82-117

H.E. No. 82-17

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

In the Matter of

COUNTY OF BERGEN-OPERATING BERGEN
PINES COUNTY HOSPITAL,

Respondent,

-and-

Docket No. CO-81-375-178

LOCAL 549, COUNCIL 52, AFSCME
AFL-CIO

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission denies a Motion to Dismiss by Respondent to defer an Unfair Practice Charge to the grievance and arbitration provisions of the parties' collective negotiations agreement. The Hearing Examiner found that the gravamen of the Complaint involves a Subsection(a)(3) violation and that such an alleged violation, consistent with NLRB precedent, is not appropriate for deferral to arbitration.

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Appearances:

For the Respondent
Edwin C. Eastwood, Jr., Esq.

For the Charging Party
Rothbard, Harris & Oxfeld, Esqs.
(Sanford R. Oxfeld, Esq.)

DECISION AND ORDER ON
RESPONDENT'S MOTION TO DISMISS

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on June 15, 1981 by Local 549, Council 52, AFSCME, AFL-CIO (hereinafter the "Charging Party" or the "Local") alleging that the County of Bergen -Operating Bergen Pines County Hospital (hereinafter the "Respondent" or the "County") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that the Respondent eliminated the job title of Richard McCulley, the President of the Charging Party, on or about June 11, 1981 and simultaneously laying him off, and also in having rejected his application for a number of vacant positions for which he was qualified, and that in so doing the Respondent was motivated by anti-union animus, all of which was alleged to be a violation of N.J.S. A. 34:13A-5.4(a)(1) and (3) of the

Act. 1/

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on June 24, 1981. Pursuant to the Complaint and Notice of Hearing, hearings were held on October 2 and November 4, 1981 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally.

On November 2, 1981 the Respondent filed a Motion to Dismiss on the ground that the Charging Party, on behalf of Richard McCulley, had elected to pursue grievance arbitration under the parties' collective negotiations agreement and that, as a result, the instant unfair practice proceedings should be deferred to arbitration. The Charging Party opposes the Motion to Dismiss but elected to file no written opposition thereto.

DISCUSSION

Consistent with the admonition of the New Jersey Supreme Court in Lullo v. International Association of Firefighters, 55 N.J. 409 (1970) and Galloway Township Board of Education v. Galloway Township Association of Education Secretaries, 78 N.J. 1, 9 (1978), the Commission has consistently sought guidance in its decisions from the decisions of the National Labor Relations Board rendered under the Labor-Management Relations Act of 1947, 29 U.S.C.A. 141 et seq.

In East Windsor Board of Education, E.D. No. 76-6, 1 NJPER 59 (1975) the Executive Director, on behalf of the Commission, declined to issue a Complaint on the ground that the matter should be deferred to the grievance and arbitration provisions of the parties' collective negotiations agreement. This was consistent with NLRB precedent

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 rights guaranteed to them by this Act."

in the case of Collyer Insulated Wire Co., 192 NLRB 837, 77 LRRM 1931 (1971).

The Commission's deferral policy essentially holds that when an issue of contract interpretation is subject to final resolution by the grievance and arbitration provisions of the collective negotiations agreement, public policy favors the utilization of that procedure: East Windsor Board of Education, supra.

In the instant case, the unfair practice charge does not involve an allegation that the agreement has been violated. Rather, the charge alleges a violation of Subsections(a)(1) and (3) of the Act, the latter Subsection involving as its essential element the allegation that the employer was by its action motivated by anti-union animus.

It is well settled that the National Labor Relations Board will not defer to arbitration in a Section 8(a)(3) case, the section of the Labor-Management Relations Act which is analogous to Section 5.4(a)(3) of our Act. For example, see General American Transportation Corp., 228 NLRB No. 102, 94 LRRM 1483 (1977) and Roy Robinson, Inc. d/b/a Roy Robinson Chevrolet, 228 NLRB No. 103, 94 LRRM 1474 (1977).

Unless a Charging Party initially consents to defer to arbitration, as in Medford Board of Education, D.U.P. No. 80-17, 6 NJPER 140 (1980), aff'd., P.E.R.C. No. 80-144, 6 NJPER 298 (1980), a Charge involving an allegation of a violation by the employer of Subsection(a)(3) of the Act should not be deferred to arbitration. See, for example, Borough of Highland Park, H.E. 82-7, 7 NJPER 544 (1981).

ORDER

For all of the foregoing reasons, it is ORDERED that the Respondent's Motion to Dismiss be and same is hereby denied.

Alan R. Howe
Hearing Examiner

Dated: November 9, 1981
Newark, New Jersey