

D.U.P. NO. 85-24

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

In the Matter of

LYNDHURST BOARD OF EDUCATION,

Respondent,

-and-

DOCKET NO. CO-85-165

LYNDHURST CUSTODIAL AND MAINTENANCE  
ASSOCIATION,

Charging Party.

SYNOPSIS

The Director of Unfair Practice Proceedings declines to issue a complaint with respect to the Charging Party's allegation that the Board of Education altered an existing past practice whereby bus drivers were paid overtime at the rate of one and one-half normal pay for any time worked beyond thirty-five hours in a given work week. The Director determines that the Board of education acted pursuant to a reasonable interpretation of the contract. Article VI, Section B, Paragraph 2 of the parties' contract provides for overtime "in excess of eight hours in any work day or forty hours in any work week" and the Commission has held that a negotiated contractual provision takes precedence over the alleged past practice. In re Delaware Valley Reg. Bd./Ed., P.E.R.C. No. 81-77, 7 NJPER 34 (¶ 12014 1980).

Accordingly, the Board has not repudiated a term and condition of employment and therefore has not committed an unfair practice. In re State of New Jersey (Dept. of Human Services), D.U.P. No. 84-11, 9 NJPER 681 (¶ 14299 1983).

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Appearances:

For the Respondent  
Cecchi & Politan, Esqs.  
(Glenn T. Leonard of counsel)

For the Charging Party  
John Biondi, UniServ Representative

REFUSAL TO ISSUE COMPLAINT

On January 8, 1985, an unfair practice charge was filed with the Public Employment Relations Commission ("Commission") by the Lyndhurst Custodial and Maintenance Association ("Association") alleging that the Lyndhurst Board of Education ("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. ("Act"), specifically §5.4(a)(1) and (5)<sup>1/</sup>

<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 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."

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 practices, and that it has the authority to issue a complaint stating the unfair practice charge.<sup>2/</sup> The Commission has delegated its authority to issue complaints to me and has established a standard upon which an unfair practice complaint shall 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.<sup>3/</sup> The Commission's Rules provide that I may decline to issue a complaint.<sup>4/</sup>

For the reason stated below I have concluded that the Commission's complaint issuance standard has not been.

The Association's charge alleges that the Board unilaterally altered an existing past practice whereby Bus Drivers were paid

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2/ The Commission shall have exclusive power as hereinafter provided to prevent anyone from engaging in any unfair practice listed in subsections a. and b. above. 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; provided that no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the 6 months period shall be computed from the day he was no longer so prevented.

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

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

overtime at the rate of one and one-half normal pay for anytime worked beyond thirty-five hours in a given work week. However, Article VI, Section B, Paragraph 2 provides in pertinent part:

Overtime shall be paid at the rate of one and one-half times the employees' regular hourly rate of pay for all time worked in excess of eight hours in any workday or forty hours in any work week.

In re Delaware Valley Reg. Bd/Ed, P.E.R.C. No. 81-77, 7 NJPER 34 (¶ 12014 1980), the Commission stated "The existence of prior practice...[can]not be considered to contradict or alter the clear terms of a written agreement." Thus, even assuming the existence of a past practice<sup>5/</sup> Article VI, Section B, Paragraph 2, by its clear terms negates the Association's past practice claim to the payment of overtime for time worked in excess of thirty-five hours (but less than 40 hours in a given work week).

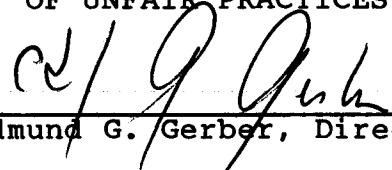
On May 20, 1985, I advised the Charging Party that in the absence of facts alleging unfair practices which fall within the Act's cognizable limitations, I would be constrained to decline to issue a complaint. On May 28, 1985, I received a written response from the Association admitting the contractual provision at issue; but, alleging that notwithstanding Article VI, Section B, Paragraph 2, the Board had no Bus Drivers employed at the time that provision was negotiated.

<sup>5/</sup> The Board, in this case, disputes the existences of any prior practice whereby Bus Drivers work more than 35 hours per week earn overtime pay at the rate of time and one-half.

Instead, subsequent to the commencement of the two-year contractual period, the Board hired Bus Drivers, established a thirty-five hour work week, and after the two Bus Drivers had been employed for over fifteen months, the Board unilaterally altered their terms and conditions of employment, as previously alleged. Although I do not doubt the facts as stated by the Association in its May 22, 1985, response, it is my determination that this does not alter the precedent established in In re Delaware Valley Reg. Bd/Ed, supra.

Accordingly, for the reasons stated above, I decline to issue a complaint.

BY ORDER OF THE DIRECTOR  
OF UNFAIR PRACTICES

  
Edmund G. Gerber, Director

DATED: June 12, 1985  
Trenton, New Jersey