H.E. NO. 2014-11

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

In the Matter of

RUTGERS, THE STATE UNIVERSITY,
Respondent,
-and-
UNION OF RUTGERS ADMINISTRATORS-
AMERICAN FEDERATION OF TEACHERS,
LOCAL 1766, AFL-CIO,
Charging Party.

Docket No. CO-2012-239

SYNOPSIS

A Hearing Examiner denies a motion for summary judgment filed by Union of Rutgers Administrators-American Federation of Teachers, Local 1766, AFL-CIO and grants a cross-motion for summary judgment filed by Rutgers, the State University. The unfair practice charge filed by URA alleged that Rutgers violated section 5.4a(1), (2) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act) by issuing an "inaccurate and inappropriate" email advising all unit employees that the parties reached an agreement concerning a salary freeze and an extension of the parties' collective negotiations agreement. The charge alleges that the parties had not reached a "final agreement" and that the email violated provisions of an agreement over ground rules for successor negotiations signed by the parties.

The Hearing Examiner determined that the email did not violate the ground rules agreement; did not interfere with, restrain or coerce employees in the exercise of rights guaranteed to them by the Act; and did not interfere with the formation, existence or administration of URA.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Charging Party.

Appearances:

For the Respondent
Rutgers, The State University
(Sarah A. Luke, Assistant General Counsel)

For the Charging Party
Weissman & Mintz, attorneys
(Ira W. Mintz, of Counsel)

HEARING EXAMINER'S DECISION ON MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT

On February 24, 2012, Union of Rutgers Administrators-American Federation of Teachers, Local 1766, AFL-CIO (URA) filed an unfair practice charge against Rutgers, the State University (Rutgers). The charge alleges that on January 12, 2012, Rutgers Interim Executive Vice President for Academic Affairs Richard L. Edwards issued an "inaccurate and inappropriate" email to unit employees advising that the parties had reached an agreement resolving a grievance concerning a "salary freeze" and extending

the current collective negotiations agreement through August 31, 2014. The charge alleges that, ". . . in fact," on January 12, 2012, the parties had not reached "final agreement" on the successor contract, nor final settlement of the arbitration over the salary freeze. The charge also alleges that the email violates two provisions of an agreement over ground rules for successor contract negotiations signed by the parties on July 22, 2011. Rutgers' conduct allegedly violates section 5.4a(1), (2) ad (5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act).

On September 5, 2012, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On September 20, Rutgers filed an Answer admitting some allegations and denying others. It denies violating the Act. On October 4, 2012, this case was reassigned to me.

On April 8, 2013, URA filed a motion for summary judgment, together with a certification and exhibits. On April 10, 2013, Rutgers filed a cross-motion for summary judgment, together with

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1/ These provisions 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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (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."

a certification and exhibits. On May 1, 2013, URA filed a reply. On May 23, the Commission referred the motions to me for a decision. N.J.A.C. 19:14-4.8.

Summary judgment will be granted:

> if it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and the movant . . . is entitled to its requested relief as a matter of law. [N.J.A.C. 19:14-4.8(e)]

Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995), sets forth the standard to determine whether a "genuine issue" of material facts precludes summary judgment. The factfinder must ". . . consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." If that issue can be resolved in only one way, it is not a genuine issue of material fact. A motion for summary judgment should be granted cautiously -- the procedure may not be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 182 (App. Div. 1981); Essex Cty. Ed. Serv. Comm., P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982).

Applying the standards and relying upon the pleadings and certifications, I make the following:

FINDINGS OF FACT

1. URA is the majority representative of all "administrative employees" of Rutgers. URA and Rutgers signed a collective negotiations agreement extending from July 1, 2007 through June 30, 2011.

2. On December 2, 2009, in the wake of an "economic crisis," the parties signed a memorandum of agreement (dated November 18, 2009) setting forth revisions of the 2007-2011 collective negotiations agreement. Among the items is a "restructuring and deferral" of wage increases for unit employees, one payable in July, 2009 and another payable in July, 2010. The memorandum defers payments to July, 2010 and June, 2011, respectively.

Rutgers did not pay the deferred increases, prompting the URA's filing of a contractual grievance on an unspecified date.

3. On July 27, 2011, representatives of the parties signed an enumerated nineteen-paragraph agreement setting forth "ground rules" for successor collective negotiations. The agreement provides in pertinent parts:

> 5. Negotiations shall be conducted in private. No one other than members of the designated negotiating teams shall be allowed to attend such sessions, except by mutual agreement, provided that either party has the right to have a non-team member(s) present as an expert or resource person for the purpose of providing special assistance on designated issues to that party's negotiating team with prior notification to the other party.

Observers who are present by mutual consent may not participate in the discussions or otherwise actively participate in the negotiation sessions and will not be granted release time. All attendees shall be bound by these ground rules. Negotiations shall proceed when a quorum of team members is present.

6. Both parties will negotiate in good faith and will make every effort to reach agreement. Accordingly, in order to avoid any chilling effect on either side's expression of opinions and creation of proposals, the parties agree to the following limited confidentiality provision: They will not publicize (including by way of press release or press conferences) proposals, counterproposals or discussions at the table, except that the union is free to communicate with members of the bargaining unit and with union officials and the University may communicate with the members of the senior administration and governing boards. Either side may be relieved of the above confidential[ity] provision by giving thirty-six (36) hours notice to the other side. After giving this notice, the parties are free to publicize the current proposals on the table as well as what transpires at the table in subsequent negotiations sessions. The parties will continue to maintain the confidentiality of discussions that occurred at the table prior to the giving of this notice, except they may disclose what has occurred previously at the table in connection with any PERC matter involving these negotiations.

* * *

12. When agreement is reached on a particular contract Article or issue, a writing memorializing the terms of the tentative agreement shall be initialed and dated by the chief spokespersons for each side. Such tentative agreements shall not be effective until a complete and final

> successor collective negotiations agreement is reached and has been ratified by the URA-AFT membership. Notwithstanding the foregoing, the parties may reach agreement on certain items where it is their intention that the effective date shall precede final agreement on all items. In such case, the parties shall so indicate this intention in clear language.

4. In January, 2012, URA and Rutgers engaged in collective negotiations for a successor agreement. They also discussed resolution of the pending grievances contesting the failure or refusal to pay the (re-)negotiated wage increases.

5. On January 10, 2012, representatives of the parties signed a memorandum of agreement for a successor collective negotiations agreement extending from July 1, 2011 through August 31, 2014. The memorandum was expressly subject to URA membership ratification and would be given "full force and effect" only upon ratification of a separate "settlement agreement" resolving the "salary freeze arbitrations."

6. Also on January 10, representatives of the parties signed a "settlement agreement" regarding "payment of salary increases to URA unit members due under the November 18, 2009 MOA," among other items. The "settlement agreement" was expressly subject to ratification by URA membership and would have "full force and effect" upon ratification of the "memorandum of agreement" settling the parties' collective negotiations agreement through August 31, 2014.

7. On January 12, 2012, Rutgers Interim Executive Vice-President for Academic Affairs Richard Edwards emailed a letter to "colleagues" about the "agreement reached with [URA]." Edwards wrote that he was, ". . . pleased to announce that we have reached an agreement with the [URA] that resolves outstanding grievances arising out of the salary freeze and that also extends the current contract through August 31, 2014." The email provides that, "the URA agreement provides salary increases and certain lump sum payments for eligible members." The email also sets forth a chart of "percentage increases" on "effective dates" and references several benefit provisions, ". . . sought by the URA."

The email also provides: "The agreement is subject to ratification by URA members, who will receive ratification materials from the URA." The email concludes: "I believe that the agreement between [URA] and [Rutgers] is reasonable and equitable. [Rutgers] looks forward to a speedy and positive ratification vote."

The complete document is attached as Attachment A and incorporated in these facts.

ANALYSIS

Detecting no constitutional impediment to ground rules for collective negotiations, the Commission has approved the negotiability of proposals establishing notice periods before a

public release of negotiations information or requiring parties to negotiate in public. Phillipsburg Bd. of Ed., P.E.R.C. No. 83-34, 8 NJPER 569 (¶13262 1982), recon. den. P.E.R.C. No. 83-67, 9 NJPER 23 (¶14011 1982). A ground rule requiring parties to attempt to reach a "joint statement" before separately releasing statements to the media has been enforced. East Windsor Bd. of Ed., H.E. No. 2013-2, 39 NJPER 130 (¶41 2012).

In the absence of an agreement on ground rules, a "free speech rule" applies, provided that the communication neither threatens reprisal or force nor promises a benefit. N.L.R.B. v. Corning Glass Works, 204 F.2nd 422 (1st Cir. 1953), 32 LRRM 2136. The concept has specifically protected an employer's right to communicate with its employees during contract negotiations. Proctor & Gamble Mfg. Co., 160 NLRB 334, 62 LRRM 1617 (1966); see also Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981); Middletown Tp., D.U.P. No. 89-7, 15 NJPER 84 (¶20035 1988).

The principal issue in this case is whether Rutgers' January 12, 2012 email violates the parties' ground rules agreement. URA contends that in violation of those ground rules, Rutgers failed to provide 36 hours notice of its intention to ". . . publicize proposals, counterproposals or discussions at the table;" and did not await URA membership ratification(s) of "tentative

agreements" before sending an email announcing the agreement to all unit employees.

I disagree that the ground rules are so clear that Rutgers' conduct violated them. For example, Rutgers may legitimately argue that it did not publicize proposals, counterproposals or discussions, ". . . at the table," [i.e., in the temporal sense, " . . . in order to avoid any chilling effect on either side's expressions of opinions and creations of proposals"]. Nor did its release of contract details before ratification jeopardize anything more than the "effective date" of "tentative agreements." Although I agree that collective negotiations are not completed until the memorandum is ratified, no ground rules provision specifically prohibits communications before URA ratification. Even if Rutgers' conduct is fairly characterized as breaching the overall "intent" of the ground rules, it does not justify a finding that section 5.4a(5) was violated.

In East Windsor Bd. of Ed., in pertinent part decided upon motion for summary judgement, the respondent association, in direct contravention of a paragraph in the ground rules, made no effort to reach a "joint statement" with the charging party employer before making statements to the media about negotiations. 39 NJPER at 133, 135. The facts of this case do not reveal a repudiation.

In Neptune Tp. Bd. of Ed., P.E.R.C. No. 94-79, 20 NJPER 76 (¶25033 1994), aff'd 21 NJPER 24 (¶26014 App. Div. 1994), a public employer's release of modified salary guides (an issue under the continuing auspices of a factfinder) not previously disclosed to the union violated 5.4a(5) and (1). The parties had previously agreed - in resolution of another unfair practice charge alleging direct dealing - to communicate their positions through proper channels. The Commission wrote that the early release ". . . may have effectively locked-in the [union] to the [employer's] position, since any adjustments giving some teachers more could have been resisted by other teachers who would have gotten less." Conceding the possibility of employer "misunderstandings," the Commission found that section 5.4a(5) was violated, owing to the employer's ". . . obligation to coordinate the actions of its agents in negotiations and [to] take responsibility for their actions." Id., 20 NJPER at 77.

Unlike the circumstances of Neptune Bd. of Ed., nothing in the facts here demonstrate that Rutgers refused to honor a clear provision of the 19-paragraph ground rules agreement.[2/] Nor did the email's release inure to the benefit of Rutgers at the

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2/ In New York, the mere breach of a negotiations ground rule (absent evidence of an intention to frustrate the negotiations process) is not a violation of the duty to negotiate in good faith. Susquehanna Valley Teachers Assn., 6 PERB ¶4526 (1973), aff'd 6 PERB ¶3049; Rensselaer City School Dist., 16 PERB ¶4535 (1983).

expense of URA's articulated (or unarticulated) position on an unresolved negotiable item.

URA also alleges that Edwards' email independently violates 5.4a(1) of the Act. This section prohibits a public employer from interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by the Act. An employer violates this section independently of any other violation if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification (emphasis added). Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004); UMDNJ-Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987); New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). In striking the balance between an employer's right of free speech and the employees' rights to be free of coercion, constraint or interference, all circumstances of a particular case must be reviewed. State of New Jersey (Trenton State College), P.E.R.C. No. 88-19, 13 NJPER 720 (¶18629 1987).

URA contends that the email tended to interfere with ". . . the right of URA unit members to engage in the statutorily-protected collective negotiations process without employer interference" (brief at 14). It argues that Edwards involved himself in the "internal workings" of the URA by announcing to all unit members that they would receive

ratification materials from URA; such processes are for the URA to decide, not Rutgers. URA also asserts that the email improperly suggests that non-members will be receiving ratification materials and that no legitimate and substantial business purpose was served by Rutgers looking forward to a "speedy and positive ratification vote."

Rutgers contends that no evidence demonstrates that Edwards' email "tended to interfere" with protected rights. It specifically avers that no evidence suggests that employees were confused or tended to be confused about the ratification process and that URA must demonstrate actual confusion in a plenary hearing (brief at 11).

The email does not accurately delineate URA members from unit employees. For example, Edwards wrote that the "agreement" provides salary increases and lump sum payments ". . . for eligible members." Similarly, it specifies that "each eligible URA-AFT member will receive the following one-time lump sum payments . . ." The email later provides however, that "the agreement is subject to ratification by URA members, who will receive ratification materials from the URA." Only union members are typically guaranteed the right to ratify a proposed collective negotiations agreement but wage increases are usually provided to all unit employees. See Quinn v. Woodbridge Tp. Fed. of Teachers, Local 822, AFT, AFL-CIO, Middlesex Cty. Chan. Div.

Dkt. No. C-2188-75 (6/22/76); State Trooper Non-Commissioned Officers Assn. (Babris), D.U.P. No. 88-7, 14 NJPER 14 (¶19004 1987). Such confusion could lead unit employees (i.e., non-URA members) to believe they would be receiving "ratification materials" and/or cause them to question their eligibility for negotiated percentage wage increases and lump sum payments. The URA would inexorably be obligated to clarify the limits of all unit employee participation.

The parties' representatives achieved a signed memorandum of agreement, leaving URA ratification as the condition precedent to a collective negotiations agreement. Edwards' email does not misrepresent the terms of the proposed agreement(s), nor does it threaten reprisal or force or promise a benefit in exchange for ratification. At worst, it confuses some unit employees about their eligibility for wage increases and their entitlement to vote for or against the deal. The burden placed upon URA to clarify such confusion is ministerial, that is, it would have to explain its extant rules for ratification and the distribution of wages and/or benefits provided under the signed memorandum of agreement. Under these circumstances, I do not believe that the confusion or uncertainty generated by Edwards' email amounts to a "tendency to interfere" with rights protected by section 5.4a(1) of the Act.

URA also alleges that Rutgers' conduct violates section 5.4a(2) of the Act by ". . . appealing directly to all negotiations unit members for a speedy and positive vote pursuant to procedures announced by [Rutgers] based on misinformation about the final nature of the tentative settlements . . . and [about] ratification procedures" (brief at 16).

Section 5.4a(2) of the Act prohibits public employers from "dominating of interfering with the formation, existence or administration of any employee organization." In Atlantic Comm. Col., P.E.R.C. No. 87-33, 12 NJPER 764 (¶17291 1986), the Commission explained:

> Domination exists when the organization is directed by the employer, rather than the employees. See, e.g., Han-Dee Spring & Mfg. Co., 132 NLRB No. 122, 48 LRRM 1566 (1961). Interference involves less severe misconduct than domination, so that the employee organization is deemed capable of functioning independently once the interference is removed. It goes beyond merely interfering with an employee's section 5.3 rights; it must be aimed instead at the employee organization as an entity.
> [12 NJPER 765]

In Bor. of Carteret, H.E. No. 88-31, 14 NJPER 83 (¶19030 1988), the non-unit police Chief/fraternal PBA member sought an increase in his PBA convention monetary allotment from the local PBA president, based upon his obtaining an increase in off-duty employment for unit employees. The Hearing Examiner determined that the Chief's request created ". . . an impermissible tension

between his PBA membership (even as a social member) and his status as an agent of the Borough." Id., 14 NJPER 86. The Hearing Examiner found that the Chief's conduct "unlawfully interfered with the administration of [the PBA local]."

I disagree that Rutgers' conduct violates section 5.4a(2). Specifically, I do not believe that the confusion generated by Edwards' email's melding of URA members and non-member unit employees was "aimed" at URA. Nothing in the email nor in the surrounding circumstances reveal an intention to undermine the functional independence of URA.

RECOMMENDED ORDER

URA's motion for summary judgment is denied. Rutgers' cross-motion for summary judgment is granted. The unfair practice complaint is dismissed.

Jonathan Roth
Hearing Examiner

DATED: April 28, 2014
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by May 9, 2014.