D.U.P. NO. 98-36

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

In the Matters of

DENNIS TOWNSHIP EDUCATION ASSOCIATION,
NEW JERSEY EDUCATION ASSOCIATION,

Respondent,

-and- Docket No. CI-98-57

SHARON J. COX,

Charging Party.

DENNIS TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and- Docket No. CI-98-58

SHARON J. COX,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses two charges by Sharon Cox. CI-98-57 alleges that the NJEA violated the Act by failing to take her case to arbitration and refusing to provide her with a lawyer. CI-98-58 alleges that the Dennis Township Board of Education violated the Act by discriminating against her because she lives outside of the district and by not treating her the same as other bus drivers.

The Director finds that she provides no facts to support a finding that the NJEA breached its duty of fair representation towards her. The Director notes that she does not have an absolute right to have her grievance arbitrated and that the union is entitled to a wide range of reasonableness in servicing its members. Further, the subject matter of Cox' grievance involves a managerial prerogative. Finally, the Director finds that Cox' claim that she was treated differently because she lives outside the district does not fall within the purview of the Act.

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Appearances:

For the Respondent Associations,
Selikoff & Cohen, attorneys
(Steven R. Cohen, of counsel)

For the Respondent Board,
Cassetta, Taylor, Whalen & Hybbeneth
(Bruce Taylor, consultant)

For the Charging Party,
Sharon Cox, pro se

REFUSAL TO ISSUE COMPLAINT

On January 20, 1998, Sharon J. Cox filed unfair practice charges against the New Jersey Education Association, CI-98-57, and the Dennis Township Board of Education, CI-98-58, with the Public

Employment Relations Commission. Cox alleges that the NJEA violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4b(1), (2), (3), (4) and (5)[1/] by failing to take her grievance to arbitration and refusing to provide her with a lawyer. Cox alleges that the Board violated 5.4a(1), (3), (4), (5) and (7) of the Act[2/] by discriminating against her because she lives outside of the district and by not treating her the same as other bus drivers.

1/ 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."

2/ 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. (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. (7) Violating any of the rules and regulations established by the commission."

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, I find that the Complaint issuance standard has not been met.

Cox is employed by the Board as a bus driver. She lives outside of the district. The Board and the Association are parties to a collective negotiations agreement which contains a grievance procedure culminating in binding arbitration. On September 18, 1997, the Board informed Cox that effective September 22, 1997, she would no longer be permitted to take her school bus home due to the excessive mileage being added to the bus.

The Association thereafter filed a grievance on Cox's behalf. The Board denied the grievance, clarifying that while it had initially allowed Cox to take her bus home despite the fact she lived outside of the district, it did so based on the assumption that this would eliminate excessive mileage. However, according to the Board, this did not turn out to be the case and thus it incurred additional costs. While the Board allowed others to take home their buses, these bus drivers resided within the district and thus they did not incur the excessive mileage and costs which Cox did.

The Association moved Cox's grievance to Level II. The Board again denied the grievance.

The Association then moved Cox's grievance to Level III. The Board again denied the grievance. It noted that the matter at issue -- the Board's denial of Cox's right to take home a Board-owned vehicle -- is not a negotiable, grievable, or arbitrable matter under PERC law. See In re Morris County Parks Commission and Morris Council No. 6, App. Div. 10 NJPER 103 (1984), cert. den., 97 N.J. 672 (1984); Egg Harbor Tp. Bd. of Ed., D.U.P. No. 98-5, 23 NJPER 473 (¶28221 1997).

The Association declined to move Cox's grievance to arbitration, based upon its assessment that it could not be won because it involved a managerial prerogative, and because it was not in the best interests of its unit members as a whole.

ANALYSIS

N.J.S.A. 34:13A-5.3 provides in part:

> A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership.

In OPEIU, Local 153, P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983), the Commission discussed the appropriate standards for reviewing a union's conduct in investigating, presenting and processing grievances:

> In the specific context of a challenge to a union's representation in processing a grievance, the United States Supreme Court has held: "A breach of the statutory duty of fair representation occurs only

> when a union's conduct towards a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Vaca v. Sipes, 386 U.S. 171, 190 (1967) (Vaca). The courts and this Commission have consistently embraced the standards of Vaca in adjudicating such unfair representation claims. See, e.g., Saginario v. Attorney General, 87 N.J. 480 (1981); In re Board of Chosen Freeholders of Middlesex County, P.E.R.C. No. 81-62, 6 NJPER 555 (¶11282 1980), aff'd App. Div. Docket No. A-1455-80 (April 1, 1982), pet. for certif. den. (6/16/82) ; New Jersey Turnpike Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979); In re AFSCME Council No. 1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978).
>
> [10 NJPER 13]

The U.S. Supreme Court has also held that to establish a claim of a breach of the duty of fair representation, such claim "...carried with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." Amalgamated Assn. of Street, Electric, Railway and Motor Coach Employees of American v. Lockridge, 403 U.S. 274, 301, 77 LRRM 2501, 2512 (1971).

Here, it appears that Cox does not allege any facts demonstrating discrimination, bad faith or arbitrary conduct against her by the Respondents. An employee organization fulfills its statutory obligation to represent employees when it evaluates a grievance on its merits and makes a judgment on whether arbitrating the issue is in the best interest of its members as a whole. That is what the Respondents did here. Cox does not have an absolute right to have her grievance arbitrated. Council of New Jersey State College Locals, D.U.P. No. 95-24, 21 NJPER 60 (¶26041 1995); New

Jersey Transit Bus Opers. and ATU Division 819, D.U.P. No. 95-23, 21 NJPER 54 (¶26038 1995); Sports Arena Employees, Local 137, D.U.P. No. 95-18, 21 NJPER 43 (¶26027 1994); ATU, Division 821, P.E.R.C. No. 91-26, 16 NJPER 517 (¶21226 1990). Nor do the Respondents have to provide her with an attorney. State of New Jersey (Vineland Developmental Center), D.U.P. No. 91-8, 16 NJPER 524 (¶21230 1990). Employee organizations are entitled to a wide range of reasonableness in determining how to best service their members. New Jersey Transit; Jersey City Bd. of Ed., D.U.P. No. 93-7, 18 NJPER 455 (¶23206 1992).

In any event, the subject matter of Cox's grievance -- the Board's determination to not allow an employee to take a Board-owned vehicle home -- involves a managerial prerogative. See Morris County Parks Commission; Egg Harbor Tp. Bd. of Ed. Thus, it is not arbitrable. See State of N.J. and AFSCME, D.U.P. No. 93-48, 19 NJPER 395 (¶24176 1993).

In her March 11, 1998 response to my February 27, 1998 preliminary findings, Cox takes issue with the Respondents' refusal to request compensation for the loss of her bus for personal use. However, as stated previously, a wide range of reasonableness must be allowed a bargaining representative in servicing its members. See PBA Loc. 277 (SOA) and Otto, D.U.P. No. 98-31, 24 NJPER 203 (¶29095 1998); N.J. Transit. Accordingly, absent clear evidence of bad faith, fraud or invidious discrimination, an employee organization may make compromises which adversely affect some unit

members, while resulting in greater benefits for other members. See PBA Loc. 277 (SOA); Jersey City, P.E.R.C. No. 87-56, 12 NJPER 853 (¶17329 1986); AFT Local 481, P.E.R.C. No. 87-16, 12 NJPER 734 (¶17274 1986), adopting H.E. No. 87-7, 12 NJPER 628 (¶17237 1986); Bridgewater-Raritan Ed. Ass'n, D.U.P. No. 86-7, 12 NJPER 239 (¶17100 1986).

Here there is no evidence of bad faith, fraud or invidious discrimination. Rather, it appears that the Respondents made a good faith decision that the determination to allow a school bus to be taken home is a managerial prerogative and a grievance on that issue would not be successful, and it would not be in the best interests of its unit members as a whole to pursue Cox's case further.

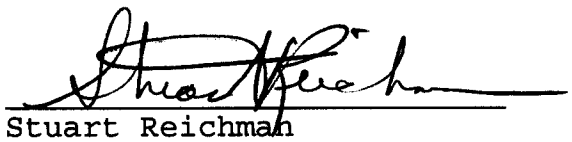
Similarly, it appears that Cox's charge against the Board fails to set forth a violation of the Act. Cox's claim that she was discriminated against and treated differently because she lives outside of the district does not fall within the purview of the Act. Moreover, as stated above, it is the Board's managerial prerogative to determine whether to allow an employee to take an employer-owned vehicle home. Morris County Parks Commission; Egg Harbor Tp.

Finally, I have reviewed the remainder of Cox's March 11, 1998 response to my preliminary findings and am not persuaded that Cox sets forth any unfair practice under the Act.

Therefore, based on the above, I find the Commission's complaint issuance standard has not been met and I decline to issue

a complaint on the allegations of CI-98-57 and CI-98-58. N.J.A.C. 19:14.2.3.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Stuart Reichman
Director of Unfair Practices

DATED: April 30, 1998
Trenton, New Jersey