

D.U.P. NO. 94-28

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

In the Matter of

TOWN OF HARRISON &
HARRISON PBA LOCAL 22,

Respondent,

-and-

Docket No. CI-93-1

DANIEL T. NANKIVELL,

Charging Party.

SYNOPSIS

The Director of Unfair Practices refuses to issue a Complaint and Notice of Hearing on a charge filed against a public employer and majority representative. The charging party alleged that the Town failed to "initiate the grievance procedure" and the PBA did not process a grievance to arbitration.

The Director dismissed the charge, finding that the self-executing contractual grievance procedure insulated the Town against the charge and no facts suggested that the PBA violated its duty of fair representation.

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Appearances:

For the Respondent Town
Murray, Murray & Corrigan, attorneys
(David F. Corrigan, of counsel)

For the Respondent PBA
Whipple, Ross & Hirsh, attorneys
(Donald B. Ross, of counsel)

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

REFUSAL TO ISSUE COMPLAINT

On July 1 and 20, 1992, Daniel T. Nakivell filed an unfair practice charge and amended charge alleging that his majority representative, Harrison PBA Local 22, and his employer, Town of Harrison, "failed to initiate the grievance procedure" after he filed a grievance on May 13, 1992. The Township allegedly violated

5.4(a) (1), (2), (3), (4), (5) and (7) of the Act^{1/} and PBA Local 22 allegedly violated subsections 5.4(b) (1), (3) and (5) of the Act.^{2/} An attached copy of a grievance indicates Nankivell received a Notice of Minor Disciplinary Act and a two-day suspension.

On October 26, 1992, counsel for PBA Local 22 submitted a letter advising that it agreed to process the grievance filed by the charging party, subject to its "duty of good faith representation." The processing of the grievance by the PBA was confirmed by charging party's letter of November 20, 1992. Subsequent correspondence on

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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (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 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. (7) Violating any of the rules and regulations established by the commission."

2/ These subsections prohibit employee organizations, 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) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. (5) Violating any of the rules and regulations established by the commission."

PBA letterhead indicates that the grievance had been processed through three grievance procedure steps between November 10 and December 11, 1992.

The Town filed a letter along with a copy of the applicable collective negotiations agreement. The Town asserts that the grievance procedure is self-executing and under law, the employer's failure to process such a grievance is not an unfair practice charge.

In June 1993, the PBA filed a supplemental letter indicating its "willingness to permit Mr. Nankivell to proceed directly to arbitration" on condition that arbitration will be "without cost or expense to the PBA."

On January 18, 1994, Nankivell filed a letter advising that the PBA had agreed to allow him to proceed to arbitration but refused to "absorb the cost." Nankivell asserts that the PBA is obligated to "process the grievance" fairly, etc. "and with the same measure of devotion to dissident employees as it owes to its own constituents."

The negotiated grievance procedure provides that "failure at any step...to communicate the decision in a grievance within the specified time limits shall permit the aggrieved employee to proceed to the next step." The first three steps are appeals up to the Mayor, and the aggrieved may then "pursue all legal remedies afforded by provisions of the Civil Service Act." If the aggrieved "does not elect to pursue the grievance under provisions of the

Civil Service Act, then the Association "shall have the right...to submit such grievance to an arbitrator."

Majority representatives must represent the interests of all unit employees without discrimination. New Jersey has adopted a standard set forth in Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967), for deciding duty of fair representation cases. D'Arrigo v. N.J. State Bd. of Mediation, 228 N.J. Super. 189 (App. Div. 1988), rev'd 119 N.J. 74 (1990). The rule states,

...a breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, capricious or in bad faith.

[Vaca at 190, 64 LRRM 2376].

See also, Union Cty. Coll. Chapter, AAUP (Donahue), P.E.R.C. No. 85-121, 11 NJPER 374 (¶16135 1985).

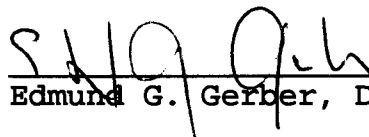
The undisputed facts indicate that Nankivell's grievance has been processed through the first three steps of the grievance procedure and the PBA announced its willingness to allow him to proceed to arbitration, but not at its expense. These facts do not suggest that the PBA violated its duty of fair representation. A majority representative may lawfully determine not to process a matter to binding arbitration. The mere assertion that Nankivell, as a "dissident" should receive the same "devotion" as union members is not a fact which justifies the issuance of a Complaint. Nankivell has asserted no facts suggestive of disparate treatment. Furthermore, the union has not necessarily violated its duty by refusing to pay legal fees connected with a disciplinary arbitration

proceeding. See Middlesex Cty. Park Police and PBA Local 156, P.E.R.C. No. 82-116, 8 NJPER 359 (¶13164 1982). Accordingly, the Charging Party has failed to meet the Commission's complaint issuance standard (N.J.A.C. 19:14-2.1) and I dismiss the charge filed against PBA Local 22.

The Commission has long held that a grievance procedure which is self-executing, that is, which advances automatically if the employer does not respond at any one step before arbitration, insulates a public employer against charges that it unlawfully refused to process a grievance. 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). The grievance procedure in the applicable agreement is self-executing; Nankivell's grievance would have proceeded automatically if the employer did not respond at intermediate steps.

Accordingly, the charge against the employer does not meet the Commission's complaint issuance standard and, therefore, I dismiss the charge in its entirety. N.J.A.C. 19:14-2.1.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES


Edmund G. Gerber, Director

DATED: February 14, 1994
Trenton, New Jersey