P.E.R.C. NO. 84-148

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY, DEPARTMENT OF HUMAN SERVICES,

Respondent,

-and- Docket No. CO-84-15

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party.

STATE OF NEW JERSEY (OFFICE OF EMPLOYEE RELATIONS),

Respondent.

-and- Docket No. CO-83-292

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission affirms two decisions refusing to issue Complaints based on unfair practice charges the Communications Workers of America, AFL-CIO had filed against the State of New Jersey, Department of Human Services, and the State of New Jersey, Office of Employee Relations. The Commission holds that Complaints should not issue on unfair practice charges which allege nothing more than that a party has breached a contract. Instead, the Administrator of Unfair Practices should examine the allegations of each unfair practice charge to determine whether there is a sufficient nexus between the duty to negotiate in good faith and an alleged contractual violation to warrant the issuance of a Complaint. Under all the circumstances of these two cases, there was not a sufficient nexus in either case.

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Appearances:

For the Respondent, Irwin I. Kimmelman, Attorney General of New Jersey (Michael L. Diller, Deputy Attorney General, of Counsel)

For the Charging Party, Steven P. Weissman, Esq.

For the Amicus Curiae, New Jersey Education Association, Zazzali, Zazzali & Kroll, Esqs. (James R. Zazzali, of Counsel)

For the Amicus Curiae, New Jersey Industrial Union Council, AFL-CIO, Reitman, Parsonnet, Maisel & Duggan, Esqs. (Bennett D. Zurofsky, of Counsel)

For the Amicus Curiae, N.J. State Federation of Teachers, Sauer, Boyle, Dwyer & Canellis, Esqs. (Christopher M. Howard, of Counsel)

For the Amicus Curiae, N.J. School Boards Association, Paula Mullaly, General Counsel (Thomas Scully, Assistant General Counsel, of Counsel)

DECISION AND ORDER

We have consolidated these two cases because they present the common question of whether and under what circumstances a claimed breach of contract may rise to the level of an unfair practice, thus warranting the issuance of a Complaint. The Administrator and Director of Unfair Practices declined to issue Complaints in the two cases. In re State of New Jersey (Department of Human Services), D.U.P. No. 84-11, 9 NJPER 681 (¶14299 1983); ("Human Services"); In re State of New Jersey (Office of Employee Relations), D.U.P. No. 84-12, 10 NJPER 3 (¶14002 1983) ("OER"). Under all the circumstances of these cases, we agree with the decisions below but amplify the reasons for our affirmance.

HUMAN SERVICES

On July 22, 1983, the Communications Workers of America, AFL-CIO ("CWA") filed an unfair practice charge against the State of New Jersey, Department of Human Services ("State" or "Human Services"). The charge, as amended on September 6, 1983, alleged that the State violated subsections 5.4(a)(1), (3), and (5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A.

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; (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; and (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."

34:13A-1 et seq., when it refused to grant a hearing to which Dr. Ruben Reyes, an unclassified professional employee terminated by the State, was allegedly entitled under the parties' collective negotiations agreement.

On August 10 and September 13, 1983, the State filed its statements of position. The State contended, in part, that the contract did not give Reyes a right to a hearing. The State further stated that this dispute was not subject to binding arbitration.

On October 28, 1983, the Director of Unfair Practices refused to issue a Complaint. He first noted that the gravamen of the charge consisted of a contractual dispute: specifically whether an unclassified employee who has been terminated without stated reasons is entitled to a hearing under the contract. The Director concluded that this contractual dispute did not warrant the issuance of a Complaint under N.J.A.C. 19:14-2.1(a)[2/] because it was not sufficiently tied to allegations of a refusal to negotiate in good faith under subsection 5.4(a)(5). In pertinent part, he said:

> It appears to the undersigned that the charge herein raises a dispute which is purely contractual in nature relating to Article 5 Section L Subsection 2 of the agreement. The instant dispute has as its gravamen the different interpretation that the parties ascribe to the subsection's last two paragraphs, and the rights and obligations described therein. The State does not contest the legality of the contractual language nor does it contend that it has repudiated the agreement. To the contrary, it asserts the contract as an affirmative defense to the charge. In sum,

2/ This regulation provides:

> After a charge has been filed and processed, if it appears to the director of unfair practices that the allegations of the charging party, if true, may constitute unfair practices on the part of the respondent, and that formal proceedings in respect thereto should be instituted in order to afford the parties an opportunity to litigate relevant factual issues, the director of unfair practices shall issue and cause to be served on all parties a formal complaint including a notice of hearing before a hearing examiner at a stated time and place.

> the parties merely interpret the clause differently. There is no allegation of facts describing the parties' prior experience in administering this clause of their agreement which would establish that the State's action with respect to Dr. Reyes constitutes a change. Accordingly, the charge does not set forth a basis for a claim that the State has set out to change the agreement or terms and conditions of employment. [9 NJPER at 682]

OFFICE OF EMPLOYEE RELATIONS

On April 28, 1983, CWA filed an unfair practice charge against the State of New Jersey, Office of Employee Relations ("State" or "OER"). The charge, as amended on July 29, 1983, alleged that the State violated subsections 5.4(a)(1), (3), and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it refused to make a longevity payment allegedly owed permanent part-time employees under Article VI of the parties' collective negotiations agreements covering professional, administrative and clerical, primary supervisory, and higher level supervisory employees.

On May 12 and September 8, 1983, the State filed statements of position with respect to the second charge. It contended, in part, that only full-time employees were entitled to longevity payments under the contractual provision CWA relied upon. It further stated that disputes concerning such claims were not subject to arbitration.

On December 2, 1983, the Administrator[3/] of Unfair Practices refused to issue a Complaint. He stated, in pertinent part:

3/ On November 1, 1983, the Commission transferred to the Administrator of Unfair Practice Proceedings the authority to issue and to refuse to issue Complaints.

> In the instant dispute, CWA alleges that the State's failure to pay longevity increases to Cohen and to similarly situated employees violated Article VI of its various contracts with the State. In its response to the Cohen grievance concerning the failure to pay the increases, the State contended that, pursuant to a contractual provision, disputes concerning part-time employees are not grievable. The State has not contested the legality (i.e., negotiability) of the language of Article VI, neither does it appear that the State has repudiated the agreement with CWA. In addition, here, as in Human Services, there is no allegation of any facts describing the parties' prior experience in administering the disputed clause of their agreements which would establish that the State's action with respect to Cohen and other similarly situated employees constitutes a change. Again, as in Human Services, the charge does not set forth a basis for a claim that the State has set out to change the agreement or terms and conditions of employment. [10 NJPER at 4].

On November 18, 1983, CWA, pursuant to N.J.A.C. 19:14-2.3, appealed the Director's decision in Human Services. On December 21, 1983, CWA appealed the Administrator's decision in OER. CWA and the State have filed briefs and have argued orally before the Commission. In addition, several organizations moved for and received permission to participate as amicus curiae in this matter. The New Jersey State Federation of Teachers, AFT/AFL-CIO, the New Jersey Education Association, and the New Jersey Industrial Union Council, AFL-CIO, have all submitted statements seeking reversal of the refusals to issue Complaint. The New Jersey School Boards Association has submitted a statement urging adoption of the decisions below.

CWA argues that the State's refusal to grant a hearing in the Human Services case violated the contract and that similar assertions of contractual violations have been sufficient in the past to warrant the issuance of Complaints and the finding of unfair practices under subsection 5.4(a)(5). It cites In re

Township of Jackson, P.E.R.C. No. 82-79, 8 NJPER 129 (¶13057 1983) ("Jackson"); In re City of Elizabeth, P.E.R.C. No. 83-33, 8 NJPER 567 (¶13261 1982); and In re Cherry Hill Bd. of Ed., P.E.R.C. No. 83-13, 8 NJPER 444 (¶13209 1982), aff'd App. Div. Docket No. A-26-82T2 (1983), and concludes that all contractual violations necessarily constitute unilateral alterations of terms and conditions of employment in violation of subsection 5.4(a)(5). It also argues that PERC has the expertise to resolve contractual disputes and is better able to do so than the Judiciary (which CWA contends would resolve such disputes in the absence, as here, of binding arbitration).

The State has urged affirmance of the decisions refusing to issue Complaints. It argues that this Commission should not substitute its processes for the parties' negotiated grievance procedures designed to resolve breach of contract claims.

In 1974, the Legislature amended the New Jersey Employer-Employee Relations Act to grant this Commission "exclusive jurisdiction" over unfair practices and to specify what actions constituted unfair practices. N.J.S.A. 34:13A-5.4.[4/] Among other things, the Act prohibits "public employers...from 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." N.J.S.A. 34:13A-5.3(a)(5). In addition, section 5.3 requires public employers to negotiate written policies setting forth grievance procedures by means of which

4/ This grant of jurisdiction was made in response to our Supreme Court's holding in Burlington Cty. Evergreen Park Mental Hosp. v. Cooper, 56 N.J. 579 (1970) that we had lacked such jurisdiction under the original Act.

their employees or representatives of employees may appeal the interpretation, application, or violation of policies, agreements, and administrative decisions affecting them. When the employer and employee representative have negotiated terms and conditions of employment and have entered a collective negotiations agreement containing grievance procedures, section 5.3 concludes that "...grievance procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement."

We have repeatedly held that deferral to a negotiated grievance procedure culminating in binding arbitration is generally appropriate when a charge essentially alleges a violation of subsection 5.4(a)(5) interrelated with a breach of contract claim. See, e.g., In re Brookdale Community College, P.E.R.C. No. 83-131, 9 NJPER 267 (¶14122 1983) ("Brookdale"). That policy ensures that the parties' grievance procedures will be used, as section 5.3 commands, for any dispute covered by the terms of such agreement. In State v. Council of State College Locals, 153 N.J. Super. 91 (App. Div. 1977), the Court, endorsing our deferral policy, said:

> This language, together with that of other statutory provisions, has been held to evidence "a clear legislative intent that disputes over contractual terms and conditions of employment should be solved, if possible, through grievance procedures." Id. at 93.

Section 5.2 of the Act charges this Commission with the duty of making policy relating to public sector dispute settlements and grievance procedures. We have rested our deferral policy on that obligation as well as on section 5.3's directive. Thus, we believe the deferral policy promotes the voluntary settlement of labor disputes. As the Executive Director said in In re East Windsor Reg. Board of Education, E.D. No. 76-6, 1 NJPER 59 (1976) ("East Windsor"):

It is clear that the issue of contract interpretation raised by the opposing positions of the parties, is subject to resolution by the grievance procedure which the parties have voluntarily agreed to follow and which, as earlier noted, can result in a binding arbitration award. The broad contractual definition of grievances, encompassing not only claims based upon the interpretation, application or resolution of the agreement, but also of policies or administrative decisions affecting a teacher or group of teachers strengthens the conclusion that the parties intended to choose their contractual grievance and arbitration machinery as an appropriate forum for resolving contract disputes. As it is reasonably probable that the instant dispute will be resolved under the parties' grievance and arbitration machinery, they should first seek its resolution in the manner prescribed therein. The Act provides that "the Commission shall have exclusive power...to prevent anyone from engaging in any unfair practice." Inherent in this power is the judicious exercise of reasonable discretion in the initial processing of the charge. In the judgment of the undersigned, deferral of further processing at this time to the parties' consensual grievance and arbitration machinery, will provide an expeditious and fair means of disposing of the dispute, and if ultimately resulting in an arbitrator's award, will have the added benefit of providing the parties with the special skills and experience of an expert neutral examining the provision at issue in light of the parties' established collective negotiations relationship.

The course taken herein, favoring voluntary settlement of labor disputes through the grievance and arbitration process, finds specific support in the policy declaration of the Act, N.J.S.A. 34:13A-2, in the interplay between the duty of public employers and employee organizations to negotiate in good faith, and in their concomitant responsibility to utilize their own voluntarily created grievance procedures to resolve disputes subject to such procedures.

While deferral of the instant dispute at this time to the processes for resolution voluntarily established by the parties is the preferred course of conduct, the Commission shall retain jurisdiction of the charge, while that process is being pursued. Retention of jurisdiction will permit the Commission to re-enter the dispute to entertain an application submitted at the appropriate time which either asserts the failure to promptly pursue the dispute to resolution under the parties' own machinery, or lack of fairness in the

> grievance and arbitration process, or an arbitration determination repugnant to the Act. Surely if such a claim, ultimately asserted, raises valid issues as to whether the grievance and arbitration process undertaken has been consistent with due process or whether ultimate disposition can reasonably be reconciled with the Commission's exclusive mandate to prevent unfair practices, the Commission should be able to determine whether it will defer to the arbitrator's award.

We reaffirm this policy today and will continue to apply it when a claimed violation of subsection 5.4(a)(5) is substantially dependent upon an underlying contractual dispute which could be submitted to binding arbitration for resolution.

The two cases we now consider are not appropriate for deferral under East Windsor and Brookdale since the parties' contracts specifically preclude the submission of these disputes to binding arbitration and the parties have not voluntarily agreed to such submission. Accordingly, these cases require us to consider whether and under what circumstances a charging party, having agreed that a contract dispute may not be submitted to binding arbitration, may still litigate a breach of contract claim in unfair practice proceedings. We conclude that a mere breach of contract claim does not state a cause of action under subsection 5.4(a)(5) which may be litigated through unfair practice proceedings and instead parties must attempt to resolve such contract disputes through their negotiated grievance procedures. We base this conclusion primarily on our interpretation of the Act and the legislative policy expressed therein favoring the use of negotiated grievance procedures for handling contractual disputes.[5/]

5/ In reaching this conclusion, we reaffirm the vitality of the following policy statement from In re Borough of Palisades Park, D.U.P. No. 78-71, 3 NJPER 238 (1977):

The Act delineates seven unfair practices by public employers, N.J.S.A. 34:13A-5.4(a), as well as five unfair practices by public employee organizations.5.4(b) The breach of a collective negotiations agreement is not enumerated as an unfair practice. We deem this omission to be significant and to evidence a legislative intent that claims merely alleging a breach of contract based on apparent good faith differences over contract interpretation would not, even if proven, rise to the level of a refusal to negotiate in good faith under subsection 5.4(a)(5). Rather than make such claims the subject of unfair practice proceedings, our Legislature has indicated that such claims must be resolved, if possible, through the parties' agreed-upon grievance procedures. N.J.S.A. 34:13A-5.3; State v. Council of State College Locals, supra, 153 N.J. Super. 91 (App. Div. 1977). These grievance procedures may (but are not required to) culminate in binding

5/ (continued)

> The Commission does not view its role as the enforcer of collective negotiations agreements. Such a matter is appropriately the concern of an arbitrator, or alternatively the courts upon a suit for contract enforcement. In certain limited situations where a contract has been breached, the Commission will find that such a breach has also constituted a statutorily prohibited unilateral change in terms and conditions of employment without prior negotiations and thereby find that an unfair practice has occurred.
> Id. (Citations omitted)

Following Palisades Park, this Commission never expressly held that a mere breach of contract constituted an unfair practice. It appears, however, that Complaints were subsequently issued, despite Palisades Park, in some cases where contract interpretation disputes had been alleged and binding arbitration was not available. Today's decision makes clear that Complaints should not issue on charges which allege nothing more than a breach of contract.

arbitration; under the Act the parties are free to negotiate over the terminal step of a grievance procedure they believe most appropriate for a particular dispute.[6/] Given the absence of an explicit statutory basis for resolving mere breach of contract claims and section 5.3's explicit command that negotiated grievance procedures be used for the resolution of contract interpretation disputes, we do not believe that the Legislature intended this Commission to substitute itself as the terminal step in resolving grievances.

We also believe that the policies reflective of the Act militate against permitting litigation of mere breach of contract claims in the guise of unfair practice charges. Such a result could necessitate potential Commission intervention in every public sector labor relations grievance in New Jersey and would necessarily supplant the parties' own negotiated dispute resolution mechanisms. We believe that parties should be encouraged to use their own negotiated grievance procedures for the resolution of contract disputes and should not be entitled to substitute this Commission for a grievance procedure which they have specifically agreed upon as the appropriate method for resolving a

6/ Although several bills have been introduced to make binding arbitration mandatory, (see, e.g., Assembly No. 1448, introduced February 9, 1976; Senate No. 1066, introduced February 3, 1976; Senate No. 1395, introduced April 26, 1976; Senate Bill No. 732, pre-filed for introduction in the 1984 session), no such bill has passed. Several other states have mandatory binding arbitration. Pennsylvania - Public Employee Relations Act, Act of July 23, 1970, P.L. 563, No. 195, as amended, §903; Minnesota - Public Employment Labor Relations Act of 1971, §§199.61 et seq. Minnesota Statutes §199.70: Florida - Public Employee Relations Act, Ch. 477, Florida Statutes, last amended by S.B. 1449, L. 1977, §477.401; Alaska - Public Employment Relations Act, Ch. 113, L. 1972, last amended by Ch. 85, L. 1976, §23.40.210.

particular contractual dispute. Thus, refusal to allow unfair practice litigation over mere breach of contract claims will, consistent with the policies of the Act and specifically 5.3, promote both the use of negotiated grievance procedures and negotiations over grievance procedures designed to end contract disagreements without recourse to formal proceedings.

Our decision is not only consistent with the Act and sound public policy, it is also consistent with the "common law" understanding of labor law agencies that a mere breach of contract is not, in itself, an unfair practice. Thus, for example, the National Labor Relations Board has refused to issue Complaints and to find unfair practices when all that is involved is a good faith dispute over the interpretation of an ambiguous contract clause.[7/] In In re United Telephone Co. of the West, 112 NLRB

7/ Our Supreme Court in Galloway Twp. Bd. of Ed. v. Galloway Twp. Ass'n of Ed. Sec., 78 N.J. 1 (1978) has specifically directed that consideration of LMRA precedent is appropriate in interpreting our Act:

> In Lullo v. Intern. Assn. of Fire Fighters, 55 N.J. 409 (1970), we observed that the original Act's provision for exclusive representation in collective negotiations, N.J.S.A. 34:13A-5.3, was modeled upon its private sector counterpart, §9(a) of the federal Labor Management Relations Act (LMRA), 29 U.S.C. §159(a). We accordingly, held that the "experience and adjudications" under the federal act may appropriately guide the interpretation of the provisions of the New Jersey statutory scheme. Although Lullo was concerned with the Act prior to its amendment in 1974, its admonition to look to the Act's federal analogue is particularly appropriate with respect to the interpretation of the unfair practice provisions of N.J.S.A. 34:13A-5.4, as these parallel the unfair labor practice provisions of the LMRA in many respects. Compare N.J.S.A. 34:13A-5.4 (a),(b),(c), and (f) with 29 U.S.C. §§158 and 160. [Id. at 9].

See also Tp. of Bridgewater and Bridgewater Public Works Ass'n 95 N.J. 235 (1984).

No. 103, 36 LRRM 1097 (1955) ("United Telephone"), the NLRB, in refusing to issue a complaint, stated:

> The complaint alleges no violation of the Act other than the one arising out of the parties' conflicting contract interpretations. It is obvious from the conflicting interpretations of the parties that the contract was not sufficiently clear to avoid a dispute over its terms. There is no showing that the Respondents, in carrying out the contract as they did, were acting in bad faith. Furthermore, the Respondents' action was in accordance with the contract as they construed it, and was not an attempt to modify or to terminate the contract. The provisions of Section 8(d) of the Act are therefore inapplicable in this case. Regarding the question of which party correctly interpreted the contract, the Board does not ordinarily exercise its jurisdiction to settle such conflicts. As the Board has held for many years, with the approval of the courts: "...it will not effectuate the statutory policy...for the Board to assume the role of policing collective contracts between employers and labor organizations by attempting to decide whether disputes as to the meaning and administration of such contracts constitute unfair labor practices under the Act." [Consolidated Aircraft Corp., 47 NLRB 694, 12 LRRM 44, enf. 141 F.2d 785, 14 LRRM 553 (C.A. 9].
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> In view of its contractual relations with the Respondents, the Union's recourse in this situation was to exhaust the possibility of settling the overtime question by negotiation and failing such settlement, to seek judicial enforcement of its construction of the contract. The Board is not the proper forum for parties seeking to remedy an alleged breach of contract or to obtain specific enforcement of its terms. Id. at ___.

See also NLRB v. C & C Plywood Corp., 325 U.S. 421, 64 LRRM 2065 (1967) ("C & C Plywood") (NLRB does not have jurisdiction to entertain mere breach of contract claims); National Dairy Products

Corp., 126 NLRB No. 62, 45 LRRM 1332 (1960). See generally, The Developing Labor Law (2d ed. 1983) at 909 (a contract violation by itself does not necessarily rise to the level of an unfair practice warranting the exercise of unfair practice jurisdiction).[8/]

In short, we conclude that allegations setting forth at most a mere breach of contract do not warrant the exercise of the Commission's unfair practice jurisdiction. An employer which negotiates terms and conditions of employment as set forth in a collective negotiations agreement, which agrees to specific grievance procedures for the resolution of contractual disputes, and which is willing to abide by those negotiated procedures, does not "refuse to negotiate in good faith" simply because its interpretation of an unclear contract clause may ultimately prove to be mistaken.[9/]

This holding does not mean, however, that a breach of contract is never evidence of an unfair practice or that we do not have the power to interpret collective negotiations agreements. Indeed, in Jackson we specifically held that we have such jurisdiction and that a breach of contract may also rise to the

8/ New York has also held that a mere breach of contract is not an unfair practice. St. Lawrence County, 10 PERB 3102 (¶3058 1977). By contrast, those few states which have permitted mere breach of contract claims to be litigated as potential unfair practices have done so as the result of an explicit legislative command. See, e.g., Wisconsin, S.E.L.R.A. §111.84(1)(3) (for State employees), MERA §111.70(3)(5) (for municipal employees); Hawaii, PERA §89-13.

9/ We disagree with CWA's assertion that every breach of contract necessarily constitutes a "unilateral" alteration of a term and condition of employment.

level of a refusal to negotiate in good faith.[10/] Thus, if the contract claim is sufficiently related to specific allegations that an employer has violated its obligation to negotiate in good faith, we would certainly have the authority to remedy that violation under subsection (a)(5).

To determine whether a charge is predominantly related to subsection 5.4(a)(5)'s obligation to negotiate in good faith or is an unrelated breach of contract claim which does not implicate any obligations and policies arising under our Act, it is necessary to look closely at the nature of the charge and all the attendant circumstances. See In re State of New Jersey, E.D. No. 79, 1 NJPER 39 (1975), aff'd 141 N.J. Super. 470 (App. Div. 1976). While there can be no precise demarcation between a mere breach of contract claim and a refusal to negotiate in good faith claim which is interrelated with an alleged contractual violation, we give the following examples of situations in which we would entertain unfair practice proceedings under section 5.4(a)(5). A specific claim that an employer has repudiated an established

10/ We disagree with CWA's contention that Jackson holds that a breach of contract is necessarily an unfair practice. Jackson holds only that we are not precluded from exercising our unfair practice jurisdiction simply because it may require the interpretation of a collective negotiations agreement. In this regard, we note that Jackson relied on C & C Plywood. That case rejected the general proposition that the NLRB had jurisdiction to consider a mere breach of contract claim as an unfair practice, but also held that the NLRB had jurisdiction to interpret a collective negotiations agreement when an employer relied upon that agreement as a defense to a charge that it had implemented a completely new term and condition of employment without negotiations. The one claim we found meritorious in Jackson involved a similar issue: the employer in effect created a new term and condition of employment, and repudiated a contract clause to the contrary, when it unilaterally adopted an ordinance giving it an option to deny contractually required sick leave. Accordingly, Jackson is not inconsistent with the result we reach today. Indeed, we affirm Jackson's holding that we will not be deprived of our unfair practice jurisdiction simply because the case may require the interpretation of a contract.

term and condition of employment may be litigated in an unfair practice proceeding pursuant to subsection 5.4(a)(5). See Jackson; Elizabeth; and Cherry Hill.[11/] Compare Sea-Bay Manor Home, 253 NLRB No. 68, 106 LRRM 1010 (1980). This example is most clearly illustrated by an employer's decision to abrogate a contractual clause based on its belief that the clause is outside the scope of negotiations. In re Local 195 v. State, 88 N.J. 393 (1982). Thus, we will entertain unfair practice cases in which an employer has already repudiated a clause based on such a belief or in which an employer has raised a scope of negotiations defense to a contract claim. See Elizabeth; In re Town of Kearny, P.E.R.C. No. 82-12, 8 NJPER 441 (¶13208 1982); In re Township of Irvington, P.E.R.C. No. 82-63, 8 NJPER 94 (¶13038 1982). A claim of repudiation may also be supported, depending upon the circumstances of a particular case, by a contract clause that is so clear that an inference of bad faith arises from a refusal to honor it or by factual allegations indicating that the employer has changed the parties' past and consistent practice in administering a disputed clause. See Cherry Hill; Oak-Cliff-Golman Baking Co., 207 NLRB No. 1063, 85 LRRM 1035 (1973).[12/] In addition,

11/ We believe CWA's reliance on Jackson, Elizabeth, and Cherry Hill is misplaced since the facts of those cases indicated that the employers had adopted new ordinances, directives, or policies repudiating contractual provisions. Jackson has already been discussed. See n. 10. Elizabeth involved the Fire Director's unilateral promulgation of a directive denying summer vacations to firefighters because of an emergency; the City claimed it had a managerial prerogative to issue that directive. Cherry Hill involved the Board's repudiation, pursuant to its reading of constitutional law concerning freedom of religion, of a contractual clause granting administrators a leave of absence on religious holidays. To the extent, however, that these cases or any other cases may be construed as implying that a breach of contract standing alone rises to the level of an unfair practice, we, for the reasons already stated, reject such implications.

12/ The NLRB's rationale for finding a violation of the Act as opposed to a mere contract violation in Oak-Cliff-Golman Baking Co., is instructive:

(continued)

we will entertain charges in which specific indicia of bad faith over and above a mere breach of contract are alleged. See National Dairy Products Corp., supra. We will also entertain charges which indicate that the policies of our Act, rather than a mere breach of contract claim, may be at stake. See Galloway Twp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978).13/ See also Oak-Cliff-Golman Baking Co., supra; Papercraft Corp., 212 NLRB No. 55, 86 LRRM 1697 (1974). We emphasize that these examples are not meant to be exhaustive and instead the Administrator of Unfair Practices must examine the allegations of each case to

12/ (continued)

> It cannot be gainsaid that an employer's decision in midterm of a contract to pay its employees for the remainder of the contract's terms at wage rates below those provided in the collective bargaining agreement affects what is perhaps the most important element of the many in the employment relationship which Congress remitted to the mandatory process of collective bargaining under the Act. Because so substantial a portion of the remaining aspects of a bargaining contract are dependent upon the wage rate provision, it seems obvious that a clear repudiation of the contract's wage provision is not just a mere breach of the contract, but amounts, as a practical matter, to the striking of a death blow to the contract as a whole, and is thus, in reality, a basic repudiation of the bargaining relationship. We believe the jurisdiction granted us under the Act clearly encompasses not only the authority but the obligation to protect the statutory process of collective bargaining against conduct so centrally disruptive to one of its principal functions - the establishment and maintenance of a viable agreement on wages.
> [85 LRRM at 1036] (emphasis added).

13/ Galloway establishes that the unilateral alteration of a prevailing term and condition of employment during the course of collective negotiations constitutes a refusal to negotiate in good faith. See also, NLRB v. Katz 369 U.S. 736 (1962). Thus, the statutory policy of upholding the status quo during the delicate period of successor contract negotiations warrants unfair practice proceedings on claims that an employer has unilaterally altered a term and condition of employment set in the expired predecessor contract.

determine whether there is a sufficient nexus between the duty to negotiate in good faith and an alleged contractual violation to warrant the issuance of a Complaint.14/

We now turn to the allegations of the two charges before us to determine whether they sufficiently indicate a refusal to negotiate in good faith, as opposed to a possible mere breach of contract, so as to warrant the exercise of our unfair practice jurisdiction under subsection 5.4(a)(5).15/ Given the circumstances of these cases, we conclude that the claims do not sufficiently indicate a refusal to negotiate in good faith and instead amount to mere breach of contract claims. Therefore, we affirm the refusals to issue Complaints.

In Human Services, the dispute centers on the parties' competing interpretations of Article 5 of the agreement. In pertinent part, that Article provides:

> In the event an unclassified employee is dismissed from State employment, without receiving specific written reasons and such dismissal is not related to fiscal problems or programmatic changes and in

14/ In the absence of such a nexus, we do not believe our expertise is demanded for the purpose of reviewing a mere breach of contract claim. Contrast Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978) (Commission has primary jurisdiction and expertise over scope of negotiations determinations). The courts of this State have jurisdiction and competence to consider such claims.

15/ While these charges have a general allegation that subsection 5.4(a)(3) has been violated, there are no specific factual allegations supporting that claim and it was correct to refuse to issue Complaints concerning that subsection. The OER case had also presented a claim of a refusal to provide information related to CWA's grievance over longevity payments, but that aspect of the charge was later withdrawn.

> the judgment of the State such dismissal is not of a nature whereby the employee must be immediately removed from the work location, the State shall provide the employee with at least ten (10) calendar days notice in advance of the dismissal.
>
> Unless there are exceptional circumstances when an unclassified employee is dismissed from State employment due to misconduct, management shall serve such employee with the specific written reasons, relating to such misconduct, and the employee may request and shall be granted a hearing by the department or agency head or his designee, whose decision shall be final. Time limits shall apply as provided in this article. The burden of proof shall be on the employee.
>
> It is understood that nothing herein shall be construed as limiting the State from exercising its inherent discretion to terminate employees serving at the pleasure of the department or agency head, (i.e., unclassified employees), without setting forth the reasons therefor. Moreover, the issue of dismissal relative to any matter of job performance shall not fall within the purview of this article. Grievances concerning the interpretation of this article shall be processed as noncontractual A.2. grievances. (Emphasis added).

Under the parties' negotiated grievance procedures, Article 5 grievances, unlike others, may not be submitted to binding arbitration; instead, the parties specifically agreed that the decision of the employer's Department Head or designee would be final.[16/]

CWA has claimed that Dr. Reyes was discharged due to an "error in judgment" which, in its view, is equivalent to "misconduct" rather than "a matter of job performance." It then claims that Dr. Reyes, although not informed he was discharged for

16/ This rule of finality had one exception -- pertaining to review by the Civil Service Commission -- apparently not applicable here.

"misconduct," was entitled to a hearing under the contract and that the State violated that contractual obligation. The State has a different view of the meaning of the contract. It contends that there is no right to a hearing under the instant circumstances since Dr. Reyes was an unclassified employee subject to termination and since, it asserts, the contractual right to a hearing only comes into play when the employer, unlike here, informs the unclassified employee he has been discharged for "misconduct."

It is apparent that the sole issue in the dispute in Human Services is merely a contractual one: is an employee contractually entitled to a hearing when the State does not explicitly state that misconduct was the reason for the termination and the employee nevertheless asserts that misconduct was the underlying reason? There are no accompanying allegations in the charge which would provide a specific basis for finding that the State has refused to negotiate in good faith with respect to that contractual dispute. The State met its obligation in the first instance to negotiate over procedural rights for unclassified employees; the contract clause it and CWA agreed to does not clearly afford Dr. Reyes the right CWA claims; the State has not repudiated the clause and instead has an understandable difference of interpretation with CWA; and the parties specifically agreed in their negotiated grievance procedures that the decision of the Department Head with respect to such differences of interpretation would be final. Under all these circumstances, we

cannot say that CWA's breach of contract claim, even if found to be ultimately meritorious, would amount to an unfair practice. We specifically decline to substitute our processes for a grievance procedure which the parties explicitly and carefully negotiated for the resolution of this dispute.

A different contract interpretation question is presented in OER. CWA claims that permanent part-time employees are contractually entitled to receive, but have not been paid, longevity payments. It relies upon Article 6, subsection (A)(1)(a)(4) which provides:

> Employees who have reached the maximum step (Step 8) within the salary range, and who have been at that maximum step for a minimum of one (1) year, and would be eligible for an increment had they not been at Step 8, shall, on their anniversary date during fiscal year 1982, receive a cash payment of $100 and for fiscal year 1983, a cash payment of $110. It is understood between the parties that this program as applied to eligible unit employees shall be a subject for renegotiations for the contract that succeeds this agreement terminating June 30, 1983.

The State, while conceding that part-time employees are members of CWA's negotiations unit and are generally covered by the provisions of the contract, denies that part-time employees are entitled to receive longevity payments under this particular section of the contract. It specifically points to "Memorandum of Understanding II A" which provides:

> The inclusion of certain part-time employees within the negotiating unit shall not be construed to expand the coverage of any State program relating to terms and conditions of employment for which such part-time employees were not previously deemed to be eligible, or to include such part-time employees under the coverage of any provision of this Agreement unless the substance of the provision describes a

> type of program for which such part-time employees were generally eligible prior to inclusion under the Agreement. Where such part-time employees are eligible for State programs or coverage under provisions of this Agreement, appropriate prorations will be made in accord with their part-time status.

Thus, the State argues:

> The entire matter arises in the context of a claim for longevity payments by a permanent part-time employee of the State in the Professional Unit. Full-time employees at the eighth or maximum step of their particular salary range were made eligible to receive a cash payment of $100.00 for the fiscal year 1982 and a cash payment of $110.00 for fiscal year 1983. However, the program as negotiated was not extended to permanent part-time employees. Consequently, the grievant was not entitled to receive any such payment. Prior contracts have provided that permanent part-time employees could receive a pro rata payment in certain situations. The existing Agreement does not provide for similar payments with regard to persons reaching the final step in their salary ranges. Clearly, there could not have been any change in the terms and conditions of employment for permanent part-time employees. In this connection, it should also be noted that Memorandum of Understanding II of the Agreement makes clear that disputes concerning part-time employees covered by the Agreement are not subject to arbitration.17/

The sole issue in OER, as in Human Services, is again a contractual one: are part-time employees entitled to longevity payments under Article 6, subsection (A)(1)(a)(4) and Memorandum of Understanding II A? As in Human Services, there are no accompanying

17/ Pursuant to Section B of the Memorandum of Understanding, disputes concerning the eligibility of part-time employees for coverage under any contractual provisions are outside the scope of the parties' contractual grievance procedure which terminates in binding arbitration. There is no dispute, however, that CWA filed grievances concerning its Article VI claim and that these grievances were processed up until the point of binding arbitration. CWA then sought to submit its claim to binding arbitration, but the State, pursuant to Section B of the Memorandum of Understanding, declined to agree to the arbitrator's jurisdiction. The State, however, was willing to arbitrate the question of whether the arbitrator had jurisdiction, and CWA declined that offer.

allegations in the charge which would provide a specific basis for finding that the State has refused to negotiate in good faith with respect to that dispute. The State met its obligation in the first instance to negotiate over compensation for unit employees; the contract clause on longevity payments the State and CWA agreed to does not incontestably afford part-time employees the right CWA claims; the State has not repudiated its obligation to pay longevity payments generally and instead has an understandable difference of interpretation concerning the coverage of part-time employees under Article 6 and the Memorandum of Understanding; the State has entertained grievances concerning CWA's claims; and the parties have apparently agreed that claims concerning the eligibility of part-time employees for particular benefits may not be submitted to binding arbitration on the merits. Given all these circumstances, and for the foregoing reasons, CWA's breach of contract claim, even if found to be ultimately meritorious, would not amount to an unfair practice.

ORDER

The refusals to issue Complaints are affirmed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Suskin and Wenzler voted in favor of this decision. None opposed. Commissioners Graves, Hipp and Newbaker abstained. Commissioner Butch was not present.

DATED: Trenton, New Jersey
June 25, 1984
ISSUED: June 26, 1984