

P.E.R.C. NO. 89-58

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Respondent,

-and-

Docket No. CO-H-88-293

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

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by Council of New Jersey State College Locals, NJSFT, AFT/AFL-CIO. The charge alleges that the State unilaterally implemented mandatory retirement policies before completing negotiations about retirement procedures. The Commission finds that the State and NJSFT were required to meet at reasonable times and negotiate in good faith about retirement procedures not interfering with the substantive decision that certain employees must retire. It further finds that the State did not try to delay or avoid negotiations and that the record does not demonstrate bad faith.

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Appearances:

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

For the Charging Party, Dwyer & Canellis, P.A.
(Paul J. Burns, of counsel)

DECISION AND ORDER

On May 16, 1988, Council of New Jersey State College
Locals, NJSFT, AFT/AFL-CIO ("NJSFT") filed an unfair practice charge
and an application for interim relief alleging that the State of New
Jersey ("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

^{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."

seq. NJSFT alleges that the State unilaterally implemented mandatory retirement policies before completing negotiations about retirement procedures.

On May 27, 1988, Commission Designee Edmund G. Gerber denied NJSFT's request for interim relief. He concluded (and the State conceded) that should NJSFT prevail on the merits of its charge, reinstatement with back pay was available as a remedy. I.R. No. 88-18, 14 NJPER 416 (¶19168 1988).

On June 1, 1988, a Complaint and Notice of Hearing issued. On June 13, the State filed an Answer asserting that the decision to retire employees was a managerial prerogative and that it was negotiating retirement procedures with NJSFT. On June 17, the State filed an amendment to the Answer asserting that NJSFT is in the wrong forum and should have sought a stay of the Appellate Division decision.

On June 28, 1988, Hearing Examiner Richard C. Gwin conducted a pre-hearing conference. The parties agreed to waive a Hearing Examiner's report and to submit a stipulated record to the Commission. N.J.A.C. 19:14-6.7.

On August 8, 1988, the parties filed stipulations. They filed briefs by August 25.

Following are the verbatim:

STIPULATED FACTS

1. On or about March 8, 1988, the Superior Court of New Jersey, Appellate Division, issued its judgment in A-5007-86T8, the

appeal of P.E.R.C. No. 87-98 [13 NJPER 154 (¶18068 1987), recon. den. P.E.R.C. No. 87-144, 13 NJPER 496 (¶18182 1987), rev'd 223 N.J. Super. 323 (App. Div. 1988), certif. granted 111 N.J. 605 (1988). The Court reversed the Commission's determination that the State had committed an unfair practice by unilaterally implementing a mandatory retirement policy].

2. Subsequently during the month of March 1988, Dr. Thomas H. Wirth, Senior Staff Representative of the Charging Party, spoke by telephone on several occasions with Mr. Edwin Evans, Employee Relations Coordinator in the Office of Employee Relations. Dr. Wirth inquired as to whether the colleges were going to implement their mandatory retirement policies this year. Dr. Wirth demanded negotiations on procedures for implementation of mandatory retirement, consistent with the aforesaid Appellate Division decision. Mr. Evans stated that the State would negotiate whatever is negotiable. Dr. Wirth argued that the implementation of the mandatory retirement policies should be postponed, since the notice to the individuals was too short and there would not be time to conclude negotiations. Mr. Evans stated that he would discuss the matter of postponing implementation with his people and get back to Dr. Wirth. However, he expressed the belief that negotiations could be concluded prior to June 30.

3. Mr. Evans subsequently contacted Dr. Wirth and advised him that the colleges intended to implement their mandatory retirement policies this year.

4. On or about March 24, 1988, attorneys for the Charging Party filed Notice of Petition of Certification of the judgment of the Superior Court Appellate Division dated March 8, 1988, Docket No. A-5007-86T8. On or about April 5, 1988, a Petition for Certification of said matter was filed with the Supreme Court of New Jersey.

5. On or about April 4, 1988, Mr. Evans spoke with Dr. Wirth by telephone and asked about dates for negotiations on mandatory retirement. Dr. Wirth said he would have to get back to Mr. Evans.

6. On or about April 8 and April 11, 1988, Mr. Evans called Dr. Wirth and requested that a date for mandatory retirement negotiations be set as soon as possible, because of the limited time to negotiate those matters which are negotiable. Dr. Wirth said that the Union needed time to formulate demands and would get back to Mr. Evans soon.

7. On or about April 12, 1988, Mr. Evans and Dr. Wirth discussed specific dates for mandatory retirement negotiations by telephone. A number of dates were discussed; April 26 and May 4 were agreed upon.

8. On April 19, 1988, Ms. Ilse Goldfarb of the Office of Employee Relations called Dr. Wirth, informed him that April 26 was not a good date, and suggested April 28 as an alternative. Dr. Wirth agreed, subject to confirmation.

9. Later on April 19, 1988, Dr. Wirth called the Office of Employee Relations and left a message for Ms. Goldfarb, to the effect that because the full Council would have to approve the demands at their meeting on April 29, it would not be possible to meet on April 28, but that the Union could proceed on May 4.

10. On April 22, Dr. Wirth sent a letter to Mr. Evans which speaks for itself (Exhibit J-2). [Wirth requested negotiations and contended it would be unlawful to enforce the mandated retirement policy without negotiated procedures in place.]

11. On or about April 29, 1988, Mr. Carl Robbins, Assistant to the President of Jersey City State College, sent a memorandum to Dr. Donald Silberman, President of Local 1863, AFT (Exhibit J-3). [Robbins stated that the College's exception clause was negotiable and requested the Union's position on the Board's policy.] The State asserts that Mr. Robbins had not contacted the Department of Higher Education or the Office of Employee Relations prior to sending the memorandum. The Charging Party has no knowledge of this assertion. Local 1839, AFT, is one of the constituent locals of the Charging Party and is the local Union at Jersey City State College.

12. Upon receipt of the aforesaid letter, Dr. Silberman contacted Mr. Robbins by telephone and pointed out that negotiations on the issue of mandatory retirement were underway at the state level.

13. On May 4, 1988, representatives of the parties met at Kean College of New Jersey. The Union presented a set of written demands to the State (Exhibit J-4). In addition, the Union demanded that implementation of the mandatory retirement policies by the colleges be postponed, inasmuch as negotiations are in progress and the affected employees deserve to get more notice -- at least as much notice as untenured faculty who are not reappointed are given.

Mr. Evans, speaking for the State, said that the colleges have decided to exercise their rights under the ruling of the Appellate Division and have made the judgment that in order to enhance the vitality of the colleges, and because Federal law will permit mandatory retirement only until 1993, it is necessary to proceed. Mr. Evans expressed a desire to negotiate and reach agreement in the immediate future on whatever is negotiable. He stated that the State will need some time -- about two weeks -- to analyze and respond to the Union's demands. He suggested a meeting on May 20, 1988. The Union agreed, and the meeting was adjourned.

14. On or about May 5, 1988, Dr. Silberman presented Dr. Carlos Hernandez, Vice President for Academic Affairs of Jersey City State College, with a written proposal (Exhibit J-5). The Charging Party asserts that this proposal was presented pursuant to J-3; the State has no knowledge of this assertion.

15. On or about May 6, 1988, Dr. Silberman met with Dr. William Maxwell, President of Jersey City State College on another matter. Dr. Maxwell stated in passing that he had decided not to

grant exceptions and that letters had been prepared informing the affected employees that they would be required to retire on June 30, 1988, pursuant to the College's mandatory retirement policy. Dr. Silberman objected to the College's sending the letters.

16. On or about May 9, 1988, Jersey City State College issued letters to four tenured employees -- Dr. Joseph Pikus, Dr. Kathryn Smith, Dr. Alice Laughlin, Ms. Ruth Arnold -- advising each that he or she would be required to retire on June 30, 1988 (Exhibits J-6a; J-6b; J-6c; and J-6d).

17. On or about May 5, 1988, William Paterson College of New Jersey issued a letter to Ms. Anna Freund and Dr. Leo Hilton, advising them that they would be required to retire pursuant to the college's mandatory retirement policy (Exhibit J-7a; J-7b).

18. On or about May 19, 1988, Montclair State College issued a letter to Professor Ben Monir advising him that his age brought him under the scope of the college policy requiring the retirement of tenured employees who have reached the age of 70 (Exhibit J-8).

19. On May 13, 1988, the instant Unfair Labor Practice Charge, Docket No. CO-H-88-293, was filed (Exhibit C-1a and C-1b).

20. On May 16, 1988, the Board of Trustees of Jersey City State College held its monthly meeting. Local 1846, AFT, presented a resolution to the Board (Exhibit J-10). Dr. Silberman asked the Board to reconsider the mandatory retirement of the affected individuals and take no action until negotiations are completed.

Dr. Maxwell responded that the vitality of the college required the employment of people with "newly minted PhD's" in critical areas such as liberal arts.

21. The parties met again on May 20, 1988. The State responded orally to the Union proposals as follows:

Demand #1. [Two calendar years notice] The demand is negotiable, but only insofar as it related to notice of waiver at Jersey City State College. In that regard, the State proposes that individuals at Jersey City State College be notified by June 1 of the year of mandatory retirement [of] any waiver which may have been granted.

Demand #2. [Contents of notice] The demand is inapplicable except at Jersey City State College, where it is something which can be worked out once we know what the procedures are. (Dr. Wirth asked what the State's position was on the negotiability of the demand at the other colleges, and Mr. Evans said he would get back to the Union next week on that issue).

Demand #3. [Waiver application review procedures] All negotiations will be at the State, not the local, level. Limited procedural aspects may be negotiable, but matters such as the levels of review, information to be used, and so forth is not negotiable. The State does not envision a process wherein the employee requests a waiver, but one in which the President makes a determination and notifies the employee of the waiver. The President will make a determination as to whether the waiver will be granted. (Mr. Evans

asked what the Union's view would be concerning this kind of process; Dr. Wirth said he would have to get back to Mr. Evans).

Demand #4. [effective date of mandatory retirement] A position of the negotiability of Demand #4 will be set forth at a later date.

Demand #5. [reappointment after retirement] A position on the negotiability of re-employment on a part-time basis will be set forth at a later date. Re-employment as a full-time employee is non-negotiable; such re-employment would fly in the face of the intent of the law (P.L. 1985, c.73).

Demand #6. [pay and benefits for reappointed employees] Not applicable, because of the State's position on Demand #3.

Demands #7-12. [pay and benefits for those forced to retire] These demands are pre-empted, and they are not "procedural" within the meaning of the Appellate Division decision.

Mr. Evans asked if the Union is going to file a Scope of Negotiations Petition on its own or does the Union want the State to join in. He stated that the State wishes to expedite a scope determination. He suggested meeting in the early part of next week to discuss further what is negotiable and to negotiate those matters which the parties agree are negotiable.

Speaking for the Union, Dr. Wirth said he would have to consult with the Union's attorney and would get back to Mr. Evans next week. Whereupon the meeting was adjourned.

22. On or about May 23, 1988, Mr. Evans called Dr. Wirth and inquired about whether the Union would file or join in a Scope of Negotiations petition. Dr. Wirth replied that he had not yet spoken with the Union's attorney. Mr. Evans said that the parties should meet this week and further discuss negotiability and negotiate on those matters that are negotiable. Dr. Wirth stated that he would have to get back to Mr. Evans after he had spoken with the Union's attorney.

23. On Friday, May 27, 1988, Mr. Evans and Dr. Wirth spoke on the telephone. Mr. Evans reiterated that the State wanted to move quickly with the Scope of Negotiations Petition and asked Dr. Wirth whether he had spoken with the Union's attorney.

Dr. Wirth stated that he had and that the Union believes that a Scope of Negotiations Petition would be premature at this time. Dr. Wirth stated that the Union does not have the State's complete position on negotiability yet, and that the Union will not file a Scope of Negotiations Petition and is not prepared to join in submitting a petition at this time. Mr. Evans suggested that he and Dr. Wirth meet on Wednesday, June 1, 1988, for substantive discussions on negotiable items and suggested that at that time the State could give the Union its complete position on negotiability. Dr. Wirth said that he would check.

Later the same day, Dr. Wirth called Mr. Evans, said that June 1 was not a convenient date, and suggested June 7 as an alternative. Mr. Evans urged that the parties meet next week

because of the limited time; Dr. Wirth stated that he was not available on June 2 or June 3, but that he would check again about June 1. Mr. Evans said he would check on June 7.

After several phonecalls, the parties agreed to meet on June 8, 1988.

24. On June 8, 1988, the parties met at the Rutgers Labor Education Center in New Brunswick. Speaking for the Union, Dr. Wirth demanded that implementation of the mandatory retirement regulations be postponed. Speaking for the State, Mr. Evans responded that the colleges have a managerial prerogative to determine when an individual should retire. He stated that he and the other representative of the State were at the meeting to negotiate negotiable issues. He said that these are "tough decisions," but that the Colleges have determined that to enhance their vitality, they must implement their mandatory retirement policies this year. This, stated Mr. Evans, is the State's formal response to Dr. Wirth's letter of April 22. Mr. Evans then asked whether the Union would join in a Scope of Negotiations Petition and stated that if not, the State would proceed unilaterally.

Dr. Wirth asked what the State's position on negotiability was in connection with those items on which the State had not previously specified its position.

Mr. Evans stated that with respect to Demand #5, part-time employment of retirees is non-negotiable, inasmuch as it is beyond the scope of mandatory retirement procedures as established by the

Appellate Division. He stated that with respect to Demand #4, the effective date of mandatory retirement is non-negotiable. He said that with respect to Demand #3, the levels of review are non-negotiable and the criteria for any waivers are also non-negotiable. With respect to Demand #2, Mr. Evans said that notice of mandatory retirement is in the policy itself. Only the notice of a waiver is negotiable. The State proposes June 1st of the year of mandatory retirement as the date of such notice. When the notice is given, it could include copies of the College's mandatory retirement policy and the agreement between the parties concerning mandatory retirement. The rest of the Union's proposal is non-negotiable or non-applicable.

Dr. Wirth stated that the Union rejects the State's positions on non-negotiability in their entirety.

Mr. Evans asked if the Union would file a Scope of Negotiations Petition.

Dr. Wirth said that the Union would not file such a petition and that the Union views the State's position on negotiability as frivolous.

Mr. Evans denied that the State's positions were frivolous and said that the State would file a Scope of Negotiations Petitions with PERC soon. Mr. Evans then asked about negotiations concerning the items the parties agree are negotiable.

Dr. Wirth stated that the Union wants to negotiate a total package and is not interested in piecemeal negotiations.

Mr. Evans expressed the hope that agreement could be reached by June 30 and asked Dr. Wirth if the Union had a counterproposal on the issues which the parties agree are negotiable.

Dr. Wirth responded in the affirmative and stated that the Union's counterproposal consisted of a reiteration of the original Union proposal in its entirety.

The parties each urged the other to reconsider its position and the meeting was adjourned.

25. On June 9, 1988, the Supreme Court of New Jersey granted the Charging Party's Petition of Certification of the judgment of the Superior Court, Appellate Division of March 8, 1988, Docket No. A-5007-86T8 (Supreme Court Docket No. 28,602).

26. On June 13, 1988, President Maxwell met with Dr. Silberman, several of the employees subject to mandatory retirement, the Chairpersons of the departments in which some of the affected employees taught, and other interested faculty. A discussion took place about granting waivers to the faculty affected by the college's mandatory retirement policy. Dr. Maxwell stated that he stood by his decision not to grant waivers to the affected individuals.

27. On June 13, 1988, Dr. Maxwell sent a memorandum to the members of the Board of Trustees of Jersey City State College (Exhibit J-11).

28. On June 17, 1988, the State filed a Scope of Negotiations Petition Docket No. SN-88-87 (Exhibit J-12).

29. On June 20, 1988, the Board of Trustees of Jersey City State College held its monthly meeting. Dr. Silberman and other interested employees expressed their outrage that the College was insisting on forcing the affected employees to retire this year. Dr. Maxwell reiterated the position he had previously set forth in his letter to the Board of Trustees.

30. Subsequent to June 20, 1988, Mr. Evans called Dr. Wirth and suggested that a meeting be scheduled to resolve those issues which both parties agree are negotiable. Dr. Wirth stated the Union is not interested in piecemeal negotiations, but intends to negotiate on a complete package, and therefore does not believe such a meeting would be productive.

31. On June 21, 1988, Dr. Wirth sent a letter to Mr. Evans (Exhibit J-13) [concerning a recent United States Supreme Court decision on employment in vacant positions not subject to mandatory retirement].

32. On June 29, 1988, Dr. Wirth sent a letter to Mr. Evans (Exhibit J-14) [adding a proposal concerning employment in vacant positions not subject to mandatory retirement].

33. On July 18, 1988, Mr. Evans sent a letter to Dr. Wirth (Exhibit J-15) [indicating the matter was not procedural and would be added to scope petition].

34. In the near future, the State will submit an amendment to its Scope of Negotiations Petition to the Public Employment Relations Commission.

35. The Union submits that Professor Thaddeus Raines and Associate Professor Daniel Skillin, who participated in the Retirement Incentive Program and retired effective June 30, 1988, from Jersey City State College and William Paterson College, respectively, would not have so retired, but for the mandatory retirement policies at their respective colleges. The State has no knowledge of this matter, but has no objection to the Union's submission of the foregoing information into the record.

36. The parties hereto agree to enter into the foregoing stipulations in order to expedite the processing of this matter. The fact that a stipulation has been made shall not be used as an indication of relevance. The parties reserve the right to argue the relevance of any of the stipulated information.

ANALYSIS

We initially found the mandatory retirement policies to be mandatorily negotiable. P.E.R.C. No. 87-98. The Appellate Division reversed, barring interference with the substantive decision as to whether an individual will be required to retire upon reaching age 70 and limiting negotiations to procedural questions. 223 N.J. Super. 323 (1988). Certification has been granted, 111 N.J. 605 (1988), but the Appellate Division order has not been stayed.

The State and NJSFT were required to meet at reasonable times and negotiate in good faith about retirement procedures not interfering with the substantive decision that certain employees must retire. 223 N.J. Super. at 336-337. Good faith negotiation

does not presume that parties will reach agreement by a deadline or that they will agree at all. Shortly after the Appellate Division issued its decision, the State agreed to negotiate the procedural aspects of mandatory retirement. It advised NJSFT that the colleges intended to implement their mandatory retirement policies in 1988, but that it believed negotiations on procedures could be concluded before June 30. The stipulated record does not suggest that the State tried to delay or avoid negotiations. To the contrary, it promptly sought NJSFT's proposals. It reviewed them, agreed to negotiate those that it considered negotiable, and offered to join NJSFT in filing a scope petition on those proposals it did not consider negotiable. It recognizes its obligation to continue to negotiate the retirement procedures. This record does not demonstrate bad faith. Accordingly, we dismiss the Complaint. Cf. In re Council of N.J. State College Locals, E.D. 79, 1 NJPER 39 (1975), aff'd sub nom State v. Council of N.J. State College Locals 141 N.J. Super. 470 (App. Div. 1976); East Orange Bd. of Ed., P.E.R.C. No. 82-40, 7 NJPER 609 (¶12271 1981).

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

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

DATED: Trenton, New Jersey
November 22, 1988
ISSUED: November 23, 1988