

D.U.P. NO. 95-36

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

In the Matter of

TOWNSHIP OF WILLINGBORO AND
FOP LODGE 38,

Respondents,

-and-

Docket No. CI-95-30

WILLIAM HENDRICKS, SR.,

Charging Party.

SYNOPSIS

The Director of Unfair Practices refuses to issue a Complaint and Notice of Hearing on a charge alleging that a public employer unilaterally eliminated a term and condition of employment -- an extended light duty assignment. It also alleges that the majority representative violated the duty of fair representation by promising to process a grievance and failing to do so.

The Director determined that an individual cannot negotiate over unit work claims, that no term and condition of employment was eliminated and that the majority representative did not violate the duty of fair representation, despite its failure to process a grievance.

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Appearances:

For the Respondent - Township
Kearns, Vassallo, Guest & Kearns, attorneys
(William John Kearns, Jr., of counsel)

For the Respondent - FOP Lodge 38
Frederick W. Hardt, attorney

For the Charging Party
Zita & Gusciora, attorneys
(W. Reed Gusciora, of counsel)

REFUSAL TO ISSUE COMPLAINT

On December 12, 1994, William Hendricks, Sr. filed an unfair practice charge against his public employer, the Township of Willingboro, and his majority representative, FOP Lodge 38. The charge alleges that the Township "unilaterally changed terms and conditions" of the light-duty employment "policy" without negotiations. Specifically, Hendricks alleges that he was forced to take unpaid medical leave from December 10, 1993 to September 19, 1994 because the Township refused to assign him light duty upon his return from sick leave. The Township's actions allegedly violate

subsections 5.4(a)(1), (2), (3), (4), (5), (6) and (7)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13a-1 et seq. ("Act").

The charge also alleges that the FOP violated the duty of fair representation by failing to process a grievance about light duty on his behalf despite its assurances that one was filed and his rights were being protected. The FOP's omission allegedly violates 5.4(b)(1), (2), (3), (4) and (5)^{2/} of the Act.

1/ These subsections 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. (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. (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 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 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."

On March 13, 1995, the respondents filed separate letters, each denying it engaged in any unfair practice.

On May 2, 1995, Hendricks filed an additional statement of position.

The Township agrees that it has occasionally and temporarily assigned clerical duties to police officers and supervisory officers when their physical condition did not permit their assignment to regular duties.

The Township asserts that in 1993, clerical employees, including those working in the police department, formed a negotiations unit represented by AFSCME Council 71. AFSCME and the Township negotiated a collective agreement covering the period January 1, 1993 - December 31, 1996. In response to a Township request on November 9, 1993, its labor counsel advised the Township that the assignment of police officers to clerical functions, in light of its relationship with AFSCME, would be an impermissible transfer of unit work.

By that date, Hendricks had used almost all his sick leave benefit and was required to undergo a complete medical examination before returning to duty. Hendricks purportedly refused and asked to be assigned "police records" duty. Hendricks asserts that he was employed in a "records" (i.e., light duty) positions before taking sick leave and that he was informed in fall 1993 that the police position was abolished and the work was assigned to the clerical unit.

According to the Township, the FOP attorney expressed concern over the Township's failure to assign Hendricks a light duty post. The FOP's concerns were for Hendricks specifically and for the negotiations units, generally (the rank-and-file unit and supervisory police units). Discussions among the Township labor counsel, Township manager and FOP counsel resulted in an offer by the Township that Hendricks apply for disability retirement and that it would not oppose his application. It further offered to employ Hendricks in an AFSCME unit title at the top of negotiated wage scale and his duties would encompass supervision and maintenance of police records.

Hendricks declined the offer, went on unpaid leave, returned to duty on September 19, 1994; and shortly thereafter retired. On February 5, 1994, Hendricks filed a complaint with the EEOC, alleging a violation of the Americans with Disabilities Act of 1990. The complaint is pending.

The Township and FOP assert, and our records confirm, that on December 30, 1993, the FOP filed an unfair practice charge (docket no. CO-94-206), alleging that the Township unilaterally changed terms and conditions of employment--a past practice--providing for light duty assignments. In resolution of the charge, the parties agreed to discuss the impact of the decision on FOP unit employees.

The Township and FOP assert that they discussed the matter in August 1994. The parties agreed to various terms in a document

called "Limited Duty Eligibility." One term provided that no officer could be assigned to "limited duty" unless the treating physician certified that the officer could return to full duty within six calendar weeks. Another term limited the benefit to no more than six calendar weeks.

The respondents assert that Hendricks would not have qualified for "Limited Duty Eligibility" because he could not provide certification that he could return to full duty within six calendar weeks.

N.J.S.A. 34:13A-5.3 entitles a majority representative to negotiate on behalf of unit employees over mandatorily negotiable terms and conditions of employment. Preservation of unit work is mandatorily negotiable. Bergen Cty., P.E.R.C. No. 92-17, 17 NJPER 412 (¶22197 1991). However, limited duty proposals and contract clauses are neither mandatorily negotiable nor permissively negotiable. City of Camden, P.E.R.C. No. 83-128, 9 NJPER 220 (¶14104 1983). Contractual grievances demanding light duty are not arbitrable. Tp. of Montgomery, P.E.R.C. No. 89-22, 14 NJPER 574 (¶19242 1988).

The FOP and not Hendricks has a right to negotiate over unit work claims. The facts and allegations indicate that the Township unilaterally narrowed the circumstances in which police officers could be assigned to light duty. The decision was within its managerial prerogative. Accordingly, I find that the Township had no duty to maintain any alleged "past practice" of offering

extended light duty and did not, as a matter of law, unilaterally and unlawfully change a term and condition of employment.

Accordingly, I dismiss the allegation that the Township violated 5.4(a)(5) of the Act.

No facts suggest that the Township's actions were in retaliation for Hendricks' exercise of rights guaranteed him by the Act. Accordingly, I also dismiss allegations that the Township violated 5.4(a)(3), (4) and (1) of the Act.

Finally, no facts suggest that the Township conspired with the FOP to harm Hendricks by offering to employ him as a civilian at the top of the AFSCME unit's wage scale. Accordingly, I dismiss the charge against the Township of Willingboro.^{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 FOP authorized its counsel to negotiate a resolution of Hendricks' employment problem and to file an unfair practice charge to remedy the light duty issue as it applied to all unit(s) employees. The charging party does not dispute that these efforts were made or that they resulted in an offer of employment and an agreement on "light duty." Considering the scope of negotiability

^{3/} No facts suggest a violation of 5.4(a)(6) and (7) of the Act.

and unit work issues--which would concern any majority representative--I conclude that the FOP appears to have made a good faith effort to address Hendricks' and the units' concerns.

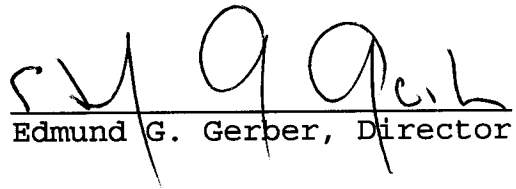
The charging party nevertheless alleges that the FOP assured him that a grievance was filed on his behalf and that it violated the duty of fair representation by failing to do so. Under some circumstances, such an omission justifies the issuance of a complaint.

But this case illustrates that a majority representative may avail itself of more than the contract grievance mechanism to raise issues concerning (or allegedly concerning) terms and conditions of employment. The FOP, through counsel, commenced informal discussions with the public employer to resolve the light duty issue as it applied to Hendricks. It also raised the issue formally (by filing the unfair practice charge) as it applied to the negotiations units. The parties eventually reached accommodations of both managerial and employee concerns. Although Hendricks was not satisfied by the Township's offer of employment and inferentially, the FOP's agreement with the Township, no facts suggest that the FOP entered an agreement for arbitrary, discriminatory or bad faith reasons. The duty of fair representation does not require a guarantee of complete satisfaction to all unit employees. The majority representative may consider all the circumstances, including negotiability and unit work issues, in discharging its responsibilities. Considering all these facts, I

decline to issue a Complaint and Notice of Hearing against the FOP.^{4/}

The charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES


Edmund G. Gerber, Director

DATED: June 19, 1995
Trenton, New Jersey

^{4/} No facts suggest that the FOP may have violated subsections 5.4(b)(2), (3), (4) or (5) of the Act.