

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

In the Matter of

STATE OF NEW JERSEY,

Respondent,

-and-

NEW JERSEY STATE EMPLOYEES
ASSOCIATION,

DOCKET NO. CI-79-30

Respondent,

-and-

FRANCES SWINICK,

Charging Party.

SYNOPSIS

A Complaint is not issued with respect to an Unfair Practice Charge filed by an individual who claimed that she was disciplined by the employer due to her vigorous exercise of grievance presentation rights and who claimed that she was improperly represented in grieving the employer's discipline by her majority representative. During the processing of the Unfair Practice Charge, it was revealed that the individual had appealed her discipline to the Civil Service Commission and had raised the same issue presented in the Unfair Practice Charge. The Acting Director finds that under City of Hackensack v. Winner, P.E.R.C. No. 77-49, 82 N.J. 1 (1980), the application of the entire controversy rule precluded further consideration of the Unfair Practice Charge.

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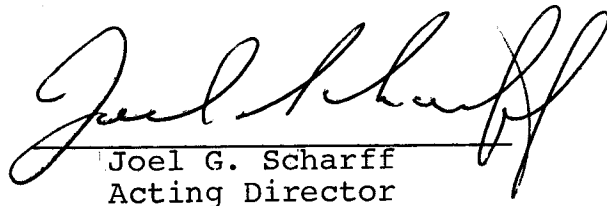
Charging Party.

E R R A T A

Page 4 Delete Footnote 4.

Page 6, line 12 and 13 which read: "after three days due to the
appellant's disorderly and in-
appropriate participation."

should read: "after three days of hearing,
stating: "The record is replete
with exchanges which demonstrated
that the appellant is functionally
unable to participate in an orderly
and appropriate fashion and it
appeared further that she is abso-
lutely totally incapable of repre-
senting herself and acting in her
own best interest."


Joel G. Scharff
Acting Director

DATED: August 2, 1983
Trenton, New Jersey

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Appearances:

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

For the Respondent Association
Fox & Fox, attorneys
(Richard H. Greenstein of counsel)

For the Charging Party
Frances Swinick, pro se

REFUSAL TO ISSUE COMPLAINT

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on November 24, 1978 by Frances Swinick against the State of New Jersey ("State") and the New Jersey State Employees Association ("SEA") alleging that the Respondents 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), (2), (3), (4), (5), (6) and (7), and N.J.S.A. 34:13A-5.4(b)(1). ^{1/}

The Charging Party was employed by the State as a senior clerk typist in the Division of Unemployment Disability Insurance, Department of Labor and Industry. She asserts that during 1978 she was subject to harassment, false evaluation, and discipline arising from her vigorous exercise of contractual and statutory rights to file grievances and as the result of her activities as a shop steward. ^{2/} Her eight page statement of charge describes in detail purported misconduct on the part of her supervisors and other State officials, as well as alleged

^{1/} N.J.S.A. 34:13A-5.4(a) prohibits 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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission.

N.J.S.A. 34:13A-5.4(b) 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/} It is unclear as to whether Mrs. Swinick's exercise of grievance presentation rights were with respect to her own grievances or those of fellow unit employees.

improper representation she received from her majority representative. ^{3/} Her allegations against the State are generalized in this passage of her statement of charge, in which she alleges that certain supervisors:

... harassed, coerced, intimidated, filed incorrect statements in petitioner's files, violated her rights to past practices, policies, benefits, threatened petitioner unjustly with disciplinary actions, suspensions and dismissals for the purpose to snap petitioner out of engaging in legal association activities, making application and signing for shop steward, as reprisal for filing and signing grievances and vigorously enforcing union agreement, Civil Service Rules and Regulations; and filed a false unsatisfactory evaluation rating in violation union contract, Civil Service Rules and Regulations in retaliation for said legal association activities; discriminating in regard to terms and conditions of employment to discourage petitioner exercising legal association activities. [sic]

The period of the alleged unfair practices by the State commenced in February 1978. Over the course of the following months, Mrs. Swinick received poor evaluations and was transferred to a different office location. In October 1978, she was suspended for thirty days.

The Charging Party alleges that she requested assistance from SEA to stop the harassment. She alleges that SEA was ineffective

^{3/} At the time this action arose, Mrs. Swinick's majority representative was the joint employee representative, New Jersey State Employees Association/New Jersey Civil Service Association. Mrs Swinick maintained membership in SEA.

in this regard, failed to prevent further harassments and to obtain the removal of false evaluation's from her file and became a conspirator in the State's efforts to effectuate her transfer. Mrs. Swinick further alleges that SEA, at times, refused to meet with her concerning her grievance relating to her suspension and did not adequately prepare her for the grievance hearing relating to her suspension. According to Swinick, SEA suggested that she "plead guilty" and it offered to attempt to have the suspension reduced to five days. Swinick rejected this approach, and decided to process her grievance pro se. She attributes her inability to mount a cohesive argument to the SEA's actions. She filed her Charge shortly thereafter, and a week after her effective removal from State service.

During the processing of this Charge, the Commission was advised that Mrs. Swinick had instituted proceedings with the Civil Service Commission regarding her transfer, suspension, and her subsequent discharge. Further, an exploratory conference was convened before a Commission staff agent. ^{4/} Mrs. Swinick has now moved for consideration of the merits of her Charge and the matter is before the undersigned for a determination as to whether a Complaint shall issue.

N.J.S.A. 34:13A-5.4(a) 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

^{4/} Mrs. Swinick has initiated a suit in federal court relating to the denial of her attempt to tape record the exploratory conference.

complaint stating the unfair practice charge. ^{5/} 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. ^{6/} The Commission's rules provide that the undersigned may decline to issue a complaint. ^{7/}

Additionally, the Commission adheres to the Supreme Court's promulgation of a single or entire controversy rule, which is applied under circumstances where two or more administrative agencies are called upon to review the same subject matter over which concurrent jurisdiction is possessed. City of Hackensack v. Winner, P.E.R.C. No. 77-49, 82 N.J. 1 (1980). The single controversy rule precludes litigation of the same issues before two administrative forums. Under the principles of Hackensack, the Commission should not proceed where the unfair labor practice issue has already been aired before Civil Service.

^{5/} 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 charged and including a notice of hearing containing the date and place of hearing before the commission or any designated agent thereof ..."

^{6/} N.J.A.C. 19:14-2-1

^{7/} N.J.A.C. 19:14-2.3

The proceedings instituted by Mrs. Swinick before the Civil Service Commission have been reviewed. The Civil Service appeal filed by Mrs. Swinick, and presented pro se, included essentially the same factual allegations against the State that are presented in the instant unfair practice charge. Mrs. Swinick's grievances forthrightly presented issues relating to her claims that State officials harassed her because of her vigorous exercise of grievance presentation rights under the Act. In that forum, Civil Service found that the State was justified in suspending and terminating Mrs. Swinick, although, on a disquieting note, it appears that proceedings were terminated by the Hearing Examiner after three days due to the appellant's disorderly and inappropriate participation. In re Decision on Appeal of Francis Swinick, December 26, 1979 (slip decision). Mrs. Swinick has advised that the Superior Court Appellate Division has dismissed her appeal of the Civil Service determination as not properly perfected.

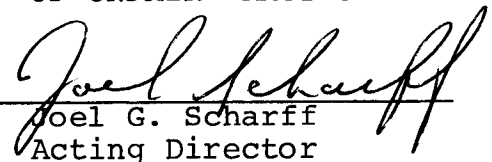
The undersigned is convinced, upon review of the above, that Hackensack considerations prevent further litigation of Mrs. Swinick's allegations against the State. Although Hackensack does contemplate a "full and fair" litigation of the unfair practice issue, it is inappropriate if not jurisdictionally improper for this agency to review Civil Service's determination given the procedural disposition of the action before that agency. In re Ralph P. Shaw/Department of Civil Service and Paul Joseph Konrad, D.U.P. No. 78-6, 4 NJPER 1 (¶ 4000 1977).

Mrs. Swinick's allegations raise some substantive concerns relating to SEA's duty to provide fair representation. It is not likely, however, that litigation of her claims against SEA can achieve a meaningful result. Regardless of Mrs. Swinick's perception that she was improperly represented by SEA in the departmental review of her grievances, her election to proceed individually before Civil Service, as was her right under N.J.S.A. 34:13A-5.3, provided a de novo consideration of all disciplinary actions taken by the appointing authority. ^{8/}

Moreover, the duty of fair representation is breached only where the majority representative's conduct can be described as arbitrary, discriminatory, or in bad faith. In re New Jersey Turnpike Authority and Walter A. Kaczmarek, P.E.R.C. No. 80-38, 5 NJPER 412 (¶ 10215 1979). It would appear, on the Charge as a whole, that the essential dispute which arose between Mrs. Swinick and the SEA was as the result of their different perceptions of their likelihood of success in pursuing the disciplinary appeals and the best strategy to be utilized. Mrs. Swinick refers to SEA's representation as ineffective. Ineffective results are not the measure of improper representation. In re City of Wildwood, D.U.P. No. 78-12, 4 NJPER 234 (¶ 4117 1978).

Accordingly, the undersigned declines to issue a complaint.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES


Joel G. Scharff
Acting Director

DATED: July 29, 1983
Trenton, New Jersey

^{8/} The undersigned further notes that SEA/CSA is no longer the majority representative.