

D.U.P. No. 2007-7

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

In the Matter of

GLOUCESTER COUNTY COLLEGE,

Charging Party,

-and-

Docket No. CE-2006-017

GLOUCESTER COUNTY COLLEGE
FACULTY ASSOCIATION,

Respondent.

SYNOPSIS

The Director of Unfair Practices refuses to issue a complaint in a charge alleging the Association engaged in bad faith by agreeing to contract terms while also filing a charge. The Director determines that the filing of a charge is, itself, protected conduct, and the Association otherwise met its obligation to submit an MOA for ratification.

D.U.P. No. 2007-7

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

In the Matter of

GLOUCESTER COUNTY COLLEGE,

Charging Party,

-and-

Docket No. CE-2006-017

GLOUCESTER COUNTY COLLEGE
FACULTY ASSOCIATION,

Respondent.

Appearances:

For the Charging Party,
Archer & Greiner, attorneys
(David A. Rapuano, of counsel)

For the Respondent,
Selikoff & Cohen, attorneys
(Keith Waldman, of counsel)

REFUSAL TO ISSUE COMPLAINT

Summary

Gloucester County College (College) filed an unfair practice charge alleging Gloucester County College Faculty Association (Association) violated the New Jersey Employer-Employee Relations Act (Act). The Act provides certain rights and obligations for both parties in the collective negotiations process. The College claims the Association violated certain of its negotiations obligations. The Association disputes that claim. I found a complaint was not warranted and dismissed the charge.

Procedural Background

On March 6, 2006, the College filed its unfair practice charge against the Association, alleging it violated 5.4b(3) and

(4)^{1/} of the Act, N.J.S.A. 34:13A-1 et seq., when it presented the parties' agreed upon Memorandum of Agreement (MOA) and contract for ratification, while simultaneously recommending the filing of an unfair practice charge. The College claims this action constitutes an unlawful refusal to negotiate in good faith.

Further, the College contends that the Association acted unlawfully when it executed a contract which it then immediately repudiated. The College argued this action constitutes a failure to negotiate in good faith in violation of 5.4b(3), as well as a refusal to reduce an agreement to writing and to sign such an agreement, in violation of 5.4b(4).

The Association denies that it violated the Act. It claims that it has not repudiated, refused to honor, or rejected the parties' agreement. The Association also argues that it ratified the agreement despite its justifiable and articulated reservations, based on the College's alleged failure to honor its prior agreement regarding the retirement bonus.

The Commission has authority to issue a complaint where it appears that the Charging Party's allegations, if true, may constitute an unfair practice within the meaning of the Act.

^{1/} These provisions prohibit employee organizations, their representatives or agents from: "(3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. That authority has been delegated to me. Where the complaint issuance standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3. In correspondence dated November 29, 2006, I advised the parties that I was not inclined to issue a complaint in this matter and set forth the basis upon which I arrived at that conclusion. I provided the parties with an opportunity to respond. Neither party filed a response. Accordingly, I find that the complaint issuance standard has not been met.

Pertinent Facts

The Association was certified to represent the College's full-time faculty in July, 2005. Prior thereto, the negotiations unit was represented for many years by the American Federation of Teachers Local 2338, AFL-CIO. The Federation's earlier negotiations agreement expired July 1, 2004.

In November 2003, the Federation began negotiations with the College for a successor agreement. In the Fall of 2004, the College and Federation first began discussing the issue of early cash-out of retirement bonus ("retirement bonus").

On November 3, 2004, as part of a settlement package offer, the College made a proposal regarding a retirement bonus; that is, unit members, under certain conditions, would be allowed to periodically cash out part of their unused sick time before retirement. On that same date, the Federation made a counter-proposal to the College's offer which included the College's

retirement bonus proposal; however, no agreement was reached. Thereafter, the same retirement bonus proposal was included in a series of proposals and counter-proposals at the next negotiations session on November 12, 2004, but no agreement was reached.

The retirement bonus continued to be discussed, and the College again proposed it on December 17, 2004. The College also included the retirement bonus in its January 19, 2005 settlement package proposal. That proposal specified it was "conditioned upon contract ratification and settlement."

On February 4, 2005, the Federation submitted a written counter-proposal, which included the retirement bonus. The counter-proposal was unsigned and stated that the "offer was contingent upon contract ratification and settlement". Also on February 4, 2005, the College made another settlement proposal which contained various terms, including the retirement bonus. This proposal also specified that it was contingent upon contract settlement and ratification. However, no written or oral agreement was reached by the parties at that time and negotiations continued.

The College became frustrated by the lack of progress and, believing that its settlement proposal was not known to the Federation membership, published the proposal. By a February 7, 2005 memo from Dominick Burzichelli, the College's Vice-President of Human Resources and its chief negotiator with employees, the

College outlined the terms of its offer to the union membership, including the retirement bonus proposal, and urged the membership to request a ratification vote. But, no request for a ratification vote was made.

On March 23, 2005, in a further effort to reach a settlement, the College forwarded to then Federation President and current Association President Dr. Lalaji Deshbandhu a copy of a proposed full agreement incorporating all of the Board's proposals, including the retirement bonus. In the cover memo, the College again urged the union leadership to seek ratification of the proposal. But that same day, March 23, 2005, the Federation filed a notice of impasse with the Commission.

On April 12, 2005, the Commission declared an impasse and assigned the parties a mediator. On April 18, 2005, in a final attempt to reach an agreement before impasse proceedings began, the College delivered to the Federation a detailed settlement proposal, as well as a redline version of the contract. The proposal contained language regarding the retirement bonus and explicitly set forth its restrictions, particularly that it would remain open only until April 30, 2005. The proposed settlement offer specifically stated:

If not accepted by April 30, 2005, this offer, including all its various components, shall be considered withdrawn. This reflects the College's longstanding position that its proposals during the negotiations are integrated and contingent.

The proposal further explained that if accepted by the membership, the proposal would then be submitted to the College's Board of Trustees for ratification. Deshbandhu acknowledged receipt of the April 18, 2005 proposal; however, no Federation officer ever signed its signature page indicating acceptance.

On April 22, 2005, the Gloucester County College Faculty Association filed a representation petition with the Commission seeking to represent the faculty unit; as a result, negotiations and impasse proceedings were suspended. The Federation did not accept or ratify the College's April 18 proposal by April 30, 2005 and thus, pursuant to its terms, the College deemed it withdrawn.

On June 27, 2005, the Commission conducted a representation election at which the Association was selected as the unit's majority representative. Following certification of the Association on July 6, 2005, negotiations commenced with the Association. Several mediation sessions were held in August and September 2005; the retirement bonus was not discussed during any of these sessions. At the third mediation session on September 9, 2005, with the help of a Commission mediator, the parties reached an agreement on all issues, and drafted and signed an MOA. The MOA was executed on behalf of the Association by Association President Deshbandhu and negotiating team members Oron Nahom and Michael Keith.

The MOA does not specifically include or mention the retirement bonus, but states that "all prior agreements shall remain settled and become part of the final agreement". The MOA further indicates that by signing the MOA, each negotiating team agrees to recommend the terms and conditions of the agreement to their respective constituents and that the MOA's terms and conditions are subject to ratification by these constituents.

Thereafter, on September 14, 2005, the College forwarded to the Association a copy of the contract in its final proposed form; the retirement bonus was not included. Deshbandhu then attempted to persuade Burzichelli to insert the retirement bonus into the agreement; Burzichelli refused. At this point, the Association complained that an agreement on the retirement bonus had been reached on February 4, 2005 or in April 2005, and further insisted that ratification of the contract would be contingent on the inclusion of the retirement bonus.

On October 3, 2005, the Association's negotiations committee presented the contract, which did not include the retirement bonus, to the Association membership for ratification. The Association also simultaneously urged the filing of an unfair practice charge against the College, in an attempt to force the inclusion of the retirement bonus in the contract. The membership then voted to ratify the contract, knowing that it did not include the retirement bonus, and also authorized the filing of an unfair practice charge.

Later that day, Deshbandhu, without mentioning the Association's intent to file an unfair practice charge regarding the contract, informed the College that the "Memorandum of Agreement dated September 9, 2005 and the faculty contract were approved by 55 to 13 margin." Deshbandhu further requested that the MOA and contract be presented to the College's Board of Trustees as soon as possible.

Based on the Association's ratification of the agreement, the Board of Trustees then voted on October 5, 2005 to ratify the contract. Immediately after the ratification vote, Deshbandhu addressed the meeting of the Board of Trustees and the public, accusing the College of bad faith. He also announced the Association's intention to file an unfair practice charge, seeking to include the retirement bonus in the agreement.

Thereafter, on October 18, 2005, Deshbandhu and the rest of the Association negotiating team executed the final draft of the agreement. Article 16.1 of the executed contract contains a comprehensive "fully bargained" clause that specifies:

This Agreement incorporates the entire understanding of the parties on all matters which were or would have been the subject of negotiation and supercedes each and every provision of all prior contracts between the parties. Except as specified, neither party shall be required to negotiate with respect to any such matter whether or not covered by this Agreement and whether or not within the knowledge or contemplation of either or both parties at the time they executed this Agreement.

Subsequently, on November 9, 10 and 28, 2005, the Association filed an unfair practice charge and two amendments, respectively, regarding the retirement bonus issue; the instant March 6, 2006 unfair practice charge by the College followed.

ANALYSIS

Based on the reasons discussed below, I dismiss the Colleges' allegations because it appears they fail to meet our complaint issuance standard.

The College claims that the Association failed to negotiate in good faith when it presented the contract for ratification, while simultaneously recommending the filing of an unfair practice charge. The Commission standard for determining whether a party has refused to negotiate in good faith follows:

It is necessary to subjectively analyze the totality of the parties' conduct in order to determine whether an illegal refusal to negotiate may have occurred. . . . A determination that a party has refused to negotiate in good faith will depend upon an analysis of the overall conduct and/or attitude of the party charged. The object of this analysis is to determine the intent of the respondent, i.e., whether the respondent brought to the negotiating table an open mind and a sincere desire to reach an agreement, as opposed to a predetermined intention to go through the motions, seeking to avoid, rather than reach, an agreement.^{2/}

Here, I find the Association did not negotiate in bad faith. It sought and reached an agreement, the MOA, with the College.

^{2/} State of New Jersey, 1 NJPER 39, 40 (1975) aff'd, 141 N.J. Super. 470 (App. Div. 1976)

Further, it signed the MOA and recommended it to its membership, despite the fact it believed that the retirement bonus had been agreed to by the parties and should have been included in the agreement.

Further, I do not find that the Association acted unlawfully when it signed the contract with the intent to immediately file a charge. The Association's filing of a charge is protected activity. The Association sought to file a charge because at the time it signed the contract it believed that an agreement on the retirement bonus had been reached. Thus it believed the College acted unlawfully when it refused to include it in the contract. The mere filing of a charge is not a violation of the Act. Under these circumstances, I cannot find the Association's actions constituted an unlawful refusal to negotiate in good faith.

The College's assertion that the Association essentially repudiated the contract by filing its charge is not persuasive. A contract repudiation occurs when a party refuses to honor a clear contract clause.^{3/} Here, the Association did not repudiate any clear contract term by filing a charge over the retirement bonus issue, it did not refuse to honor or abide by any of the terms in the parties' recently ratified agreement; rather, it simply exercised its right to engage in protected activity.

3/ See N.J. Department of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

Thus, the College's claim that the Association repudiated the agreement lacks merit.

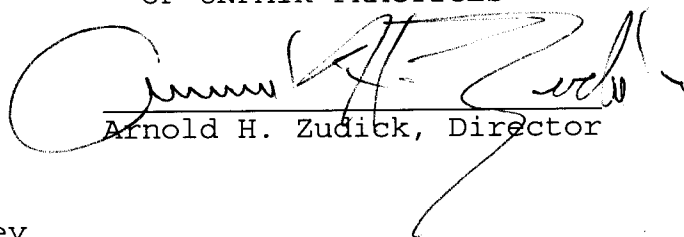
The College's claim that the Association's actions violated 5.4b(4) also lacks merit. Association President Deshbandhu, as well as the Association negotiating team members, signed the MOA and the finalized agreement, despite their objections that the retirement bonus was not included in either. The College's claim that the Association refused to reduce an agreement to writing and to sign such an agreement is not accurate.

Accordingly, I find that the Commission's complaint issuance standard has not been met and I decline to issue a complaint on the allegations of this charge.^{4/}

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Arnold H. Zudick, Director

DATED: December 21, 2006
Trenton, New Jersey

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

Any appeal is due by January 2, 2006.

^{4/} N.J.A.C. 19:14-2.3.