

D.U.P. NO. 2003-2

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

In the Matter of

UNIVERSITY OF MEDICINE AND DENTISTRY
OF NEW JERSEY AND HEALTH PROFESSIONALS
AND ALLIED EMPLOYEES, LOCAL 5094,

Respondents,

-and-

Docket Nos. CI-2002-35 &
CI-2002-36

ELBA ROSA,

Charging Party.

SYNOPSIS

The Director of Unfair Practices refuses to issue a complaint on an individual's claim that her majority representative (HPAE) violated its duty of fair representation by failing to compel expeditious processing of her various grievances and failed to represent her regarding a shift change grievance. HPAE's filing, processing and consolidating of grievances was evidence of good faith representation. The Director also dismissed various other claims due to lack of standing, lack of jurisdiction and insufficiently plead facts.

As to UMDNJ, the Director issued a complaint on a claim that Charging Party's work schedule was changed in retaliation for her having filed grievances; all other claims against UMDNJ were dismissed.

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Charging Party.

Appearances:

For Respondent - UMDNJ
David Samson, Attorney General
(Abdel Kanan, Deputy Attorney General)

For Respondent - HPAAE
Karen Szczepanski, Staff Representative

For Charging Party
Elba Rosa, pro se

DECISION

On January 31, 2002, Elba Rosa filed an unfair practice charge alleging that the University of Medicine and Dentistry of New Jersey (UMDNJ) violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4a(1), (3), (4), (6) and

(7).^{1/} Rosa simultaneously filed a charge against her employee representative Health Professionals and Allied Employees, Local 5094 (HPAE) alleging violations of 5.4b(1), (3) and (5)^{2/} of the Act. Rosa also contends UMDNJ and HPAE violated N.J.S.A. 34:13A-21 by changing terms and conditions of her employment while arbitration proceedings were pending. She also generally alleged that HPAE violated its constitution and bylaws.

Rosa alleges that she has filed various grievances through her HPAE representative since 1998, some of which are still pending. She contends UMDNJ has refused to process her grievances, HPAE has failed to compel processing, and both have violated her rights under the Act. She also asserts that UMDNJ

^{1/} 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 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. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

^{2/} These provisions 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."

discriminated against her for having filed the grievances when it changed her work shift in late 2001, and that HPAE failed to represent her concerning the shift change. UMDNJ and HPAE both deny violating the Act.

The Commission has authority to issue a complaint where it appears that the 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.

In correspondence dated August 2, 2002, I advised the parties I was inclined to dismiss all but one claim in this matter and I set forth the basis for my conclusions. The parties were given an opportunity to respond; none did. Based on the following, I find that the complaint issuance standard has been met only with regard to Charging Party's 5.4a(1) and (3) claim against UMDNJ. All other claims are dismissed.

HPAE represents a collective negotiations unit of professional staff employed by UMDNJ. HPAE and UMDNJ are parties to a negotiations agreement covering the professional unit for the period July 1, 1999 through June 30, 2003. The agreement includes a three-step grievance procedure at Article 14. Section 14.02(c) permits UMDNJ and HPAE to mutually agree to extend any time limits of the grievance procedure. It further provides that, in the

absence of a mutually agreed upon extension, the University's failure to respond to any grievance would be construed as a negative response.

Elba Rosa has been employed by UMDNJ as a physicians assistant and has been a member of HPAE's negotiations unit for over four years. In August 1998, she began filing grievances through her HPAE representative against UMDNJ related to various terms and conditions of her employment.

Presently, Rosa has five work-related grievances awaiting arbitration hearings. Two matters involve her annual evaluations, the others relate to claims regarding tuition reimbursement, overtime compensation and holiday pay (docket nos. AR-2000-211, AR-2001-029, AR-2001-036, AR-99-294 and AR-99-293, respectively).

In March 2001, UMDNJ notified Rosa that it intended to change her work schedule to four, ten-hour shifts. UMDNJ contends the change was necessitated by two factors: (1) Rosa, as a physicians assistant in the emergency department, requires physician supervision; and (2) the emergency department's physicians' schedules were changed due to increased patient demands and Rosa's schedule was therefore changed to conform to the schedule of the physicians for whom she worked. UMDNJ apparently delayed implementation of the schedule change for several months to allow Rosa to complete certain courses she was taking.

In October 2001, HPAE Staff Organizer Karen Szczepanski filed a grievance on Rosa's behalf alleging that the schedule change increased Rosa's hours from 156 to 160 hours a month and that this change was discriminatory. The schedule change apparently implemented in December 2001. Rosa charges that HPAE failed to represent her because it "allowed the employer" to change her work hours during the pendency of arbitration.

Processing Rosa's grievances and other matters involving other HPAE members through the parties' grievance procedure has routinely been delayed due to scheduling conflicts. All five of Rosa's arbitrations, however, are now consolidated and scheduled for hearing in September 2002.

Rosa also presently has a private cause of action asserting various discrimination claims against UMDNJ pending in federal court. That matter was referred to a federal mediation program. She also filed a New Jersey Division on Civil Rights (DCR) claim against UMDNJ but that matter has been stayed pending the outcome of her federal court action. An Equal Employment Opportunity Commission (EEOC) claim she filed against UMDNJ was apparently dismissed.

ANALYSIS

Charge Against HPAE

Section 5.3 of the Act empowers an employee representative to represent employees in the negotiation and

administration of a collective agreement. With that power comes the duty to represent all unit employees fairly in negotiations and contract administration. The standards in the private sector for measuring a union's compliance with the duty of fair representation were articulated in Vaca v. Sipes, 386 U.S. 171 (1967). Under Vaca, a breach of the statutory duty of fair representation occurs only when a union's conduct towards a member of the negotiations unit is arbitrary, discriminatory, or in bad faith. Id. at 191. That standard has been adopted in the public sector. Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976); see also Lullo v. International Ass'n of Fire Fighters, 55 N.J. 409 (1970); OPEIU Local 153 (Johnstone), P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983).

A union should attempt to exercise reasonable care and diligence in investigating, processing and presenting grievances; it should exercise good faith in determining the merits of the grievance; and it must treat individuals equally by granting equal access to the grievance procedure and arbitration for similar grievances of equal merit. OPEIU Local 153 (Johnstone); Mackaronis and Middlesex Cty. and NJCSA, P.E.R.C. No. 81-52, 6 NJPER 555 (¶11282 1980), aff'd NJPER Supp.2d 113 (¶94 App. Div. 1982), certif. den. 91 N.J. 242 (1982); New Jersey Turnpike Employees Union Local 194 (Kaczmarek), P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979); and AFSCME Council No. 1 (Banks), P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978).

In this case, no facts have been presented demonstrating that HPAAE treated Rosa differently than other HPAAE members. HPAAE has filed, processed, attempted to resolve, and prepared to arbitrate five grievances on her behalf. HPAAE has agreed to consolidate and expedite all five for an arbitration hearing in September 2002. HPAAE's filing of grievances and processing them to arbitration is evidence of good faith representation. While Rosa may be dissatisfied with the results of the grievances or the time it takes to process, there simply is no basis on which to conclude the results or delays were deliberately caused by HPAAE.

In addition, it appears that HPAAE's conduct did not violate the Act with regard to Rosa's schedule change grievance. Rosa acknowledges that HPAAE represented her at a first-step grievance hearing. HPAAE representatives informed Rosa that they believed management had a right to change shifts. HPAAE's alleged failure to prevent the University from implementing the schedule change while arbitration was pending is not a violation of the Act. The prohibition in N.J.S.A. 34:13A-21 against changing terms and conditions of employment during the pendency of arbitration concerns police and fire interest arbitration, not grievance arbitration.

Based on the foregoing, it does not appear that HPAAE has treated Rosa in an arbitrary, capricious or bad faith manner or violated its duty to represent Rosa in accordance with the Vaca standards. Accordingly, Rosa's 5.4b(1) claim is dismissed.

As to the allegation that HPAE violated 5.4b(3) of the Act, Charging Party, as an individual employee, has no standing to allege a violation of this section because a majority representative's obligation to negotiate runs only to the public employer. Tp. of Berkeley, D.U.P. No. 86-2, 11 NJPER 543 (¶16190 1985); Trenton Bd. of Ed., D.U.P. No. 81-26, 7 NJPER 406 (¶12179 1981). Additionally, concerning Rosa's allegation that HPAE violated 5.4b(5), she has not identified any Commission rule or regulation which has been violated. Willingboro Bd. of Ed., H.E. No. 81-3, 6 NJPER 459 (¶11235 1980). Based on the foregoing, these claims are also dismissed.

As to Charging Party's apparent claim that HPAE violated Article II of its constitution and bylaws, proper jurisdiction lies with the courts, not the Commission. See Teamsters Local 331 (McLaughlin), P.E.R.C. No. 2001-30, 27 NJPER 25 (¶32014 2000). Accordingly, this claim is also dismissed.

Charges Against UMDNJ

Although not clearly pled, Rosa asserts UMDNJ violated 5.4a(1), (3), (4), (6) and (7) of the Act by delaying the processing of her grievances and by retaliating against her for filing grievances and EEOC claims and by changing her work schedule.

With regard to the schedule change, section 5.4a(3) of our Act prohibits an employer from taking a personnel action in

retaliation for an employee's protected activity. See In re Bridgewater Tp., 195 N.J. 235 (1984). Therefore, it appears this allegation meets the Commission's complaint issuance standard.

With regard to Rosa's allegation that UMDNJ is delaying her grievances, I decline to issue a complaint. The HPAE's collective agreement provides for a grievance procedure that ends in binding arbitration. Rosa's grievances apparently are scheduled for arbitration in September 2002. The Commission has long held that a self-executing grievance procedure which permits the grievance to be moved to the next step automatically if the employer does not respond at any step before arbitration, normally insulates a public employer against charges that it unlawfully refused to process a grievance. Town of Harrison (Nankivell), D.U.P. No. 94-28, 20 NJPER 127 (¶25065 1994); 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 contractual grievance procedure in this case is self-executing. Therefore, Rosa's claim that UMDNJ delayed processing her grievances is dismissed.

No facts were alleged in support of the 5.4a(4), (6) or (7) claims. Specifically, Rosa has alleged no facts to support that she was discriminated against based on the filing or signing of an affidavit, petition or complaint under the Act, that UMDNJ refused to reduce a negotiated agreement to writing and to sign such an agreement, or that our rules or regulations were violated. Accordingly, I dismiss these claims.

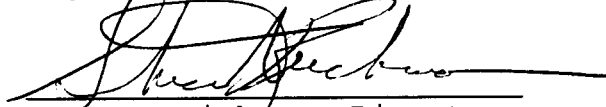
For all of the foregoing reasons, I find that the Commission's complaint issuance standard has not been met with regard to the charge against HP AE, CI-2002-36, and with regard to the 5.4a(4), (6) and (7) allegations against UMDNJ, as well as the allegation concerning UMDNJ's delays in processing Rosa's grievances. These claims are all dismissed.

As to Rosa's claim that UMDNJ changed her work schedule in retaliation for her having engaged in protected activity, the complaint issuance standard has been met and a complaint and notice of hearing shall issue.

ORDER

The unfair practice charge filed against HP AE, CI-2002-35 is dismissed. The unfair practice filed against UMDNJ, CI-2002-36, to the extent it alleges violations of 5.4a(4), (6) and (7) of the Act is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Stuart Reichman, Director

DATED: August 23, 2002
Trenton, New Jersey

