

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

In the Matter of

NEW JERSEY TURNPIKE AUTHORITY  
AND NEW JERSEY TURNPIKE EMPLOYEES  
UNION, LOCAL 194, I.F.P.T.E., AFL-CIO,

Respondents,

-and-

DOCKET NO. CI-79-31

JEFFREY BEALL,

Charging Party.

SYNOPSIS

The Director of Unfair Practices declines to issue a complaint with respect to the Charging Party's allegations that the employer improperly discharged the Charging Party without just cause and that both the employer and the Charging Party's majority representative refused to submit the Charging Party's grievance relating to his discharge to arbitration. The Director first notes that the Charge against the majority representative was not timely filed. The Director, after an examination of the issues relating to claims that an employer has failed to negotiate in good faith with a majority representative or refused to process grievances presented by a majority representative, concludes that an individual may not maintain an unfair practice proceeding against a public employer pursuant to N.J.S.A. 34:13A-5.4(a)(5) (refusing to negotiate in good faith with a majority representative) without simultaneously maintaining an Unfair Practice Charge alleging unfair representation against the majority representative. Since the Charging Party could not maintain an action against the majority representative because of the late filing of the Charge, the Director dismisses the entirety of the Unfair Practice Charge.

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Appearances:

For the Respondent Public Employer  
Bernard Reilly, Esq.

For the Respondent Employee Representative  
Francis A. Forst, Business Manager

For the Charging Party  
Barbour & Costa  
(John T. Barbour, of Counsel)

REFUSAL TO ISSUE COMPLAINT

An Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") on November 24, 1978, by Jeffrey Beall (the "Charging Party") against the New Jersey Turnpike Authority (the "Authority") and New Jersey Turnpike Employees Union, Local 194, I.F.P.T.E., AFL-CIO ("Local 194") alleging that the Respondent Authority 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-5.4(a)(1), (2), (3), (4) and (5) <sup>1/</sup> and that the Respondent Local 194 was engaging in conduct violative of N.J.S.A. 34:13A-5.4(b)(1) and (5). <sup>2/</sup>

Generally, the Charging Party states that he was wrongfully discharged from employment by the Authority and that the Authority and Local 194 refused his request to present his grievance to binding arbitration.

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

1/ These subsections prohibit employers, their representatives and agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (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. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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/ These subsections prohibit 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. (5) Violating any of the rules and regulations of the Commission."

to issue a complaint stating the unfair practice charge. <sup>3/</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>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 a complaint may not issue.

The Charging Party states that he was employed as a maintenance man by the Authority until he was "wrongfully terminated" on December 27, 1977. He alleges that his termination was "unreasonable, capricious and without just cause and violation of the charging party's contractual [sic] rights." Charging Party filed a grievance and requested that his discharge be submitted to binding arbitration pursuant to the collective negotiations agreement between the Authority and Local 194, his majority

<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 and including a notice of hearing containing the date and place of hearing before the commission or any designated agent thereof ... "

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

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

representative. He asserts that both the Authority and Local 194 refused to submit the grievance to binding arbitration and refused to permit him to be represented by counsel of his own choice. The Charging Party claims that the Authority "exerted wrongful influence and pressure upon [Local 194] to not pursue the issue to arbitration." He also traces the Authority's determination to discharge him, to harassment and discipline arising from his informing the Authority "several years ago" of wrongful activities of a foreman.

On April 10, 1978, the Charging Party herein filed a civil action complaint with the Superior Court Law Division against the Authority with respect to the claimed wrongful discharge. A complaint was not filed against Local 194. Although the Authority's answer to the complaint raised an affirmative defense that the Charging Party's "claim is as a result of actions of Local 194," Local 194 was not impleaded as defendant to the complaint. On August 14, 1978, the Authority moved to dismiss the complaint or to transfer the complaint to the Commission, and on September 18, 1978, the proceeding was transferred to the Commission with the consent of the parties. The court's order notes that the Authority "does not waive any defenses it may have based on timeliness or alleged service out of time or failure to join an indispensable party."

Accordingly, the Unfair Practice Charge herein was filed on November 24, 1978, and it appears to be the first instance of the filing of an action against Local 194. The papers submitted

before the court do not contain any reference to a notification upon Local 194 that an action was proceeding against the Authority or that Local 194 might at some point become impleaded as a defendant thereto. The undersigned concludes based upon the documents presented to the Commission that Local 194 was first notified of the matters related to the instant proceeding on November 24, 1978, with the filing of the instant Unfair Practice Charge.

Before proceeding with the analysis of the issues involved in the Charge herein, the undersigned shall first address the issue as to the timeliness of the instant Unfair Practice Charge. N.J.S.A. 34:13A-5.4(c) provides:

that no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the 6 months period shall be computed from the day he was no longer so prevented.

The instant Charge, in the light construed most favorably to the Charging Party, arises from the refusal of the Respondents to submit the Charging Party's grievance concerning his termination to binding arbitration. While the Charge does not specify the precise date on which the Charging Party became apprised of such refusal, the parties herein have informed the Commission, during the processing of this matter, that the decision to refuse to proceed to arbitration was made on February 17, 1978. The Charging

Party, in April 1978, commenced an action against the Authority in Superior Court. In accordance with the determination of the Supreme Court in New Jersey Turnpike Authority and New Jersey Turnpike Employees Union, Local 194, I.F.P.T.E., AFL-CIO v. Kaczmarek, 77 N.J. 329 (1978) and Court Rule 1:33-4, the undersigned determines that by virtue of the Superior Court's transfer of the proceeding against the authority to the Commission "the action shall then be proceeded upon as if it had been originally commenced in that court or agency." Therefore, the instant Charge against the Authority is timely filed. However, the proceeding in Superior Court did not affect the limitations period from running with respect to Local 194, since Local 194 was not made a party to the Superior Court action and did not have notice of any claim against it until November 24, 1978, approximately nine months from the date of the unfair practice alleged against Local 194. Accordingly, the undersigned determines that the instant Unfair Practices Charge may not be maintained against Local 194.

The Charging Party, in his charge against the Authority, has not stated facts which may support any claim that he was engaged in any protected activity set forth in §5.3 of the Act. Subsection 5.3 protects employees in the exercise of activities on behalf of employee organizations and alternatively protects employees who choose to refrain from such activities. The Charging Party has not alleged that he was engaged in such conduct. Further, §5.3 protects employees in the exercise of certain other conduct such as the filing of grievances through a majority representative. The undersigned's

review of the Charge does not indicate that the Charging Party claims interference or discrimination in this regard. Likewise, Charging Party's claim of harassment and discipline arising from having informed the Authority of the wrongful activities of a foreman several years back is not supported by facts which would establish that he was interfered with or discriminated against because of the protected filing of a grievance. Accordingly, the facts alleged by the Charging Party, if true, do not support a claim of an independent §5.4(a)(1) violation or a §5.4(a)(3) violation based on discrimination because an employee has exercised protected rights.

N.J.S.A. 34:13A-5.4(a)(2) prohibits employers from dominating or interfering with the formation, existence or administration of any employee organization. The facts of the Charge do not support a claim under this subsection. The Charging Party's claim that the Authority exerted "wrongful influence and pressure" upon Local 194 not to pursue the issue to arbitration is conclusory and not supported by any factual proffer. <sup>6/</sup>

Additionally, there are no facts alleged in the Charge to support a claimed violation of §5.4(a)(4). The facts stated in the Charge do not support a claim that the Charging Party was discharged because he signed or filed an affidavit, petition or

<sup>6/</sup> Assuming for the present purpose that the Charging Party herein could, upon proper factual submission, maintain a §5.4(a)(2) claim, under the circumstances herein, the issuance of a complaint under §5.4(a)(2) would be controlled by the analysis relating to the §5.4(a)(5) claim, infra.



complaint or had given any information or testimony under this Act. <sup>7/</sup>

Therefore, for the above reasons, the undersigned determines that the facts of the Charge against the Authority, if true, may not constitute a violation of §5.4(a)(1) independently, §§5.4(a)(2), (3), and (4).

Accordingly, there remains for consideration before the undersigned the allegation under §5.4(a)(5) that the Authority has "refuse[d] to process grievances presented by the majority representative" by allegedly altering the just cause standard for discharge in the collective negotiations agreement and by refusing to arbitrate Charging Party's grievance.

The Commission, in numerous decisions, has determined that a public employer violates §5.4(a)(5) when it unilaterally alters contractual provisions governing terms and conditions of employment. The basis for such findings has been that a unilateral alteration by an employer of contractual terms and conditions of employment without prior negotiation with the majority representative is violative of that portion of §5.3 which mandates that:

proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

<sup>7/</sup> It may be that the Charging Party has alleged the §5.4(a)(4) claim due to his alleged complaint "against a foreman." This conduct, however, if actionable at all, is actionable as retaliation for the assertion of a protected right and has been analyzed above in the consideration of the claimed violations under §5.4(a)(1) and (3).

Therefore, the Commission has found that a violation of the obligations contained in §5.3 constitutes the prohibited conduct outlined in §5.4(a)(5) of refusing to negotiate in good faith with a majority representative of employees in an appropriate unit. Significantly, the Commission determinations have arisen solely with respect to Charges filed by majority representatives who have sought to remedy the violation of their exclusive negotiations rights. The instant proceeding raises the issue of whether an individual has standing to assert that the employer is refusing to negotiate in good faith with a majority representative, and, in effect, may assert the right of a majority representative to demand that there be prior negotiations concerning any alteration of contractual provisions.

In a recent decision of the Maryland Court of Appeals, Offutt v. Montgomery County Board of Education, et al., <sup>8/</sup> the Maryland Court held that a claim of refusal to negotiate in good faith against the public employer may not be maintained by individual employees unless the employees are simultaneously maintaining an action against the majority representative for a breach of the duty to provide fair representation to the employees. While the Court was specifically presented with a factual circumstance arising from the renegotiation of a collective negotiations agreement between the employer and the majority representative the Court in dicta made clear its intent that its decision apply to those circumstances where the refusal to negotiate charge arises

<sup>8/</sup> Maryland Court of Appeals, No. 105, September Term, 1978.  
July 24, 1979. 1978-1979 PBC ¶ 36,615.

in the context of contract violation claims. The court stated:  
" ... once the union fulfills its duty to fairly represent the employees it alone may pursue avenues of relief against the employer."

The result of the Offutt decision is that the right to compel a public employer to negotiate in good faith is exclusive to a majority representative and, therefore, the right to assert a §(a)(5) claim is also exclusive to the majority representative unless it is claimed by the Charging Party, through an unfair representation claim against the majority representative, that the majority representative has not fulfilled its duty to fairly represent unit employees. The undersigned is in basic agreement with the determination of the Maryland court.

N.J.S.A. 34:13A-5.3 provides:

Representatives designated or selected by public employees for the purposes of collective negotiation by the majority of the employees in a unit appropriate for such purposes or by the majority of the employees voting in an election conducted by the commission as authorized by this act shall be the exclusive representatives for collective negotiation concerning the terms and conditions of employment of the employees in such unit ...

Further, §5.3 provides:

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. 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, it is clear that, under the Act, an employer is under the responsibility to negotiate exclusively with a majority representative. This responsibility is underscored by the provision in §5.3 which provides that:

Nothing herein shall be construed to prevent any official from meeting with an employee organization for the purpose of hearing the views and requests of its members in such unit so long as ... (b) any changes or modifications in terms and conditions of employment are made only through negotiation with the majority representative ...

By providing that an employer engages in a prohibited practice when it refuses to negotiate in good faith with a majority representative, §5.4(a)(5) serves to protect the rights exclusively granted to the majority representative. Accordingly, a public employer must give cognizance only to demands of the majority representative to enter into collective negotiations. The employer is under no obligation to respond to the demand of an individual either to negotiate with the individual or to negotiate with the

majority representative. Likewise, §5.4(a)(5) defines as a prohibited practice, the refusal of an employer to process grievances presented by the majority representative. This subsection is consistent with the provision of §5.3 that where a majority representative has been designated, such representative and the designated representative of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances. In addition, §5.3 provides that an individual employee may present his own grievance only in those circumstances where no majority representative has been selected as the negotiations agent for the unit of which the individual employee is a part. Accordingly, it is clear that in those situations where a majority representative has been selected as the negotiations representative for the unit the obligation to process grievances, pursuant to §5.4(a)(5), arises solely with respect to grievances filed by the majority representative. As noted by the Supreme Court in Red Bank Regional Educational Association v. Red Bank Regional High School Board of Education, 78 N.J. 122 (1978):

Significantly, N.J.S.A. 34:13A-5.4 (a)(5) does not make it an unfair practice for a public employer to refuse to process a grievance presented personally by an individual employee or one presented through a non-majority representative.... The combination of N.J.S.A. 34:13A-5.3 and 5.4(a)(5) would seem to manifest a primary responsibility for the presentation of employee grievances to a majority representative (where one exists) rather than to the aggrieved

individual himself. We can only infer from this amendment to the Act that N.J.S.A. 34:13A-5.3 must be construed to safeguard the right of the individual unit employees to have their grievances presented through their majority representative.

at 139, 140.

It follows that if an unfair practice charge is to be filed under §5.4(a)(5), alleging that an employer is in violation of its responsibility to negotiate in good faith with the majority representative or its responsibility to process grievances presented by the majority representative, it must be filed by the party to whom these rights and obligations flow. To countenance otherwise would be to jeopardize the stability in labor relations sought to be created by the Act through the delegation of exclusive negotiations rights to the freely chosen majority representative of employees.

It is evident herein that the controlling question is not whether the employer has "refused to negotiate in good faith" by allegedly breaching a contractual provision limiting discharges to just cause, but whether the majority representative has fairly represented the individual grievant by exercising its discretion not to pursue his grievance to arbitration. If an individual employee could compel an employer through the filing of a §5.4 (a)(5) charge to proceed to arbitration of the individual's grievance notwithstanding the fact that the employer and the majority representative have properly disposed of the grievance, albeit

unfavorably to the Charging Party, then:

the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and leaving the individual grievant to the vagaries of independent and unsystematic negotiations.

Vaca v. Sipes, 386 U.S. 171, 191 (1967).

Accordingly, the undersigned determines that an individual may not maintain a §5.4(a)(5) claim against the public employer in the absence of a claim which may be maintained against a majority representative, under §5.4(b)(1), based upon the breach of the duty of fair representation. The charging party, therefore, must charge both the public employer and the majority representative with engaging in prohibited activities. <sup>9/</sup>

Although the Charging Party herein has alleged a claim of unfair representation against his majority representative, the undersigned has previously noted that such claim may not be maintained since it has not been timely filed pursuant to §5.4(c). It is noteworthy that in the Offutt decision, the individuals had

<sup>9/</sup> The duty of a majority representative to provide fair representation may be traced in several decisions issued by the Commission and the undersigned. See In re N.J. Turnpike Employees Union, Local 194, IFPTE, P.E.R.C. No. 80-38, 5 NJPER 412 (¶ 10215 1979); In re Council #1, AFSCME, AFL-CIO, P.E.R.C. No. 79-28, 5 NJPER 21 (¶ 10013 1978); In re State of New Jersey and Council of N.J. State College Locals, NJSFT/AFT/AFL-CIO, D.U.P. No. 80-6, 5 NJPER 429 (¶ 10223 1979); In re Fraternal Order of Police, Lodge 62, D.U.P. No. 79-24, 5 NJPER 178 (¶ 10096 1979); In re Red Bank Bd. of Ed., D.U.P. No. 79-17, 5 NJPER 56 (¶ 10037 1979); and In re Township of Springfield, D.U.P. No. 79-13, 5 NJPER 14 (¶ 10008 1978).

initially filed a claim against both the employer and the majority representative, but their claim against the majority representative lapsed when the appellants declined to appeal that part of the lower court decision finding that the association had fairly represented them in the bargaining process. As a result, the appellant's appeal could only be asserted against the employer and was, therefore, not actionable. Consistent therewith, the undersigned determines that the ability of the Charging Party herein to proceed against the public employer is not controlled simply by the fact that a charge is asserted against the majority representative but is dependent upon a viable claim against the majority representative which is actionable as an unfair practice.

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

BY ORDER OF THE DIRECTOR  
OF UNFAIR PRACTICES

  
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Carl Kurtzman, Director

DATED: November 13, 1979  
Trenton, New Jersey