D.U.P. NO. 89-16

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

In the Matter of

COUNTY OF ESSEX & TEAMSTERS
LOCAL 723,

Respondents,

-and-

Docket No. CI-89-46

EDWARD M. ENGLISH,

Charging Party.

SYNOPSIS

The Director of Unfair Practices refuses to issue a complaint where the charging party failed to establish a breach of the duty of fair representation. The Director determined that the County and the Association, in agreeing to provide less merit pay to employees at the maximum of the applicable salary range, exercised discretion within a wide range of reasonableness permitted in negotiations. The statutes and regulations cited by the charging party provide a right to be free from discrimination, but do not provide an entitlement to a specific amount of merit pay.

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Appearances:

For the Respondent County
Lucille LaCosta-Davino, Esq.

For the Respondent Teamsters
Goldberger & Finn, Esqs.
(Howard Goldberger, of counsel)

For the Charging Party
Edward M. English, pro se

REFUSAL TO ISSUE COMPLAINT

On November 23, 1988, Edward English filed an unfair practice charge against Essex County ("County") and the International Brotherhood of Teamsters, Local 723 ("Local 723"). The charge alleges that the County and Local 723 violated the New Jersey Employer-Employee Relations Act, specifically subsections 5.4

(a)(1), (3) and (7) [1/] and 5.4 (b)(1) and (5) [2/] when they entered into a collective negotiations agreement covering the period between January 1, 1988 and December 31, 1990 that includes an illegal provision. Article XXVII of the agreement is a performance appraisal system which provides merit pay to all employees except those at the maximum of the applicable salary range for 1987. In 1988, 1989 and 1990, employees at the maximum step of their salary ranges receive lesser merit pay bonuses than other employees. Merit pay bonuses for 1988 through 1990 are payable no later than December 1 of each year. The agreement, effective between January 1, 1988 and December 31, 1990, was signed on December 28, 1987.

English, who is at the maximum step of his salary range, alleges that this provision is illegal because it violates Article 9.1.8g of the Essex County Administrative Code, N.J.S.A. 11A:7-1, the Equal Protection Clause of the 14th Amendment, U.S. CONST.

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. (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. (7) Violating any of the rules and regulations established by the commission."

2/ These subsections prohibit 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. (5) Violating any of the rules and regulations established by the commission."

amend. XIV, the Fair Labor Standards Act, 29 U.S.C. 207 (a)(1), and certain standards enumerated in 45 CFR Part 900, Subpart F.[3/] The County and Local 723 assert the charge is untimely.

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 charged.[4/] The Commission

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3/ Article 9.1.8g provides:

> It is the policy of the Essex County government to provide equal employment opportunities. This policy shall apply to all phases of employment, including, but not limited to recruitment, hiring, placement, promotion, transfer, lay-off, recall or termination, rates of pay or other forms of compensation and selection of training.

N.J.S.A. 11A:7-1 provides in part:

> The head of each State agency shall ensure equality of opportunity for all employees and applicants seeking employment. Equal employment opportunity includes, but is not limited to, the following areas: recruitment, selection, hiring, promotion, transfer, lay-off, return from lay-off, compensation and fringe benefits.
>
> The remaining provisions cited by the charging party all require that similarly situated individuals or employees be treated equally.

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

has delegated its authority to issue complaints to me 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 the charging party, if true, may constitute an unfair practice within the meaning of the Act.[5/] The Commission's rules provide that I may decline to issue a complaint.[6/]

Our Act requires that an unfair practice charged be filed within six months of the occurrence of the alleged unfair practice unless the charging party was prevented from filing a charge. N.J.S.A. 34:13A-5.4(c). In Kaczmarek v. N.J Turnpike Authority, 77 N.J. 329 (1978), the New Jersey Supreme Court described how one is "prevented" from filing a charge:

> The term "prevent" may in ordinary parlance connote that factors beyond the control of the complainant have disabled him from filing a timely complaint. Nevertheless, the fact that the Legislature has in this fashion recognized that there can be circumstances arising out of an individual's personal situation which may impede him in bringing his charge in time bespeaks a broader intent to invite inquiry into all relevant considerations bearing upon the fairness of imposing the statute of limitations. Cf. Burnett v. N.Y. Cent. R.R., supra, 380 U.S. at 429, 85 S. Ct. at 1055, 13 L.Ed.2d at 946. The question for decision becomes whether, under the circumstances of this case, the equitable considerations are such that appellant should be regarded as having been "prevented" from filing his charges with PERC in timely fashion. Kaczmarek at 340.

5/ N.J.A.C. 19:14-2.1.

6/ N.J.A.C. 19:14-2.3.

In Kaczmarek, the plaintiff's delay in filing the charge was excused by his previous filing of a timely action in an improper forum. Here, charging party did not file any action before filing this charge. Nor do the facts suggest any extenuating reasons why charging party delayed in filing the charge.

Local 723 and the County signed an agreement which included merit pay provisions on December 28, 1987. The agreement included separate provisions for merit pay in 1987, 1988, 1989 and 1990. Charging party challenges these provisions for each year. Charging party had until June 28, 1988 to file a charge with respect to the merit pay provision for 1987. The charge was not filed until November 23, 1988. We are therefore dismissing the allegation that the County and Local 723 illegally agreed not to provide a merit increase for employees at the maximum for the applicable salary range in 1987.

However, the charging party asserts that the statute of limitations should be suspended because the cause of action is dependent on a statutory entitlement. Charging party alleged only that the County and Local 723 negotiated a discriminatory level of merit pay for him. To the extent that these actions were completed with the signing of the contract on December 28, 1987, we find that the allegation concerning the negotiation of the discriminatory pay provision is untimely. He has not alleged a specific statutory entitlement to a particular level of merit pay. Therefore, we must apply the statute of limitations in N.J.S.A. 34:13-5.4(c).

Relying on N.J.A.C. 19:10-3.1(a) and (b), [7/] English asserts that dismissing the charge would be unfair and unjust because economic discrimination would continue through the life of the contract.

Since the merit pay bonus for 1988 was payable by December 1, 1988, charging party's allegations concerning the unfair treatment accorded to maximum step employees by the disputed pay provision may be timely. However, even if timely, it appears that the allegation concerning the disputed pay treatment for maximum step employees does not meet the Commission's complaint issuance standards.

7/ N.J.A.C. 19:10-3.1 provides:

> (a)Whenever the Commission or designated officer find that unusual circumstances or good cause exists and that strict compliance with the terms of these rules will work an injustice or unfairness, the Commission or such officer shall construe these rules liberally to prevent injustices and to effectuate the purposes of the Act.
>
> * * *
>
> (b) When an act is required or allowed to be done at or within a specified time, the Commission may at any time, in its discretion order the period altered where it shall be manifest that strict adherence will work surprise or interfere with the proper effectuation of the act.

Merit pay is a mandatory subject for negotiations.[8/]

In Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Federation of Teachers, 142 N.J. Super. 486 (App. Div. 1976), the Court explained the standard to be applied in evaluating a union's conduct in agreeing to a contractual pay clause:

> Designation of an exclusive bargaining agent under the New Jersey Employer-Employee Relations Act confers on a union broad power to represent the members of the bargaining unit and to negotiate the terms and conditions of their employment. Along with this power comes the obligation to represent all employees "without discrimination." N.J.S.A. 34:13A-5.3. This duty of fair representation of a union toward its members has received extensive development in the experience and adjudications under the National Labor Relations Act, which we find to be an appropriate guide for the interpretation of our own enactment. See Lullo v. International Ass'n of Fire Fighters, 55 N.J. 409, 424 (1970). In Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967), the United States Supreme Court stated (at 190, 87 S.Ct. at 916): "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Thus, the mere fact that a negotiated agreement results, as it did here, in a detriment to one group of employees does not establish a breach of duty by the union. The realities of labor-management relations which underlie this rule of law were expressed in Ford Motor Co. v. Huffman, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048 (1953), where the court wrote:

8/ The Commission has found Essex County's merit pay plans negotiable and arbitrable in three cases. Essex Cty. and AFSCME Council 52, Local 1247, P.E.R.C. No. 86-149, 12 NJPER 536 (¶17201 1986) and Essex Cty. and Essex Cty. Local Unit of JNESO, P.E.R.C. No. 87-48, 12 NJPER 835 (¶17321 1986), aff'd App. Div. Dkt. Nos. A-5803-85T7 and A-1458-86T7 (6/30/87); Essex County, P.E.R.C. No. 87-113, 13 NJPER 275 (¶18114 1987).

> ...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 servicing the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion....
> [at 337-338, 73 S.Ct. at 686].
> [142 N.J. Super. at 490-491]

See also, Lawrence Tp. PBA Local 119, P.E.R.C. No. 84-76, 10 NJPER 41 (¶15023 1983).

In order to maintain a claim that a majority representative has breached its duty of fair representation, facts must be alleged, which, if true, would support the claim that it acted in a manner which was arbitrary, discriminatory or in bad faith. City of Jersey City, P.E.R.C. No. 87-56, 12 NJPER 853 (¶17329 1986); Lawrence Tp. P.B.A. Local 119; Vaca v. Sipes, 386 U.S. 171 (1967). Here, English alleges only that during contract negotiations, his representative did not obtain for him and others at the maximum pay step the same pay increases accorded to other supervisory employees of the County Welfare Division. The courts and the Commission recognize that in the give and take of collective negotiations, certain employees will fare better than others. A majority representative does not breach its duty to fairly represent its members at the negotiations table simply because the benefits achieved are not identical for all

employees; it must be alleged that the majority representative acted arbitrarily, discriminatorily or in bad faith. English alleges that Local 723 acted discriminatorily by agreeing to the merit pay amount provided in the Agreement. He did not allege any facts which would show that Local 723 intended to discriminate against those employees who are at the maximum step of each salary range. In the absence of specific allegations of such conduct, we are not inclined to issue a complaint.

English also alleges that the County violated subsections 5.4(a)(1), (3) and (7) by agreeing to provide employees at the maximum in the applicable range with less merit pay than other employees. Since he has not alleged facts supporting these allegations, we are inclined to dismiss the charges against the County.

English alleges that the union violated the Act by agreeing to this merit pay clause because it does not treat all employees equally in violation of several state and federal statutes and rules as well as the United States Constitution and the Statutes and rules he cited provide a specific statutory entitlement to a particular level of merit pay. However, these provisions were never intended to invalidate collective negotiation agreements, wherein parties may lawfully agree to provide different benefits to employees based upon their different skills, responsibilities or seniority. Ford Motor Co. v. Huffman, at 337-338.

In State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978) ("State Supervisory"), the Supreme Court first considered when a statute or regulation preempts negotiation over an otherwise negotiable term and condition of employment. The Court stated:

> Furthermore, we affirm PERC's determination that specific statutes and regulations which expressly set particular terms and conditions of employment, as defined in Dunellen, for public employees may not be contravened by negotiated agreement. For that reason, negotiations over matters so set by statutes or regulations is not permissible. We use the word "set" to refer to statutory or regulatory provisions which speak in the imperative and leave nothing to the discretion of the public employer.
> 78 N.J. at 80.

The Court also held that statutes or regulations permitting the public employer to retain and exercise some discretion over a particular term and condition of employment only partially preempt negotiation. The Court stated:

> It is implicit in the foregoing that statutes or regulations concerning terms and conditions of public employment which do not speak in the imperative, but rather permit a public employer to exercise a certain measure of discretion, have only a limited preemptive effect on collective negotiation and agreement. Thus, where a statute or regulation mandates a minimum level of rights or benefits for public employees but does not bar the public employer from choosing to afford them greater protection, proposals by the employees to obtain that greater protection in a negotiated agreement are mandatorily negotiable. A contractual provision affording the employees rights or benefits in excess of that required by statute or regulation is valid and enforceable. However, where a statute or regulation sets a maximum level of rights or benefits for employees on a particular term and condition of employment, no proposal to affect that maximum is negotiable nor would any

> contractual provision purporting to do so be enforceable. State Supervisory at 81-82.

See also Local 195, IFPTE v. State, 88 N.J. 393, 403-404 (1982). The provisions cited by the Charging Party do not provide an entitlement to a specific level of benefit--in this case a particular amount of merit pay. Rather, they provide the Charging Party a right to be free from discrimination. We are not pursuaded that a clause limiting the amount of merit pay provided to employees at the top of the salary scale--those who already have the highest salaries--discriminates against those employees.

Charging Party asserts that the merit pay provision included in the agreement between the County and Local 723 violates the Equal Protection Clause of the Fourteenth Amendment because it unfairly discriminates against those employees at the top step of the salary schedule.[9/] This argument is misplaced. The State and Federal Courts have long held that the equal protection clause of the constitution is not violated by collective negotiations agreement which provided differing rates of compensation. Jones &

9/ The charging party also alleges the contract violates the Fair Labor Standards Act. We have no jurisdiction to make such a finding.

Laughlin Steel, 301 U.S. 1, 1 LRRM 703 (1937) and Lullo v. IAFF, 55 N.J. 409, 428 (1970).10/11/

For these reasons we dismiss the charges against the County and Local 723.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

Edmund G. Gerber, Director

DATED: May 12, 1989
Trenton, New Jersey

10/ The Commission may consider constitutional arguments when determining whether a matter is within the scope of negotiations. Hunterdon Central H.S. Bd. of Ed., P.E.R.C. No. 80-4, 5 NJPER 289 (¶10158 1979), aff'd 174 N.J. Super 468 (App. Div. 1980), aff'd o.b. 86 N.J. 43 (1981).

11/ English cites Essex County Welfare Board v. Klein, 149 N.J. Super. 241 (1977), where the Appellate Division found that excluding non-unit employees from the opportunity to receive salary differentials greater than established salary ranges for unit employees violated the Equal Protection Clause. Appellants in Klein challenged a section of Ruling 11 which excluded directors and deputy directors. Ruling 11, promulgated by the Department of Institutions and Agencies, controlled terms and conditions of employment for county welfare board employees. N.J.S.A. 44:7-6.1 revoked Ruling 11 and gave a county welfare agency, "complete authority to establish wages and terms and conditions of employment for its employees through collective negotiation with an authorized employee organization."