

D.U.P. NO. 94-34

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

In the Matter of

WARREN TOWNSHIP BOARD OF EDUCATION,

Charging Party,

-and-

Docket No. CE-94-8

WARREN TOWNSHIP EDUCATION ASSOCIATION/
NEW JERSEY EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Director of Unfair Practices dismisses the Board's charge alleging that the local Association and the NJEA violated the Act by demanding representation fees from non-members after the Board sought to remove them from the unit as confidential employees. The Director determined that the alleged events were beyond the Commission's six-month statute of limitations. Additionally, the Director found that the Association could invoke its contractual right to the fees at any time even in the face of a contrary past practice. Further, the Board's claim that the Association's demand was retaliatory was also dismissed for failure to state any employee protected activity.

Finally, the Board also alleged that the Association violated the Act by filing an unfair practice charge over the representation fees. The Director also dismissed that allegation, finding that the parties' statutory right to file charges is not dependent upon the ultimate findings on their merits.

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Appearances:

For the Charging Party,
Schwartz, Simon, Edelstein, Celso & Kessler, attorneys
(Joel G. Scharff, of counsel)

For the Respondent,
Klausner, Hunter, Cige & Seid, attorneys
(Stephen E. Klausner, of counsel)

REFUSAL TO ISSUE COMPLAINT

On January 19, 1994, the Warren Township Board of Education filed an unfair practice charge with the Public Employment Relations Commission alleging that the Warren Township Education Association and the New Jersey Education Association violated subsections 5.4(b) (1) and (2)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. The Board asserts the following facts.

^{1/} 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. (2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances."

The Warren Education Association represents the Board's clerical staff. Under the parties' current and prior collective negotiations agreements, the Association had the right to collect representation fees in lieu of dues from unit employees who were not Association members.

The Board asserts that on November 18, 1992, it sought the Association's agreement that certain unit secretaries were confidential and after it raised the confidentiality issue, the WTEA and the NJEA sought for the first time to collect representation fees from unit employees who were non-Association members; on December 2, 1992,^{2/} NJEA Representative Rudy Lawton made a demand for representation fees. On January 25, 1993 the Board advised the Association that it intended to file a unit clarification petition with this Commission. On February 18, 1993, the Association filed an unfair practice charge asserting that the Board had refused to collect representation fees from the secretaries who are the subject of the unit clarification petition.

The Board asserts that, by the timing of the Associations' representation fee demand and its pursuit of an unfair practice charge against the Board, the Association "intends to chill the right of the Board to identify and designate [confidential] employees..." in violation of subsections 5.4(b)(1) and (2).

^{2/} The Board's initial charge stated that NJEA Representative Lawton demanded the representation fees on December 3, 1993. It has since advised us the the date was a typographical error and was intended to read 1992.

The Board asks that a Complaint issue on its charge and that the matter be consolidated with the Complaint on the Association's charge (docket number COH-93-291), which is presently in hearing.

The Commission's complaint issuance standard has not been met here. N.J.A.C. 19:14-2.1.

The Board's charge was filed outside the Commission's statute of limitations. N.J.S.A. 34:13A-5.4(c) precludes the Commission from issuing a Complaint where an unfair practice charge has not been filed within six (6) months of the occurrence of any unfair practice, unless the aggrieved person was prevented from filing the charge. North Warren Bd. of Ed., D.U.P. No 78-7, 4 NJPER 55 (¶4026 1977). The Associations' demand for representation fees was made in December, 1992. The Association's charge was filed in February, 1993. Both of these events occurred more than six months before the Board filed its charge. Accordingly, the charge is untimely and no complaint may issue thereon.

Moreover, the Associations' alleged actions do not constitute a violation of the Act. The Board concedes that under the current collective agreement between the parties, the Association has a contractual right to representation fees from non-members. Where a party has a contractual right, it may choose to invoke that right at any time, even if the party has not exercised it in the past. A past practice cannot supercede the plain meaning of a written contract; parties to a negotiated

agreement always have the right to rely upon the contract's written terms. Where clear and unambiguous contract language sets employees' terms and conditions of employment, an employer may at any time end a divergent past practice and return to the benefit level set by the contract. Kittatinny Reg. Bd. of Ed., P.E.R.C. No. 92-37, 17 NJPER 475 (¶22230 1991); Kittatinny Bd. of Ed., P.E.R.C. No, 93-34, 18 NJPER 501 (¶23231 1992); Burlington Cty. Bridge Comm., P.E.R.C. No. 92-47, 17 NJPER 496 (¶22242 1991); Passaic Cty. Reg. Bd. of Ed., P.E.R.C. No. 91-11, 16 NJPER 446 (¶21192 1990); New Jersey Sports and Exposition Authority, P.E.R.C. No. 88-14, 13 NJPER 710 (¶18264 1987). Accordingly, the Association could not have violated the Act by seeking to enforce its contractual rights to employee representation fees from non-Association members.

The Board also alleges that the Association's demand for representation fees is retaliatory. The Act guarantees public employees the right to form, join, and assist employee organizations and to refrain from doing so. N.J.S.A. 34:13A-5.3. An employee representative violates subsection 5.4(b)(1) when its actions tend to interfere with, restrain or coerce employees in the exercise of their statutory rights. The employer has asserted no employee statutory right that the Association's actions tend to chill, nor any employee protected activity which the Associations have retaliated against.

The Board also alleges that the Associations violated subsection 5.4(b)(2), which provides that the employee

representative may not "interfere with, restrain or coerce a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances." Nothing in the facts of the Board's charge suggest that the Association interfered with the employer's selection its representatives for such purposes. The Association's insistence on its contractual right to representation fees in lieu of dues and the filing of its unfair practice charge are not violations of the Act.

Finally, the Association's filing of its February 22, 1993 charge against the Board is not a violation of the Act. The Association's statutory right to file unfair practice charges is not dependent upon the ultimate determination of the charge's merits. Accordingly, I decline to issue a complaint and dismiss the charge. N.J.A.C. 19:14-2.3.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Edmund G. Gerber, Director

DATED: March 21, 1994
Trenton, New Jersey