

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Respondent,

-and-

Docket No. CO-2012-108

COUNCIL OF NEW JERSEY
STATE COLLEGE LOCALS, AFT,

Charging Party.

SYNOPSIS

A Commission designee denies an application for interim relief filed by the Council of New Jersey State College Locals based upon a charge alleging that the State of New Jersey violated N.J.S.A. 34:13A- 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it suspended the sabbatical leave program after the expiration of the parties collective negotiations agreement ("CNA"). The Council alleged irreparable harm because the State, by terminating the sabbatical leave program, chilled the negotiations process. The State argued that the Article in the CNA covering the sabbatical leave program specifically delineated the four academic years that the program would be in effect, and, as a result, the program expired with the CNA. The Council made several arguments asserting that the program did not expire with the CNA. The designee found that the sabbatical leave Article was ambiguous since it was not clear on the record if the CNA created a term and condition of employment with respect to the sabbatical leave program which survived the expiration of the contract. As a result, the designee denied the application, finding that the Council had not demonstrated that it had a substantial likelihood of success in prevailing on the facts in this matter.

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Appearances:

For the Respondent, McElroy, Deutsch, Mulvaney & Carpenter, LLP, attorneys (John J. Peirano, of counsel and on the brief; Michael J. Dee and David M. Alberts, on the brief)

For the Charging Party, Mets, Schiro & McGovern, LLP, attorneys (Kevin P. McGovern, of counsel and on the brief)

INTERLOCUTORY DECISION

On October 11, 2011, the Council of New Jersey State College Locals, AFT, AFL-CIO ("Council") filed an unfair practice charge against the State of New Jersey ("State") which was accompanied by an application for interim relief seeking temporary restraints. The charge alleges that the State violated N.J.S.A. 34:13A- 5.4a(1) and (5)^{1/} of the New Jersey Employer-Employee

^{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
(continued...)

Relations Act, N.J.S.A. 34:13A-1 et seq., when it suspended the sabbatical leave program at the expiration of the parties collective negotiations agreement ("CNA") on June 30, 2011. The application seeks an Order directing the State to cease terminating and/or suspending the sabbatical leave program and to restore the status quo ante to all matters related to sabbatical leave, including allowing the granting of sabbatical leave at the local college/university level; enjoining the State from making any changes to the terms and conditions of employment while the parties are engaged in negotiations for a successor agreement; and enjoining the State from committing any violations of the Act.

On November 2, 2011, I issued an Order to Show Cause without temporary restraints specifying November 28 as the return date for argument via telephone conference call. The State was directed to file its response brief by November 21. On November 28 the matter was argued.

The Council represents the following unit members at all nine state colleges/universities: (1) teaching and/or research faculty; (2) department chairperson; (3) administrative staff (non-managerial); (4) librarians; (5) student personnel staff;

1/ (...continued)
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."

(6) demonstration teachers; (7) demonstration Specialist - A, Harry Moore School; (8) professional academic support personnel (holding faculty rank); (9) part-time personnel employed in categories 1-8 above who (a) are employed in regular, recurrent positions, (b) work at least half of a full load, and (c) are employed on either a one-year contract or on at least a second half-year contract occurring during any two consecutive academic years; and (10) members of the state colleges/universities who teach summer session. The unit excludes: (1) college/university president and vice president; (2) deans, associate and assistant deans and other managerial executives; (3) secretarial staff; (4) maintenance staff; (5) bookstore, food service, etc. staff; (6) adjunct faculty and academic specialists; and (7) graduate assistants.

The following material facts are based on certifications and documentation provided by the parties.

The State and the Council are parties to a collective negotiations agreement ("CNA") with a term of July 1, 2007 through June 30, 2011. In pertinent part, the CNA provides at Article XXVII, "Sabbatical Leaves":

The STATE agrees to continue, as herein modified, a sabbatical leave program. Effective in the first and second year of this Agreement the State Colleges/Universities will be authorized to grant one hundred and eighty (180) half-year leaves. Effective the third and fourth year of this Agreement the State Colleges/Universities

will be authorized to grant one-hundred and ninety (190) half-year leaves. At each College/University two (2) half-year leaves may be combined into one (1) full year leave. These leaves will be apportioned among the Colleges/Universities on a basis proportional to the number of eligible faculty members and librarians at each College/University with a least six (6) consecutive years of service at a College/University.

A. Eligibility – Application – Approval

1. All full-time tenured faculty members (including Demonstration Teachers and Demonstration Specialists at the A.H. Moore School) and librarians who, as of June 30 prior to the year for which leave is requested, have completed a period of (6) or more consecutive years of service at a College/University, shall be eligible to apply for a sabbatical leave during the 2007-2008, 2008-2009, 2009-2010, 2010-2011 academic years. Sabbatical leaves are granted no more frequently than once every seven (7) years.

2. a. Application shall be submitted to the President of the College/University no later than February 1st of each year.

b. Application may be made for the purpose of pursuing a substantial project designed to yield publishable results and/or enhance competency as a scholar or teacher. Sabbatical leaves may also be granted for the pursuit of an accredited degree program in an appropriate field.

c. A committee will be established under the governance structure of each College/University to review the academic merits of each application and make recommendations to the President. The UNION shall have the right to appoint one employee observer to such committee. The committee shall conduct its review and make its recommendations by no later than March 1st of the year involved.

d. The President shall take into consideration the recommendations of the committee and shall make recommendations for approval or disapproval to the Board of Trustees.

B. Terms of Sabbatical Leave

1. Half-year leaves shall be at the rate of full salary.

2. Full-year leaves shall be at the rate of three quarters (3/4) salary.

3. For librarians, half-year leaves shall be five (5) months, and full year leaves ten (10) months.

4. The period of the leave shall be credited for increment purposes, where such credit is relevant.

5. A faculty member or librarian on sabbatical leave shall be entitled to the continuation of pension and insurance programs benefits as provided in the applicable plans.

6. Each faculty member or librarian accepting a leave must sign a written statement obligating him or her to continue to serve for at least one (1) year after expiration of the term of the leave, unless waived by the President of the College/University.

7. Faculty members or librarians on such leave are permitted to receive additional compensation in the form of fellowships, government grants, and honoraria for purposes related to the leave and part-time employment directly related to the project at an institution where they are in residence for the purpose of study and research in addition to the partial salary from the College/University, provided that total compensation

from all sources does not exceed such faculty members' full salary at the College/ University. The leave may not be used to accept paid employment during the period of the leave except as provided above.

8. Faculty or librarians on sabbatical leave may engage in outside employment if it does not conflict with the purpose of the sabbatical leave or N.J.A.C. 9:2-10.1, et seq. and the faculty member reports the outside employment before going on leave.

The Council and the Governor's Office of Employee Relations (State) began negotiating for a successor agreement in May 2011. On September 15, 2011, Yvonne Catley, Deputy Director of the Governor's Office of Employee Relations sent the following email to Steve Young, Executive Director of the Council:

Hi Steve, as you are aware, pursuant to the contract, we apportion sabbaticals and career development for each fiscal year of the agreement; the sabbatical provision actually sets forth the dates. Since we are still in negotiations and have not settled the sabbatical leave or career development provision there has been no agreed upon apportionment as the contract has expired. Therefore, the provisions for sabbatical leave and the career development expired as of the end of the contract.

This unfair practice charge followed.

ANALYSIS

Interim relief is extraordinary relief, and the granting of such relief requires the "most sensitive exercise of discretion." Crowe v. De Gioia, 90 N.J. 126, 132 (1982). Under Crowe, a

determination as to whether interim relief should be granted is guided by four fundamental principles. Id. at 132-134. The first principle is that interim relief should not be granted except when necessary to prevent irreparable harm. The second principle is that interim relief should not be granted if the legal right underlying the movant's claim is unsettled. The third principle is that interim relief should not be granted where material facts are in dispute and the movant has not made a preliminary showing of a substantial likelihood of success on the merits. The final principle is a weighing of the relative hardship to the parties in granting or denying relief. Ibid. Further, the public interest must not be injured by an interim relief order. See also Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975). A moving party must prevail in all four prongs in order to be granted interim relief.

Sabbatical leave programs are terms and conditions of employment and are therefore mandatory subjects of bargaining. See Willingboro Bd. of Ed. and Willingboro Ed. Ass'n, P.E.R.C. No. 80-46, 5 NJPER 475 (¶10240 1979), aff'd P.E.R.C. No. 80-75, 5 NJPER 553 (¶10287 1979), aff'd NJPER Supp.2d 88 (¶70 App. Div. 1980), certif. denied 87 N.J. 320 (1981).

The crux of this matter concerns Article XXVII of the CNA and the dispositive test in this case is whether or not the

Council has a substantial likelihood of success on the merits^{2/}. The State argues that Article XXVII is limited to the term of the CNA because the four school years are specifically delineated in the CNA.

The Council argues that the sabbatical leave program survived the expiration of the CNA because the State approved requests for sabbatical leaves that were submitted on or before February 1, 2011 and these approved sabbaticals are being taken and will continue to be taken during the 2011-2012 academic year notwithstanding the expiration to the CNA on June 30, 2011^{3/}.

Additionally, the Council points to two other sections in the CNA where specific language is used allegedly clearly showing that the Article only applies during the period covering the

^{2/} Although the Council has made arguments and cited case law regarding irreparable harm, the relative hardship to the parties and the public interest, because I find the substantial likelihood of success to be the dispositive factor, I have not addressed the other factors.

^{3/} The State argues that it was required to "accept" the applications by February 1, 2011 pursuant to the terms of the CNA, but was not required to process the applications for the 2011-2012 academic year. Even assuming arguendo, that the State was not required to accept applications, it should be noted that where an employer provides a benefit greater than one stated in a CNA, it is not a unilateral alteration of terms and conditions of employment if the employer reduces that benefit to the level provided for in the CNA. It is the CNA which establishes the terms and conditions of employment rather than the actual practice. New Brunswick Bd. of Ed., P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1978).

CNA^{4/} and argues that had the parties wanted the sabbatical leave program to expire with the agreement, they could have stated so clearly. The State counters this argument by asserting that there is no meaningful distinction between the language in Article XXVII which sets forth the specific dates of the sabbatical leave program and the terminology used in Article XIX.

The Council also argues that fixing the number of sabbaticals at 190 per half-year leaves is no different than fixing the number of vacation days, sick leave days or the amount payable as overload compensation, benefits which do not terminate with the expiration of the CNA. However, the parties practice of implementing these benefits after the expiration of the CNA does not shed light on the ambiguity regarding the intent of the parties with respect to the Article addressing sabbatical leaves.

Finally, the Council asserts that there is a past practice of extending the sabbatical leave program even when the CNAs had expired^{5/}.

^{4/} Article XIX Section E provides, "It is agreed that the STATE shall continue the Dental Care Program during the period of this agreement." Article XIX Section F provides, "It is agreed that the STATE shall continue the Eye Care Program during the period of this agreement."

^{5/} The Council's certification from Steve Young, Executive Director of the Council, indicates that he has only been employed with the Council for 8 1/2 years; the State's certification from Yvonne Catley, however, indicates that in the case of the previous two CNA's, the 1999-2003 CNA and the 2003-2007 CNA, the parties negotiated the successor CNAs
(continued...)

Due to this confusion of the meaning of Article XXVII, specifically, whether or not the program expired with the CNA, the Council has not demonstrated it has a substantial likelihood of success in prevailing on the facts in this matter. It is not clear on the record if the CNA created a term and condition of employment with respect to the sabbatical leave program which survives the expiration of the contract. Ocean County Sheriff's Dept., P.E.R.C. No. 86-107, 12 NJPER 341, 347 (¶17130 1986); Hudson County Sheriff's Officers, PBA Local 334 v. Hudson County Sheriff, et al., H.E. No. 93-2, 18 NJPER 384, 387 (¶23173 1992), aff'd P.E.R.C. No. 93-56, 19 NJPER 64 (¶24029 1992). Therefore, the Council has not satisfied one of the requisite elements to allow for the granting of interim relief.

ORDER

The application for interim relief is denied. The charge will be forwarded to the Director of Unfair Practices for processing in accordance with the Commission's Rules.



David N. Gambert
Commission Designee

DATED: December 7, 2011

Trenton, New Jersey

5/ (...continued)
before the start of the academic year. As a result, the State argues that there was no need to notify the Council of the expiration of the sabbatical leave program.