D.U.P. No. 2009-7

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

In the Matter of

PENNSAUKEN BOARD OF EDUCATION,

Respondent,

-and-

AFSCME COUNCIL 71, LOCAL 2300, Docket No. CI-2009-019

Respondent,

-and-

LESTER CREAM,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed against a majority representative alleging that the majority representative breached its duty of fair representation when it elected not to pursue a grievance to arbitration. The Director noted that a majority representative does not have a duty to process every grievance to arbitration and there was no allegation that the union's conduct was arbitrary, discriminatory or in bad faith.

The Director also dismisses an unfair practice filed by an individual against his employer. The Director found no facts to support any violation of the Act and therefore, the Commission's complaint issuance standards were not met.

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Appearances:

For the Respondent - Board,
Quinlan, Dunne & McConnell, LLC
(Karl N. McConnell, of counsel)

For the Respondent - AFSCME,
John Hemmy, Associate Director

For the Charging Party,
Lester Cream, pro se

REFUSAL TO ISSUE COMPLAINT

On November 18 and 27, 2008, Lester Cream (Cream) filed an unfair practice charge and amended charge against his employer, the Pennsauken Board of Education (Board) and his majority representative, the American Federation of State, County and Municipal Employees, AFL-CIO, District Council 71 (AFSCME or Council 71). The charge alleges that the Board violated 5.4a(1),

(2), (3), (4), (5), (6) and (7)[1/] of the New Jersey Employee-Employer Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). The gravamen of the charge is that nine daytime custodians all receive the same salaries for performing the same job duties, except for Cream. The charge also alleges that AFSCME allegedly violated 5.4b(1), (2), (3), (4) and (5)[2/] of the Act by failing

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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; (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 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; (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."

to advance a grievance to arbitration, following an October 16, 2008 denial at a step 3 hearing.

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

Lester Cream is employed by the Pennsauken Board of Education as a custodian and is included in a negotiations unit of regularly employed custodial and maintenance employees represented by AFSCME Council 71. In his charge, Cream asserts that AFSCME filed a grievance on his behalf on May 7, 2008. It was moved through the grievance procedure by AFSCME, and was continuously denied through step 3, which issued on October 16, 2008. Steps 4 and 5 permit advisory arbitration. Only the "union" may advance a grievance from step 3 to 4. Cream's only allegation against AFSCME is that it did not pursue his grievance to arbitration, which he believes violated its duty of fair representation, conduct prohibited by section 5.4b(1) of the Act.[3/]

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3/ No facts were offered suggesting that section 5.4b(2), (3), (4) or (5) of the Act was violated. Accordingly, those (continued...)

Section 5.3 of the Act empowers an employee representative 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 set forth 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).

AFSCME asserts that no article of or appendix to the collective negotiations agreement was violated and it lawfully elected not to file for arbitration. Cream's charge alleges only that AFSCME failed to file for arbitration; he does not allege any fact(s) indicating that its decision was arbitrary, discriminatory or in bad faith. Vaca v. Sipes. Accordingly, I dismiss the charge filed against AFSCME.

Cream's charge against the Board alleges that the nine daytime custodians perform the same duties in each of the Board's

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3/ (...continued)
allegations are dismissed.

nine elementary schools, and eight of the custodians, except Cream, are paid as "CS-custodians" on the salary guide. Cream is paid a lesser salary on a regular custodial salary guide. Cream's charge does not allege a date on which the Board engaged in any unfair practice; does not allege that the Board's actions interfered with or restrained his exercise of rights guaranteed under the Act; does not allege that he engaged in protected activity; does not allege that he was discriminated against because he signed or filed an affidavit, petition or complaint or gave information or testimony under the Act; does not allege that the Board's actions were in retaliation for his exercise of protected conduct under the Act, and he has not identified any Commission rule that has been violated.

Accordingly, I find that Cream has not alleged facts indicating that the Board violated 5.4a(1), (3), (4) and (7) of the Act. An individual employee does not have legal standing to assert a 5.4a(2), (5) or (6) charge because the employer's duty under those subsections run only to the majority representative.

AFSCME and the Board concur that Cream was initially placed on a negotiated salary guide in the early 1990's. Until that time, the respondents agreed upon a classification entitled, "B maintenance." The Board and AFSCME discontinued the classification in negotiations and employees in the classification were absorbed into the custodial pay guide. At that time, the "B maintenance" employees were paid much higher

salaries than the custodians and AFSCME would not agree to reduce those salaries in order to make them consistent with the then-current custodial pay scale. The respondents agreed to "grandfather" any employee classified as "B maintenance" at their higher pay and designated them, "CS-custodians." The only employees on the "CS" salary guide are those who held a "B maintenance" classification at the time that contract was negotiated. Cream was not an employee at that time and never held the "B maintenance" classification.

Cream complains that the negotiated agreement to grandfather the "B maintenance" employees at a higher pay, though now performing essentially the same custodial work as he, is unfair. This allegation does not constitute an unfair practice within the meaning of the Act.

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

Arnold H. Zudick, Director

DATED: February 19, 2009
Trenton, New Jersey

**This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3.**

**Any appeal is due by March 4, 2009.**