

D.U.P. NO. 2005-2

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

In the Matter of

STATE OF NEW JERSEY,
(CORRECTIONS),

Respondent,

-and-

Docket No. CO-2004-009

NEW JERSEY SUPERIOR OFFICERS
ASSOCIATION, FRATERNAL ORDER OF
POLICE, LODGE 183,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by the New Jersey Superior Officers Association, Fraternal Order of Police, Lodge 183 against the State of New Jersey (Corrections), asserting that the State violated subsection 5.4a(1), (2), (5) and (7) of the Act when it failed to process an FOP group grievance. The Director determined that since the parties' contract has a self-executing grievance procedure, the State's failure to respond did not constitute an unfair practice. He found that the FOP was not precluded from processing its grievance to arbitration. The Director rejected the FOP's articulated reasons for not processing the grievance finding that none of the reasons presented a procedural impediment to moving the grievance to arbitration. Finally, the Director found no factual support for the asserted 5.4a(2) and (7) violations.

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Appearances:

For the Respondent,
Camille Warner Anthony, Employee Relations Coordinator

For the Charging Party,
Mario A. Iavicoli, attorney

REFUSAL TO ISSUE COMPLAINT

On July 7, 2003, the New Jersey Superior Officers Association, Fraternal Order of Police, Lodge 183 (FOP) filed an unfair practice charge with the Public Employment Relations Commission against the State of New Jersey, Department of Corrections (State). The FOP alleges that the State violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (2), (5) and (7)^{1/}, when it failed to

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the
(continued...)"

process an FOP group grievance alleging that the State failed to reduce the parties' 1999-2003 contract to writing.^{2/}

The State denies it violated the Act. It contends the contract grievance procedure is self-executing. It asserts that the FOP failed to process the group grievance through the grievance steps to arbitration.

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. By letter of May 5, 2004, I advised the parties that I did not intend to issue a Complaint on any of the allegations as set forth in the charge, and I explained the basis

1/ (...continued)
rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (5) Refusing to negotiate in good faith with the 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."

2/ On July 7, 2003, the FOP filed a separate charge under Docket No. CO-2004-008 alleging that the State violated 5.4a(2) and (6) of the Act when it failed to reduce the 1999-2003 contract to writing, and sign it.

for my conclusions. I provided the parties with an opportunity to respond.

On May 27, 2004, the Charging Party responded. It asserts that, although the parties' contractual grievance procedure is self-executing, it could not process its grievance to arbitration because the parties mutually agreed to hold the grievance in abeyance, the State lost the original and copies of the grievance, and the parties have not agreed to a panel of arbitrators.

On June 21, 2004 the State submitted a response. It contends that it did not process the grievance because the parties mutually agreed to hold it in abeyance while contract language was finalized, it did not lose copies of the grievance and the contract provides for an alternate procedure if the parties cannot agree on an arbitrations panel.

Based upon the following, I find that the complaint issuance standard has not been met.

The State of New Jersey is a public employer within the meaning of the Act. The FOP is the exclusive representative of a unit of law enforcement superior officers, including various lieutenant titles, employed by the State.

On October 31, 2002, an interest arbitration award was issued regarding the 1999-2003 contract.^{3/} Since the filing of this charge, the parties have resolved disputes over contract language for the 1999-2003 contract. The State has reduced that contract to writing and sent the contract for final review and approval to the FOP. Once approved, the contract will be signed by the parties, and copies will be printed by the State. The parties are also currently in negotiations for a successor contract.

Article X, entitled Grievance Procedure, sets forth a three-step procedure ending in binding arbitration. Section E, entitled Grievance Time Limits and Management Responses, provides^{4/}:

Should a grievance not be satisfactorily resolved, or should the employer not respond within the prescribed time periods, either after initial receipt of the grievance or after a hearing, the grievance may be appealed within three (3) working days to the next step. The lack of response by the State within the prescribed time periods, unless time limits have been extended by mutual agreement, should be construed as a negative response.

Time limits under this Article may be changed by mutual agreement and requests for

3/ The parties previous contract was effective from July 1, 1995 through June 30, 1999.

4/ The language taken from Article X is from the 1995-1999 contract. The grievance procedure is not changed in the 1999-2003 contract.

extensions of time limits will not be unreasonably denied.

Section H, entitled Grievance Steps and Parties Therein, at paragraph 2 provides in pertinent part:

Within thirty (30) days of the execution of this Agreement, the parties shall mutually agree upon a panel of three (3) arbitrators . . . In the event the parties are unable to agree upon a panel of arbitrators within thirty (30) days, arbitrators shall be selected, on a case-by-case basis, under the selection procedure of the Public Employment Relations Commission until such time as the parties mutually agree upon a panel.

On April 29, 2003, the FOP filed a group grievance asserting that the State violated the contract when it failed to reduce the 1999-2003 contract to writing. The State did not immediately respond to the grievance. However, on April 30, 2003, at a negotiations session for a successor contract, the State acknowledged the grievance and the parties mutually agreed to hold the group grievance in abeyance while the State reduced the 1999-2003 contract to writing.

After several months without resolving language issues and reducing the 1999-2003 contract to writing, the FOP filed this unfair practice charge.

ANALYSIS

The FOP has alleged that the State violated 5.4a(1), (2), (5) and (7) when it failed to process a group grievance.

Subsection 5.4a(5) of the Act prohibits public employers from 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.

The grievance procedure here is self-executing. When a contract includes a self-executing grievance procedure ending in binding arbitration, an employer's failure to respond to a grievance at intermediate steps is not usually an unfair practice. See University of Medicine and Dentistry of New Jersey, D.U.P. No. 2003-2, 28 NJPER 374 (¶33136 2002); State of New Jersey (DEPE), D.U.P. No. 98-18, 23 NJPER 534 (¶28260 1997); Township of Southampton, D.U.P. No. 97-34, 23 NJPER 258 (¶28124 1997); State of New Jersey, P.E.R.C. No. 89-39, 14 NJPER 656 (¶19277 1988); City of Trenton, D.U.P. No. 87-7, 13 NJPER 99 (¶18044 1986); New Jersey Transit Bus Opers., 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 Bd. of Ed., E.D. No. 76-34, 2 NJPER 175 (1976).

In City of Pleasantville, the Director of Unfair Practices explained why an employer's failure to respond to a grievance is not usually a violation of subsection 5.4a(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. Id. at 373.

The FOP asserts that it was prevented from processing its grievance for several reasons - the parties mutually agreed to hold the processing of the grievance; the State lost its copies of the grievance; and the parties could not agree on a panel of arbitrators. First, the parties mutually agreed to waive the contractual time limits and hold the grievance in abeyance in order for the State to resolve language disputes and reduce the contract to writing. At any time thereafter, the FOP could have moved the grievance through the grievance steps if it was dissatisfied with the State's efforts.

Next, the State denies that it lost the original and copies of the grievance. Assuming, however, that the grievance was lost, the State's inability to locate its copies of the grievance

does not prevent the FOP from submitting its own copy or recreating a copy of its grievance for the arbitrator. The State does not deny that a grievance was filed or the substance of the grievance. Finally, the parties' contract provides that if no agreement is reached on a panel of arbitrators, arbitrators shall be selected from the Commission's panel of arbitrators. An alternate procedure was, therefore, in place should the grievance be moved to the final step. None of the FOP's articulated reasons for not processing its grievance presented a procedural impediment to moving the grievance to arbitration. Nor has the FOP articulated any affirmative steps taken by the State to restrain the arbitration proceeding which would rise to the level of an unfair practice. Pleasantville.

Based on the foregoing, I decline to issue a complaint on any facts alleging a violation of 5.4a(5) regarding the failure to process the group grievance.

A 5.4a(1) violation independently occurs when an employer engages in conduct which tends to threaten, coerce or intimidate employees to discourage them from engaging in activities protected by our Act. No facts have been alleged here demonstrating that the State or its representatives said or did anything which might have intimidated, coerced or threatened employees. Therefore, I do not find an independent 5.4a(1) violation.

Subsection 5.4a(2) of the Act prohibits public employers from dominating or interfering with the formation, existence or administration of any organization. Commission cases dealing with 5.4a(2) claims generally involve organizational rights or the actions of an employee with a conflict of interest caused by his membership in a union and his position as an agent of an employer. Union Cty. Reg. Bd. of Ed., P.E.R.C. No. 76-17 2 NJPER 50 (1976); Middlesex Cty. (Roosevelt Hospital), P.E.R.C. No. 81-129, 7 NJPER 266 (¶12118 1981); Camden Cty. Bd. of Chosen Freeholders, P.E.R.C. No. 83-113, 9 NJPER 156 (¶14074 1983). The Commission has held that the type of activity prohibited by 5.4a(2) is "pervasive employer control or manipulation of the employee organization itself." North Brunswick Tp. Bd. of Ed., P.E.R.C. No. 80-122, 6 NJPER 193, 194 (¶11095 1980). No facts have been alleged demonstrating that the State dominated or interfered with the formation, existence or administration of the employee organization. Therefore, I decline to issue a complaint on the 5.4a(2) violation.

Finally, a violation of 5.4a(7) occurs when an employer violates any of the rules and regulations of the Commission. The charging party must cite to a specific rule or regulation alleged to have been violated, otherwise the Commission will not issue a complaint on that allegation. High Point Reg. H.S. Bd. of Ed., D.U.P. No. 80-23, 6 NJPER 214, 215 (¶11105 1980). Here, the

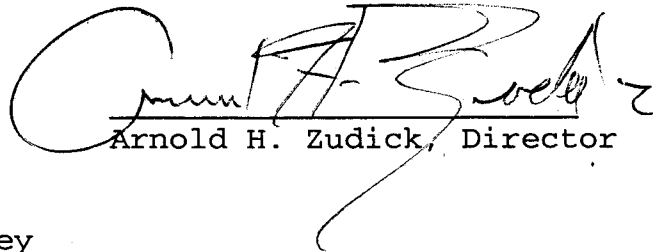
charge does not allege the employer violated any specific section of the Commission rules or regulations. Therefore, I decline to issue a complaint on the 5.4a(7) violation.

Based on the foregoing, the Commission's complaint issuance standard has not been met and I decline to issue a complaint on the allegations of this charge.^{5/}

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Arnold H. Zudick, Director

DATED: August 5, 2004
Trenton, New Jersey