

D.U.P. NO. 94-8

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

In the Matter of

BURLINGTON TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-93-197

BURLINGTON TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

BURLINGTON TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CE-93-12

BURLINGTON TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Director refused to issue a Complaint and Notice of Hearing on charges filed by a majority representative and public employer. The union alleged that the employer's attempts to require testimony of "witnesses" at an interim step of the grievance procedure ending in binding arbitration violates 5.4(a)(1) and (5) of the Act. The employer alleges that the union's refusal to participate at the interim step violates 5.4(b)(1) and (5) of the Act.

The Director determined that the failure to comply with an interim step of the grievance procedure is not an unfair practice and the meaning of the interim step as set forth in the agreement is itself arbitrable. He also found that the employer's act was not an independent violation of 5.4(a)(1) of the Act.

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Charging Party.

Appearances:

For the Board of Education,
David M. Serlin, attorney

For the Education Association,
Selikoff and Cohen, attorneys
(Kenneth A. Sandler, of counsel)

REFUSAL TO ISSUE COMPLAINT

On December 7, 1992, the Burlington Township Education Association filed an unfair practice charge against the Burlington Township Board of Education. The charge alleges that the Board unilaterally determined to conduct an evidentiary hearing, using subpoena powers under Title 18 to compel attendance and testimony, at level three of the negotiated grievance procedure. The hearing was to have concerned a letter of reprimand issued to Sharon

Cleghorn, a negotiations unit employee. The Association also alleged that the Board had never before conducted a hearing at level three without the Association's request. (The negotiated grievance procedure ends with binding arbitration.) The acts allegedly violate 5.4(a)(1) and (a)(5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

On March 22, 1993, the Board filed an unfair practice charge against the Association alleging that it refused to participate in the step three hearing in December 1992. It specifically cited testimony of Association counsel appearing at the December hearing. Association counsel stated that the proceeding was "not an appropriate Level 3 proceeding." These acts allegedly violate 5.4(b)(1) and (5)^{2/} of the Act.

On March 10, 1993, the Board filed a complaint in Superior Court seeking to compel Association compliance with subpoenas issued by the Board. The Board president sought the appearance of the alleged witnesses at the step three hearing. On June 10, 1993, the judge dismissed the complaint, finding that the Commission has primary jurisdiction.

^{1/} These subsections prohibit public employers, 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) 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 established by the commission."

On March 23, 1993, the Board filed a scope of negotiations petition, seeking to restrain arbitration on the grievance filed by Cleghorn. The Board contends that the comments on an evaluation (which is the subject of the grievance) are "evaluative" and not "disciplinary". The Association opposes the petition.^{3/}

I dismiss both charges. The negotiated grievance procedure, at Level three, states in pertinent part: "The Board shall review the grievance, hold a hearing with the employee, if requested, and render a decision as promptly as possible within ten work days." Level four provides for binding arbitration.

The Commission has repeatedly held that the failure to comply with an intermediate step of the grievance procedure, in and of itself, is not an unfair practice, when the contract provides a self-executing grievance procedure culminating in binding arbitration. New Jersey Transit Bus Operation, Inc. PERC No. 86-129, 12 NJPER 442 (¶17164 1986); New Jersey Transit DUP No. 87-14, 13 NJPER 383 (¶18154 1987); City Trenton DUP No. 87-7, 13 NJPER 99 (¶18044 1986); Essex Cty. Vocational School Bd. of Ed. DUP No. 77-2, 2 NJPER 372 (1976).

Whether the Board may compel witnesses to appear and testify at an interim step of the negotiated grievance procedure is

^{3/} On June 14, 1993, the Board filed an application for interim relief with the Commission, seeking a restraint of a scheduled June 28 arbitration on the Cleghorn letter of reprimand. The application was denied and the parties have participated in the scheduled arbitration although the scope of negotiations petition is still pending.

a dispute which the Commission will not resolve. The Board relied on the contract provision in seeking to require testimony at level three although its efforts were ultimately unsuccessful. The meaning of Level three as set forth in the agreement is itself arbitrable. See John Wiley & Sons, Inc. v. Livingston 376 US 541 (1964).

The standard to determine whether an employer violates 5.4(a)(1) of the Act was stated in New Jersey Sports and Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979):

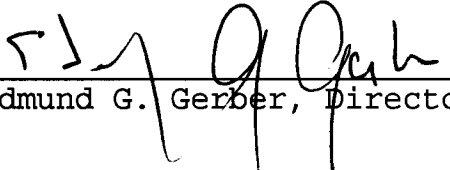
It shall be an unfair practice for an employer to engage in activities which, regardless of direct proof of anti-union bias, tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions lack a legitimate and substantial business justification.

[Id at 551 n. 1]

The Board relies on the agreement, specifically the level three provision, in seeking to compel testimony. Its interpretation may ultimately be overruled by an arbitrator but I cannot conclude that its acts "repudiated" the agreement. Furthermore, no subpoenaed unit employee testified in a Board grievance proceeding. Under these circumstances, I do not believe a complaint may be issued under 5.4(a)(1) of the Act.

The charges are dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES


Edmund G. Gerber, Director

DATED: August 6, 1993
Trenton, New Jersey