D.U.P. NO. 90-6

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

In the Matter of

BROOKDALE COMMUNITY COLLEGE,

Respondent,

-and-

Docket No. CO-90-86

BROOKDALE COMMUNITY COLLEGE
FACULTY ASSOCIATION,

Charging Party.

SYNOPSIS

The Director of Unfair Practices refuses to issue a complaint on a Charge which asserts that the publishing of an informational advertisement by the employer violated the Act. The Director found that the message contained in the advertisement was protected by the First Amendment and did not amount to language having the tendency to interfere with, coerce or intimidate unit employees. The Director also found that placing the ad did not breach the employer's duty to negotiate in good faith.

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Appearances:

For the Respondent
Murray, Murray & Corrigan, Esqs.
(David F. Corrigan, of counsel)

For the Charging Party
Wills, O'Neill & Mellk, Esqs.
(Arnold M. Mellk, of counsel)

REFUSAL TO ISSUE COMPLAINT

On September 29, 1989, the Brookdale Community College Faculty Association, ("Association") filed an unfair practice charge with the Public Employment Relations Commission ("Commission") alleging that Brookdale Community College ("College") violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically, subsections 5.4(a)(1), (3) and (5) 1/

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; (3) Discriminating in

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when it published an informational advertisement in a community newspaper.

The Commission has delegated its authority to issue complaints to me and 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 constitute an unfair practice within the meaning of the Act. 2/ If this standard is not met, I may decline to issue a complaint. 3/

For the reasons set forth below, I find that the Commission's complaint issuance standards have been met.

On about September 18, 1989, the College placed an advertisement, titled "A Message to the Citizens and Taxpayers of Monmouth County" in the Asbury Park Press, a community newspaper. The advertisement was signed by Joshua L. Smith and Helen Mae Hannah, the President and the Board Chairman of the College, respectively. The message was subtitled "Negotiations Update # 3"

1/ Footnote Continued From Previous Page

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; and (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."

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

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

and addresses the status of negotiations. The ad stated that there had been a fact-finding session and that issues had been limited and narrowed. The ad identified the percentage increases sought by the Association and those offered by the College; it also identified another unresolved key issue, and concluded with a statement that classes and services to the public are continuing.

The Association asserts that publishing this "message" constitutes an attempt to coerce the Association, and is calculated to interfere with the Association's affairs and rights. The Association claims that some of the published information is confidential.

The Act does not limit a public employers right to express opinions about labor relations when such statements are noncoercive. 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).[4/]

4/ 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. 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

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An employer has the right to advise employees of the conduct of negotiations so long as the communication is not coercive in nature. Non-coercive communications do not violate subsection (a)(1). See Trenton State College, P.E.R.C. No. 88-19, 13 NJPER 720 (¶18269 1987).

Here, the statements made in the newspaper advertisement does not rise to the level of a threat, coercion or promise of benefit to unit employees. The parties here had just completed a fact-finding session before a neutral fact finder. The newspaper message was addressed to the public and on its face did not threaten, coerce, or promise any benefits to faculty unit employees. It did not disparage the union or imply that any adverse or beneficial action would be taken as a result of the union's negotiations positions.

Moreover, I find that the employer's informational advertisement is neither a prima facie refusal to negotiate nor a pretextual agreement to negotiate violative of §(a)(5) of the Act. Absent an allegation that the employer agreed and then broke its promise to keep silent as to the status of negotiations, I do not find the employer's "message" contained confidential information which otherwise amounted to bad faith negotiations.

4/ Footnote Continued From Previous Page

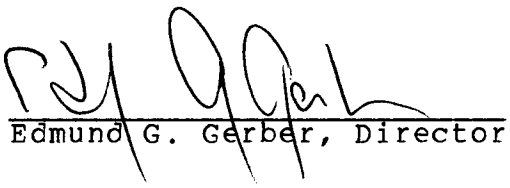
situation and determines the question from the standpoint of employees over whom the employer has a measure of economic power. See NLRB v. E.I. DuPont de Nemours, ____ F.2d _____, 118 LRRM 2014, 2016 (6th Cir. 1984).

Therefore, I decline to issue a complaint on the 5.4(a)(1), and (5) allegations.

Similarly, the charge contains no allegations to support the asserted violation of subsection (a)(3) of the Act. Accordingly, I decline to issue a complaint concerning the alleged violation of subsection (a)(3).

The charging party has requested that this charge be consolidated with CO-90-75. Since I decline to issue a complaint on this charge, the application for consolidation is denied.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Edmund G. Gerber, Director

DATED: December 28, 1989
Trenton, New Jersey