

D.U.P. NO. 2015-7

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

In the Matter of

CITY OF TRENTON,

Respondent,

-and-

Docket No. CO-2014-199

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES
COUNCIL 73 LOCAL 2286,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge alleging that the City of Trenton (City) violated section 5.4a(5) of the New Jersey Employer-Employee Relations Act (Act) by failing to provide a substantive response to a grievance concerning compensation for out-of-title work. The City and the Charging Party, AFSCME Council 73, Local 228 (AFSCME), were parties to a collective negotiations agreement that set forth a self-executing grievance procedure culminating in binding arbitration. While the City did not respond to AFSCME's grievance, AFSCME was permitted under the grievance procedure to pursue binding arbitration ex parte and there was no allegation the City prevented AFSCME from pursuing arbitration. The Director determined that the City's lapse in responding to AFSCME's grievance was not a refusal to process a grievance in violation of the Act since AFSCME was not prevented from processing its grievance unilaterally through binding arbitration.

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Appearances:

For the Respondent
Parker McCay P.A., attorneys
(Melissa M. Ferrara, of counsel)

For the Charging Party
Pellettieri, Rabstein & Altman, attorneys
(Andrew L. Watson, of counsel)

REFUSAL TO ISSUE COMPLAINT

On February 27, 2014 and March 6, 2014, AFSCME Council 73, Local 2286 (AFSCME or Charging Party) filed an unfair practice charge and amended charge against the City of Trenton (City or Respondent). The charge, as amended, alleges that on October 21, 2013, the Respondent violated section 5.4(a)(5)^{1/} of the New

^{1/} This provision 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.

(continued...)

Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., by refusing to process a grievance concerning the assignment of out-of-title work. Specifically, AFSCME alleges that the City failed to provide a substantive response to its grievance following a meeting between it and City representatives during which the grievance was reviewed and discussed.

The Commission has authority to issue a complaint where it appears that a charging party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4(c); 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; CWA Local 1040 (Weisman), D.U.P. No. 2011-9, 38 NJPER 93 (¶20 2011), aff'd P.E.R.C. No. 2012-55, 38 NJPER 356 (¶120 2012).

On October 22, 2014, I issued a letter to the parties tentatively dismissing the charge and inviting responses. No responses were filed.

I find the following facts.

AFSCME and the City are parties to a collective negotiations agreement extending from January 1, 2002 through December 31, 2006 (Agreement). The Agreement was extended through December

1/ (...continued)
regulations established by the commission."

31, 2011 with several changes by Memorandum of Agreement (MOA). The MOA did not alter the Agreement's grievance procedure.

According to AFSCME, unit members Lori Gallon, Ken Ninaltowski, Marisol Ramos and Maria Caraballo have been working in out-of-title positions since October 2009.^{2/} AFSCME filed timely grievances challenging the out-of-title assignments and demanding compensation for the out-of-title work under Article VII of the Agreement, which governs the assignment of out-of-title work and compensation for out-of-title work.

On October 21, 2013, AFSCME met with City representatives Cleveland Thompson and Renee Barfield^{3/} to address the group grievance concerning out-of-title assignments. Barfield and Thompson assured AFSCME at the meeting that the grievance would be reviewed and processed. However, the City has not responded to the grievance.

The grievance procedure is set forth in Article III of the Agreement. The procedure sets forth a five-step process culminating in binding arbitration. The Business Administrator is the decision-maker at Step 4 of the grievance procedure, which is the terminal step before arbitration. Step 5 of the grievance procedure provides, in pertinent part:

^{2/} The parties do not indicate what job titles these employees hold and what out-of-title positions they work in.

^{3/} The parties do not identify the job titles Thompson and Barfield hold with the City.

If the grievance is still unsettled, either party (Employer or Union) may within ten (10) working days after the reply of the Business Administrator is due, by written notice to the other, request arbitration... Within seven (7) days following presentation of such request, the party demanding arbitration shall request the New Jersey Public Employment Relations Commission to appoint an arbitrator... [whose decision] shall be final and binding on the Union and the Employer.

AFSCME did not file a request for arbitration under the grievance procedure. AFSCME does not allege the City prevented it from doing so.

A public employer's failure to respond to a grievance, by itself, is not an unfair practice. Tp. of Millburn, D.U.P. No. 81-24, 7 NJPER 370 (¶12168 1981). Where the parties' grievance procedure is self-executing (*i.e.*, where either party can advance a grievance to binding arbitration unilaterally), an employer's failure to respond at intermediate steps of the grievance procedure before arbitration is not an unlawful refusal to negotiate. Borough of Sayreville, D.U.P. No. 98-20, 23 NJPER 536 (¶28262 1997). Although a self-executing grievance procedure does not give an employer ". . . license to ignore those intermediate steps in all cases where the contract clearly calls for them", the Commission has held that a "self-executing grievance mechanism permitting the union to advance grievances to binding arbitration is sufficient cure for an employer's occasional lapse in following the grievance procedure's

intermediate steps." State of New Jersey (Judiciary), P.E.R.C. No. 2014-84, 41 NJPER 43, 47 (¶11 2014).

In Millburn, the majority representative alleged the employer violated the Act by failing to take any action to process a grievance. The parties' negotiated grievance procedure allowed a grievant to appeal an unsatisfactory grievance disposition to the next step of the grievance procedure through binding arbitration. Under this procedure, the majority representative could pursue arbitration even in the absence of a employer response. The Director determined that a "simple failure to respond to a grievance at a given level does not constitute the unfair practice of refusing to process a grievance." 7 NJPER at 370, quoting In re State of New Jersey, D.U.P. No. 77-3, 2 NJPER 373 (1976). The Director reiterated:

Regardless of the potential outcome, 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., 7 NJPER at 370]

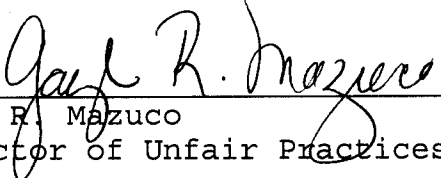
In this matter, the City's lapse in responding to AFSCME's grievance is not an unfair practice. The Agreement's grievance procedure is self-executing since it does not prevent AFSCME from unilaterally pursuing binding arbitration of its grievance with or without the City's participation in the grievance process. The City's failure to respond to AFSCME's grievance at the

intermediate steps of the grievance procedure is not, by itself, a refusal to negotiate or process AFSCME's grievance. AFSCME does not allege the City prevented it from pursuing binding arbitration of its grievance.

Accordingly, I find that AFSCME's 5.4a(5) allegation does not satisfy the complaint issuance standard.

ORDER

The unfair practice charge is dismissed.



Gayl R. Mazuco
Director of Unfair Practices

DATED: November 12, 2014
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 November 24, 2014.