

D.U.P. NO. 92-6

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

In the Matter of

TOWNSHIP OF SOUTH ORANGE VILLAGE,

Respondent,

-and-

Docket No. CO-91-190

FMBA LOCAL NO. 40 &
FMBA LOCAL NO. 240,

Charging Party.

SYNOPSIS

The Director of Unfair Practices refuses to issue a complaint on an unfair practice charge filed by Locals No. 40 and 240 of the FMBA alleging that the Township of South Orange Village violated subsections 5.4(a)(1) and (5) of the Act when it issued a memorandum to unit(s) employees during negotiations.

The Director determined that the memorandum was not coercive within the meaning of Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 83-19, 7 NJPER 502 (¶12223 1981); was distinguishable from State of New Jersey (Trenton State College), P.E.R.C. No. 88-19, 13 NJPER 720 (¶18269 1987); and generally did not interfere with employee rights as stated in N.J. Sports and Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979).

The Director also determined that the memorandum was not "another example" of the Township's "bad faith" in negotiations.

D.U.P. NO. 92-6

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

In the Matter of

TOWNSHIP OF SOUTH ORANGE VILLAGE,

Respondent,

-and-

Docket No. CO-91-190

FMBA LOCAL NO. 40 &
FMBA LOCAL No. 240,

Charging Party.

Appearances:

For the Respondent,
Ruderman and Glickman, attorneys
(Mark S. Ruderman, of counsel)

For the Charging Party,
Fox and Fox, attorneys
(Dennis J. Alessi, of counsel)

REFUSAL TO ISSUE COMPLAINT

On January 28, 1991, the South Orange Firemen's Mutual Benevolent Association, Local No. 40 and Local No. 240 ("FMBA") filed an unfair practice charge against the Township of South Orange Village ("Township"). The charge alleges that a memorandum mailed to employees represented by the FMBA^{1/} from the Township Administrator unlawfully "circumvented the certified collective bargaining representatives" by "negotiating directly with the

^{1/} A copy of the memorandum was apparently not mailed to the majority representatives.

membership", violating subsections 5.4(a)(1) and (5)^{2/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). The charge also asserts that the memorandum is "just another example" of the Township's "bad faith", as similarly alleged in unfair practice docket no. CO-H-89-190.

On January 18, 1991, the Township Administrator mailed a memorandum concerning the "current contract impasse" to each firefighter and superior officer. A copy of the memorandum is attached.

The FMBA alleges that the memorandum is rife with "snide remarks and innuendo" which "attempts to undermine the union as an entity." It asserts that the first sentence of paragraph four and other sentences request union members to meet directly with the employer and that the union is poorly representing the employees. It asserts that the sentence beginning with the phrase, "I sincerely believe..." seeks to provoke the membership into "disavow[ing] the union and meeting directly with respondent." The FMBA also submitted affidavits relating the effect of the memorandum on unit employees in the course of collective negotiations.

^{2/} 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."

On August 9, 1991, we issued a letter tentatively dismissing the charge.

On September 9, 1991, the FMBA filed a response, arguing that the issuance of the memorandum violates the Act. It emphasized that the memorandum circumvented the majority representative and that the correct legal standard for evaluating the propriety of such a communication is whether it "attempted to undermine" the majority representative. The FMBA included affidavits of twelve unit employees who believed that the memorandum was a personal solicitation.

N.J.S.A. 34:13A-5.4(c) sets forth in pertinent part that the Commission shall have the power to prevent anyone from engaging in any unfair practice, and that it has the authority to issue a complaint stating the unfair practice charged.^{3/} The Commission has delegated its authority to issue complaints to me and has established a standard upon which an unfair practice complaint may be issued. The standard provides that a complaint shall issue if it appears that the allegations of the charging party, if true, may

^{3/} N.J.S.A. 34:13A-5.4(c) provides: "The commission shall have exclusive power as hereinafter provided to prevent anyone from engaging in any unfair practice.... Whenever it is charged that anyone has engaged or is engaging in any such unfair practice, the commission, or any designated agent thereof, shall have authority to issue and cause to be served upon such party a complaint stating the specific unfair practice charged and including a notice of hearing containing the date and place of hearing before the commission or any designated agent thereof...."

constitute an unfair practice within the meaning of the Act.^{4/}
 The Commission's rules provide that I may decline to issue a
 complaint.^{5/}

The Act does not limit a public employer's right to express
 opinions about labor relations if the statements are not coercive.
 In Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 83-19, 7 NJPER 502
 (¶12223 1981), the Commission stated:

A public employer is within its rights to comment
 upon those activities or attitudes of an employee
 representative which it believes are inconsistent
 with good labor relations, which includes the
 effective delivery of governmental services, just
 as the employee representative has the right to
 criticize those actions of the employer which it
 believes are inconsistent with that goal.
 [Id. at 503]

In analyzing speech cases, a balance must be struck between
 conflicting rights: the employer's right of free speech and the
 rights of employees to be free from coercion, restraint or
 interference in their exercise of protected activities. See
generally, Cty. of Mercer, P.E.R.C. No. 86-33, 11 NJPER 589 (¶16207
 1985).^{6/}

4/ N.J.A.C. 19:14-2.1.

5/ N.J.A.C. 19:14-2.3.

6/ The standard adopted by the Commission in these cases mirrors
 that developed in the private sector under the Labor
 Management Relations Act. 29 U.S.C. §141 et seq. See
Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n. of Ed. Sec., 78
N.J. 1, 9 (1978). See NLRB v. Gissel Packing Co., 395 U.S.

An employer has the right to advise employees of the conduct of negotiations if the communication is not coercive.

6/ Footnote Continued From Previous Page

575, 71 LRRM 2481 (1969). In Gissel, the Supreme Court, in setting forth the balance required in these cases, said:

Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely...and any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear. Stating these obvious principles is but another way of recognizing that what is basically at stake is the establishment of a non-permanent, limited relationship between the employer, his economically dependent employee and his union agent...Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit."...If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such, without the protection of the First Amendment. [71 LRRM at 2497-98; citations omitted]

In determining whether a statement is coercive, the NLRB considers the "total context" of the situation and determines the question from the standpoint of employees over whom the employer has a measure of economic power. See NLRB v. E.I. DuPont de Nemours, ___ F.2d ___, 118 LRRM 2014, 2016 (6th Cir. 1984).

Coercion may be defined as a threat of reprisal or force or promise of benefit. Camden Fire Dept., P.E.R.C. No. 82-103, 8 NJPER 309 (¶13137 1982). Non-coercive communications do not violate subsection (a)(1).

I do not believe that the memorandum violates subsection 5.4(a)(1). The Administrator writes at the outset that the Township is interested in "negotiating the remainder of the contract issues"; that "both parties" are never completely satisfied; that the "Association will not receive all of its desires nor will the Village. However, with the aid of an arbitrator, we can reach an acceptable settlement." It follows that the "we" in the last sentence refers to the Township, or its agent administrator and the FMBA organizations. The next sentences refer to "our third year without a contract" and asks, "let's get together and resolve these negotiations." I do not believe that the "our" and "let's get together" can reasonably be interpreted as an invitation to unit employees to disavow their majority representatives. It appears to refer to the majority representatives and the employer.

In State of New Jersey (Trenton State College), P.E.R.C. No. 88-19, 13 NJPER 720 (¶18269 1987), the Commission considered whether the distribution of a memorandum to unit employees during negotiations violated subsection 5.4(a)(1). The Commission found that a memorandum distributed by the College to unit employees violated 5.4(a)(1) because it implied that "employees should not discuss organizational structure with their union." The memorandum

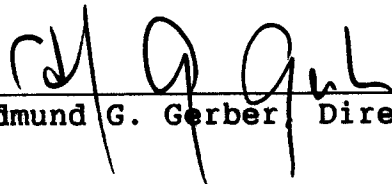
states that the College was ceasing negotiations with the union on the organizational structure issue. It is therefore logical to view the remainder of the memorandum as an invitation to the employees "to work out the organizational structure."

No statements in the January 11 memorandum declare an end to negotiations with the FMBA. In fact, the Township's complaint is that the FMBA had not agreed to arrange negotiations sessions. Whether the complaint is accurate is beside the point; it appears to criticize the majority representatives' conduct toward negotiations. I believe such statements are permissible under Black Horse Pike. The memorandum does not appear to solicit the memberships disavowal of their majority representatives or threaten reprisal or promise a benefit. It does not tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act. N.J. Sports & Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). Finally, the Commission must evaluate section 5.4(a)(1) violations by an objective standard. The focus of the inquiry is on the offending communication rather than the subjective beliefs of those receiving it. Accordingly, I do not give the supporting affidavits great weight in my decision.

I also dismiss the FMBA's allegation that the Township violated subsection 5.4(a)(5) of the Act. Although other charges are pending before the Commission, no decision has been rendered and the record remains open. The FMBA seeks to bring CO-89-190 et al., to bear upon this charge; those matters are factually

distinguishable from this alleged unlawful act. There are no facts upon which I may issue a complaint on this second allegation and accordingly, dismiss the charge.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Edmund G. Gerber, Director

DATED: September 13, 1991
Trenton, New Jersey

January 18, 1991

M E M O R A N D U M

TO: FIRE FIGHTERS AND SUPERIOR OFFICERS,
SOUTH CRANCE FIRE FORCE

FROM: JOSEPH G. DIARCO, VILLAGE ADMINISTRATOR ~~AS~~

SUBJECT: PENDING CONTRACT NEGOTIATIONS

I would like to take this opportunity to communicate to the members of the F.M.B.A. and Superiors Association relative to the current contract impasse.

Although there is a major issue which has caused extreme difficulties between the Village and the Association, the Village is still desirous of negotiating the remainder of the contract issues and bring some stability to the working conditions of our employees: the matter currently under litigation (the working tour) will be settled through the P.E.R.C. process, and that process is and will be protracted due to the complexity of the issue and the obvious limits of the hearing calendar. The remaining issues of your contract, wages, etc. can be reasonably settled by the Village or an arbitrator, and we have requested negotiations sessions with an arbitrator and your counsel on numerous occasions without success.

Contract negotiations at their conclusion never provide either side with complete satisfaction; both parties settle for a portion of their original request. However, not meeting, even with the assistance of an arbitrator brings unnecessary strain to the total organization.

I am requesting that we agree to meet with the selected arbitrator to settle those remaining items which can be agreed upon, specifically wages and benefits. It should be obvious to both parties that the Association will not receive all of its desires nor will the Village. However, with the aid of an arbitrator, we can reach an acceptable settlement. I sincerely believe it is unnecessary and a hardship to some to be in our third year without a

EXHIBIT A

Fire Fighters and Superior Officers,
South Orange Fire Force
January 18, 1991
Page Two

wage settlement, and this environment only fuels the fires of misunderstanding, hostility and discontent. Let's get together and resolve these negotiations.

I would like to assure you that the Village is prepared to meet with an arbitrator and settle your salary, wage and benefits package. In due course the P.E.R.C. hearings will bring to conclusion the matter of working hours.

/ic

The Township of South Orange Village