

P.E.R.C. NO. 88-89

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,
(OFFICE OF EMPLOYEE RELATIONS),

Respondent,

-and-

Docket No. CO-H-88-36

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

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies the State of New Jersey, Office of Employee Relations' motion to dismiss a Complaint based on an unfair practice charge filed by the Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO against the State. The charge alleged that the State violated the New Jersey Employer-Employee Relations Act when, without negotiations, the State Board of Education proposed regulations setting terms and conditions of employment for employees represented by the Council. The Commission finds that it has jurisdiction to consider the charge.

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Charging Party.

Appearances:

For the Respondent, Cary Edwards, Attorney General
(Melvin E. Mounts, Deputy Attorney General)

For the Charging Party, Dwyer & Canellis, P.A.

DECISION AND ORDER

On July 24, 1987, the Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO ("Council") filed an unfair practice charge against the State of New Jersey (Office of Employee Relations) ("State"). Count I alleges that the State violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (5),^{1/} when, without

^{1/} These subsections 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; and (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...."

prior negotiations, the State Board of Higher Education ("Board") proposed regulations setting terms and conditions of employment of full-time faculty and other professional employees represented by the Council. Count II alleges that some of the proposed regulations would apply to part-time employees whom the Council had just been certified to represent. Both counts request that the Board be ordered to rescind its resolution noticing the proposed regulations, stop public consideration, and negotiate with the Council about the regulations before implementation.

The proposed regulations cover such personnel matters as compensation, salary adjustments, sick leave, vacation leave, classifications and reclassifications, appeal procedures, and equal employment opportunity and affirmative action procedures, but the proposals on compensation and leaves of absence covered managerial employees rather than unit employees. The proposals are meant to replace Civil Service regulations which had applied to State College employees before the State College Autonomy Law, N.J.S.A. 18A:64-1 et seq., became effective on July 9, 1986.

On August 27, 1987, the Director of Unfair Practices issued a Complaint. An Answer admitted that the Board had proposed regulations, but denied that doing so violated any negotiations obligation. The Answer pleaded, as separate defenses, that the charge was premature and moot and publishing the proposed regulations was statutorily authorized.

On October 1, 1987, the State moved to dismiss the Complaint. It asserted that we lacked jurisdiction because only the Appellate Division could review the validity of a proposed or final regulation; the charge was premature; the requested relief would intrude into the Board's authority to make rules preempting negotiations, and the requested relief was moot since notice had been published on September 8, 1987. The Council filed an opposing affidavit.^{2/}

On November 12, 1987, Hearing Examiner Richard C. Gwin issued a decision (copy attached) denying the motion.^{3/} He concluded that the Commission has jurisdiction over disputes involving the negotiations obligations of a public employer/administrative rulemaker. He further concluded that publication did not moot the case.

On November 20, 1987, the State requested special permission to appeal and a stay of discovery and scheduled hearings. N.J.A.C. 19:14-4.6(b). The Chairman granted these

^{2/} The Council has also moved to depose the Chancellor of Higher Education and to have him produce his records about the proposed regulations. That motion has not been decided and will not be addressed in this opinion.

^{3/} The report characterized the motion as one for summary judgment. The State, however, moved for dismissal based on jurisdictional grounds -- the Commission cannot hear any claims concerning proposed regulations no matter what evidence could be introduced -- as opposed to summary judgment grounds -- the undisputed evidence shows this claim is meritless.

requests. The parties have briefed the Commission's jurisdiction to entertain this unfair practice charge.^{4/}

N.J.S.A. 34:13A-5.4(a)(5) makes it an unfair practice for a public employer to refuse to negotiate in good faith with its employees' majority representative over terms and conditions of employment. N.J.S.A. 34:13A-5.4(c) gives us exclusive power to prevent this unfair practice. The Council contends that proposing regulations on unit employees' terms and conditions of employment without first negotiating violates subsection 5.4(a)(5) and is within the Commission's jurisdiction under subsection 5.4(c).

The State College Autonomy Law removed professional members of the State Colleges' academic, administrative and teaching staffs from coverage under the Civil Service laws. N.J.S.A. 18A:64-21.2. That law also empowered a State College's board of trustees to fix its employees' compensation and terms of employment in accordance with salary ranges and policies adopted by the State Board of Higher Education. N.J.S.A. 18A:64-6(h). The education laws in turn authorize the Board of Higher Education to "[s]et policy on salary and fringe benefits and establish general personnel policies

^{4/} On December 11, 1987, the Board adopted the proposed regulations with changes not requiring additional public notice and comment. 20 N.J.R. 89(c). In summarizing public comments, the Board stated that the Council had argued that the regulations concerned terms and conditions of employment which must be negotiated. The Board responded by limiting several rules to non-unit employees and added that it anticipated negotiations on a wide range of other issues. The State asserts that this adoption affects only its mootness argument.

for the public institutions of higher education." The validity of Board rules may be appealed to the Appellate Division. R. 2:2-3(a)(2). The State asserts that the autonomy and education laws authorized proposing regulations to replace Civil Service regulations; the Appellate Division can review any regulations adopted, and we lack jurisdiction to review either proposed or final regulations.

The Council's argument assumes the Board, as part of the Department of Higher Education, acted solely as an employer. The State's argument assumes the Board acted solely as a regulator. Neither assumption is valid. While the Board performs only regulatory functions, it is part of the Department of Higher Education which performs some employer functions. It cannot be said at this stage of the litigation that only one set of functions was exercised under the new legislation.

Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO v. State Bd. of Higher Ed., 91 N.J. 18 (1982) addressed the problem of the Board's dual roles. The Court stated:

When an agency performs dual roles as both regulator and employer, the possibility exists that the agency could use its preemptive regulatory power in an abusive or arbitrary manner to insulate itself from negotiations with its employees. The mere potential for such abuse is not grounds in and of itself to hold that preemption does not apply to regulations promulgated by such agencies. However, that possibility raises serious questions about the soundness of any rule that would accord absolute and unqualified preemption to a regulation affecting terms and conditions of employment when passed by an agency qua employer to govern the

employment terms and conditions of its own employees. To effectuate fully the legislative policy of protecting the rights of State public employees, while at the same time encouraging the proper discharge of statutory responsibilities by State agencies, the preemption accorded to administration regulations governing the employment of an agency's own employees must be qualified. [Id. at 27-28]

Such regulations are presumptively preemptive, but the presumption can be overcome by showing "that the regulations were arbitrary, adopted in bad faith, or passed primarily to avoid negotiations on terms and conditions of employment." Id. at 28. Relevant factors include:

(1) the extent to which the regulation was consistent with or necessary to effectuate the agency's statutory authority; (2) the relationship between the regulations and the exercise of the agency's regulatory jurisdiction; (3) the scope of the agency's employer role; (4) the agency's rationale for adopting the regulation; (5) the circumstances under which the regulation was adopted; (6) the scope and composition of the class of employees affected by the regulation; (7) the basic fairness of the regulation to the employees affected; and (8) the extent to which the employees or their representatives had the opportunity to express their views on the regulation during its formative stages. [Id. at 28-29]

We applied these tests in UMDNJ and AAUP, P.E.R.C. No. 85-106, 11 NJPER 290 (¶16105 1985), recon. den. P.E.R.C. No. 86-7, 11 NJPER 452 (¶16158 1985), aff'd App. Div. Dkt. No. A-11-85T7 (4/14/86). There we held that regulations adopted by an employer/regulator preempted the obligation to negotiate over the maximum number of salary cap exemptions. We also held, however, that the regulations did not preempt negotiations over the

allocation of the available exemptions since the employer retained discretion over that issue. See also State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978); UMDNJ and AAUP, P.E.R.C. No. 86-148, 12 NJPER 532 (¶17200 1986).

Given our exclusive jurisdiction to review alleged refusals to negotiate and UMDNJ and AAUP, we have jurisdiction to develop a record on the Council factors and to consider the alleged preemptive effect of adopted regulations. See also Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n, 79 N.J. 311, 316 (1979) (Commission's duties require reviewing other statutes). We stress that our unfair practice jurisdiction does not extend to reviewing a regulation's validity or wisdom directly. We limit ourselves to resolving whether the employer's duty to negotiate over terms and conditions of employment has been partially or wholly displaced. Compare State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984) (a mere breach of contract is not an unfair practice, but Commission may consider contract issues relevant to a party's negotiations obligations).^{5/}

We now consider whether our unfair practice jurisdiction permits us to entertain a claim that proposing regulations constitutes a refusal to negotiate in good faith. We answer this question yes.

The Council case worried that an agency could abuse its regulatory power to insulate itself from negotiations. That concern

^{5/} Since the Council has not alleged that the employer violated its duty to negotiate by adopting the final regulations, we do not consider whether they are preemptive.


exists when an employer/regulator proposes regulations as well as when it adopts them. Committing terms and conditions of employment to the rulemaking process rather than the negotiations table may have a present and adverse effect on an employee organization's authority as exclusive representative. Lullo v. IAFF, 55 N.J. 409 (1970). Thus, we decline to hold that we never have unfair practice jurisdiction to consider an alleged refusal to negotiate based in part on proposed regulations involving terms and conditions of employment.

We are mindful that our unfair practice jurisdiction should not unduly interfere with another agency's legitimate rulemaking authority or process and that a presumption of validity exists. Hackensack v. Winner, 82 N.J. 1 (1980); Council. Whether the instant rulemaking process can be demonstrated, despite the presumption, to have been an unlawful evasion of negotiations requires the development of a record and a careful review of the facts. Accordingly, we deny the motion to dismiss.

ORDER

The motion to dismiss the Complaint is denied. The case is remanded to the Hearing Examiner.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
March 18, 1988
ISSUED: March 21, 1988

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Charging Party.

Appearances:

For the Respondent

Hon. W. Cary Edwards, Attorney General
(Melvin E. Mounts, D.A.G.)

For the Charging Party

Dwyer & Canellis, P.A.
(Michael E. Buckley, Esq.)

HEARING EXAMINER'S RULING ON MOTION FOR SUMMARY JUDGMENT

On July 24, 1987, Council of New Jersey State College
Locals, NJSFT-AFT/AFL-CIO ("NJSFT" or "Council") filed an unfair
practice charge alleging that the State of New Jersey, Department of
Higher Education ("State"), violated subsections 5.4(a)(1) and
(5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A.

^{1/} These subsections 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; (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."

34:13A-1 et. seq. ("Act"), by adopting a resolution to publish in the New Jersey Register proposed regulations to implement the State College Personnel System. NJSFT alleges that the proposed regulations affect unit employees' terms and conditions of employment and should be negotiated prior to publication.

On August 27, 1987, the Director of Unfair Practices issued a Complaint and Notice of Hearing. I scheduled a hearing for September 17 and 18, 1987.

On September 9, 1987, the State filed an Answer admitting several of NJSFT's allegations but denying that it committed an unfair practice. The State also argued that the charge is premature because the regulations have not been adopted and that publication of the proposed regulations was authorized by Title 18A.

On September 8, 1987, NJSFT requested both a deposition of the Chancellor of Higher Education and the production of all the Chancellor's records about the implementation of the regulations. The State refused this request and on September 17, 1987, NJSFT filed a motion for an order to compel the Chancellor's deposition. On September 25, 1987, the State filed a brief and affidavit opposing the motion.

On October 1, 1987, the State filed a Motion to Dismiss the Complaint and a supporting brief and affidavit. The State also requested a stay of a ruling on NJSFT's motion to compel the Chancellor's deposition and of the hearing, which had been rescheduled to October 8 and 9, 1987. On October 2, 1987, I granted

the stay request. On October 8, 1987, NJSFT filed an affidavit opposing the State's motion.

The following facts are undisputed.

1. NJSFT is an employee organization within the meaning of the Act and is the certified majority representative for full-time faculty, certain other full-time professional employees, and part-time teaching, research and administrative faculty at the nine State Colleges of New Jersey.

2. The State is a public employer within the meaning of the Act and employs those represented by NJSFT.

3. The parties' collective agreement contains the following articles:

Article XI, Sec A. 1.:

All salary adjustments will be made consistent with the provisions, practices and policies of the state and in accordance with the state compensation plan effective at the time.

Article XXXV, Applicability Of Civil Service Rules and Regulations:

The parties to this agreement for the period July 1, 1986 to June 30, 1989 for the state colleges unit agree that the provisions of the state compensation plan and civil service rules and regulations, and the procedures provided therein, which establish terms and conditions of employment and which were applicable to the employees in the state colleges unit on June 30, 1986, and which may have been or which may be affected by the enactment of an application of A-1173(S-1469) and A-1177(S-1470) shall be continued unless changed by negotiation or regulation.

Article XXXI, Sec A.

This agreement incorporates the entire understanding of the parties on all matters which were the subject of negotiations. During the term of this agreement neither party shall be required to negotiate with respect to any such matter except that proposed new rules or modifications of existing rules governing working conditions shall be presented to the union and negotiated upon the request of the union as may be required pursuant to the New Jersey Public Employer-Employee Relations Act, as amended.

4. On March 20, 1987, the Chancellor of Higher Education presented a report at a public meeting. Page 8 of the report states:

.... [S]ubstantial efforts have been undertaken to devise a replacement system for civil service. Once a draft of the new regulations has been completed and comment solicited from all affected groups, including the Governing Boards association, the Governor's Office of Employee Relations and the AFT, among others, those regulations will be presented to the Board of Higher Education for adoption, probably within the next two months.

5. On April 6, 1987, NJSFT President Lacatena, wrote to the Chancellor and to the Director of the Office of Employee Relations and demanded "negotiation of all proposed new rules or modification of existing rules governing working conditions which may be included in any proposed replacement system for civil service before they are established."

6. On June 10, 1987, Lacatena received a memo dated June 8, 1987 from Judith Turnbull, Director of Office of Employee Relations and Personnel Policies in the Department of Higher Education. Accompanying the memo was a draft of the regulations. Turnbull invited Lacatena to review and respond to the regulations

before they were to be submitted to the Board of Higher Education ("Board").

7. On June 23, 1987, NJSFT responded to Turnbull's memo by stating that it would be unlawful for the Board to adopt or propose regulations and that Turnbull's invitation to review and respond to the draft did not satisfy the employer's negotiations obligation. Lacatena again demanded negotiations.

8. Turnbull referred Lacatena to the Governor's Office of Employee Relations.

9. Lacatena and Thomas H. Wirth, a Senior Staff Representative of the Council, met several times between March 20, 1987 and July 1, 1987 with Edwin Evans, Employee Relations Coordinator of the Office of Employee Relations.

10. On July 1, 1987, Evans called Wirth and proposed a meeting to discuss what subjects in the proposed personnel regulations were negotiable.

11. The parties met on July 20, 1987 and NJSFT presented a list of items it considered negotiable. Lacatena demanded that the proposed regulations be presented to the Council for negotiations and that the regulations be removed from the agenda of a scheduled Board meeting and not be considered by the Board until negotiations were completed. After this meeting Turnbull delivered a package of materials to Lacatena and to Board members. This package included the text of a proposed resolution and the proposed regulations scheduled to be discussed at the Board's next meeting on July 24, 1987.

12. On July 24, 1987, the Board adopted a resolution approving the noticing of the State College Personnel System regulations for the purpose of receiving public comment.

NJSFT also alleged that neither the Director of the Office of Employee Relations nor the Chancellor responded to Lacatena's April 6, 1987 letter (see finding no. 5). The State denies this allegation and also denies NJSFT's allegations that the Director stated that certain matters contained in the proposed personnel regulations might be negotiable but that he refused to remove the regulations from the Board's agenda and did not present them to the Council for negotiation.

The State advances five arguments seeking dismissal of Complaint. It argues that the Commission lacks jurisdiction to hear a challenge to the actions of a sister state agency. It asserts that only the Appellate Division has the authority to invalidate the passage of regulations by a state agency. The State also argues that the proposed rules were authorized for publication by N.J.S.A. 18A:3-14(h) and 18A:64-6(h) and were developed as part of the transition plan to implement the State College Autonomy Law, P.L. 1986, c. 42, N.J.S.A. 18A:3-14 et. seq. The State also argues that the case is not ripe for litigation because the regulations have not been adopted. It contends that any final action is only hypothetical and that the Board is immune from suit in the early stages of its rule-making activity. The State also argues that the regulations, when adopted, will preempt negotiations. Finally, the

State argues that the Complaint should be dismissed because the case is moot. The State asserts that since the regulations have been published for public comment, the relief sought by NJSFT (non-publication of the regulations) cannot be granted.

NJSFT asserts that the Commission has jurisdiction, that the case is ripe, there is no unlawful threat to the Board's rule-making authority, that the regulations would not be preemptive if adopted in bad faith, and that the charge is not moot.

Motions to dismiss unfair practice complaints are typically made after a charging party has presented its case at hearing. The State's motion, though characterized as a motion to dismiss, is more in the nature of a motion for summary judgment. It asserts that NJSFT's pleadings and supporting affidavits fail to state an actionable offense. Accordingly, I treat the State's motion as a motion for summary judgment.

Pursuant to N.J.A.C. 19:14-4.8 (d), summary judgment may be granted: "[i]f 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 or cross-movant is entitled to its requested relief as a matter of law...."

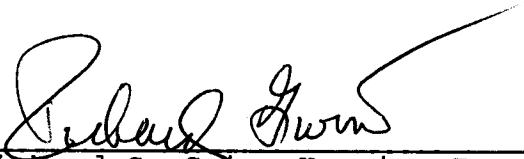
A motion for summary judgment will be granted with extreme caution. The moving papers are to be considered in the light most favorable to the party opposing the motion and all doubts are to be resolved against the movant. The summary judgment procedure is not to be used as a substitute for plenary trial. Baer vs. Sorbello,

177 N.J. Super 182, 185 (App. Div. 1981). In light of these principles, the Commission has been reluctant to grant summary judgments. See Essex Co. Ed. Serv. Comm., P.E.R.C. No. 83-65, 9 NJPER 19, 20 (¶14009 1982).

Applying this standard, I deny the State's motion. The underlying issue is the negotiations obligation of an employer/regulator and the Commission has jurisdiction over such disputes. See Council of New Jersey State College Locals v. State Bd. of Higher Ed., 91 N.J. 18 (1982). If a violation is found, an appropriate remedy may be ordered by the Commission. Publication of the proposed regulations did not render the case moot. As the State points out in its brief, "the Commission has not yet squarely faced the specific legal issues which are raised in this matter" (p. 16). Given this lack of precedent, I cannot rule, as a matter of law, that the State is entitled to a dismissal of the Complaint. Further, material factual disputes exist about the parties' conduct prior to the Board's decision to publish the proposed regulations.

Accordingly, the State's motion is denied.

Nov. 12, 1987
Date


Richard C. Gwin, Hearing Examiner