

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

In the Matter of

RUTGERS UNIVERSITY,

Respondent,

-and-

INTERNATIONAL UNION OF OPERATING
ENGINEERS, AFL-CIO, LOCAL UNION
STATIONARY LOCALS 68-68A,

DOCKET NOS. CI-82-37
CI-82-38
CI-82-39
CI-82-40

Respondent,

-and-

VELBER HODGE,

Charging Party.

SYNOPSIS

The Director of Unfair Practices declines to issue a complaint with respect to four charges filed by an individual asserting that Rutgers was violating its collective negotiations agreement with his majority representative.

The first charge alleged that the employer as well as the majority representative violated the collective agreement when only one factfinder, instead of a three person panel, heard an advisory factfinding procedure relating to Charging Party's termination. The Director finds that there are no facts supporting a claim of unfair representation by the majority representative, and that the alleged actions of the employer and the majority representative appeared to constitute a permissible contractual modification. The three other charges were not filed within six months of the claimed violations. Moreover, in these charges the Charging Party did not allege unfair representation by the majority representative. Accordingly, the Charging Party could not proceed with charges filed solely against the employer asserting a refusal on the part of Rutgers to negotiate in good faith with the majority representative.

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REFUSAL TO ISSUE COMPLAINT

On February 10, 1982 four unfair practice charges were filed with the Public Employment Relations Commission (the "Commission") against Rutgers, the State University ("Rutgers") by Velber Hodge (the "Charging Party") alleging that Rutgers 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. (a)(1), (2), (3), (4), (5), (6) and (7). ^{1/}

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. (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. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the Commission.

The charges alleged that certain agreements between Rutgers and the International Union of Operating Engineers, AFL-CIO, Local Union Stationary Locals 68-68A (the "Union") were violated by Rutgers. Further, the Charging Party claimed that he was wrongfully terminated from employment by Rutgers on July 21, 1981. In this latter regard the Charging Party also asserted that Rutgers violated the grievance procedure set forth in the collective negotiations agreement between Rutgers and the Union when only one arbitrator, instead of a three member panel, heard the "fact finding" proceeding relating to his discharge.

Although the Charging Party did not initially assert a claim against his majority representative, he subsequently amended the charge relating to the allegedly improper fact finding procedure, Docket No. CI-82-37, alleging that the Union violated its representational responsibilities, and thus N.J.S.A. 34:13A-5.4(b)(1), ^{2/} by not enforcing the contractual requirement of a tripartite fact finding panel.

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. ^{3/} The Commission's rules provide that the undersigned may decline to issue a complaint. ^{4/}

^{2/} This subsection prohibits public 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.

^{3/} N.J.A.C. 19:14-2.1

^{4/} N.J.A.C. 19:14-2.3

For the reasons stated below, it would appear to the undersigned that the Commission's complaint issuance standard has not been met with respect to the instant charges.

Initially, the undersigned notes that the issuance of a complaint with respect to events occurring prior to a six month period immediately preceding the filing of a charge is statutorily prohibited. ^{5/} Inasmuch as three of the instant charges were not filed until February 10, 1982, and relate to events outside the 6 month limitations period, the undersigned may not issue complaints with respect to CI-82-38, 39 and 40. ^{6/} Moreover, as these charges allege contract violations by Rutgers, but do not allege misconduct by the Union in failing to protect contractual rights, the undersigned will not issue

5/ N.J.S.A. 34:13A-5.4(c) provides:

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

6/ In CI-82-38, the Charging Party challenges Rutgers' reasons for terminating his employment on July 21, 1981. The fact that the Charging Party grieved his termination does not toll the running of the time period for the filing of a charge. See In re State of New Jersey (Jack Barese), PERC No. 77-14, 2 NJPER 308 (1976) aff'd 153 N.J. Super. 91 (1977), pet. for certif den 78 N.J. 326 (1978).

In CI-82-39, the Charging Party claims that on July 25, 1981 Rutgers unilaterally altered a shift deployment schedule without negotiations.

In CI-82-40, Charging Party alleges that since 1977 Rutgers has misapplied a differential pay policy.

a complaint. ^{7/}

In contrast to the above charges, CI-82-37 deals with the procedural aspects of a "fact-finding" proceeding conducted on December 11, 1981 and alleges, as well, that the Union violated its representational responsibilities to the Charging Party when it permitted one individual, instead of a three person panel, to preside in the fact-finding, allegedly in violation of the contract between the Union and Rutgers. Thus, CI-82-37 is a timely filed charge, and inasmuch as it includes, along with the charge against Rutgers, a claim of unfair representation against the Union, the elements of the charge require full consideration. Such examination must bear in mind that under the holding of the Turnpike decision, PERC No. 81-64, cited in full below at note 7, an employer may not be found to have violated §5.4(a)(5) vis a vis an individual charging party, unless it is first found that the individual's majority representative has violated its obligation

^{7/} In prior decisions the undersigned has explained that a claim of contract violation is solely addressed by the Commission in the context of an unfair practice charge that an employer has unilaterally altered a term and condition of employment without negotiating in good faith with the majority representative, in violation of N.J.S.A. 34:13A-5.4(a)(5). The undersigned has stressed that under §5.4(a)(5) the employer's duty is owed to the majority representative. Thus, unless it is claimed that the majority representative has violated its responsibility to fairly represent the interest of a unit member when a contract has been breached, the undersigned will not issue a complaint alleging that the employer has violated its responsibility to the majority representative. Full and extensive analyses of the basis of these determinations are contained in In re N.J. Turnpike Authority, D.U.P. No. 8010, 5 NJPER 518, (¶ 10268 1979), and P.E.R.C. No. 81-64, 6 NJPER 560, (¶ 11284 1980), affm'd App. Div. Docket No. A-1263-80T (10/30/81) add. for cert. pending Supreme Court Docket No. 19188; See also In re County of Middlesex, P.E.R.C. No. 81-62, 6 NJPER 555, (¶ 11282 1980), affm'd App. Div. Docket No. A-1455-80-T2 (4/1/82), and In re Twp. of Cherry Hill, D.U.P. No. 81-18, 7 NJPER 286, (¶ 12128 1981).

to provide fair representation to a unit member owed under §5.4(b)(1). The undersigned must therefore first consider whether the Union has violated the standards of fair representation, i.e. that its actions not be arbitrary, discriminatory, or in bad faith. See In re AFSCME, Council No. 1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶ 10013 1978); also see In re N.J. Turnpike (Kaczmarek), P.E.R.C. No. 80-38, 5 NJPER 412 (¶ 10215 1979).

On August 17, 1982, the undersigned advised the Charging Party that the factual allegations did not appear to make out a claim of unfair representation.

The undersigned advised that the charge appeared to be limited to the legal claim that the failure of the majority representative to insist upon having a three member panel review his grievance and render an advisory opinion constituted an act of unfair representation. The facts alleged in the Charge, however, indicated that Rutgers and the Union mutually waived the opportunity to have their designated representatives participate in the fact-finding and agreed to have the matter proceed before the single, jointly designated and neutral arbitrator. Such a waiver, as it modifies existing contractual provisions, appears to be permitted under case law upholding the validity of contract modifications. See Hayden v. RCA Global Communications, Inc. 433 F.Supp. 396, 98 LRRM 2028 (1978); Turner et. al. v. Teamsters Local 302, 604 F.2d 1219, 102 LRRM 2548 (1979).

Based upon the above, the undersigned further advised the Charging Party that the modification of the contract by Rutgers and the Union appeared to be in and of itself a valid action by Rutgers and the Union, and not actionable unless there were facts which indicated

that the Union's agreement to the designation of a single fact-finder was arbitrary, discriminatory or in bad faith. The Charging Party was provided an additional opportunity to submit a factual claim supportive of an assertion that the Union's actions were arbitrary, discriminatory, or in bad faith. Although additional material has been provided by the Charging Party, there is no factual allegation therein supportive of any claim which might be raised under the fair representation standard.

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

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES


Carl Kurtzman, Director

DATED: October 7, 1982
Trenton, New Jersey