D.U.P. NO. 84-11

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

STATE OF NEW JERSEY, DEPARTMENT OF HUMAN SERVICES,

Respondent,

-and-

DOCKET NO. CO-84-15

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party.

SYNOPSIS

The Director of Unfair Practices declines to issue a complaint with respect to an unfair practice charge alleging that the State had unilaterally changed a term and condition of employment by not providing a dismissed employee with a contractually entitled statement of reasons and opportunity for hearing. The facts indicate that the parties' dispute is essentially grounded in their different interpretation of contractual language. The charge does not contain any factual allegation indicating that the State has acted to alter or repudiate the terms of the agreement and to change terms and conditions of employment.

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Charging Party.

Appearances:

For the Respondent
Irwin Kimmelman, Attorney General
(Michael Diller, Deputy Attorney General)

For the Charging Party
Robert W. Pursell, Representative

REFUSAL TO ISSUE COMPLAINT

On July 22, 1983, an Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission"), as amended on September 6, 1983, by the Communications Workers of America, AFL-CIO ("CWA"), alleging that the State of New Jersey, Department of Human Services ("State") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically

N.J.S.A. 34:13A-5.4(a)(1), (3), and (5).[1/]

N.J.S.A. 34:13A-5.4(c) sets forth in pertinent part that the Commission shall have the power to prevent anyone from engaging in any unfair practice, and that it has the authority to issue a complaint stating the unfair practice charge.[2/] The Commission has delegated its authority to issue complaints to the undersigned and has established a standard upon which an unfair practice complaint may be issued. This standard provides that a complaint shall issue if it appears that the allegations of the charging party, if true, may constitute an unfair practice within the meaning of the Act.[3/] The Commission's rules provide that the undersigned may decline to issue a complaint.[4/]

For the reasons stated below it appears to the undersigned that the Commission's complaint issuance standards have not been met.

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. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate 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."

2/ N.J.S.A. 34:13A-5.4(c) provides: The commission shall have exclusive power as hereinafter provided to prevent anyone from engaging in any unfair practice ... Whenever it is charged that anyone has engaged or is engaging in any such unfair practice, the commission or any designated agent thereof, shall have authority to issue and cause to be served upon such party a complaint stating the specific unfair practice and including notice of hearing containing the date and place of hearing before the commission or any designated agent thereof ..."

3/ N.J.A.C. 19:14-2.1

4/ N.J.A.C. 19:14-2.3

CWA represents a negotiations unit consisting of all State professional employees. This unit includes unclassified civil service employees, including certain physicians employed by the State at various State hospitals. CWA alleges that one of these physicians, Dr. Ruben Reyes, was terminated by the State on July 5, 1983 from his position at Ancora Psychiatric Hospital in violation of Article 5 Section L of the parties' collective negotiations agreement.[5/] CWA alleges that the State committed

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5/ The pertinent portion of Article 5 Section L is subsection 2 which reads as follows:

> In the event an unclassified employee is dismissed from State employment, without receiving specific written reasons and such dismissal is not related to fiscal problems or programmatic changes and in the judgment of the State such dismissal is not of a nature whereby the employee must be immediately removed from the work location, the State shall provide the employee with at least ten (10) calendar days notice in advance of the dismissal.
>
> Unless there are exceptional circumstances when an unclassified employee is dismissed from State employment due to misconduct, management shall serve such employee with the specific written reasons, relating to such misconduct, and the employee may request and shall be granted a hearing by the department or agency head or his designee, whose decision shall be final. Time limits shall apply as provided in this article. The burden of proof shall be on the employee.
>
> It is understood that nothing herein shall be construed as limiting the State from exercising its inherent discretion to terminate employees serving at the pleasure of the department or agency head, (i.e., unclassified employees), without setting forth the reasons therefor. Moreover, the issue of dismissal relative to any matter of job performance shall not fall within the purview of this article. Grievances concerning the interpretation of this article shall be processed as noncontractual A.2. grievances.

unfair practices when it denied Dr. Reyes an internal hearing as provided for under certain circumstances in Article 5 Section L of the agreement. It contends that Dr. Reyes was terminated for misconduct, [6/] that the denial of CWA's and Reyes' request for a hearing constitutes a refusal to process a grievance, and finally, that the State's failure to list the specific reasons for discharge was a change in contractually guaranteed terms and conditions of employment.

The State responded to the original and amended charge and seeks its dismissal. Among its arguments the State avers that its termination of Dr. Reyes by letter dated June 2, 1983 was in accordance with the collective agreement since its right not to list a reason for termination of an unclassified employee is contractually protected in the last paragraph of subsection 2. The State submits that if reasons for dismissal are not cited in a letter of dismissal, the requirement for a hearing is inapplicable.

It appears to the undersigned that the charge herein raises a dispute which is purely contractual in nature relating to Article 5 Section L Subsection 2 of the agreement. The instant dispute has as its gravaman the different intrepretation that the parties ascribe to the subsection's last two paragraphs, and the rights and obligations described therein. The State does not contest the legality of the contractual language nor does it contend that it has repudiated the agreement. To the contrary, it

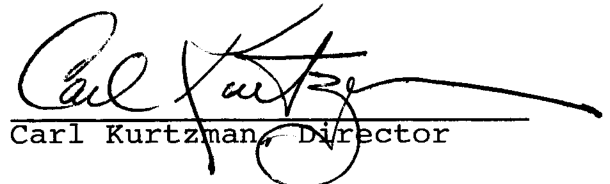
6/ CWA does not allege that Dr. Reyes was terminated because of his union activity or for any other reason protected by the Act.

asserts the contract as an affirmative defense to the charge. In sum, the parties merely interpret the clause differently. There is no allegation of facts describing the parties' prior experience in administering this clause of their agreement which would establish that the State's action with respect to Dr. Reyes constitutes a change. Accordingly, the charge does not set forth a basis for a claim that the State has set out to change the agreement or terms and conditions of employment.

Moreover, the alleged failure to process the grievance is also related to the State's denial of a departmental hearing pursuant to the clause in question. However, the facts presented by the Charging Party demonstrate that the grievance was processed. The department's designee determined that a hearing right was not afforded under the contract. 7/

Based upon the above analysis, and since there is no allegation that Dr. Reyes was terminated because of the exercise of protected activity, the undersigned declines to issue a complaint with respect to the instant charge. 8/

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Carl Kurtzman, Director

DATED: October 28, 1983
Trenton, New Jersey

7/ It is noted that in the final sentence of Article 5 Section L subsection 2, the parties have agreed to a procedure for presenting grievances concerning the interpretation of the disputed contractual provisions.

8/ See In re United Telephone Co. of the West, 112 NLRB No. 103, 36 LRRM 1097 (1955) wherein the NLRB stated:

The complaint alleges no violation of the

(continued)

9/ (continued)

Act other than the one arising out of the parties' conflicting contract interpretations. It is obvious from the conflicting interpretations of the parties that the contract was not sufficiently clear to avoid a dispute over its terms. There is no showing that the Respondents, in carrying out the contract as they did, were acting in bad faith. Furthermore, the Respondents' action was in accordance with the contract as they construed it, and was not an attempt to modify or to terminate the contract. The provisions of Section 8(d) of the Act are therefore inapplicable in this case. Regarding the question of which party correctly interpreted the contract, the Board does not ordinarily exercise its jurisdiction to settle such conflicts. As the Board has held for many years, with the approval of the courts: "... it will not effectuate the statutory policy ... for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act." [Consolidated Aircraft Corp., 47 NLRB 694, 12 LRRM 44, enf. 141 F.2d 785, 14 LRRM 553 (C.A. 9).]

* * *

In view of its contractual relations with the Respondents, the Union's recourse in this situation was to exhaust the possibility of settling the overtime question by negotiation and failing such settlement, to seek judicial enforcement of its construction of the contract. The Board is not the proper forum for parties seeking to remedy an alleged breach of contract or to obtain specific enforcement of its terms.