

D.U.P. NO. 98-4

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

In the Matter of

TOWNSHIP OF POHATCONG,

Respondent,

-and-

Docket No. CI-97-80

DEAN M. MCBRIDE,

Charging Party.

SYNOPSIS

The Director of Unfair Practices refuses to issue a complaint on allegations that the Township violated the Act by failing to provide a substantive response to a grievance.

The Director finds that the Township's failure to substantively respond to the grievance is not an unfair practice where the parties' contractual grievance procedure is self-executing.

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Appearances:

For the Respondent,
Dilts and Pursel, attorneys
(John H. Pursel, of counsel)

For the Charging Party,
Dean M. McBride, pro se

REFUSAL TO ISSUE COMPLAINT

On May 21, 1997, Dean M. McBride filed an unfair practice charge with the Public Employment Relations Commission against the Township of Pohatcong. McBride alleges that the Township violated subsection 5.4(a)(5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. by failing to provide a substantive response to his grievance. The parties submitted position statements and supporting materials by June 30, 1997.

^{1/} This subsection prohibits public employers, their representatives or agents from: "(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."

McBride filed a step two grievance^{2/} in February 1997 alleging that the Township did not comply with its guidelines when evaluating candidates for promotion to sergeant. McBride received a response to the step two grievance in March 1997. The matter was then forwarded to the mayor which initiated step three of the grievance procedure. The mayor requested an extension of the contractual time limit for response to the grievance, and McBride agreed. However, McBride alleges that the Township never provided a substantive written response to his grievance at step three. After McBride requested a response, the Township attorney replied by letter that promotions are covered under the management rights clause of the contract and that the matter was therefore not grievable. McBride has also filed an appeal with the New Jersey Department of Personnel and at the time he filed this charge, intended to file for arbitration as well.

The Township contends that promotions are managerial prerogatives pursuant to the management rights clause in the parties' agreement^{3/}. The Township states that it appointed the person who appeared first on the civil service list, in accordance

^{2/} The parties agreed to waive step one of their grievance procedure.

^{3/} Article XVII, Management Rights reads in pertinent part that: "A. The governing body hereby retains and reserves unto itself without limitation.....the following rights:
1. To hire all employees and subject to the provisions of law, to determine their qualifications and conditions for continued employment or assignment, except as specifically limited herein and to promote and transfer employees."

with the "rule of three" which allows it to choose among the three certified eligible candidates on a civil service promotional list.

The parties' grievance procedure is contained in Article XIV of their agreement. It provides, in pertinent part, that:

STEP FOUR:

1. In the event that the grievance is not resolved by Step Three, then within ten days following the determination by the Governing Body the matter shall be submitted by the PBA and/or the Governing Body to binding arbitration pursuant to the Public Employees (sic) Relations Commission Rules and Regulations.

2. However, no arbitration hearing shall be scheduled sooner than (sic) thirty days after the final decision of the Governing Body. In the event the aggrieved elects to pursue civil service procedures, the arbitration hearing shall be canceled and the matter withdrawn from arbitration.

D. TIME

The time limits set out herein shall be strictly adhered to and the failure to process a grievance to the next step within the specified time limit shall be deemed to mean that the grievant has accepted the latest determination made. However upon mutual consent of the parties, the time limits for any step may be extended or contracted.

The grievance procedure here is self-executing. That is, it permits an employee organization to unilaterally process a grievance through arbitration. When a contract includes a self-executing grievance procedure ending in binding arbitration, an employer's failure to respond to a grievance is not usually an unfair practice. See Township of Southampton, D.U.P. No. 97-34, 23 NJPER 258 (¶28124 1997); State of New Jersey, D.U.P. No. 88-9, 14

NJPER 146 (¶19058 1988); City of Trenton, D.U.P. No. 87-7, 13 NJPER 99 (¶18044 1986); New Jersey Transit Bus Opers., Inc., P.E.R.C. No. 86-129, 12 NJPER 442 (¶17164 1986); Township of Rockaway, D.U.P. NO. 83-5, 8 NJPER 644 (¶ 13309 1982); Rutgers University, D.U.P. No. 82-28, 8 NJPER 237 (¶13101 1982); City of Pleasantville, D.U.P. No. 77-2, 2 NJPER 372 (1976); Englewood Board of Education, E.D. No. 76-34, 2 NJPER 175 (1975).

In City of Pleasantville, the then Director of Unfair Practices explained why an employer's failure to respond to a grievance at intermediate steps of the grievance procedure is not usually a violation of subsection 5.4(a)(5).

...[a]s a matter of law a public employer's failure to participate in contractual arbitration proceedings does not, on the facts alleged in most instances, constitute a refusal to process grievances within the meaning of N.J.S.A. 34:13A-5.4(a)(5). The underlying theory in refusing to issue a Complaint in such instances is that absent an affirmative step by the public employer to restrain the arbitration proceeding, the failure of the public employer to participate in the arbitration proceeding will not prevent the arbitration provisions of the grievance procedure from proceeding on a self-executing basis to arbitration. Thus, the employee organization is not precluded from pursuing the arbitration to conclusion ex parte and the grievance will be "processed" to arbitration pursuant to the parties' contract notwithstanding the public employer's failure to take part in that process.

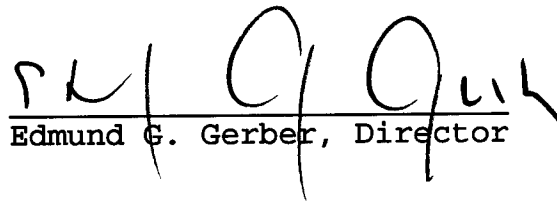
The undersigned finds that the reasoning of the Englewood case is applicable as well to the earlier stages of the grievance procedure. A public employer's failure to respond to a grievance at a given level is presumed to be a rejection of the grievance. Normally, the next level of the grievance procedure may be invoked

unilaterally by the aggrieved party inasmuch as the grievance has not been resolved to the aggrieved party's satisfaction. The grievance will thus be "processed" through the given levels until it proceeds to arbitration.

The parties' grievance procedure is self-executing. The Township responded to McBride's step three grievance by stating that it did not believe his allegations were appropriate for the grievance process. Its failure to provide a substantive response is not an unfair practice in light of the self-executing grievance procedure. The content of the Township's response did not prevent McBride from filing for arbitration and his submissions indicate his intent to do so^{4/}.

Accordingly, I find that the Commission's complaint issuance standard has not been met and I will not issue a complaint on the allegations of this charge^{5/}. The charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES


Edmund G. Gerber, Director

DATED: July 18, 1997
Trenton, New Jersey

^{4/} I do not address whether McBride's allegations are substantively arbitrable pursuant to the agreement's grievance procedure, management rights clause or the Township's rights under applicable Civil Service regulations.

^{5/} N.J.A.C. 19:14-2.3.