

P.E.R.C. NO. 92-103

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Respondent,

-and-

Docket Nos. CO-H-89-169
CO-H-89-187

COMMUNICATIONS WORKERS OF
AMERICA, LOCAL 1040,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Communications Workers of America, Local 1040 against the State of New Jersey. The CWA alleged that the employer violated the New Jersey Employer-Employee Relations Act when Salary Administration Memorandum #5-89 was approved through the Department of Personnel without prior negotiations. That memorandum granted registered professional nurses a recruitment and retention payment. Under all the circumstances, the Commission concludes that the allegations are essentially moot. Given that conclusion the Commission does not reach CWA's contention that negotiations cannot be preempted by a Salary Administration Memorandum not adopted in accordance with the Administrative Procedure Act.

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Appearances:

For the Respondent, Robert J. Del Tufo, Attorney General
(Stephen Schwartz, Deputy Attorney General)

For the Charging Party, Steven P. Weissman, attorney

DECISION AND ORDER

On December 16, 1988, the Communications Workers of America, Local 1040, filed an unfair practice charge against the State of New Jersey. The charge alleges that the State violated the New Jersey Employer-Employee Relations Act, specifically subsections 5.4(a)(2), (5) and (7),^{1/} when Salary Administration Memorandum ("SAM") #5-89 was approved through the Department of Personnel without prior negotiations. That memorandum granted registered

^{1/} These subsections prohibit public employers, their representatives or agents from: "(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 (7) violating any of the rules and regulations established by the commission."

professional nurses a recruitment and retention payment of \$3000 to be made in quarterly lump sum payments. The memorandum was approved by the Commissioner of the Department of Personnel and the Director of the Division of Budget and Accounting, two of the three members of the Salary Adjustment Committee ("SAC").^{2/}

On January 27, 1989, a Complaint and Notice of Hearing issued. On February 23 and September 7, 1989, the State filed an Answer and an amended Answer. The Answer, as amended, asserts that we lack jurisdiction since this SAM was within the exclusive jurisdiction of the Department of Personnel; the charge was untimely; the payments merely extended the program initiated after negotiations in 1988, and CWA waived any right to negotiate by not demanding negotiations over modifications in the prior payments.^{3/}

On November 15, 1989, the State moved for summary judgment. It asserts that we lack jurisdiction over SAC and its salary memoranda and that we cannot fashion a remedy.

On November 20, 1989, Hearing Examiner Richard C. Gwin conducted a hearing to develop a part of the record on the State's motion for summary judgment and CWA's anticipated cross-motion. He granted CWA's motion to amend the Complaint to allege that the State

^{2/} A second charge (CO-89-187) was consolidated with this charge. The second charge not being relevant now, it will not be discussed further.

^{3/} The Amended Answer also asserts a counterclaim against CWA. This counterclaim not being relevant now, it will not be discussed further.

had violated subsections 5.4(a)(1)^{4/} by promulgating salary regulation ("SR") #3-90, continuing the recruitment and retention payments for registered nurses, again in quarterly lump sum payments, until the end of fiscal year 1990. The parties then stipulated certain facts and agreed to continue discovery after the hearing.

On October 12, 1990, CWA cross-moved for summary judgment and responded to the State's motion. It asserts that SAM #5-89 does not preempt negotiations because it is not a formal regulation and that the State therefore violated subsections 5.4(a)(1) and (5) by adopting it without negotiations.^{5/}

On November 1, 1990, the State responded to CWA's cross-motion. It asserts that the Appropriations Acts authorizing SAC to establish salary rules and regulations preempt negotiations and that CWA's charge contesting SAM #5-89 was untimely since it had not contested an identical SAM issued the year before. It also asserts that the Legislature exempted SAC from having to adopt formal regulations under the Administrative Procedure Act ("APA"), N.J.S.A. 52:14B-1 et seq.

^{4/} This subsection prohibits 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/} CWA has withdrawn its allegations that subsections 5.4(a)(2) and (7) were violated. SAM #5-89 is the only salary action CWA disputes (Brief at 1, n.1).

On December 14, 1990, CWA filed a response. It asserts that informal administrative action cannot preempt negotiations and that its charge contesting SAM #5-89 was timely.^{6/}

In re Boyan, 246 N.J. Super. 300 (App. Div. 1991), certif. granted, ___ N.J. ___ (1991) provides some background information about SAC. No statute refers to any entity entitled the Salary Adjustment Committee. Annual Appropriations Acts, however, have authorized the State Treasurer, the Commissioner of Personnel, and the Director of the Division of Budget and Accounting to establish rules and regulations governing salary ranges and rates of pay for State employees. For example, the Appropriations Act for the 1988-89 fiscal year provided, in part:

The State Treasurer, the Commissioner of Personnel, and the Director of the Division of Budget and Accounting shall establish rules and regulations governing salary ranges and rates of pay. The implementation of such rules and regulations shall be made effective at the beginning of the bi-weekly pay period nearest July 1, 1988 or thereafter as determined by such rules and regulations, with timely notification of such rules and regulations to the Joint Budget Oversight Committee or its successor. [L. 1988, c. 47 at 269.]

Identical or nearly identical language has appeared in other Appropriations Acts. See, e.g., L. 1986, c. 41 at 247; L. 1987, c.

^{6/} CWA has filed another charge (CO-91-104) contesting the failure to pay October 1, 1990 quarterly payments allegedly called for by SR #3-90. The parties have agreed that this charge should be held in abeyance pending this decision. On April 15, 1991, the Commissioner of Personnel denied a related grievance appeal seeking these payments. In re Nurse Recruitment and Retention Program (4/15/91). CWA has appealed that denial to the Appellate Division of the Superior Court.

154 at 252.^{7/} These three officials have apparently adopted the name of Salary Adjustment Committee in connection with their functions under the Appropriations Acts. SAC's rules and regulations are not adopted in accordance with the APA.^{8/} SAC employs no staff, instead using the staff of the Commissioner of Personnel.

We have reviewed the record. We take these uncontested facts from the pleadings, the stipulations, and the certifications.

CWA represents graduate nurses, head nurses, and supervisors of nursing services within the Departments of Corrections and Human Services.

On October 17, 1987, SAM #11-88 was approved by the Commissioner of the Department of Personnel and the Director, Division of Budget and Accounting. This memorandum applied to employees whose titles required licenses as registered professional nurses. It provided, in part:

Covered employees shall receive a recruitment and retention payment of \$3,000 to be made in quarterly lump sum payments at the end of each quarter, the first such payment will cover the last quarter of calendar year 87 with payment made on or about January 1, 1988....

The program had a stated duration of one year, starting September 26, 1987 and ending September 23, 1988.

^{7/} Before September 25, 1986, N.J.S.A. 11:14-17 also empowered these three officials to promulgate supplemental compensation rules. That power now resides with the Merit System Board. N.J.S.A. 11A:6-23.

^{8/} The most recent Appropriations Act specifies that SAC directives shall not be subject to the APA. L. 1991, c. 185.

CWA did not file an unfair practice charge contesting SAM #11-88. In his certification, CWA's Area Director states:

While the union took issue with the unilateral implementation of this program, the program did provide economic benefits to CWA-represented employees. The program also addressed certain serious concerns relative to nursing personnel. However, prior to the issuance of SAM #5-89 CWA believed that the bonus program implemented on or about September, 1987 would end after one year.

On August 2, 1988, SAM #5-89 was approved by the Commissioner of the Department of Personnel and the Director, Division of Budget and Accounting. This memorandum rescinded SAM #11-88 and replaced it with identical terms, except that the program would start September 24, 1988 and end September 22, 1989. The State did not notify or negotiate with CWA before SAM #5-89 was adopted. CWA contested this SAM by filing this charge. Representatives of the State's Office of Employee Relations have consistently maintained that payments pursuant to this SAM are not negotiable.

On October 3, 1989, SR #3-90 was adopted by the Merit System Board. The memorandum replaced SAM #5-89 with identical terms,^{9/} except that the program would be effective September 23, 1989 through fiscal year 1990. SR #3-90 is signed by the Acting Commissioner of the Department of Personnel and the Director,

^{9/} The record does not reveal why SR #3-90 was not issued as a SAM, what the differences between SAMs and SRs may be, and why SR #3-90, but not SAM #5-89, was adopted by the Merit System Board.

Division of Budget and Accounting. The State did not notify or negotiate with CWA before SR #3-90 was adopted. CWA contested SR #3-90 by amending its charge.^{10/}

The State Treasurer is a member of SAC, but did not sign any of the SAMs or SRs in evidence. The Treasurer has participated in State-CWA negotiations on management's behalf. In September 1989, the Assistant Director of the Division of Budget and Accounting testified for the State at a fact-finding proceeding.

We take notice that CWA and the State have negotiated collective negotiations agreements effective from July 1, 1989 through June 30, 1992. Their salary articles call for across-the-board percentage salary increases and other forms of compensation, subject to legislative appropriations. State of New Jersey, P.E.R.C. No. 91-107, 17 NJPER 310 (¶22137 1991). In particular, nursing titles received a two salary range (approximately 10%) increase for fiscal year 1991. In re Nurse Recruitment and Retention Program (slip op. at 3).

The State contends that we do not have jurisdiction to consider this unfair practice charge and that CWA must either petition SAC for a review of any factual issues or appeal to the Appellate Division for a review of any legal issues. We disagree.

^{10/} Attached to the State's certification are other SAMs and SRs affecting nurses. Three pertain to education incentive payments, one pertains to hiring rates.

The Legislature has declared that "the voluntary mediation of such public...employer-employee disputes under the guidance and supervision of a governmental agency will tend to promote permanent...employer-employee peace and the health, welfare, comfort and safety of the people of the State." N.J.S.A. 34:13A-2. We supervise the negotiations process. N.J.S.A. 34:13A-5.2. To protect that process, we have exclusive power to prevent and remedy unfair practices. N.J.S.A. 34:13A-5.4(c). These unfair practices include an employer's interference with its employees' rights to have their majority representative negotiate over their employment conditions and an employer's refusal to negotiate in good faith. N.J.S.A. 34:13A-5.4(a)(1) and (5). But an employer's unfair practice liability for refusing to negotiate will be negated if a statute or regulation "expressly, specifically, and comprehensively" sets a term and condition of employment and thus preempts negotiations. Bethlehem Tp. Bd. of Ed. v. Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 44 (1982); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978). We thus have unfair practice jurisdiction to determine whether the State as employer had a duty to negotiate and whether it violated that duty. See State of New Jersey, P.E.R.C. No. 89-67, 15 NJPER 76 (¶20031 1988), aff'd App. Div. Dkt. No. A-3465-88T5 (6/14/90), certif. den. 122 N.J. 395 (1990); State of New Jersey, P.E.R.C. No. 88-89, 14 NJPER 251 (¶19084 1988); 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). Our

jurisdiction, however, is narrow. It does not extend to determining whether a SAM is statutorily authorized; whether it has been validly adopted; whether it is arbitrary, or whether it should be voided. These questions must go to the Appellate Division. R. 2:2-3(a)(2).

The State contends that the charge is untimely. N.J.S.A 34:13A-5.4(c) states:

[N]o complaint shall issue based upon any unfair practice occurring more than six months prior to the filing of the charge....

CWA filed its charge within six months of the issuance of SAM #5-89, the only personnel action it contests. Its election not to contest SAM #11-88 is relevant to determining the State's obligation to negotiate, but it does not make this charge untimely.

We now turn to the motion and cross-motion for summary judgment. N.J.A.C. 19:14-4.8(d) provides:

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 or cross-movant is entitled to its requested relief as a matter of law, the motion or cross-motion for summary judgment may be granted and the requested relief may be ordered.

Because both parties have moved for summary judgment and neither side has identified any material facts in dispute, summary judgment is appropriate.

In adopting the annual Appropriations Acts, the Legislature has entrusted SAC with the responsibility to establish rules and regulations governing salary ranges and rates of pay. For purposes

of this proceeding, we must assume that SAC had authority which it properly exercised to establish and extend the recruitment and retention payments (CWA brief, p. 4). Only the appellate courts may determine the boundaries of SAC's authority. The Supreme Court and Appellate Division will have opportunities to do so in Boyan and in In re Nurses Recruitment and Retention Program.

CWA does not argue that SAC is a public employer or a dual regulator/employer under Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO v. State Bd. of Higher Ed., 91 N.J. 18, 28 (1982); it contends only that negotiations were not preempted because no formal regulation required the payments called for by SAM #5-89 (Brief at 8-9). SAC therefore was not obligated to negotiate with CWA before it established or extended the recruitment and retention payments and SAC's adoption of SAM #5-89, standing alone, does not show that the State as employer refused to negotiate in good faith. See UMDNJ and AAUP. Cf. State of New Jersey, P.E.R.C. No. 84-77, 10 NJPER 42 (¶15024 1983), aff'd App. Div. Dkt. No. A-2408-83T3 (2/8/85). CWA, moreover, did not contest SAM #11-88 establishing the recruitment and retention payments. That inaction permitted a reasonable belief that the State as employer could make these payments unilaterally, at least until it received a specific demand to negotiate over the discontinuance or amounts of the payments. We further note that the recruitment and retention program has expired and payments have been discontinued; the parties have since

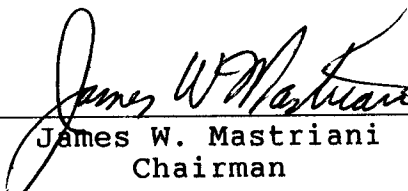
negotiated salary range increases for nursing titles; and CWA has not demanded recoupment of past payments.

Under all the circumstances, we conclude that the allegations concerning the adoption of SAM #5-89 are essentially moot. Given that conclusion, we do not reach CWA's contention that negotiations cannot be preempted by a SAM not adopted in accordance with the APA. We note that under the Council case, the preemption doctrine applies to validly adopted and duly enacted regulations, 91 N.J. at 26 and 33, and that Boyan's concurring opinion questions the validity of SAC's salary memoranda. We also note that the most recent Appropriations Act specifies that SAC directives shall not be subject to the APA. The appellate courts must ultimately determine whether SAC memoranda have been validly adopted.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Grandrimo, Regan and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Smith abstained.

DATED: March 30, 1992
Trenton, New Jersey
ISSUED: March 31, 1992