

P.E.R.C. NO. 93-45

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CAMDEN COUNTY JUDICIARY,

Respondent,

-and-

Docket No. CO-H-91-319

COALITION OF CAMDEN COUNTY
PROBATION OFFICERS,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission grants the Camden County Judiciary's motion for summary judgment and dismisses a Complaint based on an unfair practice charge filed by the Coalition of Camden County Probation Officers. The charge alleged that the employer violated the New Jersey Employer-Employee Relations Act when it tried to deal directly with unit employees to influence them to accept a team leader position outside the charging party's unit; assigned unit work to the team leader position; failed to file a clarification of unit petition; and invited unit employees to negotiate over terms and conditions of employment for team leaders.

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Charging Party.

Appearances:

For the Respondent, Robert J. Del Tufo, Attorney
General (Michael L. Diller, Senior Deputy Attorney
General, of counsel)

For the Charging Party, Baker and Kahn, attorneys
(Leonard S. Baker, of counsel)

DECISION AND ORDER

On May 28, 1991, the Camden County Probation Officers
Association filed an unfair practice charge against the Camden
County Judiciary. The charge alleges that the employer violated
the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et
seq., specifically subsections 5.4(a)(1), (2), (3), and (5),^{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. (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."

when it tried to deal directly with unit employees to influence them to accept a team leader position outside the charging party's unit; assigned unit work to the team leader position; failed to file a clarification of unit petition; and invited unit employees to negotiate over terms and conditions of employment for team leaders.

On August 14, 1991, a Complaint and Notice of Hearing was issued consistent with Passaic Cty. Probation Officers' Ass'n v. Passaic Cty., 73 N.J. 247 (1977), and In re Judges of Passaic Cty., 100 N.J. 352 (1985). The case was held in abeyance pending a representation proceeding during which the Coalition of Camden County Probation Officers replaced the Association as majority representative of nonsupervisory probation officers. The Coalition assumed responsibility for this charge.

On July 15, 1992, the employer filed an Answer. It denies trying to deal directly with unit employees; soliciting employees for the team leader position; giving unit work to team leaders; inviting employees to negotiate over terms and conditions of employment for team leaders; and being obligated to negotiate with the Association or the Coalition over terms and conditions of employment for team leaders. The employer claims that the team leader position is supervisory or managerial and not includable in the Coalition's unit; it had no obligation to file a clarification of unit petition; and the Coalition and Association waived any claim to represent team leaders by failing to participate in the Commission-conducted election which resulted in a supervisory unit including team leaders.

On September 14, 1992, the employer moved for summary judgment and a stay of further proceedings. Pursuant to N.J.A.C. 19:14-4.8(a), I referred the motions to Hearing Examiner Arnold H. Zudick. On September 21, 1992, the Hearing Examiner notified the parties that the hearing had been postponed and referred the Coalition to the rules for responding to the motion. The Coalition did not respond to the employer's motion, brief, or affidavits.

On October 28, 1992, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 93-11, 18 NJPER ___ (¶____ 1992). He concluded that the employer did not violate the Act by inviting employees to accept a promotion outside the charging party's unit, or by responding to employee requests for a meeting and information regarding terms and conditions of employment for a title outside the charging party's unit. The Hearing Examiner further concluded that the employer did not invite the employees to negotiate, nor did its responses to the employees' requests rise to the level of negotiations.

The Hearing Examiner served his decision on the parties and informed them that exceptions were due by November 12, 1992. Neither party filed exceptions or requested an extension of time.

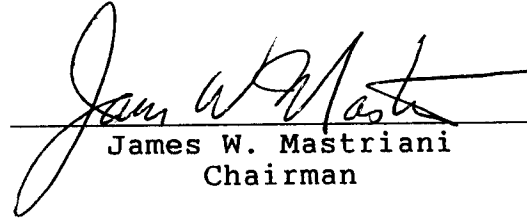
I have reviewed the record. I incorporate the Hearing Examiner's undisputed findings of fact (H.E. at 4-9). Acting pursuant to authority granted to me by the full Commission in the absence of exceptions and applying the standards for deciding

motions for summary judgment, N.J.A.C. 19:14-4.8(d), I grant the employer's motion and dismiss the Complaint.

ORDER

The employer's motion for summary judgment is granted. The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

DATED: December 4, 1992
Trenton, New Jersey

H.E. NO. 93-11

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CAMDEN COUNTY JUDICIARY,

Respondent,

-and-

Docket No. CO-H-91-319

COALITION OF CAMDEN COUNTY
PROBATION OFFICERS,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends the Commission grant the Respondent's Motion for Summary Judgment and dismiss the Complaint. The Hearing Examiner concluded that the Camden County Judiciary did not violate the New Jersey Employer-Employee Relations Act by inviting employees to accept a promotion outside the negotiations unit, or by responding to employee requests for a meeting and information regarding terms and conditions of employment for a title outside the Charging Parties' unit. The Hearing Examiner further concluded that the Judiciary did not invite the employees to negotiate, nor did its responses to the employees' requests rise to the level of negotiations.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

STATE OF NEW JERSEY
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Docket No. CO-H-91-319

COALITION OF CAMDEN COUNTY
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Appearances:

For the Respondent, Hon. Robert J. Del Tufo, Attorney
General of New Jersey
(Michael L. Diller, Sr. D.A.G., of counsel)

For the Charging Party, Baker and Kahn, Attorneys
(Leonard S. Baker, of counsel)

HEARING EXAMINER'S RECOMMENDED REPORT AND
DECISION ON MOTION FOR SUMMARY JUDGMENT

On May 28, 1991, the Camden County Probation Officers
Association (Association) filed an unfair practice charge with the
Public Employment Relations Commission against the Camden County
Judiciary alleging the Judiciary violated subsections 5.4(a)(1),
(2), (3), and (5) of the New Jersey Employer-Employee Relations Act,
N.J.S.A. 34:13A et seq.^{1/} When the charge was filed the

^{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

Association was the majority representative of all probation officers and senior probation officers employed by the Judiciary. The Association alleged, in pertinent part, that: 1) on or about December 27, 1990 the Judiciary "sought" to deal directly with unit employees to "influence" them to accept a position the Judiciary "intended to place outside the...unit"; 2) the employees "solicited" for this position were senior probation officers; 3) the duties for the "team leader" position were duties performed by senior probation officers; 4) the Judiciary did not clarify the unit through the Commission; 5) by letter of March 26, 1991 Judge Paul Porreca "invited" employees represented by the Association to negotiate with the Judiciary over team leader terms and conditions of employment; 6) this action was taken without negotiations with the Association and constituted an attempt to unilaterally bypass the Association and change terms and conditions affecting the Association's unit. The Association sought an order requiring the Judiciary to cease attempting to remove unit work, and from negotiating with its unit members.

1/ Footnote Continued From Previous Page

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. (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."

A Complaint and Notice of Hearing was issued on August 14, 1991 consistent with the policies enunciated in Passaic Cty. Probation Officers' Ass'n v. Passaic Cty., 73 N.J. 247 (1977), and In re Judges of Passaic County, 100 N.J. 352 (1985). The Judiciary filed an answer on July 15, 1992 denying it violated the Act.^{2/} It denied: "seeking" to deal directly with employees; soliciting employees for the team leader position; that team leader duties were the same as senior probation officers; that Judge Porreca invited employees to negotiate over team leader terms and conditions of employment; and that it was obligated to negotiate with the Association or the Coalition over team leader terms and conditions of employment.

The Judiciary cited as defenses that: the team leader position is a supervisory or managerial title and not includable in the majority representative's unit; the Judiciary had no obligation to file a clarification of unit petition; and the "charging party" waived any claim to represent team leaders by failing to participate

^{2/} After the Complaint issued the parties agreed to place the processing of the case on hold pending settlement discussions and the resolution of a representation petition filed by the Probation Association of New Jersey seeking to represent employees included in the unit then represented by the Association. But by early 1992 the Coalition of Camden County Probation Officers was recognized as the new majority representative of the probation and senior probation officers employed by the Judiciary. The Coalition thereafter assumed the responsibility for processing the charge, and in June 1992 it requested the charge proceed to hearing. By letter of June 10, 1992, I notified the parties that the matter would proceed to hearing and requested the Judiciary submit an answer. That answer was submitted in July 1992.

in the Commission conducted election resulting in the recognition of a supervisory unit including team leaders.

A hearing was scheduled for September 22, 1992. On September 14, 1992 the Judiciary filed a Motion for Summary Judgment with the Commission's Chairman and also requested a stay of the scheduled hearing. The Motion was accompanied by a brief, two affidavits, two memorandums, and other documents. On September 16, 1992 the Chairman, pursuant to N.J.A.C. 19:14-4.8(a), referred the Motion and requested stay to me for review. By telephone and by letter of September 21, 1992 I notified the parties that the hearing had been postponed, and referred the new majority representative, the Coalition of Camden County Probation Officers (Coalition) to the rules for filing an answer to the Motion. The Judiciary submitted a third affidavit in support of its Motion on October 8, 1992. The Coalition did not respond to the Motion, brief, or affidavits.

Based upon the documents filed by the parties in this proceeding to date, I make the following:

FINDINGS OF FACT

1. From at least 1986 to 1991 the Association had been recognized by the Judiciary as the majority representative for probation and senior probation officers (non-supervisory titles) employed in the Camden County Probation Department. In the late 1980's or early 1990 the New Jersey Administrative Office of the Courts (AOC) developed a new job classification, team leader,

intended to be a primary level supervisory title. There was a challenge to the creation of that job classification as an unclassified title, and on February 22, 1990, the initial determination rejected the AOC's request. That initial determination was subsequently reversed, but the issue is still being litigated.

2. In November 1990 the Camden County Court Administrator, Dollie Chambers, under direction of the Assignment Judge, prepared a job vacancy announcement for three team leader positions. The announcement was posted on November 19, 1990. It showed that team leaders would supervise professional, paraprofessional and clerical employees. According to the announcement, team leaders have the authority to recommend promotions and discipline. There was no evidence that team leaders were performing senior probation officer duties and responsibilities.^{3/}

^{3/} The Association alleged in the charge that team leaders were to perform senior probation officer duties and responsibilities. The Judiciary denied that allegation in its answer, and in its motion papers produced the job announcement. That announcement shows that team leaders possess duties that are supervisory within the meaning of the Act which made them ineligible for inclusion in the Association's rank and file unit. The Coalition has not demonstrated what, if any, team leader duties were the same as those performed by senior probation officers. Since the Coalition did not respond to the Motion or contradict the job duties listed in the job announcement, I credit the announcement to show that team leaders were/are supervisory employees not appropriate for inclusion in the Association's/Coalition's unit. At least to that extent, team leaders were not performing senior probation officer duties.

3. By letter of January 14, 1991, Ann Morabito, Association President, notified Assignment Judge, Donald Bigley, that her Association was interested in representing team leaders, and she asked Judge Bigley to modify the recognition clause of their collective agreement to include the new title in the existing unit with probation and senior probation officers. Judge Bigley responded by letter of January 16, 1991 denying the request. He explained that since team leaders were supervisors they were not appropriate for inclusion in the Association's negotiations unit. There is no evidence that the Association disagreed with that result at that time.

4. After the team leader announcement had been posted, several employees requested a meeting with Presiding Judge Paul Porreca to clarify questions they had regarding the employment terms of the unrepresented team leader title. That meeting was held on or about February 21, 1991. Judge Porreca invited those employees who informally held team leader titles to accept appointments to the new formal title. But he did not negotiate with those employees over team leader terms and conditions of employment. There was no evidence that Judge Porreca had sought direct dealings with these employees or that he had invited them to engage in negotiations.^{4/}

^{4/} The Association had alleged that on or about December 27, 1990 the Judiciary sought direct dealings with the employees, but there is no evidence to support that allegation. The evidence

As a follow-up to that meeting a group of team leader employees, or employees eligible for promotion to team leader, by memorandum of March 19, 1991, posed lengthy questions to Judge Porreca regarding team leader terms and conditions of employment. They asked specific questions regarding salary, overtime, longevity, health, disability and life insurance, maternity, personal, sick, vacation, bereavement and compensatory leave, pensions, seniority, work hours and others. By memorandum of March 26, 1991, Judge Porreca, with Dollie Chambers' assistance, comprehensively responded to the employees' memorandum. Despite the Association's assertion in the charge, Judge Porreca's memorandum did not invite employees to enter into negotiations with the Judiciary regarding team leader terms and conditions of employment. He merely answered their questions point-by-point. In his memorandum, Judge Porreca occasionally answered an employee's question by noting the result if a collective agreement existed. When asked how the salary range would be determined, for example, he responded in pertinent part:

Future adjustments...will depend upon the terms of a collective bargaining agreement, if and when such an agreement exists....

4/ Footnote Continued From Previous Page

shows a meeting took place on or about February 21, 1991. There was no evidence of anything occurring on December 27. Judge Porreca did not seek the February 21 meeting. It was sought by the employees and referred to in their March 19, 1991 memorandum requesting additional information on team leader terms and conditions of employment. Judge Porreca merely honored the employees' request to meet.

5. The Association filed its unfair practice charge on May 28, 1991. On July 18, 1991 the Merit System Board issued a decision recognizing the team leader title as an established job classification. That decision was subsequently appealed to the Appellate Division. On August 4, 1992 the appellant in that matter requested the Supreme Court certify the appeal.

6. On September 24, 1991 the Probation Association of New Jersey (PANJ) filed a petition for certification with the Commission (Docket No. RO-92-54) seeking to represent the probation and senior probation officers then represented by the Association. Team leaders were not included in the petition. On October 7, 1991 the Association notified the Commission that it did not wish to intervene in the petition. The Coalition did intervene.

On October 15, 1991 PANJ, the Coalition and the Judiciary consented to an election covering probation and senior probation officers. Team leaders were not included in the election. The election was held on October 31, 1991 and the Coalition received a majority of the votes cast.

PANJ filed objections to the election on November 8, 1991. On December 20, 1991 the Director of Representation issued a decision, Camden County Judiciary, D.R. No. 92-9, 18 NJPER 30 (¶23009 1991), dismissing the objections. On December 31, 1991 the Judiciary recognized the Coalition as the majority representative for the unit formerly represented by the Association.

On January 10, 1992 PANJ requested the Commission review the Director's decision. On January 31, 1992 the Commission issued a decision, Camden County Judiciary, P.E.R.C. No. 92-86, 18 NJPER 103 (¶23048 1992) denying the request for review. As a result, PANJ withdrew its petition for certification on February 7, 1992, which was approved on February 14, 1992.

7. The hearing in the unfair practice charge had been scheduled for November 1991, but was cancelled to first resolve the representation issue. On March 6, 1992, and twice in May 1992, I asked the Coalition to advise me of its position on the charge. On June 4, 1992, the Coalition notified me of its intent to pursue the charge. On June 10, 1992 I rescheduled the hearing for September 22, 1992. The Judiciary's Motion was filed on September 14, 1992, and I stayed the hearing on September 21, 1992.

8. On April 24, 1992 the Judicial Supervisors Association (JSA) filed a petition for certification (RO-92-180) seeking to represent Team Leaders and PREP Supervisors employed by the Judiciary. Neither the Association, PANJ, nor the Coalition intervened in that petition. On June 1, 1992 the Judiciary and JSA consented to an election which was held on June 18, 1992. A majority of the votes cast were in favor of representation. On August 18, 1992 the Judiciary formally recognized the JSA as the majority representative of team leaders and PREP supervisors. Thus, the JSA withdrew its petition on August 25, 1992, which was approved on September 1, 1992.

ANALYSIS

It is well settled law in this State that in considering motions for summary judgment, all inferences are drawn against the moving party and in favor of the party opposing the motion. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954). Additionally, in considering a motion for summary judgment, no credibility determinations may be made. The motion must be denied if material factual issues exist. Id. at 74. A motion for summary judgment must be granted with extreme caution, all doubts resolved against the movant, and the summary judgment procedure may not be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super 182, 185 (App. Div. 1981); State of N.J., Dept. of Personnel, P.E.R.C. No. 89-67, 15 NJPER 76 (¶20031 1988), aff'd App. Div. Dkt. No. A-3465-88T5 (6/14/90), certif. den. 122 N.J. 395 (1990); AFT Local 481 (Jackson), H.E. No. 87-9, 12 NJPER 628 (¶17237 1986), adopted P.E.R.C. No. 87-16, 12 NJPER 734 (¶17274 1986); Essex County Educational Services Comm., P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982).

However, the Court in Judson also established that if the opposing party offers "no affidavits or matter in opposition," to the moving party, summary judgment may be granted, taking the movant's uncontradicted facts and documents as true, provided those facts or documents did not raise a disputed material fact. Id. at 75. See also, In re City of Atlantic City, H.E. No. 86-36, 12 NJPER 160 (¶17064 1986), adopted P.E.R.C. No. 86-121, 12 NJPER 376 (¶

17145 1986); In re CWA, Local 1037, AFL-CIO, H.E. No. 86-10, 11 NJPER 621 (¶ 16217 1985), adopted P.E.R.C. No. 86-78, 12 NJPER 91 (¶ 17032 1985). The Court in Judson specifically held that:

...if the opposing party offers no affidavits or matter in opposition, or only facts which are immaterial or of an insubstantial nature...he will not be heard to complain if the court grants summary judgment, taking as true the statement of uncontradicted facts and the papers relied upon by the moving party, such papers themselves not otherwise showing the existence of an issue of material fact. 17 N.J. at 75.

Since the Coalition did not respond to the Motion, I find no material facts in dispute and, therefore, accept the Judiciary's uncontradicted facts as true. Those facts show that the team leader title, from its inception, was created as a supervisory title and was at a promotional level above senior probation officers. Judge Porreca did not "solicit" or deal directly with employees or unlawfully "influence" them, he merely encouraged them to accept appointment to a supervisory title. There is no evidence that any Judiciary official engaged in unlawful conduct. Rather, a job announcement was posted for three team leader positions which gave senior probation officers the opportunity to be considered for promotion. There is no evidence that the appointments adversely affected the number of senior probation officers in the Coalition's unit, and senior probation officers continue to work in the Department.

Employees, not the Judiciary, requested the February 21 meeting to learn more about the team leader terms and conditions of

employment. Judge Porreca did not negotiate with those employees, nor did he "invite" them to enter into such negotiations. Rather, he "invited" interested employees to accept appointment to the new position. His March 26, 1991 memorandum was not evidence of negotiations, it was evidence of a direct response to questions posed by the employees in their own memorandum of March 19, 1991. Those responses do not constitute negotiations within the meaning of the Act.

The wording of the allegations in the charge demonstrates the Association's misunderstanding of its rights and responsibilities vis-a-vis the Judiciary's. A public employer has the managerial prerogative to create new titles and job descriptions and hire and/or promote employees into new titles. See Bergen Pines County Hospital, P.E.R.C. No. 87-25, 12 NJPER 753 (¶17283 1986); Willingboro Bd. Ed., P.E.R.C. No. 85-74, 11 NJPER 57 (¶16030 1984); West Deptford Bd. Ed., P.E.R.C. No. 80-96, 6 NJPER 56 (¶11030 1980). The employer may promote unit employees to titles outside the negotiations unit. In fact, even if a Judiciary official had asked certain senior probation officers to accept team leader positions, that would not violate the Act. The Judiciary has the right to promote employees, and there was no allegation that the Judiciary discriminated against employees in promoting senior probation officers or that qualified employees were being bypassed.

Where, as here, the Judiciary created team leaders as a supervisory title not appropriate for inclusion in the Association's

unit, it was not obligated to give notice to or negotiate any terms and conditions of employment of that title with the Association. By January 1991 the Association knew the Judiciary considered team leaders to be supervisory employees because it had denied the Association's request to represent them. If the Association still believed that the team leader title belonged in its unit, or was going to perform its unit work, it was incumbent upon the Association to file a clarification of unit petition with the Commission at that time to resolve that issue. A clarification of unit petition was appropriate then because the team leader title was new, and not represented by any other negotiations unit.^{5/} The Judiciary was not obligated to file such a petition since it believed it created a supervisory title which was outside the Association's recognition clause. The facts support that position.

By October 1991 the Association had disclaimed interest in continuing to represent its negotiations unit. After an election the Coalition became the majority representative of probation and

^{5/} The Association was not "required" to file a clarification of unit petition, but if it sought to represent that title it had to file that petition or a charge or both. The Association only filed the charge, but since the Coalition has not contradicted the team leader duties in the job announcement, there is no reason to challenge the finding that team leaders are supervisory employees and inappropriate for inclusion in the Association's/Coalition's unit. It would have been more appropriate to litigate the team leader supervisory question through a timely filed clarification of unit petition before the team leaders were organized in a separate unit. In that sense, it was incumbent upon the Association to file such a petition since it was the organization claiming interest in the title.

senior probation officers, but took no action to represent team leaders who were then still unrepresented. When the JSA sought to represent team leaders in a supervisory unit, neither the Coalition nor the Association intervened. By failing to raise the supervisory issue in a timely manner or intervene in the JSA's petition, the Association/Coalition waived the right to represent team leaders at least until the time of the next open period.^{6/}

Thus, based upon the undisputed facts, and the law, I find that team leaders are supervisory employees, were not appropriate for inclusion in the Association/Coalitions unit, and the Judiciary was not obligated to negotiate with the Association/Coalition over promoting senior probation officers to team leaders. The Judiciary similarly did not negotiate with employees over team leader terms and conditions of employment, and did not violate the Act by

^{6/} The Coalition cannot now seek to represent team leaders through a clarification of unit petition questioning their supervisory status. It can only seek to represent them by filing a petition for certification of public employee representative and arguing they are not supervisory. Such a petition can only be filed during an open period. The next open period for team leaders will be based upon the termination date of any collective agreement reached between the Judiciary and the JSA. If the JSA does not have a contract in place within one year after its recognition as majority representative, however, the open period will begin at that time.

inviting senior probation officers to accept promotions to the higher title.^{7/}

Accordingly, based upon the above findings and analysis, I make the following:

RECOMMENDATION

I recommend the Motion be granted and the Complaint dismissed.


Arnold H. Zudick
Hearing Examiner

Dated: October 28, 1992
Trenton, New Jersey

^{7/} In its Motion the Judiciary also argued that the Coalition, as the predecessor majority representative to the Association, did not have the standing to pursue this charge. The Judiciary contends that its actions had taken place before the Coalition was majority representative, presumably meaning that the Coalition was, therefore, not affected by anything the Judiciary did and, therefore, had no cause of action here. I do not reach that issue at this time. My recommendation is based upon the facts and law discussed above.