P.E.R.C. NO. 83-131

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BROOKDALE COMMUNITY COLLEGE,

Respondent,

-and- Docket No. CO-83-95

BROOKDALE COMMUNITY COLLEGE
ADMINISTRATORS ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission defers a charge alleging a violation of subsection 5.4(a)(5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., to binding arbitration under the parties' negotiated grievance procedures, but retains jurisdiction of the charge to review the arbitration award. The Commission distinguishes Jefferson Township Bd. of Ed. v. Jefferson Township Ed. Ass'n, __ N.J. Super. __ (App. Div. Docket No. A-600-81T1, December 13, 1982).

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Appearances:
For the Respondent, Murray & Granello, Esqs.
(David F. Corrigan, of Counsel)

For the Charging Party, Sterns, Herbert & Weinroth, P.C.
(Michael J. Herbert, of Counsel)

DECISION

On October 14, 1982, the Brookdale Community College Administrators Association ("Association") filed an unfair practice charge against Brookdale Community College ("College") with the Public Employment Relations Commission. The charge alleged that the College violated subsections 5.4(a)(3) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act")[1/] when on July 8, 1982, its Board of Trustees unilaterally amended its collective negotiations agreement with the Association to increase the contractual maximum

1/ These subsections prohibit public employers, their representatives or agents from: "(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

of each of the following positions by 15%: (1) Manager, Data Base, (2) Assistant Director, Computer Services, (3) Project Manager, Computer Services, and (4) Mark IV Coordinator.

The case was assigned to a staff agent for processing. On December 9, 1982, the staff agent conducted an exploratory conference. The College submitted a written statement of position in which it maintained that a Complaint should not issue. It asserted that the charge alleged nothing more than a breach of the parties' collective negotiations agreement, and that this claim, in accordance with the Commission's longstanding policy, should be deferred to binding arbitration under the parties' agreement.2/ It cited In re East Windsor Reg. Board of Education, E.D. No. 76-6, 1 NJPER 59 (1976); In re Township of Springfield, D.U.P. No. 79-13, 5 NJPER 14 (¶10008 1979); In re Borough of Palisades Park, D.U.P. No. 78-1, 3 NJPER 238 (1977). The College also maintained that the charge did not specifically allege facts which, if true, might constitute a violation of subsection 5.4(a)(3).

On December 20, 1982, the Association responded to the College's statement of position. It asserted that a recent decision of the Superior Court, Appellate Division, Jefferson Township Bd. of Ed. v. Jefferson Township Ed. Ass'n, App. Div.

2/ The parties' agreement, effective between July 1, 1980 and June 30, 1983, contains a grievance procedure which culminates in binding arbitration. On October 8, 1982, the Association filed a grievance which alleged that the College violated the collective negotiations agreement when it increased the contractual maximum for each of the four positions identified in the charge by 15%. On October 12, 1982, the College denied the grievance. The College has stated that it will not interpose any procedural defenses to arbitration.

Docket No. A-600-81T1 (Nov. 9, 1982) ("Jefferson Township"), which restrained binding arbitration of a grievance alleging that the employer discharged an employee because of her union activities, precluded deferral to binding arbitration. The Association also asserted that deferral was inappropriate in any event because, it speculated, the only relief the arbitrator might grant -- rescinding the raises -- would cause hardship to some unit members and would not benefit all other unit members who also should receive 15% increases. The Association finally asserted that its charge was sufficiently specific concerning the alleged subsection 5.4(a)(3) violation because the alleged facts indicated that the College had not treated all unit members equally.

On January 20, 1983, the Director of Unfair Practices sent the parties a letter informing them that he would decline to issue a Complaint at that time. Instead, the Director deferred further processing of the charge's subsection 5.4(a)(5) allegations to the parties' contractual grievance/binding arbitration procedures. The Director noted that the Commission would retain jurisdiction of the charge for the purpose of entertaining an appropriate and timely application for further consideration upon a proper showing that (a) the dispute was not promptly submitted to arbitration and resolved, (b) the arbitration procedures were not fair and regular, or (c) the arbitration procedures had reached a result repugnant to the Act. The Director also stated that a determination concerning whether to issue a Complaint on the subsection 5.4(a)(3) allegation would be made subsequent to

his receipt and review of the arbitrator's award and the Association's request that this portion of the charge be processed further.

On February 2, 1983, the Association filed an appeal of the Director's refusal to issue a Complaint with the Commission pursuant to N.J.A.C. 19:14-2.3. It reiterates its position that Jefferson Township abolished the Commission's previous deferral policy.

On February 7, 1983, the College submitted its response. It asserts that Jefferson Township is distinguishable because that case did not involve deferral at all, but rather a scope of negotiations determination, and because the Commission has retained jurisdiction to review the arbitrator's award.

A review of our deferral policy is necessary in light of Jefferson Township. We commence this review by examining the statutory bases for our unfair practice jurisdiction and for deferral to grievance procedures, including binding arbitration, of contractual disputes. We then examine our deferral policy prior to Jefferson Township and conclude that the Association's charge of breach of contract would have been deferred under that policy. We then ask whether Jefferson Township has altered our deferral policy concerning subsection 5.4(a)(5) charges and conclude that it is distinguishable. Finally, we consider whether Jefferson Township should be expanded to apply to subsection 5.4(a)(5) cases and conclude that it should not. Accordingly, we affirm the decision of the Director of Unfair Practices deferring further processing of the Association's subsection 5.4(a)(5) unfair practice charge to the parties' contractual grievance/binding arbitration procedures.

N.J.S.A. 34:13A-5.4(c) states, in part:

> The Commission shall have exclusive power as hereinafter provided to prevent anyone from engaging in any unfair practice listed in subsections a. and b. above. Whenever it is charged that anyone has engaged or is engaging in any such unfair practice, the commission, or any designated agent thereof, shall have authority to issue and cause to be served upon such party a complaint stating the specific unfair practice charged....

Under N.J.S.A. 34:13A-5.4(a)(5), it has been held that a public employer commits an unfair practice when it unilaterally alters or abrogates a contractually established term and condition of employment. Galloway Township Bd. of Ed. v. Galloway Twp. Assoc. of Educational Secys, 78 N.J. 1 (1978); Piscataway Twp. Bd. of Ed. v. Piscataway Twp. Principals Assoc., 164 N.J. Super. 98 (App. Div. 1978). Accordingly, we have jurisdiction to consider the Association's charge of breach of contract here.

N.J.S.A. 34:13A-5.3 provides, in part:

> Public employers shall negotiate written policies setting forth grievance and disciplinary review procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions, including disciplinary determinations affecting them, [and] such grievance and disciplinary review procedures shall be included in any agreement entered into between the public employer and the representative organization. Such grievance and disciplinary review procedures may provide for binding arbitration as a means for resolving disputes...Grievance and disciplinary review procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement. (Emphasis supplied)

The dispute here is covered by the terms of the parties' agreement which contains a grievance procedure culminating in binding arbitration.

N.J.A.C. 19:14-2.1 provides:

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

The Director of Unfair Practices in this case determined that the Commission had and should retain jurisdiction of the Association's unfair practice charge since it alleged facts which might constitute an unfair practice under N.J.S.A. 34:13A-5.4(a)(5), but declined to issue a Complaint because formal Commission proceedings were not necessary, given the availability of binding arbitration, at that time in order to afford the parties an opportunity to litigate relevant legal and factual issues.

The Commission has repeatedly held that deferral to a negotiated grievance procedure culminating in binding arbitration is generally appropriate when the charge essentially alleges a contractual breach of a term and condition of employment in violation of N.J.S.A. 34:13A-5.4 (a)(5) and there are no procedural barriers to arbitration. In East Windsor Bd. of Ed., for example, the Commission refused to issue a Complaint involving an essentially contractual claim before the matter had been submitted to binding arbitration under the parties' contract. It was stated:

> It is clear that the issue of contract interpretation raised by the opposing positions of the parties, is subject to resolution by the grievance procedure which the parties have voluntarily agreed to follow and which,

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

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

While deferral of the instant dispute at this time to the processes for resolution voluntarily established by the parties is the preferred course of conduct, the Commission shall retain jurisdiction of the charge, while that process is being pursued. Retention of jurisdiction will permit the Commission to re-enter the dispute to entertain an application submitted at the appropriate time which either asserts the failure to promptly pursue the dispute to resolution under the parties' own machinery, or lack of fairness in the grievance and arbitration process, or an arbitration determination repugnant to the Act. Surely if such a claim, ultimately asserted, raises valid issues as to whether the grievance and arbitration process undertaken has been consistent with due process or whether ultimate

> disposition can reasonably be reconciled with the Commission's exclusive mandate to prevent unfair practices, the Commission should be able to determine whether it will defer to the arbitrator's award. (Supra at p. 61, footnotes omitted).

See also, In re City of Englewood, P.E.R.C. No. 82-124, 8 NJPER 375 (¶13172 1982) ("Englewood"); In re State of New Jersey (Stockton State College), P.E.R.C. No. 77-31, 3 NJPER 62 (1977); In re City of Trenton, P.E.R.C. No. 76-10, 1 NJPER 58 (1975); In re Township of Springfield, supra; In re Borough of Palisades Park, supra. See, generally, Tener, The Public Employment Relations Commission: The First Decade, 9 Rutgers-Camden Law Journal 609, 650-652 (1978).

The Commission's policy of deferring essentially contractual claims to binding arbitration is modelled upon the policy of the National Labor Relations Board ("NLRB") in administering the federal Labor-Management Relations Act, 29 U.S.C. §151 et seq. ("LMRA"). The NLRB, like the Commission, has recognized that deferral is an important element of national labor policy favoring the speedy and peaceful resolution of employer-employee disputes through arbitration. When an unfair labor practice charge is filed alleging that a contractual term and condition of employment has been dishonored in violation of the federal counterpart of N.J.S.A. 34:13A-5.4(a)(5), 29 U.S.C. §158(a)(5), the NLRB will defer further processing of the charge if the parties' contract provides for binding arbitration, but will retain jurisdiction over the charge so that, if the arbitrator's award is challenged, it can assure itself that the procedures were fair and regular and the result is not repugnant to the LMRA. See Collyer Insulated Wire, 192 NLRB 837, 77 LRRM 1931 (1971) and Spielberg Mfg. Co., 112 NLRB 1080, 36 LRRM 1152 (1955). See also, Gorman, Basic Text

on Labor Law, pp. 734-743 (1976).[3/] It is, of course, appropriate for the Commission to look to experience, policies, and adjudications under the LMRA as a guide to interpretation of the New Jersey statutory scheme. Lullo v. Intern. Assn of Fire Fighters, 55 N.J. 409 (1970); Galloway Tp. Bd. of Ed. v. Galloway Tp. Assoc. of Ed. Secys., supra.

The Commission's policy of deferring essentially contractual claims under N.J.S.A. 34:13A-5.4(a)(5) to binding arbitration has been strongly approved by those appellate courts which have explicitly considered it. Thus, in State v. Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO, 153 N.J. Super. 91, 93-94 (App. Div. 1977), the Court stressed the clear legislative intent embodied in N.J.S.A. 34:13A-5.3 that contractual disputes should be resolved through contractual grievance procedures, and then stated:

3/ When an unfair practice charge is filed alleging discrimination against an employee in regard to his terms and conditions of employment in order to discourage that employee from engaging in protected activity, N.J.S.A. 34:13A-5.4(a)(3) and 29 U.S.C. §158(a)(3), neither the Commission nor the NLRB will defer further processing of the charge pending arbitration. Both agencies have, however, stated they will defer to an already rendered arbitration award under a contractual anti-discrimination clause if (and only if) the parties presented and the arbitrator resolved the discrimination issue, the proceedings were fair and regular, and the decision on that issue was not repugnant to the policies and purposes of the statute each agency administers. Compare, Englewood with Suburban Motor Freight, Inc., 247 NLRB No. 2, 103 LRRM 1113 (1980). This opinion does not consider the validity after Jefferson of this limited aspect of the Commission's deferral policy.

> We perceive the interpretation of the Commission and its expressed administrative practice as an effort to harmonize the language of the statutory provisions in order that they may be administered in a workable and practicable manner. The interpretation of a statute by the agency charged with its enforcement is entitled to great weight. In re Application of Saddle River, 71 N.J. 14, 24 (1976). We find it to be eminently reasonable and consonant with established principles of law. See, Nix v. Spector Freight System, Inc., 62 N.J. Super. 213, 223 (App. Div. 1960).

Similarly, in Bd. of Ed. of Warren Hills Regional High School Dist. v. Warren Hills Reg. Ed. Ass'n, App. Div. Docket No. A-4778-77 (May 9, 1980), the Court rejected the employer's argument, in seeking to vacate an arbitration award, that the Commission, not the arbitrator, had jurisdiction over a claimed contractual violation. The Court stated:

> This particular issue if viewed by PERC would probably have been referred to arbitration. See N.J.S.A. 34:13A-5.3 (permissive institution of grievance-arbitration mechanism.) See also East Windsor Bd. of Ed., 1 NJPER 59, 61 (1975). This deference is even more likely where the resolution of the contract dispute will put to rest the unfair labor practice issue as well. Cf. Collyer Insulated Wire, 192 NLRB 837 (1971); see also Gorman, Labor Law, supra, at 479. (Slip opinion at p. 7)

We are satisfied that under our long-standing deferral policy, modelled upon the NLRB's identical policy and approved by the courts, the Director of Unfair Practices properly decided to defer the Association's N.J.S.A. 34:13A-5.4(a)(5) charge to binding arbitration.[4/] We now consider whether, as the Associa-

4/ We perceive no inherent difference between the arbitrator's remedial authority and our remedial authority. Under our deferral policy, we will review an arbitrator's award, including any remedy ordered, to see if it is repugnant to our Act.

tion contends, the recent case of Jefferson Township has invalidated this policy.

In Jefferson Township, the Jefferson Township Education Association ("JTEA") filed a grievance alleging that the Jefferson Township Board of Education ("JTBE") violated its collective negotiations agreement when it refused to renew the contract of a school bus driver, allegedly because of her activities as an Association representative. The JTBE then filed a petition for scope of negotiations determination in which it asserted that the dispute was non-arbitrable under State of New Jersey v. Local 195, IFPTE, 179 N.J. Super. 146 (App. Div. 1981), certif. den. 89 N.J. 433 (1982) ("Local 195"), because it involved discipline.5/ The Commission held that Local 195 did not preclude binding arbitration over a grievance primarily based upon an assertion that anti-union discrimination motivated a discharge and consequently declined to restrain arbitration. P.E.R.C. No. 82-43, 7 NJPER 614 (¶12274 1981).

The JTBE appealed and requested a stay of arbitration pending its appeal. The Board based its request for a stay on an argument it had never presented to the Commission: the Commission's "exclusive power" under N.J.S.A. 34:13A-5.4(c) to resolve unfair practice charges allegedly preempted arbitration

5/ A recent amendment to N.J.S.A. 34:13A-5.3 has changed the law under Local 195. We do not address the nature and extent of that change here.

of a contractual claim alleging anti-union discrimination. Both a three Judge panel of the Superior Court and the Supreme Court denied the request for a stay.

Arbitration proceeded. The arbitrator dismissed JTEA's claim of anti-union discrimination for lack of proof, but found that the JTBE did not have just cause to terminate the grievant's employment and ordered her reinstated without back pay.6/

The Appellate Division of the Superior Court reversed the Commission's scope of negotiations determination and remanded the matter to the Commission for further proceedings. The Court reasoned that the Commission, having determined that the dominant issue involved a claim of retaliation for union activity, had to exercise its "exclusive power" under N.J.S.A. 34:13A-5.4(c) over unfair practice charges and could not submit the matter to binding arbitration or designate an arbitrator to hear the case on the Commission's behalf.7/ The Court acknowledged that N.J.S.A.

6/ The Commission submitted a letter brief to the Superior Court informing it of the arbitrator's award and asserting that his dismissal of the Association's discrimination claim per force mooted any further consideration of the arbitrability of that claim. Instead, the only remaining scope issue was whether the arbitrator's award was illegal under Local 195 and the recent amendment to N.J.S.A. 34:13A-5.3. As will be seen, the Court disregarded the Commission's position and addressed the arbitrability of the initial claim of anti-union discrimination.

7/ In fact, the JTEA had never filed an unfair practice charge and the Commission had not submitted the matter to arbitration or designated an arbitrator as its agent. Instead, the Commission had merely decided that the parties could legally include protections against anti-union discrimination in employment in their contract and could themselves agree to submit disputes under such clauses to binding arbitration.

34:13A-5.3 provided that negotiated grievance procedures shall be used for any contractual dispute, but held that statutory command inapplicable because the parties' contract specifically excluded from arbitration any matter for which a specific method of review was prescribed and expressly set forth by law. The Court concluded that PERC's unfair practice jurisdiction was a specific method of review of an anti-union discrimination claim.

We believe that Jefferson Township is distinguishable from the instant case.

First, Jefferson Township involved a possible (but uncharged) violated of subsection 5.4(a)(3), an allegation which requires examination of indicia of anti-union animus and does not usually turn on contract interpretation. This case, by contrast, involves a claimed violation of subsections 5.4(a)(5) and hinges entirely upon how the contract is interpreted.[8/] Allowing an arbitrator whom the parties mutually select and trust to resolve questions of contractual interpretation skillfully, quickly, and inexpensively is a significant element of public sector labor relations policy in New Jersey. N.J.S.A. 34:13A-2; Kearny PBA Local #21 v. Town of Kearny, 81 N.J. 208 (1979); Neptune City Bd. of Ed. v. Neptune City Ed. Ass'n, 153 N.J. Super. 406 (App. Div. 1977); cf. United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of

8/ Although alleging that the Board has violated subsection 5.4(a)(3), the charge contains no specific facts which, if true, would establish a violation of that subsection. In particular, there is no alleged tie between the increase in each contractual maximum and the exercise of any protected rights (continued)

America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). See also Pedersen v. S. Williamsport School Dist., 677 F.2d 312, 110 LRRM 2361 (3rd Cir. 1982) (public sector arbitration is a fundamentally fair way to resolve disputes) and Devine v. White, 697 F.2d 421, 112 LRRM 2374 (D.C. Cir., January 7, 1983) (importance of arbitration as a means of resolving disputes in the public sector).

Second, the Court in Jefferson Township specifically determined that the matter was not contractually arbitrable 9/ because the parties had agreed to exclude from arbitration any matters, including claims of anti-union discrimination, which could be reviewed by agencies such as PERC; the Court therefore declined to consider the significance of N.J.S.A. 34:13A-5.3's command that "grievance and disciplining review procedures established by agreement between the public employer and the

8/ (Continued) nor is there any allegation that the Board increased contractual maximums in order to encourage or discourage the exercise of such rights. In re New Lisbon State School, D.U.P. No. 82-15, 8 NJPER 1 (¶13000 1982). The Director reserved decision on whether a Complaint should issue on the subsection 5.4(a) (3) charge until after the arbitrator's award issued, but we see no reason not to determine now that a Complaint cannot issue on that charge. Accordingly, we dismiss the subsection 5.4(a)(3) portion of the charge.

9/ We note that the court should not have addressed a question of contractual arbitrability in a scope of negotiations proceeding. Ridgefield Park Ed. Assn. v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978). Nevertheless, the Court did and its contractual arbitrability determination quite clearly limits the reach of its scope of negotiations determination.

representative shall be utilized for any contractual dispute." The parties' contract here provides for binding arbitration as the appropriate final forum for resolving questions of contract interpretation and under N.J.S.A. 34:13A-5.3 such negotiated grievance procedures should be followed.

Third, in Jefferson Township, the Commission decided a scope of negotiations question and did not retain jurisdiction to review the arbitrator's award. Here, the Commission is considering an unfair practice charge involving a question of contractual interpretation and will retain jurisdiction of that charge in order to review the arbitrator's award.

Fourth, the Court in Jefferson Township did not expressly consider the propriety of the Commission's deferral policy in unfair practice cases alleging a violation of subsection 5.4(a)(5). Since the only appellate court cases expressly considering this policy have embraced it, State v. Council of N.J. State College Locals, supra and Bd. of Ed. of Warren Hills Regional High School Dist. v. Warren Hills Regional Ed. Assn, supra, we will continue to follow those cases.

We also believe that it would be improper, as a matter of both statutory construction and sound labor relations policy, to extend Jefferson Township to preclude deferral in all unfair practice cases alleging contractual violations. A brief review

of pertinent legislative history and caselaw makes clear the folly of applying Jefferson Township too broadly and rigidly.

In 1970, the New Jersey Supreme Court held that PERC lacked jurisdiction under the Act -- L. 1968, c. 303 -- which created it to conduct unfair practice proceedings. Burlington County Evergreen Park Mental Hosp. v. Cooper, 56 N.J. 579 (1970). Instead, the Court ruled that questions of statutory violations would have to be raised before other agencies, such as the Civil Service Commission, with jurisdiction over the employee's claim.

In response to Cooper, the Legislature enacted L. 1974, c. 123. As a result, N.J.S.A. 34:13A-5.4(c) now confers exclusive power upon the Commission to prevent unfair practices while N.J.S.A. 34:13A-5.3 simultaneously states that negotiated grievance procedures shall be used for contractual disputes.

It is clear from the face of the statute and the legislative history that N.J.S.A. 34:13A-5.4(c)'s conferral of "exclusive power" upon the Commission was meant to establish and define the Commission's unfair practice jurisidction vis-a-vis other agencies and courts called upon to interpret the Act. It was not meant to oust the jurisdiction of arbitrators empowered under a negotiated grievance procedure to interpret and enforce a contract. To the contrary, the Legislature, by enacting section 5.3, affirmatively embraced resort to the negotiated grievance procedures as the preferred means for resolving contractual disputes such as the instant one. To extend Jefferson Township reflexively to cases involving claims of contractual breaches violating subsection 5.4(a)(5) would mean that no contractual disputes could be submitted to binding arbitration since any

alleged violation of a contractual term and condition of employment might constitute an unfair practice. Such an expansion of Jefferson Township would, in effect, read the last line of section 5.3 out of the Act and defeat the legislative preference for resolving contractual disputes through the parties' own agreed-upon procedures.

It is also significant that the Legislature's use of the phrase "exclusive power" is borrowed from a substantial body of private sector case law which holds that the NLRB has "exclusive power", vis-a-vis federal and state courts and agencies, to adjudicate and remedy any alleged actions which are arguably protected or prohibited by the LMRA. See, generally, Gorman, supra, at pp. 766-770, and The Developing Labor Law, Cum. Supplement 1971-1975, pp. 422-424. See also Amalgamated Assn of Street, Elec. Ry. & Motor Local Employees v. Lockridge, 403 U.S. 274 (1971); San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959); Blum v. International Assn. of Machinists, AFL-CIO, 42 N.J. 389 (1964); Cream-O-Land Dairy v. Milk Drivers and Dairy Empl. Local 680, 111 N.J. Super. 578 (App. Div. 1970).[10/] The NLRB's "exclusive power" over statutory unfair practices, however, does not oust an arbitrator's power to consider related

10/ There are a few exceptions to the preemption doctrine in the private sector. For example, a union's breach of its duty of fair representation constitutes an unfair practice under the LMRA, but may also be redressed in a court action premised upon a breach of contract. Vaca v. Sipes, 386 U.S. 171 (1967); cf. Kaczmarek, supra, at p. 346 (Pashman, J. concurring); Saginario v. Attorney General, 87 N.J. 480, 502, n. 2 (1981) (Clifford J. (concurring and dissenting). See also Division 1478 v. Ross, 90 N.J. Super. 391(App. Div. 1966).

contractual claims. See, generally, Gorman, supra. at pp. 568-573. Indeed, the United States Supreme Court settled any question concerning the arbitrator's jurisdiction to determine contractual claims in Smith v. Evening News Assn, 371 U.S. 195 (1962) and Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964). See also, Carpenters & Millwrights, 40 N.J. 97 (1963); P.T. & L. Constr. Co., Inc. v. Teamsters Local No. 469, 131 N.J. Super. 104 (Law Div. 1973), affmd 66 N.J. 97 (1974); Public Utility Constr. & Gas Applicance Workers v. Public Service Elec. & Gas Co., 26 N.J. 146 (1958); Independent Oil Workers at Paulsboro v. Socony-Mobil Oil Co., Inc., 85 N.J. Super. 453 (App. Div. 1964); cf. Alexander v. Gardner-Denver Co., 415 U.S. 36, 49-50 (1974); Bd. of Ed. of the Borough of Fair Lawn v. Fair Lawn Ed. Assn., 174 N.J. Super. 554 (App. Div. 1980). We believe that the Legislature intended to follow, not overrule, this extensive body of private sector precedent when it amended the Act in 1974 and particulary amended section 5.3 to require the resolution of contractual disputes through negotiated grievance procedures.[11/]

New Jersey case law interpreting the Commission's "exclusive power" under N.J.S.A. 34:13A-5.4(c) to resolve unfair

11/ In addition, other jurisdictions with statutes conferring exclusive power upon agencies to resolve unfair practice charges have recognized that such powers do not oust arbitral jurisdiction over contract claims. Hollinger v. Department of Public Welfare, ___ Pa. ___, 365 A.2d 1245 (1976); York County Hosp. and House v. Dist. Council 89, AFSCME, ___ Pa. Commw. ___, 426 A.2d 1224 (1981); Weber v. School Dist. of Phila., 465 F. Supp. 1371 (E.D. Pa. 1979); City School Dist., Peekskill v. Peekskill Faculty Assn, 398 N.Y.S. 2d 693, 59 A.2d 739 (Supreme Ct., App. Div. 1977); Bd. of Ed. v. Teachers Assn., 83 LRRM 2525 (N.Y. Sup. Ct. 1973).

practice charges has shunned a mechanistic approach. As previously discussed, the only two appellate court cases directly considering the Commission's deferral policy have recognized that this policy appropriately reconciles the Legislature's preference for using negotiated grievance procedures with the Legislature's conferral of unfair practice jurisdiction upon the agency. Similarly, in Hackensack v. Winner, 82 N.J. 1 (1980), the Supreme Court held that the Commission's "exclusive power" to determine unfair practice charges did not necessarily preclude the exercise of jurisdiction by other agencies over related claims nor did it mandate that the Commission proceed rather than defer to other agencies. Thus, **N.J.S.A. 34:13A-5.4(c) is not "jurisdictional"** in a wholly preemptive sense; but rather incorporates relative concepts of comity and deference. Cf. Township of Teaneck v. Local #42, FMBA, 158 N.J. Super. 131 (App. Div. 1978); In re Hoboken Teachers Assn, 147 N.J. Super. 240 (App. Div. 1977) (courts may restrain strikes, despite allegations of refusal to negotiate in good faith within Commission's unfair practice jurisdiction). In addition, in State v. Camden County Board of Chosen Freeholders, 180 N.J. Super. 430 (App. Div. 1981), the Court specifically held that the Commission's "exclusive power" over unfair practice claims did not prevent courts from resolving questions of contractual interpretation. Under these cases, it would be improper to insist that the Commission must process and decide every contractual claim rather than retain jurisdiction and defer to arbitration in the first instance so that the arbitrator's expertise over matters of contractual interpretation can be applied.

We also believe that the public policies behind the Act, N.J.S.A. 34:13A-2, would be impaired if our policy of deferring contractual claims to binding arbitration were to be abandoned. Labor peace and stability are promoted through recourse to parties' agreed-upon grievance procedures including binding arbitration.

Accordingly, we hold that the instant unfair practice charge should be deferred to binding arbitration under our long-standing and judicially approved deferral policy in subsection 5.4(a)(5) cases. Jefferson Township does not alter this deferral policy and should not be expanded to apply to subsection 5.4(a)(5) cases.[12/]

ORDER

The decision of the Director of Unfair Practices deferring further processing of the Association's subsection N.J.S.A. 34:13A-5.4(a)(5) unfair practice charge to the parties' contractual grievance/binding arbitration procedures is affirmed. The Commission will retain jurisdiction of the charge for the purpose of entertaining an appropriate and timely application for further consideration upon a proper showing that (a) the dispute has not with reasonable promptness been resolved or submitted to arbitration, (b) the grievance or arbitration procedures have not

12/ We express no opinion on whether or how Jefferson Township applies to subsection 5.4(a)(3) cases when an arbitrator with contractual jurisdiction over an anti-union discrimination claim has already decided that claim after the parties have fully litigated it. Englewood.

been fair and regular, or (c) the grievance or arbitration procedures have reached a result which is repugnant to the Act. The Association's subsection N.J.S.A. 34:13A-5.4(a)(3) unfair practice allegations are dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Hartnett, Graves, Suskin, Hipp and Newbaker voted for this decision. Commissioner Graves dissented from that portion of the decision dismissing the (a)(3) violation. None opposed.

DATED: Trenton, New Jersey
April 19, 1983
ISSUED: April 20, 1983