D.U.P. NO. 79-17

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

In the Matter of

RED BANK BOARD OF EDUCATION AND
RED BANK ADMINISTRATIVE UNIT,

Respondents,

-and- DOCKET NO. CI-77-1

THOMAS DWAYNE WILLIAMS,

Charging Party.

SYNOPSIS

The Director of Unfair Practices declines to issue a complaint with respect to an Unfair Practice Charge filed by an individual alleging that an employer's proposal and a majority representative's acceptance of a "dysfunctional salary formula" constitute unfair practices. Under the "dysfunctional salary formula" the individual Charging Party did not receive a salary increase while other members of the negotiations unit received increases. The Charging Party did not allege that he was engaged in any protected activity guaranteed by the Act and did not allege that his majority representative's acceptance of the proposal was arbitrary, in bad faith, or discriminatorily motivated. The Director finds in the context of the claim that the employer's conduct constituted a refusal to negotiate in good faith, that a proposal by an employer to freeze benefits or to provide reduced benefits is not per se an unfair practice. With respect to the claim that the employer's conduct interfered with the existence and administration of the majority representative's organization because the proposal resulted in internal unit divisiveness, the Director finds that a requisite element of finding such a violation in the circumstances presented would be motivation by the employer to dominate or interfere with the employee organization. The Charging Party did not allege any fact which would have attributed such motivation to the employer. The fact that the proposal would cause internal unit divisiveness does not establish such intent. The Director further rejects the Charging Party's claim that such a proposal would necessarily constitute an unfair practice under N.J.S.A. 34:13A-5.4(a)(2) because it would necessarily lead to the destruction of small negotiating units.

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Appearances:

For the Respondent Board
Reussille, Cornwell, Mausner & Carotenuto
(Martin M. Barger, of Counsel)

For the Respondent Employee Representative
Jane Bostrom, Representative

For the Charging Party
McCarter & English, Esqs.
(Steven B. Hoskins, of Counsel)

REFUSAL TO ISSUE COMPLAINT

An Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") on July 27, 1975 [1/] by Thomas Dwayne Williams (the "Charging Party") against the Red Bank Board of Education (the "Respondent") and on December 14, 1976 against the Red Bank Administrative Unit (the "Administrators") alleging that the Respondent 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. (the "Act"),

1/ The Charge against the Board was amended on August 24, 1976 and on December 6, 1976.

specifically N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (5) [2/] and that the Respondent Administrators was in violation of N.J.S.A. 34:13A-5.4(b)(1). [3/] Generally, Charging Party claims that the Board's proposal and the Administrators' acceptance of a "dysfunctional salary formula" applicable to the Charging Party through a 1975-76 collective negotiations agreement constitute unfair practices.

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

2/ These subsections prohibit employers, their representatives and 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 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."

3/ 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."

4/ 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 and including a notice of hearing before the commission or any named designated agent thereof ... "

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. 5/ The Commission's rules provide that the undersigned may decline to issue a complaint. 6/

For the reasons stated below the undersigned has determined that the Commission's complaint issuance standards have not been met.

The undersigned has carefully reviewed the allegations of the Charging Party.

Charging Party alleges that the Board's proposal of a salary formula which would increase the salary of some members of the negotiations unit by a substantial amount but would not increase the Charging Party's salary and, further, would provide a salary figure for the Charging Party which would be below the previous year's salary is in violation of §§ (a)(1), (3) and (5). The Charging Party also alleges that the Board's actions constitute a § (a)(2) violation for the following reasons: " ... the action of the Board of Education in proposing a formula whereby certain individuals would receive minimal or zero increases was an unfair labor practice in that it was designed to interfere with the bargaining unit and to create devisiveness [sic] among

5/ N.J.A.C. 19:11-2.1.

6/ N.J.A.C. 19:11-2.3.

its members. This type of proposal can ultimately lead to the domination or destruction of small negotiating units which violates the intent and purpose of the Public Employment Relations Act."

N.J.S.A. 34:13A-5.4(a)(1) and (3), supra, n.3, prohibit employers from interfering with, restraining or coercing employees and from discriminating against employees in the exercise of the rights guaranteed to them by this Act. These rights are generally described in N.J.S.A. 34:13A-5.3 and normally are associated with the protection of an employee's right to engage in activities or to refrain from engaging in activities on behalf of an employee organization. See In re Borough of Avalon, D.U.P. No. 78-13, 4 NJPER 236 (¶4118 1978). Charging Party herein has not alleged facts which would indicate that he was engaged in activities on behalf of the Administrators or any other organization, or that he was refraining from such activities, and that the Board interfered with, restrained or coerced, or discriminated against him in the exercise of these protected rights. Therefore, the Charging Party has not asserted a factual basis for demonstrating that the employer committed an independent § (a)(1) violation or a § (a)(3) violation. See, In re Township of Springfield, D.U.P. No. 79-13, 5 NJPER 15 (¶10008 1978); In re Avalon, supra,; In re Borough of Palisades Park, D.U.P. No. 78-1, 3 NJPER 238 (1978).

The basis for the Charging Party's § (a)(5) allegation is that the Board did not negotiate in good faith by proposing the alleged "dysfunctional salary formula." The Charging Party

claims that this proposal was "purposely contrived." 7/

It is not an unfair practice for an employer to maintain an "arm's length" relationship with an employee organization and to maintain a firm negotiating position. See, In re State of New Jersey (State Colleges), E.D. No. 79, 1 NJPER 39 (1975). Futher, it is not a per se unfair practice for an employer to propose that employees receive the same benefits or less benefits than they received under the previous negotiations agreement. In re City of Jersey City, P.E.R.C. No. 77-58, 3 NJPER 122 (1977); In re State of New Jersey, supra. The Appellate Division of the Superior Court has acknowledged that the negotiation of agreements wherein certain individuals receive reduced salaries while other individuals receive salary increases would not constitute a per se violation of a majority representative's obligation to provide fair representation to its unit members. See, Belen v. Woodbridge Board of Education and Woodbridge Federation of Teachers, 142 N.J. Super. 486 (1976), certif den. 72 N.J. 458 (1976). By extension, it would appear that the employer's proposal that certain employees must have reductions in benefits while other receive increased

7/ Although Charging Party submits that his salary, when computed under the formula, provides for a lesser salary than in the previous year, there is no factual assertion that the Charging Party was actually paid less than the previous year. The above discussion assumes that the Charging Party received either the same salary or a lesser salary than in the previous year. In either case, the legal conclusion as to a purported § (a)(5) violation is the same. Moreover, while the undersigned addresses the substantive issues relating to the § (a)(5) claim, the undersigned does not address the issue as to whether, in fact, an individual has standing to pursue a § (a)(5) allegation.

benefits would not constitute a per se violation of the Act by the employer. Accordingly, the allegation by the Charging Party that the proposal was "purposely contrived" and the allegation that the proposal constitutes a refusal to negotiate in good faith are insufficient to support the issuance of a complaint under § (a)(5).

The Charging Party alleges that a § (a)(2) violation has occurred because the proposal "was designed to interfere with the bargaining unit and to create devisiveness [sic] among its members." Charging Party also alleges that "this type of proposal can ultimately lead to the domination or destruction of small negotiating units ... " The Charging Party further states that the consideration of the Board's proposal did in fact create divisiveness within the unit. However, the nature of the claimed divisiveness is not described by the Charging Party, nor is it alleged that this divisiveness actually resulted in the disintegration of the Administrators' unit or imminently threatened same.

Because of the seriousness of a § (a)(2) violation, the undersigned has given close scrutiny to this allegation. First, it must be recognized that this claim of a §(a)(2) violation is grounded entirely upon an allegation related to a negotiations proposal. Therefore, the issuance of a complaint under § (a)(2) must be considered in the context of the employer's right to assume a hard bargaining position and to present and insist upon this type of negotiations proposal. As stated above, the Board's conduct in presenting a proposal offering various salary levels was permissible conduct.

The Charging Party has not alleged a fact which would support the claim that the proposed instant salary formula was designed to "dominate and interfere with the existence and administration of the employee organization." When an employer's negotiations conduct, not in violation of the obligation to negotiate in good faith, constitutes the basis for a claim of § (a)(2) domination or interference, the Charging Party must provide a factual basis related to the employer's motivation to interfere with the existence or administration of the majority representative. Inasmuch as there is no factual assertion herein that the Board was motivated to interfere with or destroy the employee organization, or to dominate the majority representative, there is no basis for a conclusion that the employer is in violation of § (a)(2). The employer's insistence upon the proposal, in itself being perfectly valid, cannot solely constitute a § (a)(2) violation. The possible destructive effect of such a valid proposal does not establish that the employer intended such destructive effect.

Second, the fact that there is divisiveness within an employee organization is not necessarily an indication that the administration of the employee organization has been interfered with or that the organization's existence is threatened by the employer in violation of § (a)(2). When an employer assumes a hard negotiating position with respect to employee benefits, it is only natural that employee dissension occurs. The undersigned notes that the Charging Party herein does not state the nature of

the divisiveness within the unit. The undersigned is reluctant in any context to attribute a § (a)(2) violation to an employer merely because the reaction among unit members to an employer's negotiating position has resulted in internal divisiveness. Given the context of the matter herein it would be incumbent upon the Charging Party to allege with specificity the facts describing the division among employees and, as stated above, to establish a nexus between the divisiveness and the employer's motivation to provoke this divisiveness in such a manner as would result in the representative's internal destruction. The undersigned cannot accept the suggestion that the employer's proposal to freeze or to reduce benefits for unit members constitutes a per se § (a)(2) violation when the negotiations unit is small for the purported reason that such a proposal must ultimately lead to the internal destruction of the organization. When the employer's proposal is presented void of any malice, the natural consequences of employee reaction to the employer's proposal may not be attributed to the employer under § (a)(2), regardless of the size of the unit.

With regard to the Charging Party's allegations against the Administrators under § (b)(1), the undersigned in Springfield, supra, and the Appellate Division in Belen, supra, have determined that it is not per se unfair representation for an employee organization to agree to a negotiations proposal which provides for less benefits for some members of a unit. Although an employee organization does owe a duty of fair representation to its employees,

Belen provides that such unfair representation occurs only where the organization's actions have been "arbitrary, discriminatory or in bad faith."

As noted above, Charging Party has not alleged that he was engaged in the exercise of conduct protected under the Act. Charging Party has not alleged that he was discriminated against because he was a member of another organization or refrained from assisting the Administrators. Further, he has not alleged that he has been singled out for capricious retaliation or arbitrary action by members of the unit. There is nothing in his Charge to indicate that the acceptance of the proposal by the Administrators 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. Accordingly, there is no factual basis for the allegations of unfair representation other than the allegation that the Charging Party did not receive a salary increase or that the Charging Party received reduced salary benefits. The fact that the Association accepted the agreement does not support the position that the Association acted in a manner contrary to its obligation to provide fair representation to all employees in its unit. 8/

8/ As stated in Ford Motor Company v. Huffman, 345 U.S. 330 (1953):

> ... 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 to a statutory bargaining representative in serving a unit it represents, subject always to complete good faith and

(Cont'd)

Accordingly, for the above reasons, the undersigned declines to issue a Complaint herein.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

Carl Kurtzman, Director

DATED: February 5, 1979
Trenton, New Jersey

8/ (Cont'd)

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. [at 338]