

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

In the Matter of
BOROUGH OF PALISADES PARK,
Respondent,

-and-

Docket No. CI-76-25

FRANK C. PALLOTTA,
Charging Party.

SYNOPSIS

The Director of Unfair Practices declines to issue a complaint with respect to an unfair practice charge filed by an individual who has claimed that his employer committed various unfair practices under the New Jersey Employer-Employee Relations Act relating to events surrounding his layoff from public employment. Most of the claims of unfair practices involve alleged violations of a contract between the employer and the individual's collective negotiations representative. The Charging Party alleges violations of N.J.S.A. 34:13A-5.4(a)(1), (3), (5), and (7).

The Director refuses to issue a Complaint with respect to general allegations of violations of N.J.S.A. 34:13A-5.4(a)(1), (3), and (7) since the Charging Party did not allege that he participated in any of the protected activities which subsections a(1) and a(3) are designed to protect, and since he did not specify any Commission rule to support a claim of a subsection a(7) violation.

While the Charging Party alleges that his employer has not adhered to various contract provisions concerning his layoff, the gravamen of the Charge is that he was not recalled to his position pursuant to the terms of the contract. The Charging Party concedes, however, that a "new agreement" was entered into by his employer and his union after these parties met with respect to the recall issue. Thus, no a(5) violation occurred inasmuch as the employer satisfied its responsibility under the Act to negotiate with the majority representative. Similarly, the Director refuses to issue a Complaint regarding the Charging Party's allegation that the employer violated the Act in its processing of a grievance relating to him, as it was conceded that the employer met with the majority representative pursuant to the contract requirements.

The Director also refuses to issue a Complaint with respect to claims that the employer violated the Sunshine Law and Veterans Tenure Act. The Charging Party's claims are not violations of the Employer-Employee Relations Act. In addition, the Director declines to issue a Complaint involving a claim of unfair practice which factually arose prior to six months of the filing of the Charge.

The Director, however, remands for processing certain allegations relating to claimed violations in order to determine whether they have been resolved through the parties' agreement or through a court proceeding involving related issues.

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Appearances:

For the Borough of Palisades Park,
Edwin Eastwood, Esq.

For Frank C. Pallotta,
Joseph R. Marinielle, Esq.

REFUSAL TO ISSUE COMPLAINT

An Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") on May 14, 1976, by Frank C. Pallotta (the "Charging Party") against the Borough of Palisades Park (the "Borough") alleging that the Borough was in violation of several of the unfair practice provisions of the New Jersey Employer-Employee Relations Act (the "Act"), specifically N.J.S.A. 34:13A-5.4(a)(1), (3), (5) and (7) (hereinafter referred to as section (a)(1), (3), (5) and (7) of the Act.)^{1/}

Mr. Pallotta's charge sets forth numerous allegations which either individually or collectively are alleged to constitute violations of the sub-

^{1/} These subsections prohibit public employers from (1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act...(3) 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...(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...(7) Violating any of the rules and regulations established by the commission.

sections previously set forth. The Charging Party maintains that the Borough has breached several provisions of the collective negotiations agreement between the Borough and Teamsters Local No. 97 of New Jersey (the "Union") which is the majority representative of the employees including Mr. Pallotta.

The charges in a summarized form are as follows:

1. That the Borough discharged the Charging Party without proper notice and without regard to job classification seniority as set forth in Article XVIII sec. 18-3 of the agreement.

2. That the Borough failed and refused to notify the Union of its intention to remove employees from the Borough's payroll as set forth in Article 1, Sec. 1-3 of the agreement.

3. That the Borough failed and refused to provide the Union with a seniority list of employees by classification as set forth in Article XVIII, Section 18-5 of the agreement.

4. That the Borough failed and refused to adhere to proper grievance procedures as set forth in Article XVI, Section 16-2 of the agreement.

5. That the Borough failed and refused to provide vacation days and a "birthday" holiday in accordance with Article III, Section 3-3, and Article IV of the agreement.

6. That the Borough failed and refused to follow the requirements of the Sunshine Law.

7. That the Borough failed and refused to negotiate in good faith.

8. That the Borough failed and refused to follow the requirements of the Veterans Tenure Act, specifically that a veteran cannot be removed for political reasons.

The Charging Party is seeking a Commission decision directing the Borough to reinstate him to his previous position, and directing the Borough

to give him back pay for the time lost between the date of discharge and the date of reinstatement.

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 within the meaning of the Act.^{3/}

The facts as alleged in the instant matter indicate that Mr. Pallotta was hired on December 22, 1974 as a driver in the sanitation department, and was laid off on or about February 20, 1976 along with other employees apparently for economic reasons. The major issue of the instant matter apparently occurred when some of the laid off employees were due to be recalled. The Charging Party argues that the contract between the parties mandated that the last person hired in the job classification should be the first employee recalled, which meant that persons with less unit-wide seniority could be recalled

^{2/} N.J.S.A. 34:13A-5.4(c) provides in pertinent part: "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...."

^{3/} N.J.A.C. 19:14-2.1 provides in pertinent part: "After a charge has been filed and processed, if it appears to the Commission or its named designee 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 legal and factual issues, the Commission or its named designee shall issue and cause to be served on all parties a formal complaint including a notice of hearing before a hearing examiner at a stated time and place."

before recalling more senior employees.^{4/} Mr. Pallotta maintains that had the contractual provision been followed, he would have been recalled to his position instead of an employee from another classification being assigned to his job. However, he alleges that the Borough and the Union pursuant to a meeting relating to a group grievance filed with regard to this subject reached a "new agreement" that recall should be based upon total seniority, which meant that employees with more seniority would be recalled first regardless of classification.

The Charging Party does not allege that the Borough discharged, laid off, or discriminated against him because of his involvement in, or his refusal to become involved in union activities or protected activities. In fact, the thrust of his charge is that the Borough allegedly failed to abide by various contractual provisions of the existing collective negotiations agreement between the Borough and the Union, and that the manner in which the "new agreement" was entered into raises questions as to whether his previously filed grievance was handled "above board."

For the reasons hereinafter enumerated the alleged violations of the Act as asserted by the Charging Party, even if true, do not constitute unfair practices within the meaning of the Act. A complaint based upon the (a)(7) allegations may not be issued inasmuch as the Charging Party has not alleged the specific rule of the Commission claimed to be violated^{5/} and, in fact, has not specifically asserted that the Borough violated any rules of this Commission.^{6/}

^{4/} Article XVIII, Section 18-3 of the agreement between the Borough and the Teamsters is as follows:

"In the event of layoffs and rehiring, the last person hired in the job classification affected shall be the first to be recalled in accordance with his seniority in his classification, provided the more senior employee is able to do the available work in a satisfactory manner."

^{5/} See In re Madison Township Bd. of Educ., E.D. No. 76-8 (1975).

^{6/} Moreover, the undersigned is not able to identify which rule of the Commission may have been violated by the Respondent.

Secondly, the undersigned concludes that the Section (a)(3) aspects of the Charge must fall insofar as the Charging Party has not asserted a claim that the Borough has discriminated in his terms and conditions of employment because of an intent to encourage or discourage his exercise of protected activities granted by the Act.^{7/} Thus, while the Charging Party asserts that he was denied certain vacation benefits, it is clear that he relies not upon a claim of having been discriminated against for the exercise of protected rights under the Act but rather upon a claim of entitlement to certain contractual benefits provided under the contract. Accordingly, at best, the allegations would set forth a claimed (a)(5) violation.^{8/} Similarly, in the absence of a specific assertion that the Charging Party has been interfered with, restrained, or coerced by the employer due to his exercise of protected rights under the Act, the Charging Party's claimed (a)(1) violation does not stand independently but rather must exist, if at all, as derivative of the claimed (a)(5) violation. In conclusion, the undersigned finds that the Section (a)(3) and (a)(7) allegations are not supported by the contents of the Charge, that the Section (a)(1) aspects of the Charge are dependent on the Section (a)(5) aspects of the Charge, and therefore only a Section (a)(5) allegation and possible derivative (a)(1) violation is before the undersigned for consideration as to the issuance of Complaint herein.

As hereinabove discussed, the criteria used to determine whether a Complaint should issue is whether the allegations, if true, would constitute a violation of the Act. As set forth in Section (a)(5), supra, note 1, an

^{7/} N.J.S.A. 34:13A-5.3 provides: "Except as hereinafter provided, public employees shall have, and shall be protected in the exercise of, the right, free and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity...."

^{8/} The Commission does not view its role as the enforcer of collective negotiations agreements. Such a matter is appropriately the concern of an arbitrator, or alternatively the courts upon a suit for contract enforcement. In certain limited situations where a contract has been breached, the Commission will find that such a breach has also constituted a statutorily prohibited unilateral change in terms and conditions of employment without prior negotiations and thereby find that an unfair practice has occurred. See In re Piscataway Twp. Board of Education, P.E.R.C. No. 77-65, 3 NJPER ____ (1977).

employer is prohibited from "refusing to negotiate in good faith with a majority representative of employees...." (emphasis added). The subsection is designed to require an employer to negotiate with the collectively chosen majority representative as the exclusive representative of the employees concerning employees' terms and conditions of employment and not with individual members of the bargaining unit.^{9/} More specifically, N.J.S.A. 34:13A-5.3 provides:

"Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances and terms and conditions of employment."

Thus, if an unfair practice pursuant to Section (a)(5) is to be found herein, it must be predicated upon the assertion of facts which, if true, would indicate that the Borough has violated its statutory responsibility to negotiate with the majority representative with respect to proposed changes of rules governing working conditions or with respect to grievances and terms and conditions of employment.

To the contrary, the Charging Party's own Statement of the Charge indicates that the Borough and the majority representative negotiated with respect to the claimed contractual/statutory violation concerning recall rights. The Charging Party states that the Borough and the Union met with respect to a group grievance filed in regard to recall, and emerged with an agreed understanding providing for recall based on one seniority list for all employees. Thus, even assuming that the Borough has unilaterally changed Charging Party's terms and conditions of employment, the Borough fulfilled any negotiations responsibilities to the majority representative by meeting and negotiating with the majority representative in regard to this issue and by reaching agreement with the majority representative with respect to the resolution of the grievance that was filed by the Union.

^{9/} See Lullo v. International Association of Fire Fighters, 55 N.J. 409 (1970).

It is significant that the Union has not filed a charge against the Borough. Nor has it joined or concurred in the instant unfair practice charge. Additionally, it is also significant that the Charging Party has not filed a charge against the Union. N.J.S.A. 34:13A-5.3 requires that:

"A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership."

Therefore, it is clear that the Charging Party has not alleged that either the Borough or the Union have acted so as to deprive the Charging Party of his rights under the Act, guaranteed by the above provision.

Accordingly, inasmuch as the allegations of the Charge concede that the Borough has met its responsibilities to negotiate with respect to recall with the Union, and as no discrimination with respect to protected activities is alleged, the undersigned refuses to issue a Complaint on these aspects of the Charge.

Additionally, the matters concerning alleged violations of the Sunshine Law and Veterans Tenure Act, as set forth by the Charging Party, do not constitute violations of the Act.

The Charging Party also alleges that on his birthday, May 8, 1975, the Borough failed to provide him with one additional holiday or equivalent holiday pay as required by the contract. The instant unfair practice Charge was filed on May 14, 1976. Accordingly, and pursuant to N.J.S.A. 34:13A-5.4(c), an unfair practice complaint may not issue insofar as the claimed violation occurred prior to six months before the filing of the Charge.

Charging Party also alleges that the Borough failed to adhere to proper grievance procedures incorporated in Article XVI, Sec. 16-2 of the contract, and cites the contract provision that the employer and the Union Grievance Committee

meet "with the object of settling the problem within seven (7) calendar days" after failing to resolve a grievance at step 2. However, Charging Party admits that "a meeting was held in accordance with the above-stated provision of the Agreement." It thus appears by the Charging Party's own admission that the Borough has met its obligation to process grievances under the contract and pursuant to its statutory responsibility of Section a(5) to process grievances through the majority representative. The undersigned notes that Article XVI, Sec. 16-3 of the contract, which is attached to and made a part of the Charge, allows a unit member to process his own grievance. Charging Party has not alleged that he filed an individual grievance or that he was prevented from filing his own grievance. Accordingly, inasmuch as the Charging Party confines his Charge to the Borough's obligation to the majority representative while conceding that these responsibilities were met, the undersigned refuses to issue a Complaint on this allegation of the Charge.

There remains outstanding the allegations of the Charge that the Borough has violated the Act by failing to provide the Union, pursuant to a non-contractual obligation, with a seniority list and a notice of Charging Party's removal from the payroll. It is also alleged that the Borough has violated the Act by failing to provide Charging Party with certain vacation benefits, as provided in the contract. The undersigned, however, declines to issue a Complaint at this time with respect to these allegations. The Commission has been advised that these matters are currently the subject of a Complaint filed in the Superior Court of New Jersey.^{10/} These matters may have been already resolved by judicial resolution, or by agreement of the parties. For this reason, the undersigned

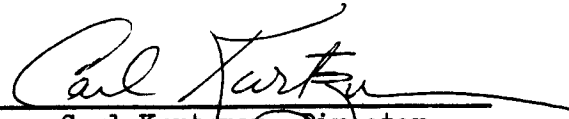
^{10/} The Commission has adopted a deferral to arbitration policy which is applicable in those cases where it is reasonably probable that the underlying issues of an Unfair Practice Charge may be adjudicated through a binding arbitration mechanism. Given the preference of the Commission not to act as the enforcer of contracts, and the universally accepted principle that binding arbitration mechanisms or suits for contract enforcement are the appropriate means to resolve allegations of contract violation, the under-

(continued)

shall direct that an exploratory conference pursuant to N.J.A.C. 19:14-1.6 be convened to ascertain the current status of the remaining issues.

Accordingly, for the reasons stated above, the undersigned declines to issue a Complaint with respect to the Section a(3) and a(7) allegations of the Charge; the Section a(5) and a(1) allegations relating to recall, "birthday" holiday, and grievance processing; and allegations of a violation of the Veterans Tenure Act and the Sunshine Law. An exploratory conference with respect to the matters relating to notice of discharge, provision of seniority list, and vacation benefits shall be scheduled forthwith by staff member Charles A. Tadduni.

BY ORDER OF THE DIRECTOR OF
UNFAIR PRACTICE PROCEEDINGS



Carl Kurtzman, Director
Unfair Practice Proceedings

DATED: July 21, 1977
Trenton, New Jersey

10/ (continued) signed notes that the Charging Party's Superior Court complaint, and not the invocation of the unfair practice provisions of the Act, is the preferred method of obtaining the relief which Charging Party requests. It is, at this time, questionable whether the Commission may order reinstatement and back pay in an a(5) situation. See Galloway Twp. Board of Education v. Galloway Twp. Assn. of Educational Sec'ys, 149 N.J. Super. 346 (1977). Petitions for Certification relating, inter alia, to these issues have been filed with the Supreme Court.