D.U.P. NO. 95-30

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

In the Matter of

RUTGERS UNIVERSITY,

Respondent,

-and- Docket No. CI-94-81

BERNAIS MCNEIL,

Charging Party.

SYNOPSIS

The Director of Unfair Practices refuses to issue a complaint on allegations that Rutgers University committed an unfair practice by suspending Officer Bernais McNeil and refusing to respond to a grievance in retaliation for protected activity. The Director finds that McNeil's allegation concerning his suspension is a mere breach of contract claim and dismisses it pursuant to Human Services. The Director finds that Rutgers' alleged failure to respond to a grievance is not an unfair practice in the face of the parties' self-executing grievance procedure and that McNeil's allegations of anti-union animus are factually unsupported.

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Appearances:

For the Respondent,
Christine B. Mowry, Assistant Vice-President
for Staff Affairs

For the Charging Party,
A.J. Fusco, Jr., Consultant

REFUSAL TO ISSUE COMPLAINT

On June 16, 1994, Bernais McNeil filed an unfair practice charge with the Public Employment Relations Commission against Rutgers University. McNeil alleges that the University violated subsections 5.4(a)(1), (3), (4), (5) 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 rights guaranteed to them by this act; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition

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Employer-Employee Relations Act N.J.S.A. 34:13A-1 et seq. by suspending him without pay, denying him a hearing or formal charges on the suspension and failing to respond to a grievance in violation of the agreement between the University and his majority representative. McNeil also alleges that the University's actions were "arbitrary, capricious, discriminatory and oppressive against union practice."

McNeil is a Rutgers University police officer represented by FOP Lodge No. 54. On December 31, 1993, McNeil was arrested by the Newark Police Department pursuant to a domestic violence complaint from his wife. On January 3, 1994, Captain Richard Golpin notified McNeil that, effective December 31, 1993, he was suspended without pay until he was psychologically evaluated. The letter stated that McNeil had been charged with terroristic threats under the domestic violence statute and was in violation of the department's weapons policy by threatening his wife with a department firearm. The letter further stated that "once a psychological evaluation has been completed, it will then be determined as to what future status you will have in this

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1/ Footnote Continued From Previous Page

or complaint or given any information or testimony under 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 and (7) Violating any of the rules and regulations established by the commission."

department." On January 18, 1994, McNeil's wife withdrew the charges and the complaint was dismissed.

Correspondence submitted by McNeil indicates that he filed a step three grievance on January 21, 1994, stating that the charges were dropped and that the grounds for his suspension were invalid. He requested immediate reinstatement and backpay from December 31, 1993. Another grievance was filed at step one on February 3, 1994. That grievance alleges that the suspension was groundless and that the University violated the parties agreement and committed "possible" civil rights violations. Captain Golpin responded to the second grievance on February 17, 1994. He stated that although McNeil was required to obtain a psychiatric evaluation, that he visited a counselor only twice and discontinued counselling because he believed that the counsellor did not know what he was doing. Golpin reiterated that the suspension will remain in effect contingent upon an evaluation and if McNeil chose not to consult with a designated doctor, further disciplinary action, up to and including termination, could result.

On June 1, 1994, Rutgers Assistant Vice President for Staff Affairs Christine Mowry answered McNeil's third step grievance. She concluded that she could not answer the grievance fully without the report of the psychologist, but determined that McNeil should be returned to administrative duty. On June 2, 1994, FOP Vice President Shawn Meade corresponded with Mowry, requesting that

McNeil's grievance be moved to step four - binding arbitration[2/]. On June 13, 1994, McNeil's attorney also requested that the grievance be submitted to arbitration and requested a list of arbitrators.

Rutgers urges dismissal of the charge. It states that its representatives responded to McNeil's grievance and that the balance of his allegations do not meet the standard for complaint issuance.

McNeil alleges that Rutgers violated the Act by suspending him without pay and denying him a hearing or formal charges on the suspension. Article 5, section 1 of the parties' agreement provides that:

> No officer shall be discharged, suspended or disciplined except for just cause. Before an officer is suspended for a period in excess of five (5) days, involuntarily demoted or terminated, the University Police Department shall conduct an interview with the officer at which time the officer will be informed of the reasons for the interview and the officer may respond.

Article 5, Section 2 provides that:

> Reasons for discipline shall be put in writing and Rutgers shall provide a copy of any written reprimand, notice or suspension, involuntary demotion or termination to the officer and the FOP. In cases of suspension, the length of the suspension will be stated in the notice.

2/ Meade's letter also stated that the grievance was moved to step three because there was no response at step two and Mowry's response to the step three hearing was not submitted within the five days required by the agreement.

Article 5, section 3 provides that "in the case of any disciplinary action, the sole right and remedy under this agreement shall be to file a grievance through and in accordance with the grievance procedure." The substance of this portion of McNeil's claim is that Rutgers breached the collective negotiations agreement. In State of New Jersey (Department of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419, 421 (¶15191 1984), the Commission held that:

> a mere breach of contract claim does not state a cause of action under subsection 5.4(a)(5) which may be litigated through unfair practice proceedings and instead parties must attempt to resolve such contract disputes through their negotiated grievance procedures.

This allegation is therefore dismissed.

McNeil also alleges that Rutgers violated the parties' agreement by failing to respond to a grievance. No evidence has been presented demonstrating that Rutgers refused to respond to McNeil's grievances. However, assertions of an employer's refusal to respond to a grievance, or its improper treatment of a grievance at an intermediate step of the grievance procedure do not violate subsection 5.4(a)(5) of the Act when the contract provides for a self-executing grievance procedure which ends in binding arbitration. See New Jersey Transit Bus Operations, Inc., P.E.R.C. No. 86-129, 12 NJPER 442 (¶17164 1986); Wayne Bd. of Ed., D.U.P. No. 92-9, 18 NJPER 105 (¶23050 1992); New Jersey Transit, D.U.P. No. 87-14, 13 NJPER 383 (¶18154 1987); City of Trenton, D.U.P. No. 87-7, 13 NJPER 99 (¶18044 1986); Tp. 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).

The parties' collective negotiations agreement is self-executing and ends in binding arbitration. It permits grievants who are dissatisfied with a decision at any step of the grievance procedure to proceed to the next step. The FOP exercised this option on McNeil's behalf by moving the grievance to the next step when Rutgers did not respond in a timely manner. Accordingly, this allegation is dismissed.

McNeil alleges that Rutgers' actions were "arbitrary, capricious, discriminatory and oppressive against union practice." It appears that McNeil is claiming that he was retaliated against for exercising his rights under the Act. The standard for determining whether adverse personnel actions violate subsections 5.4(a)(3) and (1) of the Act was stated in In re Bridgewater Tp., 95 N.J. 234 (1984). The Charging Party must allege that activity protected by the Act was a substantial or motivating factor in the adverse action. McNeil has merely alleged that his suspension was arbitrary, capricious, discriminatory and oppressive against union practice. However, no facts are alleged that demonstrate McNeil engaged in any protected activity, that Rutgers knew of such activity, and was hostile to his exercise of protected rights. Union Cty Voc-Tech Bd. of Ed., D.U.P. No 95-25, 21 NJPER 61 (¶26043 1995). Accordingly, this allegation is also dismissed.

Finally, McNeil has alleged that Rutgers violated subsections 5.4(a) (4) and (7) of the Act. However, he has alleged no facts showing that Rutgers' actions resulted because McNeil signed or filed an affidavit, petition or complaint or gave information or testimony under the Act. McNeil has also not cited any Commission rule or regulation violated by Rutgers. These allegations are also dismissed.

The Commission's complaint issuance standard has not been met. N.J.A.C. 19:14-2.1. Accordingly, I decline to issue a complaint and the charge is dismissed. N.J.A.C. 19:14-2.3.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

Edmund G. Gerber, Director

DATED: March 28, 1995
Trenton, New Jersey