

D.U.P. NO. 2003-1

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

In the Matter of

NEW JERSEY INSTITUTE OF TECHNOLOGY,

Respondent/Charging Party,

-and-

Docket No. CO-2002-120 &
CE-2002-5

NEW JERSEY INSTITUTE OF TECHNOLOGY
SUPERIOR OFFICERS ASSOCIATION,

Charging Party/Respondent.

SYNOPSIS

The Director of Unfair Practices refuses to issue complaints on related unfair practices filed by NJIT and the NJIT SOA. The SOA contended NJIT violated the Act by certain irregularities in processing a disciplinary appeal and grievance. NJIT contended the SOA's manner of handling the disciplinary procedure and grievance, particularly its insistence on providing legal representation to its member during those proceedings, violated the Act.

The Director found that the parties' disputes were nothing more than alleged breach of contract claims more properly litigated through the parties' negotiated grievance procedure.

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Appearances:

For NJIT
Robert H. Avery, general counsel
(Holly Stern, associate general counsel)

For NJIT Superior Officers Association
Fusco & Macaluso, P.A.
(Thomas Possumato, labor consultant)

REFUSAL TO ISSUE COMPLAINT

On November 5 and December 6, 2001, the New Jersey Institute of Technology Superior Officers Association (SOA) filed an unfair practice charge and amended charge (docket no. CO-2002-120), respectively, with the Public Employment Relations Commission (Commission) alleging that New Jersey Institute of Technology (NJIT) violated 5.4a(1), (2), (3), (4), (5) and (7)^{1/} of the New Jersey

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with,

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).

On January 16, 2002, NJIT filed an unfair practice charge (docket no. CE-2002-5) alleging that the SOA violated sections 5.4b(1), (2), (3) and (5)^{2/} of the Act. Both charges relate to the same operative facts and have, therefore, been consolidated for processing. The parties' numerous submissions in these matters provide a detailed description and chronology of events related to certain disciplinary action taken against Sergeant Stephen Daly.

1/ Footnote Continued From Previous Page

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 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. (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 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."

The SOA asserts that NJIT violated the Act by certain irregularities in processing Daly's disciplinary appeal and his resulting grievance. NJIT alleges that the SOA's handling of the disciplinary procedure and collateral grievance violated 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 June 26, 2002, I advised the parties that I was not inclined to issue a complaint in this matter and I set forth the reasons for my conclusion. The parties were provided an opportunity to respond. NJIT submitted a letter reiterating its various positions but offering no new facts or argument. It did, however, more narrowly address its prior contention that the SOA has repudiated the parties' collective agreement. This additional argument does not, however, compel a different conclusion. The SOA also submitted a response by letter dated July 17, 2002. Based on the following, and incorporating the parties' additional submissions, I find the complaint issuance standard has not been met.@

The SOA is the majority representative of police sergeants employed by NJIT. The SOA has a current collective agreement with NJIT covering police superiors. Daly is the SOA president.

On October 22, 2001, Daly was charged with (1) failure to obey a direct order, (2) official misconduct, (3) neglect of duty, (4) failure to supervise, (5) providing false information during an investigatory conference, (6) violating NJIT's computer use policy and (7) theft of NJIT time. The charges were based on alleged conduct occurring on or about September 13, 2001. A "due process" meeting was scheduled for October 24, 2001.

On October 24, 2001, Daly requested to adjourn the meeting and demanded the right to legal representation of his choice during the meeting. The meeting time was adjourned but the request for legal representation was denied. NJIT relied upon Article VII, section C, of the NJIT/SOA collective negotiations agreement which provides as follows:

Legal counsel representing SOA shall be permitted to attend employment due process meetings only where employment charges include or reasonably may be construed to include criminal behavior in violation of New Jersey's Penal Code.

On October 24, 2001, Daly's attorney, Anthony Fusco, acknowledged NJIT's denial of representation and threatened to file an unfair practice charge. On October 29, 2001, NJIT advised both Fusco and Daly that the disciplinary charges against Daly related solely to employment misconduct and no criminal behavior was implicated. NJIT reiterated that legal counsel would not be permitted during Daly's due process proceedings as the charges did not include criminal behavior in violation of the State penal code.

On November 2, 2001, Holly Stern, NJIT's associate general counsel and executive director of legal and employment affairs, denied a further request to hold the disciplinary due process proceedings in abeyance and rescheduled the due process meeting for November 7, 2001.

On November 5, 2001, the SOA advised NJIT that, without waiving its pending unfair practice charge, it would participate in Daly's due process hearing with a non-attorney union representative. The same day, Daly submitted a grievance to his supervisor, Lieutenant Ira Ford. Daly's grievance listed, without explanation as to cause or relevance, several articles of the contract allegedly violated by NJIT including Articles I, Recognition; II, Negotiating Procedure; III, Management Rights; V, Rights of the SOA; VII, Investigation, Due Process, Discipline and Challenge; and VIII, Non-Discrimination (November 5 grievance). Ford denied the grievance and it was moved to step two of the grievance procedure.

On November 7, 2001, the parties conducted the due process hearing during which Daly, represented by non-attorney union representative Thomas Possumato, was provided an opportunity to be heard prior to the imposition of discipline. NJIT's findings on the disciplinary charges were issued November 19, 2001; he was suspended for 30 days. At the end of the disciplinary hearing, the parties agreed to expedite Daly's November 5 grievance regarding the denial of legal counsel to a step-three meeting.

The step-three hearing on the November 5 grievance was scheduled for November 26, 2001. On November 21, 2001, Possumato requested discovery of documents and tangible evidence related to the Daly disciplinary matter, including his personnel file and a list of witnesses NJIT intended to call during the hearing. The SOA also requested four witnesses be made available for the hearing and advised that Daly would be represented by counsel.

The hearing was rescheduled to November 30, 2001. By letter dated November 28, 2001, NJIT responded to the discovery requests. NJIT advised that the only issue it would hear was that regarding the denial of legal representation during the Daly disciplinary matter. It also requested the SOA to provide a clear and concise statement of the actions the SOA was grieving. On November 29, 2001, Possumato confirmed that the November 5 grievance was based on the denial of legal representation during Daly's November 7, 2001 disciplinary hearing.

On November 30, 2001, Daly appeared at the step-three hearing accompanied by Possumato and attorney Michael Montanari. Stern appeared as the hearing officer and Christine Li appeared on behalf of NJIT. Although it had been previously asserted that Daly was grieving the denial of his request for legal representation, Montanari and Possumato claimed that Daly's November 5 grievance actually contested the due process findings and notice of suspension, which were issued on November 19, 2001. Stern, however, would only entertain argument regarding legal representation during

Daly's due process hearing. The hearing ended abruptly after Possumato and Montanari refused to present arguments on the issue of Daly's entitlement to legal representation during his due process hearing and instead demanded that the matter be forwarded to arbitration. No witnesses were provided by NJIT.

The SOA has not filed a grievance or otherwise appealed the November 19, 2001, 30-day suspension. The SOA has, however, submitted the November 5 grievance to binding arbitration.

The SOA charges that NJIT discriminated against Daly and interfered with his rights under the Act by refusing to permit him legal representation at his October 24, 2001 disciplinary hearing. SOA alleges that Daly is entitled to such legal representation pursuant to the provisions of collective negotiations agreement at Article VII. The SOA has also sought to arbitrate these alleged "procedural irregularities" in the due process hearing leading to Daly's 30-day suspension (docket no. AR-2002-421). NJIT filed a Scope of Negotiations Petition seeking to restrain that arbitration. On July 26, 2002, the Commission issued a decision in the scope matter, finding that the question of whether an officer is entitled to be represented by an attorney at a due process hearing is a procedural one that is legally arbitrable. The Commission restrained arbitration over any challenges to the substantive decision to impose discipline. N.J. Inst. of Technology, P.E.R.C. No. 2003-9, 28 NJPER ____ (¶ ____ 2002). The SOA's grievance is scheduled to be heard before the arbitrator.

The NJIT alleges that the SOA violated the Act by (a) ignoring contract language (Article VIIC); (b) attempting to arbitrate matters of major discipline, despite the Commission's prior rulings that major discipline is not arbitrable; (c) seeking to arbitrate Daly's discipline notwithstanding that the grievance filed related only to NJIT's prohibition of legal counsel as representative at the pre-disciplinary meeting; (d) continuing to appear with legal counsel at pre-disciplinary meetings despite NJIT's contrary directive and clear contract language restricting counsel to step III grievance hearings; (e) demanding discovery concerning its grievance on the denial of legal counsel when the contract clearly restricts discovery to step III grievance hearings; and (f) "making up" rules and procedures regarding disciplinary and grievance hearings which clearly contravene specific negotiated procedures.

The crux of the SOA's charge is that NJIT violated Article VII of the collective agreement by refusing to allow Daly legal counsel at his investigatory hearing. NJIT argues that Article VII's language is clear and unambiguous and thus there is no bona fide dispute over its interpretation. It maintains that Daly's discipline was related to non-criminal employment misconduct and therefore, did not trigger a contractual right to legal counsel. NJIT contends that SOA's November 5 grievance claiming irregularities in the disciplinary procedure is a "smokescreen designed to get a matter of major discipline before an arbitrator."

It argues that the arbitration of Daly's November 5 grievance is the third time it is facing arbitration of a major disciplinary matter.

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 ordinarily rise to the level of a violation of section (a) (5) of the Act which may be litigated through unfair practice proceedings. Instead parties must attempt to resolve contract disputes through their negotiated grievance procedures.

In this case the parties apparently have a good faith dispute over the interpretation or application of Article VIIC of the collective agreement. Under Human Services, when both parties reasonably rely upon language contained in the agreement in support of their actions, the Commission will not entertain the alleged violation of 5.4a(5) of the Act.

The parties disagree over whether Daly was entitled to an attorney as his representative during his disciplinary proceedings. They also disagree over other alleged irregularities regarding those proceedings. Those disputes may be resolved through resort to the collective agreement's grievance procedure. While NJIT asserts that the contract clause clearly and unambiguously precludes attorney representation in this circumstance, the SOA argues that the same clause cannot be read so strictly. Thus, I find that the disputes over the entitlement to attorney representation during disciplinary proceedings and other alleged irregularities in those proceedings

represents nothing more than an alleged breach of contract. See generally New Jersey (State Judiciary), D.U.P. No. 2001-9, 26 NJPER 464 (¶31182 2000). Accordingly, I find that the SOA's charge does not rise to the level of a violation of the Act and I refuse to issue a complaint.

NJIT frames its charge with reference to alleged repeated attempts by the SOA to ignore and/or bypass the collective agreement. In Human Services, the Commission observed that a specific claim of repudiation may be litigated in an unfair practice proceeding pursuant to subsection 5.4a(5); however, a repudiation claim must be supported by a contract clause that is so clear that an inference of bad faith arises from a refusal to honor it, or by facts alleging a change in the parties' past and consistent practice in administering a disputed clause. Human Services.

To the extent NJIT seems to be alleging that the SOA repudiated the parties' collective agreement, I find that the facts do not support such a claim. There is no allegation of any change in the parties' past practice in administering the disputed clause. NJIT relies on the language of Article VIIC to support its denial of Daly's request for legal counsel during his disciplinary proceedings. The SOA asserts that the disciplinary charges against Daly did trigger a contractual right to legal representation. Whether, and to what extent Article VIIC is implicated by the specific facts of the parties' conduct is appropriately resolved by an arbitrator. These disputed facts do not, however, support an

inference of bad faith or repudiation of the collective agreement by either party. Human Services. Based on the foregoing, I find that the parties' dispute is contractual and the actions do not constitute a violation of 5.4a(5) or, derivatively, a(1) of the Act.


Finally, NJIT alleges that for the third time, the SOA is seeking to arbitrate major discipline. The pending arbitration stems from Daly's November 5 grievance contending NJIT violated the collective agreement by denying Daly's right to legal counsel during the disciplinary hearing. I do not find that the SOA's demand for arbitration over this procedural issue is a violation of the Act. In any event, the Commission has already restrained SOA from seeking to arbitrate the substantive decision to discipline Daly. N.J. Inst. of Technology, P.E.R.C. No. 2003-9.

For all of the foregoing reasons, I find that these charges are based on differing interpretations of the application of Article VIIC of the parties collective agreement. Therefore, I find that the Commission's complaint issuance standard has not been met and I decline to issue a complaint on the allegations in either of these charges.^{3/}

ORDER

The unfair practice charges are dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES


Stuart Reichman, Director

DATED: August 14, 2002
Trenton, New Jersey

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