

P.E.R.C. NO. 93-55

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(OFFICE OF EMPLOYEE RELATIONS),

Petitioner,

-and-

Docket No. SN-93-11

COMMUNICATIONS WORKERS OF
AMERICA,

Respondent.

SYNOPSIS

The Public Employment Relations Commission holds not mandatorily negotiable a restriction in a code of ethics against auditors in the New Jersey Division of Taxation preparing New Jersey tax returns as part of their outside employment. The Commission holds mandatorily negotiable a restriction against auditors preparing tax returns of the federal government and other states.

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Appearances:

For the Petitioner, Robert J. Del Tufo, Attorney General
(Grey J. DiMenna, Deputy Attorney General, on the brief)

For the Respondent, Steven P. Weissman, attorney

DECISION AND ORDER

On August 10, 1992, the State of New Jersey (Office of Employee Relations) petitioned for a scope of negotiations determination. The employer seeks a declaration that it need not negotiate with the Communications Workers of America, AFL-CIO ("CWA") over a revised code of ethics covering auditors in the Division of Taxation of the Department of the Treasury. That code prohibits auditors from preparing tax returns as part of outside employment.

A certification, exhibits and briefs have been filed. These facts appear.

CWA represents State employees in four negotiations units: administrative and clerical employees, professional employees, primary level supervisors, and higher level supervisors. In particular, it represents auditors in the Division of Taxation who are in the units of professional employees and primary level supervisors.

Pursuant to the New Jersey Conflicts of Interest Law, each State agency must promulgate a code of ethics for its employees to meet "the particular needs and problems of the agency." N.J.S.A. 52:13D-23. That code "shall not be effective unless it has first been approved by the Executive Commission on Ethical Standards" ("ECES"). When a code is submitted for approval, it must be accompanied by an opinion of the Attorney General. N.J.S.A. 52:13D-23(b).

In January 1972, the Department of the Treasury promulgated a code of ethics. That code tracked the guidelines for ethical conduct set forth in N.J.S.A. 52:13D-23. The preface stated, in part:

It is essential, therefore, that officers and employees must avoid all situations where private interest in outside business activities and opportunities for personal or financial gain could influence their decisions in giving of favored treatment to any organization or person. They must equally avoid circumstances and conduct in outside activities which, per se, do not constitute wrongdoing or a conflict of interest but, nevertheless, appear questionable to the general public.

Guidelines numbered 5, 7, 9, 10, and 11 stated:

5. No officer or employee should undertake any employment or service, whether compensated or not, which might reasonably be expected to impair his objectivity and independence of judgment in the exercise of his official duties.

7. No officer or employee should knowingly act in any way that might reasonably be expected to create an impression or suspicion among the public having knowledge of his acts that he may be engaged in conduct violative of his trust as a Department officer or employee.

9. All personnel of the Department who are engaged in or who are seeking outside employment or business interest must disclose in writing to their Division Director the nature and extent of their financial interest in and association with any person or entity that supplies or is seeking to supply the State with goods or services, or whose activities are subject to or regulated by laws which are administered by the department.

10. All officers and employees who have outside private interest with organizations doing business with the State are required to file their disclosure forms annually or as otherwise required by the Division having jurisdiction of the individual. Any employee may, if he so desires, submit the outside employment disclosure form through appropriate reporting channels for an opinion when he is uncertain whether his outside interest or activity conflicts with the established guidelines contained herein.

11. All officers and employees of the Department of the Treasury seeking or engaging in outside employment must obtain the necessary approval of the Division Director or higher authority as appropriate. A statement must be obtained stipulating that such outside employment or personal interest in outside organizations does not conflict with any of the standards or guidelines established herein. Willful violations of the Code of Ethics promulgated by the Department shall be cause for disciplinary actions consistent with existing policy and Civil Service rules and regulations.

This code did not ban outside employment.

There are approximately 400 auditors in the Division of Taxation. Their responsibilities with respect to New Jersey tax payers include auditing tax returns, investigating civil and criminal tax violations, and collecting funds from delinquent tax accounts. It does not appear that the auditors have any responsibilities with respect to taxes imposed by the federal government or other states.

Approximately 40% of auditors in the Division of Taxation have engaged in outside employment by performing accounting and bookkeeping services for individuals and businesses. These services have included preparing state and federal tax returns. Pursuant to the 1972 code, the auditors have filed disclosure forms and apparently have had their outside employment approved. The record does not reveal any instances in which auditors have been disciplined for violating the code.

On December 17, 1990, the State Treasurer sent a memorandum to all Division of Taxation employees informing them that the Department of the Treasury had a final draft of a revised code of ethics. Part VII of that code is entitled Outside Employment and Activities. Section D addresses outside employment for Division of Taxation employees:

1. General provisions

The Taxation Division gives employees the maximum freedom possible to engage in outside employment or business activities consistent with the division's functional responsibilities established by State law and related statutes. However, the division's extremely sensitive

mission and the attendant importance of public relations necessitate certain restrictions.

Employees may engage in outside employment or business activity, provided such activity is not prohibited by this code or by any statute, rule, order, division or Treasury directive; also provided that:

a. The outside activity would not place the employee in a situation where there may be a possible conflict or the appearance of a conflict between the employee's private interests and the employee's official duties and responsibilities. Such private interest would include the use of the employee's name on business documents or in business interests by spouse or relatives in a manner prohibited by this code.

b. The outside activity would have nothing to do with tax problems, tax returns, or with the determination of tax liabilities, whether federal, state or other taxes are involved.

c. The outside activity would not result in improper use of official information obtained in connection with an employee's governmental duties or position.

d. The nature of employment or business activity or the hours to be devoted to such outside activity would not impair the employee's availability, capacity, or efficiency for the performance of the employee's official duties.

e. The outside activity would not result in the use of State time, facilities, property, employees or telephones to further private interests.

f. The outside activity would not include advertising or publicly representing that the employee works for the Division of Taxation in order to generate or enhance the employee's private interests.

2. Prohibited and restricted activities - The Division of Taxation.

This section identifies certain outside employment and business activities prohibited or restricted for Division of Taxation employees. Prohibitions are necessary to maintain the public confidence in the integrity of the division and also to prevent allegations of conflicts of interest and abuses of official positions.

a. Legal representation for tax-related matters.

No employee may engage in outside legal practice or employment involving the rendering of legal services that involve, directly or indirectly, any tax related matters or in any way presents a conflict between the employee's private interests and official duties and responsibilities.

b. Appearance on behalf of taxpayers

No employee of the division may appear on behalf of any taxpayer as an attorney, agent, factor, or representative before any government agency - federal, state or local - in an action involving a tax matter.

c. Preparing tax returns for compensation

No employee may engage in the preparation, directly or indirectly, of federal, state or local tax returns for compensation of any kind on behalf of any taxpayers.

d. Bookkeeping and accounting

An employee may not engage in bookkeeping or accounting services for compensation except for services that do not involve or influence a tax determination.

e. Real property valuation and appraisal

An employee is prohibited from engaging in any type of valuation of real property other than those assigned duties within the division.

f. Other tax-related employment

No employee may serve as a local tax collector, assessor, member of a local Board of Assessors, a commissioner or secretary on a County Board of Taxation, or as an employee of any of the aforementioned offices.
[Emphasis supplied]

The underlined restrictions are in dispute.

On January 11, 1991, the Acting Director of the Division of Taxation sent a memorandum to employees confirming that the revised code would prohibit preparing tax returns for compensation. This revised code was developed without CWA's input and over its objections, as recorded in a letter to the State Treasurer. After the memorandum was circulated, a meeting was held as a "courtesy" to CWA, but no negotiations occurred. The revised code was approved by the ECES, effective February 15, 1991.

On February 8, 1991, CWA filed an unfair practice charge. It asserted that the State violated subsections 5.4(a)(1) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when the Department of the Treasury, without prior negotiations, promulgated the revised code of ethics and thus ended a practice of over 20 years of allowing auditors to have outside accounting and tax practices.

CWA requested interim relief and Commission designee Edmund G. Gerber heard argument. On February 22, 1991, the designee issued

^{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...."

his interlocutory decision. I.R. No. 91-12, 17 NJPER 137 (¶22055 1991). He drew a distinction between working on New Jersey tax returns which will be processed within the New Jersey Department of the Treasury and working on federal tax returns and other states' tax returns which will not be processed within the Department. With respect to New Jersey tax returns, he declined to restrain implementation of the revised code because CWA had not shown a substantial likelihood that such a restriction was mandatorily negotiable. With respect to other tax returns, he restrained implementation of that aspect of the revised code, pending this decision, because CWA had shown a substantial likelihood that such restrictions were mandatorily negotiable. In this regard, he noted that the State had not submitted specific evidence to support its contention that the New Jersey Division of Taxation and the federal Internal Revenue Service share information.

The State asked the Appellate Division to accept an interlocutory appeal and to vacate the interim relief order. Those applications were denied.

On February 26, 1991, a Complaint and Notice of Hearing issued. On March 13, the State filed an Answer admitting that auditors had engaged in outside accounting and tax practices for over 20 years with the knowledge of the Division of Taxation; but denying "any implication that such 'permission' had been without limitation." The State also asserted that it had a prerogative to implement the revised code and thus had no duty to negotiate.

After interrogatories had been exchanged, the State filed this instant petition. It asserts that a scope of negotiations determination will render the unfair practice charge moot, an assertion CWA does not contest. Given these special circumstances, we will entertain this petition. N.J.A.C. 19:13-2.2(a)(4).

The State asserts that codes of ethics governing employees of State agencies are not mandatorily negotiable; Association of State College Faculties Inc. v. New Jersey Bd. of Higher Ed., 66 N.J. 72 (1974) ("State College Faculty") is distinguishable and does not require negotiations over these outside employment restrictions; and the statutory requirement that the ECES approve codes of ethics preempts negotiations over this revised code. CWA responds that the restrictions on outside employment directly affect the auditors' work and welfare and do not significantly interfere with governmental policy; State College Faculty and Somerset Cty., P.E.R.C. No. 84-92, 10 NJPER 130 (¶15066 1984) ("Somerset"), are on point; and negotiations are not preempted, although any negotiated agreement must be reviewed by ECES for approval or disapproval.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978). We are solely concerned with the abstract negotiability of the disputed parts of the revised code of ethics. We do not consider their wisdom. In re Byram Tp. Bd. of Ed., 152 N.J. 12, 30 (App. Div. 1977).

N.J.S.A. 34:13A-5.3 requires negotiations over "terms and conditions of employment." Under Local 195, IFPTE v. State, 88 N.J. 793 (1982), a subject is mandatorily negotiable if:

(1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions. [Id. at 404-405]

Before applying these tests to this revised code of ethics, we will review the case law concerning the negotiability of codes of ethics generally.

In State College Faculty, the Board of Higher Education adopted a code of ethics pursuant to the Conflicts of Interest Law. That code, like the original Treasury code in this case, proscribed outside employment that was in "substantial conflict" with the employees' duties or that might be expected to impair their "objectivity or independence of judgment." Further guidelines on outside employment were adopted the next year. The majority representative did not object to guidelines prohibiting outside employment that constituted a conflict of interest, occurred when the employee was expected to perform assigned duties, or diminished the employee's efficiency in doing his or her primary work. Nor did the majority representative object to a contractual requirement that employees notify their immediate administrative superior of their off-campus commitments. But the majority representative did object

to these unilaterally adopted requirements: all regular or continuing outside employment shall have the prior and continuing approval of the chief executive officer; no full-time employee may perform part-time work for another public institution unless the employee has the prior and continuing written approval of the chief executive officer of the employee's main institution and the approval of the chief executive officer of the other institution; and no full-time employee may receive compensation from the employee's institution in excess of the employee's regular full-time salary except as specifically authorized by the guidelines. Our Supreme Court held that these additional restrictions were mandatorily negotiable terms and conditions of employment under the Employer-Employee Relations Act because they directly affected the work and welfare of college employees and did not affect any major educational policy.

In Somerset, the County had permitted its social workers, psychologists, and psychiatrists to conduct private practices, provided they did so during non-working hours, they did not use the County's mental health center, and their patients were not patients of that center. The County, however, then prohibited social workers and psychologists (but not psychiatrists) from conducting private practices within the County. Applying State College Faculty, we held that the unilateral adoption of this new restriction violated subsections 5.4(a)(1) and (5). The restriction substantially reduced the employees' employment opportunities and earning

capacities and the County had not adduced any specific evidence showing why this restriction had been adopted, how it furthered governmental policies, or why psychiatrists had been exempted.

In Montclair Tp., P.E.R.C. No. 90-39, 15 NJPER 629 (¶20264 1989), the employer adopted requirements that police officers report all outside employment and that such employment be approved. Applying State College Faculty, we held that a grievance contesting these requirements was legally arbitrable.^{2/}

State College Faculty, Somerset, and Montclair recognize that restrictions on outside employment curtail the employment opportunities and earning capacities of employees and are thus of considerable importance to them. These cases, however, do not establish that all restrictions on outside employment are mandatorily negotiable. Instead, some restrictions may be so integrally related to the mission of the agency as not to require negotiations.^{3/} We now turn to the particular restrictions in the revised code of ethics.

^{2/} We cited Bowman v. Pennsauken Tp., 709 F. Supp. 1329 (D.N.J. 1989), a case preliminarily enjoining a township's restrictions on employers wishing to hire police officers to "moonlight" as security guards. The Court concluded that the restrictions unduly encroached upon the liberty interests and equal protection rights of officers seeking security jobs.

^{3/} Compare Peerless Publications, Inc., 283 NLRB No. 54, 124 LRRM 1331 (1987). That case states that a newspaper's code of ethics is not mandatorily negotiable to the extent it protects the "core purposes of the enterprise"; is narrowly tailored to

Given the caselaw and the facts, we recognize that the employees have important interests at stake. For over 20 years, tax auditors were permitted to supplement their incomes by preparing tax returns as part of their outside employment. About 160 tax auditors engaged in such employment. These auditors will lose that employment under the revised code of ethics and their overall incomes could be substantially reduced.

The public employer also has important interests at stake. Cases recognize that "public officials hold positions of public trust... [and] are under an inescapable obligation to serve the public with the highest fidelity, good faith and integrity." Newtown v. Demas, 107 N.J. Super. 346, 349 (App. Div. 1969), certif. den. 55 N.J. 313 (1970) (citation omitted); New Jersey State Plumbing Inspectors Ass'n, Inc. v. Sheehan, 163 N.J. Super. 398, 403 (App. Div. 1978), certif. den. 79 N.J. 484 (1979). The Conflicts of Interest Law similarly embodies a legislative mandate that the reality and the appearance of conflicts of interest be avoided. N.J.S.A. 52:13D-12; N.J.S.A. 52:13D-23(e)(7). Pursuant to that law,

3/ Footnote Continued From Previous Page

meet the employer's legitimate and necessary objectives without being overly broad, vague or ambiguous; and is limited in its applicability to the employees and activities necessary to accomplish the objectives. The code in question, however, did not meet these criteria.

the employer has adopted a code of ethics and a revised code of ethics that set general guidelines, proscribe certain activities, and require employee disclosure and employer approval. Only a few of these guidelines, proscriptions, and requirements are in dispute.

We believe that our designee properly balanced and accommodated the parties' interests. While the record does not demonstrate the reality of any conflicts of interest, having New Jersey tax auditors prepare New Jersey tax returns presents the appearance of a conflict of interest. That appearance is integrally related to the mission of the Department of the Treasury -- the public must be assured in reality and in appearance that New Jersey taxes are impartially collected and New Jersey tax laws are fairly enforced, without any favors to anyone at anytime. But the employer has not specifically claimed or demonstrated that preparing other tax returns presents an appearance of a conflict of interest compromising its mission. On balance, the employees' interests with respect to preparing other tax returns outweigh the employer's interests in proscribing that aspect of outside employment.

Negotiations over an employment condition will not be preempted unless a statute or regulation expressly, specifically, and comprehensively dictates that condition, thereby eliminating the parties' discretion to alter it. 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). No statute

or regulation prohibits New Jersey tax auditors from preparing non-New Jersey returns. The Conflicts of Interest Law sets general guidelines, but grants the employer discretion to adopt specific rules applicable to each agency. Those specific rules are mandatorily negotiable when they establish employment conditions that do not significantly interfere with governmental policy. That is the case here.

Under N.J.S.A. 52:13D-23(b), any code of ethics must be submitted to the ECES and accompanied by an opinion of the Attorney General. The ECES and Attorney General will disapprove any code that does not satisfy the Conflicts of Interest Law. No negotiated agreement may displace these statutory requirements. But these requirements do not preempt negotiations over the exercise of an employer's discretion with respect to employment conditions covered by its code of ethics. Compare 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); 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); State of New Jersey, Dept. of Human Services (Div. of Public Welfare), P.E.R.C. No. 82-83, 8 NJPER 209 (¶13088 1982).^{4/}


^{4/} The cited cases all involve instances, like this one, where the parties had the discretion to negotiate over certain issues, but a statute required review by another entity of any

In sum, the restriction in the revised code of ethics against preparing non-New Jersey tax returns is not preempted and is mandatorily negotiable. The employer must negotiate in good faith over that restriction.

ORDER

The restriction in the revised code of ethics against preparing New Jersey tax returns is not mandatorily negotiable. The restriction in the revised code of ethics against preparing other tax returns is mandatorily negotiable.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

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

DATED: December 17, 1992
Trenton, New Jersey
ISSUED: December 18, 1992

4/ Footnote Continued From Previous Page

agreement reached. Contrast State Supervisory where the Court stated that the employer cannot enter a binding agreement over matters the legislature has placed outside the employer's control. Id. at 79. There, unlike here, the employer had no discretion.