D.U.P. No. 2020-8

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Respondent,

-and- Docket No. CI-2019-031

AAUP - BIOMEDICAL AND HEALTH SCIENCES
OF NEW JERSEY,

Respondent,

DR. GAETANO G. SPINNATO,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by Dr. Gaetano Spinnato, against his employer, Rutgers University (the University) and his employee representative, AAUP-Biomedical and Health Sciences of New Jersey (Union) arising from disputes concerning compensatory time off for holidays that fell on Spinnato's day off and the revocation of his membership with the union. The Director finds that the claims regarding the denial of Spinnato's compensatory time grievance and the claims regarding the union's handling of that grievance are time-barred. Even assuming those claims were timely filed, the Director also finds they do not meet the complaint issuance standard. The Director finds that the claims against the University regarding the compensatory time grievance constitute a contractual interpretation dispute over which the Commission lacks jurisdiction. The Director further finds that the union did not breach its duty of fair representation in handling Spinnato's grievance, and that Spinnato consequently lacks standing to assert a violation of Section 5.4a(1) and (5) of the Act against Rutgers. Lastly, the Director finds that disputes regarding the revocation of union membership and the deduction of dues do not constitute unfair practices within the meaning of the Act.

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Appearances:

For the Respondent,
David Cohen, Esq.

For the Respondent,
Diomedes Tsitouras, Executive Director

For the Charging Party,
Rubas Law Offices, attorneys
(Michael P. Rubas, of counsel)

REFUSAL TO ISSUE COMPLAINT

On March 6 and 13, 2019, Dr. Gaetano G. Spinnato (Charging Party) filed an unfair practice charge and amended charge against the AAUP-BHSNJ (Union) and Rutgers University (University). The charge, as amended, complains of a variety of conduct arising from disputes concerning compensatory time off for holidays that fall on the Charging Party's day off and a dispute regarding revoking his membership in the Union. More specifically, the

Charging Party alleges that the University wrongfully denied him compensatory time off for 23 holidays since 2014 that coincided with his day off from work; that the University made several mistakes in denying the grievance contesting that issue; that it failed to withdraw his membership from the Union; and that it refused to stop deducting dues after being informed of his decision to withdraw membership.

The Charging Party alleges that the Union has held his arbitration in abeyance since October, 2017 against his wishes, and has refused to process his resignation from the Union. As amended, the charge alleges that the University's and the Union's conduct violate section 5.4(a)1, 3, 4, 5, 6, 7[1/] and section

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1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by this act;" "(3)Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act;" "(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;" "(6) Refusing to reduce a negotiated agreement to writing and to sign such agreement;" and "(7) Violating any of the rules and regulations established by the commission."

5.4(b)1, 3, 4, 5[2/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act), respectively.

The Commission has authority to issue a complaint where it appears that the Charging Party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3. I find the following facts.

The University is a public employer within the meaning of the Act. Effective July 1, 2013, pursuant to the Medical and Health Sciences Restructuring Act, certain schools of the former University of Medicine and Dentistry of New Jersey (UMDNJ) became part of the University. The Union represents certain teaching, and/or research faculty and librarians employed by the University in legacy UMDNJ positions. The University and the Union's first collective negotiations agreement covered the period from July 1, 2013, through June 30, 2018.

2/ These provisions prohibit employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act;" "(3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in the unit;" "(4) "Refusing to reduce a negotiated agreement to writing and to sign such agreement" and "(5) Violating any of the rules and regulations established by the commission."

The Charging Party is employed as a professor in the University's School of Dental Medicine, and included in a collective negotiations unit represented by the Union. He has a .8 full-time appointment and is scheduled to work 4 days per week and is generally off-duty on Mondays.

On August 18, 2016, the Union, on behalf of Spinnato and similarly situated employees, filed a grievance under Article V of the parties' collective negotiations agreement. Specifically, the grievance alleged that the University had breached Article IX (Fringe Benefits) of the collective negotiations agreement, which provides in a pertinent part:

> Holidays for Faculty Unit Members
>
> Faculty unit members shall be allowed four (4) float holidays, to be scheduled in conjunction with department Chairs or a designee of the Dean of the School of Nursing. Such unit members shall be entitled to the following holidays: New Year's Day, Martin Luther King Jr. Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, the day after Thanksgiving and Christmas Day.

The Union claimed in the grievance that Spinnato and other similarly situated faculty members who are not scheduled to work on a University holiday are entitled to compensatory time off in place of the holiday, and that such compensatory time could be used on a regularly scheduled work day.

The parties conducted a grievance meeting on September 20, 2016. Lisa Bonick, Executive Director of the Office of Academic

Labor Relations, denied the grievance in a February 23, 2017, letter to the Acting Executive Director of the Union, Bob Witkowski. The Charging Party was copied on this letter. Executive Director Bonick explained that the contract ". . . lists the specific holidays that unit members are entitled to; it does not state that every unit member is entitled to eight holidays." Therefore, the University understood the contract to require that it pays unit members for a holiday only if they are scheduled to work on one of the enumerated holidays.

The Union sought arbitration and a hearing was scheduled for Monday, October 16, 2017. However, over the objections of Spinnato, the Union ultimately decided to adjourn the arbitration and address the dispute through collective negotiations for the successor agreement. Article V of the contract affords the Union – not the individual grievant – the right to proceed to arbitration if it is not satisfied with the Step One disposition of the grievance.

On or around July 11, 2018, the Charging Party filed a charge (Dkt. No. CI-2019-001) against the University and the Union, making largely identical allegations regarding the University's denial of his grievance and the Union's processing of it. Included with this prior charge was a July 2, 2018, email from Diomedes Tsitouras, Executive Director of the Union, advising Spinnato that he previously told him that the Union

decided to resolve the dispute at the bargaining table. The Charging Party withdrew this initial charge on October 25, 2018.

In a January 11, 2019 email, the Office of Labor Relations informed Spinnato that the University mistakenly failed to deduct dues from a July 27, 2018, paycheck and would therefore be recouping the dues from the then-upcoming January 25 and February 22, 2019 paychecks. On January 15, 2019, Spinnato replied to that email, with a copy sent to the Union. He wrote that he did not want any union dues deducted and that he called repeatedly to discontinue his membership in the Union. On January 24, 2019, Spinnato sent a follow-up email to the University seeking confirmation that dues were not being deducted and that he would be filing a complaint with the Commission for the Union's failure to represent him properly against the University.

In a fax that the Charging Party sent to the Commission presumably in support of his charge, Spinnato included a copy of an April 4, 2019 email from the Union's Executive Director, advising Spinnato that the Union processed his request to be dropped from membership and that it should be reflected in the April 5 payroll. Executive Director Tsitouras advised that members ordinarily cannot resign until July 1, but the Union made an exception for Spinnato.

ANALYSIS

The allegations against the University regarding its denial of Spinnato's grievance and the allegations against the Union

regarding its representation and processing of Spinnato's grievance are time-barred because the charge was filed after the six-month statute of limitations expired. N.J.S.A. 34:13A-5.4c establishes a six-month statute of limitations period for the filing of unfair practice charges. The statute provides in a pertinent part:

> . . . that no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such a charge in which event the 6-month period shall be computed from the day he was no longer so prevented.

The Union filed the grievance on August 18, 2016. The University denied the grievance on February 23, 2017. The Union informed Spinnato in its July 2, 2018, email that it was refusing to arbitrate the grievance. Spinnato did not file the instant charge until March 6, 2019. He hasn't alleged any facts suggesting that he was prevented from filing a timely charge. See Kaczmarek v. New Jersey Turnpike Auth., 77 N.J. 329 (1978). In fact, Spinnato previously filed a charge against the University and the Union on July 10, 2018, regarding his grievance but ultimately withdrew it. Under these circumstances, the Charging Party's claims related to the University's denial of his grievance and the Union's representation and processing of his grievance are dismissed as untimely.

If the allegations against the University and the Union regarding his grievance are considered timely, they would have to be dismissed because they fail to meet the complaint issuance standard. The allegations against the University do not include any facts that would suggest a violations under Section 5.4a(3), (4), (6) or (7) of the Act. Therefore, I dismiss those claims against the University.

In the most generous light, the allegations against the University potentially implicate violations of section 5.4a(1) or a(5) of the Act because the University erred in denying Spinnato's grievance regarding compensation for holidays that fell on his day off. Essentially, Spinnato seeks to relitigate the merits of the grievance.

The Commission does not have jurisdiction over disputes solely involving contractual interpretation. State of New Jersey, (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419, 421 (¶15191 1984) (explaining "[w]e conclude that a mere breach of contract claim does not state a cause of action under subsection 5.4a(5) which may be litigated through unfair practice proceedings and instead parties must attempt to resolve such contract disputes through their negotiated grievance procedures"). Our case law also clarifies that only the majority representatives of public employees may bring a claim under Section 5.4a(1) or a(5) of the Act. In New Jersey Turnpike Authority (Jeffrey Beall), P.E.R.C. No. 81-64, 6 NJPER 560

(¶11284 1980), the Commission found the standing of individual claimants to allege violations of section 5.4(a)(5) is very limited. The Commission held:

> As a general matter, we do not believe that an individual . . . can use the unfair practice forum to litigate an alleged breach of a collective negotiations agreement unrelated to union activity. The violation of the duty to negotiate terms and conditions of employment implied by such an allegation is more appropriately asserted by the majority representative. It is not an unfair practice for a public employer to refuse to negotiate with an individual employee or even a group of employees if they do not constitute the exclusive majority representative. Therefore, while the breach of a contract may violate certain rights of an individual employee, they are not normally vindicated in the unfair practice forum provided by this Act. . . . . However, a different analysis may be called for where the employee not only alleges a breach of the contract, but also alleges that the majority representative either alone, or in collusion with the employer, processed the grievance in bad faith, or in some other way violated the duty of fair representation owed the employee. [6 NJPER at 561]

With respect to section 5.4a(1) claims alleged by an individual public employee, the Commission further explained that a public employer does not interfere with rights afforded by the Act when a majority representative refuses to process a grievance to arbitration since there is not an absolute right to arbitration. Id. at 562. Therefore, unless the facts as alleged indicate that the majority representative may have breached its duty of fair representation, then an individual employee will be precluded

from bringing a Section 5.4a(1) or a(5) claim against a public employer.

A majority representative has a duty to represent all unit employees fairly and without discrimination on the basis of union membership. N.J.S.A. 34:13A-5.7. A majority representative breaches its duty of fair representation "only when [its] conduct towards a member of the collective barging unit is arbitrary, discriminatory, or in bad faith." Vaca v. Sipes, 386 U.S. 171, 190 (1967). The Commission subsequently adopted this standard, the violation of which would arise under Section 5.4b(1) of the Act. Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. Of Teachers, 142 N.J. Super. 486 (App. Div. 1976); Lullo v. International Ass'n of Fire Fighters, 55 N.J. 409 (1970); OPEIU Local 153 (Johnstone), P.E.R.C. No. 84-60, 10 NJPER 12, 13 (¶15007 1983).

A union is afforded a "'wide range of reasonableness' in servicing its members," and "[t]he fact that a union's decision results in a detriment to one unit member does not establish a breach of the duty." Essex-Union Joint Meeting and Automatic Sales, Servicemen & Allied Workers, Local 575 (McNamara), D.U.P. No. 91-26, 17 NJPER 242 (¶22108 1991)(citing Ford Motor Co. v. Huffman, 345 U.S. 330 (1953)). There is no absolute right to grievance arbitration. Id. (citing Vaca, supra). The Commission has frequently rejected duty of fair representation claims based on allegations that a union's representation was negligent,

inadequate or otherwise unsatisfactory from the grievant's perspective. Passaic Cty. Comm. Coll. Admin. Ass'n (Wasilewski), P.E.R.C. No. 98-131, 24 NJPER 256 (¶29123 1998); Council of N.J. State College Locals, AFL-CIO (Roman), P.E.R.C. No. 2015-76, 42 NJPER 33 (¶8 2015); ATU Local 540 (Warfield), D.U.P. No. 2016-003, 42 NJPER 376 (¶107 2015), aff'd P.E.R.C. 2016-046, 42 NJPER 336 (¶96 2016).

The facts as alleged do not establish that the Union breached its duty of fair representation. The Union filed Spinnato's grievance, sought and scheduled arbitration when the grievance was denied, but ultimately decided the dispute regarding compensation for holidays that fell on unit members' days off would be more suitable for resolution through the collective negotiations process. This decision falls within the reasonable discretion parameters afforded to unions in determining how to represent members. Nothing in the charge suggests that the Union changed its strategy based upon an unlawful motivation. Therefore, the Section 5.4b(1) claim against the Union is dismissed. Moreover, the allegations against the Union do not include any facts that would suggest a violations under Section 5.4b(3), (4), or (5) of the Act. Therefore, I dismiss those claims against the Union.

Since the Union did not breach its duty of fair representation, Spinnato does not have standing to assert a violation of Section 5.4a(1) or (5) against Rutgers.

Accordingly, these allegations against Rutgers are also dismissed.

The only remaining allegations pertain to the alleged failure of Rutgers and the Union to process Spinnato's revocation of membership and continued deduction of dues from his salary. The United States Supreme Court in Janus v. American Fed'n of State, Cty., and Mun. Emp., Council 31, 585 U.S. ___, 138 S.Ct. 2448, 2486 (2018), reversed over three decades of precedent in holding that under the First Amendment, "neither agency fee nor any other payment to the union may be deducted from a nonmember's wages . . . ." unless the nonmember agrees to pay. The Janus decision involved agency fees paid by a nonmember. It did not address an employee's revocation of membership, which is at issue in the instant charge.

Instead, a state statute entitled the Workplace Enhancement Democracy Act (WDEA) N.J.S.A. 34:13A-5.11, sets forth the procedure for withdrawing authorization for payroll deduction of fees. It creates a default process for an employee withdrawing membership, which involves written notice to the public employer during the 10 days following each anniversary date of the employee's employment, and makes the effective date the 30th day after the anniversary date of employment.[3/] The statute's

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3/ Specifically, the WDEA modified N.J.S.A. 52:14-15.9e as follows:

(continued...)

default process can be modified to a certain extent by contract. It does not appear that Spinnato followed the statutory process

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3/ (...continued)

> Employees who have authorized the payroll deduction of fees to employee organizations may revoke such authorization by providing written notice to their public employer during the 10 days following each anniversary date of their employment. Within five days of receipt of notice from an employee of revocation of authorization for the payroll deduction of fees, the public employer shall provide notice to the employee organization of an employee's revocation of such authorization. An employee's notice of revocation of authorization for the payroll deduction of employee organization fees shall be effective on the 30th day after the anniversary date of employment.
>
> Nothing herein shall preclude a public employer and a duly certified majority representative from entering into a collectively negotiated written agreement which provides that employees included in the negotiating unit may only request deduction for the payment of dues to the duly certified majority representative. Such collectively negotiated agreement may include a provision that existing written authorizations for payment of dues to an employee organization other than the duly certified majority representative be terminated. Such collectively negotiated agreement may also include a provision specifying the effective date of a termination in deductions as of the July 1 next succeeding the date on which notice of withdrawal is filed by an employee with the public employer's disbursing officer.
>
> This authorization for negotiation of exclusive dues deduction provisions shall not apply to any negotiating unit which includes employees of any local school district or county college.

to revoke membership, or that he followed the process that was outlined in the contract between Rutgers and the Association.[4/]

Nothing in the Janus decision or in the WDEA provides a legal basis for transforming a dispute regarding the revocation of union membership to an unfair practice within the meaning of the Act. In passing the WDEA, the state legislature explicitly identified the particular provisions it wanted to include within the Act's unfair practice jurisdiction. Section 5.14(c)of the WDEA specifically provides that violations of Section 5.14(a) or (b) of the WDEA constitute unfair practices pursuant to Section 5.4(a)(1) of the Act.[5/] The provisions pertaining to deduction

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4/ Under the contract, bargaining unit members can withdraw dues on January 1 or July 1 of each year so long as timely notice was provided.

5/ N.J.S.A. 34:13A-5.14 provides:

> **a.** A public employer shall not encourage negotiations unit members to resign or relinquish membership in an exclusive representative employee organization and shall not encourage negotiations unit members to revoke authorization of the deduction of fees to an exclusive representative employee organization.
>
> **b.** A public employer shall not encourage or discourage an employee from joining, forming or assisting an employee organization.
>
> **c.** A public employer that violates any provision of subsection a. or b. of this section shall be regarded as having engaged in an unfair practice in violation of subsection a. of section 1 of P.L.1974, c.123 (C.34:13A-5.4), and, upon a finding that the

(continued...)

of fees under N.J.S.A. 52:14-15.9e do not contain any similar language regarding unfair practices. The Commission has previously applied this fundamental principle of statutory construction to ascertain the scope of its jurisdiction over unfair practices. See e.g. State of New Jersey, (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419, 421 (¶15191 1984) (finding that the omission of breach of contract claims among the enumerated unfair practices in Section 5.4 was evidence of the legislature's intent to exclude breach of contract actions as unfair practices.) Therefore, I dismiss the allegations regarding the failure of Rutgers and the Union to process Spinnato's revocation of membership and continued deduction of dues from his salary.[6/]

5/ (...continued)
violation has occurred, the Public Employment Relations Commission, in addition to implementing any other remedies authorized by that section, shall order the public employer to make whole the exclusive representative employee organization for any losses suffered by the organization as a result of the public employer's unlawful conduct and any other remedial relief deemed appropriate.

6/ I note that there has been recent federal litigation interpreting the WDEA, which addressed constitutional questions that are beyond the bounds of the Commission's unfair practice jurisdiction. See e.g., Smith, et al. v. NJEA, et al., 2019 U.S. Dist. LEXIS 205960 (D.N.J. Civil No. 18-10381 11/27/2019)(finding that the union dues authorizations previously signed by employees seeking to resign from union were valid contracts and declining retrospective monetary relief for non-member employees); Thulen v. AFSCME, 2019 U.S. Dist. LEXIS 221502 (D.N.J. Civil
(continued...)

Accordingly, the charge in its entirety is dismissed.

/s/ Jonathan Roth
Jonathan Roth
Director of Unfair Practices

DATED: January 21, 2020
Trenton, New Jersey

This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3.

Any appeal is due by January 31, 2020.

6/ (...continued)
No. 18-14584 12/27/2019)(dismissing claims that public sector employees have a constitutional right to resign from a union at any time without restrictions). Nothing about my conclusion that a dispute solely involving revocation of union membership is not an unfair practice is inconsistent with these federal cases. As explained in Smith and Thulen, union dues authorizations that limit the period for revocation are enforceable contracts and Janus does not entitle resigning employees to the immediate cessation of dues. Moreover, the court in Smith ruled that the members plaintiffs seeking to resign from their unions lacked Article III standing to claim that the restrictive revocation procedures set forth in the WDEA violated their First Amendment rights to resign from the Union because they were not subject to the 10-day open period for providing notice of revocation. Here the Charging Party in the instant matter was also permitted to resign membership outside of the ten-day window. As discussed above, the Union deviated from its contractual procedure and made the Charging Party's revocation effective on or around the April 5, 2019, payroll rather than the July 1, 2019, effective date.