

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

In the Matter of

BLACKHORSE PIKE REGIONAL
BOARD OF EDUCATION,

Respondent,

-and-

DOCKET NO. CO-81-137

BLACKHORSE PIKE EDUCATION
ASSOCIATION,

Charging Party.

SYNOPSIS

The Director of Unfair Practices declines to issue a complaint with respect to an Unfair Practice Charge alleging that the employer refused to negotiate an agency shop proposal with the Charging Party. The Director finds that although, if the facts are true, an unfair practice may have been committed the circumstances involving this matter are such that formal litigation should not be instituted. The Charging Party requested negotiations when legislation allowing the negotiation of agency shop became effective, and sought inclusion of the agency shop provision in a currently effective agreement. The employer, according to the Charging Party, agreed to negotiate this subject for inclusion only in a successor agreement.

In response to the Charge, the employer indicated that it had directed its agents to now negotiate agency shop within the context of the current agreement and stated that its agents had already commenced these negotiations. This activity preceded the Commission's rulings of first impression that there was an obligation to immediately negotiate agency shop in the context of existing agreements, upon demand. Thus, the Board's violation of the Act, i.e., its initial refusal to negotiate was de minimis and occurred at a time when the applicability of the agency shop amendments was subject to question. There is little likelihood of repetition of its conduct in the future.

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Appearances:

For the Respondent
Wade & Friedman, P.A.
(John D. Wade of counsel)

For the Charging Party
Selikoff & Cohen, P.A.
(John Collins of counsel)

REFUSAL TO ISSUE COMPLAINT

An Unfair Practice was filed with the Public Employment Relations Commission (the "Commission") on October 28, 1980, as amended December 4, 1980, by the Blackhorse Pike Education Association (the "Association") against the Blackhorse Pike Regional Board of Education (the "Board"), alleging that the Board was engaging in an unfair practice 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-5.4(a)(1) and

(5). 1/ The Association, which is the exclusive representative of the Board's teaching staff, alleges that the Board refused to engage in negotiations with respect to including an "Agency Shop Clause" in the current contract covering employees in the negotiations unit.

Pursuant to N.J.A.C. 19:14-1.6 the undersigned assigned the Charge to a Commission staff agent for processing and an informal conference was convened. On June 10, 1981, the Association advised the assigned Commission staff agent that "although the agency shop issue is now being discussed at the bargaining table it is the Charging Party's position that Respondent willfully violated the Act for an extended period of time by refusing to negotiate and that an unfair practice should be found in the Respondent's actions during that period." Accordingly, the Association has declined to withdraw its unfair practice charge, although it concedes that the Board is now negotiating, and the matter is before the undersigned for the purpose of determining whether a formal complaint shall issue.

N.J.S.A. 34:13A-5.4(c) provides that "whenever it is charged that anyone has engaged or is engaging in any such unfair practice, the commission, or any designated agent thereof, shall

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. (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."

have authority to issue and cause to be served upon such parties a complaint ... " 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 to the director of unfair practices that the allegations of the charging party, if true, may constitute unfair practices on the part of the respondent, and that formal proceedings in respect thereto should be instituted in order to afford the parties an opportunity to litigate relevant and factual issues... " (emphasis added). N.J.A.C. 19:14-2.1. The Commission's rules provide that the undersigned may decline to issue a complaint. N.J.A.C. 19:14-2.3. In this regard, the Supreme Court, in Galloway Township Bd. of Ed., v. Galloway Township Education Ass'n., 78 N.J. 25 (1978) has stated:

... the determination of whether a charge is sufficiently meritorious to warrant the issuance of a complaint is made by PERC's Director of Unfair Practices. See N.J.A.C. 19:10-1.1(a)(11). Any unfair practice complaint issued includes a notice of hearing on the unfair practice complaint before P.E.R.C. N.J.S.A. 34:13A-5.4(c). To this point, PERC's role has been of a prosecutory nature. (footnote omitted).

Based upon the standard set forth by the Commission for complaint issuance, it would appear to the undersigned that a complaint should not issue in this matter for the following reasons.

On February 27, 1980, the Act was amended to provide that public employers and exclusive representatives shall negotiate

upon demand concerning the subject of requiring the payment of a representation fee (agency shop) to a majority representative by all non-member employees in a negotiations unit. This legislation became effective July 1, 1980. The Legislature was silent as to whether, upon the effective date of the law, an employer was obligated to reopen negotiations where the majority representative sought to negotiate the inclusion of an agency shop clause in a currently effective agreement.

On July 1, 1980, the Association and the Board were parties to a current agreement effective July 1, 1976 through July 30, 1981. On July 1, 1980, the Association wrote to the Board secretary advising that "the Association desires to negotiate an Agency Shop Clause in the current agreement between the Board and the Association." In letters attached to and made a part of the unfair practice charge, the Board secretary advised the Association's president that the Board would discuss the matter and on September 19, 1980, the Board secretary wrote to the Association president advising that "the Board indicated they would be happy to include the topic among those to be considered during sessions about to be scheduled for the purpose of reaching a successor to our present Agreement."

Thereafter, the Association filed the instant Unfair Practice Charge. The Charge, as amended, notes the Board's willingness to negotiate the Association's demand with respect to the successor agreement, and targets the Board's refusal to negotiate the demand for insertion into the current agreement as the claimed unfair practice.

In a reply to the Unfair Practice Charge, dated December 29, 1980, and provided to the Association, the Board stated "the Board understands its statutory mandate to negotiate the Agency Shop issue and remains ready to continue negotiations on the issue. The Board contends applicability to the current agreement or to a successor agreement is negotiable and has directed its team to negotiate over that issue and all other Agency Shop issues. In other words the Board has not placed any limiting factor on the negotiation of Agency Shop." (emphasis the Board's).

On March 10, 1981, the Commission issued a decision, In re Wayne Bd. of Ed, P.E.R.C. No. 81-106, 7 NJPER 151 (¶ 12061 1981), holding, as a matter of first impression, that the agency shop amendments did require negotiation, upon demand, with respect to the insertion of agency shop provisions in current collective negotiations agreements. Accordingly, it appears to the undersigned that the first part of the complaint issuance standard -- an unfair practice may have been committed -- has been met herein, assuming the truth of the factual allegations. However, the undersigned determines that formal proceedings with respect to the Charge and the opportunity to litigate legal and factual issues should not be instituted.

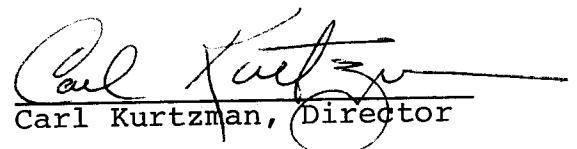
The undersigned has carefully considered the facts advanced by the Association. At the same time, the undersigned cannot ignore the undisputed statement by the Board that by December 29, 1980, it had already discussed the agency shop proposals of the Association at three negotiating sessions and that the Board's team was directed to negotiate over that issue in the context of the current agreement and the successor agree-

ment. It would appear that the Board's initial refusal to negotiate may have been a violation of the Act which occurred at a time when the applicability of the agency shop amendment to current agreements was subject to question and when no definitive case law was available to guide the Board. Given the Board's subsequent negotiations position, as expressed in the December 29 letter, it further appears that there is minimal likelihood of the occurrence of the aggrieved conduct by the Board in the future. Given the above, litigation of the Charge for the purposes of securing a technical order and a notice of posting for the benefit of employees is not appropriate. Based upon the above, it appears to the undersigned that the harm to public rights occasioned by the Board's initial refusal to negotiate in the context of this matter is de minimis and does not warrant the issuance of a complaint and the convening of an evidentiary hearing.

Subsequent to the filing of the Unfair Practice Charge, by letter dated July 8, 1981, the undersigned requested the Association to withdraw its Unfair Practice Charge and that in the absence of a withdrawal, or a statement of position setting forth reasons why a complaint should issue, the undersigned would decline to issue a complaint. The undersigned has not received a withdrawal of the Charge nor a reply to the July 8, 1981 letter.

Accordingly, for the above reasons, the undersigned declines to issue a complaint.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES


Carl Kurtzman, Director

DATED: July 23, 1981
Trenton, New Jersey