

D.U.P. NO. 2020-15

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

In the Matter of

HACKENSACK BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2020-058

HACKENSACK CUSTODIAL AND  
MAINTENANCE ASSOCIATION,

Charging Party.

**SYNOPSIS**

The Director of Unfair Practices dismisses an unfair practice charge filed by the Hackensack Education Association (Association) against the Hackensack Board of Education (Board). The charge alleged the Board violated sections 5.4a(5) and (1) of the Act by refusing to process grievances filed by the Association on behalf of three unit employees. The Director rejected the claim that the Board refused to process grievances in violation of the Act because the parties' grievance procedures were self-executing and the grievances themselves did not fit within the definition of a grievance under the parties' collective negotiations agreement.

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Charging Party.

Appearances:

For the Respondent,  
Florio, Perrucci, Steinhardt, Cappelli,  
Tipton & Taylor, attorneys  
(Christine Ann Soto, of counsel)

For the Charging Party,  
Zazzali, Fagella, Nowak, Kleinbaum  
& Friedman, attorneys  
(Richard A. Friedman, of counsel)

**REFUSAL TO ISSUE COMPLAINT**

On September 5, 2019, the Hackensack Custodial and Maintenance Association (Association) filed an unfair practice charge against the Hackensack Board of Education (Board). The charge alleges that the Board violated sections 5.4a(1), (3) and (5) of the New Jersey Employer-Employee Relations Act (Act)<sup>1/</sup>,

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<sup>1/</sup> 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 and (continued...)

N.J.S.A. 34:13A-1 et seq., by refusing to process grievances presented by the Association on behalf of unit employees Dragon Ninoski, Sergio Garcia and Kevin Berberich in March and April of 2019. According to the Association, the Board's refusal to process grievances was a repudiation of the parties' negotiated grievance procedures.

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-5.4c; 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 Association is the exclusive majority representative of the Board's custodial and maintenance employees. The Association and Board signed a collective negotiations agreement extending from July 1, 2018 through June 30, 2021 (Agreement). Article 3 of the Agreement governs the parties' grievance procedure.

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1/ (...continued)  
condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by 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."

Article 3(A) (1) defines a grievance as "a complaint by any member or members of the bargaining unit represented by the Association, or by the Association itself, that there has been an actual personal loss because of an interpretation, application or violation of policies or agreements, or as a result of an administrative decision affecting terms and conditions of employment." Article 3 also provides a five-step process for initiating and appealing grievance determinations, designating grievance decision-makers at Steps 1 through 5 as the Principal (Step 1), the Director of Buildings and Grounds (Step 2), the Superintendent (Step 3), the Board (Step 4) and an arbitrator (Step 5). Article 3(B) (14) provides that "the findings and recommendations of the arbitrator shall be recommendatory or advisory only, except that they shall be final and binding on both parties when Contract items are an issue."

At each step of the grievance procedure, Article 3 provides timelines for appealing and deciding grievances. Article 3(B) (3) provides, in pertinent part: "The following procedures shall govern the processing of all grievances: Failure at any level of this procedure to communicate a written decision within the specified time limits permits the grievant to proceed to the next level."

On or about March 14, 2019, the Association submitted a Step 1 grievance on behalf of unit employee Dragon Ninoski,

“. . . alleging a violation of the Agreement and of Board Policy regarding unwarranted commentary that Mr. Ninoski's supervisor wrote on his evaluation.” (Paragraph 5 of Charge). The Step 1 decision-maker “. . . ignored the grievance.” (Paragraph 5 of Charge). The Association alleges the Article 3 grievance procedure is “. . . not self-executing, i.e. the Association cannot unilaterally process the grievance to arbitration.” (Paragraph 4 of Charge). However, the Association, without an administrative response, moved the March 14 grievance to Steps 2, 3 and 4 of the grievance procedures on March 20, 28 and April 10, 2019. The grievance was advanced through Steps 2 through 4 of the grievance procedure without response from the Step 2 through 4 decision-makers.

On or about April 16, 2019, the Association submitted a second Step 1 grievance on behalf of Ninoski, alleging the Agreement was breached by the Board by depriving Ninoski “. . . of his right to take a vacation day and a floating holiday, that the District had unilaterally changed past practice by requiring a leave request form in advance of taking a vacation day and a floating holiday, and that Mr. Ninoski was unjustly disciplined and was not afforded the opportunity for Association representation at the disciplinary meeting relating to this incident.” (Paragraph 7 of Charge). The Association then moved the April 16 grievance to Step 2 on April 23, 2019. On April 29,

2019, the Step 1 decision-maker, High School Principal Jim Montesano, responded to the April 16 grievance:

I have received your Grievance on behalf of Dragon Ninoski and the High School Custodians. It is my understanding that this process has since been rectified. Mr. Ninoski was able to take his vacation and the extra step of filling out a leave request form has been eliminated. Please let me know if you need any additional information.  
[Exhibit E to Charge].

The Association also filed a grievance on behalf of unit employee Kevin Berberich on or about March 8, 2019. Berberich's grievance alleged the Board violated Board policies and the Agreement by adding ". . . unwarranted commentary on Mr. Berberich's evaluation." (Paragraph 11 of Charge). The Association alleges the Step 1 decision-maker ignored the grievance. When the Association then presented the grievance to the Step 2 decision-maker and requested a meeting with Servet Kazai, the Director of Buildings and Grounds, Kazai responded that it was ". . . not necessary to have a meeting for Custodian evaluations." (Exhibit F to Charge). After Kazai's response, the grievance was moved to Steps 3 and 4 of the grievance procedure on March 28 and April 10, 2019. The Board's Step 3 and 4 decision-makers did not respond to the grievance.

On or about February 27, 2019, the Association submitted a grievance on behalf of Sergio Garcia alleging the Board violated the Agreement and Board policy ". . . when the Acting Superintendent sent Mr. Garcia a letter stating the number of

days he had been absent, which was within the contractually allotted number.” The Step 1 decision-maker ignored the grievance and the Association then moved the grievance through Steps 2 through 4 of the grievance procedure. According to the Association, the administrators at Steps 1 through 4 did not respond to the grievance.

Finally, the Associates asserts in a letter dated May 4, 2020<sup>2/</sup>, that the Board violated the grievance procedure by attempting to schedule a Board-level presentation of three grievances on November 25, 2019 on three hours notice to the Association. When the Association objected to the November 25 date, the Board rescheduled the presentation for its January 27, 2020 meeting when, according to the Association, it should have scheduled the matter for its December 16, 2019 meeting. The Association also alleges in the May 4 letter that the Board’s Business Administrator described the Association’s representative as “impertinent” and allotted only fifteen minutes for the Association’s presentation per grievance.

#### **ANALYSIS**

The Act prohibits public employers from “. . . refusing to process grievances presented by [a] majority representative.” N.J.S.A. 34:13A-5.4a(5). An employer’s failure to respond to a

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<sup>2/</sup> The Association did not file an amended charge encompassing these allegations. The allegations, however, are addressed in this decision.

grievance is not necessarily a refusal to process a grievance. Where a majority representative and employer have negotiated a self-executing grievance procedure that permits the union to advance grievances without an employer's response at intermediate steps in the grievance procedure, that procedure is ". . . a sufficient cure for an employer's occasional lapse in following the grievance procedure's intermediate steps . . . ." State of New Jersey (Treasury), P.E.R.C. No. 89-39, 14 NJPER 656 (¶19277 1988); State of New Jersey (Judiciary), P.E.R.C. No. 2014-84, 41 NJPER 43 (¶11 2014); Millburn Tp., D.U.P. No. 81-24, 7 NJPER 370 (¶12168 1981); Borough of Sayreville, D.U.P. No. 98-20, 23 NJPER 536 (¶28262 1997); City of Trenton, D.U.P. No. 2015-7, 41 NJPER 311 (¶100 2014). However, a self-executing grievance procedure is also "not a license [for an employer] to ignore those intermediate steps in all cases where the contract clearly calls for them." State of New Jersey (Treasury), 14 NJPER 656; State of New Jersey (Judiciary) 41 NJPER 43. Thus, the Commission has held that an employer repudiates a grievance procedure in violation of the Act by applying a ". . . blanket policy of categorically refusing to process certain types of grievances" where there is no contractual or legal basis for that refusal. New Jersey Transit Bus Operations, Inc., P.E.R.C. No. 89-29, 14 NJPER 638 (¶19267 1988) (Commission holds employer repudiated grievance procedure by imposing blanket policy of refusing to



conduct grievance hearings without grievant's attendance in spite of multiple arbitration awards finding parties' grievance procedure did not require grievant's attendance at hearings); City of Newark, P.E.R.C. No. 90-83, 16 NJPER 182 (¶21078 1990) (Commission finds employer violated the Act by implementing a blanket policy of refusing to process any grievance over the discipline of provisional employees and held that provisional employees were entitled to use the parties' negotiated disciplinary review procedures); But compare State of New Jersey (Treasury), P.E.R.C. No. 89-39, 14 NJPER 656 (¶19277 1988) (Commission explains that contractual disputes over whether the parties agreed to arbitrate violations of a "respect and dignity clause" should be decided by arbitrator).

The allegation that the Agreement's grievance procedure is not self-executing, is undercut by Article 3 and the Association's actual processing of the subject grievances. Article 3(B)(3) of the Agreement permits a grievant to advance a grievance to the next step of the procedure if an employer does not respond to the grievance within specified timelines. That is what the Association did with grievances filed on behalf of Garcia, Ninoski, and Berberich. More specifically, it advanced those grievances to the next step of the grievance procedure without an employer response; the ability to process a grievance

ex parte is normally a cure for an employer's failure to respond a grievance. Millburn; Sayreville.

Moreover, the Board did not repudiate the Agreement's grievance procedure by applying a blanket policy of categorically denying any grievance of a certain type as the employers in New Jersey Transit and Newark, supra, did. Principal Montesano responded to Ninoski's grievance concerning the use of leave time and Director Kazazi responded to Berberich's grievance concerning "unwarranted commentary" in an evaluation. To the extent that the Association was dissatisfied with these responses, the Association was permitted, under the grievance procedure, to advance the grievances to the next step of the process, including but not limited to arbitration.

The Board also had a good faith contractual and legal basis for not responding to the grievances concerning "unwarranted commentary" in employee evaluations. The complaints about evaluation commentary do not fit within the parties' definition of a grievance under Article 3 of the Agreement. Grievances are defined, in pertinent part, as interpretations, violations or applications of the Agreement or Board policy that results in "actual personal loss" to the grievant or an administrative decision "affecting terms and conditions of employment." Contested commentaries however disagreeable to the Association or the grievant, arguably do not in-and-of themselves impact terms

and conditions of employment or cause "actual personal loss." And the Association does not allege that the Board refused to process any grievance challenging disciplinary action flowing from those evaluations. In short, there is at least a good faith argument that the "grievance" over evaluation commentary was not a grievance under Article 3. In addition, an employer enjoys a managerial prerogative to evaluate and observe its employees, and it is at least arguable the Board had no obligation to respond to a complaint over evaluation commentary. Bergenfield Bd. of Ed., P.E.R.C. No. 2017-43, 43 NJPER 319 (¶90 2017). Either way, the failure to respond to the complaints about evaluation commentary was not a repudiation of Article 3.

The same analysis may be applied with equal force to Garcia's grievance. The Board's sending of a letter to Garcia advising of the number of days he was absent does not, by itself, cause an "actual personal loss" to Garcia nor does it have any tangible impact on his terms and conditions of employment. An employer has managerial prerogative to verify the proper use of leave time and notify employees of its calculations of absences within a given time period. New Jersey Transit, P.E.R.C. No. 2005-24, 30 NJPER 436 (¶143 2004). The Board's failure to respond to Garcia's grievance, like the grievances challenging evaluation commentary, was, at least, justified by the Agreement

and applicable law and was not tantamount to a repudiation of that Agreement.

For these reasons, I dismiss the Association's section 5.4a(5) and derivative (a)(1) claims.<sup>3/</sup>

**ORDER**

The unfair practice charge is dismissed.

/s/ Jonathan Roth  
Director of Unfair Practices

DATED: May 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 June 5, 2020.**

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<sup>3/</sup> The Association does not allege any facts to support its (a)(3) allegation. I, therefore, dismiss this claim.