

I.R. NO. 91-12

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Respondent,

-and-

Docket No. CO-91-203

COMMUNICATIONS WORKERS OF AMERICA,

Charging Party.

SYNOPSIS

A Commission Designee temporarily restrains the Department of Treasury of the State of New Jersey from implementing an ethics code without first negotiating with the CWA as the majority representative of the affected employees. Specifically, the Department sought to impose a ban upon outside employment involving tax work of all kinds performed by auditors within the Division of Taxation. The Designee held that a conflict of interest may exist when auditors engaged in outside employment prepare New Jersey State tax forms and such a ban would be non-negotiable. However, the ban as it applied to preparing tax forms for other jurisdictions, e.g., federal and other states, did not seem to involve a conflict of interest and were mandatorily negotiable. The Department was not restrained from unilaterally implementing that portion of the Code of Ethics where an actual conflict of interest may exist.

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Appearances:

For the Respondent

Robert J. DelTufo, Attorney General of New Jersey
William Harla, Assistant Attorney General
(Grey J. DiMenna, on the brief)

For the Charging Party

Steven P. Weissman, of counsel

INTERLOCUTORY DECISION

On February 8, 1991, the Communications Workers of America ("CWA") filed an Unfair Practice Charge with the Public Employment Relations Commission alleging that the State of New Jersey engaged in unfair practice within the meaning of N.J.S.A. 34:13A-1 et seq., specifically subsection 5.4(a)(1) and (5) when the Department of Treasury ("Department") promulgated a code of ethics which unilaterally altered a 20 year practice of permitting auditors employed by the Division of Taxation to have outside accounting and tax practices.

The new code of ethics prohibits auditors from engaging in such outside employment effective February 15, 1991. The Department refused to negotiate over this new code.

The CWA submitted an Order to Show Cause. The Order was executed and made returnable for February 15, 1991.

There are about 400 auditors in the Department of Taxation. The CWA states that 40% of them engage in outside employment involving tax preparation, accounting or bookkeeping.

The Department of Treasury has had a code of ethics since 1972. The code was created pursuant to the conflict of interest statute, N.J.S.A. 52:13D-12 et seq. The code restricts employees from undertaking "any employment or service, whether compensated or not, which might reasonably be expected to impair his objectivity and independence." The code further requires that Department employees obtain approval of outside employment.

The CWA first received notice that the Department was about to promulgate a new code on December 17, 1990 when the Department circulated a memo alerting employees of the imminent adoption of the new code. The notice stated that "one of the (code's) major provisions includes the restriction in outside employment on the preparation of any tax-related matter by personnel of the Division of Taxation". A second notice was issued on January 11, 1990 stating "the Code contains a provision prohibiting tax return preparation for compensation by a Division employee. It is important to note that this restriction applies to all Division

employees, whether management, professional or clerical or whether employed permanently or intermittently."

At the request of the CWA, a meeting was held with the State Treasurer and several union representatives. The Treasurer declined to negotiate over the proposed Code at the meeting.

The New Jersey Executive Committee on Ethical Standards (ECES) reviewed the Department's proposed Ethical standards code and approved that code. The code expressly provides that Taxation Division employees cannot engage in outside activity which "would have anything to do with tax problems, tax returns or with the determination of tax liabilities whether federal, state or other taxes are involved." The Department announced that the new code would be effective February 15, 1991 and all employees must comply with the new code effective that date.

The standards that have been developed by the Commission for evaluating interim relief requests are similar to those applied by the Courts when addressing similar applications. The moving party must demonstrate that it has a substantial likelihood of success on the legal and factual allegations in a final Commission decision and that irreparable harm will occur if the requested relief is not granted. Further, in evaluating such requests for

relief, the relative hardship to the parties in granting or denying the relief must be considered.^{1/}

The State argues that since the ethical code was approved by the ECES, the code is, in effect, a regulation pre-empting negotiations. However, N.J.S.A. 52:13D-2 et seq. leaves considerable discretion to the employer. The ECES only approves a code submitted by a Department. A Department is free to modify its code of ethics at anytime subject to ECES approval. Such discretion in the Department will not preempt negotiations. State v. State Supervisory Assn., 78 N.J. 54 (1978); Bethlehem Tp. Bd. of Ed. v. Bethlehem Ed. Assn., 91 N.J. 38 (1982); University of Medicine & Dentistry, P.E.R.C. No. 85-106, 11 NJPER 290 (¶16105 1085)

The negotiability of restrictions on outside employment was addressed in Ass'n of New Jersey State College Faculties, Inc. v. New Jersey Bd. of Higher Ed., 66 N.J. 72 (1974). There the parties' contract required disclosing any regular off-campus services. The union did not object to guidelines prohibiting outside employment which: (1) constituted a conflict of interest, (2) occurred during college work time, or (3) diminished the employee's efficiency in doing his primary job. But the union did object to other guidelines requiring the employer's prior and continuing written approval and

^{1/} Crowe v. DeGioia, 90 N.J. 126 (1982); Tp. of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Tp. of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 36 (1975).

limiting the compensation an employee could receive. The Court held that these additional restrictions were mandatorily negotiable and ordered them stricken pending negotiations.

The Commission expressly found in Montclair, P.E.R.C. No. 90-39, 15 NJPER 629 (¶20264 1989) and Somerset County, P.E.R.C. No. 84-92, 10 NJPER 130 (¶15066 1984) that Higher Ed is still good law. As stated in Somerset, a code of ethics which has a blanket restriction on outside employment is mandatorily negotiable under the Supreme Court test of In re IFPTE Local 195 v. State, 88 N.J. 393, 403-404 (1982).

The CWA maintains that since guidelines were already in place as a safeguard both in Higher Ed and here, the Commission should follow the Court's precedent. However, in Higher Ed, the union did not test that portion of the restriction which banned employment that creates a conflict of interest. Since Higher Ed did not address whether ethical guidelines concerning an actual conflict of interest are negotiable, Higher Ed does not serve as a basis for the granting of a restraint here. There is a substantial question whether a code of ethics which bars an employee from employment which creates a conflict of interest is mandatorily negotiable.

However, the Department's ban goes beyond those tax returns processed within the Department. The ban extends to the preparation of tax returns of other states and the federal government. The State argues that the State Division of Taxation and the Federal Internal Revenue Service "share information". Absent specific

evidence as to what information is shared and how it is shared, such a general assertion does not show a conflict of interest exists. Balancing the employers interest against the employee's interest in outside employment,^{2/} the balance favors the right to negotiate over outside employment. Woodstown-Pilesgrove Bd. of Ed. v. Woodstown-Pilesgrove Ed. Assn., 81 N.J. 582 (1980). There is a substantial likelihood that the Commission will find these prohibitions negotiable.


The damages which would be suffered by these employees cannot be readily quantified. Division employees have outside accounting practices that can exceed 100 clients. If they lose all their clients this year, it would be impossible to calculate the long term financial damage to such practices.

I believe that to comply with the statutory scheme, the Department should have negotiated with the CWA over negotiable aspects of the Ethics Code prior to submitting the Code for ECES approval. In this manner, the ECES would act as an automatic

^{2/} In Bowman v. Pennsauken Tp., 709 F. Supp. 1329 (D.N.J. 1989), Judge Rodriguez preliminarily enjoined restrictions on third party employers wishing to hire police officers to "moonlight" as security guards. These restrictions required the employers to execute a hold harmless and indemnification agreement, to insure each officer for at least one million dollars, and to pay an administrative fee. In effect, the Township became a broker in off-duty security work. Judge Rodriguez recognized the Township's legitimate interests in reducing fatigue, limiting litigation and lessening insurance expenses. Slip op. at 22-23. Nevertheless, the restrictions unduly encroached upon the liberty interests and equal protection rights of officers seeking security jobs.

review. If the ECES believes a negotiated code is insufficient, it would be free to reject it, with suggested revision, or as suggested by the CWA, the ECES can make necessary revisions. Further, if the employer and union reach an impasse in negotiations, the Department could submit its code proposal directly to the ECES.

Therefore, It Is Ordered That the Department of Treasury is restrained from implementing that portion of the Department of Treasury Code of Ethics which bars Taxation Division employees from having anything to do with tax problems, tax returns or with the determination of tax liability whether federal, state or other taxes are involved, except that the Department may implement this or any other portion of the Code as to any matter which will be processed or reviewed by the New Jersey State Division of Taxation.^{3/}



Edmund G. Gerber
Commission Designee

DATED: February 22, 1991
Trenton, New Jersey

^{3/} This is an interim order only. This matter will go forward to a plenary hearing to determine which aspects of the Ethical Code are subject to collective negotiations.