H.E. NO. 93-22

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PASSAIC COUNTY COMMUNITY COLLEGE

Respondent,

-and- Docket No. CO-H-92-402

PASSAIC COUNTY COMMUNITY COLLEGE
SUPPORT STAFF ASSOCIATION, NJEA,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent College did not violate sections 5.4(a)(1), (5) or (7) of the New Jersey Employer-Employee Relations Act by its conduct in unilaterally changing the payroll procedure from one based upon a 260-day year to one based upon a variable year of either 260, 261 or 262 days and then reducing the paychecks of employees to reflect the change made. The Hearing Examiner's action was one of granting a Motion to Dismiss prior to hearing based upon Reider v. State of New Jersey, Dept. of Transportation, 221 N.J. Super. 547 (App. Div. 1987) since judgment on the pleadings as a matter of law was deemed warranted. The case ws indistinguishable from two Commission decisions which sustained a refusal to issue [OPEIU, Local 153, P.E.R.C. No. 93-54 and P.E.R.C. No. 93-67].)

A Hearing Examiner's Decision on a Motion to Dismiss is not a final administrative determination of the Public Employment Relations Commission. The charging party has ten days from the date of the decision to request review by the Commission or else the case is closed.

H.E. NO. 93-22

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PASSAIC COUNTY COMMUNITY COLLEGE

Respondent,

-and- Docket No. CO-H-92-402

PASSAIC COUNTY COMMUNITY COLLEGE
SUPPORT STAFF ASSOCIATION, NJEA,

Charging Party.

Appearances:

For the Respondent, Passaic County Community College, Michael Yosifon, Vice President

For the Charging Party, Richard D. Comerford, NJEA Negotiations Consultant

HEARING EXAMINER'S DECISION ON
RESPONDENT'S MOTION TO DISMISS

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on June 12, 1992, by the Passaic County Community College Support Staff Association, NJEA ("Charging Party" or "Association") alleging that the Passaic County Community College ("Respondent" or "College") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"), in that the College unilaterally modified existing rules governing conditions of employment without negotiations, which occurred at the commencement of negotiations for a successor agreement; in March 1992, the College unilaterally changed the payroll procedure from

one based upon a 260-day year to one based on a variable year of either 260, 261 or 262 days and then reduced the paychecks of employees to reflect that unilateral change. This action was undertaken by the Board of the College as a fait accompli without the knowledge or input of the Association; all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1), (5) and (7)[as amended by letter dated June 30, 1992].1/

A Complaint and Notice of Hearing was issued on September 25, 1992, and hearings were scheduled for December 1, 2 and 3, 1992, in Newark, New Jersey. However, prior to the commencement of the hearing, the College filed a Motion to Dismiss as of October 28, 1992. The Association filed a response on November 20, 1992.

On December 9, 1992, I advised the parties that I was unable to decide the Respondent's Motion to Dismiss since a related decision of the Director of Unfair Practices, involving the College and OPEIU, Local 153 (D.U.P. No. 93-8, 18 NJPER 464 (¶23209 September 15, 1992) was on review before the full Commission. It appearing that the facts presented in that case were similar to those in the instant case, I deemed it premature for me to act pending the Commission's decision in D.U.P. No. 93-8, supra.

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. (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. (7) Violating any of the rules and regulations established by the commission."

The Commission issued its decision on review December 18, 1992 (P.E.R.C. No. 93-54, 19 NJPER 59 (¶24027 1992). It sustained the refusal of the Director of Unfair Practices to have issued a Complaint in the OPEIU case. Based on this decision, I sent a letter to the parties on December 22nd, in which I requested of them certain factual data which was not previously in the file and which I deemed necessary for the adjudication of the Respondent's Motion to Dismiss. This data was provided by January 11, 1993.

However, on January 13, 1993, OPEIU, Local 153 moved for reconsideration of P.E.R.C. No. 93-54. The Commission on February 23, 1993, granted OPEIU's motion for reconsideration but reaffirmed the refusal of the Director of Unfair Practices to have issued a Complaint (P.E.R.C. No. 93-67, 19 NJPER ___ (¶24072 1993).

* * * *

Based upon: (1) the allegations in the Unfair Practice Charge; (2) the affirmative allegations in the Answer of the Respondent; (3) the November 17th response of the Association to the College's Motion to Dismiss; and (4) the respective responses of the parties to my letter of December 22nd, requesting additional information, I now make the following:[2/]

2/ The Respondent's Motion to Dismiss prior to hearing under N.J.A.C. 19:14-4.7 is similar to a Motion to Dismiss for failure to state a claim upon which relief may be granted, i.e., one which raises only issues of law and admits all facts properly pleaded by the party opposing the motion.

UNDISPUTED FINDINGS OF FACT

1. The Passaic County Community College is a public employer within the meaning of the Act, as amended, and the Passaic County Community College Support Staff Association, NJEA, is a public employee representative within the meaning of the same Act.

2. The current collective agreement between the parties, effective July 1, 1989 to June 30, 1992, contains the following relevant provisions:

> Article VIII, "Overtime," C: In the event the College closes for emergency purposes and employees are required to work, they shall receive compensation at twice their regular hourly rate. Incorporated within the premium rate of double time is the employee's regular per diem rate (1/260 of the employee's base salary)....
>
> Article XI, "Separation," D.(2): Supportive Staff members who are laid-off shall receive at least one month notice of a lay-off. In the event the Board gives late notice, the Supportive Staff member shall receive two week's pay (1/26 of the employee's base pay) in the form of separation pay...
>
> Article XII, "Holidays," B: [If members of the unit perform duties on a holiday...] the member shall receive compensation at two and one-half times their regular hourly rate or at his/her option, compensatory time off... Incorporated within the premium rate of double time and one-half is the employee's regular per diem rate (1/260 of the employee's base salary...

3. On March 24, 1992, the instant College unilaterally changed the payroll procedure from one based upon a "260 day year" to one based upon a variable year of either 260, 261 or 262 day year and then reduced the paychecks of employees to reflect that unilateral change, which averaged about $4.00 per paycheck. This action of the College was undertaken without negotiations or the

consent of the Association. Further, this action occurred after the date of March 31st had been set as the first negotiations session for a successor agreement.[3/]

4. In D.U.P. No. 93-8, 18 NJPER 464 (¶23209 1992), supra. the Director of Unfair Practices found on September 15th that in 1984 the College converted its payroll system from a semi-monthly to a bi-weekly system, which involved OPEIU, Local 153. At that time the annual salary was divided by 260 workdays to obtain a daily rate and this was continued by the College even in fiscal years which included 261 or 262 workdays. During the years thereafter the employees represented by the OPEIU received an over-payment. When this was discovered in March 1992, the College explained the error to the affected employees. It then implemented a reduction in the bi-weekly rate. The Director found that the College had the right to make this correction so that annual salaries paid matched the annual salaries in the agreement.

5. On appeal, the Commission on December 18, 1992 affirmed the Director's refusal to issue a Complaint (P.E.R.C. No. 93-54, 19 NJPER 59 (¶24027 1992). In so deciding, the Commission noted first that the appendix to the contract listed specific rates

---

3/ Since I can consider only those facts well pleaded by the Charging Party, all of which are admitted for purposes of disposing of the motion, I am unable to consider at this point matters of defense by the College such as "mistake" or "error" even though they appear in the Association's responses of November 17th and December 28, 1992, in addition to the response of the College dated January 7, 1993.

of pay for groups of titles of employees while labeling them salary ranges. However, they were not in fact "salary ranges". The Commission concluded that the dispute should be resolved through the negotiated grievance procedure: State of New Jersey, (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

6. On January 13, 1993, the OPEIU moved for reconsideration, which the Commission granted on February 23, 1993. Nevertheless, the Commission again sustained the refusal of the Director to issue a Complaint, stating that the dispute must be resolved through the parties' negotiated grievance procedure: Human Services, supra., [P.E.R.C. No. 93-67, 19 NJPER ___ (¶24072 1993)].

7. A conclusive factual parallel exists between the instant case and that of OPEIU, Local 153, supra.

* * * *

APPLICABLE STANDARD TO A MOTION TO DISMISS PRIOR TO HEARING

A motion to dismiss before hearing under N.J.A.C. 19:14-4.7 is similar to a motion to dismiss for failure to state a claim upon which relief can be granted under R.4:6-2(e). City of Margate, H.E. 89-23, 15 NJPER 166 (¶20070 1989). Alternatively, it is a motion for judgment on the pleadings, which raises solely issues of law and admits all facts properly pleaded by the opposing party. Reider v. State of New Jersey Dept. of Transp., 221 N.J. Super 547 (App. Div. 1987).

In Reider v. State of New Jersey Dept. of Transp., 221 N.J. Super. 547 (App. Div. 1987), the court stated:

> On a motion made pursuant to R. 4:6-2(e) "the inquiry is confined to a consideration of the legal sufficiency of the alleged facts apparent on the face of the challenged claim." P. & J. Auto Body v. Miller, 72 N.J. Super 207, 211 (App. Div. 1962). The court may not consider anything other than whether the complaint states a cognizable cause of action. Ibid. For this purpose, "all facts alleged in the complaint and legitimate inferences drawn therefrom are deemed admitted." Smith v. City of Newark, 136 N.J. Super 107, 112 (App. Div. 1975). See also Heavner v. Uniroyal, Inc., 63 N.J. 130, 133 (1973); Polk v. Schwartz, 166 N.J. Super 292, 299 (App. Div. 1979). A complaint should not be dismissed under this rule where a cause of action is suggested by the facts and a theory of actionability may be articulated by way of amendment. Muniz v. United Hsps. Med. Ctr. Pres. Hsp., 153 N.J. Super 79, 82-83 (App. Div. 1977). However, a dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted.
>
> Reider, at 552.

In considering whether to grant a motion to dismiss a complaint for failure to state a claim upon which relief can be granted, i.e., judgment on the pleadings, the allegations in the complaint must be taken as true and the benefit of all favorable inferences from the allegations must be afforded the Charging Party. Wuethrich v. Delia, 134 N.J. Super. 400 (Law Div. 1975), aff'd 155 N.J. Super. 324 (App. Div. 1978); Sayreville B/E, H.E. No. 78-26, 4 NJPER 117 (¶4056 1978).[4/]

4/ Compare New Jersey Turnpike, P.E.R.C. No. 79-81, 5 NJPER 197 (1979) where the Commission adopted the standard used by the

Footnote Continued on Next Page

ANALYSIS

As noted in the above statement of the law on a motion to dismiss before hearing, the motion must necessarily raise only issues of law with all of the facts properly pleaded deemed as admitted. And, as noted in Reider v. State, "...a dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted..." (221 N.J. Super. at 552). I have concluded that the averments made by the Association, taken as true with all favorable inferences afforded to the Association, are, nevertheless, legally insufficient to support a finding and conclusion that the College has violated Sections 5.4(a)(1), (5) and (7) of the Act as alleged. My reasons for so concluding are as follows:

First, with respect to the alleged violation of Sections 5.4(a)(1) and (5) of the Act, there is no way in which I can distinguish the instant case from the OPEIU, Local 153 case, supra. There the Commission twice found that the issuance of a complaint was not warranted.[5/] It noted that while the appendix to the

---

4/ Footnote Continued From Previous Page

New Jersey Supreme Court in Dolson v. Anastasia, 55 N.J. 2 (1959) for a motion to dismiss at the close of a charging party's case. That standard requires that the evidence (at least a scintilla) be viewed in a light most favorable to the party opposing the motion.

5/ No significant distinction exists as between OPEIU, Local 153, supra., where no complaint ever issued and the case at bar where a complaint did issue.

contract listed specific rates of pay for groups of titles of employees, labeling them as "salary ranges," the contract did not in fact create actual "salary ranges." Thus, did the Commission conclude that the OPEIU dispute should be resolved under the parties' contractual grievance procedure.

Given such explicit guidance from the Commission, and being unable to differentiate the facts in the OPEIU case from those presented in the case at bar, it must follow that the College did not in this case violate Sections 5.4(a)(1) and (5).

Finally, the College did not violate section 5.4(a)(7) of the Act, which deals with the rules and regulations of the Commission, since no relevant averments have been made by the Association nor proofs proferred.

* * * *

For all of the reasons above stated, I now make the following:

CONCLUSION OF LAW

The Respondent College did not violate N.J.S.A. 34:13A-5.4(a)(1), (5) or (7) by its conduct in March 1992, when it unilaterally changed the payroll procedure from one based upon a 260-day year to one based upon a variable year of either 260, 261 or 262 days and thereafter reduced the paychecks of employees to reflect that unilateral change. Nor were any rules or regulations of the Commission violated herein by the College.

RECOMMENDED ORDER

I recommend that the Commission ORDER that the complaint be dismissed.

Alan R. Howe
Hearing Examiner

Dated: April 23, 1993
Trenton, New Jersey