P.E.R.C. NO. 93-119

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ENGLEWOOD BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-93-40

ENGLEWOOD TEACHERS ASSOCIATION for the
ENGLEWOOD CUSTODIANS ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Englewood Teachers Associations for the Englewood Custodians Association. The charge alleged that the Englewood Board of Education violated the New Jersey Employer-Employee Relations Act by subcontracting custodial-maintenance services and terminating all unit members; refusing to negotiate over recall rights; and refusing to negotiate over severance pay and separation rights or benefits. The Director of Unfair Practices issued a Complaint in this case. The Board moved to dismiss before the Hearing Examiner. The Commission's procedures do not contemplate that a respondent may appeal to a Hearing Examiner to overrule the Director's determination that the specificity requirements of the Commission's rules have been met. Nevertheless, because the rules do not specify how a charging party may appeal the Director's decision to issue a Complaint, the Commission treats this motion to dismiss as a request for special permission to appeal his decision. The Commission finds that most of the allegations contest the Board's right to subcontract; even if true, they would not constitute an unfair practice. The allegations concerning the refusal to negotiate over recall rights, severance pay and separation rights do not meet the specificity requirements of N.J.A.C. 19:14-1.3. The charge and amendment do not contain the "time and place of occurrence of the particular acts alleged or the name of the respondent's agents or other representatives by whom committed."

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-and- Docket No. CO-H-93-40

ENGLEWOOD TEACHERS ASSOCIATION for the
ENGLEWOOD CUSTODIANS ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Gutfleish & Davis, attorneys (Allan S. Gutfleish and Suzanne E. Raymond, on the brief before the Commission) and Siff Rosen, P.C. (Gerald T. Ford and George L. Vitureira, on the brief before the Commission)

For the Charging Party, Springstead & Maurice, attorneys (Alfred F. Maurice, of counsel; Lauren E. McGovern, on the brief before the Commission)

DECISION AND ORDER

On July 28 1992, an unfair practice charge was filed against the Englewood Board of Education by the Englewood Teachers Association for the Englewood Custodians Association. The charge alleges that the Board 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), (5) and (7),[1/] by subcontracting

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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

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custodial/maintenance services and terminating all unit members effective June 30, 1992; refusing to negotiate over recall rights; and refusing to negotiate over severance pay and separation rights or benefits. The charge further alleges that the Board tried to destroy the Association by subcontracting all work; discriminated by encouraging unit members to be employed by the subcontractor; refused to negotiate in good faith over post-employment rights; and generally violated the rules of the Commission. The charge sought an order directing the employer to meet and negotiate regarding severance, re-employment rights and related issues.

On September 25, 1992, the charging party amended its charge to allege that the Association demanded and the employer refused to negotiate regarding severance pay and separation rights; the employer refused to reduce to writing an agreement to place Association members on a preferred eligibility list for re-employment in the event subcontracting was abandoned; the employer misled the Association regarding its intention to subcontract; and the employer accepted the bid of a private contractor without giving the Association the opportunity to respond

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1/ 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. (7) Violating any of the rules and regulations established by the commission."

to the bid. The amendment seeks an order setting aside the bid for failure to meet negotiations obligations and the opportunity to respond to economic proposals.

On October 8, 1992, the Director of Unfair Practices issued a Complaint and Notice of Hearing on the amended charge. On October 23, the Board filed an Answer admitting that it terminated all custodial employees and subcontracted all custodial and maintenance work, but denying all other allegations in the amended charge as unsupported by the facts. The Board also filed a motion to dismiss with the Hearing Examiner, asserting that the amended charge failed to meet the specificity requirements of N.J.A.C. 19:14-1.3(a)(3). The charging party did not respond to that motion.

On December 22, 1992, Hearing Examiner Arnold H. Zudick dismissed the Complaint. H.E. No. 93-14, 19 NJPER 78 (¶24036 1992). He concluded that there are insufficient facts and dates alleged on the face of the charge and amendment to constitute a violation of the Act. Specifically, he found that: the employer had a managerial prerogative to subcontract; the charging party did not allege, in its original charge, that it demanded to negotiate over any severable issues; and the charging party did not specify, in its amendment, when it demanded to negotiate, when the Board refused to negotiate, or when the Board refused to reduce an agreement about preferred eligibility to writing. The Hearing Examiner also found that the other allegations in the Complaint, even if true, would not constitute a violation of the Act.

On January 4, 1993, the charging party asked the Hearing Examiner to reconsider his decision. It explained that it did not respond to the Board's motion due to confusion caused by the simultaneous filing of a motion to dismiss by the Board in a related action before the Commissioner of Education. It requested the opportunity to present papers in opposition to the motion and submitted the documents it had filed with the Commissioner. The Board filed a reply relying on the Hearing Examiner's decision dismissing the Complaint.

On January 7, 1993, the Hearing Examiner accepted the Association's request for reconsideration as its response to the Board's motion as well as its argument for reconsideration. He found that the documents submitted by the Association contained allegations not in the amended charge. He further found that nothing in the reconsideration request changed his view of the sufficiency of the allegations and that it was too late to allow an amendment to meet the required standard.

On January 14, 1993, the charging party timely requested an extension of time to seek review of the Hearing Examiner's decision. The request did not indicate that the Board was served with a copy of the request. That same day, a secretary employed by the charging party's attorney was asked to send us a letter indicating that the Board had consented to the extension of time. On January 19, a secretary to the charging party's attorney was informed that an extension until February 11 would be granted, but

that we must receive a letter indicating that the Board had consented. No such letter was received by us.

On February 10, 1993, the charging party requested review. The charging party concedes that the specific date of the demand to negotiate was not included on the face of the charge, but argues that the absence of an exact date does not suffice to dismiss an entire charge. It further argues that bad faith can be inferred from the allegations, and that Printing Mart v. Sharp Electronics, 116 N.J. 739, 746 (1989), requires a court to search the complaint in depth and with liberality to establish whether a cause of action can be gleaned even from an obscure statement.

On February 17, 1993, the Board opposed the request for review. It claims that the charging party's request is untimely. It further argues that N.J.A.C. 19:14-1.3 requires specificity and that if the charging party knew the specific times, places and persons involved in the alleged unfair practice, it was obligated to include those allegations in the charge.

On March 16, 1993, the charging party notified us that "due to some miscommunication between the offices of the charging party and respondent, consent to the extension of time by the respondent was not given." It requests that we accept its request for review as if timely filed based on the timely request for an extension of time.

We begin with the charging party's request that we accept its request for review as timely filed. In general, the charging

party should have known that it needed to serve its request for an extension of time on its adversary. In particular, it knew that the extension granted orally depended upon its submitting a letter indicating that it had gotten the Board's consent. We note also that the charging party claimed before the Hearing Examiner that it failed to reply to the motion to dismiss because of "confusion" and that its untimely arguments should be considered. Despite the charging party's failing to abide by our timelines, we note that it did timely request an extension of time to file its request for review. Under these circumstances and with the admonition that all future deadlines will be strictly enforced, we grant the charging party's request that its request be considered timely filed.

We now consider the merits of that request. N.J.S.A. 34:13A-5.4(c) provides that the Commission, or its designee, has the authority to issue a Complaint based on an unfair practice charge. Under that authority, we have delegated to the Director of Unfair Practices the authority to issue a Complaint and Notice of Hearing:

> if it appears to the the director...that the allegations of the charging party, if true, may constitute unfair practices on the part of the respondent....

N.J.S.A. 19:14-1.3(a)(3) requires that an unfair practice charge contain:

> A clear and concise statement of the facts constituting the alleged unfair practice, including, where know, the time and place of occurrence of the particular acts alleged and the

> names of respondent's agents or other representatives by whom committed and a statement of the portion or portion of the act alleged to have been violated.

By issuing a Complaint, the Director implicitly found compliance with N.J.A.C. 19:14-1.3(a)(3). See City of Englewood, P.E.R.C. No. 82-124, 8 NJPER 375 (¶13172 1982). Our designee having made that determination, the respondent may challenge it by seeking special permission to appeal directly to us. See, e.g., Town of Westfield, P.E.R.C. No. 90-32, 15 NJPER 618 (¶20257 1989). Or the respondent can file a motion for summary judgment with the Chairman claiming that the pleadings, together with the briefs, affidavits or other documents, show that there exists no genuine issue of material fact and that it is entitled to its requested relief as a matter of law. See N.J.A.C. 19:14-4.8. Our procedures, however, do not contemplate that a respondent may appeal to a Hearing Examiner to overrule our designee's determination that our specificity requirements have been met.

Nevertheless, because our rules do not specify how a charging party may appeal the Director's decision to issue a Complaint, we will treat this motion to dismiss as a request for special permission to appeal his decision. We grant the request but adopt the Hearing Examiner's analysis. Most of the allegations contest the Board's right to subcontract; even if true, they would not constitute an unfair practice. The allegations concerning the refusal to negotiate over recall rights, severance pay and

separation rights do not meet the specificity requirements of N.J.A.C. 19:14-1.3. The charge and amendment do not contain the "time and place of occurrence of the particular acts alleged or the names of the respondent's agents or other representatives by whom committed."[2/]

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Grandrimo and Wenzler voted in favor of this decision. Commissioner Smith voted against this decision. Commissioners Bertolino and Regan abstained from consideration.

DATED: June 24, 1993
Trenton, New Jersey
ISSUED: June 25, 1993

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2/ Since a motion seeking consolidation with the matter before the Commissioner of Education and a predominant interest determination has been filed at the Office of Administrative Law, we will serve a copy of this decision on that Office.

H.E. NO. 93-14

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

In the Matter of

ENGLEWOOD BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-93-40

ENGLEWOOD TEACHERS ASSOCIATION for the
ENGLEWOOD CUSTODIANS ASSOCIATION,

Charging Party.

**SYNOPSIS**

A Hearing Examiner of the Public Employment Relations Commission grants the Englewood Board of Education's Motion to Dismiss the Complaint. The Englewood Teachers Association had alleged the Board failed and/or refused to negotiate over negotiable aspects of its decision to subcontract custodial work. The Hearing Examiner concluded that the Association's charge and amended charge did not comply with the clear and concise requirements of N.J.A.C. 19:14-1.3(a)(3). The Hearing Examiner explained that the Association had the burden to allege that it made a timely demand to negotiate such matters. But absent such an allegation, and the timely dates of a refusal, the complaint was dismissed.

H.E. NO. 93-14

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

In the Matter of

ENGLEWOOD BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-93-40

ENGLEWOOD TEACHERS ASSOCIATION for the
ENGLEWOOD CUSTODIANS ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Gutfleish & Davis, attorneys
(Suzanne E. Raymond, of counsel) and Siff Rosen, P.C.
(George L. Vitureira, of counsel)

For the Charging Party, Springstead & Maurice, attorneys
(Alfred F. Maurice, of counsel)

HEARING EXAMINER'S DECISION
ON MOTION TO DISMISS

An unfair practice charge was filed with the Public Employment Relations Commission on July 28, 1992, and amended on September 25, 1992, by the Englewood Teachers Association for the Englewood Custodian's Association, alleging the Englewood Board of Education violated subsections 5.4(a)(1), (2), (3), (5) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A et seq.[1/] In the original charge the Association alleged that the

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with,

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Board: 1) terminated all the employees in the unit effective June 30, 1992, and subcontracted the custodial/maintenance services to a private contractor; 2) refused to negotiate over recall rights for unit members; and 3) refused to negotiate over severance pay and separation rights or benefits.

The Association then alleged in that charge that the Board committed the following "violations": 1) interfering with the Association's existence by trying to destroy the union by subcontracting; 2) discriminating against employees by encouraging them to be employed by the subcontractor; and 3) refusing to negotiate over post-employment rights. In the original charge the Association seeks an order requiring the Board to negotiate over severance, re-employment rights and related issues.

In the amended charge the Association alleged that: 4) it demanded and the Board refused to negotiate over severance pay and separation rights; 5) the Board refused to reduce an agreement to

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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. (7) Violating any of the rules and regulations established by the commission."

writing placing unit members on a preferred eligibility list; 6) the Board misled the Association about subcontracting; 7) the Board did not give the Association the opportunity to compete with the costs of subcontracting the custodial work; and 8) the Board accepted a subcontractor's bid without giving the Association the opportunity to respond.

In the amended charge the Association seeks an order setting aside the subcontracting bid to give it the chance to respond.

On October 8, 1992, a Complaint and Notice of Hearing was issued on the charge and amended charge. On October 23, 1992, the Board submitted an Answer to the complaint and a motion to dismiss together with a notice of motion, a brief supporting the motion and proof of service on the Association.

In its Answer, the Board admitted it terminated all custodial employees and subcontracted all custodial and maintenance work, but denied all other allegations in the charge and amended charge. The Board also asserted several affirmative defenses including that it is adhering to the parties' collective agreement which contains a provision concerning recall rights.

In its motion to dismiss, the Board argued that the Association's charge failed to comply with N.J.A.C. 19:14-1.3(a)(3), which requires a clear and concise statement of the facts including the time (and place) of the alleged acts. The motion was filed in accordance with N.J.A.C. 19:14-4.3 which included proof of service

upon the Association. The Association has not responded to the motion.[2/]

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

## Findings of Fact

1. The Association attached certain documents to its charge and amended charge. Attached to the charge was a copy of the 1989-92 collective agreement between the Board and the Englewood Teachers Association on behalf of the custodial/maintenance employees. The recognition clause (Article 1) of the agreement recognized the Teachers Association as exclusive representative for a separate unit of all non-supervisory custodial/maintenance employees employed by the Board. The grievance procedure (Article 4) ended with binding arbitration, and the "Reductions in Force" clause (Article 8) provided:

> A. In the event of a layoff, the employee with the least seniority in each classification shall be the first laid off.
>
> B. The employee last laid off shall be the first to be recalled within the applicable classification.

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2/ On November 12, 1992, the Association filed a "proposed amendment" which was assumed to be an amendment to this unfair practice charge. By letter of November 13, 1992, I refused to accept the proposed amendment as an amendment to this charge. I found this proposed amendment procedurally deficient. The proposed amendment was not a response to the motion to dismiss. The Association subsequently informed the office of the Director of Unfair Practices that the "proposed amendment" was not an amendment at all, and was not related to this charge. It was meant to be a new charge concerning just the Teachers Association.

The agreement expired June 30, 1992.

2. Four documents were attached to the amended charge. The first, a March 24, 1992 letter from the Board secretary notifying the Association that the Board was considering subcontracting the custodial work. That letter said:

> This is to advise you that the Board is exploring contracting either the managerial services or the total services for the custodial and building emergency services for the school district.
>
> We have sent out bid notices for these two areas of work. We have not determined, at the present time, which of the possibilities we will contract. However, we will keep you informed as to our intent in this matter.
>
> If you have any questions, please do not hesitate to call.

The second document was Board minutes from the meeting of April 16, 1992 at which the Board accepted the lowest bid for contracting out the custodial and maintenance work. The third document was Board minutes from the meeting of April 21, 1992 at which the Board abolished all custodial positions and terminated all custodial employees effective June 30, 1992 as a result of its decision to subcontract custodial work.

The fourth document was a copy of the April 22, 1992 letter sent to custodial employees notifying them of their termination. That letter provided in pertinent part:

> This is to inform you that the Board of Education, at its public meeting on April 21, 1992, voted to abolish all Custodial and Building Emergency Service positions in the district; as a result, you will be terminated

effective June 30, 1992. This letter will serve as your sixty (60) day notice.

## ANALYSIS

N.J.A.C. 19:14-1 generally sets forth the filing requirements for an unfair practice charge, and 19:14-1.3 generally sets forth the content requirements of a charge. N.J.A.C. 19:14-1.3(a)(3) specifically requires a clear and concise statement of the facts, and where known, the time and place of the alleged unlawful acts, and other requirements. That rule provides a charge should contain:

> A clear and concise statement of the facts constituting the alleged unfair practice, including, where known, the time and place of occurrence of the particular acts alleged and the names of the respondent's agents or other representatives by whom committed and a statement of the portion or portions of the act alleged to have been violated.

In its motion to dismiss, the Board argued that the charge and amended charge failed to comply with 19:14-1.3 because it did not contain facts constituting an unfair practice, and because it did not allege the time or place of the alleged unlawful acts or the names of Board representatives. The Board further argued that its mere decision to subcontract the custodial work and terminate the custodians did not constitute an unfair practice, and that the documents attached to the amended charge did not demonstrate unlawful action. Those arguments were unopposed.

A motion to dismiss made before hearing pursuant to N.J.A.C. 19:14-4.7 is similar to a motion to dismiss for failure to

state a claim upon which relief can be granted under R.4:6-2(e). See City of Margate, H.E. No. 89-23, 15 NJPER 166 (¶20070 1989). Alternatively, it is a motion for judgment on the pleadings which only raises issues of law while admitting the opponent's properly plead facts. Reider v. State of N.J. Dept of Transp., 221 N.J. Super. 547 (App. Div. 1987).

In Reider the Court held:

> On a motion made pursuant to R. 4:6-2(e) "the inquiry is confined to a consideration of the legal sufficiency of the alleged facts apparent on the face of the challenged claim." P. & J. Auto Body v. Miller, 72 N.J. Super 207, 211 (App. Div. 1962). The court may not consider anything other than whether the complaint states a cognizable cause of action. Ibid. For this purpose, "all facts alleged in the complaint and legitimate inferences drawn therefrom are deemed admitted." Smith v. City of Newark, 136 N.J. Super 107, 112 (App. Div. 1975). See also Heavner v. Uniroyal, Inc., 63 N.J. 130, 133 (1973); Polk v. Schwartz, 166 N.J. Super 292, 299 (App. Div. 1979). A complaint should not be dismissed under this rule where a cause of action is suggested by the facts and a theory of actionability may be articulated by way of amendment. Muniz v. United Hsps. Med. Ctr. Pres. Hsp., 153 N.J. Super 79, 82-83 (App. Div. 1977). However, a dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted.
>
> Reider, at 552.

In considering whether to grant a motion to dismiss a complaint for failure to state a claim upon which relief can be granted, i.e., judgment on the pleadings, the allegations in the complaint must be taken as true and the benefit of all favorable inferences from the allegations must be afforded the Charging

Party. Wuethrich v. Delia, 134 N.J. Super. 400 (Law Div. 1975), aff'd 155 N.J. Super. 324 (App. Div. 1978); Sayreville B/E, H.E. No. 78-26, 4 NJPER 117 (¶4056 1978).[3/] See also PBA (Franklin), H.E. No.90-40, 16 NJPER 207 (¶21082 1990); Rutgers University, H.E. No. 91-4, 16 NJPER 471 (¶21202 1990).

Having considered the pleadings, allegations, the Board's arguments, the findings of fact and the law, and noting no opposition by the Association, I grant the motion and dismiss the complaint.

In Local 195, IFPTE v. State, 88 N.J. 393 (1982), the New Jersey Supreme Court held that public employers have a managerial prerogative to subcontract unit work. As a result, the Commission has held that decisions to subcontract are neither negotiable nor arbitrable. Old Bridge Tp. Bd. of Ed., P.E.R.C. No. 88-143, 14 NJPER 465 (¶19194 1988); Brick Tp. Bd. of Ed., P.E.R.C. No. 86-40, 12 NJPER 153 (¶17058 1985); New Jersey Hwy. Auth., P.E.R.C. No. 85-111, 11 NJPER 309 (¶16110 1985). But the Court further held that notice provisions and proposals to "discuss" subcontracting motivated by economic considerations, were negotiable (and arbitrable). Local 195, 88 N.J. at 409. See also, Old Bridge Tp. Bd. of Ed.

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3/ Compare New Jersey Turnpike, P.E.R.C. No. 79-81, 5 NJPER 197 (1979) where the Commission adopted the standard used by the New Jersey Supreme Court in Dolson v. Anastasia, 55 N.J. 2 (1959) for a motion to dismiss at the close of a charging party's case. That standard requires that the evidence (at least a scintilla) be viewed in a light most favorable to the party opposing the motion.

The Court also explained that a public employer could not subcontract if done in bad faith, if illegally motivated, or for no legitimate reason. There must be a rational basis for subcontracting. The Court held:

> We emphasize that our holding today does not grant the public employer limitless freedom to subcontract for any reason. The State could not subcontract in bad faith for the sole purpose of laying off public employees or substituting private workers for public workers. State action must be rationally related to a legitimate governmental purpose. Our decision today does not leave public employees vulnerable to arbitrary or capricious substitutions of private workers for public employees. 88 N.J. at 411.

See also, N.J. Sports & Exposition Auth., P.E.R.C. No. 90-63, 16 NJPER 48 (¶21023 1989); Monroe Tp. Bd. of Ed., P.E.R.C. No. 85-35, 10 NJPER 569 (¶15265 1984); Deptford Tp. Bd. of Ed., P.E.R.C. No. 83-44, 8 NJPER 603 (¶13285 1982).[4/]

In addition to a union's right to negotiate over notice provisions and proposals to discuss subcontracting, the Commission has held that unions have the right to negotiate over proposals concerning severance pay and recall rights for employees who lose their jobs, particularly if they do not have statutory recall rights. Monroe Tp. Bd. of Ed., 10 NJPER at 570; Pennsville Bd. of Ed., P.E.R.C. No. 84-21, 9 NJPER 586 (¶14246 1984). See also, State v. State Supervisory Employees Assoc., 78 N.J. 54, 84-85 (1978);

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4/ A decision on whether an employer's subcontracting determination was illegally motivated or done in bad faith is based upon a review of the totality of the circumstances in a particular case. Mt. Olive Bd. of Ed., P.E.R.C. No. 84-73, 10 NJPER 34 (¶15020 1983).

Plumbers and Steamfitters v. Woodbridge Bd. of Ed., 159 N.J. Super. 83, 4 NJPER 301 (¶4151 1978).

But in Monroe Tp. Bd. of Ed., 10 NJPER at 570, note 6, the Commission explained that since subcontracting is a managerial prerogative, absent existing contractual requirements, a public employer is not obligated to initiate negotiations over the above-discussed negotiable matters prior to adopting or implementing a subcontracting decision. The Commission held that in a subcontracting situation, a labor organization has the burden to demand negotiations over severance, recall, and related matters, and the employer has the right to an opportunity to respond, prior to the filing of an unfair practice charge.

Pursuant to Reider, the inquiry here is limited to a consideration of the "legal sufficiency" of the alleged facts apparent on the face of the charge. A dismissal of the charge is mandated where the alleged facts are insufficient to support a claim upon which relief can be granted.

In order to determine the "legal sufficiency" of the allegations, I must consider those allegations in conjunction with the law, including Commission rules and regulations. Where the allegations do not comply with the rules, or raise facts which the law has determined do not set forth a violation of the Act, the allegations are not legally sufficient to support an unfair practice charge.

That is the result here. The Association's charges do not comply with N.J.A.C. 19:14-1.3, or with the Commission's holding in Monroe. There are insufficient facts and dates alleged on the face of the charge and amended charge to constitute a violation of the Act. The allegations about the Board's decision to subcontract, and its alleged failure to discuss subcontracting with the Association, are legally insufficient to constitute a violation because subcontracting is a managerial prerogative, and the Association neither alleged it demanded to discuss the subcontracting, nor did it allege the decision to subcontract was made in bad faith.

In reviewing the original charge, I find the Association did not allege that it demanded negotiations over any negotiable aspects of the subcontracting. Since the decision to subcontract was a managerial prerogative, and severance and recall rights only negotiable upon demand, the absence of an allegation on the original charge that a demand was made makes the allegations of a refusal to negotiate legally insufficient to constitute a violation of the Act. The result is the same for paragraphs two and three of the refusal to negotiate section, and paragraph three of the violations section of the original charge. The Association did not allege it demanded negotiations nor did it state when the Board allegedly refused to negotiate over recall, severance or post-employment rights. The Association has not argued that circumstances existed preventing it from knowing the relevant dates, times and places of these events.

Although the Association alleged that it demanded negotiations over severance pay and separation rights in paragraph four of the amended charge, it did not allege when it made that demand, nor when the Board allegedly refused to negotiate. Without those dates, the Association does not meet the threshold requirement of the Commission's rule (19:14-1.3), and the allegations do not establish that the Board had the opportunity to respond to such a demand prior to the filing of the amended charge. Monroe. Thus, based upon the particular circumstances here, and since the motion is unopposed, I find that allegation legally insufficient to constitute a violation of the Act.

The documents the Association submitted with its amended charge establish that between March 24 and April 22, 1992, it had reasonable notice of the Board's subcontracting decision. The Association had ample time to demand negotiations between April 22 and June 30, 1992, the date the employees were terminated and the negotiations unit ceased to exist. But there was no allegation that a demand to negotiate was made during that time or that the Association was somehow prevented from making such a demand.

A review of the remaining allegations in the charge and amended charge also shows insufficient basis for a violation. The Board admitted it terminated all unit members and subcontracted its custodial work. But since the Board had the managerial right to subcontract, its admission of these facts is not proof of a violation.

The Board's mere decision to subcontract, absent an Association allegation that the subcontracting decision was made in bad faith, is not a violation of the Act even if it has a negative effect on the Association's existence. Similarly, absent an allegation of bad faith, it could not be a violation for the Board to encourage the soon to be terminated employees to seek employment elsewhere.

The Association made other allegations in the amended charge. In paragraph five it alleged the Board refused to reduce an agreement to writing concerning a preferred eligibility list. Subsection 5.4(a)(6) of the Act makes it a violation for an employer to refuse to reduce an agreement to writing,[5/] but the Association did not plead an (a)(6) violation, did not allege when such an agreement was reached or when the Board allegedly refused to reduce it to writing. Thus, that allegation was legally insufficient to constitute a violation of the Act.

In paragraph six of the amended charge, the Association alleged it was misled regarding the Board's subcontracting intentions; in paragraph seven it alleged the Board accepted the subcontracting bid without informing the Association of its intent or giving the Association the opportunity to compete with the subcontractor's bid; and, in paragraph eight it alleged the Board

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5/ Subsection 5.4(a)(6) of the Act provides: This subsection prohibits public employers, their representatives or agents from: "(6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

accepted the subcontractor's bid without giving the Association the opportunity to review and respond.

But none of those allegations, even if true, would constitute a violation of the Act. The Association's documents show that it had ample notice that the Board was considering subcontracting. Absent a demand by the Association, the Board was not obligated to initiate a discussion of the subcontracting with the Association or to give the Association the opportunity to compete with or respond to the bid. It was the Association's burden to make such a demand, and there is no allegation that a timely demand was made.

Finally, the viability of the Board's affirmative defense, that it negotiated recall rights as evidenced by Article 8 of the parties' agreement, need not be decided to dispose of the motion to dismiss. Absent a bad faith allegation and the allegations of a timely demand to negotiate, and dates of alleged refusal to negotiate, the charge and amended charge do not set forth legally sufficient allegations to constitute a violation of the Act. Thus, the complaint must be dismissed.

Accordingly, based upon the above findings of fact and legal analysis, the Motion to Dismiss is granted with the following:

**ORDER**

The Complaint is dismissed. N.J.A.C. 19:14-4.7.

Arnold H. Zudick
Hearing Examiner

Dated: December 22, 1992
Trenton, New Jersey