

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

In the Matter of

STATE OF NEW JERSEY, OFFICE  
OF EMPLOYEE RELATIONS,

Respondent,

-and-

DOCKET NO. CO-82-271

COUNCIL OF NEW JERSEY STATE  
COLLEGE LOCALS, NJSFT-AFT/AFL-CIO,

Charging Party.

SYNOPSIS

The Director of Unfair Practices declines to issue a complaint with respect to allegations that the State engaged in unfair practices when the Civil Service Commission passed regulations altering certain employment anniversary dates without prior negotiations with the Council of New Jersey State College Locals. The Council, a representative of state college faculty, alleged that the Civil Service rules change was preceded by negotiations with the majority representative of other State employee negotiations units. The Council conceded that the Civil Service Commission was a regulatory agency. State v. State Supervisory Employees, 70 N.J. 54 (1978) holds that rules promulgated by regulatory agencies preempt collective negotiations. The Director finds that the Council's allegations involve circumstances unlike Council of New Jersey State College Locals v. State Board of Higher Education, 91 N.J. 18 (1982), in which the regulatory agency was also identified as the employer of the employees which it regulates.

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REFUSAL TO ISSUE COMPLAINT

An Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") on April 20, 1982, by Council of New Jersey State College Locals, NJSFT-AFL/AFL-CIO (the "Council") against the State of New Jersey, Office of Employee Relations (the "State") alleging that the State was engaging in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), specifically, N.J.S.A. 34:13A-5.4(a)(1), (2), (3), and (5). <sup>1/</sup>

N.J.S.A. 34:13A-5.4(c) sets forth in pertinent part that the Commission shall have the power to prevent anyone from engaging in any

<sup>1/</sup> N.J.S.A. 34:13A-5.4(a) prohibits public employers, their representatives and agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage 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."

unfair practice, and that it has the authority to issue a complaint stating the unfair practice charge. <sup>2/</sup> The Commission has delegated its authority to issue complaints to the undersigned and has established a standard upon which an unfair practice complaint may be issued. This standard provides that a complaint shall issue if it appears that the allegations of the charging party, if true, may constitute an unfair practice within the meaning of the Act. <sup>3/</sup> The Commission's rules provide that the undersigned may decline to issue a complaint. <sup>4/</sup>

For the reasons stated below, the undersigned has determined that the Commission's complaint issuance standards have not been met.

The Council is the certified negotiations representative of a unit of faculty and certain other professional staff employees at eight State colleges. The public employer with whom it negotiates is the State of New Jersey. In the current collective negotiations agreement covering unit employees, the employer is identified as the State, by the Governor's Office of Employee Relations and the Department of Higher Education.

The instant matter concerns the adoption of certain rules by the Civil Service Commission on March 2, 1982 relating to employee anniversary dates which, the Council alleges, have the effect of

<sup>2/</sup> N.J.S.A. 34:13A-5.4(c) provides: "The commission shall have exclusive power as hereinafter provided to prevent anyone from engaging in any unfair practice ... Whenever it is charged that anyone has engaged or is engaging in any such unfair practice, the commission, or any designated agent thereof, shall have authority to issue and cause to be served upon such party a complaint stating the specific unfair practice and including a notice of hearing containing the date and place of hearing before the commission or any designated agent thereof..."

<sup>3/</sup> N.J.A.C. 19:14-2.1

<sup>4/</sup> N.J.A.C. 19:14-2.3

altering terms and conditions of employment for unit members. The Council alleges that Civil Service's adoption of the above rule changes was preceded by negotiations over these modifications between the State and the Communications Workers of America (a certified representative of four units of white-collar State employees). The Council asserts that the State did not negotiate with it. The Council claims that "the aforesaid actions of the State and its Civil Service Commission constitute a refusal 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, interference with, restraint and coercion of employees in the exercise of the rights guaranteed to them by the N.J. Employer-Employee Relations Act, interference with the existence and administration of an employee organization, and discrimination in regard to terms and conditions of employment to discourage employees from the exercise of the rights guaranteed to them by the Act."

In a statement of position filed in response to the charge, the State argues that under the parties' collective agreement as well as by operation of law pursuant to State v. State Supervisory Employees Assn., 78 N.J. 54 (1978), the Council was bound by the Civil Service rules. State Supervisory holds that specific statutes and regulations which set or control a particular term and condition of employment preempt collective negotiation and agreement.

On August 26, 1982, the undersigned advised the parties that the instant matter was being reviewed under the Commission's complaint issuance standard, supra, and requested further statements as to the

applicability vel non of State Supervisory to the issues under review. The undersigned also requested that the parties direct their attention to the more recent decision of Council of N.J. State College Locals, NJSFT-AFT/AFL-CIO v. State Board of Higher Education, 91 N.J. 18 (1982). In this latter case, the Council had challenged the State Board of Higher Education's adoption of certain regulations establishing uniform procedures for staff reductions at State Colleges during periods of fiscal emergencies, arguing that the proposed regulations should have been submitted to collective negotiations before their adoption. The Court noted that the Board of Higher Education acted in the dual capacity of a regulator and employer, and held:

The determination whether an agency regulation affecting terms and conditions of employment should be given preemptive effect may depend upon the direct application of the regulation to the agency's own employees and the agency's posture vis-a-vis the employees affected by the regulation. We therefore hold that if the agency acts solely as a regulator and has no direct employer interest over the employees affected, its regulations fixing terms and conditions of employment must be given the same preemptive effect as a statute. See Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Assn., N.J. (1982); State Supervisory, 78 N.J. at 80-82. However, if the agency acts in dual capacities and promulgates a regulation affecting employees under its control, its regulations establishing terms and conditions of employment will not necessarily preempt negotiation on the subject matter covered therein. In this latter setting, preemption will be presumed. However, that presumption can be overcome by demonstrating that the regulations were arbitrary, adopted in bad faith, or passed primarily to avoid negotiation on terms and conditions of employment. When such a showing is made, the regulations will not be given preemptive effect.

The Court found, however, upon review of all relevant factors that the regulations were preemptive in nature notwithstanding the Department's dual role of regulator and employer.

In reply to the undersigned's request for a positional statement in light of State Supervisory and Council, the Council stated that "the allegations of the Unfair Practice Charge require an answer to the question whether the Civil Service Commission, a state agency, can pass these regulations without prior negotiations with the representative for the employees who will be affected." The Council conceded that the Supreme Court had established that "a regulator has a right to determine substantive terms and conditions of employment without negotiation." However, the Council argued that the instant matter was governed by Council. The Council argued:

In the instant case, the Civil Service Commission is the employer of the employees the Council represents, and the agency who (sic) set forth the regulations. As such, the decision in Council operates to directly qualify the Commission's power as a regulator.

The Council further argued that its factual allegations concerning the State's negotiations with CWA would demonstrate "bad faith" and thus rebut the presumption of Council that there has been a valid preemption.

The Council's statement did not contain any factual or legal analysis supportive of its claim that the Civil Service Commission was the employer. Since there was no evidence supportive of the claim that the Civil Service Commission served as an employer, the undersigned advised the Council to provide material supportive of its claim, and indicated that in the absence of such support, a complaint would not issue.

On November 9, 1982, the Council responded to the undersigned's request for further material, indicating that its previous assertion

that the Civil Service Commission was the employer was an error, and it corrected that statement to reflect that the Civil Service Commission was a regulatory agency. The Council identified the State College Boards of Trustees as the "actual employer". The Council still maintained, however, that the Council decision was applicable, stating:

The instant matter, therefore, should be compared to Council of New Jersey State College Locals v. State Board of Higher Education, 91 N.J. 18 (1982) and distinguished from State v. State Supervisory Employees Association, [78 N.J. 54] (1978). The 1982 case qualifies the power of a regulator which also asserts authority as an employer. It applies herein because the State participated in negotiations with the Communications Workers of America and not with the Council, a representative of a separate segment of state employees, specifically state college faculties. This act was an unjustifiable and arbitrary bypassing of the Council. When the State seeks to implement a change affecting all employees of one employer, it cannot deal with just one bargaining agent, unless that agent represents all the employees. Liken what the State did to the case of a municipal employer negotiating with the Policemen's Benevolent Association Local and thereafter saying to the firemen or the sanitation workers that the same negotiations were binding upon them.

The undersigned has carefully reviewed the factual allegations and argument advanced by the Council. Unlike the circumstances presented in the Council case involving the actions of the Department of Higher Education, the Civil Service Commission has not been identified by the Council herein as both a regulatory agency and an employer agency with respect to the affected employees. Unlike the analogized hypothetical situation advanced by the Council, the State's implementation of anniversary date changes for all affected employees arises not by discretion but by the direction of a State regulatory body.

Accordingly, the undersigned does not find, based upon the factual and legal argument presented, that a basis exists for the litigation of the within allegations and hereby declines to issue a complaint.

BY ORDER OF THE DIRECTOR  
OF UNFAIR PRACTICES

  
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Carl Kurtzman, Director

DATED: November 29, 1982  
Trenton, New Jersey