H.E. No. 79-7

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE PUBLIC EMPLOYMENT
RELATIONS COMMISSION

In the Matter of

BURLINGTON COUNTY SPECIAL SERVICES SCHOOL DISTRICT,

Respondent,

-and-

Docket No. CO-78-123-80

BURLINGTON COUNTY SPECIAL SERVICES CUSTODIAL AND MAINTENANCE ASSOCIATION, a/w N.J.E.A. and WILLIAM HORN,

Charging Parties.

SYNOPSIS

A Hearing Examiner, ruling on a motion made by the Charging Parties before hearing to join an alleged employee organization as a party in interest in the proceeding, concludes that he has authority on such application to join necessary parties when deemed just and for the protection of their interests, but determines on the allegations contained in the complaint, that the Charging Parties have failed to show that the alleged organization is an indispensable party warranting its mandatory joinder in the proceeding.

Under the Commission Rules, the Hearing Examiner's ruling on this motion shall not be appealed directly to the Commission except by special permission of the Commission, but shall be considered by the Commission in reviewing the record, if exceptions to the ruling is included in the statement of exceptions filed with the Commission to the Hearing Examiner's Recommended Report and Decision issued after hearing.

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RULING DENYING MOTION TO JOIN PARTY

On July 3, 1978, prior to opening of the hearing in the above-captioned proceeding, the Charging Parties, Burlington County Special Services Custodial and Maintenance Association, a/w N.J.E.A. and William Horn, filed a motion with the undersigned to join the Special Services Custodial and Maintenance Association ("Association") as a party in interest. In support of its position, Charging Party also filed an accompanying memorandum of law, alleging the unlawful assistance and support of the Special Services Custodial and Maintenance Association by the Respondent, Burlington County Special Services School District. Proof of service upon the Respondent and one George Grigaitas for the Association was provided. By letter dated July 6, 1978, the Respondent opposed granting of the motion. By notice dated July 11, 1978, the undersigned notified respective counsel for the Charging Parties and Respondent and Mr. Grigaitas that answering papers could be filed with the undersigned on or before July 17, 1978. No response has been filed by Mr. Grigaitas.

In requesting that the Commission declare the agreement between Respondent and the Association a nullity, the Charging Party urges joinder of the latter to facilitate implementation of appropriate remedial relief should the Charging Party prevail.

Although the Civil Practice Rules of the New Jersey Courts provide for joinder of necessary parties pursuant to Rule 4:28-1(a) and (b), [1/] the New Jersey Administrative Procedure Act, applicable to the New Jersey Employer-Employee Relations Act (see N.J.S.A. 34:13A-5.4(c)) is devoid of any reference to joinder. The

1/ "Joinder of Persons Needed for Just Adjudication
(cont'd. next page)

Commission's Rules do,however, allow for intervention when necessary. Specifically, the "Commission, the Director of Unfair Practices, or the Hearing Examiner, as the case may be, may by order permit intervention to such extent and upon such terms as may be deemed just." 2/ (Emphasis added)

The clear implication of the above, is a recognition of the need to include parties other than the Charging Party and the Respondent in proceedings where required for the protection of interests of other parties. Of particular importance is the discretion afforded a Hearing Examiner in permitting intervention. Furthermore, the Commission's Rules define "party", in pertinent part,as "any person, organization or public employer named as a party in a charge, complaint, request, application or petition filed under this Act" (N.J.A.C. 19:10-1.1(a) 20.) - a definition seemingly broad enough to encompass Charging Parties instant motion for mandatory joinder of the Association as a party in interest.

In light of the presence of the intervention and party provisions in the Rules indicating the acceptability of third party participation in proceedings and in the absence of a specific prohibition of joinder either in the Administrative Procedure Act, Employer-Employee Relations Act or Rules, it would appear that the Hearing Examiner has the authority to join necessary parties on motion when "deemed just." That discretion is not uncommon in administrative proceedings. In PepsiCo Inc. v. FTC, 472 F. 2d 179 (2d Cir. 1972) the court commented on the Commission's discretion

1/ (cont'd. from page 1)

(a) Persons to be Joined if Feasible. A person who is subject to service of process shall be joined as a party to the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest in the subject of the action and is so situated that the disposition of the action in his absence may either (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or other inconsistent obligations by reasons of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so he may be made a defendant.

(b) Disposition by Court if Joinder Not Feasible. If a person should be joined pursuant to R. 4:28-1(a) but cannot be served with process, the court shall determine whether it is appropriate for the action to proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, the extent to which a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for non joinder."

2/ Commission Rule 19:14-5.1 (N.J.A.C. 19:14-5.1).

to allow joinder saying:

> "It was entitled to weigh the added comfort which all-out joinder would give PepsiCo against the mountain of paperwork and the delay that would result from joining the 513 Pepsi Cola bottlers and the bottlers in the six other proceedings, ..., and also the precedent this would create in cases where even larger numbers were involved.... [T]his is a choice to be made by the agency..., so long as the fundamental rights of PepsiCo and the bottlers to be heard in opposition and not to be exposed to liability for complying with any order that may ultimately issue are adequately protected." 3/

Having demonstrated the Hearing Examiner's discretionary authority to allow joinder, the question remains whether the Association is an indispensible party. A review of federal case law and NLRB decisions 4/ indicate that the operative fact in a joinder determination in a proceeding of this nature is the status of the alleged assisted association and the degree of assistance rendered.

In NLRB v. Pennsylvania Greyhound Lines, 303 U.S. 261 (1937), the Supreme Court affirmed the Board's finding of complete domination by the employer over the Employees Association of the Pennsylvania Greyhound Lines in violation of the NLRA 5/ and concluded that the Association's presence was not vital to a determination of that violation. 6/ One year later the Court in Consolidated Edison of New York Inc. et al., 305 U.S. 197 (1938) opted for joinder of an assisted labor organization, specifically the International Brotherhood of Electrical Workers, 7/ an AFL affiliate. 8/ Although these decisions appear contradictory, close examination reveals a a basic distinction defined in National Licorice Company v. NLRB, 309 U.S. 350 (1940). Here, upon a request from a small group of employees, National Licorice Company lent assistance in forming a representative committee for contract negotiating purposes. 9/

3/ PepsiCo Inc. v. FTC 472 F. 2d 179, 190 (2d Cir. 1972).

4/ According to Lullo v. International Association of Fire Fighters, 55 N.J. 409 (1970), NLRB case law can be used in guiding PERC decisions, since the N.J. Public Employer-Employee Relations Act was patterned after the National Labor Relations Act.

5/ NLRB v. Pennsylvania Greyhound Lines,303 U.S. 261, 263 (1937).

6/ Id. at 271.

7/ Consolidated Edison of New York Inc. et al., 305 U.S. 197, 233 (1938).

8/ Id. at 217.

9/ National Licorice Company v. NLRB, 309 U.S. 350, 353 (1940).

The Supreme Court affirmed the Board's finding, inter alia, that the employer's initiation, sponsorship and domination of the labor committee constituted an unfair practice. [10] The Court also specifically affirmed the Board's denial of the request that the Committee be joined as an indispensable party. [11] Upon consideration of the aforementioned decisions it becomes increasingly evident that a joinder determination hinges, to a great extent, on the degree of support given an organization.

In Pennsylvania Greyhound Lines and National Licorice Company, it was discovered that the labor unions involved were assisted to the point of domination and as a result had no distinct and separate existence. Con Ed, however, reveals a different situation. There, the union-employer relationship did not rise to the level of domination. Rather, the amount of support offered by Con Ed was relatively minimal. Herein lies the controlling consideration as noted in NLRB v. Indiana and Michigan Electric Company, 124 F. 2d 50 (6th Cir. 1941), aff'd. 318 U.S. 9 (1943) where the Court stated:

> "[T]he Board found that Respondent caused the Association to be organized and dominated it in the performance of the bargaining contract. It therefore, followed that it is controlled by the Greyhound Lines and National Licorice Company cases and the Association was not a necessary party to the proceeding." [12]

In Versatube Corporation and International Union, United Automobile, Aerospace and Agricultural Workers of America (UAW), 203 NLRB No. 87 (1973) the Board found that the Versatube Employees Association was illegally dominated by the employer. As in the instant situation, the Employee Association was a signatory to a collective bargaining agreement. [13] This was the basis for an argument that the VEA was a necessary party to the proceeding. In denying that assertion, the Board concluded in pertinent part: "[T]he VEA is not an independent labor organization such as was involved in Con Ed. Instead, as has been found above, it is an organization which the Respondent has illegally dominated and assisted and it is entirely a creature of the Respondent. In light of the foregoing, [the Board] conclude[s] that the VEA is not and was never a necessary party to the proceeding." [14] (Emphasis added)

10/ Id. at 355.

11/ Id. at 366

12/ NLRB v. Indiana and Michigan Electric Company, 124 F. 2d 50, 55 (6th Cir. 1941).

13/ Versatube Corporation and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), 203 NLRB No. 87 at 463 (1973).

14/ Id.

It is abundantly clear that any employer-dominated labor organization cannot, by definition be independent. It is equally apparent, based on the foregoing, that an association to be joined as a necessary party must be shown, or at least claimed, to have an independent status. It follows therefore that an employer-dominated labor organization is not an indispensable party since as a "creature" of the employer it has no separate and distinct existence.

The Charging Party contends in its assistance allegation(count one, paragraph four of the Amended Complaint) that the Respondent "assisted" in the organization of the Special Services Association by activities resulting in the Association's disaffiliation from the Charging Party employee organization. It would seem that the nature of the "support" provided the Association constitutes a form of domination rather than assistance, as those terms have been defined by the relevant case law. As such, the Association cannot be joined as an indispensable party. However, page two of the Charging Party's memorandum of law in support of its motion alleges in conclusionary form that the Association was "assisted and supported" and makes no mention of the Respondent's role in the actual organization of the Association. 15/

It has been established that a decision on joinder requires an understanding of the employer-employee organization relationship. The thrust of the Charging Parties' case is that the Association was formed with the active participation of Respondent agents. The charge and amended charge fail to allege that the Association, apart from the Respondent's organizational aid, ever existed as an independent, on-going employee organization free of the taint of the employer's involvement in its creation. In any event, as a result of a lack of precision in the cited portions of the amended charge and in the absence of consistent terminology, it is less than certain what degree of alleged "support" the Respondent is claimed to have afforded the Association The nature of the assistance is crucial to a determination of joinder. Absent a precise assessment of that assistance, and given the thrust of the amended charge and complaint, the Charging Parties have failed to sustain their burden that the Association is an indispensable party warranting its mandatory joinder in the instant proceeding.

15/ It is clear that the Charging Parties have had and continue to have the option of filing a charge against the Association on the grounds alleged in the charge already filed. There is little doubt that such a charge would be consolidated with the instant proceeding and that the Association's status as a party would be thereby achieved.

CONCLUSION

For all the foregoing reasons, the Motion to Join the Special Services Custodial and Maintenance Association as a party in interest is hereby denied.

Robert T. Snyder
Hearing Examiner

Dated: Newark, New Jersey
July 27, 1978