

D.U.P. NO. 88-14

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

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Respondent,

-and-

Docket No. CO-88-190

RUTGERS COUNCIL OF AAUP CHAPTERS,

Charging Party.

SYNOPSIS

The Director of Unfair Practices refused to issue a Complaint where the charge alleged a good faith dispute over the meaning of a clause in the parties' contract. The Director declined to take jurisdiction because the phrase in question involved the negotiability of a subject destined for advisory arbitration. Further, the Director determined that the claim did not rise to the level of repudiation under State of New Jersey (Department of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

The Director also refused to issue a Complaint on an Amended Charge which alleged that the University violated the Act by refusing to allow "presentation" of certain grievances under the standards set forth in Township of West Windsor v. PERC, 78 N.J. 98 (1978). The Director found that the University's Step One meeting and written response on the merits satisfied its West Windsor "presentation" obligation.

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Appearances:

For the Respondent

Carpenter, Bennett and Morrissey, Esqs.  
(John J. Peirano, of counsel)

For the Charging Party

Reinhardt and Schachter, P.C.  
(Paul Schachter, of counsel)

REFUSAL TO ISSUE COMPLAINT

On January 25, 1988, Rutgers Council of AAUP Chapters ("AAUP" or "Charging Party") filed an unfair practice charge against Rutgers, the State University ("University" or "Rutgers"), and on April 18, 1988, it amended the charge alleging violations of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4(a)(1) and (5).<sup>1/</sup> The

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

initial charge alleged that the University repudiated the parties' collective negotiations agreement when it refused to submit certain grievances, which the University deemed non-negotiable, to advisory arbitration.

On February 11, 1988, Commission staff attorney Susan Weinberg conducted an exploratory conference on the initial charge. The parties presented their positions and later submitted several documents. Based on this investigation, the following facts appear:

The parties have a collective negotiations agreement extending from July 1, 1986 through June 30, 1989. The agreement contains a grievance procedure defining two categories of grievances. Category One grievances arise under provisions of the contract and end in binding arbitration. Category Two grievances, the type involved in this case, are defined as follows:

An allegation that, with respect only to those University policies, agreements, administrative decisions or Regulations which affect terms and conditions of employment as the concept has been defined by law, there has been a misrepresentation, misapplication or violation of such a University policy, agreement, administrative decision or Regulation which has affected the terms and conditions of employment of a member or members of the bargaining unit.

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1/ Footnote Continued From Previous Page

rights guaranteed to them by this act; and, (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."

The grievance procedure for a Category Two grievance ends in advisory arbitration.

On October 6, 1986, and March 27, 1987, the AAUP filed two Category Two grievances on behalf of unit members Goode and Murray, respectively. The Goode grievance complained about the University's failure to nominate him to the Graduate Faculty and its failure to include his proposed music course in the graduate curriculum. Murray's grievance complained that a letter about alleged anti-semitic statements he made in the classroom was placed in his personnel file. Both grievances were denied at step one and the AAUP appealed them to advisory arbitration.

On January 13, 1988, Rutgers sought to restrain advisory arbitration in the Chancery Division, Superior Court. The University argued that under the terms of the agreement, the grievances were not contractually arbitrable, i.e. that it never agreed to arbitrate the issues raised by the Goode and Murray grievances. The University maintained:

The Rutgers-AAUP contract permits grievances only over those matters which affect "terms and conditions of employment as that concept has been defined by law." ...[A] subject matter not preempted, which is not mandatorily negotiable, is not a "term and condition of employment as that concept has been defined by law." Since the subject matters raised by the grievances do not fit within this definition, the arbitration must be enjoined.  
(University's Brief submitted to the Court, page 18.)

The AAUP argued that the issues raised by the Goode and Murray grievances were entitled to a presumption of arbitrability.

It argued that "terms and conditions of employment" included both mandatorily and non-mandatorily negotiable items. It maintained that the issues raised by the grievances (which the University claimed were not mandatorily negotiable) were arbitrable both contractually and under the University's definition of "terms and conditions of employment."

The matter was argued before Honorable John E. Bachman, J.S.C., on February 2, 1988. Judge Bachman concluded that the phrase "terms and conditions of employment as that concept has been defined by law" referred only to mandatorily negotiable subjects. He restrained the Goode arbitration, finding that it involved a subject which was not mandatorily negotiable. Bachman also found that the Murray grievance was negotiable and arbitrable because it concerned discipline, a subject which the parties had stipulated to be negotiable and arbitrable. He ordered that the grievance proceed.

The unfair practice charge was filed after Bachman ruled. The AAUP argues that the University repudiated the contract by asserting that all issues which it (the University) deemed non-negotiable will not be recognized as appropriate Category Two grievances. The Charging Party maintains that the repudiation constitutes an unfair practice as defined by State of New Jersey (Department of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

The University argues that this dispute involves a good faith disagreement over the meaning of a contract provision. The

University asserts that at worst, the dispute constitutes no more than a contract violation based on differing interpretations of the grievance procedure, and that it should be resolved through the parties' contractual dispute resolution mechanism (i.e., arbitration). The University contends that the dispute does not rise to the level of a repudiation under Human Services, and that bad faith cannot be inferred from its Superior Court action seeking a determination on contractual arbitrability.

In determining if a complaint will issue on the allegations contained in the initial charge; two questions must be addressed:

1. Must the Commission decide what constitutes a "term and condition of employment"?

2. Did the University's actions constitute a "repudiation" of the contract under Human Services?

The AAUP argues that only the Commission can determine what the phrase, "terms and condition of employment as that concept has been defined by law" means. That is, the interpretation of this language falls within the Commission's exclusive jurisdiction. The Commission is obligated to delineate mandatorily and non-mandatorily negotiable terms and conditions of employment in scope of negotiations proceedings (See §5.4(d) of the Act.) The Commission does not decide the negotiability of a subject that is destined for advisory arbitration. Pursuant to Teaneck Bd. of Ed. v. Teaneck Teachers' Assn., 94 N.J. 9 (1983) and Bd. of Ed. of Bernards Tp. v.

Bernards Tp. Ed. Assn., 79 N.J. 311 (1975), issues which are otherwise not mandatorily negotiable and therefore not arbitrable between these parties are appropriate for advisory arbitration.

The parties cannot contractually agree to extend the Commission's jurisdiction to matters which are not subject to its jurisdiction by statute or court decision. "Terms and conditions of employment as that concept has been defined by law" expresses only the agreed-upon subject matter of Category Two grievances. Specifically, it only defines the contractual limits of arbitrability. The parties' disagreement over the phrase's meaning does not constitute a scope of negotiations dispute. Questions of contract arbitrability are for the courts or an arbitrator, and not the Commission, to determine. Ridgefield Park, 78 N.J. 144 (1978).

In Human Services, the Commission held that allegations of a mere breach of contract do not warrant the exercise of the Commission's unfair practice jurisdiction. However, a specific "repudiation" exception was noted:

A specific claim that an employer has repudiated an established term and condition of employment may be litigated in an unfair practice proceeding pursuant to subsection 5.4(a)(5).... A claim of repudiation may...be supported...by a contract clause that is so clear that an inference of bad faith arises from a refusal to honor it or by factual allegations indicating that the employer has changed the parties' past and consistent practice in administering a disputed clause.  
[10 NJPER at 422-423]

It does not appear that the AAUP can support a claim of bad faith. The Superior Court decision on contract arbitrability on the

Goode and Murray grievances is consistent with the University's interpretation of the disputed language. The University's interpretation of the language is reasonable. The court action does not substantiate a claim of repudiation. Further, as evidenced by the parties' briefs to the Court and Judge Bachman's decision, the contract provision itself is open to differing, good faith interpretations. Finally, the AAUP can point to no past and consistent practice of the University in administering the disputed clause. In some cases, the same type of grievances were arbitrated without objection by the University and in others they were not. Based on all of these facts, we do not believe a repudiation can be found and decline to issue a complaint on the initial charge.

The amended charge sets forth three allegations: 1) that Rutgers "refused to recognize" certain grievances; 2) that Rutgers "refused to recognize and apply Article IX.A.4 of the agreement, which implemented the provisions of N.J.S.A. 34:13A-5.3 and the doctrines set forth in Township of West Windsor v. PERC, 78 N.J. 98 (1978), and Teaneck Bd. of Ed. v. Teaneck Teachers Association, supra"; and 3) that Rutgers "failed to negotiate or recognize written policies setting forth grievance review procedures by means of which employees/representatives may appeal the interpretation, application or violation of policies affecting their terms and conditions of employment." No other facts or supporting documents were submitted with the amended charge.



By letter dated April 22, 1988, we informed the charging party that its amended charge did not meet the requirements of N.J.A.C. 19:14-1.3 because it did not state specific facts, times or instances about the allegations. In response, the charging party submitted a grievance dated November 4, 1987, alleging improper reassignment and change in space allocation to faculty members in the Geology Department. AAUP argued that Rutgers' response to this grievance supports the allegations in its amended charge and thus satisfied the specificity requirements of N.J.A.C. 19:14-1.3.

The Geology Department grievance was submitted as a "Category Two" grievance. It alleged that Rutgers violated University Regulations, page 6.3.7, regarding the scheduling and use of University facilities; it stated that an administrator failed to follow policies, improperly supervised the unit in accordance with University Regulations, and inadequately consulted with Geology Department faculty members and the University's Space Committee.

On January 8, 1988, Jean Ambrose, Assistant Vice President for Faculty Affairs, responded to the grievance for the University. She stated that a step one meeting was held with the grievants on December 11, 1987. She set forth the nature of the grievance and the violations alleged. Her ruling in the grievance states:

The scheduling and use of University facilities is an educational matter, does not affect the terms and conditions of employment as that concept has been defined by law, and is therefore not properly the subject of an Article IX grievance. Nevertheless, I investigated the matter and would like to note that the Newark

Space Committee<sup>2/</sup> was consulted on more than one occasion about the reallocation of space from the Geology to the Biological Sciences Department, although it did not meet in formal session. [Ambrose response to grievance, January 8, 1988]

In Township of West Windsor v. PERC, 78 N.J. 98 (1978), the New Jersey Supreme Court addressed the issue of what rights public employees have when presenting grievances to public employers. In interpreting the Act, the Court stated:

The statutory language chosen evinces a legislative intent to ensure that all negotiated grievance procedures would provide public employees with a forum for the presentation of their complaints to their public employers on all matters 'affecting them'.

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Our holding that N.J.S.A 34:13A-5.3 mandates the scope of matters as to which public employees must be able to present grievances applies only to the presentation stage of the grievance procedure.  
[at 106, 107]

In the amended charge, the AAUP argued that the University violated the Act by refusing to allow presentation of alleged "Category Two" grievances involving non-mandatory subjects of

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<sup>2/</sup> The Newark Space Committee is chaired by Associate Provost Gene A. Vincenti, and has as members, the Director of Physical Plant, the Registrar, and a staff member from the Office of the Provost.

negotiation.<sup>3/</sup> The only allegation supporting this argument is the grievance challenging space allocations in the Geology Department. Based on our review of the facts together with all of the allegations contained in the amended charge, we can find no basis on which to issue a complaint.

Under West Windsor, a public employer's only obligation outside its negotiated grievance procedure is to allow "presentation" of grievances. Here, the University not only held a step one meeting attended by the two grievants and a union representative, but also issued a two-page grievance response. Although it is true that Rutgers initially denied the matter because it was "not properly the subject of an Article IX grievance", Rutgers did address the grievance on its merits. The response went on to state that the grievance was in fact investigated.<sup>4/</sup> Rutgers conducted an investigation and gathered evidence before the grievance was denied. That information was communicated to AAUP in Ambrose's memorandum. These actions on behalf of the University

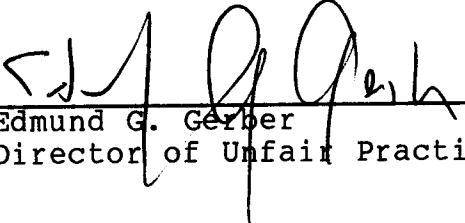
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<sup>3/</sup> Two other allegations were made in the amended charge. The first simply reiterates charging party's repudiation argument. The second allegation asserts that the University failed to negotiate grievance review procedures by which employees/representatives can appeal the interpretation, application or violation of policies affecting their terms and conditions of employment. This argument too must be dismissed. Such grievances are expressly covered by the "Category Two" grievance procedure, the subject of the original charge.

<sup>4/</sup> We do not address the question of whether a response on the merits is necessary to satisfy West Windsor.

satisfy its obligation under West Windsor. Accordingly, we can discern no violations of the Act based on facts alleged in the amended charge.<sup>5/</sup> We decline to issue a complaint and dismiss the charges.

BY ORDER OF THE DIRECTOR OF  
UNFAIR PRACTICES



Edmund G. Gerber  
Director of Unfair Practices

DATED: May 17, 1988  
Trenton, New Jersey

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<sup>5/</sup> We have also reviewed the Murray and Goode grievances, submitted with the initial charge, in light of the allegations contained in the amended charge. Both of the University grievance responses indicate that step one meetings were held with the grievants and union representatives in attendance, and both responses indicate that the subjects of the grievances were addressed on their merits. As such, we again conclude that there is no evidence on the face of the charge that the University failed to fulfill its "presentation" obligation and thus violated the Act.