D.U.P. NO. 2002-1

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

In the Matter of

COUNCIL OF NEW JERSEY
STATE COLLEGE LOCALS,

Respondent,

-and- Docket No. CI-2001-24

WILLIAM DUSENBERRY,

Charging Party.

SYNOPSIS

The Director of Unfair Practices refuses to issue a complaint on a charge filed by a unit member alleging his majority representative breached its duty of fair representation when it refused to arbitrate a grievance regarding the academic credentials of the president of the New Jersey City University. The Director found that the president's academic credentials were not a term or condition of Charging Party's employment, were not subject to the collective negotiations agreement, and is not a negotiable subject the majority representative is obligated to arbitrate. The Director also found the majority representative satisfied its duty to investigate and consider the grievance and even assisted Charging Party process it up to arbitration. The full membership of the unit, not any individual officer, determined it should not go to arbitration. Finally, other collateral allegations were untimely.

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Appearances:

For the Respondent,
Dwyer, Canellis & Adams, attorneys
(Brian Miller Adams, of counsel)

For the Charging Party
William Dusenberry, pro se

REFUSAL TO ISSUE COMPLAINT

On October 20, 2000, and June 25, 2001, William Dusenberry, an associate professor of sociology at New Jersey City University (University), filed an unfair practice charge and amended charge, respectively, alleging that his majority representative, Council of New Jersey State College Locals, AFT/AFL-CIO (the Council), violated section 5.4b(1)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

1/ This provision prohibits 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.

(Act) when it refused to take a grievance regarding University President Carlos Hernandez' academic credentials to arbitration. Dusenberry's original charge claimed that the Council's decision not to arbitrate his grievance was in retaliation for earlier charges he filed against the Council. In his amended charge, he also contends that the Council's retaliation was provoked by his earlier criticisms of certain local officers of the Council.

The Council denies violating the Act. It contends that it offered Dusenberry assistance in processing his grievance at the first step of the grievance process, but subsequently determined it lacked merit to proceed to arbitration.

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 21, 2001, I advised the parties that I was not inclined to issue a complaint in this matter and set forth the factual and legal basis upon which I arrived at that conclusion. The parties were invited to respond. Charging Party submitted his amended charge which conceded our factual findings, claimed the additional basis for the retaliation, and presented legal argument.

Based on the following, I find that the complaint issuance standard has not been met.

The Council represents the University's academic faculty. The Council's most recent collective agreement covering faculty provides a two-step grievance procedure. Article VII, Section B, defines a grievance as:

> ... an allegation by an employee or the UNION that there has been:
>
> 1. A breach, misinterpretation or improper application of terms of this Agreement; or,
>
> 2. An arbitrary or discriminatory application of, or failure to act pursuant to, the applicable policies or rules of a Board of Trustees, or applicable regulations or statutes which establish terms and conditions of employment.

Article VII, Section D describes the grievance procedure. Step one of the procedure requires that grievances be filed with the college/university president. Step one grievances may be filed by individual employees or the Council. Step two of the procedure triggers either binding or non-binding arbitration. If the allegations constitute an Article VII B.1 grievance, the arbitration is binding. If the allegations constitute an Article VII B.2 grievance, the arbitration is advisory. Step two grievances, however, may only be filed by the Council.

On March 29, 2000, Dusenberry individually filed a grievance alleging that University President Hernandez was using fraudulent academic credentials (hereafter the "Hernandez grievance"). Dusenberry asserts that the University and the Council

have allowed Hernandez to "append his name with a nonexistent master's degree" in violation of the New Jersey Administrative Code.[2/] Dusenberry questions Hernandez' ability to render an objective determination regarding his application for promotion. Although apparently not part of the Hernandez grievance, Dusenberry contends that University Vice President Larry Carter slandered him by calling him a liar for challenging Hernandez' credentials.

Sometime between March 29 and July 21, 2000, Dusenberry presented the Hernandez grievance at a grievance hearing. Treva Pamer, the Council's local grievance chair, attended the hearing and was available to assist Dusenberry. Pamer specifically assisted him in amending the grievance.

The University's designated representative denied the grievance. Dusenberry then requested the Council to submit his grievance to arbitration. On July 20, 2000, the Council's grievance committee, which is comprised of representatives from nine State colleges, considered his request. By letter dated July 21, 2000, Council Staff Representative Bennett Muraskin advised Dusenberry that the committee determined it was unlikely to prevail on the issues raised in the Hernandez grievance or to secure the remedy sought. Muraskin also advised Dusenberry of his right to appeal the committee's decision to the full membership.

2/ According to Dusenberry, Hernandez was hired in 1976 as an instructor without the required masters degree and in 1980 began appending references to the degree to his name. In 1985, Hernandez became the academic vice president. It is not clear from the facts presented when Hernandez became president.

On July 27, 2000, Dusenberry appealed the committee's determination to the full membership alleging that the committee failed to investigate the following: (1) Carter's alleged slanderous statements; (2) Hernandez' alleged fraudulent academic credentials; and (3) irregularities in the promotion requirements. On September 22, 2000, the full membership of the Council voted not to process the grievance to arbitration.

In the amended charge, Dusenberry alleges that "A former president, not only of our local, but also of the State AFT, told me in a telephone conversation that he 'would ruin me.' He said this because of a 'letter to the editor' I wrote criticizing his misuse of his union office." Additionally, Dusenberry's amendment recounts a letter he circulated "several years ago" criticizing a candidate for union office for crossing picket lines. The candidate was subsequently elected vice president. Charging party asserts, without any factual support, that the individual "now likely uses his influence" to oppose Dusenberry's arbitration request.

ANALYSIS

Section 5.3 of the Act empowers an employee representative to exclusively represent employees in the negotiations 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 toward 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; Middlesex Cty and NJCSA (Mackaronis), P.E.R.C. No. 81-62, 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, 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).

However, an employee representative is entitled to a wide range of reasonableness in determining how to best service its members. Ford Motor Co. v. Huffman, 345 U.S. 330, 337-338, 73 S.Ct. 681, 97 L.Ed. 1048 (1953); Atlantic Cty. Special Services (Postal), D.U.P. No. 99-14, 25 NJPER 272 (¶30115 1999). It does not have an

obligation to arbitrate every grievance. N.J. Tpk. Auth. (Beall), P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980), aff'd NJPER Supp.2d 101 (¶85 App. Div. 1981)(union's decision not to arbitrate was based on good faith belief that grievance lacked merit); Carteret Ed. Ass'n (Radwan), P.E.R.C. No. 97-146, 23 NJPER 390 (¶28177 1997); Camden Cty. College (Porreca), P.E.R.C. No. 88-28, 13 NJPER 755 (¶18285 1987); Fair Lawn Ed. Ass'n. (Solomons), P.E.R.C. No. 84-138, 10 NJPER 351 (¶15163 1984)(no violation where union in good faith refused to take grievance to arbitration since it lacked merit); N.J. Tpk. Employees Union, Local No. 194 (Kaczmarek), P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979)(no breach of the duty of fair representation where the union decided that it could not win in arbitration); Monroe Tp. (Kurczeski), D.U.P. No. 93-26, 19 NJPER 134 (¶24066 1993)(union's refusal to arbitrate employee's grievance not unlawful where it based its decision on counsel's opinion that the grievance lacked merit).

Based upon the circumstances presented here, I find that the Council did not breach its duty of fair representation. A Council representative attended Dusenberry's grievance hearing and was thereby apprised of the nature and circumstances of his claim. The representative assisted him in amending his grievance. Thereafter, the Council's grievance committee considered Dusenberry's request to process his claim to arbitration and determined the grievance lacked sufficient merit under the contract to warrant arbitration. A Council representative then advised

Dusenberry of his right to appeal the committee's decision to the full membership. He appealed to the full membership and it was the vote of the full membership that resulted in the final determination not to process the grievance to arbitration.

It is apparent that the grievance Dusenberry wanted arbitrated does not involve a term and condition of his employment. The grievance concerning the academic credentials of the University president is neither a provision of the Council's collective agreement covering the faculty, nor do I find it to be a legally negotiable subject over which the Council is obligated to seek arbitration. An employer's development and implementation of academic credential policies constitutes an exercise of its inherent, non-negotiable, managerial prerogative. See Burlington County College, I.R. No. 99-8, 25 NJPER 82 (¶30034 1998). This is particularly true since it is a member of management whose academic credential is being challenged. An employee representative cannot be legally obligated to arbitrate a non-arbitrable issue,[3/] regardless of the underlying merits of the claim. Passaic Cty. Voc/Tech. Maint. and Cust. Assn. (A. Moore), D.U.P. No. 2001-15, __ NJPER ____ (¶ _____ 2001)(union not obligated to arbitrate

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3/ In Local 195, IFPTE v. State, 88 N.J. 393 (1982), the Supreme Court determined that a subject is legally negotiable when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. Id. at 404-405.

subcontracting claim since issue is managerial prerogative). Therefore, I find that the Council did not have an obligation to arbitrate an issue which is non-arbitrable and, consequently, committed no unfair practice by refusing to take the grievance to that level.

In Charging Party's amendment, he appears to suggest that his earlier criticisms of the Council's leadership may have influenced its decision to reject his request to arbitrate the "credentials" grievance. Charging Party raises no facts to support a nexus between his critical comments of "several years ago" and the Council's decision not to arbitrate the claim. Moreover, I note that it was not the Council's leadership that made the final determination whether to process the grievance to arbitration; it was the full membership. In any event, the Council cannot be found to have violated the Act by refusing to arbitrate clearly non-arbitrable issue -- one not involving a term and condition of employment.

To the extent that Dusenberry may be alleging that the Council separately violated the Act when a former union officer threatened him, and a union vice-president improperly influenced a grievance committee vote, neither claim states a specific date. The Commission will not assume that a charge is timely. Passaic Cty Voc/Tech. Maint. and Cust. Assn. (S. Moore), D.U.P. No. 2001-11, 27 NJPER 58, 63 (¶32027 2000). N.J.S.A. 34:13A-5.4(c) precludes the Commission from issuing a Complaint where an unfair practice charge

has not been filed within six months of the occurrence of any unfair practice, unless the aggrieved person was prevented from filing the charge. See North Warren Bd. of Ed., D.U.P. No. 78-7, 4 NJPER 55 (¶4026 1977). The amended charge does not allege that either of these alleged events occurred within the six-month limitation; thus, on its face, these allegations are untimely.

Based on all the foregoing, the Commission's complaint issuance standard has not been met and I decline to issue a complaint on these allegations. N.J.A.C. 19:14-2.3.

ORDER

The charge and amended charge are dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

Stuart Reichman, Director

DATED: July 25, 2001
Trenton, New Jersey