

D.U.P. No. 2007-8

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

In the Matter of

GLOUCESTER COUNTY COLLEGE,

Respondent,

-and-

Docket No. CO-2006-128

GLOUCESTER COUNTY COLLEGE  
FACULTY ASSOCIATION,

Charging Party.

**SYNOPSIS**

The Director of Unfair Practices refuses to issue a complaint in a charge alleging the College violated the Act by refusing to include a retirement bonus in the parties recently negotiated agreement. The Director finds no agreement had been reached to include a retirement bonus in the new contract.

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Appearances:

For the Respondent,  
Archer & Greiner, attorneys  
(David A. Rapuano, of counsel)

For the Charging Party,  
Selikoff & Cohen, attorneys  
(Keith Waldman, of counsel)

**REFUSAL TO ISSUE COMPLAINT**

**Summary**

Gloucester County College Faculty Association (Association) filed an unfair practice charge alleging Gloucester County College (College) violated the New Jersey Employer-Employee Relations Act (Act). The Act provides certain rights and obligations for both parties in the collective negotiations process. The Association claims the College violated certain of its negotiation obligations. The College disputes that claim. I found a complaint was not warranted and dismissed the charge.

**Procedural Background**

On November 9, 10, and 28, 2005, the Association filed its unfair practice charge and two amendments, respectively, against

the College, alleging it violated 5.4a(5)<sup>1/</sup> of the Act, N.J.S.A. 34:13A-1 et seq. The Association claims the College violated the Act by refusing to reduce an agreement on retirement bonuses to writing and by refusing to include the retirement bonus in the parties' final agreement. The Association requests that the Commission order the enforcement of the agreement on the retirement bonus.

The College denies it violated the Act. It claims that there was no agreement between the parties to include the retirement bonus in the successor contract.

The Commission has authority to issue a complaint where it appears that the Charging Party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. That authority has been delegated to me. Where the complaint issuance standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3. In correspondence dated November 29, 2006, I advised the parties that I was not inclined to issue a complaint in this matter and set forth the basis upon which I arrived at that conclusion. I provided the parties with an opportunity to

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<sup>1/</sup> These provisions prohibit public employers, their representatives or agents from: "(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."

respond. Neither party filed a response. Accordingly, I find that the complaint issuance standard has not been met.

### **Pertinent Facts**

The Association was certified to represent the College's full-time faculty in July, 2005. Prior thereto, the negotiations unit was represented for many years by the American Federation of Teachers Local 2338, AFL-CIO. The Federation's earlier negotiations agreement expired July 1, 2004.

In November 2003, the Federation began negotiations with the College for a successor agreement. In the Fall of 2004, the College and Federation first began discussing the issue of early cash-out of retirement bonus ("retirement bonus").

On September 30, 2004, the College proposed withdrawing all outstanding issues contingent on the negotiation of an expedited economic settlement. These issues were not permanently removed from the table; they were simply held in abeyance with the understanding that if the parties reached a quick resolution of the economic issues, the College would sign-off on withdrawing its other issues. However, no quick agreement on the economic issues was reached, thus the College's non-economic proposals remained on the table.

Under the parties' (College and Federation) prior agreement, a set amount of unused sick time was paid out to employees at retirement as a bonus. On November 3, 2004, as part of a settlement package offer, the College proposed a retirement

bonus; that is, under certain conditions, unit members would be allowed to periodically cash out part of their unused sick time before retirement. On that same date, the Federation made a counter-proposal with various demands, and which also included a reiteration of the College's retirement bonus proposal; however, no agreement was reached. At the next negotiation session on November 12, 2004, the same retirement bonus was included in a series of proposals and counter-proposals between the parties; again, no agreement was reached.

The retirement bonus continued to be discussed, and the College again proposed it on December 17, 2004. The College also included it in its January 19, 2005 settlement package proposal. That proposal specifically stated that it was "conditioned upon contract ratification and settlement."

On February 4, 2005, the Federation submitted a written counter-proposal, which included the retirement bonus. The counter-proposal was unsigned and stated that the "offer was contingent upon contract ratification and settlement". Also on that date, the College made another settlement proposal which included the retirement bonus and which further indicated that it was contingent upon contract settlement and ratification. But, no written or oral agreement was reached by the parties at that time and negotiations continued.

The College became frustrated by what it perceived to be a lack of progress and, believing that its settlement proposal was

not known to the Federation membership, published the proposal. By a February 7, 2005 memo from Dominick Burzichelli, the College's Vice-President of Human Resources and its chief negotiator with employees, the College outlined the terms of its offer to the union membership, including the retirement bonus proposal, and urged the membership to request a ratification vote. But, no request for a ratification vote was made.

On March 23, 2005, in a further effort to reach a settlement, the College forwarded then Federation and current Association President Dr. Lalaji Deshbandhu a copy of a proposed final agreement incorporating all of the Board's proposals, including the retirement bonus. In the cover memo, the College again urged the union leadership to seek ratification of the proposal. But that same day, March 23, 2005, the Federation filed a notice of impasse with the Commission.

On April 12, 2005, the Commission declared an impasse and assigned the parties a mediator. On April 18, 2005, in a final attempt to reach an agreement before impasse proceedings began, the College delivered to Deshbandhu a copy of a detailed settlement proposal and a redline version of the contract. This April 18 proposal included the retirement bonus, among other items the parties had tentatively agreed to. Moreover, this proposal explicitly set forth its restrictions, particularly that it would only remain open until April 30, 2005. The proposed settlement offer specifically stated:

If not accepted by April 30, 2005, this offer, including all its various components, shall be considered withdrawn. This reflects the College's longstanding position that its proposals during the negotiations are integrated and contingent.

The proposal further explained that if accepted by the membership, the proposal would still have to be submitted to the College's Board of Trustees for ratification. Federation President Deshbandhu acknowledged receipt of the April 18, 2005 proposal; however, no Federation officer ever signed its signature page indicating acceptance.

On April 22, 2005, the Gloucester County College Faculty Association filed a representation petition with the Commission seeking to represent the unit; as a result, negotiations and impasse proceedings were suspended. The College's April 18<sup>th</sup> proposal was not accepted or ratified by the Federation by April 30, 2005 and, thus, by its terms, it was deemed withdrawn by the College. On June 27, 2005, the Commission conducted a representation election at which the Association was selected as the unit's majority representative. Following certification of the Association, on July 6, 2005 negotiations commenced with the Association. Several mediation sessions were held in August and September 2005; the retirement bonus was not discussed during any of these sessions. At the third mediation session on September 9, 2005, with the help of the mediator, the parties reached an agreement on all issues and drafted and signed a Memorandum of Agreement (MOA). The MOA was executed on behalf of the

Association by Association President Deshbandhu and negotiating team members Oron Nahom and Michael Keith.

The MOA does not specifically include or mention the retirement bonus, but states that "all prior agreements shall remain settled and become part of the final agreement". The Association negotiating team believed that there was an agreement on the retirement bonus, as well as every other article of the contract contained in the College's April 18, 2005 proposal. Accordingly, it believed the retirement bonus to be included in the MOA because of the MOA's specification that all prior agreements shall become part of the final agreement.

The MOA further specifies that by signing it, each negotiating team agrees to recommend the terms and conditions of the agreement to their respective constituents and that the MOA's terms and conditions are subject to ratification by these constituents.

On September 9, 2005, Burzichelli sent Deshbandhu a draft copy of the contract which did not include a number of items in the College's April 18, 2005 proposal and in the September 9, 2005 MOA; the retirement bonus was among the items missing. The draft contract was subsequently modified on September 13, 2005, but the retirement bonus still was not included.

On September 14, 2005, the College forwarded to the Association a copy of the final proposed contract; the retirement bonus was not included. The Association asserted to the College



that an agreement on the retirement bonus had been reached on February 4, 2005 or in April 2005, and insisted that ratification would be contingent on the inclusion of it in the contract.

Deshbandhu contacted Burzichelli and went to his office several times beginning on or about September 14, 2005. Subsequently, with Deshbandu observing, Burzichelli inserted items into the contract which the parties had tentatively agreed upon; however, Burzichelli refused to insert the retirement bonus, despite the Association's belief that there had also been a prior agreement on that issue. According to the Association, the College at that point claimed for the first time that it was withdrawing the retirement bonus proposal.

Because of the College's refusal to include the retirement bonus in the agreement, the Association negotiating team claims it was left with the choice of either: (1) refusing to present the contract to its members for ratification and then face an unfair practice charge that would stymie negotiations; or: (2) explaining to the members what had happened, seek ratification of the contract and also seek authorization to pursue an unfair practice charge against the College. The Association negotiating team decided on the second choice.

Accordingly, on October 3, 2005, the Association negotiating team presented the contract to the Association membership for ratification. At the same time, they also urged the filing of an unfair practice charge against the College, in an attempt to

force the inclusion of the retirement bonus in the contract. The membership then voted to ratify the contract and to authorize the filing of an unfair practice charge.

Later that day, Deshbandhu, without mentioning the Association's intention to file an unfair practice charge regarding the retirement bonus, informed Burzichelli that the "Memorandum of Agreement dated September 9, 2005 and the faculty contract were approved by 55 to 13 margin." Deshbandhu further requested that the MOA and contract be presented to the College's Board of Trustees for ratification as soon as possible.

Based on the Association's ratification of the agreement, the Board of Trustees voted to ratify the contract on October 5, 2005. Immediately thereafter, Deshbandhu addressed the meeting of the Board and the public. He accused the College of bad faith and announced that the Association intended to file an unfair practice charge, seeking to include the retirement bonus in the agreement.

Subsequently, on October 18, 2005, Deshbandhu and the rest of the Association negotiating team, executed the final agreement with full knowledge that it did not include the retirement bonus. Article 16.1 of the executed contract contains a comprehensive "fully bargained" clause that specifies:

This Agreement incorporates the entire understanding of the parties on all matters which were or would have been the subject of negotiation and supercedes each and every provision of all prior contracts between the parties. Except as specified, neither party

shall be required to negotiate with respect to any such matter whether or not covered by this Agreement and whether or not within the knowledge or contemplation of either or both parties at the time they executed this Agreement.

Thereafter, on November 9, 10 and 28, 2005, the Association filed an unfair practice charge and two amendments regarding the retirement bonus issue.

**ANALYSIS**

Based on my review of the record, I find that the Association's charge does not support the issuance of a complaint.

The Association claims that the College's actions in failing to reduce its prior agreement on the retirement bonus to writing, and in repudiating the MOA, constitute an unlawful refusal to negotiate in good faith in violation of 5.4a(5) of the Act. The Commission standard for determining whether a party has refused to negotiate in good faith follows:

It is necessary to subjectively analyze the totality of the parties' conduct in order to determine whether an illegal refusal to negotiate may have occurred. . . . A determination that a party has refused to negotiate in good faith will depend upon an analysis of the overall conduct and/or attitude of the party charged. The object of this analysis is to determine the intent of the respondent, i.e., whether the respondent brought to the negotiating table an open mind and a sincere desire to reach an agreement, as opposed to a predetermined intention to go

through the motions, seeking to avoid, rather than reach, an agreement<sup>2/</sup>.

Here, it does not appear that the College unlawfully refused to negotiate in good faith. Since November 2003, the College has negotiated with the sincere desire to reach an agreement. The College included the retirement bonus in several settlement proposals it made to the Federation, including its November 3, November 12, and December 17, 2004 settlement proposals, as well as its January 19, February 4 and March 23, 2004 proposals. However, the Federation rejected all these proposals and an impasse was eventually declared by the Commission on April 1, 2005. Thereafter, on April 18, 2005, the College included the retirement bonus in its last settlement offer to the Federation prior to the start of impasse proceedings. This April 18, 2005 settlement offer contained explicit restrictions, particularly that it would remain open only until April 30, 2005.

The Federation did not accept this settlement offer by April 30, 2005; thus, by its terms, the College considered it withdrawn. After the Association took over as the unit's exclusive representative, several mediation sessions took place and the retirement bonus was never discussed, offered or agreed upon at any of these sessions. Eventually, with a Commission mediator's help, the parties reached an agreement and signed an MOA; the MOA did not include or mention the retirement bonus.

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<sup>2/</sup> State of New Jersey, 1 NJPER 39, 40 (1975), aff'd 141 N.J. Super. 470 (App. Div. 1976).

Accordingly, the College did not include the retirement bonus in the final proposed contract it forwarded to the Association on September 14, 2005.

The Association claims there was a prior agreement on the retirement bonus, and wanted it to become part of the final agreement.

The College, however, would not agree to insert the retirement bonus, because, it believed that there was never an agreement with the Federation or the Association on that item. Despite the fact the College continued to refuse to include the retirement bonus in the agreement, the Association membership voted to ratify the agreement and the Association executed it, knowing of the retirement bonus' absence and that the agreement also included a "fully bargained" clause.

Upon reviewing the totality of the circumstances, I do not find that the College acted in bad faith during negotiations or specifically, that it refused to reduce an agreement on the retirement bonus to writing. The College brought an open mind to the negotiating table and a sincere desire to reach an agreement, but the retirement bonus was never included in the MOA or the finalized agreement.

The agreement executed and ratified by the Association is clear on its face; it does not contain a retirement bonus. The

Association cannot achieve in this amended unfair practice charge what it failed to achieve in negotiations.<sup>3/</sup>

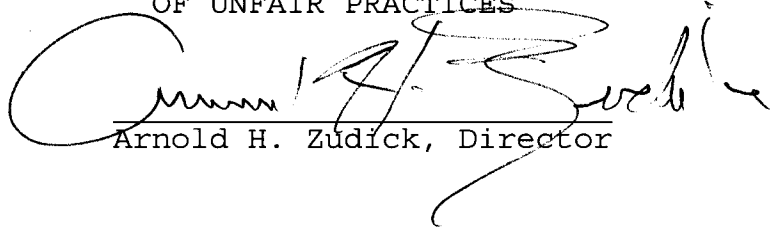
Finally, based on these circumstances, I dismiss the Association's claim that the College unlawfully repudiated the MOA by not including the retirement bonus in the final agreement. A contract repudiation occurs when a party refuses to honor a clear contract clause.<sup>4/</sup> Here, there is no clear contract clause that the College refused to honor since the retirement bonus is not included or even mentioned in the MOA.

Accordingly, 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.<sup>5/</sup>

**ORDER**

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR  
OF UNFAIR PRACTICES



Arnold H. Zudick, Director

DATED: December 21, 2006  
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 January 2, 2007.**

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<sup>3/</sup> See Township of Vernon, P.E.R.C. No. 84-41, 9 NJPER 655 (¶14283 1983).

<sup>4/</sup> See N.J. Department of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

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