

D.U.P. NO. 91-13

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

In the Matter of

ATU DIVISION 824,

Respondent,

-and-

Docket No. CI-90-51

ALAN McDEDE,

Charging Party.

SYNOPSIS

The Director of Unfair Practices refuses to issue a complaint on the allegation that Local 824 violated the duty of fair representation by simultaneously filing for third and fourth step grievance hearings.

The Director finds that even if the concurrent filing is procedurally incorrect, there is no breach of the duty of fair representation absent allegations of arbitrary, discriminatory or bad faith conduct.

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Appearances:

For the Public Employer
Balk, Oxfeld, Cohen & Mandell, attorneys
(Arnold S. Cohen, of counsel)

For the Charging Party
Alan McDede, pro se

REFUSAL TO ISSUE COMPLAINT

On February 16, 1990, Alan McDede ("McDede") filed an unfair practice charge with the Public Employment Relations Commission ("Commission") alleging that Amalgamated Transit Union Division 824 ("Local 824") violated subsection 5.4 (a) (2) ^{1/} of the New Jersey Employer-Employee Relations Act ("Act"). McDede alleges that arbitration of his grievance was denied because a Local 824 delegate did not follow proper procedures.

^{1/} This subsection prohibits public employers, their representatives or agents from: "(2) Dominating or interfering with the formation, existence or administration of any employee organization."

N.J.S.A. 34:13A-5.4(c) sets forth in pertinent part that the Commission shall have the power to prevent anyone from engaging in any unfair practice, and that it has the authority to issue a complaint stating the unfair practice charged.^{2/} The Commission has delegated its authority to issue complaints to me and has established a standard upon which an unfair practice complaint may be issued. The standard provides that a complaint shall issue if it appears that the allegations of the charging party, if true, may constitute an unfair practice within the meaning of the Act.^{3/} The Commission's rules provide that I may decline to issue a complaint.^{4/} Based on McDede's allegations, the Commission's complaint issuance standards have not been met. These facts appear.

Local 824 filed a grievance on McDede's behalf contesting a one day suspension and discipline. After the second step grievance hearing, Local 824 representative James Lynch ("Lynch") filed for both a third and fourth step hearing simultaneously. The fourth

^{2/} N.J.S.A. 34:13A-5.4(c) provides: "The commission shall have exclusive power as hereinafter provided to prevent anyone from engaging in any unfair practice.... Whenever it is charged that anyone has engaged or is engaging in any such unfair practice, the commission, or any designated agent thereof, shall have authority to issue and cause to be served upon such party a complaint stating the specific unfair practice charged and including a notice of hearing containing the date and place of hearing before the commission or any designated agent thereof...."

^{3/} N.J.A.C. 19:14-2.1.

^{4/} N.J.A.C. 19:14-2.3.

step of the parties' grievance procedure is binding arbitration. Subsequently, the arbitrator held that Local 824 failed to adhere to the agreement when it simultaneously submitted requests for the step three and step four hearings to the employer. The arbitrator held that Local 824's failure to adhere to the contractual procedures constituted a waiver of its contractual rights and held that the grievance was therefore non-arbitrable.

McDede states that arbitration of his grievance was denied because Lynch simultaneously filed for step three and step four grievance hearings. He alleges that Lynch's failure to follow the contractual grievance procedure constitutes negligence.

Local 824 contends that it filed for arbitration when the employer failed to respond to the step three grievance. It states that it filed the step three grievance on February 8, 1989 and was advised on that day by the employer that the grievance would not be accepted. It then filed a fourth step grievance on the same day (2/8/89). Lynch then refiled both the third and fourth step grievances on March 29, 1989. When the employer refused to accept the step 3 filing, Lynch again filed for arbitration on that same day. Local 824 states that it did not refuse to take McDede's grievance to arbitration. Local 824 also contends that its decision to file the third and fourth steps simultaneously was a good faith effort to move McDede's case quickly through the grievance procedure to arbitration, and was not arbitrary, discriminatory or made in bad faith.

In articulating the standard of a union's duty to fairly represent unit employees, the Commission has looked both to the Act and to compatible private sector case law. N.J.S.A. 34:13A-5.3 provides in part that:

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) ("Middlesex County"); New Jersey Turnpike Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979) ("Local 194"); In re AFSCME Council No. 1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978). [footnote omitted]

We have also stated that 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. Middlesex County; Local 194. All the circumstances of a particular case, however, must be considered before a determination can be made concerning whether a majority representative has acted in bad faith, discriminatorily, or arbitrarily under Vaca standards. [OPEIU Local 153 at 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). Further, the National Labor Relations Board has held that where a majority representative exercises its discretion in good faith, proof of mere negligence, standing alone, does not suffice to prove a breach of the duty of fair representation. Service Employees International Union, Local No. 579, AFL-CIO, 229 NLRB 692, 95 LRRM 1156 (1977); Printing and Graphic Communication, Local No. 4, 249 NLRB No. 23, 104 LRRM 1050 (1980), reversed on other grounds 110 LRRM 2928 (1982).

Although McDede erroneously cites a section of the Act addressing unfair practices committed by employers,^{5/} the substance of his unfair practice charge concerns an alleged breach

^{5/} N.J.S.A. 34:13-5.4 (a)(2)

of the duty of fair representation by Local 824. McDede does not allege that Local 824 refused to take his grievance to arbitration. He has not presented any facts demonstrating that Local 824 acted in an arbitrary, discriminatory or bad faith manner in pursuing his grievance. McDede only alleges that arbitration of his grievance was denied because Local 824 filed for the third and fourth step hearings simultaneously. Even if the concurrent filings were procedurally incorrect, that, without more, does not establish a breach of the duty of fair representation. Rutgers University (Dros-Martinez), P.E.R.C. No. 91-33, 16 NJPER ____ (¶ ____ 1990); Service Employees International Union, Local No. 579, AFL-CIO; Printing and Graphic Communication, Local No. 4. Accordingly, I find that Local 824 did not breach its duty of fair representation.

The Commission's complaint standard has not been met and I decline to issue a complaint. The charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES


Edmund G. Gerber, Director

DATED: November 19, 1990
Trenton, New Jersey