P.E.R.C. NO. 89-67

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY, OFFICE OF EMPLOYEE RELATIONS, DEPARTMENT OF PERSONNEL,

Respondent,

-and-

Docket No. CO-H-88-106

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants summary judgment to the Department of Personnel ("DOP"). The Communications Workers of America, AFL-CIO filed an unfair practice charge alleging that DOP adopted regulations so that the State could avoid negotiations over several terms and conditions of employment.

The Commission does not have power to invalidate regulations or require negotiations before DOP proposes or adopts rules. Only the New Jersey Supreme Court has determined whether a regulatory agency is also an employer. The Supreme Court has declared that DOP's predecessor, the Civil Service Department, was not an employer and the Legislature has not displaced that dictum. CWA acknowledges that DOP performs the same functions as the Civil Service Department. Under the law as it now stands, the Commission therefore holds that CWA's attacks on DOP's regulations cannot be further entertained in this forum.

The Commission grants in part and denies in part a motion for summary judgment filed by the Office of Employee Relations. To the extent the unfair practice charge alleges that OER refused to negotiate over changes by DOP in certain terms and conditions of employment, those allegations are dismissed. But those portions of the charge accepting DOP's regulatory authority and demanding negotiations over issues severable from the regulations may be processed.

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COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party.

Appearances:

For the Respondent State of New Jersey, Cary Edwards, Attorney General (Michael L. Diller, Deputy Attorney General representing the Office of Employee Relations; Douglass L. Derry, Deputy Attorney General representing the Department of Personnel)

For the Charging Party, Steven P. Weissman, Esq.

DECISION AND ORDER

I. Procedural History

On October 20, 1987, the Communications Workers of America, AFL-CIO ("CWA") filed an unfair practice charge alleging that the State of New Jersey, Office of Employee Relations ("OER"), Department of Personnel ("DOP") violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). CWA generally alleges that: "[w]ith limited exceptions, [DOP] does not function as a neutral regulatory body vis-a-vis State employees, but is part of the managerial apparatus of the State. [DOP]

effectively functions as the employer of State employees represented by CWA." CWA specifically alleges that the State, through DOP, has: (1) proposed and promulgated regulations unilaterally changing grievance and layoff procedures and other terms and conditions of employment; (2) refused to negotiate over the effects of title reevaluations on salaries and other conditions of employment, and (3) unilaterally altered employment conditions at the Water Supply Authority. By these actions the State, through DOP, allegedly "has in bad faith attempted to circumvent its negotiations obligation with respect to mandatory subjects of negotiations, including layoff procedures, salaries, job security and grievance procedures" and has thus allegedly violated subsections 5.4(a)(1) and (5).[1/]

On November 10, 1987, the Director of Unfair Practices issued a Complaint and Notice of Hearing.[2/]

On March 4, 1988, the State moved for dismissal or summary judgment, asserting that the Commission lacks jurisdiction over DOP and its actions and that CWA has not stated a cause of action permitting relief since the Commission cannot invalidate DOP regulations. CWA responded that the Commission has jurisdiction to

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit...."

2/ The Director declined to issue a Complaint on another charge (CO-87-137). D.U.P. No. 88-18, 14 NJPER 430 (¶19176 1988).

determine whether DOP, allegedly as an employer and allegedly at the behest of management officials, has abused its regulatory power to insulate the State from its negotiations duty.

On May 24, 1988, Hearing Examiner Mark A. Rosenbaum denied the motion. H.E. No. 88-58, 14 NJPER 399 (¶19157 1988). He reasoned that the Commission had jurisdiction to develop a record on whether DOP, unlike its predecessor, was an employer and that the record at that point did not permit him to say "with assurance that DOP has acted as a completely independent regulatory agency, as the State claims, or that it has acted as a dual regulator/employer, as CWA claims." (Slip opin. at 6).[3/]

On June 6, 1988, attorneys for OER and DOP requested special permission to appeal. The Chairman granted this request. The parties filed briefs and the Commissioner of DOP submitted an affidavit. On October 20, the Commission heard argument.

II. Background

The State alleges that OER acts as the employer and that DOP is an independent and neutral regulatory agency. CWA alleges that State officials and DOP have in concert abused DOP's regulatory process to evade the State's negotiations obligations. To review these contentions, we must set forth the duties and powers of OER, DOP, and this Commission.

3/ The State had also moved to strike CWA's interrogatories. The Hearing Examiner denied this motion, but permitted the State to challenge specific interrogatories not tied to the unfair practices alleged.

A. OER

On April 2, 1970, Governor Cahill issued Executive Order No. 4, establishing the Governor's Office of Employee Relations. The Governor is the employer of State employees and OER is the Governor's agent in collective negotiations with their majority representatives. Ass'n of N.J. State College Fac. v. Bd. of Higher Ed., 112 N.J. Super. 237 (Law Div. 1970). OER also assists the Governor's Employee Relations Policy Council, created by Executive Order No. 3 and consisting then of the president of the Civil Service Commission and other State officials.

B. DOP

Article VII, Section 1, par. 2 of the New Jersey Constitution provides:

> Appointments and promotions in the civil service of the State...shall be made according to merit and fitness to be ascertained, as far as practicable, by examination, which, as far as practicable, shall be competitive....

This command resulted in a Civil Service law designed to "remove employment in the classified service from political control, partisanship and personal favoritism, and to maintain stability and continuity in ordinary public employment." Loboda v. Clark, 40 N.J. 424, 434 (1963), quoting Connors v. City of Bayonne, 36 N.J. Super. 390 (App. Div. 1955), certif. den. 19 N.J. 362 (1955). Like Civil Service systems in other States, this law evolved beyond merit principle provisions on appointments and promotions to personnel management provisions on almost all terms and conditions of

employment. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 76-77 (1978). See also Executive Committee, 1967 National Governor's Conference, Report of Task Force on State and Local Government Labor Relations, pp. 18-19 (1967).

In 1986, a new Civil Service Act was enacted. L. 1986, c. 112, codified at N.J.S.A. 11A:1 et seq. This statute abolished the Civil Service Department and the Civil Service Commission and replaced them, respectively, with DOP and the Merit System Board. N.J.S.A. 11A:2-1. A Commissioner of Personnel serves as DOP's chief executive. N.J.S.A. 11A:2-8.

N.J.S.A. 11A:2-6 specifies the duties of the Merit System Board. They include deciding appeals of removals, suspensions, demotions and terminations and adopting and enforcing rules to "implement a comprehensive personnel management system."

N.J.S.A. 11A:2-11 specifies the duties of the Commissioner. They include planning, evaluating, administering and implementing personnel programs; assisting the Governor in general work force planning, personnel matters and labor relations; establishing and consulting with advisory boards representing personnel officers, labor organizations and other groups; and recommending rules to the Merit System Board. The Commissioner may delegate to the appointing authority technical functions and the tasks of classifying positions and administering examinations. DOP employees may be assigned to help. N.J.S.A. 11A:2-12.

The new Civil Service Act, like the old one, regulates many terms and conditions of employment. The Commissioner, for example, must establish an equitable State compensation plan. N.J.S.A. 11A:3-7. Other examples are title classification, 3-1; appointment examinations, 4-1; transfer and reassignment procedures, 4-16; leaves of absence and vacations, 6-1; hours of work and overtime pay 6-24; performance evaluations, 6-28; equal employment opportunities, 7-1 and layoffs, 8-1. The Commissioner must consult with the labor advisory board before recommending new regulations on layoffs.

Last, the Civil Service Act declares a public policy ensuring the bargaining rights protected by the collective negotiations law and specifies that the act is "not to be construed either to expand or to diminish collective negotiations rights." N.J.S.A. 11A:1-2e and 12-1.

C. This Commission

Article I, par. 19 of the Constitution provides:

> Persons in public employment shall have the right to organize, present to and make known to the State...their grievances and proposals through representatives of their own choosing.

The New Jersey Employer-Employee Relations Act implements these guarantees. Lullo v. IAFF, 55 N.J. 409 (1970).

The Legislature has declared that "the voluntary mediation of such public...employer-employee disputes under the guidance and supervision of a governmental agency will tend to promote permanent...employer-employee peace and the health, welfare, comfort and safety of the people of the State. N.J.S.A. 34:13A-2. The

Commission supervises the negotiations process. N.J.S.A. 34:13A-5.2. To protect that process, it has exclusive power to prevent and remedy unfair practices. N.J.S.A. 34:13A-5.4(c). These unfair practices include an employer's interference with its employees' rights to have their majority representative negotiate over their employment conditions and an employer's refusal to negotiate in good faith. N.J.S.A. 34:13A-5.4(a)(1) and (5). "Employer"

> includes an employer and any person acting, directly or indirectly, on behalf of or in the interest of an employer with the employer's knowledge or ratification.... This term shall include "public employers" and shall mean the State of New Jersey...or any authority, commission, or board, or any branch or agency of the public service. [N.J.S.A. 34:13A-3(c)]

Generally, a statute or regulation "expressly, specifically, and comprehensively" setting a term and condition of employment will preempt negotiations and thus negate any unfair practice liability for refusing to negotiate over that subject. Bethlehem Bd. of Ed. v. Bethlehem Ed. Ass'n, 91 N.J. 38, 44 (1982); State Supervisory at 80-82. But the Supreme Court has held that if an agency is also an employer, its regulations will not be preemptive if proved to be "arbitrary, adopted in bad faith, or passed primarily to avoid negotiations...." Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO v. State Bd. of Higher Ed., 91 N.J. 18, 28 (1982). In that case, the majority representative appealed regulations of the State Board of Higher Education and the Supreme Court, while ultimately upholding the regulations, found that the State Board was a dual employer/regulator.

We asserted our authority to apply the Council tests in UMDNJ and AAUP, P.E.R.C. No. 85-106, 11 NJPER 290 (¶16105 1985), recon. den. P.E.R.C. No. 86-7, 11 NJPER 452 (¶16158 1985), aff'd App. Div. Dkt. No. A-11-85T7 (4/14/86). We recently reaffirmed our jurisdiction to process unfair practice charges alleging an abuse of regulatory power by an agency which the Supreme Court has found to be a dual employer/regulator. State of New Jersey (OER) and Council, P.E.R.C. No. 88-89, 14 NJPER 251 (¶19094 1988). This jurisdiction is narrow. It does not extend to determining whether a regulation is statutorily authorized; whether it has been validly adopted; whether it is wise, or whether it should be voided. These questions must go to the Appellate Division. R. 2:2-3(a)(2). Moreover, only the Supreme Court has determined whether an agency is in fact an employer/regulator so that the Council tests may be applied.

III. Parties' Contentions

A. The State

The State asserts that the Commission lacks jurisdiction over DOP and its actions and that it cannot invalidate DOP's regulations. It contends that State Supervisory and Council establish that Civil Service regulations are absolutely preemptive and that the Legislature confirmed this state of the law when, having rejected bills requiring DOP to negotiate over its regulations, it declared that the new Civil Service statute did not

expand negotiations rights. CWA and other unions serve on the DOP labor advisory board, N.J.S.A. 11A:2-11, and may participate in the rule-making process, N.J.S.A. 52:14B-1 et seq.; but CWA may contest a DOP regulation only by appealing to the Appellate Division.[4/] OER adds that CWA never specifically asked it to negotiate so the allegations against it should be dismissed.

B. CWA

CWA asserts that the Commission has jurisdiction to determine whether DOP has acted as an employer under N.J.S.A. 34:13A-3(c) and Council and whether it has abused the regulatory process to evade the State's negotiations obligation. It contends that State Supervisory did not consider or foreclose its dual employer/regulator contention and that DOP, like its predecessor, has acted as an employer in several ways. For example, DOP allegedly has a representative on the State's negotiations team.[5/] According to CWA's Area Director, DOP officials confer with OER representatives and Cabinet members about labor relations issues. These contacts allegedly resulted in DOP adopting a regulation, N.J.A.C. 4:6-1.3, which voided a contract provision on sick leave accumulation; adopting a regulation, N.J.A.C. 4A:6-5.3(d), intended to make increment withholdings non-arbitrable;

4/ CWA did appeal some regulations, but that appeal was dismissed for failure to prosecute.

5/ The State's affidavits do not contradict this assertion, but its brief asserts that DOP advises unions and employers alike about preemption.

limiting the bumping rights of employees laid off in 1987, and proposing regulations codifying those restrictions, 19 N.J.R. 1363(a).[6/] It further notes that many employees of the former Civil Service Department were "confidential employees" under N.J.S.A. 34:13A-3(g) because they had assisted the State as employer with its half of the negotiations process. State of New Jersey and CWA, P.E.R.C. No. 86-18, 11 NJPER 507 (¶16178 1985), recon. den. P.E.R.C. No 86-59, 11 NJPER 714 (¶16249 1985).[7/] CWA concludes that it should be permitted to proceed on its unfair practice charge alleging that DOP has acted as an employer and has abused its regulatory power.

IV. DOP's Motion For Dismissal Or Summary Judgment

A. Motion for Dismissal

We have provisional jurisdiction to determine if and when an entity is subject to our Act. See, e.g., Bergen Cty. Prosecutor, P.E.R.C. No. 78-77, 4 NJPER 220 (¶4110 1978), aff'd 172 N.J. Super. 411 (App. Div. 1970); Mercer Cty. Supt. of Elections, P.E.R.C.

6/ This proposal was withdrawn, 20 N.J.R. 1980(b), and a new proposal has been published for public hearing and comment. 20 N.J.R. 2955.

7/ The State had also argued that all department employees should be declared confidential given the department's neutral role as regulator, but the Commission held that the statutory definition did not grant a department-wide exclusion. The new Civil Service statute mooted the State's appeal because it states that all DOP employees are confidential for negotiations purposes. N.J.S.A. 11A:2-11(b).

No. 78-78, 4 NJPER 221 (¶4411 1978). If the answer is no, we will dismiss. See also Cape May Cty. Guidance Center, D.R. No. 78-19, 3 NJPER 350 (1977) and ARA Services, E.D. No. 76-31, 2 NJPER 112 (1976). It is proper to continue to exercise our provisional jurisdiction until we can determine our ultimate jurisdiction.

B. **Motion for Summary Judgment**

Summary judgment may be granted "[i]f 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 or cross-movant is entitled to its requested relief as a matter of law...." N.J.A.C. 19:14-4.8(d). But summary judgment is to be granted cautiously, after considering the moving papers in the light most favorable to the opposing party and resolving all doubts against the movant. Baer v. Sorbello, 177 N.J. Super. 182, 185 (App. Div. 1981); State of New Jersey, P.E.R.C. No. 89-52, 14 NJPER 695 (¶19297 1988); Essex Cty. Ed. Services Comm'n, 9 NJPER 19 (¶14009 1982). See also Frank v. Ivy Club, 228 N.J. Super. 40 (App. Div. 1988).

Applying these standards, we are compelled to grant DOP summary judgment. As the law stands now, DOP is not an employer. We have never exercised jurisdiction to determine whether an agency is an employer/regulator under Council. Assuming we have that power, we do not believe we could exercise it to displace Council's dictum.

DOP, like the preceding Civil Service Commission, has vast statutory authority to regulate terms and conditions of employment. But that authority does not make it an employer or require negotiations before it adopts regulations. State Supervisory. That expansion of negotiations must come from the Legislature. Nor will we examine a claim that another agency's decisions collectively tilt one way or another. Cf. Hackensack v. Winner, 82 N.J. 1 (1982) (Commission may not secondguess another agency's fact-finding). Instead we must focus on CWA's claim that particular regulations were promulgated because DOP abused its power as an undisputed regulator and alleged employer to evade negotiations.

We agree with CWA that neither State Supervisory nor Council focussed on a claim that the functions and actions of the Civil Service Department raised the possibility of employer/regulator abuse that Council sought to prevent. But we agree with the State that these cases, especially the dictum in Council, foreclose such a claim unless the Supreme Court revisits them.

In State Supervisory the Commission held that only specific statutes setting an employment condition remained preemptive. P.E.R.C. No. 76-18, 3 NJPER 118 (1977). The Supreme Court agreed. 78 N.J. at 79-82. But the Court extended the preemption doctrine to specific regulations as well and found several Civil Service regulations specific enough to preempt negotiations. Id. at 84-97.

The parties could seek changes through the administrative process or a legislative petition. Id. at 82, 87, 92.

Council held that regulations of employer/regulator agencies were presumptively (but not absolutely) preemptive. In dictum, the Court contrasted the then Civil Service Commission with the State Board of Higher Education:

> In State Supervisory, we held that "the adoption of any specific statute or regulations setting or controlling a particular term or condition of employment will preempt" negotiation on that subject. However, that case involved regulations passed by the Civil Service Commission, a State executive department with regulatory jurisdiction over all public employees in the classified civil service. In contrast, this case involves regulations promulgated by the State Board of Higher Education, which is an agency with statewide regulatory jurisdiction over the field of higher education, including State college employees. [Id. at 23]

The Court added:

> The unique feature of this case, not present in State Supervisory, is that the regulatory agency involved also performs certain employer functions regarding the same employees it regulates. [Id. at 26]

Our Appellate Division has stated that where there is Supreme Court dictum on point, it should adhere. Shackil v. Lederle Laboratories, 219 N.J. Super. 601, 620 (App. Div. 1987). We must do so also, unless the Legislature has displaced Council's dictum. Compare Eatontown Bd. of Ed., P.E.R.C. No. 88-144, 14 NJPER 466 (¶19195 1988) (discipline amendment partially displaces dictum that employers have a non-negotiable prerogative to dismiss employees). Adherence is especially appropriate given that the Supreme Court,

rather than the Commission, has been the forum for determining which agencies are employers as well as regulators.

We turn now to the provisions of the Civil Service Act on labor relations. This Act declares the need to ensure bargaining rights secured by the collective negotiations law and declares that it is "not to be construed either to expand or to diminish collective negotiations rights." N.J.S.A. 11A:1-2 and 12-1. Legislation was introduced to eliminate the preemptive effect of Civil Service regulations (except for minimum benefits) and to require DOP's Commissioner to negotiate over employment conditions.[8/] But rather than overruling State Supervisory, the Legislature preserved the status quo.

We agree with CWA that the legislative debate did not touch upon the possibility of abuse issue or foreclose a claim seeking Council's limited protection. But the State is just as right that the Civil Service Act did not grant that protection or displace Council's dictum. Thus, the Legislature did not reject or endorse Council's dictum. The dictum's validity remains an issue for the Supreme Court.[9/]

8/ S-1567, introduced on January 30, 1986. See also A-2227, introduced on June 25, 1984.

9/ At argument CWA acknowledged that DOP's functions were essentially the same as its predecessor's functions (Tr. 67).

This holding does not leave CWA without recourse. First, it may appeal this decision and ask that Council's dictum be reconsidered or at least that a record be developed towards that end. Second, CWA retains its statutory right to participate in rule-making proceedings and its special access as a member of DOP's labor advisory council. Third, if it believes that a particular regulation is biased or arbitrary, it may ask the Appellate Division to have a hearing conducted. R. 2:5-5; cf. In re Judges of Passaic Cty., 100 N.J. 352 (1985). It may also petition the Legislature.

V. OER's Motion For Summary Judgment

In Monroe Tp. Bd. of Ed., P.E.R.C. No. 85-35, 10 NJPER 569 (¶15265 1984) and Town of Secaucus, P.E.R.C. No. 87-104, 13 NJPER 258 (¶18105 1987), we held that if an employer has a prerogative to make a decision, it need not negotiate at all unless the majority representative identifies and demands to negotiate over mandatorily negotiable issues which are severable from the decision. Citing these cases, OER argues that CWA had an obligation to demand negotiations over specific issues related to the disputed regulations. We agree in part and disagree in part.

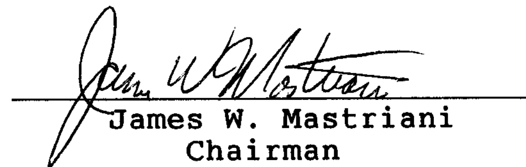
Some portions of the charge (¶¶ 2, 3 and 6) simply allege that the State refused to negotiate over changes by DOP in certain terms and conditions of employment. Since DOP is not an employer, its regulations are entitled to absolute preemptive effect and the State has no duty to negotiate over them. CWA has not identified or asked to negotiate over severable issues. We dismiss those portions.

Some portions of the charge (¶¶4 and 5) accept DOP's regulatory authority over job reevaluations, but allege that the State rejected CWA's demand to negotiate with respect to the effects of these reevaluations on terms and conditions of employment. Such a demand may have been made (RA28-29, 259-260, 262-263). We will not dismiss those portions.

ORDER

The motion for summary judgment in favor of the Department of Personnel is granted. The motion for summary judgment in favor of the Office of Employee Relations is granted except for paragraphs 4 and 5 of the unfair practice charge. Those portions of the charge are remanded for further proceedings.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Reid and Wenzler voted in favor of this decision. Commissioners Bertolino and Smith were opposed. Commissioner Johnson was not present.

DATED: Trenton, New Jersey
December 19, 1988
ISSUED: December 19, 1988

H.E. NO. 88-58

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

In the Matter of

STATE OF NEW JERSEY,
(DEPARTMENT OF PERSONNEL),

Respondent,

-and-

Docket No. CO-H-88-106

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO,

Charging Party.

SYNOPSIS

A Commission Hearing Examiner denies a Motion to Dismiss, Motion for Summary Judgment and Motion to Strike Interrogatories filed by the State of New Jersey. The Hearing Examiner finds that the Commission has jurisdiction to determine whether the State Department of Personnel is a dual employer/regulator whose regulations are not entitled to automatic preemptive effect under Council of New Jersey State College Locals v. State Board of Higher Education, 91 N.J. 18 (1982).

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COMMUNICATIONS WORKERS
OF AMERICA, AFL-CIO,

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Appearances:

For the Respondent, Cary Edwards, Attorney General
(Michael L. Diller, Deputy Attorney General)

For the Charging Party, Steven P. Weissman, Esq.

DECISION ON MOTION TO DISMISS/MOTION FOR
SUMMARY JUDGMENT AND MOTION TO STRIKE INTERROGATORIES

On October 20, 1987, the Communications Workers of America, AFL-CIO (CWA) filed an unfair practice charge alleging that the State of New Jersey, Department of Personnel (State or DOP) violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). CWA alleges that the State, through DOP, has proposed and promulgated regulations unilaterally changing terms and conditions of employment of employees in CWA negotiations units in violation of subsections 5.4(a)(1) and (5). These terms and conditions include salaries, layoff procedures, job security and grievance procedures. Central to the charge is CWA's claim that DOP has functioned as an employer of State employees.

On November 10, 1987, the Director of Unfair Practices issued a Complaint and Notice of Hearing.[1/] On March 4, 1988, the State filed a Motion to Dismiss or, alternatively, a Motion for Summary Judgment. The State asserts that the Commission lacks jurisdiction over DOP and its regulatory actions and that CWA has not stated a cause of action permitting relief. The State has also moved to strike or to delay compliance with CWA's interrogatories; I granted a delay pending this decision.

On April 18, CWA filed its opposing brief, affidavits and documents. On May 4, the State filed a response.

N.J.S.A. 34:13A-5.4(a)(5) makes it an unfair practice for a public employer to refuse "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...." N.J.S.A. 34:13A-5.4(c) gives the Commission exclusive power to prevent this unfair practice.

An employer need not negotiate over terms and conditions of employment dictated by specific regulations. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978) (State Supervisory). But if the agency adopting the regulations is both a regulator and an employer, the regulations are not automatically

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1/ The parties have also briefed whether the Director of Unfair Practices should issue a Complaint on a related unfair practice charge (CO-87-137), and if he does, whether to consolidate these Complaints. I have forwarded the briefs to the Director. N.J.A.C. 19:14-2.1.

preemptive. Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO v. State Bd. of Higher Ed., 91 N.J. 18, 27-28 (1982), (Council) states:

> When an agency performs dual roles as both regulator and employer, the possibility exists that the agency could use its preemptive regulatory power in an abusive or arbitrary manner to insulate itself from negotiations with its employees. The mere potential for such abuse is not grounds in and of itself to hold that preemption does not apply to regulations promulgated by such agencies. However, that possibility raises serious questions about the soundness of any rule that would accord absolute and unqualified preemption to a regulation affecting terms and conditions of employment when passed by an agency qua employer to govern the employment terms and conditions of its own employees. To effectuate fully the legislative policy of protecting the rights of State public employers, while at the same time encouraging the proper discharge of statutory responsibilities by State agencies, the preemption accorded to administrative regulations governing the employment of an agency's own employees must be qualified.

A presumption of preemption can thus be overcome by showing "that the regulations were arbitrary, adopted in bad faith, or passed primarily to avoid negotiations on terms and conditions of employment" Id. at 28. Eight factors are relevant. Id. at 28-29.

The Commission applied these tests in UMDNJ and AAUP, P.E.R.C. No. 85-106, 11 NJPER 290 (¶16105 1985), recon. den. P.E.R.C. No. 86-7, 11 NJPER 452 (¶16158 1985), aff'd App. Div. Dkt. No. A-11-85T7 (4/14/86). It recently reaffirmed its jurisdiction to develop a record on whether an agency acting as both regulator and employer has abused its regulatory power. State of New Jersey (Office of Employee Relations) and Council of New Jersey State

College Locals, NJSFT-AFT/AFL-CIO, P.E.R.C. No. 88-89, 14 NJPER 251 (¶19094 1988). The Commission's jurisdiction does not extend to reviewing a regulation's validity or wisdom and is limited to determining whether a regulation displaces the statutory duty to negotiate.

CWA alleges that DOP acts as an employer within the meaning of the Council case and N.J.S.A. 34:13A-3(c). That section defines the term "employer" to include "any person acting, directly or indirectly, on behalf of or in the interest of an employer with the employer's knowledge or ratification...." CWA specifically alleges that DOP, at the behest of management officials, has abused its preemptive power to insulate the State as employer from negotiations.

CWA submits that the new Civil Service Act gives DOP many personnel management responsibilities. See, e.g., N.J.S.A. 11A:2-6(d). Its chief executive officer is charged with both recommending personnel regulations and with assisting the Governor in general work force planning, personnel matters and labor relations. N.J.S.A. 11A:2-11(l) and (p). CWA asserts that DOP, like the agency in Council, advises the State in contract negotiations.[2/] CWA further notes that many employees of the Department of Civil Service were "confidential employees" under N.J.S.A. 34:13A-3(g) because they assisted the State as an employer

2/ The State asserts that the DOP independently advises both parties of conflicts between proposals and regulations. I cannot resolve this dispute on this record.

in negotiating and administering its contracts. State of New Jersey and CWA, P.E.R.C. No. 86-18, 11 NJPER 507 (¶16179 1985), recon. granted in part, P.E.R.C. No. 86-59, 11 NJPER 714 (¶16249 1988), appeal dismissed App. Div. Dkt. No. A-1375-85T1 (1/9/87).[3/] It also alleges specific instances in which employer representatives have allegedly induced DOP officials to alter terms and conditions of employment.

The State responds that DOP is an independent regulatory agency without any employer functions and that this Commission lacks jurisdiction to process unfair practice charges which allege that its regulations are not entitled to preemptive effect. It notes that State Supervisory held that regulations of the former Civil Service Commission were automatically preemptive and that Council contrasted that agency's regulations with the regulations of an employer/regulator agency.[4/]

The Commission has often asserted jurisdiction to determine whether an entity is, as claimed, a public employer. See, e.g., Bergen Cty. Prosecutor, P.E.R.C. No. 78-77, 4 NJPER 220 (¶4110

3/ While the Commission found a majority of positions in dispute to be confidential, it rejected the argument that all Civil Service department employees were confidential under section 3(g). But the Civil Service Act later excluded DOP employees from the Act's protections. CWA does not assert any claims on their behalf.

4/ CWA responds that neither case considered whether Civil Service performed employer functions and that developments have shown the dual functions of that department and its successor.

1978), aff'd 172 N.J. Super. 411 (App. Div. 1970) and Mercer Cty. Supt. of Elections, P.E.R.C. No. 78-78, 4 NJPER 221 (¶4111 1978). If, after a record is developed, the Commission finds that the entity is not a public employer, it dismisses the matter. See also Cape May Cty. Guidance Center, D.R. No. 78-19, 3 NJPER 350 (1977) and In re ARA Services, E.D. No. 76-31, 2 NJPER 112 (1976). The Commission thus has jurisdiction to develop a record on the issue of who is an employer.

Given State Supervisory, I believe that CWA must establish that unlike its predecessor, DOP functions as a dual employer/regulator, and that therefore, DOP regulations, unlike those of Civil Service, are not entitled to preemptive effect. But at this point, I cannot say with assurance that DOP has acted as a completely independent regulatory agency, as the State claims, or that it has acted as a dual regulator/employer, as CWA claims. CWA has the burden of proving its allegations by a preponderance of the evidence. The record needs to be developed more before these issues can be resolved. Accordingly, I deny the motions.

The State has also moved to strike all of CWA's interrogatories under N.J.A.C. 1:1-10.4. I deny this motion. Some interrogatories may shed light on whether or not DOP and its officials are performing an employer's functions and abusing the process for regulating the terms and conditions of employment of CWA unit members. Such information is relevant, material and within the State's control. N.J.A.C. 1:11.2(b). However, I will not require

that all interrogatories be answered at this time. Interrogatories seeking information on events before the Civil Service Act need not be answered now since the central issue is whether or not the new agency functions as an employer/regulator. Moreover, the parties have focused on the jurisdictional issues. This opinion refines what information is relevant to developing the record. I will thus entertain challenges to specific interrogatories which the State claims seek details about DOP's organization, personnel and workings not specifically tied to the unfair practices alleged. The State must answer the interrogatories and raise its specific objections within 30 days of receiving this decision. CWA will then have 10 days to reply to any objections.

ORDER

I deny the Motion to Dismiss, the Motion for Summary Judgment and the Motion to Strike all Interrogatories which may proceed pursuant to the terms of this decision.

Mark A. Rosenbaum
Hearing Examiner

DATED: May 24, 1988
Trenton, New Jersey