E.D. No. 76-34

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ENGLEWOOD BOARD OF EDUCATION,

Respondent,

- and - Docket No. CO-76-45

ENGLEWOOD TEACHERS ASSOCIATION,

Charging Party.

TENAFLY BOARD OF EDUCATION,

Respondent,

- and - Docket No. CO-76-46

TENAFLY TEACHERS ASSOCIATION,

Charging Party.

SYNOPSIS

The Executive Director refuses to issue complaints in consolidated unfair practice proceedings, finding that a public employer's failure to participate in contractual arbitration proceedings does not normally constitute "refusing to process grievances" within the meaning of the Act's unfair practice provisions. The Executive Director reasons that most contractual grievance and arbitration procedures are self-executing and thus will proceed on their own even in the absence of one of the parties to the contract.

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Appearances:
For Englewood Board of Education, Wittman, Anzalone, Bernstein & Dunn, Esqs. (Mr. Thomas W. Dunn, of Counsel)

For Tenafly Board of Education, Parisi, Evers & Greenfield, Esqs. (Mr. Irving C. Evers, of Counsel)

For Englewood Teachers Association and Tenafly Teachers Association, Goldberg, Simon & Selikoff, Esqs. (Mr. Theodore M. Simon, of Counsel)

REFUSAL TO ISSUE COMPLAINTS

Unfair practice charges were filed with the Public Employment Relations Commission (the "Commission") by the Englewood Teachers Association against the Englewood Board of Education, and by the Tenafly Teachers Association against the Tenafly Board of Education, alleging in both instances

that the Boards engaged in unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(1) and (5)[1/] by refusing to process named grievances to arbitration pursuant to grievance and arbitration provisions contained in the parties' respective collective negotiations agreements.[2/] Determinations in both cases as to whether complaints should be issued are governed by the identical principle as set forth below, and accordingly the cases have been consolidated for purposes of the instant decision.

N.J.A.C. 19:14-2.1 provides in pertinent part that a complaint and notice of hearing shall issue in an unfair practice proceeding "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,..." It is the conclusion of the undersigned, as the Commission's named designee,[3/] that as a matter of law a public employer's failure to participate in contractual arbitration proceedings does not, on the facts in this case and in most instances, constitute "refusing to process grievances" within the meaning of N.J.S.A. 34:13A-5.4(a)(5) and the undersigned will

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.... /or/ (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/ For the history of related scope of negotiations proceedings involving these parties and essentially the same underlying grievances, see: In re The Board of Education of the Borough of Tenafly, P.E.R.C. No. 86, 1 NJPER 18 (1975); Board of Education of City of Englewood v. Englewood Teachers Association, 135 N.J. Super 120, 1 NJPER 34, 90 LRRM 2074 (App. Div. 1975); In re Board of Education of the Borough of Tenafly, P.E.R.C. No. 92, 1 NJPER 50 (1975); In re Board of Education of the City of Englewood, P.E.R.C. No. 93, 1 NJPER 51 (1975); In re Board of Education of the City of Englewood, P.E.R.C. No. 76-23, 2 NJPER 72 (1976); In re Board of Education of the Borough of Tenafly, P.E.R.C. No. 76-24, 2 NJPER 75 (1976).

3/ See, 7 N.J.R. 78(a) (February 6, 1975).

accordingly refuse to issue complaints in the instant proceedings.[4/]

Except in circumstances involving atypical contractual provisions, a public employer's failure to participate in arbitration will not in any event forestall arbitration in the absence of an affirmative step by the public employer to restrain the arbitration proceeding. Contractual grievance and arbitration procedures generally and in the instant matter provide that a party dissatisfied with the outcome of the preliminary internal steps of the grievance procedure may submit the grievance to arbitration. Generally a public or private organization maintaining panels of arbitrators for such purposes -- such as the Commission pursuant to N.J.A.C. 19:12-5.1 et seq, the New Jersey State Board of Mediation pursuant to N.J.A.C. 12:105-1.1 et seq, the American Arbitration Association pursuant to its private rules, and many others -- is named in the contract as the vehicle for selecting an arbitrator. If no method is provided in the contract for selecting an arbitrator, the superior or county court will appoint an arbitrator in an action commenced pursuant to N.J.S.A. 2A:24-5.

The failure of either party to participate in the selection process normally will not forestall the process. Rather, the selection will proceed on the basis of the preferences indicated by the participating party.[5/]

4/ The instant charges allege violations of subsections (a)(1) and (a)(5), set forth supra, note 1. The undersigned reads the charges as grounded upon the "refusing to process grievances" language of subsection (a)(5). Subsection (a)(1) violations can be either derivative (violations of any of the other subsections are also (a)(1) violations) or independent (not incidental to violations of other subsections, but rather interference with rights although not specifically prohibited by any other subsection). The instant charges do not purport to allege independent (a)(1) violations, and thus must fall if the (a)(5) allegations are legally insufficient.

5/ See, for example: N.J.A.C. 19:12-5.3 (Commission); N.J.A.C. 12:105-4.2 (a)(1) (State Board of Mediation); American Arbitration Association's Voluntary Labor Arbitration Rules, Rule 12.

Similarly the arbitration hearing will proceed, and the arbitrator's award will be valid if otherwise valid, and subject to confirmation in proceedings under N.J.S.A. 2A:24-7, even in the absence of the unwilling party. If the initiating party chooses not to proceed *ex parte*, he may compel the unwilling party to participate by commencing a summary action in the superior or county court pursuant to N.J.S.A. 2A:24-3. Even in an *ex parte* arbitration hearing, the initiating party will not be thwarted in the presentation of his case due to the absence of the unwilling party, since N.J.S.A. 2A:24-6 empowers the arbitrator to issue judicially enforceable subpoenas *ad testificandum* or *duces tecum*.

It is clear from the foregoing that the failure of a public employer to participate in arbitration proceedings -- without anything else -- will not preclude the employee organization from pursuing the arbitration to conclusion *ex parte*. Thus, the grievance will be "processed" to arbitration pursuant to the parties' contract notwithstanding the public employer's failure to take part in that process.

If the public employer's unwillingness to arbitrate is grounded upon a claim of non-arbitrability, the arbitration will nevertheless proceed unless the public employer moves affirmatively to restrain the arbitration.[6] In the event such an affirmative step is taken, expeditious resolution is readily available in summary judicial proceedings under N.J.S.A. 2A:24-1 *et seq* with respect to traditional claims of contractual non-arbitrability, or

[6] The undersigned makes reference to claims of *substantive* non-arbitrability, i.e.: absence of an agreement to arbitrate; grievance is not within the scope of the arbitration clause; grievance relates to a non-negotiable and therefore non-arbitrable subject-matter. On the other hand, claims of *procedural* non-arbitrability are traditionally given to the arbitrator to resolve. See *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964). The principles enunciated by these cases have been discussed and followed by the New Jersey Supreme Court. *Standard Motor Freight, Inc. v. Local Union No. 560*, 49 N.J. 83 (1967).

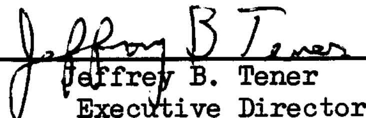
in interim proceedings before the Commission in scope of negotiations proceedings with respect to claims of non-arbitrability based upon non-negotiability. See, for example, In re The Board of Education of the City of Englewood, P.E.R.C. No. 93, 1 NJPER 51 (1975) (restraint granted); In re The Board of Education of the Borough of Tenafly, P.E.R.C. No. 92, 1 NJPER 50 (1975) (restraint granted); In re City of Jersey City, P.E.R.C. No. 76-26, 2 NJPER 96, motion for leave to appeal denied, Docket No. AM-496-75 (App. Div., April 27, 1976) (restraint denied). The undersigned does not construe the Act's prohibition against "refusing to process grievances" as encompassing a public employer's efforts to restrain arbitration on the grounds of non-arbitrability, regardless of the merits. The aforementioned judicial and administrative proceedings provide an expeditious and readily available method for disposing of such requests, and if resolved against the public employer will impose only a minimal delay in the processing of a grievance to arbitration.

For all of the reasons set forth above, the undersigned concludes that absent extraordinary circumstances not present herein,[7/] the failure of a public employer to participate in arbitration proceedings pursuant to a contractual grievance and arbitration provision, does not constitute "refusing to process grievances" within the meaning of N.J.S.A. 34:13A-5.4

7/ As can be gleaned from the analysis herein, the underlying rationale for the instant determination is the self-executing nature of most contractual grievance and arbitration procedures. The undersigned views the "refusing to process grievances" language of subsection (a)(5) as intended to cover circumstances not presented herein, such as a public employer's refusal to meet with a majority representative and attempt to adjust a grievance in the absence of a contractual procedure, or public employer conduct that, by virtue of the specific contractual language, renders the procedure non-self-executing. Application of the foregoing to specific factual patterns will more appropriately be determined on a case by case basis.

(a)(5). Accordingly, the instant charges alleging violations of N.J.S.A. 34:13A-5.4(a)(1) and (5) must fall, the undersigned hereby refuses to issue complaints thereon, and the instant cases are hereby closed.[8/]

BY ORDER OF THE EXECUTIVE DIRECTOR



Jeffrey B. Tener
Executive Director

DATED: Trenton, New Jersey
May 11, 1976

8/ While this determination relates specifically to conduct of a public employer, it is apparent that the rationale would be equally applicable to allegations of similar conduct by an employee organization.