

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

In the Matter of

TOWNSHIP OF ROCKAWAY,

Respondent,

-and-

DOCKET NO. CO-83-37

FRATERNAL ORDER OF POLICE,  
LODGE NO. 31,

Charging Party.

SYNOPSIS

The Director of Unfair Practices declines to issue a complaint with respect to an unfair practice charge alleging that the employer, in failing to respond to a grievance and in failing to participate in the selection of an arbitrator, discriminated against employees to discourage them in the exercise of rights under the Act. The charging party did not allege facts indicating that the grievant was discriminated against in retaliation for his activities in support of an employee organization or because he filed a grievance, or for the exercise of any other protected activity under the Act.

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Appearances:

For the Respondent  
Wiley, Malehorn and Sirota  
(Fredric J. Sirota of counsel)

For the Charging Party  
Neal A. McCarthy, Secretary

REFUSAL TO ISSUE COMPLAINT

An Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") on August 20, 1982, by the Fraternal Order of Police, Lodge No. 31 (the "Charging Party") against the Township of Rockaway (the "Township") alleging that the Township 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"), specifically N.J.S.A. 34:13A-4.5(a) (3). <sup>1/</sup>

<sup>1/</sup> N.J.S.A. 34:13A-5.4(a) (3) prohibits public employers, their representatives and agents from: "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."

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. <sup>2/</sup> 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. <sup>3/</sup> The Commission's rules provide that the undersigned may decline to issue a complaint. <sup>4/</sup>

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

The Charging Party has filed the instant charge on behalf of a unit member who, assertedly, was injured in the line of duty and, as a result, has been unable to return to work. A grievance was generated alleging that the unit member was not accorded paid injury leave, in violation of the collective negotiations agreement between the PBA and the Township. The PBA claims that the Township failed

<sup>2/</sup> N.J.S.A. 34:13A5.4(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..."

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

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

to respond to the grievance at two levels, and has not responded to requests to designate an arbitrator under the binding arbitration mechanism of the Agreement.

The factual issues presented herein are similar to those presented in several previous matters wherein it has been claimed that an employer's failure to respond to a grievance at a particular level and/or failure to participate in the selection of an arbitrator is conduct violative of the duty to process grievances, and proscribed by N.J.S.A. 34:13A-5.4(a)(5). In such cases the undersigned has declined to issue a complaint since the self-effectuating nature of most contractual grievance/arbitration mechanisms provides for ex parte processing of grievances through arbitration notwithstanding the employer's non-participation. See In re State of New Jersey, D.U.P. No. 77-3, 2 NJPER 373 (1976) (employer's refusal to agree to submission of a particular issue to arbitration); In re City of Pleasantville, D.U.P. No. 78-2, 2 NJPER 372 (1976) (employer's failure to respond to grievance at various steps of grievance procedure); and In re Englewood Board of Education, E.D. No. 76-34, 2 NJPER 175 (1976) (employer's failure to participate in contractual arbitration proceedings). <sup>5/</sup>

<sup>5/</sup> In Englewood, supra, the Executive Director stated:

Except in circumstances involving atypical contractual provisions, a public employer's failure to participate in arbitration will not in any event forestall arbitration in the absence of an affirmative step by the public employer to restrain the arbitration proceeding. Contractual grievance and arbitration procedures generally and in the instant matter provide that a party dissatisfied with the outcome of the preliminary internal steps of the grievance procedure may

(continued)

Although the charging party has not alleged a violation of §5.4(a)(5) herein, its claim is that such conduct is violative of §5.4(a)(3). However, the charging party does not assert facts alleging that the grievant was discriminated against in retaliation for any activities on behalf of an employee organization or because he filed the grievance, or for the exercise of other activity protected by the Act. See N.J.S.A. 34:13A-5.3. Accordingly, the unfair practice charge is devoid of factual allegations which would support the maintenance of a §5.4(a)(3) action or of a §5.4(a)(5) allegation, if raised, and a complaint may not issue.

5/ (continued)

submit the grievance to arbitration. Generally, a public or private organization maintaining panels of arbitrators for such purposes--such as the Commission pursuant to N.J.A.C. 19:12-5.1 et seq, the New Jersey State Board of Mediation pursuant to N.J.A.C. 12:105-1.1 et seq, the American Arbitration Association pursuant to its private rules, and many others--is named in the contract as the vehicle for selecting an arbitrator. If no method is provided in the contract for selecting an arbitrator, the superior or county court will appoint an arbitrator in an action commenced pursuant to N.J.S.A. 2A:24-5.

The failure of either party to participate in the selection process normally will not foretell the process. Rather the selection will proceed on the basis of the preferences indicated by the participating party. (footnote deleted)

x x x

It is clear from the foregoing that the failure of a public employer to participate in arbitration proceedings--without anything else--will not preclude the employee organization from pursuing the arbitration to conclusion ex parte. Thus, the grievance will be "processed" to arbitration pursuant to the parties' contract notwithstanding the public employer's failure to take part in that process.

In the instant matter, the arbitration procedure in the collective agreement adopts the rules and procedures of the American Arbitration Association.

For the reasons stated above, it appears to the undersigned that the Commission's complaint issuance standard has not been met. Accordingly, the undersigned declines to issue a complaint herein.

BY ORDER OF THE DIRECTOR  
OF UNFAIR PRACTICES

  
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Carl Kurtzman Director

DATED: October 29, 1982  
Trenton, New Jersey