

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

In the Matter of

STATE OF NEW JERSEY (KEAN COLLEGE),

Respondent,

-and-

DOCKET NOS. CO-78-75
CO-78-78

N.J. CIVIL SERVICE ASSOCIATION &
N.J. STATE EMPLOYEES ASSOCIATION AND
STATE SUPERVISORY EMPLOYEES
ASSOCIATION a/w NJCSA/NJSEA,

Charging Parties.

SYNOPSIS

The Director of Unfair Practices, finding that none of the criteria are present for reasserting jurisdiction of Unfair Practice Charges which had been deferred to arbitration, declines to issue complaints. The Unfair Practice Charges related to the closing of the employer's premises for electrical construction. Although the Charges were deferred to arbitration, the Charging Parties presented the underlying issues in Superior Court upon a suit for contract enforcement. The Charging Parties' claim was denied by the Court. Charging Parties alleged that the Court did not consider certain aspects of the dispute which were raised in its Unfair Practice Charge. The Director observes that the issues could have been resolved in an arbitration proceeding, and that the nonpresentation or unsuccessful argument of certain contractual claims or pertinent theories by the Charging Parties is not a basis for reassertion of Commission jurisdiction of deferred Unfair Practice Charges.

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Appearances:

For the Respondent
Melvin E. Mounts, Deputy Attorney General

For the Charging Parties
Fox & Fox
(David I. Fox, of Counsel)

REFUSAL TO ISSUE COMPLAINT

Unfair Practice Charges were filed with the Public Employment Relations Commission (the "Commission") on October 17, 1977 and October 18, 1977 by the New Jersey Civil Service Association and New Jersey State Employees Association and the State Supervisory Employees Association a/w NJCSA/NJSEA (the "Charging Parties") against the State of New Jersey (Kean College) (the "Respondent") alleging that the Respondent 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), (5), and (7). ^{1/} The undersigned declined to issue a complaint with respect to the Charges pursuant to the Commission's deferral to arbitration policy. ^{2/} Apparently, the issue underlying the Charges was not thereafter submitted to arbitration under the grievance mechanism contained in the parties' agreements. Instead, a contract enforcement action was instituted by NJCSA/NJSEA in Superior Court. The claim was denied by the Court. Thereafter, on June 19, 1979, the Charging Parties requested that the Commission process the initial Charges.

The Commission has adopted a standard for reconsideration of unfair practice charges deferred to arbitration. ^{3/} Jurisdiction

^{1/} These subsections prohibit 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. (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. (7) Violating any of the rules and regulations established by the commission."

^{2/} See In re Board of Education of East Windsor, E.D. No. 76-6, 1 NJPER 59 (1975); In re City of Trenton, P.E.R.C. No. 76-10, 1 NJPER 58 (1975). Unfair practice charges are deferred to arbitration by the Commission where it is reasonably probable that the issue underlying the alleged unfair practice will be resolved pursuant to the parties' contractual grievance procedure forum and the grievance procedure terminates in binding arbitration.

^{3/} See n.2, supra.

is retained for the purpose of entertaining an application for further consideration upon a proper showing that (a) the dispute has not, with reasonable promptness after issuance of the deferral determination, been resolved by amicable settlement in the grievance procedure, or submitted promptly to arbitration, (b) the grievance or arbitration procedures have not been fair and regular, or (c) the grievance or arbitration procedures have reached a result which is repugnant to the Act. Accordingly, the Charging Parties must show the presence of at least one aspect of the above criteria to warrant further processing of these matters.

The essence of the instant Charges is that the State "improperly changed a term and condition of employment" of certain employees of Kean College by closing its premises on September 2, 1977 in order to perform electrical work. The Charging Parties state: "Unilateral action of the college was to dock the employees for the day's pay or take other action, all of which was not agreed to or negotiated with the association in violation of the act. The relief sought is that the employees in question be paid for the day in question or granted other appropriate relief."

Charging Parties submitted the underlying issues raised by these claimed unfair practices to the Court as contract violations under a past benefits and practices clause. The relief sought was "pay for affected employees for the day in question." Additionally, the Charging Parties also argued before the Court that "said action

violated the collective bargaining agreement in unilaterally determining the restructuring of the hours of employment of these employees for the week ending September 2, 1977."

Charging Parties now urge reconsideration for the following reasons, as stated by their counsel:

I presume that you view the reference in the contract in question to "where practicable, the normal work week shall consist of five consecutive work days" as dispositive. The Court was not considering the question of impact of a change in the work day or week. This is an issue which P.E.R.C. must adjudicate, namely whether or not there were negotiations concerning the impact of the decision to eliminate Friday as a work day and require employees to donate compensatory time or otherwise make up the time for that day. The Court decided that the State had the right to eliminate the day in question as a particular work day under the contract. The issue of negotiations on the impact of this elimination was neither raised before the Court nor considered by it.

The concept that the State of New Jersey, the largest public employer in the State under the jurisdiction of P.E.R.C., may change hours of work and days of work without negotiations is of deep concern to us....

Initially, the undersigned observes that the term "impact" as used by charging parties, refers to changes in terms and conditions of employment as a result of the one-day closing of the college. The only "change" specifically addressed in the Charges is the "docking" of employees for the day's pay. This issue was specifically presented to the Court.

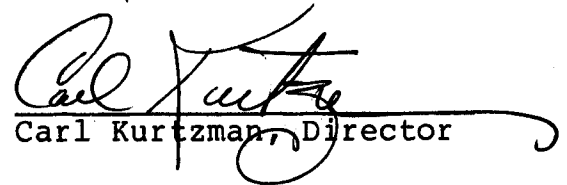
The undersigned cannot accept the Charging Parties' claims that since the Court did not consider the issues of compensatory time or make-up time, these issues must now be considered by the Commission. First, it appears that the Court was asked to consider "the restructuring of the hours of employment" as a violation of the contractual past practice clause. The Court properly analyzed the issues under the theories advanced. Second, the undersigned's review of the Charging Parties' contractual agreements reconfirms that the contracts provide ample means for these "impact" issues to be raised and resolved in a contract interpretation forum. If the "impact" considerations were not considered, it was either because they were not advanced or unsuccessfully argued. The burden of presentation and argument of the claimed violation and pertinent theories is upon the Charging Party in the grievance/arbitration forum. In those instances where the Charging Party fails to convince the neutral of the claimed violation or fails to argue the pertinent theories, it is inappropriate for the Commission to reassert jurisdiction in the unfair practice proceeding. ^{4/}

Accordingly, for the reasons stated above, the undersigned determines that none of the criteria required to be present

^{4/} It also appears that the Charging Parties presume that the undersigned found the "work week" provisions of the contract as dispositive. This presumption is not well founded. The undersigned considers the entirety of the collective negotiations agreement before making a determination concerning the appropriateness of deferral.

for the purpose of reasserting jurisdiction of these deferred Charges are met herein, and the undersigned hereby declines to issue a complaint.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES


Carl Kurtzman, Director

DATED: July 23, 1979
Trenton, New Jersey