

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

In the Matter of

EMPLOYEES ASSOCIATION OF WILLINGBORO
SCHOOLS,

Respondent,

-and-

DOCKET NO. CE-82-4

WILLINGBORO BOARD OF EDUCATION,

Charging Party.

SYNOPSIS

The Director of Unfair Practices declines to issue a complaint with respect to an unfair practice charge filed by a board of education alleging that the majority representative of certain employees was withholding information relevant to the processing of its grievances until the matter proceeded to arbitration. The Director notes that the board has the ability to effectively object to this type of conduct by raising the issue to an arbitrator.

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REFUSAL TO ISSUE COMPLAINT

On October 2, 1981, the Willingboro Board of Education (the "Board") filed an Unfair Practice Charge with the Public Employment Relations Commission (the "Commission") against the Employees Association of Willingboro Schools (the "Association"). ^{1/} The charge alleges that the Association is 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"). Specifically, the Board alleges that the Association violated N.J.S.A. 34:13A-5.4(b)(2), (3) and (5) ^{2/} when it refused to comply with the grievance mechanism

^{1/} The charge was subsequently amended on February 19, 1982 to bring it within the six month limitation period of N.J.S.A. 34:13A-5.4(c) which provides in part that "...no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge ..."

^{2/} These subsections prohibits public employee organizations, their representatives or agents from: "(2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances. (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. (5) Violating any of the rules and regulations established by the Commission."

contained in the collective negotiations agreement between the parties.

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. ^{3/} The Commission has delegated its authority to issue complaints to the 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. ^{4/} The Commission's rules provide that the undersigned may decline to issue a complaint. ^{5/}

Having reviewed the Charge, the undersigned determines that the Commission's complaint issuance standards have not been met.

The grievance procedure is described in Article XX of the collective negotiations agreement between the Board and the Association. Section 5(a) of the grievance procedure requires the grievant to discuss informally his/her grievance with his/her immediate supervisor.

^{3/} 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 containing the date and place of hearing before the commission or any designated agent thereof ... "

^{4/} N.J.A.C. 19:14-2.1

^{5/} N.J.A.C. 19:14-2.3

If the grievance remains unresolved, Section 5(b) provides for the grievant to make a formal presentation of the grievance. The relevant portion of Section 5(b) states:

The presentation of the grievance shall indicate the nature of the complaint and the specific facts that the grievant considers to be relevant to its resolution.

It is this section of the grievance procedure which is implicated in the Board's Unfair Practice Charge.

In its Charge, the Board alleges that the Association has engaged in a course of conduct whereby it introduces at the arbitration step factual evidence which it fails to produce during the early stages of the grievance procedure. ^{6/} Further, the Board alleges that the Association has consciously chosen to refuse to disclose such information until the arbitration hearing. The Board contends that this course of conduct, which violates the contract and the past practice of the parties, results in surprise and puts it at a disadvantage during an arbitration hearing. The Board contends that it has incurred increased costs as a result of the Association's actions due to its inability to settle grievances at the earlier stages of the grievance process.

6/ The Board attached to its amended Unfair Practice Charge twenty-one (21) grievances in which it alleged that the Association violated Section 5(b) of the negotiated grievance procedure. Not all of these grievances have reached the arbitration stage. But in each grievance, the Board alleges that the Association did not provide specific facts relevant to its resolution.

It is well-settled that the arbitral process is a less formal procedure than litigation and is not intended to duplicate practice and procedure in the courts.

The advantage inherent in arbitration from the viewpoint of the parties, is that it allows for 'the final disposition, in a speedy, inexpensive, expeditious, and perhaps less formal manner, of the controversial differences between [them]'.
(citations omitted) 7/

By arguing that the Association is precluded from introducing new facts and/or arguments during an arbitration hearing, the Board is attempting to impose the more formal practice of the courts on the grievance process. 8/ The undersigned is unaware of any statutory or regulatory mandate which imposes a burden upon a grievant to marshal all factual and legal argument at a particular level of the grievance procedure. Thus, it appears to the undersigned that the Association's conduct, assuming the truth of the allegations, would not of itself constitute an unfair practice.

Moreover, assuming for the instant purposes that the Association is in violation of its contract with the Board, 9/ this violation of contract does not automatically translate into a violation of the Act. The Commission has found that contract violations by employers constitute a violation of the duty to negotiate in good faith because

7/ Kearny PBA Local #21 v. Town of Kearny, 81 NJ 208, 225 (1981) (Pashman, concurring); see also ELKOURI & ELKOURI, HOW ARBITRATION WORKS, 8-10 (3rd. ed. 1973).

8/ For example, the New Jersey Courts have consistently stated that arguments not raised below will not be considered on appeal. E.g., Ferraro v. Demetrakis, 167 NJ Super. 429, 431-432 (App. Div. 1979), certif. den. N.J. 290 (1979).

9/ The undersigned stresses that he is not making such a finding.

the attendant consequences of a contract breach by an employer almost always entail a violation of the statutory proscription preventing an employer from modifying existing rules governing working conditions without prior negotiations with the majority representative. N.J.S.A. 34:13A-5.3. See In re Borough of Palisades Park, D.U.P. No. 78-1, 3 NJPER 238 (1977). There is no statutory corollary governing unilateral changes in working conditions by majority representatives, if this is indeed possible. Accordingly, the undersigned fails to see a violation of §§ 5.4(b)(3).

For the above reasons, and for the reasons that follow, the undersigned concludes that the protections and remedies available to the employer under this type of claim must be contractual in nature.

The heart of the Board's Charge is that the Association has failed to comply with the terms of the negotiated grievance procedure. The Board may thus argue that the presentation of all specific facts relevant to a resolution of the dispute was a condition precedent to any duty to arbitrate. Issues of "procedural arbitrability" are decided by an arbitrator as a predicate to deciding the merits of the dispute. John Wiley & Sons v. Livingston, 376 US 543 (1964). Thus the Board is free to present any alleged violation of the grievance procedure by the Association to the arbitrator as a defense.

The Board has also alleged that the Association's refusal to reveal all the specific facts in a particular grievance results in surprise and puts the Board at a disadvantage in the arbitration hearing. However, the Board again has the means to protect itself. The

Board may request an adjournment to enable it to respond to any new evidence which is introduced.

It should be emphasized that whatever element of unfairness may be involved in the use of new evidence, it is largely mitigated or eliminated by the fact that arbitrators who accept newly submitted evidence will take any reasonable steps necessary to insure the opposite party adequate opportunity to respond thereto, regardless of whether the evidence had been withheld in good or bad faith. 10/

Thus, where new evidence has been introduced, the arbitrator may return the case to the parties for further consideration, or the arbitrator may adjourn the hearing to give the surprised party opportunity to respond to the new evidence. 11/

The Board has also alleged that the Association has violated N.J.S.A. 34:13A-5.4(b)(2) and (5). However, the Board has not alleged facts indicating that the Association has interfered with the Board's selection of its representatives for purposes of negotiation or the adjustment of grievances. In addition, the Board has not cited any Commission rules or regulations which the Association has allegedly violated. In re Madison Tp. Bd. of Ed., E.D. No. 76-8.


The undersigned has completed his review of all allegations contained in the instant amended charge. It does not appear that

10/ ELKOURI & ELKOURI, supra, at 258; see also American Arbitration Association, Voluntary Labor Arbitration Rules, Rule 23 (1979).

11/ While this procedure may result in increased costs to the Board, the Association will be equally burdened since both parties share the cost of arbitration.

these allegations, even if true, may constitute any unfair practice within the meaning of the Act. Accordingly, the undersigned declines to issue a complaint.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES


Carl Kurtzman, Director

DATED: August 20, 1982
Trenton, New Jersey