  
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Alan R. Howe  
Hearing Examiner

Dated: May 23, 1983  
Trenton, New Jersey