

P.E.R.C. NO. 84-99

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

OCEAN COUNTY COLLEGE,

Respondent,

-and-

Docket No. CO-83-285-118

OCEAN COUNTY COLLEGE ADJUNCT
FACULTY ASSOCIATION,

Charging Party.

OCEAN COUNTY COLLEGE ADJUNCT
FACULTY ASSOCIATION,

Respondent,

-and-

Docket No. CE-83-21-119

OCEAN COUNTY COLLEGE,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses Complaints based on unfair practice charges the Ocean County College and the Ocean County College Adjunct Faculty Association filed against each other. The Commission finds that neither party has proved by a preponderance of the evidence that the other party has refused to negotiate in good faith.

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Appearances:

For the County College, Berry, Kagan, Privetera
and Sahradnik (Seymour J. Kagan, of Counsel)

For the Association, Sterns, Herbert & Weinroth
(Mark D. Schorr, of Counsel)

DECISION AND ORDER

On April 25, 1983, the Ocean County College Adjunct Faculty Association ("Association") filed an unfair practice charge against Ocean County College ("College") with the Public Employment Relations Commission. The charge alleged that the College refused to negotiate in good faith with the Association, thus allegedly violating subsections 5.4(a)(5) and (6)^{1/} of the

^{1/} These subsections prohibit public employers, their representatives or agents from: "(5) Refusing to negotiate in good faith with a majority representative of employees in an

(continued)

New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

On May 23, 1983, the College filed an Answer. Asserting that it had negotiated in good faith, the College specifically stated that it had agreed to some of the Association's proposals, but had not agreed to other proposals which were allegedly inappropriate to grant part-time employees and too costly. The College further averred that the charge was prematurely filed in that the contract being negotiated would not become effective until September, 1983.

On May 23, 1983, the College also filed a counterclaim. Alleging that the Association had failed to negotiate in good faith, the College specifically asserted that the Association and its president had issued distorted press releases; had threatened to strike; had used the College mailbox system to disseminate memoranda attacking the College's negotiations team and distorting its proposals; and had insisted on negotiating over certain allegedly illegal subjects of negotiation.^{2/}

1/ (continued)

appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; and (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

2/ The Hearing Examiner properly treated the counterclaim as having in substance alleged violations of subsections 5.4(b)(2) and (3) of the Act. These subsections prohibit public employee organizations, their representatives or agents from: "(2) interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances; and (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit."

On June 29, 1983, the Director of Unfair Practices issued Complaints on both the charge and the counterclaim and then consolidated the Complaints for a single hearing.

On October 3, 1983, Hearing Examiner Edmund G. Gerber conducted a hearing. The parties examined witnesses, introduced exhibits, made motions to dismiss which were denied, argued orally, and filed post-hearing briefs.

On January 10, 1984, the Hearing Examiner issued his report and recommended decision. H.E. No. 84-32, 10 NJPER ____ (¶____ 1984). Finding that neither the College nor the Association had violated its negotiations obligations, he recommended that both Complaints be dismissed.

On January 23, 1984, the Association filed exceptions. It contends that the Hearing Examiner erred in determining that, under the totality of circumstances, the College had negotiated in good faith with an intent to reach an agreement. It also argues that the Hearing Examiner placed undue reliance on the Association's unwillingness to make further use of the Commission's impasse procedures and erred in finding that the Association's seniority proposal was not mandatorily negotiable.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-7, 9-10) are accurate. We adopt and incorporate them here.

We first consider the Association's contention that the College refused to negotiate in good faith with an intent to reach an agreement. In re State of New Jersey, E.D. No. 79, 1 NJPER 39 (1975), aff'd 141 N.J. Super 470 (App. Div. 1976) sets forth the appropriate standard for determining whether a party has refused to negotiate in good faith:

It is necessary to subjectively analyze the totality of the parties' conduct in order to determine whether an illegal refusal to negotiate may have occurred...A determination that a party has refused to negotiate in good faith will depend upon an analysis of the overall conduct and/or attitude of the party charged. The object of this analysis is to determine the intent of the respondent, i.e., whether the respondent brought to the negotiating table an open mind and a sincere desire to reach an agreement, as opposed to a pre-determined intention to go through the motions, seeking to avoid, rather than reach, an agreement. [Id. at 40, footnotes omitted].

That case further stated:

It is well established that the duty to negotiate in good faith is not inconsistent with a firm position on a given subject. "Hard bargaining" is not necessarily inconsistent with a sincere desire to reach an agreement. An adamant position that limits wage proposals to existing levels is not necessarily a failure to negotiate in good faith. [Id. at 40].

See also In re Mt. Olive Bd. of Ed., P.E.R.C. No. 84-73, 10 NJPER ____ (¶ ____ 1983). Under the totality of the circumstances of this case, we agree with the Hearing Examiner that the College's negotiations attitude and behavior did not transgress over the line separating hard bargaining from a pre-determined intention to avoid reaching an agreement.^{3/} In particular, we note, among

^{3/} In finding that the College did not negotiate in bad faith, we are not approving the substance or suitability, as opposed to the sincerity, of its positions.

other factors, that the College met frequently with the Association at agreed-upon times and places; repeatedly discussed all items and agreed to several; asked for but did not receive comparability data from the Association concerning adjunct faculty salaries and benefits; and participated fully in the Commission's impasse procedures.^{4/}

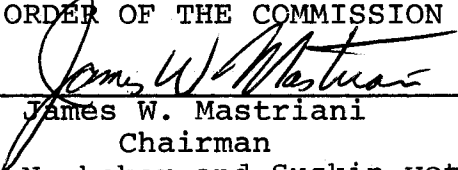
We next consider the College's counterclaim. Under all the circumstances of this case, we agree with the Hearing Examiner that the College did not prove by a preponderance of the evidence that the Association and its president negotiated in bad faith or coerced the College in the selection of its negotiations representative.

Finally, we encourage the parties to resume negotiations immediately. In the event an impasse arises, the full range of Commission impasse procedures will be available for their use.

ORDER

The Complaints are dismissed.

BY ORDER OF THE COMMISSION



 James W. Mastriani
 Chairman

Chairman Mastriani, Commissioners Newbaker and Suskin voted for this decision. Commissioner Graves opposed the decision. Commissioners Butch and Hipp abstained. Commissioner Hartnett was not present.

DATED: Trenton, New Jersey
 February 15, 1984

ISSUED: February 16, 1984

^{4/} We do not believe it is necessary to determine formally whether the Association's contract proposal entitled seniority is within the scope of collective negotiations. There is no scope of negotiations petition before us and no specific unfair practice charge concerning a refusal to negotiate over that particular proposal. Further, the parties apparently placed this proposal on hold at their January 7, 1983 meeting. In any event, In re Rutgers University College Teachers Ass'n, P.E.R.C. No. 83-136, 9 NJPER 276 (¶14127 1983), should give the parties the guidance they need for any further negotiations on this subject. See also In re Willingboro Bd. of Ed., P.E.R.C. No. 82-67, 8 NJPER 104 (¶13042 1982); In re Atlantic Community College, P.E.R.C. No. 82-58, 8 NJPER 34 (¶13015 1981).

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SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission finds that the Ocean County College did not violate the New Jersey Employer-Employee Relations Act during the course of its negotiations with the Ocean County College Adjunct Faculty Association. Although the College would not negotiate a salary increase, it did negotiate on non-economic items. Further, the Association did not fully utilize the Commission's conciliation procedures nor did it allow sufficient time for negotiations when it cut off negotiations and brought the instant charge. The Association failed to prove by a preponderance of the evidence that the Commission suggested in bad faith.

It is further recommended that the Commission find that the Association did not threaten an illegal strike against the College. Articles did appear in the local newspapers in which the President of the Association was quoted as stating a strike might occur under certain circumstances, but under the facts of this case such newspaper articles fall short of a threat.

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.

H.E. No. 84-32

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Appearances:

For the Association
Sterns, Herbert & Weinroth
(Mark D. Schorr, Esq.)

For Ocean County College
Berry, Kagan, Privetera & Sahradnik
(Seymour J. Kagan, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On April 25, 1983, the Ocean County College Adjunct Faculty Association ("Association or Charging Party") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") alleging that Ocean County College ("College or Respondent") had engaged

in unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a) (5) and (6). 1/

It was specifically alleged that the College consistently has refused to negotiate and "reduce to writing issues and items as presented in a comprehensive proposal" by the Association. Further it was alleged that throughout negotiations the College representatives refused to negotiate or to "acknowledge the existence of" the Association.

On May 23, 1983 the College filed an Answer, asserting that it in fact negotiated in good faith with the Association, and a Counterclaim, asserting that the Association committed unfair practices by resorting to: distorted press releases, threatening a strike, using the College mail boxes to disseminate memoranda to its members that personally attack individuals on the College Bargaining Team and demanding to negotiate over issues that were illegal subjects of bargaining. The charge filed by the College asserts that the Association violated N.J.S.A. 34:13A-5.4(a) (5) and (6). These subsections allege unfair practices by employers. However since its counterclaim was litigated without objection to the faulty pleadings, the undersigned has treated the College's charge as if it alleged violations of §5.4(b) (2) and (3). 2/

1/ These subsections prohibit public employers, their representatives or agents from: "(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; (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

2/ These subsections prohibit public employee organizations, their representatives or agents from: "(2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances; (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit."

It appearing that the allegations of the respective charges if true might constitute violations of the Act, an Order Consolidating Cases and a Complaint and Notice of Hearing were issued by the Director of Unfair Practices on June 29, 1983. A Hearing was held on October 3, 1983 ^{3/} at which time the parties were given the opportunity to introduce evidence, examine and cross-examine witnesses, argue orally and present briefs.

* * *

The Ocean County College Faculty Adjunct Association was certified by the Commission as the majority representative of Adjunct Faculty at the College on October 5, 1982.

THE ASSOCIATION CHARGES

There are 146 members of the Adjunct Faculty and between 90 and 100 are teaching in any given semester. These are part-time instructors who are hired to teach specific courses and are paid on the basis of the amount of credit hours they teach per semester. They receive no fringe benefits. It is an instructor's responsibility to provide for and, if necessary, compensate a substitute if an instructor is unavailable for any reason. In 1970 compensation for adjunct instructors ranged from \$210 to \$225 per credit hour depending upon years of experience at the College. Salary increases have averaged around 3% a year at the College. In the 1982-83 academic year adjunct instructors' salaries were not increased except that a new compensation range was created for instructors with 8 years of experience. The compensation structure for 1982-1983 was:

3/ The transcript was received on December 7, 1983.

<u>Equivalent Instructional Years of Service</u>	<u>Compensation Scale</u>
New at Ocean County College	\$300/semester credit hour
2 Years at Ocean County College	\$305/semester credit hour
4 Years at Ocean County College	\$310/semester credit hour
6 Years at Ocean County College	\$315/semester credit hour
8 Years at Ocean County College	\$320/semester credit hour

The parties commenced negotiations for a contract for the 1983-84 Academic year on November 10, 1983. The parties agreed that negotiation sessions would start at 4:00 p.m. and last until 5:45 p.m. These times were selected because the chief negotiator for the College, Seymour Kagan, is an Attorney and he did not want to begin negotiations until after the courts closed; whereas the Adjutants wanted to conclude negotiations before classes commenced in the evening at 7:00 p.m. The Association wanted longer negotiation sessions and requested that the parties meet on either Saturdays or Friday evenings but the College refused. Altogether there were seven negotiation sessions. The last one was held on February 7, 1983. In addition the parties had one mediation session in April but failed to reach an agreement.

At the first negotiation session, the Association presented a proposed contract to the Board negotiator. The parties reviewed what the Association characterized as its major proposals for 1983-84. These included salary increase, sick leave, tuition reimbursement, free tuition for instructors and family members and seniority for the Adjudent staff.

The College stated that the salaries at the College were on a par with the highest salaries in the State for Adjutants at Community Colleges and they would not increase the Adjutant's salary. The College asserted that no other College in the State provides fringe benefits

and they saw no need to grant them.

The Association disputed the College's claim as to salaries and benefits in other Community Colleges. Thereupon the College invited the Association to submit a survey, by either the N.J.E.A. ^{4/} or the Association itself concerning comparability of salaries at the State's Community Colleges. If the College salaries were not equivalent to the highest in the State the College would move off of its position.

The College took the position that the Adjutants did not need leave time since Adjutants are part-time employees, had full-time jobs elsewhere and accordingly had the protection of fringe benefits from their full-time jobs. The College refused to negotiate over seniority; it maintained seniority was non-negotiable as a managerial prerogative.

The Board also rejected tuition reimbursement and free attendance of classes, maintaining that such policies would ultimately take seats away from regular students.

At the second meeting, the balance of the Association's proposals were discussed. These proposals were considered of less importance by the Association, and some of them merely codified existing practices at the College. The College took a number of them under advisement and, over the course of the negotiation sessions, several were accepted by the College.

The College accepted a recognition clause and an academic freedom clause. The College agreed to attempt to arrange for secretarial service and Adjutant faculty parking. The College agreed that whatever benefits the Association members have now they will continue to receive.

^{4/} New Jersey Education Association

The College agreed to lengthen the time period between final exams and the submission of grades by the faculty to the College.

The parties had negotiated a grievance procedure but when negotiations had broken off they had not yet agreed upon a time frame for the steps in the procedure.

The College asked the Association to table proposals concerning the right of posting notices and the use of college facilities by the Association for dues deductions. Although never rejected, the College never agreed to these items.

On February 7, the seventh and final meeting was held. The College again refused to alter its position on the so-called major items. By the close of this session the parties had reviewed all of the proposed contract provisions three times. The Association declared an Impasse and, subsequently, filed a Notice of Impasse with the Commission.

The Commission provided a mediator and the parties agreed to meet on April 21. At the session, when it became apparent that the College was not willing to move on the so-called major proposals, the Association stated they would file what proved to be the instant unfair practice charge against the College. The Association chose not to go to fact-finding (or to have any further attempts at mediation).

It is noted that the College never joined in the declaration of Impasse. They were prepared to negotiate further. In addition, the College was willing to have further meetings with the mediator.

The Association alleged it was an unfair practice for the College not to reduce agreed upon provisions to writing or, otherwise, present its own contract proposal. However, the Association never demonstrated that there was any agreement between the parties which

required proposals, as opposed to the final agreement, to be reduced to writing.

The standard for determining a refusal to negotiate in good faith was first set forth in State of New Jersey, E.D. No. 79, 1 NJPER 39 (1975), aff'd 141 N.J. Super 470 (App. Div. 1976). That case states:

It is necessary to subjectively analyze the totality of the parties' conduct in order to determine whether an illegal refusal to negotiate may have occurred...A determination that a party has refused to negotiate in good faith will depend upon an analysis of the overall conduct and/or attitude of the party charged. The object of this analysis is to determine the intent of the respondent, i.e., whether the respondent brought to the negotiating table an open mind and a sincere desire to reach an agreement, as opposed to a pre-determined intention to go through the motions, seeking to avoid, rather than reach, an agreement. [Id. at 40] [Footnotes omitted]

Here, the College consistently refused to move off of its position on any of the Association's economic proposals. It did not refuse to discuss economic topics, rather, it took the position that its salaries were as high as any other county college.

What was said in State of New Jersey, supra, 1 NJPER 39 is applicable here and worthy of repetition:

It is well established that the duty to negotiate in good faith is not inconsistent with a firm position on a given subject.

'Hard bargaining' is not necessarily inconsistent with a sincere desire to reach an agreement. An adamant position that limits wage proposals to existing levels is not necessarily a failure to negotiate in good faith.

[Id. at 40]

A major consideration in determining the College's good faith is in its solicitation to the Association to show the College what

salaries for comparable positions are throughout the State.

Perhaps more importantly, the Association did not fully utilize the Commission's conciliation procedures in order to get the Negotiations moving. It was the Association on its own that brought this matter to mediation. Moreover, the negotiations were for a contract which was to be effective in September of 1983 but the instant charge was filed in late April 1983. There were potentially another four months in which the parties could have negotiated.

The Association did not show the Board's action constituted an illegal refusal to negotiate. Given the totality of the circumstances, the Association acted prematurely. Not only did the Association not take advantage of the College's offer to demonstrate what other adjutant faculty in the State earn, the Association never allowed the College to be influenced by the independent recommendations, of a PERC appointed fact-finder. Since the negotiations were abbreviated, and the parties did not utilize the available Commission conciliation procedures, the Association could not demonstrate that the Board did not have a "sincere desire to reach an agreement."

Finally, the College was not obligated to negotiate seniority here. It is noted that in Rutgers University College Teachers Association and Rutgers, The State University, P.E.R.C. No. 83-136, 9 NJPER 276 (1983) the Commission held that re-employment of co-adjutant faculty based strictly on seniority is not a mandatorily negotiable subject. ^{5/}

^{5/} However the Commission did not decide whether a seniority provision would be negotiable if its application was limited to situations in which the appointed and rejected teaching candidates in fact were otherwise equally qualified. In re Willingboro Bd. of Ed., P.E.R.C. No. 82-67, 8 NJPER 104, 106, n.14, (¶ 13042 1982).

THE COLLEGE'S CHARGES

The President of the Association, Cleary, issued several press releases during the course of the negotiations in which he was quoted as discussing the possibility of a strike. Cleary was quoted by the College newspaper, The Viking of September 22, 1983 that "if nothing is resolved as a result of the instant hearing, the Association will vote to strike." Cleary testified at the hearing, however, that he stated to the reporter it was up to the membership to decide what they wanted to do. He admitted that he stated that the membership's ultimate position could result in a strike.

In two other articles, Cleary is quoted as stating a strike is a possibility. Cleary denied using the word strike, rather he stated a job action was possible.

In an article printed in The Press on February 22, 1983, Cleary is quoted as stating: "If we (the Association) do strike, the day workers would not cross our picket line because we are both part of the New Jersey Education Association." Cleary does admit he made that statement. Cleary testified that whenever he talked to any reporter he always was careful to state it was up to the membership of the Association to decide what course of action the Association would take.

Cleary testified in an honest and forthright manner and I credit his testimony. Although Cleary did mention the possibility of a strike to the reporter, such statements fall short of a threat. He never stated or implied that either he or the Association had decided to strike; a strike was only a possible course of action sometime in the future and would occur only if a certain precondition was met

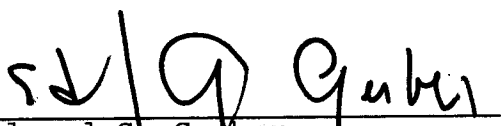
(i.e. if the Association membership decided). Cleary's comments were made to newspaper reporters who did not always accurately quote Cleary. These statements were not made to any College officer or negotiator. Cleary would always state that he lacked the pre-requisite capacity to call a strike. Similarly, it was not demonstrated at the hearing that anyone perceived that the Association had both the intention and capacity to strike. See also, Galloway Twp. Bd. of Ed. and Galloway Twp. Ed. Assoc., P.E.R.C. No. 78-1, 3 NJPER 316 (1977). Accordingly I find that no threat was made, therefore it is not necessary to determine if a threat to strike constitutes an unfair practice.

The College never introduced any evidence at the hearing in support of their charge that the Association improperly utilized college facilities or "made argument (sic) attacking in a personal nature individuals on the negotiating team." The College did introduce a local newspaper clipping in which Kagan was criticized for a potential conflict of interest. However, no evidence was adduced at the hearing that indicated the newspaper article was not accurate.

Accordingly, it is recommended that the College charges as incorporated in the Complaint in this matter be dismissed.

RECOMMENDED ORDER

The Hearing Examiner recommends that both complaints in the instant action be dismissed in their entirety.


Edmund G. Gerber
Chief Hearing Examiner

DATED: January 10, 1984
Trenton, New Jersey