D.U.P. NO. 82-24

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

In the Matter of

HAMILTON TOWNSHIP BOARD
OF EDUCATION and HAMILTON
TOWNSHIP EDUCATION ASSOCIATION,

Respondents,

-and-

DOCKET NO. CI-81-71

AD HOC COMMITTEE OF HAMILTON
TOWNSHIP TEACHERS,

Charging Party.

SYNOPSIS

The Director of Unfair Practices refuses to issue a complaint on an unfair practice charge, as amended, which the "Ad Hoc Committee of Hamilton Township Teachers representing 88 teachers employed by the Hamilton Township Board of Education" (the "Ad Hoc Committee") filed against the Hamilton Township Education Association (the "Association") and the Hamilton Township Board of Education (the "Board"). The Ad Hoc Committee asserted that the Association violated its duty of fair representation when it withdrew, as part of a multi-year contract settlement with the Board in which the Board withdrew pending requests for injunctive relief, two unfair practice charges challenging the Board's actions concerning sick leave pay for absent teachers. The Ad Hoc Committee had also asserted that the Board violated its duty to negotiate in good faith with the Association when it required absent teachers to submit a statement by either a doctor or a family member explaining the absence and when it refused to grant absent teachers a hearing prior to docking their wages. The Director determines that the Ad Hoc Committee has not alleged sufficient facts which, if true, might establish a violation of the Association's duty of fair representation. In the absence of a properly pleaded claim alleging a breach of the Association's duty of fair representation, the Ad Hoc Committee lacks standing to charge the Board with violating its duty to negotiate in good faith with the exclusive representative.

D.U.P. NO. 82-24

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

In the Matter of

HAMILTON TOWNSHIP BOARD
OF EDUCATION and HAMILTON
TOWNSHIP EDUCATION ASSOCIATION,

Respondents,

-and- DOCKET NO. CI-81-71

AD HOC COMMITTEE OF HAMILTON
TOWNSHIP TEACHERS,

Charging Party.

Appearances:

For the Respondent Hamilton Tp. Board of Education
Aron, Till & Salsberg, attorneys
(David A. Wallace of counsel)

For the Respondent Hamilton Tp. Education Association
Greenberg, Kelley & Prior, attorneys
(James F. Schwerin of counsel)

For the Charging Party
Strauss, Wills, O'Neill & Voorhees, attorneys
(G. Robert Wills of counsel)

REFUSAL TO ISSUE COMPLAINT

On July 22, 1981, the "Ad Hoc Committee of Hamilton Township teachers representing 88 teachers employed by the Hamilton Township Board of Education" (the Ad Hoc Committee") filed an amended unfair practice charge against the Hamilton Township Board of Education (the "Board") and the Hamilton Township Education Association (the "Association") on behalf of some of the Board's teachers who were absent from work and were docked

a day's wages on either March 5, 1980 or April 16, 1980. The Ad Hoc Committee alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), specifically N.J.S.A. 34:13A-5.4(a)(5), 1/ when, in contravention of the Board's collective agreement with the Association (the exclusive representative of all teachers), it required absent teachers to submit a statement signed by either a doctor or a family member explaining the absence and when it refused to grant absent teachers a hearing prior to docking their wages. The Ad Hoc Committee asserts that the Association violated N.J.S.A. 34:13A-5.4(b)(1) and (3) 2/ when on or about September 28, 1980, as part of a multi-year contract settlement under which the Board agreed to withdraw pending requests for injunctive relief, it agreed to withdraw two unfair practice charges challenging the Board's actions concerning sick leave pay for absent teachers and

1/ This subsection prohibits public employers, their representatives or agents from: "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."

2/ These subsections prohibit employee organizations, 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] (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."

when on November 4, 1980, it did withdraw these unfair practice charges. 3/

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. 4/ 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 charge, if true, may constitute an unfair practice within the

3/ The instant charge seeks to amend, for the second time, a charge first filed on March 12, 1980.

The original charge contained identical allegations against the Board, but neither named the Association as a respondent nor contained any allegations implicating the Association in possible violations of the Act. On May 27, 1981, the undersigned, concluding that the charge against the Board was fatally flawed in the absence of a viable claim of collusion or unfair representation by the majority representative, refused to issue a complaint. In re Hamilton Tp. Bd. of Ed. and Ad Hoc Committee of Hamilton Tp., D.U.P. No. 81-22, 7 NJPER 323 (¶ 12141 1981); See also In re New Jersey Turnpike Authority (Beall), P.E.R.C. No. 81-64, 6 NJPER 560 (¶ 11284 1980), aff'd, App. Div. Docket No. A-1263-80 T3 (October 30, 1981).

On June 11, 1981, the Ad Hoc Committee filed an amended charge which repeated the allegations of the original charge and added the allegations against the Association contained in the instant amended charge and described above. The Ad Hoc Committee, however, failed to name the Association as a respondent or to serve a copy of the charge upon it; consequently, on July 1, 1981, the undersigned informed the Ad Hoc Committee by letter that the amendment was not properly filed until it corrected these deficiencies. On July 22, 1981, the Ad Hoc Committee responded with the instant amended charge.

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

meaning of the Act. 5/ The Commission's rules provide that the undersigned may decline to issue a complaint if this standard is not met.

After carefully reviewing the instant amended charge and the materials submitted by all parties, the undersigned concludes that the Commission's complaint issuance standards have not been met. 6/

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

6/ The undersigned had requested the parties to brief two ostensible procedural problems in addition to discussing the application of duty of fair representation case law to the facts alleged: (1) may the present amended charge be processed, although filed after the decision declining to issue a complaint; and (2) did the Ad Hoc Committee comply with the six month time period for filing unfair practice charges set forth in N.J.S.A. 34:13A-5.4(c). In light of this decision based on the substantive deficiencies in the charge, the undersigned need not definitively resolve these procedural questions. The undersigned observes, however, that as a technical matter, the initial Refusal to Issue Complaint constituted a dismissal of the original charge; in the absence of a successful appeal to the Commission pursuant to N.J.A.C. 19:14-2.3, there was nothing to amend. Consequently, it appears that a new charge, not an amended charge, should have been filed. Compare, e.g., Practice and Procedure Before the National Labor Relations Board, p.70 (1980); National Labor Relations Board Casehandling Manual, § 10064.4 ( ). Further, the amended charge appears to be untimely insofar as it names the Association as a respondent since the Association was not joined or served until more than eight and a half months after the withdrawal of its unfair practice charges. The Ad Hoc Committee's reliance on Kaczmarek v. New Jersey Turnpike Authority, 77 N.J. 329 (1978) is misplaced since in the instant case no proceeding against the Association commenced within the six month period, no misinformation led the Ad Hoc Committee to file in another forum, and there was no ambiguity in precedent establishing the availability of this forum for breach of duty of fair representation claims and the necessity of joining such claims when an individual or minority organization seeks to litigate a § (a)(5) charge against an employer.

In order to maintain a § (b)(1) claim that a majority representative breached its duty of fair representation, a charging party must allege specific facts which, if true, would support the claim that he was the victim of the representative's arbitrary, discriminatory, or bad faith conduct. Belen v. Woodbridge Tp. Bd. of Ed., 142 N.J. Super 486 (1976), certif. den., 72 N.J. 458 (1976); In re N.J. Turnpike Authority (Kaczmarek), P.E.R.C. No. 80-38, 5 NJPER 412 (¶ 10215 1979); In re Council #1, AFSCME, P.E.R.C. No. 79-28, 5 NJPER 21 (¶ 10013 1979); In re Red Bank Bd.. of Ed., D.U.P. No. 79-17 , 5 NJPER 56 (¶ 10037 1979); cf. Vaca v. Sipes, 386 U.S. 171 (1967). In Belen, the Court assessed and rejected a duty of of fair representation claim asserted by an individual employee disgruntled with the result of unit-wide contract negotiations. The Court stated, supra at 491, that " ... the mere fact that a negotiated agreement results, ... in a detriment to one group of employees does not establish a breach of duty by the union" and then quoted a leading United States Supreme Court case, Ford Motor v. Huffman, 345 U.S. 330, 337-338 (1953), at length:

> Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. A major responsibility of negotiators is to weigh the relative advantages and disadvantages of differing proposals.
>
> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees

> and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.
>
> Compromises on a temporary basis, with a view to long range advantages, are natural incidents of negotiations. Differences in wages, hours and conditions of employment reflect countless variables.

See also, In re Tp. of Springfield, D.U.P. No. 79-13, 5 NJPER 15 (¶ 10008 1978); [7/] Offutt v. Montgomery Cty. Bd. of Ed., 101 LRRM 3035 (Maryland Ct. App. 1979). The demanding standards set forth in Belen, Huffman, and Springfield govern the determination of whether a charging party has specifically and sufficiently alleged facts showing arbitrary, discriminatory, or bad faith conduct in connection with the majority representative's handling of unit-wide contract negotiations.

In the instant case, the facts alleged in the amended charge state that the Association withdrew its unfair practice charges as part of an overall multi-year collective agreement

---

7/ In Springfield, the undersigned refused to issue a complaint on the basis of an accusation that the majority representative negotiated salary increases for all unit members except the charging party since there were no accompanying allegations of arbitrary, discriminatory, or bad faith conduct. The undersigned quoted McGrail v. Detroit Fed. of Teachers, 82 LRRM 2623, 2625 (Mich. Cir. Ct. 1975):

> The law basically says that the union should have broad discretion in negotiating contracts, weighing advantages and disadvantages of different proposals, and that to allow every dissatisfied person to challenge the validity of certain contracts without showing a strong indication of a breach of the duty to fairly represent, would create havoc in the field of labor law.

Supra, at p.17.

settlement and specifically as the quid pro quo for the Board's withdrawal of pending injunctive relief proceedings. The Ad Hoc Committee, after detailing the history of the unfair practice charges which the Association filed and then withdrew as part of its contractual settlement, sets forth the only allegations pertinent to its unfair representation claim:

> At no time did the majority representative adequately consult with or have the permission of the employees herein known as the Ad Hoc Committee to agree to dismiss their cause of action against the Hamilton Township Board of Education. Moreover, the Ad Hoc Committee submits that a majority representative cannot on its own initiative and without the consent of an individual employee dismiss a cause of action with prejudice that is vested in the employee, particularly where the cause of action is legitimate and the likelihood of vindication is great and at a time when the matter had yet to even reach the rudimentary stages of the public employment adjudication process. By agreeing to the dismissal of the pending charges, the majority representative has acted in collusion with the Board of Education and has unfairly represented at least 88 of its members. The majority representative here has thereby violated N.J.S.A. 34:13A-5.4(b)(1).

These allegations, even if true, do not manifest the arbitrary, discriminatory, or bad faith conduct necessary to ground an unfair representation claim.

The Ad Hoc Committee has failed to set forth specific facts evidencing that the Association engaged in arbitrary conduct. Here, the Association negotiated a multi-year contract which required the withdrawal of certain unfair practice charges allegedly affecting the contractual rights of all unit members in exchange for

certain employer concessions, including the termination of injunctive relief proceedings, benefiting all unit members. The amended charge essentially alleges that a subset of the employees affected by the withdrawal of the unfair practice charges was discontented with the balance struck as a result of negotiation trade-offs. The charge suffers from the same defect preceived in Belen, Huffman, and Springfield: it reflects disgruntlement with various contractual compromises, but does not articulate why these compromises stray beyond the wide range of reasonableness accorded a majority representative when negotiating on behalf of an entire unit. Indeed, the allegations are much weaker than in Springfield, Belen, or Huffman since here, the charging party was not uniquely disadvantaged by the settlement reached. In short, the contractual settlement reached in and of itself does not evidence arbitrary conduct which would violate the Association's duty of fair representation.

The amended charge alleges that the Association lacked power to withdraw the two unfair practice charges without securing the consent of each individual employee who had been affected by the challenged Board action. The undersigned has given careful consideration to this claim.

In Council #1, AFSCME, supra, the Commission dismissed a complaint which had alleged that an employee representative breached its duty of fair representation when it settled a grievance without the grievant's knowledge or approval. The Commission stated:

> The action of Council No. 1 in settling the grievance was not arbitrary, discriminatory, nor in bad faith but rather was a reasonable determination that there was little likelihood that the grievance could be resolved favorably if pursued beyond the second step and the further pursuit of the grievance could have an adverse effect upon numerous other employees represented by Council No. 1 in hospitals through the State. Supra, at 21.

AFSCME Council #1 makes clear that a § (b)(1) charge cannot rest solely on an allegation that a majority representative failed to secure the consent of an affected employee before settling or deciding not to pursue a grievance. Rather, the § (b)(1) charge must contain factual allegations which would establish that the respondent carried out its action in an arbitrary, discriminatory, or bad faith manner. See also, In re Bd. of Chosen Freeholders of Middlesex Cty., P.E.R.C. No. 81-62, 6 NJPER 555 (¶ 11282 1980), appeal pending, App. Div. Docket No. A-1455-80; In re New Jersey Turnpike Authority (Beall), supra, n.3; compare, Vaca v. Sipes, supra. 8/

A majority representative's power to settle or withdraw its own unfair practice charge is per force greater than its

8/ In Vaca v. Sipes, the United States Supreme Court stressed the infeasibility of affording an individual employee the absolute right to have his grievance taken to arbitration, regardless of the majority representative's good faith analysis of the merits of the claim and the interests of the unit as a whole. The Court stated:

> If the individual employee could compel arbitration of his grievance regardless of its merit the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiations.

power to compromise an individual's grievance. Both of the charges ultimately withdrawn were originally filed in the name of the Board's actions violated the Association's § (a)(5) right to have contractually negotiated provisions honored and the § (a)(1) and (3) rights of teachers not to be intimidated, coerced, or discriminated against as a result of their support of the Association. In short, both charges focused on the alleged violation of the associational rights of a majority representative and its supporters, not on a breach of the "vested" contractual rights of individual employees as individuals. 9/ Given the nature of the unfair practice charges, the Association, and not individual teachers, must retain primary authority for calculating the relative advantages and disadvantages of pursuing the unfair practice charges versus withdrawing them in exchange for other contractual concessions profiting the unit as a whole.

The amended charge also fails to allege any facts evidencing discrimination against the individuals here involved. The settlement exchanged the Association's right to pursue unfair practice charges affecting compensation for all unit members for concessions, including the withdrawal of injunctive relief proceedings, which benefited all unit members. No allegations

9/ In Springfield, supra, the undersigned observed that the preferred method for raising individual contract claims is to commence either grievance or court proceedings, not to file an unfair practice charge. In Vaca v. Sipes, supra, the United States Supreme Court suggested that an employee who asserts a breach of a collective agreement must at least attempt to exhaust exclusive grievance and arbitration procedures before resorting to a judicial or administrative forum.

suggest how this negotiated trade-off somehow adversely affected only the charging parties while simultaneously helping only Association adherents.

In In re Tp. of Cherry Hill, D.U.P. No. 81-19, 7 NJPER 286 (¶ 12128 1981), the undersigned, considering similar facts and claims, refused to issue a complaint because of the absence of a nexus to discriminatory conduct. There, the majority representative -- the FOP -- refused to process a grievance presented by a minority organization -- the PBA. In rejecting PBA's claim that the FOP's refusal to pursue the grievance breached the duty of fair representation, the undersigned distinguished between allegations of improper representation affecting all unit members and improper representation of employees attributable to their membership in a minority representative. Since the charge involved an alleged contractual violation affecting all unit members and not a claim of discriminatory action directed against PBA supporters, no breach of the duty of fair representation could exist.

Similarly, in In re Council of N.J. State College Locals, D.U.P. No. 81-8, 6 NJPER 531 (¶ 11271 1980), the undersigned refused to issue a complaint on the basis of a minority organization's unfair practice charge claiming that the majority representative violated § (b)(1) when it did not execute a contract ratified by its own membership. The undersigned reasoned:

> The established standard for fair representation protects individual employees and classes of employees from indiscriminate treatment by the majority representative. Where a majority representative's activities

> affect all unit employees equally, the "quality" of representation not its "fairness" is placed in issue and this conduct may not constitute an unfair practice. Supra , at 532.

Cherry Hill and Council of N.J. State College Locals, squarely control the instant case. The absence of any specific allegations of discriminatory conduct against individual employees or classes of employees makes the amended charge deficient. 10/

Additionally, the amended charge does not allege any specific facts suggesting that the Association acted in bad faith towards any particular group of employees. Again, it appears that the Association struck a bargain which exchanged its right to pursue certain contractual claims affecting all unit employees for concessions profiting all unit employees. As the undersigned stated in In re Red Bank Bd. of Ed., supra, at p.57:

> There is nothing in his charge to indicate that the acceptance of the proposal by the [majority representative] was motivated for any other reason than the realization by the organization that it had reached a mutual accord with the Board that would satisfy the interests of the unit as a whole.

See also, In re Tp. of Cherry Hill, supra.

Lastly, the charging party asserts that the Association did not consult with the instant 88 employees in withdrawing the unfair practice charges. In the context of the instant circumstances, where the resolution of the unfair practice dispute was

10/ These two cases also establish that the Ad Hoc Committee, if viewed as a minority organization, lacks standing to assert a § (b)(3) claim against the majority representative. Accordingly, a complaint will not issue on the § (b)(3) part of the amended charge.

not arbitrary, discriminatory or in bad faith vis-a-vis any individual teacher or class of teachers, and where the dispute was integral to the resolution of contract negotiations, the appropriate method of notification was consonant with the notification to be afforded all unit members concerning contract resolution. The Association was not required to provide special notice to the individuals who comprise the charging party herein.

Because the amended charge does not allege any specific facts evidencing that the Association engaged in arbitrary, discriminatory, or bad faith conduct towards individual employees or particular classes of employees, the undersigned concludes that the Charging Party has not presented a cognizable § (b)(1) claim. Therefore, a complaint will not issue on this aspect of the amended charge. 11/

In the absence of a properly pleaded § (b)(1) claim an individual employee or minority organization has no standing to assert that an employer violated § (a)(5). Therefore, the undersigned will not issue a complaint on this aspect of the

11/ Our Supreme Court's recent decision in Saginario v. Attorney General, State of N.J., 87 N.J. 480 (1981) does not apply to the circumstances herein. Saginario involved an individual member of a negotiations unit whose promotion was directly placed in question by a group grievance filed by the majority representative. In the circumstances surrounding the instant matter, the Association's unfair practice charge sought a resolution which was in harmony with the interests of the charging party. Likewise, as noted earlier, the unfair practice context in which this matter arises presents issues which are not necessarily applicable to the grievance context presented in Saginario.

amended charge. 12/

The undersigned has completed his review of all allegations contained in the instant amended charge. It does not appear that these allegations, even if true, may constitute any unfair practice within the meaning of the Act. Accordingly, the undersigned declines to issue a complaint.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

Carl Kurtzman, Director

DATED: March 2, 1982
Trenton, New Jersey

12/ The Commission and the undersigned have reserved decision on whether an individual can prevail on a § (a)(5) charge against an employer, even if he succeeds in establishing that the majority representative violated its § (b)(1) duty of fair representation. To date, all the Commission and the undersigned have held is that an employee who properly pleads a § (b)(1) breach should have an opportunity to prove the factual and legal basis, if any, for an individual § (a)(5) claim. In re Bd. of Chosen Freeholders of Middlesex Cty., supra; In re Tp. of Cherry Hill, supra.