D.U.P. NO. 2014-8

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

In the Matter of

WILLINGBORO BOARD OF EDUCATION,

Public Employer,

-and- Docket No. CI-2013-051

WILLINGBORO EDUCATION ASSOCIATION,

Employee Organization,

-and-

ANTOINETTE MASCIO,

Charging Party.

SYNOPSIS

Antoinette Mascio filed an unfair practice charge against the Willingboro Board of Education (Board) and the Willingboro Education Association (Association) alleging that the Board and Association unlawfully refused to allow her to arbitrate a grievance challenging the withholding of her increment. Mascio alleged the Board violated 5.4a(1) and 5.4a(5) of the New Jersey Public Employer-Employee Relations Act, and the Association violated 5.4b(1) of the Act. The Director of Unfair Practices found that Mascio failed to allege any facts showing that the Association's decision not to arbitrate the grievance was arbitrary, discriminatory, or in bad faith. The Director also found that pursuant to D'Arrigo v. NJ State Bd. of Mediation, 119 N.J. 74 (1990), absent clear language in a collective bargaining agreement conferring the right to invoke arbitration to an individual employee, the employee organization has the exclusive right to invoke the arbitration provisions of the contract.

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Appearances:

For the Public Employer
Long Marmero and Associates, LLP, attorneys
(Kathleen M. Bonczk, of counsel)

For the Employee Organization
Selikoff and Cohen, attorneys
(Steven R. Cohen, of counsel)

For the Charging Party
Geoffrey B. Gompers and Associates, attorneys
(Geoffrey B. Gompers, of counsel)

**REFUSAL TO ISSUE COMPLAINT**

On May 9, 2013, Antoinette Mascio (Mascio) filed an unfair practice charge against the Willingboro Board of Education (Board) and the Willingboro Education Association (Association). The charge alleges that the Board and Association unlawfully

refuse to allow Mascio to arbitrate a grievance challenging the withholding of her increment.

The Board's conduct allegedly violates 5.4a(1) and (5)[1/] of the New Jersey Public Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act), and the Association's conduct allegedly violates 5.4b(1)[2/] of the Act[3/]. As a remedy, Mascio seeks a determination that her increment was withheld for predominantly disciplinary reasons; an order that Mascio be allowed to arbitrate her grievance with her own attorney; an order that the Association pay Mascio's attorney's fees, and that the Board and Association equally share the cost of arbitration.

On November 19, 2013, I issued a letter, tentatively dismissing the charge and providing an opportunity for responses. On December 2, 2013, Counsel for Mascio filed a letter urging

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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. (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."

2/ 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."

3/ Mascio also alleges that the Association violated 5.4a(5) of the Act. However, the Association is not a public employer within the meaning of the act and thus cannot violate this section.

that N.J.S.A. 34:13A-26 and 29 mandate that Mascio, a unit employee, is entitled to arbitrate the matter of her increment withholding.

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. Where the complaint issuance standard has not been met, the charge will be dismissed. N.J.A.C. 19:14-2.3. I find the following facts.

Mascio is a tenured school psychologist employed by the Board. The Association is the exclusive majority representative of a collective negotiations unit consisting of several Board titles, including school psychologist. The Board and Association are currently operating under a collective negotiations agreement (Agreement) that expires on June 30, 2014.

On January 23, 2013, Mascio, through her private attorney and without the Association's authorization, filed a demand for arbitration with the American Arbitration Association (AAA) challenging the Board's decision to withhold her increment. Both the Board and Association object to Mascio's demand for arbitration, asserting that the right to invoke arbitration rests solely with the Association.

On February 13, 2013, Mascio wrote a letter to the executive board members of the Association requesting permission to

arbitrate her grievance with her private attorney. By letter dated March 13, 2013, the Association denied Mascio's request based on the following four factors:

> 1) Mascio's increments were withheld for predominately evaluative reasons and not disciplinary reasons, and thus the grievance would not be subject to arbitration.
>
> 2) An investigation by Uniserv revealed that the Board had valid reasons to withhold Mascio's increment.
>
> 3) The request to arbitrate the grievance was untimely.
>
> 4) Nothing in the collective negotiations agreement between the Board and Association gives an individual unit member the right to pursue a grievance to arbitration.

Also on March 13, 2013, the Association issued a letter to the AAA advising that it would not authorize Mascio to pursue her grievance to arbitration. On May 14, 2013, AAA notified the parties that because the Board and Association agreed that Mascio cannot pursue her claim individually, it will not proceed with the administration of the case.

The charge alleges that the Association and Board have unlawfully interfered with Mascio's right to pursue her grievance to arbitration. The Board and the Association each filed responses denying that they engaged in unfair practices. The Association specifically argues that its collective negotiations agreement with the Board does not permit individual employees to proceed to binding arbitration without the Association's

authorization. The Board asserts that it is not obligated to process all employee grievances to arbitration; it is obliged to process only those that the majority representative pursues according to the terms of the collective negotiations agreement between the parties.

ANALYSIS

Section 5.3 of the Act empowers a union to negotiate on behalf of all unit employees and to represent all unit employees in administering the collective negotiations agreement. With that power comes the duty to represent all unit employees fairly in negotiations and contract administration. Section 5.3 specifically links the power to negotiate and administer with the duty to represent all unit employees "without discrimination and without regard to employee organization membership." 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 towards a member of the negotiations unit is arbitrary, discriminatory or in bad faith. Id. at 191. Those standards have been adopted in the New Jersey 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) and

Carteret Ed. Assn. (Radwan), P.E.R.C. No. 97-146, 23 NJPER 390, 391 (¶28177 1997).

Mascio has not alleged any facts, other than the mere refusal to advance the matter to arbitration, showing that the Association acted in violation of Vaca standards. See also, OPEIU Loc. 153 (Thomas Johnstone), P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983). A union is allowed a "wide range of reasonableness in servicing its members." Ford Motor Company v. Huffman, 345 U.S. 330, 337-338, 73 S.Ct. 681, 97 L.Ed. 1048 (1953). The Commission has repeatedly held that an employee organization is not obligated to pursue every grievance to arbitration. Rather, it must evaluate requests for arbitration on the merits and decide in good faith whether it believes the employee's claim has merit. See D'Arrigo v. New Jersey State Bd. of Mediation, 119 N.J. 74 (1990); Carteret Ed. Ass'n.(Radwan); Camden Cty. College (Porreca), P.E.R.C. No. 88-28, 13 NJPER 755 (¶18285 1987); Trenton Bd. of Ed (Salter), P.E.R.C. No. 86-146, 12 NJPER 528 (¶17198 1986). The Association's March 13, 2013 letter to Mascio, setting forth several reasons for refusing to authorize Mascio to process the grievance to arbitration, including its own investigation on the merits, indicates that organization's compliance with Vaca standards. Mascio has not set forth any facts contesting the proffered reasons for its

refusal nor any circumstances indicating that the Association's decision is arbitrary, discriminatory, or in bad faith.

Mascio contends that she has the right to pursue the matter to arbitration individually, pursuant to N.J.S.A. 34:13A-26[4/] and Randolph Tp. Bd. of Ed. v. Randolph Ed. Ass'n, 306 N.J. Super. 207, (App. Div. 1997), certif. den. 153 N.J. 214 (1998).

Reliance on Randolph is misplaced. In Randolph Tp. Bd. of Ed., the Randolph Board of Education (RBE) and Randolph Education Association (REA) were parties to a collective negotiations agreement specifying that "binding arbitration does not apply to the withholding of salary increments." The REA filed for arbitration in order to challenge the RBE's decision to withhold a salary increment of an administrative secretary. Id. at 208-209. The Court held that despite the parties having negotiated the issue of arbitrability of salary increments, the negotiated term of the agreement could not deprive employees of their rights to binding arbitration under N.J.S.A. 34:13A-29.[5/] Id. at 213.

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4/ N.J.S.A. 34:13A-26 provides: "Disputes involving the withholding of an employee's increment by an employer for predominately disciplinary reasons shall be subject to the grievance procedures established pursuant to law and shall be subject to the provisions of section 8 of this act."

5/ N.J.S.A. 34:13A-29 provides: a) The grievance procedures that employers covered by this act are required to negotiate pursuant to section 7 of P.L.1968,c.303 (C.34:13A-5.3) shall be deemed to require binding arbitration as the terminal step with respect to disputes concerning imposition of reprimands and discipline as that term is defined in this

(continued...)

Unlike the facts in Randolph Tp. Bd. of Ed., the parties' agreement in this case does not prohibit binding arbitration of increment withholdings. The issue in this case is whether a unit employee has a right to pursue a grievance to arbitration without the majority representative's authorization.

Our Supreme Court in D'Arrigo v. NJ State Bd. of Mediation, 119 NJ 74, 75-76 (1990) held that, "absent clear language in the [collective negotiations] agreement conferring [the right to invoke the arbitration machinery of the contract], the employee organization has the exclusive right to invoke the arbitration provisions of the contract." The Court differentiated the right of an individual employee to initiate a grievance from the right of that employee to invoke binding arbitration, holding that the employee organization's exclusive right to invoke the arbitration provisions of the contract carries with it a duty of fair representation to the employee.

In D'Arrigo, an employee argued that the collective negotiations agreement governing the terms and conditions of his employment entitled him to binding arbitration for a grievance challenging his termination. He relied on the "discharge and discipline" provision in the agreement which stated that any

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5/ (...continued)
act. b) In any grievance procedure negotiated pursuant to this act, the burden of proof shall be on the employer covered by this act seeking to impose discipline as that term is defined in this act.

discharge "shall be subject to grievance and arbitration as set forth in Article VII..." Id. at 80. Article VII part one set forth the procedures whereby "any employee covered by this Agreement" is entitled to resolve alleged grievances. Article VII, subsection three provided:

> Nothing contained in this Article shall limit the right of the employee to process his or her own grievance provided, however, the Union shall be notified by the Authority of all such situations and shall have the right to be present during the same, and, further provided that any agreement reached with any such employee shall not violate the Agreement. [119 N.J. 80]

The Court found that the quoted portion did not "expressly and unambiguously" provide for an employee to compel arbitration relying in part on the provision of our Act which specifies that representatives selected by public employees are their exclusive representative for collective negotiations concerning terms and conditions of employment. N.J.S.A. 34:13A-5.3.

Like the provision in D'Arrigo, the language in Article V ("Grievance Procedure") of the parties' agreement also allows an individual employee to file a grievance. A grievance may be initiated by "an aggrieved employee," a group of aggrieved employees, or the Association. Article VC6 provides: "If the grievant is not satisfied with the Superintendent's decision, or if the Superintendent has made no response within the time frame

provided above, then the grievance may, at the election of either party hereto, be submitted to final and binding arbitration."

This provision does not specify that a unit employee has the right individually to proceed to binding arbitration. In the absence of "clear language" in the grievance procedure conferring that right to a unit employee, I find, in keeping with D'Arrigo, that the right belongs exclusively to the Association.

Mascio argues that the term "party" in Article VC6 can only mean either party to the *grievance*. I disagree. The parties to the agreement are all set forth in its Preamble. The parties are the Board of Education of Willingboro Township and the Willingboro Education Association. When Article V is read in its entirety the term "party" can only be fairly read to mean the Board or the Association.

The first level of the parties' grievance procedure provides for a meeting of the aggrieved employee and either the principal or immediate supervisor involved. The second level permits a dissatisfied grievant to present the grievance to the Superintendent, who in turn provides a written response. If the grievant is not satisfied with the Superintendent's response, then at the third level the grievance may, "at the election of either party hereto," be submitted to final and binding arbitration "conducted under the rules of the American Arbitration Association." The decision of the arbitrator "shall

be final and binding upon the parties hereto..." Furthermore, the cost of the arbitration "shall be divided equally between the parties."

The Association and Board have also incorporated into their contract by reference the AAA rules. These rules make clear that arbitration may be initiated by either "party" to a collective negotiations agreement. *See* AAA Labor Arbitration Rules, R.1, R.5, *available at* http://www.adr.org. More importantly, AAA rules do not allow individual employees to initiate arbitration, as evidenced by AAA's refusal to administer Mascio's case.

The Court in D'Arrigo wrote of "sound reasons" for distinguishing between the right of an individual employee to initiate a grievance and the right of an employee to invoke the binding arbitration machinery. Those reasons apply to this case as well. The earlier steps in a grievance procedure are less formal and more flexible, thus making it easier to resolve minor disputes without formal involvement from the majority representative. It would be too disruptive of labor relations to allow arbitration at an individual employee's sole election. Absent clear language in the agreement conferring such a right on an employee, an employee organization has the exclusive right to invoke the arbitration provisions of the contract. D'Arrigo, 119 N.J. at 75-76, 82. The applicable grievance procedure between the Board and Association does not "clearly empower an employee

to go forward to arbitration on his own initiative." Id., 119 N.J. at 81.

Finally, increment withholdings that are for predominately disciplinary reasons are reviewed through binding arbitration. N.J.S.A. 34:13A-26. If the reason for a withholding is related to the evaluation of a teaching staff member's teaching performance, any appeal must be filed with the Commissioner of Education. N.J.S.A. 34:13A-27(d). Mascio insists that as part of this unfair practice charge, we make a determination that her withholding was for predominately disciplinary reasons so that she may proceed to arbitration. However, disputes over the nature of a withholding have always been reviewed through a scope of negotiations petition, not an unfair practice charge. See Morris Hills Regional District Board of Education, P.E.R.C. No. 92-69, 18 NJPER 59 (¶23025 1991); Marlboro Township Board of Education, P.E.R.C. No. 2010-5, 35 NJPER 284 (¶98 2009); Summit Board of Education, P.E.R.C. No. 2013-57, 39 NJPER 311 (¶107 2013). Therefore, a determination regarding the withholding will not be made, nor is it necessary to do so.[6/] The Association met its obligation by evidently investigating the nature of Mascio's grievance, and then concluding that her grievance lacked merit.

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6/ Even if it was determined that Mascio's increment was withheld for disciplinary reasons, she still would not have the 'right to proceed to arbitration without the Association's authorization.

Accordingly, the charge does not set forth facts justifying the issuance of a complaint against the Association, or the Board[7/], and is therefore dismissed.

Gayl R. Mazuco
Director of Unfair Practices

DATED: December 26, 2013
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 January 9, 2014.**

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7/ An individual employee may pursue a claim of an a(5) violation only where that individual has also asserted a viable claim of the breach of the duty of fair representation (section 5.4b(1)) against the majority representative. Jersey City College, D.U.P. 97-18, 23 NJPER 1 (¶28001 1996).