D.U.P. NO. 98-18

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

In the Matter of

STATE OF NEW JERSEY (DEPE),

Respondent,

-and-

Docket No. CO-97-317

PBA LOCAL 222,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses a charge filed by a PBA local alleging the State Department of Environmental Protection failed to process the local's grievance. The Director finds that only the majority representative--the State PBA, not any of its individual locals--has standing to allege the employer failed to negotiate or administer the contract in violation of subsection 5.4(a)(5) of the Act.

Further, the Director holds that, where the grievance process is self-executing, the employer's failure to respond to a grievance at intermediate steps is not ordinarily an unfair practice.

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Appearances:

For the Respondent,
Peter Verniero, Attorney General
(Stephan M. Schwartz, Deputy Attorney General)

For the Charging Party,
Joseph M. Przygocki, President

REFUSAL TO ISSUE COMPLAINT

On March 17, 1997, PBA Local 222 filed an Unfair Practice Charge against the New Jersey State Department of Environmental Protection. The charge alleges that on October 15, 1996, the State advised Local 222 that its grievance concerning a park service policy was untimely and would not be processed pursuant to the policy of that department. Local 222 alleges that the State violated subsections 5.4(a)(1),(4) and (7)[1/] of the New Jersey

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the

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Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by failing to schedule a grievance hearing within contractually required time limits. Local 222 also alleges that the DEP's actions violated DEP policy and N.J.A.C. 4A:2-3.6(a); its failure to notify the Local of its appeal process violated the contract and its failure to consider the grievance altered the negotiated agreement between the PBA and the State.

The State denies that it violated the Act and argues that Local 222's allegations assert a violation of contractual rights which should not be litigated as an unfair practice charge before this Commission. The State asserts that the charge should be deferred to the contractual grievance procedure. State of New Jersey (Department of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

* * *

Local 222 asserts violations of 5.4(a)(1),(4), and (7) of the Act. An (a)(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 demonstrating that DEP

1/ Footnote Continued From Previous Page

rights guaranteed to them by this act; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act; (7) Violating any of the rules and regulations established by the commission."

representatives said or did anything which might have intimidated, coerced or threatened employees. Therefore, we find no independent (a)(1) violation.

An (a)(4) violation occurs when an employer retaliates against an employee because he or she has testified before this Commission. There has been no assertion that any employee was called to testify before this Commission, or that any negative employment action resulted from testimony before the Commission. Therefore, we see no conceivable violation of 5.4(a)(4).

An (a)(7) violation occurs when an employer violates any of the rules and regulations of this Commission. Although Local 222 alleges that the employer violated N.J.A.C. 4A:2-3.6(a) and DEP policy, the charge does not allege that the employer violated any specific section of Commission rules or regulations. Therefore we find no 5.4(a)(7) violation.

However, Local 222 filled in "failure to process grievance" on the top of section 3 of the unfair practice form. Assuming for the sake of argument that Local 222 is really asserting a violation of subsection 5.4(a)(5) of the Act, we will consider that allegation.

Subsection 5.4(a)(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 Commission has previously found that only the majority

representative has standing to assert claimed violations of subsection 5.4(a)(5). State of New Jersey (DEPE) and CWA Local 1037 & 1038, D.U.P. No. 93-43, 19 NJPER 388 (¶24170 1993). This is so because an employer's statutory obligation to negotiate in good faith runs to the majority representative, not to any individuals or groups.

Here, neither the contract with the State nor the certification of the Commission identify any individual locals, including Local 222. The New Jersey State PBA is named as the exclusive representative on the Commission's certification of representative.2/ The recognition clause of the contract (Article 1) provides that: "The State recognizes the PBA as the sole and exclusive representative of the employees in the Law Enforcement Unit for the purpose of collective negotiations concerning salaries, wages, hours of work and other terms and conditions of employment." The Commission has previously found that the exclusive representative of this employee unit is the New Jersey State PBA, not any of its individual locals or components. State of New Jersey (SLEC), P.E.R.C. No. 90-100, 16 NJPER 303 (¶21125 1990). Therefore, it appears that only the State PBA, not the locals, may bring a charge alleging a refusal to negotiate or administer the PBA's collective negotiations agreement. Accordingly, Local 222 does not have standing to allege that the employer failed to adhere to the

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2/ We take administrative notice of the Commission's certification issued to this unit on February 9, 1972.

grievance procedure, failed to notify the Local of its appeal process and altered the negotiated agreement between the State and the PBA.

Even if Local 222 had standing to bring this charge, we would not be inclined to issue a complaint on these allegations. Where the parties' contractual grievance procedure provides for a self-executing process, it is not an unfair practice for the employer to fail to act at an intermediate step of the process because the union contractually enjoys the right to advance its grievance to the next step. Step 2 of the PBA contract provides,

> If the grievance is not satisfactorily disposed of at Step One, it may be appealed to the Department Head or his designee who shall not be a person who was directly involved in the grievance. The appeal shall be accompanied by the decisions at the preceding levels and any written record that has been made part of the preceding hearings.
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> The grievant may be represented by the Local Association President and/or his designee. The Association may designate an additional non-employee representative. If the decision involves a non-contractual grievance or if the grievant has presented his appeal without Association representation, the decision of the department head or his designee shall be final and a copy of such decision shall be sent to the Association.

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 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 Bd. of Ed., 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.

I find that Local 222 does not have standing to bring this allegation. Even if there was not a standing problem, the parties' self-executing grievance procedure means that the State's failure to process Local 222's grievance at an intermediate step of the process is not an unfair practice. Therefore I do not believe that the Commission's complaint issuance standard has been met and am not inclined to issue a complaint on the allegations of this charge.3/

The charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

Edmund G. Gerber, Director

DATED: September 8, 1997
Trenton, New Jersey

3/ N.J.A.C. 19:14-2.3