

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

In the Matter of

BOARD OF EDUCATION OF VOCATIONAL
SCHOOLS IN THE COUNTY OF ESSEX,

Respondent,

-and-

DOCKET NO. CO-78-80

ESSEX COUNCIL VOCATIONAL AND
TECHNICAL TEACHERS ASSOCIATION,

/ Charging Party.

SYNOPSIS

The Director of Unfair Practices declines to issue a complaint with respect to an Unfair Practice Charge alleging that the Board of Education has ignored an employee for all promotions and has failed to respond to a grievance. The Association contends that these actions are violations of N.J.S.A. 34:13A-5.4(a)(1) and (5). The Association stated in its Charge that the employee had better or substantially equal qualifications than other candidates for promotion and that a contractual seniority provision would therefore apply. The Director notes that the establishment of promotional qualifications as well as the assessment as to whether an individual meets the qualifications is a managerial prerogative. Inasmuch as the Association has not asserted that the employer had acknowledged that the individual met the promotional qualifications, the Director determines that the Charge essentially involves a dispute as to the assessment of qualifications. Therefore, since the assessment does not involve terms and conditions of employment a complaint under Subsection (a)(5) may not issue. As to the alleged failure to respond to the filing of a grievance, the Director finds, consistent with the policy of the Commission, that a failure to respond to a grievance at a given level of the grievance procedure is not, of itself, an unfair practice.

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Appearances:

For the Respondent

Richard M. Cignarella, First Assistant County Counsel

For the Charging Party

Rothbard, Harris & Oxfeld, Esqs.
(Sanford R. Oxfeld, of Counsel)

REFUSAL TO ISSUE COMPLAINT

An Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") on October 20, 1977, by the Essex County Vocational and Technical Teachers Association (the "Association") against the Board of Education of Vocational Schools in the County of Essex (the "Board") alleging that the 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., as amended (the "Act"), specifically

N.J.S.A. 34:13A-5.4(a)(1) and (5). 1/

The Association alleges that the Board has: (1) ignored Ms. Cole, a unit member for all promotions in violation of Article XIII, ¶ C.2 of the agreement between the parties dated July 1, 1976 through June 30, 1979; and (2) failed to respond to the Association's filing of a grievance on behalf of Ms. Cole.

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. 2/ 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

1/ These subsections prohibit 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."

2/ 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 named designated agent thereof..."

within the meaning of the Act. ^{3/} The Commission's rules provide that the undersigned may decline to issue a complaint. ^{4/}

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

The undersigned has carefully reviewed the Association's allegations. Regarding the first allegation, that "The Board continues to ignore Ms. Cole for all promotions," the Association points to a provision respecting promotions in its contract with the Board which states,

Promotions

In filling such vacancies, preference shall be given to qualified teachers already employed by the Board. When all other factors are substantially equal, seniority shall be a major factor.

The Association claims that, "Despite Ms. Cole's acknowledged ability and seniority others, less qualified and more junior, have received appointments." The Association claims that violations of § a(1) and a(5), supra, n.1, have occurred. Section a(5) provides that it is an unfair practice to refuse to negotiate in good faith with the majority representative respecting terms and conditions of employment. The Commission has determined, and the Appellate Division of the Superior Court has agreed, that the establishment of qualifications for promotion is not a term and

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

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

condition of employment which requires negotiation with a majority representative, but rather relates to a managerial prerogative.^{5/} It follows that the judgment as to whether an individual meets the qualifications for a particular position, or is more qualified than another candidate, is a prerogative of management. Therefore, a dispute as to the correctness of the judgment of the employer in assessing qualifications does not involve a subject which may be deemed a term and condition of employment.

The Association does not state a factual claim that the employer indicated that it had adjudged Ms. Cole's qualifications better or substantially equal to the qualifications of other candidates. The source of its statement that Ms. Cole has "acknowledged ability" is not identified; nor paranthetically does the term "ability" necessarily connote that a candidate is qualified. Likewise, its claim that less qualified individuals are being promoted is not supported by any factual assertion that the employer has adjudged those individuals less qualified. Accordingly, the undersigned must assume that the opinion expressed in the Charge as to qualifications is the opinion of the Association and disputes an assessment made by the employer. Inasmuch as this assessment does not involve a subject which is a term and condition of employment, a Complaint under § a(5) may not issue.

^{5/} In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 27 (1977), aff'g in part P.E.R.C. No. 76-27, 2 NJPER 143 (1976). See also In re Borough of Roselle, P.E.R.C. No. 76-29, 2 NJPER 142 (1976).

The second allegation of the Charge is a failure of the Board's Superintendent to respond to the filing of a grievance concerning this matter. The Commission has held that "as a matter of law a public employer's failure to participate in contractual arbitration proceedings does not, on the facts alleged in most instances, constitute a refusal to process grievances within the meaning of N.J.S.A. 34:13A-5.4(a)(5)." ^{8/} The Commission's determination is based on the premise that in the normal course, the failure of the public employer to respond to the grievance at any given level is presumed to be a rejection of a grievance and does not prevent the aggrieved party from proceeding to the next step of the grievance procedure. The undersigned notes that the parties' grievance procedure expressly provides in item 9 that if the Superintendent fails to act respecting a grievance, an appeal may be taken to the Board.

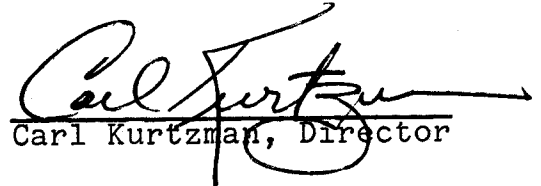
There is no allegation in the Charge that the employer has taken an affirmative action which would prevent the Association from processing the grievance pursuant to the parties' grievance procedure. Absent such allegation, the Charge fails to allege facts which, if true, may constitute a § a(5) violation of a refusal to process grievances.

^{8/} In re Englewood Bd. of Ed. & Englewood Teachers Association, E.D. No. 76-34, 2 NJPER 175 (1976). See also In re City of Pleasantville & Mainland Local No. 77, PBA, D.U.P. No. 77-2, 2 NJPER 372; In re State of New Jersey & Council of New Jersey State College Locals, NJSFT/AFT/AFL-CIO, D.U.P. No. 77-3, 2 NJPER 373 (1976).

Inasmuch as the Charging Party's § a(1) allegations may only be considered as derivative of its § a(5) allegations, these too have no basis.

Therefore, for the reasons set forth above, the undersigned declines to issue a Complaint.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES


Carl Kurtzman, Director

DATED: May 31, 1978
Trenton, New Jersey