

D.U.P. NO. 93-29

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

In the Matter of

BOONTON BOARD OF EDUCATION and
BOONTON EDUCATION ASSOCIATION,

Respondent,

-and-

Docket Nos. CI-92-95
CI-92-96

JUDITH M. KRAMER,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses unfair practice charges filed by Judith Kramer against the Boonton Board of Education and the Boonton Education Association. The charges allege that the Board and the Association violated the Act by collecting a representation fee when no agreement authorizing such deduction was in force; during the period between agreements when neither the predecessor nor successor agreements so provided for the collection of fees, and during the period when a permanent waiver of fees existed. The charges further allege that the Association and the Board violated the Act by deducting a fee in excess of 85% of Association dues and by enforcing the collection of monies for organizations other than the Association. Finally, the charges assert that the Association and the Board each violated its duty of fair representation.

The Director finds that contractual provisions requiring the deduction of representation fees remain in effect during negotiations; the alleged waiver was not permanent; that the contractual right to fees prevails over any past practice and that any challenge to the amount of the representation fees belongs before the Appeal Board. The Director also finds that the Association has not breached its duty of fair representation and that the Board does not have such a duty under the Act.

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Appearances:

For the Respondent Board of Education
Vogel, Chait, Schwartz & Collins, attorneys
(Barbara E. Turen, of counsel)

For the Respondent Education Association
Zazzali, Zazzali, Fagella & Nowak, attorneys
(Richard A. Friedman, of counsel)
Bredhoff & Kaiser, attorneys
(Bruce Lerner and Robert Chanin, of counsel)

For the Charging Party
Henry S. Kramer

REFUSAL TO ISSUE COMPLAINT

On May 7, 1992, Judith Kramer filed unfair practice charges against the Boonton Education Association and the Boonton Board of Education. The charges allege that since March 15, 1992, the Association and the Board have violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4; specifically,

subsections (b)(1),^{1/} and (a)(1) and (3),^{2/} respectively, by collecting a representation fee during a period in which no collective negotiations agreement authorizing such deduction was in force; during the period between agreements when neither the predecessor nor successor agreements "so provided" for the collection of agency fees as required by 5.8^{3/} of the Act and during the period when a permanent waiver of the Association's claim to an agency fee existed. Kramer also claims that the Association

1/ This subsection prohibits 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."

2/ 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."

3/ This section in pertinent part provides:

Payment of the representation fee in lieu of dues shall be made to the majority representative during the term of the collective negotiation agreement affecting such nonmember employees and during the period, if any, between successive agreements so providing...

and the Board violated 5.3, 5.4, 5.5^{4/} and 5.6^{5/} of the Act by causing the deduction of a representation fee in excess of 85% of Association dues and by enforcing the collection of monies for organizations other than the Association. Kramer further alleges that the Association and the Board violated 5.3 and the duty of fair representation; that the Association violated (b)(1); and that the Board violated (a)(1) and (3) by violating a six-year past practice and the aforementioned waiver of fees. Moreover, Kramer alleges that the Association violated 5.3, 5.4(b)(1), 5.7^{6/} and its duty

4/ This section in pertinent part provides:

b. The representation fee in lieu of dues shall be in an amount equivalent to the regular membership dues, initiation fees and assessments charged by the majority representative to its own members less the cost of benefits financed through the dues, fees and assessments and available to or benefitting only its members, but in no event shall such fee exceed 85% of the regular membership dues, fees and assessments.

5/ This section in pertinent part provides:

Where a negotiated agreement is reached, pursuant to section 2 of this act [Section 34:13A-5.5], a majority representative of public employees in an appropriate unit shall be entitled to a representation fee in lieu of dues by payroll deduction from the wages or salaries of the employees in such unit who are not members of a majority representative; provided, however, that membership in the majority representative is available to all employees in the unit on an equal basis and that the representation fee in lieu of dues shall be available only to a majority representative that has established and maintained a demand and return system which provides pro rata returns as described in section 2(c).

6/ This section provides "Any action engaged in by a public employer, its representatives or agents, or by an employee

of fair representation by offering typically employer-provided benefits to "members only" without negotiating for such benefits. Finally, Kramer claims that the Association and the Board breached the duty of fair representation by delegating to the Association the power to unilaterally create the salary guide for unit employees.

The Association denies that it violated the Act and claims that its deduction of fees complied with contractual and legal requirements. The Association explains that although the agreement expired, its terms remain in effect, including the provision requiring deduction of agency fees. Moreover, even if not so required by law, the parties agreed to abide by the provisions of the agreement during the 1991-1992 school year. Further, neither party has suggested any changes to the provision during negotiations.

The Association also claims that the waiver of fees agreed to was to extend only until June 30, 1985 and that Kramer understood this. It further denies that a six-year past practice of not collecting fees existed, claiming that it has tried to collect fees since the waiver ended in 1985. The Association explains that Kramer was not charged with a fee during the 1985-1986 membership year because she was on a leave of absence and during the 1987-1988

6/ Footnote Continued From Previous Page

organization, its representatives or agents, which discriminates between nonmembers who pay the said representation fee and members with regard to the payment of such fee other than as allowed under this act, shall be treated as an unfair practice within the meaning of subsection 1(a) or subsection 1(b) of this act."

and 1988-1989 membership years, the Board inadvertently failed to deduct the fees, despite the Association's direction to do so. In any event, Kramer was charged with fees during the 1989-1990, 1990-1991 and 1991-1992 school years, and thus according to the Association, there is no basis for concluding that the alleged past practice exists. Finally, according to the Association, Kramer's allegations of a permanent waiver and a past practice of exemption from fees merely allege violations of an individual agreement between her and the Association and not an unfair practice under the Act.

The Association also asserts that Kramer's allegations that the representation fee exceeded 85% of regular dues is erroneous because it included monies earmarked for Association affiliates. The Association contends that subsection 5.5(b) authorizes a representation fee which includes amounts transmitted to affiliates and in any event, the Association argues that this claim falls under the exclusive jurisdiction of the Appeal Board. Accordingly, the Association argues that the allegations should be dismissed.

Further, the Association disputes Kramer's claims that its offer of certain benefits to "members only" results in its failure to negotiate over such benefits. The Association contends that it has not focused bargaining on these benefits because an acceptable insurance package is already provided through the Teachers' Pension and Annuity Fund. Moreover, since only a small number of members purchase these benefits, the programs could not possibly have any

effect on the benefits that the Association obtains through bargaining. Finally, the Association notes that the costs of these members-only benefits are excluded from the agency fee amount.

The Association also disputes Kramer's allegations that it unilaterally determined the salary guide. Rather, it asserts that the salary guide is negotiated. Moreover, the Association explains that it could not have breached its duty of fair representation with regard to this year's salary guide since bargaining over the guide is still ongoing.

The Board also denies that it violated the Act, claiming that its deduction of a representation fee was made pursuant to 5.5 and 5.8. Moreover, the Board asserts that it is not party to any waiver of representation fees and denies knowing of one. Further, the Board notes that since it was not a party to the waiver, the waiver can not relieve the Board of its obligation to deduct representation fees. The Board also points out that a claim of unequal representation fees is appropriately directed against the Association, not the Board, and that the challenge to the amount of the fee and its being filtered to other affiliated organizations constitutes a request for review pursuant to N.J.A.C. 19:17-4.1. Finally, the Board claims that identical charges and facts were previously adjudicated by the Commission and thus, charging party's claims are barred by the doctrine of res judicata; that Kramer failed to exhaust her administrative remedies under N.J.A.C. 19:17-4.1; and that her claims are barred by the statute of limitations.

We have conducted an administrative investigation into the allegations in the instant charges. I find that Kramer's allegations against the Association and the Board fail to meet our complaint issuance standard and thus I decline to issue a complaint for the reasons set forth below.

First, Kramer alleges that the Association and the Board violated 5.8 by deducting a representation fee when no agreement authorizing such deduction was in effect and when neither the predecessor nor successor agreements "so provided" for the collection of a representation fee during the interim.

Although the most recent agreement between the parties has expired, its terms remain in effect during the course of negotiations for a successor agreement, unless and until they are altered through negotiations and agreement between the parties. See Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n., 78 N.J. 25, 4 NJPER 334 (¶4163 S. Ct. 1978). This rule of law applies to the contractual provisions requiring the deduction of representation fees. See Walter Baran, A.B.D. No. 91-2; Hamilton Tp., P.E.R.C. No. 82-121, 8 NJPER 370 (¶13169 1982). In fact, 5.8 prevents an employer from suspending representation fees during negotiations. Baran. Accordingly, I dismiss these portions of the charges against both the Board and the Association.

Kramer's next allegation is that money was deducted from her paycheck during periods in which a waiver of representation fees was in effect. The alleged waiver is a January 4, 1984 letter from the then-president of the Association to Kramer.

The letter reveals that the parties were then litigating in the Appellate Division, Boonton Bd. of Ed. v. Kramer, 99 N.J. 523, 494 A.2d 279 (1985), cert den. 475 U.S. 1076 (1986). In trying to settle the case at an early stage, the Association agreed to "exempt [Kramer] from the requirements of the Agency Shop provision (Article 15) of the collective bargaining agreement between the Board and the Association." The next sentence states: "This means that we will not authorize the Board to deduct any fees from your salary for the duration of the current agreement - i.e., through June 30, 1985." Thus, the Association's letter is not a waiver of its right to seek representation fees after June 30, 1985.

Kramer also claims that a six-year past practice exists whereby no fees have been collected from Kramer. The Association contends that no such practice exists. It concedes that the 1985-86 representation fee was returned to her in order to avoid the burden of litigation after she filed an unfair practice charge in 1986 and she was not charged a fee in 1986-87 because she was on a leave of absence. However, the Association asserts, and the Board agrees, that it instructed the Board to deduct fees during the 1987-88 and 1988-89 membership years, but the Board inadvertently failed to do so. In any event, Kramer has been charged with a representation fee during the 1989-90, 1990-91, and 1991-92 school years. Under these circumstances, I find that no past practice exists.

Moreover, in a January 24, 1984 letter to the judge in the then-pending appellate case, Kramer's attorney asserted in response to the Association's January 4, 1984 letter:

...the Respondent Associations give no assurance as to what they will do with regard to Mrs. Kramer after June 30, 1985. It may well be that they go back to exactly the same behavior towards her which occasioned this action in the first place. The case should not be held moot unless it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to reoccur (citation omitted).

In the preceding paragraph, the attorney disputed that the "issues" were moot because "funds which...were wrongfully taken in the past have now been refunded."

These facts suggest that the representation Kramer now argues is a "waiver" was not considered to be even an "assurance" at the time it was offered. It also appears that Kramer's asserted rights pertain to a personal contractual agreement and are not concerned with the enforcement of the collective negotiations agreement. Cf. Belleville Ed. Assn. v. Belleville Bd. of Ed., 209 N.J. Super. 93 (1986). Even assuming that a practice of not deducting Kramer's fees exists, I find that the Association's well-documented contractual right to the fees (i.e., representation fee provisions for 1985-1991) prevails over any contrary past practice. See N.J. Sports and Exposition Authority, P.E.R.C. No. 88-14, 13 NJPER 710 (¶18264 1987); Randolph Tp. School Bd., P.E.R.C. No. 81-73, 7 NJPER 23 (¶12009 1980).

Kramer further alleges that the Association and the Board violated the Act by deducting a fee in excess of 85% of Association dues and by enforcing the collection of monies for organizations other than the Association -- specifically, its affiliates.

N.J.S.A. 34:13A-5.5(b) makes the amount of the representation fee equivalent to regular membership dues, initiation fees and assessments charged by the majority representative to its own members, less the cost of benefits financed through the dues, fees and assessment and available to or benefiting only members. In no event may the fee exceed 85% of the regular dues, fees and assessments.

N.J.A.C. 19:17-3.3 requires a majority representative to provide fee payers a verified statement of expenditures "of the majority representative and its affiliates which are in aid of activities...only incidentally related to terms and conditions of employment..."

The Appeal Board has "mandatory jurisdiction over the amount of the representation fee. The Commission does not have jurisdiction over that issue." Boonton Bd. of Ed. v. Kramer; Anderson, Robinson and Olsen, P.E.R.C. No. 90-52, 16 NJPER 13 (¶21008 1989). Any allegation that the amount of the representation fee deducted is inappropriate or incorrect must be processed through the Appeal Board; Kramer has not filed a petition with the Appeal Board and thus, I dismiss this portion of her charge. Further, the allegations concerning affiliates improper receipt of monies should also be processed through the Appeal Board. In any event, N.J.A.C. 19:17-3.3 contemplates the Association's transmittal of portions of representation fees to its affiliates. See also Stracker, A.B.D. No. 86-19.

Kramer next alleges that the BEA violated the Act and breached its duty of fair representation by offering certain "typically employer-provided benefits" (such as life insurance) to members only, rather than seeking to negotiate such benefits on behalf of the entire unit.

A breach of the duty of fair representation occurs only when a union's conduct toward a unit member is "arbitrary, discriminatory, or in bad faith." Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976), citing Vaca v. Sipes, 386 U.S. 171 (1967).

In the context of a challenge to a union's representation in the negotiation of a collective agreement, the United States Supreme Court stated:

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.

Ford Motor Co. v. Huffman, 346 U.S. 330, 338 (1953); See also, Humphrey v. Moore, 375 U.S. 335 (1964). This test has been specifically adopted by the Commission in Lawrence Twp. PBA Local 119, P.E.R.C. No. 84-71, 10 NJPER 41 (¶15023 1983); City of Union City, P.E.R.C. No. 82-65, 8 NJPER 98, 99 (¶13040 1982).

Here, there is no allegation or evidence that the Association acted arbitrarily, discriminatorily or in bad faith. Nor is there any allegation or evidence that the Association made a deliberate decision in bad faith to cause Kramer economic harm. Bridgewater-Raritan Education Assn., D.U.P. No. 86-7, 12 NJPER 239 (¶17100 1986). Rather, the Association's conduct in not negotiating over the "typically employer-provided benefits" falls within the wide range of reasonableness allowed the Association in negotiations. The Association contends that it does not focus bargaining on life insurance because an acceptable life insurance package is already provided by the Teachers' Pension and Annuity Fund and because any additional life insurance would have adverse tax consequences for employees. As to the other benefits offered, such a small percentage of members participate that it believes bargaining over these benefits would not be warranted. Based on the foregoing, I find that the Association has not breached its duty of fair representation. Thus, I dismiss this portion of the charge.

Kramer also alleges that both the Association and the Board breached the duty of fair representation by allowing the Association to unilaterally create the salary guide for unit employees. With respect to these allegations, I find that the Commission's complaint issuance standard has not been met. Again, Kramer fails to allege or show that the Association acted arbitrarily, capriciously or in bad faith. The Association contends that the salary guide is negotiated between the Board and the Association and in fact,

bargaining over this year's guide is still ongoing. Accordingly, it is impossible for Kramer to demonstrate at this time that the guide is arbitrary or discriminatory.

Finally, I dismiss the allegations that the Board breached its duty of fair representation towards Kramer, since, under the Act, an employer does not have such a duty. N.J.S.A. 34:13A-5.3 sets forth a majority representative's duty of fair representation. However, there is no corresponding duty set out in the Act for employers.^{7/}

Based on the foregoing, I find that the Commission's complaint issuance standard has not been met and refuse to issue a complaint on the allegations of these charges.^{8/}

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES


Edmund G. Gerber, Director

DATED: January 29, 1993
Trenton, New Jersey

^{7/} Kramer cites several cases under Federal law which, she claims, provide that an employer has a duty of fair representation towards unit employees. The cited Federal cases hold that an employer may be joined in a duty of fair representation suit and if the union is found to have violated its duty of fair representation, may share liability. However, there are no Commission decisions holding that an employer has a duty of fair representation towards unit employees.

^{8/} N.J.A.C. 19:14-2.3.