D.U.P. NO. 2024-9

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

In the Matter of

RUTGERS, THE STATE UNIVERSITY
OF NEW JERSEY,

Respondent,

-and- Docket No. CO-2021-112

UNION OF RUTGERS ADMINISTRATORS
AMERICAN FEDERATION OF TEACHERS,
LOCAL 1766 (URA-AFT),

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by the Union of Rutgers Administrators, American Federation of Teachers, Local 1766 (URA-AFT) (the Charging Party or Local) against Rutgers University, the State University of New Jersey (Respondent or University). The charge alleges the University announced a new policy entitled "University Policy 60.1.32 - Policy on Consensual Relationships in Academic Settings," which the Local claims changed unspecified mandatory subjects of negotiations. It further alleges that the University failed to negotiate and refused to revert to the status quo. The Director concludes that the University's decision to prohibit certain types of consensual relationships in the academic setting was not subject to mandatory negotiations because a public employer has a managerial prerogative to prohibit relationships that create an actual or apparent conflict of interest. The Director also concludes that the University was not obligated to negotiate when the Local failed to specifically identify severable negotiable issues. Lastly, the Director finds that the charge fails to satisfy our pleading standards.

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Appearances:

For the Respondent,
(Julianne Apostolopoulos, Esq.)

For the Charging Party,
(Gregory Rusciano Marti, URA-AFT Director)

REFUSAL TO ISSUE COMPLAINT

On December 3, 2020, the Union of Rutgers Administrators, American Federation of Teachers, Local 1766 (URA-AFT) (the Charging Party or Local) filed an unfair practice charge against Rutgers University, the State University of New Jersey (Respondent or University). The charge alleges that on June 15, 2022, Barbara Lee, Senior Vice President for the University, announced a new policy entitled "University Policy 60.1.32-Policy on Consensual Relationships in Academic Settings," which the Local claims changed unspecified mandatory subjects of negotiations. It further alleges that on the same day, Director

of the Local, Gregory Rusciano, emailed Harry Agnostak, the Associate Vice President for Labor and Employee Relations at the University, demanding negotiations and restoration of the status quo. It maintains that no University representative agreed to negotiate over the "change(s) of mandatory subjects, the impact(s) of the change(s) or to revert to status quo." The Local alleges that these actions violate the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(2) and (5) of the Act[1/] as well as the New Jersey Workplace Democracy Enhancement Act (WDEA)[2/] N.J.S.A. 34:13A-5.11 through 5.15.

The Commission has authority to issue a complaint where it appears that a charging party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4(c); N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I will decline to issue a complaint.

1/ These provisions prohibit public employers, their representatives or agents from: "(2) Dominating or interfering with the formation, existence or administration of any employee organization; [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/ Alleged violations of the WDEA do not necessarily implicate this agency's unfair practice jurisdiction, as the statute clearly identifies only certain conduct as an unfair practice under the Act. See N.J.S.A. 34:13A-5.14(c)

N.J.A.C. 19:14-2.3; CWA Local 1040, D.U.P. No. 2011-9, 38 NJPER 93 (¶20 2011), aff'd P.E.R.C. No. 2012-55, 38 NJPER 356 (¶120 2012).

I find the following facts.

The University is a public employer within the meaning of the Act. The University and the Local are parties to a collective negotiations agreement (CNA) that extended from July 1, 2018 through June 30, 2022. The Local represents a negotiations unit comprised of administrative employees employed by the University at its many campuses.

Both the Local and the University submitted position statements in support of their respective claims and copied each other on their submissions.

Announcement of the Policy on Consensual Relationships in Academic Settings

On June 15, 2020, Barbara A. Lee, the Senior Vice President for Academic Affairs, sent an email to University staff and students entitled "New Policy on Consensual Relationships in Academic Settings." Lee's email announced this new policy and explained that it already went into effect thirteen days earlier on June 15, 2020. Lee explained that the policy was instituted pursuant to the recommendations of the Rutgers University Committee on Sexual Harassment Prevention and Culture Change, which was charged in 2018 with the responsibility of creating a plan to address the findings of a study by the National Academies

of Sciences, Engineering, and Medicine that sexual harassment is experienced by substantial percentages of female students and staff in the STEM and medical fields. Lee provided a link to the full policy and provided the following overview of the policy in pertinent part:

> This new policy comprises the recommendations of the Subcommittee on Consensual Relationships, focusing particularly on those within the academic setting of the University. The policy prohibits the following relationships: (I)"any Academic Supervisor [as defined by the policy] from engaging in a consensual relationship with any student currently enrolled as an undergraduate as an undergraduate at the University"; (ii) "any Academic Supervisor from engaging in a consensual relationship with any graduate or professional student, Postdoctoral Associate or Fellow, or Clinical Resident or Fellow which creates a conflict of interest" in areas specified in the fuller policy; and (iii)"any Internship Supervisor [as defined by the policy], Student Employee (including but not limited to Residence Life advisors/Assistants, Teaching Assistants, Graduate Assistants and Postdoctoral Associates), and Postdoctoral Fellows, which creates a conflict of interest because the Internship Supervisor/Student Employee/Postdoctoral Fellow teaches, manages, supervises, advises or evaluates in any way the other party in an academic setting or living or learning environment or might reasonably be expected to do so in the future."
>
> Additionally, the policy includes a reporting structure for alleged violations of the policy, and includes a mitigation process to be utilized in the event of a relationship between consenting members of the Rutgers community that may result in a conflict with the policy, as well as a process to handle exceptions. As outlined in the policy, "individuals who wish to engage in a relationship [that is considered prohibited] are required to immediately submit a request for an exemption to the Policy's prohibition of such relationships. If a request for an exemption is submitted timely and approved, the parties'

> relationship will be considered to violate this Policy."
>
> . . . . Lastly, the policy provides protection for those who report policy violations, documents a process for the investigation of policy violations, and maintains confidentiality in all processes and materials involved in the implementation of the policy.

Local's Demand to Negotiate

A few hours after Lee's email was sent, the Director of the Local, Gregory Rusciano, forwarded the email to Harry Agnostak, the Associate Vice President for Labor and Employee Relations at the University. Rusciano wrote:

> Harry,
>
> The University failed in its obligation to negotiate over this policy (see below) in advance according to article 52 of our negotiated agreement. The policy contains provisions which unilaterally change mandatorily negotiable terms of employment. You must now immediately rescind the policy and revert to the status quo, and then negotiate with us. If you refuse, a grievance and unfair practice charge may be filed. We will give you until end of business on Friday to comply and set up negotiations times with us. Since you are well aware of article 52 and your obligations to negotiate under PERA [sic], I assume Dr. Lee announced this policy in purposeful defiance of those obligations which is why you will receive very little leeway from us on anything other that [sic] what I have outlined here.

Minutes later, Agnostak emailed the following response:

> Hello Greg,
>
> Before we can consider your demand, please indicate which terms and conditions of employment have been changed and which provisions change said terms.

The following day on June 16, 2020, Rusciano replied by email as follows:

> Harry,
>
> I am not going to do that unless we had reasonable assurance that your side would engage in productive good faith talks about this. However, your track record proves otherwise. And in particular, regarding this instant matter, you and Dr. Lee already chose to attempt to avert your obligations to negotiate and notify us in advance. I believe Dr. Lee, in her role and expertise as a distinguished professor of labor relations is/was more than capable of determining in advance which provisions might be of controversy or at least potentially viewed as a change in terms and conditions. However, she still chose to unilaterally announce the policy without negotiating with the unions affected. Our demand remains as stated with no change or addendum. Will you meet with us to negotiate or not?

Agnostak replied the same day as follows:

> Hello Greg,
>
> We will not accede to your demand to meet and discuss the referenced policy and your assertions that it contains provisions changing the terms and conditions of employment for URA-AFT represented employees without the URA-AFT at the very least identifying which terms and conditions of employment have been impermissibly changed and which provisions have generated those changes. The URA-AFT has raised the aforementioned allegations. Therefore, it is incumbent upon the URA-AFT, not the university, to specify what provisions of the policy form the basis of your complaint and how they necessitate a requirement to negotiate.

A little over an hour later on June 16, Rusciano provided the final response:

> Harry,
>
> We do not need a lesson on labor relations from you. We know our obligations. And we know yours. You and Dr. Lee failed in yours. If we need to prove anything we will do so through the grievance and/or process at PERC.

On December 3, the instant charge was filed.

The Policy

University Policy 60.1.32, entitled Policy on Consensual Relationships in Academic Settings, is an eight-page document that identifies its purpose as "address[ing] consensual relationships that may create actual and/or perceived conflicts of interest due to the individuals' unequal power in the academic realm, which thereby create the possibility for actual or apparent exploitation or favoritism." The policy applies to all members of the "University community." A "Consensual Relationship" is defined in pertinent part as "[a] romantic, dating, intimate, and/or sexual relationship agreed to by the involved parties."

As explained in Lee's email, the policy generally prohibits three types of relationships: (1) those between an academic supervisor and an undergraduate student; (2) those between an academic supervisor and any graduate or professional student, post doctoral associate or fellow, or clinical resident or fellow

where certain conditions exist[3/]; and (3) those between any Internship Supervisor, Student Employee and Postdoctoral Fellow and any student, intern or postdoctoral fellow which creates a conflict of interest because the supervisor/student employee/postdoctoral fellow teaches, manages, supervises, advises or evaluates the student/intern/fellow.

The policy also sets forth certain notice obligations for individuals who are in such prohibited relationships or wish to engage in a relationship that would otherwise be prohibited by the policy so that they may seek an exemption or pursue a mitigation plan that would eliminate any conflict of interest. It describes the process for seeking exemptions and mitigation plans. It creates an affirmative obligation upon employees to report possible violations of the policy. It advises that the University will investigate violations of the policy, and that "[a]ny appropriate disciplinary action will be handled under the applicable University policies, procedures, and practices and any applicable collective negotiations agreements." Lastly, the policy prohibits retaliation against individuals who report a

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3/ The first condition is where both parties are in the same academic program, discipline or department. The second is where the Academic Supervisor teaches, manages supervises advises or evaluates the other party in the relationship in any way. The third condition is the Academic Supervisor's position enables the supervisor to materially influence the educational opportunities or career of the other party in the relationship.

potential violation, or participate in the investigation or resolution of a complaint made pursuant to the policy.

ANALYSIS

The Act entitles a majority representative to negotiate on behalf of unit employees over their terms and conditions of employment and imposes upon a public employer a duty to negotiate before changing working conditions. N.J.S.A. 34:13A-5.3; See also Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48 (1978). However, not all unilateral changes to terms and conditions of employment trigger this statutory duty as it only applies to those changes that are mandatorily negotiable. IFPTE Local 195 v. State, 88 N.J. 393 (1982) (summarizing the three-part test for determining whether a subject is mandatorily negotiable or a managerial prerogative). The failure to negotiate mandatorily negotiable conditions of employment violates Section 5.4a(5) of the Act. N.J.S.A. 34:13A-5.4a(5). Moreover, while a public employer, upon specific demand by a majority representative, has a duty to negotiate over severable mandatorily negotiable issues that arise due to the impact of its exercise of a managerial prerogative, broad requests to negotiate are not sufficient. See State of New Jersey (Judiciary), P.E.R.C. No. 2008-12, 33 NJPER 225 (¶85 2007), granting recon. I.R. No. 2007-14, 33 NJPER 138 (¶49 2007). And to satisfy the pleading standards for a claim alleging a failure to negotiate

over severable negotiable issues, a charging party must allege specifically what terms and conditions of employment were impacted and that a specific demand to negotiate those issues was made to the employer. See New Jersey State (Judiciary), D.U.P. No. 2022-8, 48 NJPER 344 (¶77 2022). Applying these legal standards, I conclude that the complaint-issuance standard has not been met, and the allegation that the University violated Section 5.4a(5) of the Act must be dismissed.

The University's decision to generally prohibit certain types of consensual relationships in the academic setting was not subject to mandatory negotiations under well-settled precedent. The public employer has a managerial prerogative to prohibit relationships that create a conflict of interest or an appearance of conflict of interest. See Bernards Tp. Bd. of Ed., P.E.R.C. No. 2020-42, 46 NJPER 367 (¶90 2020) (sustaining the dismissal of an unfair practice charge where the Director concluded that a unilaterally implemented policy regarding conflicts of interest in the context of outside employment was not mandatorily negotiable); State of N.J. (OER) and CWA, P.E.R.C. No. 93-55, 19 NJPER 60 (¶24028 1992), aff'd in pt. rev'd in pt., 267 N.J. Super. 582, 589 (App. Div. 1993), certif. den., 135 N.J. 468 (1994)(explaining "[w]hat is ethical or a conflict of interest cannot be determined at the bargaining table."). Here the Policy on Consensual Relationships in Academic Settings was expressly

created to prohibit certain types of relationships in academia that create or may create the appearance of a conflict of interest due to power inequities, which in turn could cause actual exploitation or favoritism or the perception of exploitation or favoritism. Therefore, the University was not obligated to negotiate over the exercise of this managerial prerogative in determining the types of relationships that should be prohibited to avoid apparent or actual conflicts of interest.

While the exercise of this managerial prerogative may very well give rise to a severable issue that the University may be required to negotiate, the Local's demand needed to specifically identify it. See e.g. State of New Jersey (Judiciary), P.E.R.C. No. 2008-12, 33 NJPER 225 (¶85 2007), granting recon. I.R. No. 2007-14, 33 NJPER 138 (¶49 2007) (explaining that "[a] broad request to negotiate over the exercise of a managerial prerogative does not constitute a specific demand to negotiate over severable negotiable issues."); Union City, P.E.R.C. No. 2006-77, 32 NJPER 116 (¶55 2006)(finding no duty to negotiate over alleged unilateral changes arising from the exercise of a managerial prerogative where the majority representative's letter did not specify any procedures to be negotiated or any severable negotiable issues.) In the instant matter, the Local premised its demand to negotiate on its assertion that the policy unilaterally changed mandatorily negotiable terms and conditions

of employment. Director Rusciano however provided no specifics in his initial demand regarding what mandatorily negotiable terms purportedly changed, yet insisted that the University "immediately rescind the policy and revert to status quo." As we have previously recognized, a public employer is not automatically required to admit that it changed employment conditions or to revoke a challenged policy based upon general assertions made by a majority representative that unilateral changes have occurred. Id. Here, rather than refuse to negotiate, Agnostak, on two separate occasions, requested that Director Rusciano identify what about the status quo changed. And on both occasions, Director Rusciano refused to provide any specific information that would enable the University to evaluate its duty to negotiate under the Act, asserting that if the Local needed to prove anything it would do so through grievances and at PERC. Accordingly, the University did not violate the Act when Director Rusciano made a broad negotiations demand on behalf of the Local.

The Local's contention in its position statement that the Policy was negotiable "in its entirety . . . or at least contains provisions which are mandatorily negotiable" is unpersuasive, non-specific and ignores applicable law regarding conflict of interest policies and negotiations over severable issues. While asserting that it is not required to identify mandatorily

negotiable subjects, it identified the following non-comprehensive list of modified employment conditions: just cause and discipline, the grievance procedure, employee safety issues, and workplace rules.

The Local's assertion that the Policy "infringes on the just cause standard" for discipline and exceeds any existing managerial prerogative to investigate and act upon infractions and its authority to make a decision about whether or not to take disciplinary action" still fails to answer specifically how the just cause standard is infringed or otherwise impacted by the policy. Morever, the policy expressly provides that "disciplinary action will be handled under the applicable University policies, procedures, and practices and any applicable collective negotiations agreement." The Commission does not exercise jurisdiction over such contractual disputes. State of New Jersey (Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

The Local claims that the policy "illegally precludes" it from grieving violations of the policy because the policy says its determinations are final, and it has a contractual right to grieve violations of the University's policies that relate to mandatorily negotiable terms and conditions of employment. The Local's argument overlooks settled caselaw establishing that the employer has a managerial prerogative to prohibit relationships

that in its judgement create a conflict of interest or an appearance of a conflict of interest. To the extent there is some future dispute between the parties regarding whether a particular grievance challenging some application of the policy is arbitrable under the parties' contract, then it can be decided by an arbitrator or the courts. See Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978).

The Local next contends that "some existing provisions of the collective agreement address safety but there is no Zipper clause whatsoever which would preclude the Employer from its obligation to negotiate over any changes to what's already included in the collective agreement about safety or to propose and negotiate over new provisions not already covered by the collective agreement." Again, the Local fails to identify specifically what those "existing provisions" are and how they were changed. And while issues impacting employee safety may be mandatorily negotiable, it is unclear from both its position statement and its broad negotiations demand how a policy prohibiting consensual relationships between Academic Supervisors and undergraduates students make unit employees less safe.

The Local's final argument is that "workplace rules such as those outlined in the Policy are mandatorily negotiable," that the policy consists of "one or more provisions which could be new workplace rules" and that without Zipper or management rights

clauses, the University cannot "unilaterally establish new rules such as the work rules outlined in the Policy without negotiating first." The Local does not however, address settled caselaw that not all new work rules are mandatorily negotiable and does not specify which of the policy's component parts are severable negotiable issues.

The Local's allegations also fail to meet the pleading standards given its broad demand to negotiate and its refusal to identify how the status quo changed as a result of the policy. In New Jersey State (Judiciary), D.U.P. No. 2022-8, 48 NJPER 344 (¶77 2022), the Director dismissed a charge where the majority representative failed to allege specifically how a unilaterally implemented policy regarding officer uniforms impacted officers' safety or how it had an economic impact on the employees it represents. The Director concluded that the Commission pleading standards had not been met and provided the following explanation:

> A charging party, in order to justify our issuance of a complaint, must set forth in its charge a "clear and concise statement of the facts" in support of its claims. N.J.A.C. 19:14-1.3(a); Edison Tp., D.U.P. No. 2012-9, 38 NJPER 269 (¶92 2012), aff'd P.E.R.C. No. 2013-84, 40 NJPER 35 (¶14 2013); Warren Cty. College, P.E.R.C. No. 2018-25, 44 NJPER 287 (¶80 2017). This standard encompasses the "who, what, when and where" information about the commission of an unfair practice. Id. With respect to severable impact claims arising from the exercise of a managerial prerogative, a charging party must plead, with specificity, what terms and conditions of employment were impacted and allege that a specific demand to

> negotiate those impact issues was made to the employer. Warren Cty. College.

Id. In the instant matter, the Local's charge fails to meet our pleading standards because it fails to allege with any specificity the nature and extent of the policy's impact on terms and conditions of employment.

Additionally, no facts are alleged that support a violation of subsections 5.4a(2) of the Act. Accordingly, this claim is dismissed.

Lastly, no facts are alleged that support an unfair practice claim arising under the WDEA. The WDEA does not expressly confer upon the Commission a general jurisdiction to enforce all of the statutorily-created obligations imposed upon public employers. See Classical Academy Charter School, D.U.P. 2022-1, 48 NJPER 113 (¶29 2021). Furthermore, the instant charge makes only a generalized claim of a WDEA violation, and fails to articulate any specific facts that implicate conduct expressly identified by the WDEA as an unfair practice under subsection a(1) of the Act. N.J.S.A. 34:13A-5.14. Such statements clearly are insufficient to meet our pleading requirements, and the Local's claim is also dismissed on that basis. N.J.A.C. 19:14-1.3a(3).

ORDER

The unfair practice charge is dismissed.

/s/Ryan M. Ottavio
Ryan M. Ottavio
Director of Unfair Practices

DATED: September 27, 2023
Trenton, New Jersey

This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3. See N.J.A.C. 19:14-2.3(b).

Any appeal is due by October 10, 2023.