D.U.P. NO. 87-4

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

In the Matter of

JERSEY CITY BOARD OF EDUCATION,

Respondent,

-and- DOCKET NO. CO-86-158

NON-ASSOCIATED STAFF EMPLOYEES

Charging Party.

SYNOPSIS

The Director of Unfair Practices refuses to issue a complaint in an unfair practice charge brought by the Non-Associated Staff Employees (NASE) against the Jersey City Board of Education.

The charge alleges that the Board refused to recognize and implement a salary plan, formerly adopted by the Board through resolution. The Charging Party charges the Board with an (a) 5 violation for refusing to recognize the salary plan as a contract and refusing to adopt the salary plan.

Further, NASE alleges an (a) 3 violation for discriminatory practices against certain employees due to their concerted political activities.

The Director did not merit the Association's arguments that the alleged contract was enforeceable for the reason being it was too indefinite to be enforced and further he determined it to be a salary policy created for the purpose of establishing a salary scale.

Finally, the Director determined the charge untimely.

Accordingly, the Board is under no obligation to negotiate a non-existent nor unenforceable contract thereby, pre-empting the Board's obligation to negotiate with NASE.

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Appearances:

For the Respondent
Braverman & Lester, Esqs.
(Jeffrey A. Lester, of counsel)

For the Charging Party
Schiller, Vyzas, McGill & Squeo, Esqs.
(Francis E. Schiller, of counsel)

REFUSAL TO ISSUE COMPLAINT

On December 16, 1985, an Unfair Practice charge was filed with the Public Employment Relations Comission ("Commission") by the Non-Associated Staff Emplyees ("NASE") alleging that the Jersey City Board of Education ("Board") was engaging 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 §§5.4(a)(1), (3) and (5).1/

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the

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NASE alleges that the Board refused to recognize and implement a salary plan, formerly adopted by the Board through resolution in March, 1980. This resolution allegedly represented a collective negotiations agreement between the Board and NASE. NASE contends that the Board's present refusal to recognize the salary plan as a contract and its refusal to adopt the salary plan amounts to a §(a)(5) violation and derivatively a §(a)(1) violation. NASE further alleges that the Board committed a §(a)(3) violation when it discriminated against certain employees due to their concerted political activities.

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

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1/ Footnote Continued From Previous Page

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 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/ N.J.S.A. 34:13A-5.4(c) states: 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 charged

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has delegated its authority to issue complaints to the Director of Unfair Practices and has established a standard upon which an unfair practice complaint may be issued. The standard provides that a complaint shall issue if it appears that the allegations of a charging party, if true, may constitute an unfair practice within the meaning of the Act.[3/] If this standard has not been met, the Director may decline to issue a complaint.[4/]

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

NASE alleges that in 1980, it compiled a salary adjustment policy, for purposes of instituting a salary guide for supervisors and administrators, which was to be in effect for seven (7) years. NASE claims the Board adopted this guide by resolution in 1980 and implemented the raises in January 1981. However, shortly after that date, Jersey City acquired a new mayoral administration. NASE claims that the new administration abrogated the "agreement" and refused to grant any further increments.

2/ Footnote Continued From Previous Page

and including a notice of hearing containing the date and place of hearing before the commission or any designated agent thereof...."

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

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

In 1983, the Charging Party (and several others) filed suit in Federal District Court alleging that the Board's actions were in retaliation for the employees' support of certain political candidates. In 1985, the Charging Party withdrew its court complaint and the suit, as to the Charging Party, was dismissed. Subsequent to Charging Party's withdrawal of its federal court action, the Board gave several of the employees who remained in the suit a monetary settlement which amounted to those increments allegedly due to them pursuant to the salary guide.

The Association contends that the alleged 1980 agreement is still in effect and asserts that the Board violated N.J.S.A. 34:13A-5.4(a)(1), (3) and (5) when it failed to negotiate with NASE or to acknowledge the agreement with NASE.

NASE has referred to a salary adjustment policy that was purportedly adopted by the Board by resolution in 1980. There is an allegation that this policy is a de facto collective negotiations agreement between the parties. However, at best, the salary adjustment policy appears to be an oral contract. Even so, the alleged existence of an agreement is not substantiated by any action of the Board nor is there any indication in this matter that if such an "agreement" did exist that its terms are enforcable.[5/]

5/ Cf. Wood v Lucy, Lady Duff-Gordon, 222 NY 88, 118 N.E. 214 (1917), where, based upon the actions of the parties, the Court inferred certain terms which were not specifically stated in the parties' written agreement.

In Soar v NFL Players' Assn., 95 LRRM 2376, 550 F.2d 1287 (1st Cir. 1977), the Court held that an alleged oral agreement between the NFL Commissioner and certain players, where the terms of the agreement left many critical questions unanswered, was too indefinate to be enforced.6/ The Court said that "it is fundamental that for a contract to be enforceable it must be of sufficient explicitness so that a Court can perceive what are the respective obligations of the parties."7/

Here, the alleged "contract" appears to be nothing more than a salary policy created for the purposes of establishing a scale for salaries. The alleged "contract" appears too indefinite upon too many important particulars for it to be considered enforceable. "The void is too great, the omissions are too noticeable and the risk of ensnaring a party in a set of contractual obligations ... never knowingly assumed is too serious."8/

In this matter, the employee association's contractual rights could be protected if there was evidence of a writing which constitutes an agreement. However, the facts as alleged do not establish the existence of an agreement. For an (a)(5) violation of this type to be viable, (i.e., one based upon an alleged violation

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6/ See also Lullo v. IAFF, 55 N.J. 409 (1970).

7/ Soar V. NFL, supra, at 95 LRRM 2378. See also, Fahringer v. Estate of Strine, 420 Pa. 48, 216 A.2d 82 (1966).

8/ Soar, supra, at 95 LRRM 1278.

of an agreement), there must first be a valid agreement.[9/] The Charging Party claims that since the Board adopted the salary schedule by resolution on March 19, 1980 and said resolution is in written form and contains a written release, the resolution should be considered a contract. The waiver provides:

> Therefore, be it resolved, that staff who accept the salary guide of this resolution shall first release the Board of Education from any and all monetary claim said employee(s) have against the Board involving past compensatory time, credit time and overtime due and owing to said employee(s).

There are none of the standard indicia of a contract in the resolution. Nothing indicates the Association is bound in any way to this "agreement." The waiver runs to individual employees and not to a majority representative. In fact, the name of the Association does not even appear in the resolution.

All business of a Board of Education must be by resolution and all teacher salaries must be on a salary guide. See, generally, N.J.S.A. 18A-1 et seq. It is as plain as a pikestaff that the resolution is not a contract.

Even assuming that this resolution is somehow a written agreement, it is no sense a collective negotiations contract. The Commission has determined that a collective negotiations contract must "chart with adequate precision the course of the bargaining

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9/ See In re Union County Regional High School District No. 1, P.E.R.C. No. 85-23, 10 NJPER 536 (¶15248 1984).

relationship, and the parties can look to the actual terms and conditions of their contract for guidance in their day-to-day problems."[10/] Appalachian Shale Products Co., 121 NLRB No. 149, 42 LRRM 1506 (1958); City of Newark and I.L.A., AFL-CIO, D.R. No. 85-24, 11 NJPER 344 (¶16126 1985); Mt. Olive Township, D.R. No. 83-29, 9 NJPER 633 (¶14271 1983).

NASE claims that it is the majority representative of a unit of staff employees is supported only by its assertion that they once outlined a de facto salary policy. N.J.A.C. 19:11-3.1 states the criteria for "recognition as an exclusive representative" and requires certain responses from the employer acknowledging the proposed representative organization. Upon receipt of a request from an employee organization for recognition as the exclusive representative of a majority of the employees in an appropriate collective negotiations unit, an employer has the option to grant or decline recognition.[11/] Accordingly, the facts in the charge do not support the conclusion that the Board ever granted recognition to NASE.

Accordingly, we do not believe that a complaint should issue regarding the (a)(5) allegations.

10/ It is noted that this test was adopted for the purpose of determining whether a writing or understanding establishes a contract bar to a representation petition. However, these general guidelines are appropriate here.

11/ N.J.A.C. 19:11-3.1(a)

With regard to the allegation of the subsection 5.4(a)(3) violation, it is the Charging Party's obligation to specifically set forth the discriminatory acts about which it is complaining. In order to establish a prima facie case with regard to this claim, NASE must show that: (1) the employees were engaged in protected activity; (2) the employer had knowledge of such activity; and (3) the employer was hostile toward the employees' exercise of the protected activity.12/

The Charging Party claims that the new administration "unilaterially abrogated this (salary) policy due to the Charging Party's non-support in their political campaign."

In order to establish discrimination, a charging party must show that the respondent's actions were taken in retaliation for the employees' exercise of a protected activity.13/ The Charging Party does not allege facts which establish that it (NASE) engaged in any or declined to engage in any, activity protected under this Act; nor does it allege facts which indicate that the employer was hostile toward such protected activity. Rather, there is no evidence or allegations that the Association was an employee representative at this time and either took or declined to take action. The Charging Party has failed to establish a nexus between

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12/ See Twp. of Bridgewater v. Bridgewater Public Works. Assn., 95 N.J. 235 (1984) and East Orange Public Library v. Taliafero, 180 N.J. Super 155 (App. Div. 1980).

13/ See Taliafero, supra.

the employer's alleged discriminatory actions and the Charging Party's exercise of rights guaranteed to them by the Act. Accordingly, we do not believe a complaint should issue regarding the (a)(3) charge.

Finally, pursuant to N.J.S.A. 34:13A-5.4(c) the Commission is precluded from issuing a complaint where the charge has not been filed within six (6) months of the occurrence of the alleged unfair practice.14/

NASE allegedly was formed in 1979 and submitted a proposed salary guide to the Board in 1980. In 1981, the Board implemented raises. In late 1981, a new mayoral administration came to office in Jersey City. At that time, Charging Party claims that the employer breached its "agreement" with NASE by failing to implement the salary guide. From 1981 to the present, there is no indication that NASE filed any charges with the Commission nor is there any indication that it was precluded from filing such charges. Based upon these assertions, much, if not all of the instant charge appears untimely and accordingly, no complaint should issue upon it.

For the reasons stated above, we decline to issue a complaint in this matter.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

Edmund G. Gerber, Director

DATED: August 1, 1986
Trenton, New Jersey

14/ N.J.S.A. 34:13A-5.4(c) provides: "...that no complaint shall issue based upon any unfair practice occurring more than six (6) months prior to the filing of the charge unless the person aggrieved was prevented from filing such charge..."