P.E.R.C. NO. 99-105

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF PARAMUS,

Respondent,

-and- Docket No. CO-H-97-27

PARAMUS EMPLOYEES ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies a motion of the Borough of Paramus to dismiss as moot an unfair practice charge filed by the Paramus Employees Association. The charge alleges that the Borough violated the New Jersey Employer-Employee Relations Act when its mayor issued a letter to PBA members enumerating proposals made to the PBA negotiations team and expressing his disappointment that he had not yet learned the membership's position on the offer. The Borough argues that the completion of negotiations moots the dispute. The Association opposes the motion since the parties are in negotiations again and it is concerned that direct dealing will become a regular negotiations tactic. The Commission concludes that, at this juncture, it does not have enough information to make a determination that the successful completion of contract negotiations has mooted this dispute. The Commission reserves its right to revisit that question on a fuller record.

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, Ruderman & Glickman, attorneys (Joel G. Scharff, of counsel)

For the Charging Party, Maccarone & Farhi, attorneys (Michael Farhi, of counsel)

DECISION

On July 22, 1996, the Paramus Employees Association filed an unfair practice charge against the Borough of Paramus. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (2), (5) and (7),[1/] when its mayor issued

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1/ These provisions 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. (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 refusing to process grievances presented by the majority representative. (7) Violating any of the rules and regulations established by the commission."

a letter to PEA members enumerating proposals made to the PEA negotiations team and expressing his disappointment that he had not yet learned the membership's position on the offer. The charge further alleges that the letter was an attempt to bypass the Association's negotiations team and elected leadership, and to interfere with and dominate the Association's handling of the contract negotiations.

On February 11, 1997, a Complaint and Notice of Hearing issued. On February 26, the Borough filed an Answer asserting that, when all the facts are established, it will be demonstrated that the mayor's letter was within the Borough's right to communicate with employees, particularly given the Association's refusal to address the Borough's position in good faith.

On October 20, 1997, Hearing Examiner Jonathon Roth deemed the Complaint withdrawn. He had inquired about the status of the case and neither party had responded. Upon the PEA's motion, the Director of Unfair Practices reopened the case for hearing.

On July 31, 1998, the Borough filed a motion to dismiss, attaching a copy of the cover page and signature page of the parties' 1995-1997 agreement.

On August 7, 1998, the PEA filed a letter opposing the motion. It contended that the parties were then in negotiations for a successor contract to the 1995-1997 agreement and that it remained concerned that direct dealing would become a regular negotiating tactic.

On August 13, 1998, the Borough filed a reply arguing that the PEA has not met its burden of demonstrating why the charge should warrant the Commission's exercise of unfair practice jurisdiction.

On December 9, 1998, the Hearing Examiner notified the parties that the Borough's motion was in the nature of a motion for summary judgment and that under N.J.A.C. 19:14-4.8, he was conveying the motion to the Commission's Chair. On December 10, the Chair referred the motion to the Hearing Examiner.

On December 22, 1998, the Hearing Examiner issued his report and recommendations. H.E. No. 99-13, 25 NJPER 76 (¶30029 1998). Relying on the parties' briefs and supporting documents, he found certain facts and recommended dismissing the Complaint as moot. He saw no indication that similar circumstances would recur during the current negotiations and suggested that if they do, the Association could file a new charge.

Summary judgment will be granted:

> 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...is entitled to its requested relief as a matter of law. [N.J.A.C. 19:14-4.8(d)]

See also Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995).

The Association argues that it was not given an opportunity to support its allegation that the employer was attempting to interfere with and dominate the Association's control of the

negotiations. It also argues that without a complete record, the Hearing Examiner could not conclude that similar circumstances will not recur.

The employer responds that the charging party has not supported its factual assertions by affidavit or certification. It further asserts that the charging party has not presented facts corroborating its claim that the alleged unfair practice will recur.

We deny summary judgment. We emphasize that the record is very limited. The Complaint and the Answer are before us, but neither party has filed any affidavits or certifications asserting any additional or more specific facts.2/ In particular, we note that the contract pages attached to the Board's motion were not supported by an affidavit or certification and the employer has not presented any facts by way of affidavit or certification to suggest that the alleged conduct will not recur. In a number of cases, we have ruled that the successful completion of contract negotiations mooted a negotiations dispute. See, e.g., Ramapo Indian Hills Bd. of Ed., P.E.R.C. No. 91-38, 16 NJPER 581 (¶21255 1990). At this juncture, we do not have enough information to make such a determination. The single fact that the parties may have entered into a successor contract is not enough for us to rule, at this time, that, as a matter of law, the matter is moot. Contrast

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2/ We will not consider any factual allegation in the parties' briefs.

Hunterdon Cty., D.U.P. No. 85-7, 10 NJPER 544 (¶15253 1984)(charge dismissed as moot where union communicated directly with Freeholders, but ceased conduct after employer complained). We reserve our right to revisit that question later on a fuller record.3/

ORDER

The instant motion is denied.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose, Buchanan, Finn and Ricci voted in favor of this decision. None opposed.

DATED: May 27, 1999
Trenton, New Jersey
ISSUED: May 28, 1999

3/ The motion sought judgment on mootness grounds only and we therefore express no opinion on the merits of the dispute.

H.E. NO. 99-13

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

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BOROUGH OF PARAMUS,

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PARAMUS EMPLOYEES ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner grants a Respondent/Employer Motion for Summary Judgment on a Complaint alleging that it dealt directly with employees instead of the majority representative's negotiations team. The Complaint alleged that during negotiations, the Mayor issued a letter enumerating negotiations proposals and expressing disappointment that they were not communicated to the membership. This action allegedly "dominated" and "interfered" with the Association, violating 5.4a(1), (2), (5) and (7) of the Act.

The Hearing Examiner determined that the dispute was moot, inasmuch as the parties had successfully completed negotiations and no evidence suggested that similar circumstances will recur.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent, Ruderman & Glickman, attorneys
(Joel G. Scharff, of counsel)

For the Charging Party, Maccarone & Farhi, attorneys
(Michael Farhi, of counsel)

HEARING EXAMINER'S RECOMMENDED DECISION
ON MOTION FOR SUMMARY JUDGMENT

On July 22, 1996, the Paramus Employees Association filed an unfair practice charge against the Borough of Paramus. The charge alleges that on July 10, 1996, during negotiations for a 1995-97 collective agreement, the Mayor issued a letter to "all PEA members" enumerating specific proposals made to the PEA negotiations team and expressing his "disappointment" that he had not yet learned the "membership's position on this offer." The charge alleges that the correspondence is an "attempt to interfere with and dominate the Association's operation, management nd handling of contract negotiations", violating 5.4a(1), (2), (5)

and (7)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

On February 11, 1997, a Complaint and Notice of Hearing issued.

On February 26, 1997, the Borough filed an Answer admitting that the July 10, 1996 letter was issued but denying that it engaged in any unfair practice. The Borough asserts that the letter was lawful and that its overall conduct in negotiations was in good faith.

On October 20, 1997, the Complaint was deemed withdrawn. The PEA sought to reopen the case, pursuant to N.J.A.C. 19:14-1.5. The Borough opposed the Motion. On November 10, 1997, the Director of Unfair Practices advised the parties that a decision on the Motion was being deferred until an arguably related representation election (RO-98-37) was conducted and a certification issued.

On April 13, 1998, new Director of Unfair Practices and Representation Stuart Reichman granted the Motion to Reopen and reassigned the hearing to me.

1/ These provisions 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. (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 refusing to process grievances presented by the majority representative. (7) Violating any of the rules and regulations established by the commission."

On July 31, 1998, the Borough filed a Motion to Dismiss the Complaint. The Borough contends that on July 29, 1997, the parties signed the 1995-97 collective agreement. It argues that the issues raised in the Complaint are now moot.

On August 7, 1998, the PEA filed a letter opposing the Motion. The PEA contends that the parties are now engaged in successor negotiations and that a "hovering specter of 'direct dealing' by the Borough's highest official creates a chilling effect." It contends that granting the Motion gives the Borough a "green light to again engage in prohibited conduct."

The Motion was referred to me for a decision. N.J.A.C. 19:14-4.8.

Summary judgment will be granted:

> 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...is entitled to its requested relief as a matter of law. [N.J.A.C. 19:14-4.8(d)]

Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995), specifies the standard to determine whether a "genuine issue" of material fact precludes summary judgment. The factfinder must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." If that issue can be resolved in only one way, it is not a "genuine issue" of material fact. A motion for summary judgment should be granted cautiously --

the procedure may not be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 182 (App. Div. 1981); Essex Cty. Ed. Serv. Comm., P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982); N.J. Dept. of Human Services, P.E.R.C. No. 89-54, 14 NJPER 695 (¶19297 1988).

Applying these standards and relying upon the briefs and supporting documents, I make the following:

FINDINGS OF FACT

1. The Paramus Employees Association is the majority representative of certain non-supervisory employees of the Borough of Paramus.

2. On June 26, 1996, the Borough negotiations team, including Mayor Cliff Gennarelli met with the Association team in a continuing effort to reach a collective agreement for non-supervisory employees for 1995-97. During the session, the Mayor insisted that the Association team promptly communicate the Borough's offer to the membership.

The Association team advised that it needed some time to review the latest offer.

3. On July 10, 1996, the Mayor issued a letter to all "PEA members." The text of the letter states:

> I am writing to you in an attempt to resolve the P.E.A. contract in an expedient way. As you probably know, I and the Borough's Negotiation Team met with the PEA Negotiation Team and Michael Farhi on June 28, 1996.

> The offer we made at that time was as follows:
>
> 1. $2,080 increase for 1995 for the Dispatchers
>
> 2. $1,200 increase for 1995 for all other employees
>
> 3. A 4% increase for 1996 for all employees
>
> 4. A 3.1% increase for 1997 for all employees
>
> I feel this offer is not only fair but generous. I am very disappointed that we have not been notified as to the union membership's position on this offer. By copy of this letter, I am requesting a response from Mr. Farhi to our offer of June 26, 1996.

4. On or shortly before July 29, 1997, the parties signed a 1995-97 collective agreement. Article XXXVIII (Term of Agreement) provides in a pertinent part, "The parties shall meet to negotiate a successor agreement pursuant to the rules of the Public Employment Relations Commission." It also states, "If a successor agreement is not executed by December 31, 1997, then this Agreement shall continue in full force and effect until successor agreement is executed."

5. On December 31, 1997, the PEA filed an unfair practice charge (CO-98-239) against the Borough. The charge alleged that the Borough "arbitrarily gave a salary increase and transfer" to a unit employee without negotiations and did so after representing that the transfer was lateral and would not result in a salary increase. The Borough's actions allegedly violated 5.4a(1), (3), (5) and (7) of

the Act. On February 13, 1998, the charge was amended to allege additional facts.

On April 6, 1998, the parties signed a settlement agreement resolving the unfair practice charge. Without conceding any wrongdoing, the Borough acknowledged its duty to negotiate in good faith, including the duty to negotiate changes in salary of unit employees. On April 7, the case was closed.

6. On or around April 1, 1998, the parties commenced negotiations on a successor 1998-2000 agreement.

ANALYSIS

Resolution of a contract often makes moot disputes over alleged misconduct during negotiations, particularly where there is no evidence that the successful completion of negotiations was affected by the alleged misconduct. See e.g., Ramapo-Indian Hills Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 91-38, 16 NJPER 581 (21255 1990). The Commission has so held regardless of whether the charging party is a majority representative or a public employer. "Continued litigation over past allegations of misconduct which have no present effects unwisely focuses the parties' attention on a divisive past rather than a cooperative future." Ramapo-Indian Hills at 16 NJPER 582. Also see Bayonne Bd. of Ed., P.E.R.C. No. 89-118, 15 NJPER 287 (¶20127 1989), aff'd App. Div. Dkt. No. A-4871-88T, (3/5/90); Belleville Bd. of Ed., P.E.R.C. No. 88-66, 14 NJPER 128 (¶19049 1988), aff'd App. Div. Dkt. No. A-3021-87T7

(11/23/88); Matawan-Aberdeen Reg. Sch. Dist. Bd. of Ed., P.E.R.C. No. 88-52, 14 NJPER 57 (¶19019 1987), aff'd App. Div. Dkt. Nos. A-46-87T1, A-2433-87T1, A-2536-87T1 (1/24/90); Rutgers, the State Univ., P.E.R.C. No. 88-1, 13 NJPER 631 (¶18235 1987), aff'd App. Div. Dkt. No. A-174-87T7 (11/23/88); State of New Jersey, P.E.R.C. No. 88-2, 13 NJPER 634 (¶18236 1987); State Bd. of Higher Ed., P.E.R.C. No. 84-69, 10 NJPER 27 (¶15016 1983); Oradell Bor., P.E.R.C. No. 84-26, 9 NJPER 595 (¶14251 1983); Rockaway Tp., P.E.R.C. No. 82-72, 8 NJPER 117 (¶13050 1982); Union Cty. Reg. H.S. Bd. of Ed., P.E.R.C. No. 79-90, 5 NJPER 229 (¶10126 1979); see also Asbury Park Bd. of Ed. v. Asbury Park Ed. Ass'n, 155 N.J. 76 (App. Div. 1977).

No facts are disputed.

The Association argues that "a hovering specter of direct dealing...creates a certain 'chilling effect' on present negotiations." The Association also refers to a resolved charge, CO-98-239, as demonstrating a "pattern of unfair practices, whether blatant or borderline" [Assn. correspondence of 9/20/98].

In Neptune Tp. Bd. of Ed., P.E.R.C. No. 94-79, 20 NJPER 76 (¶25033 1994), the Commission found a violation of 5.4a(1) and (5) of the Act when the Board, during post-factfinding collective negotiations, attempted to deal directly with unit members by publicly releasing proposed salary guides that had never been disseminated to the Association.

The Commission wrote that the release may have

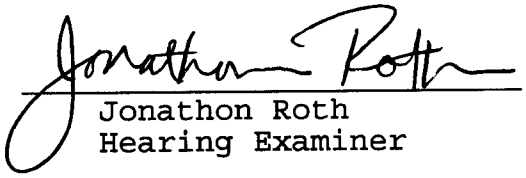
> effectively locked-in the Association to the Board's position, since any adjustments giving some teachers more could have been resisted by other teachers who would have gotten less. These circumstances interfered with the parties' ability to reach reasonable accommodations through the collective negotiations process. [Id. at 20 NJPER 77]

Another important fact in that case was that about two months before the Board released the guides, "...the parties settled an unfair practice charge alleging that the Board had tried to circumvent the negotiations process. The parties agreed in writing that they would communicate their negotiations positions through proper channels." Id. at 20 NJPER 76.

No facts of comparable significance are alleged in this case. No evidence suggests that any Borough action compromised or interfered with the Association's ability to negotiate the now-expired collective agreement. Nor do the facts indicate that the Borough contravened any pact on the dissemination of negotiations positions. Finally, the December 31, 1997 unfair practice charge appears unrelated to negotiating a successor agreement.

I see no indication that similar circumstances will recur during the current collective negotiations. If they do, the Association may file a new unfair practice charge and cite this matter as relevant evidence.

The Motion is granted. Accordingly, I dismiss the Complaint.



Jonathon Roth
Hearing Examiner

Dated: December 22, 1998
Trenton, New Jersey