

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF ENGLEWOOD,

Respondent,

-and-

Docket No. CO-80-333-130

PBA LOCAL 216 (ENGLEWOOD UNIT),

Charging Party.

SYNOPSIS

The Public Employment Relations Commission, following the approach of the National Labor Relations Board, holds that deferral to an arbitration award is not appropriate in cases alleging violations of subsection 5.4(a)(3) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., unless the issue of anti-union discrimination has been presented to and considered by the arbitrator. The Commission further finds that the Charging Party complied with N.J.A.C. 19:14-1.3(a)(3) in its factual statements concerning the alleged acts of anti-union discrimination. The Commission therefore remands for a hearing on claims of anti-union discrimination which were not presented to or considered by the arbitrator. The Commission, however, defers to the arbitration award on the issues of contractual interpretation which the arbitrator decided against the Charging Party and which the Charging Party seeks to relitigate by claiming a violation of subsection 5.4(a)(5).

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PBA LOCAL 216 (ENGLEWOOD UNIT),

Charging Party.

Appearances:

For the Respondent, Lesemann & Rupp, Esqs.
(William F. Rupp, of Counsel)

For the Charging Party, Osterweil, Wind & Loccke, Esqs.
(Richard D. Loccke, of Counsel)

DECISION AND ORDER

On May 12, 1980, Local 216 of the Patrolmen's Benevolent Association ("PBA") filed an unfair practice charge against the City of Englewood ("City") with the Public Employment Relations Commission. The charge alleged that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4(a)(1), (2), (3), (4), (5), and (7),^{1/} when on April 15 and 30, 1980, it unilaterally

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; and (7) Violating any of the rules and regulations established by the commission."

changed the work schedule of employees of the Englewood Police Department Criminal Investigation Bureau. The charge also alleged that this change "...was in part motivated as a retaliatory move by the City of Englewood because of certain public statements and efforts made by the employee organization and representations made by employee representatives before various public groups and organizations in the City of Englewood. This retaliation [interfered] with, restrained and [coerced] employees in the exercise of their rights guaranteed them under the Act, and further as a result [interfered with the] existence and administration of the employee organization. This is part of a program to divide the employee organization and diminish its ability to administer the contract, effectively represent all of its membership and to remain a viable majority representative."

On June 26, 1980, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On July 7, 1980, the City filed an Answer in which it admitted the change in the work schedule without prior negotiations, denied the remaining allegations, and raised several affirmative defenses, including a contractual right to make the change in question.

On October 9, 1980, a pre-hearing conference was held before Hearing Examiner Joan Kane Josephson. At the conference, the parties agreed to defer the unfair practice proceeding pending binding arbitration of the change in work schedule.

The Hearing Examiner accordingly informally deferred to arbitration, but retained jurisdiction of the charge.

On February 7, 1981, the arbitrator, Dr. Joan Weitzman, held that the City had not violated the collective agreement when it changed the work schedule. The PBA did not contend that anti-union animus motivated the change, and thus the arbitrator did not consider that issue. The arbitrator also emphasized that she was not passing judgment on any issues of alleged statutory violations, and that her decision was not intended to preclude either party from pursuing its rights in other tribunals.

On February 27, 1981, the PBA forwarded a copy of the arbitrator's award to the Hearing Examiner and requested a hearing. In response, the Hearing Examiner, on May 6, 1981, wrote the parties advising them that jurisdiction had been retained "for the purpose of entertaining an appropriate application for further consideration upon a proper showing that (a) the grievance or arbitration procedures had not been fair or regular, or (b) the grievance or arbitration procedures had reached a result repugnant to the Act." The Hearing Examiner also advised the parties that "[s]uch proper application must contain specifically to what extent the arbitrator's ruling has not met the above criteria, and also set forth a clear and concise statement of the facts constituting the alleged unfair practice remaining, including, where known, 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 portions of the Act alleged to have been violated."

On June 8, 1981, the City's attorney wrote the Hearing Examiner, noted that the PBA had not replied to her letter, and requested dismissal of the Complaint.

On June 12, 1981, the PBA wrote the Hearing Examiner, noted that it had not received the letter referred to in the City's letter, and requested a prompt hearing. On July 10, 1981, the PBA wrote another letter to the Hearing Examiner requesting a prompt conference or hearing.

On August 12, 1981, the Hearing Examiner sent the parties a letter scheduling a conference for September 11, 1981. She enclosed a copy of her May 6, 1981 letter for the PBA's attorney who had not yet received it. The conference was not held because the PBA's attorney was unavailable on the scheduled date.

On October 22, 1981, the Hearing Examiner sent the parties a letter directing them to respond to her letter of May 6, 1981. On January 21, 1982, she sent the PBA's attorney a letter stating that she was prepared to issue a decision without his brief.

On February 8, 1982, the PBA filed a three page response. It asserted that deferral was inappropriate because the arbitrator had specifically refrained from considering whether the City had committed any statutory violations. In particular, the PBA

asserted that it had not submitted the issue of illegal retaliation to the arbitrator, and she had not considered it. The letter also repeated the charge's allegations with respect to the date, nature, and consequences of the work schedule changes in question.

On March 9, 1982, the Hearing Examiner issued her Recommended Report and Decision. H.E. No. 82-40, 8 NJPER _____ (¶ _____ 1982) (copy attached). The Hearing Examiner recommended dismissal of the Complaint. She reasoned that there was no facts alleged in support of finding violations of subsections 5.4(a)(2), (4), and (7) of the Act, that deferral to the arbitrator's contractual interpretation was appropriate on the subsection 5.4(a)(5) claim, and that the subsection 5.4(a)(3) claim should be dismissed because, alternatively, deferral was appropriate or the PBA had failed to allege specific facts sufficient to satisfy N.J.A.C. 19:14-1.3(a)(3)'s requirements for the filing of a charge.

On March 22, 1982, the PBA filed Exceptions, arguing that (1) deferral to the arbitration award was inappropriate, and (2) it met the requirements of N.J.A.C. 19:14-1.3(a)(3).

We have considered the record. We adopt the Hearing Examiner's recommendation that we dismiss the Complaint insofar as it alleges violations of subsections 5.4(a)(4), (5), and (7), but remand for further proceedings insofar as the Complaint alleges violations of subsections 5.4(a)(1), (2), and (3).

Initially, we dismiss those aspects of the Complaint alleging a violation of subsections 5.4(a)(4) and (7). Nothing in the record suggests a basis for finding a violation of either of these subsections.^{2/}

We now consider whether we should dismiss the Complaint insofar as it alleges a violation of subsection 5.4(a)(5). We hold that deferral to the arbitration award on this issue is appropriate.

In re State of New Jersey (Stockton State College), P.E.R.C. No. 77-31, 3 NJPER 62 (1977), establishes the criteria for determining when, in a case involving an alleged violation of subsection 5.4(a)(5) hinging on a question of contractual interpretation, deferral to an arbitration award is appropriate: (1) the arbitrator must have had authority to consider the issues of contractual interpretation underlying the unfair practice charge, (2) the proceedings must have been fair and regular, and (3) the award must not be repugnant to the Act. See also, In re Town of Harrison, P.E.R.C. No. 82-73, 8 NJPER ____ (¶ ____ 1982); In re Englewood Bd. of Ed., E.D. No. 76-34, 2 NJPER 175 (1976); In re Kean College, D.U.P. No. 80-3, 5 NJPER 332 (¶10178 1979); In re Jersey City Bd. of Ed., D.U.P. No. 80-5, 5 NJPER 405 (¶10211 1979). When these criteria have been satisfied, recognition of

^{2/} We find, however, that the PBA did allege facts which might suggest a violation of subsection 5.4(a)(2). The PBA specifically alleged that the City changed the work schedule in an attempt to undermine the PBA's existence and effectiveness.

an arbitrator's award furthers the desirable objective of encouraging the voluntary settlement of labor disputes.^{3/}

The Hearing Examiner's analysis (Slip Opinion at pp. 4-6) of the propriety of deferral to the arbitration award is correct insofar as the subsection 5.4(a)(5) allegations are concerned. The PBA alleged that the City violated its collective agreement when it changed the work schedule. The parties agreed to submit this issue to arbitration, and the arbitrator ruled against the PBA. The PBA cannot now complain solely because the result is displeasing. Stockton State College, supra. There is no reason to believe that the proceedings were not fair and regular, or that the award was repugnant to our Act. Accordingly, we dismiss the Complaint insofar as it alleges a violation of subsection 5.4(a)(5).

We now consider whether deferral to the arbitration award was appropriate insofar as the Complaint alleged that subsections 5.4(a)(1), (2), and (3) had been violated. We believe it was not.

The National Labor Relations Board, in a case involving alleged anti-union discrimination in violation of subsection 8(a)(3), will not defer to an arbitration award unless the three

^{3/} In accordance with Lullo v. Int'l Ass'n of Firefighters, 55 N.J. 409 (1970), we have modelled our policy of deferring to arbitration awards upon private sector precedent. See, e.g., Spielberg Mfg. Co., 112 NLRB 1081, 36 LRRM 1152 (1955). See also, Dreis v. Krump Mfg. Co. v. NLRB, 544 F.2d 320 (7th Cir. 1975); Hawaiian Hauling Services Ltd. v. NLRB, 545 F.2d 674 (9th Cir. 1976), cert. den. 431 U.S. 965 (1977); R. Gorman, Basic Text on Labor Law, p. 734 (1976).

previously articulated criteria have been satisfied and the unfair labor practice charge has been presented to and considered by the arbitrator. See, NLRB v. Motor Convoy, Inc., NLRB , 109 LRRM 3201, 3202, n. 3 (4th Cir. 1982); Suburban Motor Freight, Inc., 247 NLRB No. 2, 103 LRRM 1113 (1980). In addition, the party urging deferral has the burden of proving that this requirement was met. Id.^{4/}

Suburban Motor Freight overruled Electronic Reproduction Service Corp., 213 NLRB 758, 87 LRRM 1211 (1974) and returned to the previously applicable standard for deferral under Yourga Trucking, Inc., 197 NLRB 928, 80 LRRM 1498 (1972) and Airco Industrial Gases-Pacific, A Division of Air Reduction Co., Inc., 195 NLRB 676, 79 LRRM 1497 (1972). The majority reasoned.

The Board majority in Electronic Reproduction rationalized its holding therein as a rule designed to encourage contractual efforts at dispute settlement by preventing multiple litigation of the same set of facts. However economically praiseworthy the intent of that rule may have been, its effect ~~has~~ has been severely criticized as an unwarranted extension of the Spielberg doctrine and an impermissible delegation of the Board's exclusive jurisdiction under Section 10(a) of the Act to decide unfair labor practice issues. We find merit in such criticism. Our experience with Electronic Reproduction has led to the conclusion

^{4/} Some courts integrate the Suburban Motor Freight requirement into the third Speilberg (and Stockton) requirement -- the award must not be repugnant to the Act -- see, e.g., Bloom v. NLRB, 603 F.2d 1015, 102 LRRM 2082 (D.C. Cir. 1979); others treat the requirement as separate and independent from the first three, see NLRB v. General Warehouse Corp., 643 F.2d 965, 969, n. 12, 106 LRRM 2729 (3rd Cir. 1981). While Suburban Motor Freight involved alleged anti-union discrimination in violation of subsection 8(a)(3), there is some authority for imposing its requirement when a union alleges that an employer breached its statutory duty to furnish relevant information under subsection 8(a)(5). See, NLRB v. Designcraft Jewel Industries, F.2d , 109 LRRM 3341 (2nd Cir. 1982).

that it promotes the statutory purpose of encouraging **collective-bargaining** relationships, but derogates the equally important purpose of protecting employees in the exercise of their rights under Section 7 of the Act. This result provoked one critic to state:

The inference to be drawn from this case is that although the contract and statutory issues are different, the union's interests may not coincide with the individuals' and the statutory issue was in no way litigated or determined, the Board will deprive these individual employees of their statutory rights under the guise of deferring to and encouraging arbitration. One's mind would need to be very fertile, indeed to conjure up a more shocking sacrifice of individual rights on the altar of institutionalism.

["Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity be Abolished?," 123 U.Penn.L.Rev. 897, 909 (1975).]

The Board can no longer adhere to a doctrine which forces employees in an arbitration proceeding to seek simultaneous vindication of private contractual rights and public statutory rights, or risk waiving the latter. Accordingly, we hereby expressly overrule Electronic Reproduction and return to the standard for deferral which existed prior to that decision.

(Footnote omitted).

The majority further rejected the argument set forth in Member Penello's dissenting opinion and in Electronic Reproduction, that refusal to defer in subsection 8(a)(3) cases would give litigants two bites at the apple.

Following the Board's lead in Suburban Motor Freight, we hold that deferral to an arbitration award is inappropriate to the extent a Complaint contains allegations of anti-union motivation and discrimination which have not been presented or considered

in arbitration. That is the case here. The unfair practice charge alleged, inter alia, that the City violated subsections 5.4(a)(1), (2), and (3) when it changed the work schedule for the purpose of retaliating against PBA supporters and dividing the PBA. The parties did not submit these allegations to the arbitrator, and she did not consider them. Accordingly, deferral to the arbitrator's award with respect to these allegations was inappropriate.^{5/}

In the alternative, the Hearing Examiner recommended that we dismiss the Complaint insofar as it alleged violations of subsection 5.4(a)(3) because the requirements of N.J.A.C. 19:14-1.3(a)(3) had not been met. This rule requires:

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 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 the instant case, the unfair practice charge alleged that on two specific dates the City violated, inter alia, subsections

^{5/} We do not disapprove the initial decision to defer to arbitration. Normally, the Commission will not defer to arbitration when a violation of subsection (a)(3) has been charged. However, when, as here, the gravamen of the grievance is appropriate for arbitration and when, as here, both parties agree to defer processing of the case pending arbitration, we will accommodate the parties' desires. In re City of Elizabeth, P.E.R.C. No. 82-74, 8 NJPER _____ (¶ _____ 1982). Thus, for example, had the arbitrator found the change in work schedule contractually invalid, litigation over the entire dispute might have ceased. Deferral to an arbitration award is a separate question from deferral to arbitration in the first instance and may yield separate answers when the arbitration process resolves some questions, but does not address others.

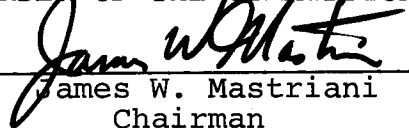
5.4(a)(1), (2) and (3) when it unilaterally made a specific change in the work schedule of specific employees in order to retaliate against the PBA and its supporters. The Director of Unfair Practices, implicitly finding compliance with N.J.A.C. 19:14-1.3(a)(3), issued a Complaint on these allegations. The City at no time made a Motion to Dismiss or a Motion for Summary Judgment. While the charge did not specify exactly what statements, efforts, and representations allegedly led the City to retaliate and while we certainly do not condone the failure of the PBA to respond more quickly to the Hearing Examiner's requests for information, we do not believe that the PBA failed to comply with N.J.A.C. 19:14-1.3(a)(3). Accordingly, we will remand for a hearing on the Complaint insofar as it alleges violations of subsections 5.4(a)(1), (2), and (3).

ORDER

The Commission dismisses the Complaint insofar as it alleges violations of subsections 5.4(a)(4), (5) and (7) of the Act.

The Commission remands for a hearing on the Complaint insofar as it alleges violations of subsections 5.4(a)(1), (2) and (3).

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Hartnett, Hipp and Newbaker voted in favor of this decision. None opposed. Commissioner Suskin was not present at the time of the vote. Commissioner Graves was not in attendance.

DATED: Trenton, New Jersey
June 3, 1982
ISSUED: June 4, 1982

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Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss an unfair practice charge following the issuance of an arbitrator's decision after a deferral to arbitration by the Hearing Examiner. The Hearing Examiner denied the Charging Party's request to reassert jurisdiction on the (a)(5) since the arbitrator reached the merits of the contract violation charge and also refused jurisdiction on the (a)(3) since there was not a sufficient statement of facts alleged to support that charge.

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.

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Appearances:

For the Respondent
Lesemann & Rupp, Esqs.
(William F. Rupp, Esq.)

For the Charging Party
Osterweil, Wind & Loccke, Esqs.
(Richard D. Loccke, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") on May 12, 1980 by PBA Local 216 (the "Charging Party" or the "PBA") alleging that the City of Englewood ("Respondent" or the "City") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), in that Respondent had unilaterally increased the workload obligation of unit members without granting additional compensation and refused to negotiate any aspect of the change. The charge also alleged the change was motivated as a retaliatory move because of public statements made by representatives of the majority representative, all

which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (4), (5) and (7). ^{1/}

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on June 26, 1980. A prehearing conference was held on October 9, 1980. At the conference the undersigned was advised that the same issue was being submitted to binding arbitration under the parties' collective negotiations agreement. Since the parties agreed to proceed with the arbitration proceeding and defer the unfair practice proceeding, the undersigned informally deferred to arbitration and retained jurisdiction of the charge. On February 27, 1981, the Charging Party forwarded me a copy of the arbitrator's award and requested that the matter be set down for hearing.

The parties were then advised that pursuant to the Commission's deferral to arbitration policy jurisdiction of the charge was retained for the purpose of entertaining an appropriate and timely

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; (7) Violating any of the rules and regulations established by the commission."

application for further consideration upon a proper showing that (a) the grievance or arbitration procedures had not been fair or regular, or (b) the grievance or arbitration procedures had reached a result repugnant to the Act.

The Respondent did not join in the request to proceed with the unfair practice hearing and on June 8, 1981, requested that the charge be dismissed. ^{2/} On January 28, 1982, the Charging Party submitted a statement of position on the matter.

The charge alleges that on April 15 and 30, 1980, the employer unilaterally implemented a schedule change for members of the Criminal Investigation Bureau (Detective Bureau) which increased the annual work obligation of these employees by 17 days. Charging Party also alleges the Respondent refused to negotiate this change, which change they allege was "in part motivated as a retaliatory move by the City of Englewood because of certain public statements and efforts made by the employee organization and representations made by employee representative before various public groups and organizations in the City of Englewood.

The following issue was submitted to the arbitrator:

Did the city violate the contract by
changing the Detective Bureau Schedule?
If so, what shall the remedy be?

The arbitrator noted that the PBA grieved this change in schedule, claiming that it resulted in the addition of 17 work days per year without compensation. The arbitrator denied the grievance because

^{2/} There ensued a series of correspondence. The Charging Party was ultimately advised on January 21, 1982, that since the appropriate application for further consideration had not been made, the decision would be issued unless such application was made within seven days.

she found that the schedule shift change was permissible under the parties' collectively negotiated agreement. ^{3/}

In requesting that the Commission reassert jurisdiction, the Charging Party states: "[W]e do not subscribe to the narrow definition of criteria for Commission review after an arbitration award as set forth in your letter..." There is no authority cited for using any other criteria nor no other criteria is suggested.

In re State of New Jersey (Stockton State College), P.E.R.C. No. 77-31, 3 NJPER 62 (1977) established the criteria for determining when deferral to an arbitration award is appropriate: (1) the arbitrator must have had authority to consider the issues of contractual interpretation underlying the unfair practice charge, (2) the proceedings must be fair and regular, and (3) the award not repugnant to the Act. See also In re Englewood Bd/Ed, E.D. No. 76-34, 2 NJPER 175 (1976). ^{4/} When these criteria have been satisfied, recognition of an arbitrator's award furthers the desirable objective of encouraging the voluntary settlement of labor disputes (Town of Harrison, P.E.R.C. No. 82-73, 8 NJPER (¶ 1982)). The Commission held in Stockton State College, supra, that the above bases for deferral

^{3/} The arbitrator noted that the same parties previously arbitrated a virtually identical clause and issue and the Town was found not to have violated the contract in that case. The arbitrator's award was confirmed in the Superior Court of New Jersey.

^{4/} In accordance with the New Jersey Supreme Court's suggestion that precedents and policies under the federal Labor-Management Relations Act may be helpful in interpreting and implementing our Act, Lullo v. Int'l Assn of Fire Fighters, 55 N.J. 409 (1970), our deferral policy is based on Spielberg Mfg. Co. 112 NLRB 1081, 36 LRRM 1152 (1955). See also Dreis v. Krump Mfg. Co. v. NLRB, 544 F.2d 320 (7th Cir. 1975); Hawaiian Hauling Services ltd. v. NLRB, 545 F.2d 674 (9th Cir. 1976), cert. den., 431 U.S. 965 (1977).

remain a constant and essential requirement for deferral during the entire process. If the standards are met, the Commission will defer to the arbitration award. The Commission noted "Just because one party or the other is dissatisfied with the award does not mean that deferral is inappropriate." It also does not mean that the standard is inappropriate. In Stockton the complaint was dismissed after the arbitrator's award because the deferral criteria had been met.

Initially, I recommend dismissal of those aspects of the complaint alleging violations of (a)(2), (4) and (7). There is not one fact alleged relating to any aspect of any portion of these subsections. N.J.A.C. 14:14-1.3(a)(3).

As to the (a)(5), the PBA alleges that a change in terms and condition of employment (increase in workload) without negotiations is an unfair practice charge that the Commission has exclusive jurisdiction to hear and the arbitrator only has jurisdiction to hear contract violations. Alleged unilateral changes in terms and conditions of employment may also constitute contract violations. In re Piscataway Twp. Bd/Ed, P.E.R.C. No. 77-65, 3 NJPER 169 (1977), aff'd 164 N.J. Super. 98 (App. Div. 1978). The Commission has made it clear that when the above requirements for deferral are met the arbitration award becomes the sole remedy for both the contractual and statutory violations. Stockton State College, supra.

The arbitrator found that the parties' agreement allowed the employer to institute the new schedule. Therefore, the change in schedule was found to be within the bilaterally negotiated agree-

ment and not a unilateral change as alleged. ^{5/} The Charging Party has submitted no reason to believe that the arbitrator's award was not fair and regular or that the decision was repugnant to the Act. Just because the PBA is dissatisfied with the award does not mean the deferral is no longer appropriate. Stockton State College, supra; Town of Harrison, supra. Therefore, I recommend dismissal of the (a) (5).

The Charging Party also argues that since the charge asserts that the "unilateral change was made as a retaliation for certain exercises of rights guaranteed the majority representative under the Act," this alone should "spur Commission action as this is an issue not even available to the arbitrator." ^{6/}

The charge alleges:

The unilateral change described above was in part motivated as a retaliatory move by the City of Englewood because of certain public statements and efforts made by the employee organization and

^{5/} The Charging Party points out that the arbitrator noted that her decision was confined to the contractual dispute. She had noted that the parties had argued whether the schedule change was negotiable and it was in this context that she stated she was not passing judgment on the statutory issue but confining herself to the contract. If negotiability was in question, the issue should have been submitted to the Commission in a scope of negotiations petition prior to the arbitration proceeding.

^{6/} While the Charging Party has not raised the issue of deferral in (a) (3) cases, this statement does suggest that policy. The Commission does not normally defer to arbitration where a violation of § (a) (3) of the Act is charged. In City of Elizabeth, P.E.R.C. No. 82-74, 8 NJPER (¶ 1982) the Commission noted there are certain (a) (3) cases in the context of a grievance that might be appropriate for deferral. I believe this is such a case. The parties' contract specifically contains a non-discrimination clause that provides that there will be no discrimination in appointments, assignments, promotions because of union affiliation. There is no reason why this could not have been placed before the arbitrator. The parties chose binding arbitration for the resolution of contractual disputes, including allegations of union discrimination.

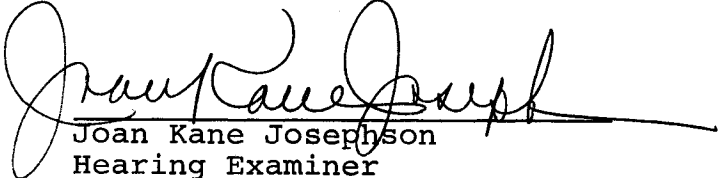
representations made by employee representatives before various public groups and organizations in the City of Englewood. This retaliatory interference with, restrained and coerce employees in the exercise of their rights guaranteed them under the act, and further as a result of interfering with existence and administration of the employee organization. This is part of a program to divide the employee organization and diminish its ability to administer the contract, effectively represent all of its membership and to remain a viable majority representative.

N.J.A.C. 19:14-1.3(a)(3) requires:

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 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.

The conclusionary statement in the charge does not meet this requirement. There was ample time to amend the charge. On May 6, 1981, the undersigned directed the Charging Party to supply such information as required under the Commission's Rules. Since no facts constituting an alleged violation of either (a)(1) or (3) have been offered, I recommend these portions of the charge also be dismissed.

Accordingly, for the reasons stated above, I hereby recommend that the complaint be dismissed in its entirety.


Joan Kane Josephson
Hearing Examiner

DATED: March 9, 1982
Trenton, New Jersey