

D.U.P. NO. 85-23

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

In the Matter of

WILLINGBORO EDUCATION ASSOCIATION,

Respondent,

-and-

DOCKET NO. CE-85-7

WILLINGBORO BOARD OF EDUCATION,

Charging Party.

SYNOPSIS

The Director of Unfair Practices declines to issue a complaint on the instant charge brought by the Willingboro Board of Education, alleging violations of subsections (b)(1), (2), (3) and (4) of the Act by the Willingboro Education Association. The Board alleged that the Association had violated the Act when it sought to arbitrate the grievance of an employee whose title had been removed from the negotiations unit approximately three months after the grievance had been filed. The Director found that during the time that the disputed position was included in the unit, the employee filling same was entitled to all the rights and benefits conferred upon the employees covered by the contract. Because the employee is not currently covered by the contract does not mean that contract rights previously accrued are now forfeited.

Further, the Director notes that inasmuch as the unit was clarified to exclude the disputed title after the grievance had already been filed, and because the unit clarification process is prospective -- not retroactive -- in nature, then the Association's filing and arbitration of a grievance on behalf of one of its unit members cannot be an unfair practice.

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Appearances:

For the Respondent  
Selikoff & Cohen, Esqs.  
(Joel S. Selikoff of counsel)

For the Charging Party  
Barbour & Costa, Esqs.  
(John J. Barbour of counsel)

REFUSAL TO ISSUE COMPLAINT

On September 12, 1984, the Willingboro Board of Education ("Board") filed an unfair practice charge and a request for interim relief with the Public Employment Relations Commission alleging that the Willingboro Education Association ("Association") had violated subsections 5.4(b)(1), (2), (3) and (4) of the New Jersey Employer-Employee Relations Act N.J.S.A. 34:13A-1 et seq. ("Act"), <sup>1/</sup> by attempting to arbitrate the grievance of an

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<sup>1/</sup> These subsections prohibits public employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act. (2) Interfering with,  
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employee, James Vance, whose title, Director of Vocational Education, was removed from the unit approximately three months after the grievance had been filed.<sup>2/</sup>

N.J.S.A. 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>3/</sup> The Commission has delegated its authority to issue complaints to me and has established a standard upon which an unfair practice complaint may be issued. The 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, and that formal

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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. (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

<sup>2/</sup> The Board's request to restrain the arbitration was denied by Commission Designee, Arnold H. Zudick. See In re Willingboro Education Association, I.R. No. 85-9, NJPER (Para. 1985).

<sup>3/</sup> 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 charged and including a notice of hearing containing the date and place of hearing before the Commission or any designated agent thereof..."

proceedings in respect thereto should be instituted in order to afford the parties an opportunity to litigate relevant legal and factual issues.<sup>4/</sup> The Commission's rules provide that the undersigned may decline to issue a complaint.<sup>5/</sup>

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

On December 10, 1979, the Board filed a Petition for Clarification of Unit seeking clarification of a unit comprised as follows:

#### ARTICLE I - RECOGNITION

A. The Board recognizes the Association as the exclusive representative of the personnel hereinafter listed for the purpose of collective negotiation of salaries and the terms and conditions of employment pursuant to Chapter 123 P.L. 1974: (1) classroom teachers, nurses and librarians, (2) ten and twelve month counselors, social workers, speech therapists and learning disability teacher-consultants, (3) the district reading supervisor, (4) high school and junior high school guidance directors, (5) ten and twelve month psychologists, (6) certificated T.V. professional personnel and any equivalent positions which, after the execution hereof, may be created by the Board.

More specifically, the Board sought to remove the title of Director of Vocational Education from the unit because of its supervisory responsibilities.

Hearings were conducted in late 1981, and a Hearing Officer's report recommending the removal of the Director's title

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

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

was issued on April 14, 1984. The Commission in In re Willingboro Bd. of Ed., P.E.R.C. No. 84-146, 10 NJPER 389 (Para. 15179 1984), adopted the Hearing Officer's recommendation on June 14, 1984, thereby removing the Director from the Association's unit.

Prior to the issuance of the Hearing Officer's report, on March 25, 1984, the Association filed a grievance on behalf of Director James Vance alleging that he had been required to work beyond the 7 1/4 hours as provided for in Article V of the parties' collective negotiations agreement. The grievance sought extra compensation for the Director, due to his having performed the assigned work. On April 2, 1984, the Assistant Superintendent denied the grievance at step one. On April 9, 1984, the Superintendent denied the grievance at step two. The Association filed for binding arbitration on May 3, 1984, and in its proposed remedy sought an order that Vance not be required to work beyond 7 1/4 hours per day and that he be retroactively compensated for those time periods in which he was required to work beyond his regular workday.

The Board notes that the Director of Vocational Education position was determined to be a supervisory position and thus warranted removal from the extant unit. The Board argues that because the Director position is no longer included in the Association's unit, it is an unfair practice for the Association to continue to press a grievance involving that position. I disagree.

While Mr. Vance's position was included in the Association's unit, he was entitled to all the rights and benefits

conferred to those employees covered under the contract. Simply because he is now no longer covered by the agreement does not mean that he must retroactively forfeit those rights and benefits which may have accrued to him while he was covered by the contract. Similarly the union's obligation to represent a unit member does not metamorphose into an unfair practice. The Association might very well be remiss in its duty of fair representation if it failed to enforce the contract as to those rights. A union must represent fairly the interest of all unit members in the negotiation, administration and enforcement of its collective negotiation agreement, and this duty extends to all persons within the negotiations unit. See Saginario v. Attorney General State of New Jersey, 87 N.J. 480 (1981), In re Lawrence Twp. P.B.A. Local 199 v. Burns et al, P.E.R.C. No. 84-76, 10 NJPER 41 (Para 25023 1983), In re Union City v. F.M.B.A. Local 13, P.E.R.C. No. 82-65, 8 NJPER 98 (Para 13040 2982) and Electrical Workers (IBEW) v. Foust, 572 F.2d 710, 97 LRRM 3040 (CA 10 1978), 442 U.S. 42, 101 LRRM 2365 (1979). See also, N.J.S.A. 34:13A-5.3.

In In re Clearview Regional Bd. of Ed., D.R. No. 78-2, 3 NJPER 248 (1977) the Director of Representation established guidelines as to when an employee is effectively removed from a unit as a result of a decision in a unit clarification proceeding. If an employee is removed from a unit due to supervisory status or conflict of interest, that employee is removed from the unit upon the expiration of the collective agreement which was in effect when the clarification of unit petition was filed. Where, as here, the

agreement in effect when the Petition was filed expires before the Commission issues its decision, the removal is effective with the issuance of the decision, but not sooner. Here, the collective negotiations agreement in effect when the Petition was filed had expired. Thus, when the Commission decision was issued on June 14, 1984, Vance was effectively removed from the unit on that date.

There is no question that Vance was a member of the Association's negotiation unit at the time his grievance was filed, and that the remedy sought by the Association only pertains to the period of time that he was within the unit. The key elements here -- the alleged accrual of Vance's contractual rights, the Association's filing of a grievance and the Association's initiation of arbitration -- all occurred before the Director position was removed from the unit.<sup>6/</sup> In this context, the Association's attempt to arbitrate a grievance filed on behalf of one of its unit members cannot be an unfair practice.<sup>7/</sup>

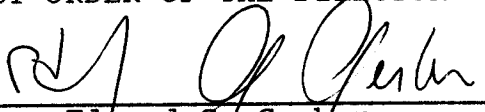
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<sup>6/</sup> It is also important to note that when the Association filed the grievance, it was not solely for the purpose of protecting Vance's interests, but more significantly, the interests of the entire unit. "The individual employee has basically a purely personal interest in the contract because the terms and conditions of his employment are governed thereby. The union has a significantly broader interest in the contract as the unique representational obligation to defend its integrity." Fairlawn Bd. of Ed. v. Fairlawn Ed. Assn., 174 N.J. Super. 554, 559 (1980).

<sup>7/</sup> A distinction may readily be drawn between this fact chronology -- where all of the crucial events occurred prior to the removal of the position from the unit -- and a situation where an employee representative seeks to negotiate  
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For the reasons stated above, I decline to issue a complaint.

BY ORDER OF THE DIRECTOR

  
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Edmund G. Gerber

DATED: April 24, 1985  
Trenton, New Jersey

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for or create new contractual rights beyond the date of removal from the unit. This determination does not address the circumstance wherein a grievance arises, is filed and arbitration is initiated after the position is removed from the unit.