P.E.R.C. NO. 2018-25

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WARREN COUNTY COLLEGE,

Respondent,

-and- Docket No. CO-2016-006

WARREN COUNTY COLLEGE
FACULTY ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants the College's request for special permission to review the Acting Director's decision in D.U.P. No. 2018-004 and affirms it to the extent set forth in the Commission's decision. The Acting Director issued a complaint with respect to the Association's unfair practice charge that the College violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(1) and (5), by refusing to negotiate in good faith over the impact of March 10 policy revisions and by advising faculty that the College would not negotiate with the Association for a successor agreement as long as the then-President and Vice President of the Association remained in on the Association's Executive Board. Finding that the Association's amended charge satisfies the specificity requirements of N.J.A.C. 19:14-1.3(a)(3) and supports the issuance of a complaint with regard to the subsection 5.4a(1) claim, the Commission affirms that aspect of the Acting Director's decision. Finding that the interest of justice weighs in favor of allowing the subsection 5.4a(5) claim to proceed to hearing despite the Association's failure to provide a clear and concise statement of the facts within its second amended charge, the Commission affirms that aspect of the Acting Director's decision.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Respondent, Cleary, Giacobbe, Alfieri & Jacobs, attorneys (Gregory Franklin, of counsel)

For the Charging Party, Detzky, Hunter & DeFillippo, LLC, attorneys (Stephen B. Hunter, of counsel)

DECISION

Before us is a request for special permission to appeal the decision issued on October 12, 2017 by the Acting Director of Unfair Practices in D.U.P. No. 2018-004. We grant special permission to appeal because of deficiencies in the charge and irregularities in its processing. However, we allow the complaint to proceed to hearing in accordance with the terms of this decision.

By letter-brief filed on October 25, 2017, Respondent Warren County College asserts that the Acting Director erred by issuing a complaint with regard to (1) the Warren County College Faculty Association's claim that the College refused to negotiate in good

faith over the impact of March 10 policy revisions, and (2) the Association's claim that the College President "advised Faculty members that he does not intend to negotiate in good faith with the Association as long as [the Association President and Vice President] hold their Executive Board positions" with the Association. On November 9, 2017, the Association filed a letter opposing the College's request.

With regard to the College's first point, it notes that neither the Association's initial charge filed on July 22, 2015 nor its amended charge filed on May 2, 2017 allege that the College refused to negotiate over the impact of the policy revisions. With regard to the second point, the College maintains that the Association first made the allegations about the College President in interrogatory answers dated April 16, 2015, wherein the then Association President said that the anti-union remarks were made on June 20, 2013, over two years before the initial charge was filed in this case.

In response to the College's request for review, the Association argues that the standard for granting special permission to review the Acting Director's decision has not been met and, in any event, we should affirm her decision to issue a complaint as to the two claims.

To place the parties' arguments in context additional background information is necessary. The charge, as amended,

alleges that on or about March 10, 2015, the College unilaterally and without notice to faculty members changed "promotional procedures" when it revised "Guidelines for Qualifications for Faculty Rank" contained in its policy and procedures manual. With regard to the matter of notice, the Association cites in the amended charge State of New Jersey v. State Troopers NCO Ass'n, 179 N.J. Super. 80 (App. Div. 1981), asserting that the decision "defined" promotional procedures. Based upon the policy revisions, the Association asserts that the College violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsection 5.4a(5), refusal to negotiate in good faith, and 5.4a(3), discriminating with regard to terms of employment to encourage or discourage the exercise of rights guaranteed by the Act.

In its statement of position, copied to the Association, the College argued that the complained-of changes were not to promotional procedures, but rather to non-negotiable criteria for hiring and promoting faculty.

On August 7, 2017, the Acting Director sent the parties a letter, which this Agency refers to as a "7-day letter." After summarizing the facts of the matter and analyzing applicable law, the Acting Director set forth tentative conclusions as to whether the amended charge met the Commission's complaint-issuance standard. The Acting Director stated that she was inclined to

dismiss the 5.4a(5) claim, agreeing with the College that it had a non-negotiable managerial prerogative to change "promotional criteria."[1/] With regard to the Association's allegation that the policy revisions adversely affected certain faculty members and were made without prior notice, the Acting Director observed that the Association was required, prior to filing its charge, to request negotiations over any severable impacts of the College's decision.[2/] Implicit in the statement is that the Association had not alleged in the charge that it had made such a request, which our review of the charge confirms.

As for the 5.4a(3) claim, the Acting Director advised that she was inclined to dismiss that claim because the Association did not allege what protected activity motivated the policy revision. The Acting Director observed that although the charges

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1/ The policy revisions changed the "Guidelines for Qualifications for Faculty Rank" from master's degree plus a specified number of "graduate level credits" to the same degree and the same number of "doctoral level credits" for assistant professor and associate professor. Also, the revisions added that specified GPAs "should be considered." For the reasons stated by the Acting Director in D.U.P. No. 2018-004, we agree that these changes are non-negotiable substantive criteria, not negotiable procedures.

2/ We agree with the Acting Director that the Association had the burden to seek negotiations over the effect of the policy revisions on members' terms and conditions of employment, but contrary to the 7-day letter, nowhere in the charges, initial or amended, does the Association allege that "several members relied, to their detriment, on the pre-March 10 Policy in selecting courses and academic programs in which to enroll."

allege that the affected members held union positions, that does not, by itself, demonstrate the requisite nexus between the activities protected by the Act and the adverse personnel action or satisfy the pleading requirements of N.J.A.C. 19:14-1.3(a)(3).

On the other hand, the Acting Director advised that she was inclined to issue a complaint as to the asserted violation of subsection 5.4a(1), prohibiting public employers from interfering, restraining, or coercing employees in the exercise of rights guaranteed to them by the Act, given the alleged statements of the College President. In addressing that claim, the Acting Director distinguished between alleged statements made in 2012 and 2013, which she found to be time-barred under N.J.S.A. 34:13A-5.4(c), and the statements allegedly made in April 2015, occurring within 6 months of the filing of the initial charge in July 2015. However, neither the initial nor the amended charge specifies when the alleged statements were made by the College President.

The Acting Director's August 7 letter instructed, "If the Charging Party believes that additional facts should be considered, a formal amendment to the unfair practice charge stating those facts should be filed . . . NOT LATER than seven (7) days from today – by the close of business (5 p.m.) on **August 17, 2017**." The Acting Director also instructed that if the Charging Party disagreed with her tentative legal conclusions, it

could instead file a legal brief, also by the same date. The letter provided no instructions to the College relative to the tentative ruling.

The Association requested and was granted a two-week extension of time in which to file an amended charge. Rather than file a second amended charge, the Association filed an eight-page certification dated August 24, 2017 of its President with exhibits. According to the Acting Director's decision of October 12, the College did not respond to the Association's submission.

Appended to the Association's certification are a copy of an unsigned letter dated May 20, 2015 from the Association's then President to the College's Director of Human Resources in which the former requests "impact negotiations" over the policy revisions; an email from the Director sent on June 2 indicating the College's willingness to meet after the Association articulated how the policy changes impacted its members' terms of employment; and a June 14, 2015 email reply from the Association. In the reply, the Association states that the policy change will prevent some members from being promoted, thereby impacting their salaries.

The certification does not address the alleged statements of the College President, including when they were made.

The certification also argues that the Acting Director misapplied State of New Jersey v. State Troopers NCO Ass'n ("State Troopers"), 179 N.J. Super. 80 (App. Div. 1981).[3/] The Association President contends that the court's decision requires "a public employer to announce in advance to all promotional candidates the criteria it plans to use . . . ." Although the President recites part of the article on promotions set forth in the parties' last negotiated agreement ("the 2009-2012 CNA"), she does not maintain, nor has the Association alleged or shown through any filing that the CNA requires prior notice of changes to promotional criteria.[4/]

Lastly, the President advises in the certification that the Association would not challenge the Acting Director's decision not to issue a complaint with regard to the subsection 5.4a(3) claim.

As noted at the outset, the Acting Director issued a decision on October 12. Consistent with the 7-day letter, the Acting Director dismissed the claimed violation of subsection 5.4a(3) and, given that the 5.4a(5) claim contested changes to promotional qualifications, that claim as well. With regard to the latter, the Director correctly found that the policy

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3/ Affidavits and certifications serve as a vehicle to set forth material, admissible facts. They should not include argument, which may be made by way of a brief.

4/ A copy of the CNA is posted on our website.

revisions were to criteria, not procedures, and that the Association misconstrued State Troopers as the decision did not limit a public employer's right to change promotional criteria unless it first provided notice of its intent to do so in the absence of an agreed-upon notice requirement. The Acting Director also pointed out that even when a negotiated agreement may provide for such notice, a mere breach of contract claim does not constitute an unfair practice.[5/]

However, even though the Association had not amended the charge to allege that it had requested negotiations over the impact of the policy revisions on members' salaries, the Acting Director stated that the Association had presented sufficient facts to support a claim that the College violated subsection 5.4a(5) by refusing to engage in impact negotiations. In doing so, the Acting Director acknowledged that the refusal to negotiate claim "has not been pled in the Association's charge." The Acting Director instructed, "the Association shall file an amendment to its charge setting forth this claim." She added, "We will not issue a complaint on this claim without this amendment."

5/ We agree with the Acting Director's dismissal of these claims, her view of the revisions as changes to qualifications and not promotional procedures, and her reading and application of State Troopers as it relates to the notice issue. Under the Act, a claimed breach of contract, in and of itself, is not an unfair practice.

Moreover, the Acting Director hypothesized as to the unpled impact, stating (emphasis added):

> [The College] was obligated to negotiate with the Association, upon demand, over severable procedural and impact-related issues arising from the March 10 Policy (such as whether or not employees who relied, to their detriment, on the old promotional policy should be grand-fathered under the new policy or made whole in another manner).

This illustrative topic (underlined above) was not articulated in the June 14, 2015 email appended to the Association President's certification or the charge, as amended. Nor was the issue of prior notice of promotional criteria mentioned.[6/] Only salary on account not being promoted for not meeting the new standards was specifically cited as an impact of the policy revisions.[7/]

The Acting Director also issued a complaint, consistent with the 7-day letter, on the subsection 5.4a(1) claim even though the dates of the statements allegedly made by the College President

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6/ The June 14, 2015 email does state that members might have accepted other employment at the time of hire had they been notified of the doctoral and GPA standards for future promotions.

7/ We express no opinion on whether the impact on the salaries of those members who do not acquire the requisite credits to qualify for promotion may be considered severable from the prerogative to set promotional qualifications. That depends on whether negotiating additional salary for those members would significantly or substantially encroach upon the prerogative to establish or modify promotional qualifications. See Piscataway Twp. Educ. Ass'n v. Piscataway Twp. Bd. of Educ., 307 N.J. Super. 263, 276 (App. Div. 1998).

were not set forth in an amended charge or even the Association's certification.

N.J.A.C. 19:14-1.3(a)(3) provides that a charge must contain the following:

> A clear and concise statement of the facts constituting the alleged unfair practice. The statement must specify the date and place the alleged acts occurred, the names of the persons alleged to have committed such acts, the subsection(s) of the Act alleged to have been violated, and the relief sought.

This Agency's practice has been to notify a charging party when a charge fails to meet the requirements of the regulation. The notice includes a request that the charging party amend the charge to provide the omitted information and indicates that if the Commission does not receive the amendment by a specified date, the charge will be deemed withdrawn. Compliance with the regulation is a necessary component to the determination of whether a charge meets the complaint-issuance standard set out in N.J.A.C. 19:14-2.1(a) and the limitation period for the filing of a charge set forth in N.J.S.A. 34:13A-5.4(c). It also provides the minimum information necessary for the respondent to defend the charge. Thus, we are concerned with much more than form over substance.

The charge, as amended, does not meet the requirements of the rule. First, it fails to specify the date when the College President allegedly said he would not negotiate with the

Association as long as its President and Vice President held their Executive Board positions. Thus, pursuant to N.J.A.C. 19:14-1.3(a)(3), that allegation should have been dismissed, subject to the filing of a curative amendment in response to the 7-day letter. See also Englewood Bd. of Ed., P.E.R.C. No. 93-119, 19 NJPER 355 (¶24160 1993)(dismissing complaint where charge and amendment did not contain the date of the acts alleged to violate the Act); Township of Edison and IAFF Local 1197, D.U.P. No. 2012-9, 38 NJPER 269 (¶92 2012) aff'd, P.E.R.C. No. 2013-84, 40 NJPER 35 (¶14 2013)(specificity requirement of N.J.A.C. 19:14-1.3(a)(3) not met with respect to subsection 5.4a(3) claim where, in response to 7-day letter, the charging party amended the charge and described the alleged protected activity forming the basis of its claim as "traditionally engages in the aggressive defense of its membership...including filing unfair practice charges, claims in state and federal court, and grievances").

Second, the charge fails to allege the basis of the subsection 5.4a(5) claim as to which the Acting Director stated her intention to issue a complaint, provided the Association complied with her directive that it file "an amendment setting forth this claim." That is, the charge does not allege that the College refused to negotiate in good faith over the impact of the March 10 policy revisions. Therefore, pursuant to N.J.A.C.

19:14-1.3(a)(3), that allegation should have been dismissed when, following the issuance of the 7-day letter, the Association failed to amend its charge to set forth that allegation.

We take notice that on November 9, 2017, the same date the Association filed its letter opposing the College's request for special permission to appeal, the Association also filed a second amended charge. As it relates to the College's request, the second amended charge (in paragraph 12), unlike the prior charges, states that "during April, 2015 and early May, 2015," the College President said in discussions with faculty members that he would not negotiate with the then Association President and Vice President and that they should change the makeup of the Association negotiations team "if the Faculty ever wanted to settle a new contract." This statement satisfies the specificity requirements of N.J.A.C. 19:14-1.3(a)(3) and supports the issuance of a complaint with regard to the subsection 5.4a(1) claim. We will allow that claim to proceed to hearing in the interest of justice but without further amendment.

As for the refusal to negotiate claim, the second amended charge (in paragraph 11), unlike the prior charges, now states, succinctly put, that on or about May 20, 2015, the Association requested "impact negotiations" regarding the "March 10, 2015 Policy Revisions" and that on June 22, 2015, "College

Representatives" said that the College "would not negotiate over the impact of the changes."

Without more, the second amended charge would continue to be defective as to the 5.4a(5) claim. That is because the "College Representatives" are not named and the asserted impacts are not described. As to the former, N.J.A.C. 19:14-1.3(a)(3) requires a charge to set forth "the names of the persons alleged to have committed [the] acts" constituting the alleged unfair practice. As to the latter defect, "A broad request to negotiate over the exercise of a managerial prerogative does not constitute a specific demand to negotiate over severable negotiable issues." State of New Jersey Judiciary and Probation Ass'n of New Jersey, P.E.R.C. No. 2008-12, 33 NJPER 225 (¶85 2007), granting recon. I.R. No. 2007-14, 33 NJPER 138 (¶49 2007). See also City of Union City and PBA Local 8, P.E.R.C. No. 2006-77, 32 NJPER 116 (¶55 2006) affirming dismissal of charge alleging that the City rejected PBA's demand to negotiate over changes in employment conditions and "the impact of any modification of the terms and conditions of employment or the impact of the exercise of any managerial prerogative").

However, in the same paragraph, the Association refers to its President's August 24, 2017 certification, which is attached to the second amended charge along with the documents submitted with the certification in response to the 7-day letter. Given

the length of the certification, the extensive argument set forth in it, and the requirements of N.J.A.C. 19:14-1.3(a)(3), the Association should have done what it did in the case of the subsection 5.4a(1) claim. It should have named in the charge the College's representatives who allegedly refused to engage in impact negotiations. Doing so would make it unnecessary to search the eight-page certification and its attachments to cull that information. In addition, it should have spelled out in the charge the specific impacts over which the Association sought negotiations. As long as our regulations remain in force, we are bound by them. County of Hudson v. Department of Corrections, 152 N.J. 60, 71 (1997). The rules require a "clear and concise statement of the facts"; not multiple pages of argument and opinion.[8/] Nevertheless, in the interest of justice, we will allow this claim to proceed to hearing.

Finally, State of New Jersey Judiciary and Union City, supra, bear closer examination for another reason. In the former, the Judiciary adopted a directive requiring probation officers to carry out inspections of probationers' homes. The officers' association filed an unfair practice charge alleging that the directive changed terms and conditions of employment and

8/ We are not suggesting that it was inappropriate to attach to the charge copies of the parties' communications on which the Association relies to show that it requested impact negotiations.

seeking its rescission pending negotiations over its implementation. The association amended the charge to add the allegation that it had requested the Judiciary to provide training for the inspections and to suspend the directive until officers had completed the training. At the same time, the Association filed for interim relief, seeking the directive's rescission and the negotiations specified in the charge, among other relief. The Designee granted interim relief ordering the Judiciary to negotiate over pepper spray, Kevlar vests, and a protocol for when police should be called to the probationer's home even though the Association's charge, interim relief application, and a supporting certification did not allege or show that negotiations over these three issues had been requested. On the State's motion for reconsideration, we vacated those portions of the interim relief order.

In Union City, the PBA relied upon a letter from its counsel to the police chief in arguing that the letter created an obligation on the City's part to negotiate over the impact of certain alleged changes in terms of employment arising from the exercise of a managerial prerogative. We held that the letter did not create such an obligation because it did not specify any procedures to be negotiated or any issues severable from the managerial prerogative. We dismissed the subsection 5.4a(5) and derivative a(1) allegations based on the letter.

Similar to the Designee's error in State of New Jersey Judiciary, the Acting Director here constructed issues not articulated by the Association in its charge or the June 14, 2015 email to support her decision to issue a complaint on the claim that the College refused to negotiate impact issues raised by the Association. While we leave it to the Hearing Examiner to determine the precise contours of any impact issues actually raised in the Association's June email, we note that neither the second amended charge nor the email requested negotiations over notice of changes or, as phrased in the October 12 decision, "whether or not employees who relied, to their detriment, on the old promotional policy should be grand-fathered under the new policy or made whole in another manner." We also leave it to the Hearing Examiner to determine in the first instance whether any issues raised are in fact severable from the managerial prerogative to change promotional criteria.

Pursuant to N.J.A.C. 19:14-2.3(c), a decision by the Director of Unfair Practices to issue a complaint or to refuse to issue a complaint on a portion of an unfair practice charge may not be appealed pre-hearing except by special permission to appeal pursuant to N.J.A.C. 19:14-4.6. In turn, the latter requires a request for special permission to appeal to be filed within five days from the service of rulings to be reviewed. However, D.U.P. No. 2018-04 advised that any appeal from the

decision was not due until October 26, which afforded more time than our regulations allow. Under these circumstances, we decline to find the College's request for review untimely.

Special permission to appeal will be granted only in extraordinary circumstances. N.J.A.C. 19:14-4.6(b); Rutgers, The State Univ., P.E.R.C. No. 2005-47, 31 NJPER 79 (¶36 2005) (Commission will not intrude mid-hearing absent extraordinary circumstances). Given the several defects in the charge and the irregularities that took place in its processing, we find circumstances are such so as to warrant our review.

ORDER

The request of Warren County College for special permission to review the Acting Director's decision in D.U.P. No. 2018-004 is granted. The decision is affirmed to the extent set forth herein.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau, Eskilson and Voos voted in favor of this decision. None opposed. Commissioner Bonanni recused himself. Commissioner Jones was not present.

ISSUED: December 21, 2017

Trenton, New Jersey