

H.E. NO. 94-7

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

In the Matter of

WARREN TOWNSHIP BOARD OF
EDUCATION,

Respondent,

-and-

Docket No. CO-H-93-291

WARREN TOWNSHIP EDUCATION
ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Hearing Examiner grants in part and denies in part Respondent's Motion to Dismiss filed before the hearing. The charging party alleged that the respondent refused to deduct agency fees from unit members. In its Motion, the Respondent argued that these facts could not rise to the level of 5.4(a)(1) and (2) violations. Additionally, the Respondent asserted that there could be no 5.4(a)(7) violation because there were no Commission rules and regulations cited in the charge and allegedly violated.

Accepting the facts alleged in the charge as true for purposes of the Motion, the Hearing Examiner finds that the respondent's refusal to deduct agency fees from unit members could be 5.4(a)(1) and (2) violations of N.J.S.A. 34:13A-1 et seq. See County of Passaic, P.E.R.C. No. 88-64, 14 NJPER 125, (¶19047 1988), appeal dismissed App. Div. Dkt. No. 2911-87T1 (6/22/88). Accordingly, the Motion was denied on these allegations. However, the Hearing Examiner granted the Respondent's Motion and dismissed the 5.4(a)(7) allegation because no rules or regulations were cited in the charge and allegedly violated.

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Appearances:

For the Respondent, Schwartz, Pisano & Edelstein
(Joel Scharff, of counsel)

For the Charging Party, Klausner & Hunter
(Stephen Klausner, of counsel)

HEARING EXAMINER'S DECISION
ON MOTION TO DISMISS

On February 22, 1993, the Warren Township Education Association filed an unfair practice charge alleging that the Warren Township Board of Education violated subsections 5.4(a)(1), (2) and (7)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

^{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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (7) Violating any of the rules and regulations established by the commission."

In its charge, the Association alleges that:

"On November 18, 1992, the Board, in a letter to the President of the Local Education Association, refused to deduct agency fee monies from secretaries who are part of the bargaining unit and have opted not to belong to the local education association (pursuant to 34:13A-5.5 and 13A-5.8)."

The Association also filed a clarification of unit petition, CU-93-37, on February 22, 1993 seeking to include the three secretaries who are the subject of the charge into its negotiations unit.

On April 23, 1993, the Director of Unfair Practice and Representation issued a consolidation order and a Complaint and Notice of Hearing assigning both cases to me. I scheduled a pre-hearing conference on June 1, 1993 and set hearing dates for June 9 and 10, 1993.

On May 10, 1993, the Board filed an Answer to the complaint denying the allegations raised in the charge. The Board asserted that the three secretaries were confidential employees within the meaning of the Act and could not be compelled to pay a representation fee to the Association since confidential employees cannot be included in any negotiations unit.

On May 26, 1993, the Board filed a Motion for Summary Judgment with me in the form of a brief, but which did not contain sworn certifications certifying facts not included in the charge. I transferred the Motion to the Chairman pursuant to N.J.A.C. 19:14-4.8. In view of the Motion, I adjourned the pre-hearing

conference and hearing dates. On July 8, 1993, the Association filed an answering letter brief without certifications, opposing the Board's Motion.

On September 22, 1993, the Chairman transferred the Motion back to me noting it appeared to be in the nature of a Motion to Dismiss. Pursuant to the Chairman's direction, this motion is being treated as a Motion to Dismiss.

For purposes of its Motion, the Board accepted the facts alleged in the charge; specifically, the three secretaries are part of the Association's unit and that the Board refused to deduct representation fees from them. In the Motion, the Board argued that these facts do not rise to the level of (a)(1) and (a)(2) violations. Further, the Board argued that since there is no rule cited in the charge alleged to have been violated, it is not guilty of an (a)(7) violation. On that basis, it sought dismissal of the complaint.

In its response to the Motion, the Association restated its position that the Board refused to deduct representation fees from three unit members in violation of the Act. Additionally, the Association indicated that the Board provided no certifications in support of its Motion.

The Board subsequently submitted a certification on July 28, 1993 from the Board Secretary attesting that none of the secretarial employees were assessed representation fees in 1992 nor did any of the three employees pay dues to the Association. This

certification offers no additional facts; rather, it confirms that the Board did not transmit representation fees to the Association.

ANALYSIS

The Board's Motion is in the nature of a motion to dismiss complaint, N.J.A.C. 19:14-4.7 because it seeks to dismiss the charge based upon a failure to state a claim upon which relief can be granted. R.4:6-2(e). In effect, the Respondent has submitted a motion for judgment on the pleadings. Comment R.4:6-2 (1988).

In Reider v. State of New Jersey Dept. of Transp., 221 N.J. Super 547 (App. Div. 1987), the court stated:

On a motion made pursuant to R. 4:6-2(e) "the inquiry is confined to a consideration of the legal sufficiency of the alleged facts apparent on the face of the challenged claim." P. & J. Auto Body v. Miller, 72 N.J. Super 207, 211 (App. Div. 1962). The court may not consider anything other than whether the complaint states a cognizable cause of action. Ibid. For this purpose, "all facts alleged in the complaint and legitimate inferences drawn therefrom are deemed admitted." Smith v. City of Newark, 136 N.J. Super 107, 112 (App. Div. 1975). See also Heavner v. Uniroyal, Inc., 63 N.J. 130, 133 (1973); Polk v. Schwartz, 166 N.J. Super 292, 299 (App. Div. 1979). A complaint should not be dismissed under this rule where a cause of action is suggested by the facts and a theory of actionability may be articulated by way of amendment. Muniz v. United Hsps. Med. Ctr. Pres. Hsp., 153 N.J. Super 79, 82-83 (App. Div. 1977). However, a dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted.

Reider, at 552.

Thus, all favorable inferences from the allegations must be accorded to the complainant. Wuethrich v. Delia, 134 N.J. Super 400 (Law Div. 1975), aff'd 155 N.J. Super 324 (App. Div. 1978); Sayreville B/E, H.E. No. 78-26, 4 NJPER 117 (¶4056 1978)..

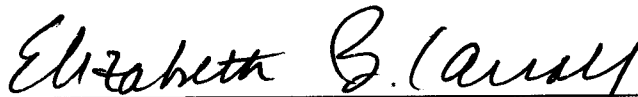
The Association must be allowed to litigate the charge. Giving every favorable inference to the Association's allegations, the refusal to deduct agency fees from employees who may be negotiations unit members could interfere with the Association's administration of its unit and, therefore would be an unfair practice. See County of Passaic, P.E.R.C. No. 88-64, 14 NJPER 125 (¶19047 1988), appeal dismissed App. Div. Dkt. No. 2911-87T1 (6/22/88). Since there is enough in the charge to allow the (a)(2) allegation to go forward, the (a)(1) allegation must also go forward because there could be a derivative (a)(1) violation. See Tp. of Wayne, P.E.R.C. No. 78-10, 3 NJPER 321 (1977). Accordingly, the Motion to Dismiss on the (a)(1) and (a)(2) allegations in the charge is denied.

However, a 5.4(a)(7) charge alleges that there has been a violation of the rules and regulations established by the Commission. Nothing in the charge refers to any rule or regulation which has been violated. The only reference is to N.J.S.A. 34:13A-5.5 and 5.8. This reference is to a statute, not to a rule. Therefore, the Motion to Dismiss on the (a)(7) allegation is granted.

Accordingly, based upon the above findings and analysis, I issue the following:

ORDER

The 5.4(a)(7) allegation is dismissed. All other aspects of the Motion are denied.



Elizabeth B. Carroll
Hearing Examiner

DATED: October 25, 1993
Trenton, New Jersey