

D.U.P. NO. 92-28

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

In the Matter of

AFSCME LOCAL 888, COUNCIL 52,

Respondent,

-and-

Docket No. CI-92-68

E. BRUCE SMITH,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses a charge filed by an employee of Rutgers University alleging his employee representative violated the Act by failing to represent him at a grievance hearing and by failing to deduct his agency fees. The Director finds that the employee never notified the union of his pending grievance nor asked the union for representation. Further, the Director notes that nothing in the Act requires the union to accept employees' agency fees.

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Appearances:

For the Respondent,
AFSCME Council 52
(Richard Gollin, Director)

For the Charging Party,
E. Bruce Smith, pro se

REFUSAL TO ISSUE COMPLAINT

On March 10, 1992, Bruce Smith, an employee of Rutgers University, filed an Unfair Practice Charge with the Public Employment Relations Commission against his employee representative AFSCME Local 888, Council 52. Smith alleges that AFSCME violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(b)(1), (3) and (5)^{1/} by banning

^{1/} These subsections 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 that unit. (5) Violating any of the rules and regulations established by the commission."

him from union membership and by failing to represent him at a step 1 and a step 2 grievance hearing.

For the reasons that follow, I decline to issue a Complaint concerning these charges.

The Membership Issue

Smith alleges that AFSCME expelled him from membership in November 1990. Smith further states that AFSCME does not collect agency fees from him, although its contract with the employer permits it to do so. AFSCME argues that it lawfully expelled Smith from membership when he violated AFSCME's constitution by his assistance to a rival organization.

Smith asserts that he participated in forming the United Crafts Associates, an independent organization which filed a representation petition with the Commission on March 2, 1990, seeking to replace AFSCME as the bargaining agent for Rutgers' craft employees at Rutgers University.^{2/} Secondly, Smith asserts that in October 1990, he filed internal charges against Local 888's president and treasurer alleging misappropriation of funds.

An employee organization violates subsection 5.4(b)(1) when its actions tend to interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by the Act, provided the actions lack a legitimate and substantial organizational

^{2/} On April 30, 1990, I determined that the petitioned-for unit was inappropriate and I dismissed the Association's petition. See Rutgers University, D.R. No. 90-27, 16 NJPER 294 (¶21119 1990).

justification. Cf. New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550, 551 n. 1 (¶10285 1979). Employee organizations are free to create rules binding on their members to accomplish organizational objectives. These rules, often in the form of constitutions and by-laws, are part of the contract between the organization and its members. Calabrese v. Policeman's Benev. Ass'n, Local No. 76, 157 N.J. Super. 139 (Law Div. 1978).

In Calabrese, the Court held that a union may expel "discordant elements." The Court stated:

The advocacy of dual unionism and sponsorship or creation of a rival organization has been held to be activity clearly in violation of membership responsibilities and disruptive of contractual relations; otherwise the members could campaign against the union while remaining a member and therefore, privy to union strategy and tactics. [Id. at 154]

The standard for testing whether a union's expulsion of one of its members violates the employee's rights under the Act is whether the union's actions were arbitrary, capricious, or invidious. Cf. CWA Local 1037 (Schuster), P.E.R.C. No. 86-78, 12 NJPER 91 (¶17032 1985); FMBA Local No. 35 (Carrigino), P.E.R.C. No. 83-144, 9 NJPER 336 (¶14149 1983); Council No. 5, NJCSA (Labriola), P.E.R.C. No. 82-75, 8 NJPER 123 (¶13053 1982); City of Jersey City, P.E.R.C. No. 83-32, 8 NJPER 563 (¶13260 1982); PBA Local No. 199 (Rasheed Abdul-Haqq), P.E.R.C. No. 81-14, 6 NJPER 384 (¶11198 1980).

An employee organization's decision to expel a member because of his activities on behalf of a rival organization is

reasonable -- it may lawfully expel "discordant elements". See F.O.P. Newark Lodge 12 (Colasanti), P.E.R.C. No. 90-65, 16 NJPER 126 (¶21049 1990); Calabrese. Accordingly, I find that Smith does not state facts on which we might conclude that AFSCME's expulsion of Smith from membership was arbitrary, capricious or invidious.

Smith argues that AFSCME's failure to collect agency fees from him and other employees is discriminatory and in violation of the Act; this insulates the union from accountability. This argument is without merit. The union's responsibility under the Act is to represent all unit employees in negotiating their terms and conditions of employment and in administering the contract covering the unit employees. This obligation is not contingent upon the collection of agency fees.

Smith also alleged that AFSCME does not hold regular membership meetings, hold regular elections of officers. He also complains about the union's bylaw changes and contract ratification process. However, Smith is not a union member and he has not shown that these internal union issues affect his rights under the Act and I am inclined to dismiss this portion of his charge.

Union Representation

Smith alleges that AFSCME failed to provide him with union representation at step 1 and step 2 grievance hearings before the employer.

Article 4 of the collective agreement between AFSCME and Rutgers permits the employee or the union to present the grievance

for adjustment at step 1 to the employees immediate supervisor. Smith did so without AFSCME's involvement.

The contract then provides that, if the grievance remains unadjusted, the employee or the union may present the grievance at step 2 to the department head. Smith disputes that the employee may present the grievance at step 2. However, the contract specifically states at Article 4, section 2, step 2:

If the employee or the union is not satisfied, the employee or the steward shall forward the written grievance and written answer to the Office of Employees Relations, the President of the Union and the employee's next level of authority, within two (2) working days after receipt of the written answer...

Smith did not forward his written grievance to the union president pursuant to the contract, nor did he ask for Local 888's assistance. However, Smith did submit his step 2 grievance to the Office of Employee Relations. The contract then provides,

Within five (5) working days after receipt of the written grievance, the Office of Employee Relations shall arrange for the division head, department head or section head to hold a meeting with the employee and a union officer. The division head, department head or section head shall give to the employee and the president of the union a written answer to the written grievance within three (3) working days after the date of such meeting.

Pursuant to this contract language, the employer -- i.e., Rutgers' employee relations office -- attempted to schedule a grievance meeting with Smith and Local 888. Since Smith had not contacted AFSCME to ask for its assistance with the grievance or forwarded them a copy of his first step response, AFSCME did not

participate in the step 2 proceeding. However, Smith also states that even without union assistance, he prevailed in the grievance and the reprimand was rescinded.

N.J.S.A. 34:13A-5.3 sets forth the union's duty to fair represent employees:

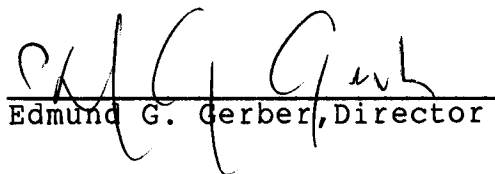
A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership.

A breach of the duty of fair representation occurs only when a union's conduct toward a unit member is "arbitrary, discriminatory, or in bad faith." Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976), citing Vaca v. Sipes, 386 U.S. 171 (1967). The Commission and New Jersey Courts have consistently applied the Vaca standard in evaluating fair representation cases. Saginario v. Attorney General, 87 N.J. 480 (1981); Fair Lawn Bd. of Ed., P.E.R.C. No. 84-138, 10 NJPER 351 (¶15163 1984); OPEIU Loc. 153 (Thomas Johnstone), P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983); City of Union City, P.E.R.C. No. 82-65, 8 NJPER 98 (¶13040 1982). A union must treat individuals equally by granting equal access to the grievance procedure and arbitration for similar grievances of equal merit. OPEIU Local 153; Middlesex County Bd. of Freeholders, P.E.R.C. No. 81-62, 6 NJPER 555 (¶11282 1980), aff'd App. Div. Dkt. No. A-1455-80 (4/1/82), pet. for cert. den. (6/16/82).

Smith does not state facts on which we might conclude that AFSCME breached its duty to represent employees. Smith was not denied access to the grievance process. As permitted by the contract, he presented his grievance at step 1 and then at step 2. Smith did not request representation from AFSCME Local 888 at his step 2 grievance meeting. Nor, did he provide ASFSCME with a copy of the first step response. It appears that the only notification AFSCME had about Smith's grievance was notice from the employer that it was attempting to schedule a meeting. This employer notification cannot substitute for the employee's request for union representation.^{3/}

Based upon the foregoing, I conclude that AFSCME's actions here would not constitute an unfair practice and, in accordance with N.J.A.C. 19:14-2.1 and 2.3, I refuse to issue a complaint and dismiss this charge.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES


Edmund G. Gerber, Director

DATED: June 25, 1992
Trenton, New Jersey

3/ Moreover, AFSCME acknowledges that it is obligated to represent Smith, or any other unit employee with a meritorious grievance, who makes a request for such representation in the grievance process.