D.U.P. NO. 2016-5

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

In the Matter of

COMMUNICATION WORKERS OF AMERICA, LOCAL 1031,

Respondent,

-and-

Docket No. CE-2015-007

RUTGERS UNIVERSITY

Charging Party.

SYNOPSIS

The Director of Unfair Practices refuses to issue a Complaint and Notice of Hearing on a charge filed by a public employer alleging that a majority representative failed to negotiate in good faith by threatening that if the employer did not agree to engage in coalition bargaining (with three other collective negotiations units), there could be an "ensuing deadlock" which would cause a "logjam" in negotiations, violating subsection 5.4b(2) and b(3), respectively.

The Director noted that the parties negotiated a successor agreement and that continued litigation "would only increase instability and cause hostility between the parties." The Director found that the CWA did not refuse to negotiate, nor did it take any coercive action to force the University into coalition bargaining. Further, the Director determined that the charge is moot.

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Appearances:

For the Respondent,
Weissman and Mintz, attorneys
(Steven P. Weisman, of counsel)

For the Charging Party,
McElroy, Deutsch, Mulvaney and Carpenter, LLP
(David Alberts, of counsel)

REFUSAL TO ISSUE COMPLAINT

On October 29, 2014 and February 19, 2015, Rutgers, The State University of New Jersey (“Rutgers” or “University”) filed an unfair practice charge and amended charge against the Communications Workers of America, Local 1031 (“CWA” or “Local 1031”). The charge alleges that on September 24, 2014, CWA refused to negotiate in good faith by threatening Rutgers in a collective negotiations session for a successor agreement that if the University did not agree to engage in coalition bargaining (with three other collective negotiations units), there could be

an "ensuing deadlock" which would cause a "logjam" in negotiations.

The charge alleges that at the next collective negotiations session, on September 29, 2014, Rutgers informed CWA that it did not wish to engage in coalition bargaining “because the interests of the four negotiation units were different.” The University alleges CWA responded that the four bargaining units “were committed to unifying their proposals,” and would not “undercut” one another by reaching separate agreements on “big issues;” would not negotiate separately on “big issues;” and, would not reach separate agreements on “big issues.” Rutgers asserts that notwithstanding its refusal to engage in coalition bargaining, the CWA demanded that the University commence discussions regarding “the ‘process’ of negotiating through coalition bargaining.”

The charge alleges that the CWA violated the Act by refusing to reach separate agreements with Rutgers regarding issues the CWA deemed significant and common to three other unions; refusing to negotiate separately with the University regarding mandatory subjects of negotiation; insisting upon coalition bargaining; threatening to bring negotiations to a halt if the University would not agree to coalition bargaining; and, demanding that the University discuss the process of coalition bargaining, despite Rutgers unwillingness to do so. CWA's conduct allegedly violates

section 5.4b(2) and (3)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. ("Act").

Rutgers and CWA were parties to a collective negotiations agreement ("Agreement") that extended from January 1, 2011 through June 30, 2014. The parties commenced negotiations for a successor agreement in August, 2014. No facts indicate that the issue of coalition bargaining was ever raised again after the negotiations sessions conducted on September 24 and 29, 2014.

A Memorandum of Agreement between Rutgers and Local 1031 was reached on May 13, 2015. The CWA asserts that the Agreement was ratified by its members and that a successor contract for a term ending on July 1, 2018, is in effect.

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 and that "formal proceedings should be instituted in order to afford the parties an opportunity to litigate relevant legal and factual issues." N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. The

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1/ These provisions prohibit employee organizations, their representatives or agents from: "(2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances. (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."

Commission has delegated that authority 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.

CWA maintains that a complaint should not issue because any dispute that arose during negotiations is moot. Local 1031 contends that it did not refuse to engage in negotiations or refuse to reach separate agreements, as evidenced by the execution of a successor agreement. Additionally, CWA asserts that the record is devoid of any facts which would support the allegation that it engaged in conduct that actually impeded or delayed negotiations following the statements attributed to CWA by the University during negotiations. Further, CWA claims that should the charge, on its face, set forth a violation of the Act, such violation would be *de minimus* because the alleged statements caused no meaningful harm to the negotiating process. CWA submits that to pursue the charge would needlessly consume the resources of the parties and the Commission.

The University claims that notwithstanding an Agreement was ultimately reached, the dispute is not moot. Rutgers contends a complaint must issue to deter the recurrence of such behavior, which is likely to arise during future negotiations.

On April 15, 2016, I issued a letter to the parties, informing them I was inclined to dismiss the charge. I also provided the parties an opportunity to submit additional facts in

the form of a formal amendment and/or argument. On May 6, 2015, Rutgers filed a reply. It requests that I reconsider a decision not to issue a Complaint, asserting that the factual findings supporting that decision conflict with allegations in the charge, the conduct of the parties at the exploratory conference, and that the decision is not in accord with relevant case law. The University presents neither new facts nor additional charges in its supplemental submission but instead requests that I specifically address the case decisions and arguments set forth in its position statements.

In Ramapo-Indian Hills Ed. Assn., P.E.R.C. No. 91-38, 16 NJPER 581 (¶21255 1990), the Commission dismissed a Complaint notwithstanding that disputes arose during negotiations, stating:

> We have often held that the successful completion of contract negotiations may make moot disputes over alleged misconduct during negotiations. We have so held irrespective of whether the charging party is a majority representative or a public employer. Continued litigation over past allegations of misconduct which have no present effects unwisely focuses the parties' attention on a divisive past rather than a cooperative future. See, e.g., Bayonne Bd. of Ed., P.E.R.C. No. 89-118, 15 NJPER 287 (¶20127 1989), aff'd App. Div. Dkt. No. A-4871-88T, (3/5/90); Belleville Bd. of Ed., P.E.R.C. No. 88-66, 14 NJPER 128 (¶19049 1988), aff'd App. Div. Dkt. No. A-3021-87T7 (11/23/88); Matawan-Aberdeen Reg. Sch. Dist. Bd. of Ed., P.E.R.C. No. 88-52, 14 NJPER 57 (¶19019 1987), aff'd App. Div. Dkt. Nos. A-46-87T1, A-2433-87T1, A-2536-87T1 (1/24/90); Rutgers, the State Univ., P.E.R.C. No. 88-1, 13 NJPER 631 (¶18235 1987), aff'd App. Div. Dkt. No.

> A-174-87T7 (11/23/88); State of New Jersey, P.E.R.C. No. 88-2, 13 NJPER 634 (¶18236 1987); State Bd. of Higher Ed., P.E.R.C. No. 84-69, 10 NJPER 27 (¶15016 1983); Oradell Bor., P.E.R.C. No. 84-26, 9 NJPER 595 (¶14251 1983); Rockaway Tp., P.E.R.C. No. 82-72, 8 NJPER 117 (¶13050 1982); Union Cty. Reg. H.S. Bd. of Ed., P.E.R.C. No. 79-90, 5 NJPER 229 (¶10126 1979). See also, Asbury Park Bd. of Ed. v. Asbury Park Ed. Ass'n, 155 N.J. 76 (App. Div. 1977).

The Commission has acknowledged that subsequent consummation of a collective agreement does not always render moot an unfair practice charge concerning a prior refusal to negotiate. State of New Jersey and Council of NJ State Colleges Local, AFT/AFL-CIO, P.E.R.C. No. 88-2, 13 NJPER 634, 640 (¶18236 1987). An exception lies in those cases where "there is a sufficient potential for recurrence of the unlawful conduct." Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25, 43 (1978).

In State of New Jersey, the Commission ruled that "Galloway does not hold that the subsequent consummation of a collective negotiations agreement never moots an unfair practice charge concerning a prior refusal to negotiate. Rather, the question is one of proper exercise of discretion." Id., 13 NJPER at 639. In Union Cty. Reg. H.S. Bd. of Ed., P.E.R.C. No. 79-90, 5 NJPER 229 (¶10126 1979), the Commission noted:

> The Supreme Court in the Galloway case held, as indicated by the Association, that this Commission was correct that the mere cessation of conduct violative of this Act, and even the payment of monies necessary to remedy the unfair practice, does not

> automatically render moot a proceeding concerning such conduct. Rather, given the on-going nature of the parties' relationships in labor relations and the public purpose behind the rights established by this Act, it may be appropriate for PERC to adjudicate unfair practices even where the offending conduct has ceased. However, the Court explicitly stated that it is a matter within this Commission's discretion, not the charging party's, to determine whether the circumstances of the particular case warrant such a course of action.

Consideration must be given to all the facts and circumstances of any case in determining whether "ending or continuing litigation over allegedly moot charges will best serve the Act's main purpose: the prevention and prompt settlement of labor disputes." Id., citing N.J.S.A. 34:13A-2.

In Galloway, a case concerning an alleged refusal to negotiate in good faith by withdrawing annual salary increments for teachers, the Court upheld PERC's determination to issue a complaint to ensure that the respondent would not cause severe financial impact on the unit members in future negotiations. Although the parties had reached a tentative settlement on a new collective agreement which provided retroactive payment of increments, the Board's request to dismiss the unfair practice proceeding as moot was denied by the Commission, which determined that respondent had violated its duty to negotiate in good faith before establishing a change in working conditions. Id., 78 N.J. at 30.

Rutgers asserts that the cases cited by CWA regarding mootness are inapposite, in that the determination of mootness was made only after a Complaint had issued, a hearing was conducted, and an interim relief order was entered and subsequently complied with; or after respondent agreed to remediate the allegedly unlawful conduct. Rutgers argues that we should instead be guided by the decision in Neptune Tp. Bd. of Ed. and Neptune Tp. Ed. Ass'n, P.E.R.C. No. 94-79, 20 NJPER 76 (¶25033 1994), aff'd 21 NJPER 24 (¶26014, App. Div. 1994), which it claims is more analogous to the within matter.

In Neptune, the Association alleged that the Board refused to negotiate in good faith by dealing directly with unit members by publicly releasing proposed salary guides that had never been disseminated to the Association. The parties entered into a settlement agreement to remedy the allegation of direct dealing, and agreed they would act only through appropriate channels. Prior to executing a final agreement over salary guides, the Board disseminated its proposed guides to the public and unit members. The Commission ruled the dispute was not moot because "there is no indication that similar circumstances will not recur." Id. A cease and desist order was issued, with the intended purpose "not to prolong a past dispute, but in the interest of preventing future ones. Under these circumstances, no further remedial order is required." Id.

Rutgers' assertion that mootness must be determined only after the issuance of a Complaint is misplaced. There is no requirement that mootness can only be ascertained after the lengthy efforts suggested by the University. In CWA Local 1035 and Hunterdon Cty. Bd. of Freeholders, D.U.P. No. 85-7, 10 NJPER 544 (¶15253 1984), a Complaint did not issue because the charge was moot when respondent ceased to engage in the disputed conduct once it was notified by the charging party to do so. Respondent's cessation of such conduct also demonstrated "minimal likelihood of occurrence of the aggrieved conduct by the respondent in the future."

In Rutgers, The State University and United Salaried Physicians and Dentists, D.U.P. No. 94-26, 20 NJPER 117 (¶25062 1994), the employer alleged that the union refused to recognize the authority of its negotiator or to meet with her. It was determined that there was an insufficient factual basis upon which a Complaint could issue because the University did not specify when or what "authority" was refused. Further, formal proceedings were not deemed warranted because the union participated in Commission impasse procedures and ultimately reached an agreement, which undermined the allegation of refusal to negotiate. Id. Determinations of mootness should be made at the earliest possible opportunity to ensure valuable resources are not squandered.

The statements attributed to the CWA are not similar in content or impact to the affirmative actions taken by the Boards in Galloway or Neptune. There are no facts presented which indicate that any action was taken by the CWA in response to the University's decision not to engage in coalition bargaining, which delayed or was detrimental to the negotiations. No adverse impact is articulated by the University. The University's claim that a Complaint must issue to ensure that the conduct alleged will not recur is speculative. The comments attributed to the CWA were made during negotiation sessions conducted on September 24 and 29, 2014. There is no indication that negotiations were thwarted, delayed or otherwise hindered as a result of anything said on those dates. A successor agreement was reached, which will remain in effect until July 1, 2018. Notwithstanding the disputed conduct, the within parties negotiated separately from the three other employee units, and reached an agreement. To that end, continued proceedings would serve no purpose other than to undermine the parties' relationship, and cause the parties to incur substantial costs from protracted litigation.

Moreover, in its May 6, 2016 reply, the University avers that some case decisions referenced in their position statements may not have been afforded sufficient consideration in reaching my tentative decision. The referenced cases have been reviewed.

The arguments articulated by the University are understood but do not persuade me to issue a Complaint in this matter.

The University references Doud v. International Longshoreman's Assn., 241 F.2d 278, 283 (2nd Cir. 1957), for the proposition that a singular act of insisting upon coalition bargaining disrupts the bargaining process itself. I find that the facts and circumstances in Doud, including the lengths pursued by the respondent to compel expansion of the bargaining units during negotiations, differ from the within matter. In Doud, the NLRB had confined the scope of the bargaining unit to the Port of Greater New York. Notwithstanding, throughout negotiations the International Longshoreman's Association (ILA) continuously demanded and insisted upon the expansion of the bargaining unit to include ILA members from all other ports of call from Portland, Maine to Brownsville, Texas. Id., at 280. Though an unfair practice charge had been filed, the parties continued to negotiate until they reached an impasse. Id. The ILA then called for a strike in Atlantic and Gulf Ports, prompting the NLRB to obtain an injunction from the District Court enjoining the ILA from seeking to expand the bargaining unit. Id.

The conduct of the ILA in Doud is more akin to the actions taken by respondents in Neptune and Galloway then to those taken by CWA in this case. The important point is that the conduct of

those respondents demonstrated extensive efforts to force coalition bargaining, conduct which is far more excessive than that alleged herein.

Rutgers also references North Brunswick Twp. Bd. of Educ., P.E.R.C. No. 80-122, 6 NJPER 193, (¶11095 1980) in support of its claim that the "very act of demanding coalition bargaining - whether or not any alleged threats were acted upon - calls into question the scope of the unit with which the employer is negotiating." In North Brunswick, the gravamen of the charge was the Board's refusal to negotiate with the Association until certain members of the union's negotiation teams were removed. Id. The Board filed unfair practice charges and representation petitions, alleging that the Association tried to consolidate with other certified units during the pendency of conflicting representation petitions. Id. Unlike North Brunswick, there has been no showing that CWA's purported statements created in Rutgers a reasonable belief that it was negotiating with any party other than CWA.

In the matter now before me, I do not find that CWA's alleged conduct warrants issuance of a Complaint. The facts of Doud and New Brunswick reveal significant efforts by the respondent unions to compel expansion of their respective bargaining negotiations units, a circumstance that simply does not exist in the present matter. I have considered the arguments

of all parties and exercise my discretion in determining that ending the within litigation will best serve the Act's main purpose.

Additionally, CWA asserts that a complaint should not issue because its purported conduct was *de minimus*, as no harm was caused to the negotiations process. In support of its position, CWA relies upon the decision in Black Horse Pike Regional Bd. of Ed., D.U.P. No, 82-7, 7 NJPER 488 (¶12216 1981). In Black Horse Pike, the Association alleged that the Board refused to engage in negotiations over an extended period of time in regard to a specific issue. Although the Board eventually engaged in such negotiations, the Association nonetheless refused to withdraw its charge. The Director determined that a complaint should not issue, noting:

> Given the Board's subsequent negotiations position, . . . it further appears that there is minimal likelihood of the occurrence of the aggrieved conduct by the Board in the future. Given the above, litigation of the Charge for the purposes of securing a technical order and a notice of posting for the benefit of employees is not appropriate. Based upon the above, it appears to the undersigned that the harm to public rights occasioned by the Board's initial refusal to negotiate in the context of this matter is *de minimis* and does not warrant the issuance of a complaint and the convening of an evidentiary hearing. [Id., 7 NJPER at 489]

In response, the University states that Black Horse Pike is irrelevant because the underlying issue did not involve coalition

bargaining. The distinction is not particularly helpful, inasmuch as both respondents cured their allegedly unlawful conduct before unfair practice charges were filed. I find the rationale expressed in Black Horse Pike persuasive. Rutgers also asserts that CWA's statements rose to the level of being insistent, warranting issuance of a complaint. However, no facts suggest that negotiations were delayed or that CWA refused to negotiate, or that the negotiations process was otherwise adversely affected by the statements attributed to CWA. Therefore, I find that the CWA's purported statements, if made, were nonetheless *de minimus* because no appreciable harm interfered with the parties' ability to reach an Agreement.

Consideration was provided to various cases referenced by the University, concerned with the parties' obligations in coalition bargaining. (Don Lee Distributor, Inc., 322 N.L.R.B. 470, 486 (1996); Shell Oil Co., 194 N.L.R.B. 988, 996 (1972), enf'd 486 F.2d 1266 (D.C. Cir. 1973). The University's contention that the rulings in those cases, as well as those in Doud and North Brunswick, mandate that I issue a Complaint on the within charges, is misplaced. Rutgers' characterization that failure to issue a Complaint in this matter will only instigate similar, future conduct because the CWA will be assured it can continue engaging in such actions is speculative.

Moreover, Rutgers alleges CWA violated Section 5.4(b)(2) of the Act by insisting upon coalition bargaining, and refusing to meet separately with the University to reach an agreement independent of other units.

A violation of Section 5.4(b)(2) requires a charging party to allege facts establishing a "coercive pattern of union conduct designed to interfere with the employer's choice of representative for purposes of collective bargaining." Rutgers, The State University and United Salaried Physicians and Dentists, D.U.P. No. 94-26, 20 NJPER 117 (¶25062 1994), quoting Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 2 (¶17002 1985).

In the matter now before me, the charge is devoid of facts sufficient to justify the issuance of a Complaint on the alleged violation of section 5.b(2). Assuming, arguendo, that Local 1031 made the statements alleged by Rutgers, CWA did not refuse to negotiate, nor did it take any coercive action to force the University into coalition bargaining. The parties evidently narrowed their differences in reaching an agreement. Continued litigation would only increase instability and cause hostility between the parties. Matawan-Aberdeen Reg. Schl. Dist., P.E.R.C. No. 88-52, 14 NJPER 57 (¶19019 1987). I find that the CWA did not engage in conduct that violated Section 5.4(b)(2) of the Act.

Accordingly, I find that Rutger's allegations concerning coalition bargaining do not meet the complaint issuance standard and I dismiss the charge that CWA's conduct violates 5.4(b) (2) and (3) of the Act.

ORDER

The unfair practice charge is dismissed.

/s/Gayl R. Mazuco, Director

Date: May 13, 2016
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 May 23, 2016.