

D.U.P. NO. 90-9

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

In the Matter of

NEW JERSEY EDUCATION ASSOCIATION,

Respondent,

-and-

Docket No. CI-89-89

PETER ESSER,

Charging Party.

SYNOPSIS

The Director of Unfair Practices refuses to issue a complaint on allegations that the NJEA declined to provide Esser counsel for internal union appeals. The Director finds that refusal to provide counsel is an internal union matter.

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Appearances:

For the Respondent
Zazzali, Zazzali, Fagella & Nowak, Esqs.
(Richard A. Friedman, of counsel)

For the Charging Party
Peter Esser, pro se

REFUSAL TO ISSUE COMPLAINT

On May 25, 1989, Peter Esser ("Esser" "Charging Party") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") alleging that the New Jersey Education Association ("Association") violated subsections 5.4(b)(1), (2), (3), (4) and (5)^{1/} of the New Jersey Employer-Employee Relations

1/ 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. (2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances. (3) Refusing to negotiate in good faith with a public employer, if they are the majority

Act, N.J.S.A. 34:13A-1 et seq. ("Act"). The charge alleges that the Association committed an unfair practice by refusing to reimburse Esser's costs for an attorney who was not under contract to the Association's legal services program. Esser alleges that it was necessary to retain private counsel because the Association did not provide an attorney for a medical transfer case.

He also alleges that the Association refused to provide him with representation at two hearings concerning an internal appeal of the Association's decision to deny his legal fees, did not help him to prepare for those hearings and that the hearings were improperly and unjustly conducted.

N.J.S.A. 34:13A-5.4(c) sets forth in pertinent part that the Commission shall have the power to prevent anyone from engaging in any unfair practice, and that it has the authority to issue a complaint stating the unfair practice charged.^{2/} The Commission

1/ Footnote Continued From Previous Page

representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (5) Violating any of the rules and regulations established by the commission."

2/ N.J.S.A. 34:13A-5.4(c) provides: "The commission shall have exclusive power as hereinafter provided to prevent anyone from engaging in any unfair practice.... Whenever it is charged that anyone has engaged or is engaging in any such unfair practice, the commission, or any designated agent thereof, shall have authority to issue and cause to be served upon such party a complaint stating the specific unfair practice charged and including a notice of hearing containing the date and place of hearing before the commission or any designated agent thereof...."

has delegated its authority to issue complaints to me and has established a standard upon which an unfair practice complaint may be issued. The standard provides that a complaint shall issue if it appears that the allegations of the charging party, if true, may constitute an unfair practice within the meaning of the Act.^{3/} The Commission's rules provide that I may decline to issue a complaint.^{4/}

Based on charging party's allegations, the Commission's complaint issuance standards have not been met. Although Esser cites five subsections of the Act, the substance of the charge concerns the NJEA's refusal to reimburse him for attorney's fees for his representation at a hearing in 1987 concerning a medical transfer and its conduct at subsequent hearings convened to allow Esser to appeal this refusal to reimburse Esser. The only basis for an unfair practice charge based on the facts alleged is a breach of the Association's duty of fair representation.

The Association has guidelines for reimbursement for legal services. Those guidelines state that members may be reimbursed only for use of attorneys under contract to its legal services program. Exceptions to this policy may only be granted by the Professional Rights and Responsibilities Chairperson "when reasonable to do so under the circumstances of the matter

3/ N.J.A.C. 19:14-2.1.

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

involved." Esser alleges that the Association did not inform him of the guidelines and that he was not aware of them until after his hearing when he read about them in an Association newsletter in December of 1987. Thereafter, Esser requested but was denied reimbursement. He then appealed the decision -- first to the Association's Professional Rights and Responsibilities Committee and then to Association President Dennis Giordano.

Esser's initial request for reimbursement was dated March 3, 1988. The Association replied to that letter on March 15, 1988 by stating that Esser did not follow required procedures and that, in any event, it would not reimburse fees for non-network attorneys. In a letter dated March 21, 1988, the Association requested that Esser provide any proof or additional facts to be considered. The Association advised Esser on November 23, 1988 that he had the right to appeal to the Professional Rights and Responsibilities Committee.

Subsection 5.4(c) of the Act provides "...no complaint shall issue based upon any unfair practice occurring more than six (6) months prior to the filing of the charge...." This charge was filed on May 25, 1989. Therefore, we cannot issue a complaint on any alleged unfair practice which occurred prior to November 24, 1988. The only timely allegation in the charge is that the NJEA would not provide Esser with counsel for the internal Association appeals. Esser appealed to the Professional Rights and Responsibilities Committee on January 31, 1989; the Professional

Rights and Responsibilities Committee denied the claim by letter dated February 16, 1989 and Esser appealed to Association President Giordano on March 10, 1989.

The Association granted Esser ample opportunity to present his case for reimbursement, and it does not appear, nor does Esser allege, that he was not treated in accordance with the program's guidelines. Absent allegations that the refusal to pay legal fees for this internal appeal was arbitrary, discriminatory or in bad faith, the denial is an internal union matter. The Act's conferral of unfair practice jurisdiction does not empower the Commission to resolve intra-union disputes. Jersey City, P.E.R.C. No. 83-32, 8 NJPER 563 (¶13260 1982) Failure to provide counsel or payment for legal fees, absent other factors, is an internal union matter, not an unfair practice. Bergen Community College; Camden County College; P.B.A. Local 105 (Giordano), D.U.P. No. 90-1, 15 NJPER 457 (¶20186 1989).

Unions must represent the interests of all unit members without discrimination. N.J.S.A. 34:13A-5.3. A breach of the duty of fair representation occurs only when a union's conduct toward a unit member is "arbitrary, discriminatory, or in bad faith." Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976), citing Vaca v. Sipes, 386 U.S. 171 (1967). The Commission and New Jersey Courts have consistently applied the Vaca standard in evaluating fair representation cases. Saginario v. Attorney General, 87 N.J. 480 (1981); Fair Lawn Bd. of

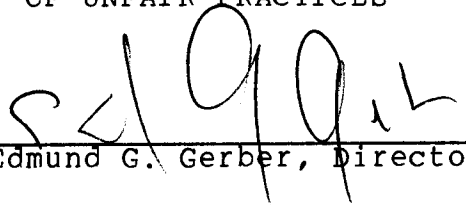
Ed., P.E.R.C. No. 84-138, 10 NJPER 351 (¶15163 1984); OPEIU Loc. 153 (Thomas Johnstone), P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983); City of Union City, P.E.R.C. No. 82-65, 8 NJPER 98 (¶13040 1982). The mere fact that a union decision results in a detriment to one unit member does not establish a breach of the duty. Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); see also Humphrey v. Moore, 375 U.S. 335 (1964).

In Bergen Community College Faculty Association, P.E.R.C. No. 84-117, 10 NJPER 262 (¶15127 1984), the Commission adopted a hearing examiner's grant of summary judgment in favor of a union charged with withdrawing legal assistance from a unit employee pursuing a lawsuit in federal court. The Commission concluded that the issue of providing legal assistance to unit employees was an internal organizational matter and one not generally within the Commission's jurisdiction. See also Camden County College, D.U.P. No. 89-11, 15 NJPER 171 (¶20072 1989) (refusal of a union to provide legal assistance to a unit member for a Commission hearing).

5/ I informed Esser that I was inclined not to issue a complaint by letter of January 11, 1990. On January 17, 1990, Esser submitted a response to my letter. The allegations in the response are general and do not contain dates. The response refers to an NJEA newsletter article on legal services for members. Esser had submitted a copy of the newsletter with his unfair practice charge. It is dated December 1, 1987. Thus, the allegations in his response are beyond the six-month statute of limitations in N.J.S.A. 34:13A-5.4(c).

Accordingly, the Commission's complaint issuance standard has not been met^{5/} and I decline to issue a complaint. The charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES


Edmund G. Gerber, Director

DATED: January 26, 1990
Trenton, New Jersey