

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

In the Matter of

STATE OF NEW JERSEY AND COUNCIL
OF NEW JERSEY STATE COLLEGE
LOCALS, NJSFT/AFT/AFL-CIO,

Respondents,

-and-

DOCKET NO. CI-79-47

JACK BARENSE,

Charging Party.

SYNOPSIS

The Director of Unfair Practices declines to issue a complaint with respect to an individual's charge that the employer improperly dismissed him due to his filing of a grievance and that his majority representative did not accord him fair representation. The Charge against the employer is essentially a motion for reconsideration by the Charging Party of a previous Commission decision dismissing an Unfair Practice Charge filed on the Charging Party's behalf by his representative. The Director determines that the motion for reconsideration should appropriately be placed before the Commission. The Charge against the representative asserts that the representative breached its responsibility of fair representation by failing to file a timely charge on behalf of the Charging Party, refusing to permit the Charging Party's attorney to participate in Court appeals related to the dismissal of the Charge, requiring the Charging Party to pay the costs of a Petition for Certification to the Supreme Court, and declining to seek reconsideration after the Supreme Court's denial of certification. The Director, upon analyzing the facts alleged in the Charge, determines that none of these actions, either individually or in combination, may constitute unfair representation.

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Appearances:

For the Respondent State of New Jersey
Honorable John Degnan, Attorney General
(Melvin E. Mounts, Deputy Attorney General, of Counsel)

For the Respondent Council
Sauer, Boyle, Dwyer & Canellis, Esqs.
(William Cambria, of Counsel)

For the Charging Party
Arlene Groch, Esq.
(James Dulfer, on the Brief)

REFUSAL TO ISSUE COMPLAINT

An Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") on March 7, 1979, and amended March 16, 1979, by Jack Barense (the "Charging Party") against the State of New Jersey (the "State") and the Council of New Jersey State College Locals, NJSFT, AFT, AFL-CIO (the "Council") alleging that the Respondent State was engaging

in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), specifically N.J.S.A. 34:13A-5.4 (a) (1) and (3) ^{1/} and that the Respondent Council was in violation of N.J.S.A. 34:13A-5.4 (b) (1) and (5). ^{2/}

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 charge. ^{3/} The Commission has delegated its authority to issue complaints to the undersigned and has established a standard upon which an unfair practice complaint may be issued. This 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

- ^{1/} These subsections prohibit employers, their representatives and 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."
- ^{2/} These subsections prohibit employee organizations, their representatives and agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act. (5) Violating any of the rules and regulations established by the commission."
- ^{3/} 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 and including a notice of hearing containing the date and place of hearing before the commission or any designated agent thereof ... "

Act. ^{4/} The Commission's rules provide that the undersigned may decline to issue a complaint. ^{5/}

In 1974, Barensen was a faculty member at Stockton State College. At all material times herein, the Council was, and is now, the majority representative of a collective negotiations unit consisting of faculty personnel. The instant Charge arises from unfair practice allegations against the State (i.e., the College) filed by the Council on March 19, 1976, on behalf of Barensen, which were dismissed by the Commission. In this earlier Unfair Practice Charge, the Council alleged that a refusal of Stockton State College to reappoint Professor Barensen to a faculty position was in reprisal for the filing of a grievance on behalf of Barensen in 1974. The Commission dismissed this charge holding that the charge was not timely filed within the six month statutory limitations period set forth in N.J.S.A. 34:13A-5.4(c). ^{6/} The Council appealed the

^{4/} N.J.A.C. 19:14-2.1

^{5/} N.J.A.C. 19:14-2.3

^{6/} The Barensen grievance was filed on November 14, 1974. In December 1974, Professor Barensen was notified he would not be reappointed to the faculty. Rather than filing an unfair practice charge at that time, the Council filed a second grievance. Pursuant to an arbitrator's recommendation, the reappointment of Professor Barensen was considered de novo by the College. On December 5, 1975, notwithstanding a committee recommendation for reappointment, the President of Stockton advised Barensen that he had not altered his recommendation not to reappoint Barensen. Thereafter the Council filed its Charge. The Commission after reviewing these events, noted that no unfair practice charge was filed within six months of the arguably tainted termination notice in December 1974, and dismissed the Charge as untimely filed. The Commission rejected the Council's contention that the six month period for filing purposes should have been tolled during the time period in which the Council was pursuing its contractual remedies for the aggrieved employer conduct. The Commission held that the filing of a grievance relating to the same subject matter underlying a charge does not relax the time period for filing an unfair practice charge with the Commission.

Commission's decision. The decision was affirmed by the Appellate Division of the Superior Court on October 6, 1977. In November 1977, Council filed a petition for certification to the Supreme Court. The petition was denied in September 1978. Sub nom In re State of New Jersey v. Council of State College Locals, 153 N.J. Super. 91 (1977), petition for certification denied, 78 N.J. 326 (1978).

In the instant matter, Barensse reasserts the same charges against the State as alleged by the Council in the earlier charge, and urges that the Commission reconsider the timeliness of his earlier charge in light of principles set forth by the Supreme Court in Kaczmarek v. New Jersey Turnpike Authority, et al., 77 N.J. 329, decided August 7, 1978. More specifically, in a brief prepared at the request of the undersigned, Charging Party states:

Petitioner first requests that P.E.R.C. consider this Complaint as a Motion for Reconsideration in light of Kaczmarek and seeks reinstatement of the original charge filed by Council on his behalf on March 19, 1976, with the substitution of himself for the Council as the charging party.

Since the Charging Party herein admittedly seeks reconsideration of the original charge by the Commission, and substitution of himself for the Council as the Charging Party therein, this request must be appropriately addressed before the Commission in the context of the previous charge rather than in the form of a new charge upon

subject matter previously litigated. Accordingly, the undersigned declines to issue a complaint against the State herein. 7/

Barense's charge against the Council is that "it interfered, restrained, and coerced him in the exercise of his rights under the act and violated the rules and regulations of the Commission by failing to file a timely petition with P.E.R.C. and in other ways set forth herein." Aside from the claim that the Council failed to file a timely charge with the Commission, the Charging Party asserts that the Council improperly represented him by refusing to permit him to have his own attorney participate in the Court appeals and by refusing his requests made after the denial of certification that the Council apply to the Commission or to the Appellate Division for reconsideration in light of the Kaczmarek decision. 8/

The undersigned has not been apprised of any statutory requirement, constitutional prescription, or judicial authority which, as a matter of law, imposes an obligation on the part of a majority representative to file unfair practice charges or other suits on behalf of individual unit members, to appeal lost decisions to the Court of last consideration, and, thereafter, to explore

7/ The undersigned hereby forwards the relevant portion of the Charge to the Commission for their determination regarding the request for reconsideration of the original Charge.

8/ The undersigned initially notes that, with the exception of the demand that Council seek reconsideration in light of the Kaczmarek decision, supra, all the allegations of the Charging Party against the Council are untimely filed. The undersigned, however, shall review this earlier conduct as it may bear upon the claim that the Council was acting unfairly when it declined to seek reconsideration.

possibilities for reconsideration. ^{9/} Nor, in the undersigned's judgment, may such a requirement be read into the Act. The judgment of a representative not to pursue any particular unfair practice charge on behalf of a unit member or members is ultimately a matter of discretion. Unlike the possibilities that may arise in grievance presentation, the exercise of discretion by the majority representative not to file a charge does not necessarily preclude an individual from filing a charge under N.J.S.A. 34:13A-5.4.

The Commission approaches the issue relating to the proper representation of unit employees by applying the standards relating to fair representation developed in the private labor relations sector. Under this well established approach, a majority representative violates its duty of providing fair representation to unit members, and thereby violates N.J.S.A. 34:13A-5.4(b)(1), only when its conduct is "arbitrary, discriminatory, or in bad faith." See Vaca v. Sipes, 386 U.S. 171 (1967); In re Miranda Fuel Co., 54 LRRM 2715 (1963); In re Council #1, A.F.S.C.M.E., AFL-CIO, P.E.R.C. No. 78-28, 5 NJPER 21 (¶ 10013 1978); In re Red Bank Board of Education, D.U.P. No. 79-17, 5 NJPER 56 (¶ 10037 1979); and In re Township of Springfield, D.U.P. No. 79-13, 5 NJPER 15 (¶ 10008 1978).

^{9/} Contrast Red Bank Regional Education Association v. Red Bank Regional Board of Education, 78 N.J. 122 (1978) wherein the Court construes N.J.S.A. 34:13A-5.3 to require a majority representative to present a grievance on behalf of unit members at least at the initial level of the grievance procedure.

Assuming arguendo that under certain limited circumstances a majority representative may breach its responsibility of fair representation to a unit member by not filing an unfair practice charge, could the Respondent Council herein have breached its duty of fair representation by failing to file the initial unfair practice charge in a timely fashion? Although not alleged in the factual statement of the Charge, Charging Party's brief asserts that "Petitioner had repeatedly questioned Council's representatives ... as to whether a P.E.R.C. filing was required, and was assured ... that filing was not required during the pendency of grievance procedures." Charging that the Council's conduct was nonfeasance, the Charging Party contends, in his brief, that:

The respondent, Council of New Jersey State College Locals, was the bargaining agent on behalf of Professor Barensen and was, or should have been, utterly familiar with the Act. By undertaking the representation of Professor Barensen following President Bjork's decision not to recommend reappointment and the filed grievance that ensued [sic], the Council should have been mindful and aware of the filing procedures with PERC and the period of limitations within which to file a charge.

The Charging Party does not allege facts which would indicate that the Council, in filing an untimely unfair practice charge, was motivated by discriminatory or bad faith considerations. Further, on its face, no facts have been alleged to establish that the Council's initial judgment to submit Barensen's

claims to the grievance procedure, rather than through the unfair practice charge forum, was arbitrary. Upon a closer examination, it appears that the Council's failure to file a timely charge may not constitute unfair representation. The authorities in the private sector hold that negligence on the part of unit representatives does not constitute unfair representation, In re Great Western Unifreight System, 209 NLRB 446, 85 LRRM 1385 (1974), although certain courts have indicated that gross negligence or perfunctory conduct constitutes arbitrary conduct, Ruzicka v. General Motors Corp., 523 F.2d 306, 90 LRRM 2497 (CA-6 1975). ^{10/} The Council may have relied upon a mistake of judgment, in an area of untested legal argument, when it assumed that the filing of a grievance would toll the statutory limitations period for filing unfair practice charges. However, this mistake in judgment cannot, under the circumstances, be deemed gross negligence.

Paragraphs 24 and 25 of the Charge set forth the facts alleged to constitute unfair representation by the Council after the Commission dismissed the Council's Unfair Practice Charge on behalf of Bareense.

24. The Council initially refused Professor Bareense's requests that (A) the Council apply to the Superior [Supreme (?)] Court for certification to review the Appellate Court's decision and (B) Professor Bareense be permitted to provide counsel of his own choosing to represent the Union in the Superior [Supreme (?)] Court appeal.

^{10/} In Ruzicka, the local union's representatives, without making a decision as to the merits of a grievance and without explanation or notice, failed to file a timely grievance form necessary to invoke contractual arbitration, although granted two extensions.

25. The Council subsequently agreed to pursue certification but only on the following conditions: (A) Jack Barensen must bear all legal costs incurred by the Union and (B) the Union's attorney would represent the Union and Jack Barensen's counsel could not participate in the application.

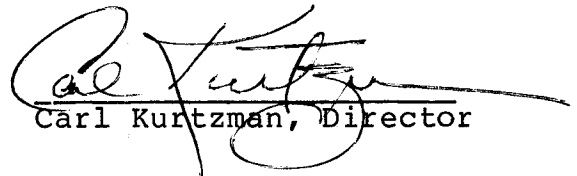
Paragraph 29 of the Charge sets forth the claim that after the Supreme Court denied certification, the Council declined Barensen's request that the Council refile with the Appellate Division or the Commission in light of the Kaczmarek decision, supra.

The Charging Party has not apprised the undersigned of any authority which holds that the facts alleged above, either individually or in combination, constitute unfair representation. In the undersigned's judgment, these facts, whether considered individually or in combination, do not indicate that the majority representative has acted improperly. The authorities consistently hold that a representative's judgment to discontinue formal proceedings filed on behalf of unit members, even when such conduct is based upon a mistake in judgment, does not constitute unfair representation unless accompanied by an improper motive. See Vaca, supra. The Charging Party herein does not claim discrimination or bad faith even with respect to the imposition of the requirement that he pay the costs for certification to the Supreme Court; nor would the facts presented support such a claim. Additionally, the refusal of a union to permit an individual member

to be represented by his own attorney, at least in the context of an arbitration proceeding, has not been found to constitute unfair representation. See Bailer v. Local 470, Teamsters, 400 Pa. 188, 159 A.2d 343, 46 LRRM 2405 (1960). A fortiori, the same logic would apply to the appeal of judicial decisions. Although a member of the labor bar has suggested that majority representatives, in order to avoid the potential for unfair representation claims, permit members to utilize their own attorneys in arbitration proceedings when there is a possible "conflict of interest" between the representative and the member, ^{11/} no factual allegation of conflict is made herein.

Accordingly, for the above reasons, the Charge against the Council fails to state facts which, if true, may constitute unfair practices on the part of the Council. For all the reasons above, the undersigned declines to issue a complaint herein.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES


Carl Kurtzman, Director

DATED: September 12, 1979
Trenton, New Jersey

^{11/} See Radin, Robert, "The Duty of Fair Representation in Arbitration" in The Duty of Fair Representation, John T. McKelvey, Ed., ILR Publications Division, Cornell University (1977).