D.U.P. NO. 2002-3

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

In the Matter of

PAPER, ALLIED-INDUSTRIAL, CHEMICAL
& ENERGY WORKERS INTERNATIONAL UNION,
LOCAL 1426,

Respondent,

-and-

Docket Nos. CI-2001-25
CI-2001-26
CI-2001-29
CI-2001-32

JOAN KAGER; DOLORES CROOKER;
DIANE ZICK; LOUISE ZACCAGNINO,

Charging Parties.

SYNOPSIS

The Director of Unfair Practices dismisses unfair practice charges which allege that the Union, PACE, breached its duty of fair representation to Charging Parties, part-time nurse employees of the Middlesex County Improvement Authority when it determined not to process a grievance on behalf of the Charging Parties concerning a reduction in their hourly rate of pay. The part-time nurses' wage rate was reduced from that contained in their individual employment contracts when PACE and the Employer corrected a mutual mistake in calculation of those rates which had been carried into a successor collective negotiations agreement.

The Director finds that PACE did not act discriminatorily or detrimentally toward the Charging Parties as compared to other unit employees when it determined not to go forward with a grievance, and that there is no allegation that PACE prevented the Charging Parties from subsequently filing their own grievance. The Director also comfirms that in a conflict between the terms of an individual employment contract and a collective negotiations agreement, the conflict is to be resolved in favor of the negotiations agreement. Dr. Leo Troy, et al. v. Rutgers, the State University, _ NJ __ (A-17-00, June 20, 2001).

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Charging Parties.

Appearances:

For the Respondent,
Lynch Martin Kroll, attorneys
(Raymond G. Heineman, of counsel)

For the Charging Parties,
Joan Kager, pro se
Dolores Crooker, pro se
Diane Zick, pro se
Louise Zaccagnino, pro se

REFUSAL TO ISSUE COMPLAINT

On October 23, 25, 30 and 31, 2000, Roosevelt Care Center employees Joan Kager, Dolores Crooker, Diane Zick and Louise Zaccagnino (Charging Parties) filed unfair practice charges against the Paper, Allied-Industrial, Chemical Energy Workers Union Local 1426 (PACE), their majority representative. Charging Parties allege that PACE violated the New Jersey Employer-Employee Relations

Act, N.J.S.A. 34:13A-1 et seq. (Act), and specifically 5.4b(1)[1/] when in April 2000, it failed to process Charging Parties' grievances concerning a reduction in their hourly wage rate.

Charging Parties[2/] also allege that they were not timely informed of the wage reduction and that their initial employment contracts reflecting their previous pay rate were removed from their personnel files. Two of the Charging Parties also allege that a PACE representative suggested that they could find employment elsewhere if they were not satisfied with their wages. Charging Parties seek to have their previous wage rates restored, to be made whole for the wage difference, and to have their initial employment contracts restored to their personnel files.

PACE denies that it engaged in any unfair labor practice. It asserts that it investigated the Charging Parties' complaints concerning their wage reduction and determined not to proceed on grievances since the reduction actually corrected a mistake mutually made by the employer and PACE in 1997. PACE further maintains that it had nothing to do with the removal of employment contracts from

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1/ 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."

2/ The charges were consolidated for processing and on December 21, 2000, an exploratory conference was conducted by a Commission staff attorney. Charging Party Zick (Docket No. CI-2001-29) was unable to attend the conference and did not wish to reschedule. She agreed that the conference should proceed without her.

employees' files and that it attempted to locate copies of those documents.

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. In correspondence dated April 25, 2001, I advised the parties that I was not inclined to issue a complaint on the allegations in this charge and set forth the basis upon which I arrived at that conclusion. I provided the parties with an opportunity to respond.

On May 7, 2001, Charging Party Kager submitted additional argument which was intended to clarify the charge in response to my April 25 correspondence. Along with her submission, Kager submitted an amendment to the original charge. On May 14, 2001, Charging Parties Crooker and Zaccagnino also submitted amendments to their original charges. The three amendments are identical. Charging Party Zick submitted neither response material to my April 25 letter nor an amendment to her original charge.3/

3/ No charge was filed against the employer, Middlesex County Improvement Authority (MCIA). In her May 7 submission, Kager requests that Charging Parties "be granted 6 months in which to file unfair practice charges against MCIA" based upon PACE's alleged reluctance to process Charging Parties grievances.

In their amendments, Charging Parties initially repeat the allegations set forth in the original charges. They also allege for the first time that because PACE's attorney played a role in settling PACE's dispute with the employer, Middlesex County Improvement Authority (MCIA) over incorrect wages which resulted in the reduction of the Charging Parties' wages, the attorney had a conflict of interest when he advised PACE not to file grievances over that same reduction of wages.

Additionally, the Charging Parties allege for the first time in their amendment that PACE processed a similar grievance on behalf of full-time nurses but refused to afford the Charging Parties the same "due process."

On June 1, 2001, PACE filed a response to the Charging Parties' submission and amendments. PACE argues that the Charging Parties have not alleged in their amended charge that they were prevented from filing their own grievance over the reduction in wages and that the Charging Parties could have done so even if PACE chose not to. PACE denies that it processed the full-time nurses' grievance and asserts that documents submitted by the Charging Parties themselves reveal that the full-time nurses processed their own grievance. PACE also argues in its response that counsel for PACE was acting as an agent of PACE when he resolved the incorrect wage calculation with the employer on behalf of the local and that there is no allegation in the charge or amendment that PACE's counsel had a personal interest in determining whether to process the grievance or the outcome of the grievance procedure.

I have reviewed the submissions of all parties. Based on the following, I find the complaint issuance standard has not been met.

Charging Parties are part-time nurses employed by MCIA at Roosevelt Care Center (RCC). Prior to June 14, 1997, Charging Parties were employed by Middlesex County. On June 14, MCIA took control of the RCC and initially contracted with Solomon Health Group to manage the facility. Management of the RCC has since been turned over to a new company, Royal Healthcare.

At the time of the 1997 MCIA takeover, PACE had an expired collective agreement with the County covering RCC's nurses. In June 1997, PACE and MCIA negotiated a successor contract covering full-time and part-time nurses for the period July 1, 1997 to June 30, 2002. The terms of the successor agreement included an increase in the full-time nurses' workweek from 35 to 40 hours, which resulted in a decrease in the employees' hourly wage. The contract also eliminated shift differentials which had been included in the employees' base salaries under PACE's contract with the County. Article 4 of that agreement, Wages, incorporates the base salaries which the MCIA had granted employees in "initial offers of employment" on June 14, 1997. Even though a successor contract was negotiated, MCIA allegedly made unilateral changes to the employees' terms and conditions of employment. As a result, PACE filed several unfair practice charges and the full-time nurses filed grievances over the alleged changes. While investigating and processing the

unfair practice charges and the full-time nurses' grievances, particularly with regard to the workweek and shift differential pay, PACE discovered wage rate disparities between the full-time and part-time nurses to the advantage of the part-time nurses. Based on its investigation, it became clear to PACE that when the employees' wages were adjusted for the change in workweek and differential, Solomon Health Group mistakenly failed to adjust the wages of the part-time employees and only decreased the hourly wages of the full-time nurses. Likewise, when the written "initial offers of employment" from MCIA were given to the part-time nurses in June 1997, those offers also did not include an adjustment in hours or the elimination of the shift differential. Instead, MCIA's offers to part-time nurses reflected the previous higher wage rates which had existed in the expired agreement between PACE and the County along with a negotiated percentage increase. Additionally, the earlier mistake made by Solomon Health Group maintaining the higher salaries for part-timers was mistakenly carried over by both parties into their 1997-2002 agreement.

Charging Parties assert that the "mistake" was obvious when the employment offers were given out to the entire staff in June 1997. They do not dispute that their hourly rate was "unfairly higher" than the full-time nurses' rate and that there was a mistake

made in the conversion of the pay rate from a 35-hour to a 40-hour work week.4/

In April 2000, Royal Healthcare took over the management of RCC and agreed to abide by the terms of the parties' 1997-2002 collective negotiations agreement. PACE's processing of the full-time nurses' grievance and the unfair practice charges were also proceeding to a settlement with MCIA. The incorrect salaries remained the same until April, 2000 when PACE, Royal Healthcare and MCIA agreed to correct the mistake by prospectively reducing part-time employee salaries effective April 2000 with no recapture of the excess wages paid to them from June 1997 through March 2000. The Charging Parties became aware of the decrease in wages in late April 2000 when it was reflected in their paychecks. On April 26, 2000, the Charging Parties asked PACE Local President Elizabeth Rivera to file a grievance over the reduction in wages, disappearance of their June 1997 employment offers from their personnel files and the employer's failure to notify them of the

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4/ Charging Parties assert that in late summer or early fall 1997, when the full-time nurses brought the problem to the attention of their shop stewards and filed a grievance, the full-time nurses were told that the mistake would be corrected in the next collective negotiations agreement. There is no allegation in the charge that PACE told any employees that the problem would be corrected by raising the base salaries of the full-time employees, rather than by lowering the hourly wage of the part-timers to reflect the increase in work hours and the elimination of the shift differential, even though the Charging Parties might have expected that the resolution would result in raising the salaries of the full-time nurses. In any event, the mistake was perpetuated in the 1997-2002 collective agreement.

wage rate change before it was implemented in April 2000. Rivera told Charging Parties that she would investigate the matter and ask for an extension of time to file a grievance. Rivera consulted with PACE's attorney as a result of the Charging Parties' requests to file a grievance. In a written response to Rivera on May 31, 2000, the PACE attorney advised PACE not to file a grievance since the 1997 wage rate for part-timers was based on a mutual mistake in calculating the part-time employees' salaries, and then carried over into the 1997-2002 contract. Therefore, the attorney advised that a grievance based upon a correction of a mutual mistake could not be sustained. The attorney's advice was based upon his analysis of arbitration cases and Commission caselaw. The Charging Parties were advised of PACE's decision not to grieve and were provided a copy of the attorney's May 31 written opinion.

Although PACE's contract requires a shop steward to present a grievance to the employer's representative, PACE asserts that the parties' practice permits employees to file their own grievances at the first step. In fact, the full-time nurses did so in 1997. Further, the contract permits employees to move a grievance to Step 2 on their own.5/ There is no allegation in the charge that PACE

5/ Article 18 of the 1997-2002 agreement provides in pertinent part:

Footnote Continued on Next Page

prevented the Charging Parties from filing a grievance on their own once PACE had determined not to file a grievance.

As to the employment offers missing from employees' files, PACE requested information as to these documents as late as September 5, 2000, and informed Charging Parties of its efforts to locate the employment offers.

ANALYSIS

Section 5.3 of the Act empowers an employee representative to exclusively represent public employees in collective negotiations. With that authority comes the duty to represent all unit employees fairly in negotiations and contract administration.

5/ Footnote Continued From Previous Page

Article 18
DISCIPLINE BY DISCHARGE; GRIEVANCE PROCEDURE

No employee will be disciplined by discharge without just cause.

Any alleged violation of the collective bargaining agreement, or any dispute with regard to its meaning or application may constitute "grievance." Disputes concerning matters involving the sole and exclusive discretion of the MCIA shall not constitute a "grievance." Resolution of any grievance shall be made in accordance with the following procedures:

Step 1. The employee's Shop Steward shall present the employee's grievance or dispute in writing to the Administrator within ten (10) working days of its occurrence....

Step 2. If the grievance has not been resolved, the grievance shall be presented in writing by the employee to the Administrator within five (5) working days after the employee's receipt of the response provided at the end of Step 1.

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 toward 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).

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. OPEIU Local 153; Middlesex Cty. and NJCSA (Mackaronis), P.E.R.C. No. 81-62, 6 NJPER 555 (¶11282 1980), aff'd NJPER Supp.2d 113 (¶94 App. Div. 1982), certif. den. 91 N.J. 242 (1982); New Jersey Turnpike Employees Union Local 194 (Kaczmarek), P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979); and AFSCME Council No. 1 (Banks), P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978).

Here, I find that the Charging Parties' allegations, even if true, do not establish that PACE breached its duty of fair

representation owed to them. Specifically, no facts were presented that demonstrate that PACE breached its duty of fair representation by treating these unit employees detrimentally as compared to other unit employees when it determined not to go forward with grievances filed in regard to the April 2000 decrease in their wages. When the full-time employees filed a grievance in the fall of 1997 alleging a wage disparity between the full-time and part-time employees, it was PACE's investigation of that grievance that revealed the June 1997 mistake in salary calculation which was then carried into the 1997-2002 collective agreement.6/ That mutual mistake wrongfully afforded the part-time employees a higher rate of pay than the full-time employees. The Charging Parties do not dispute that a miscalculation occurred and that their pay was higher than the full-time nurses as a result. The resolution of the full-time nurses' grievance did not occur until early April 2000, when the employer and PACE resolved to correct their mutual mistake by applying the correct hourly wage rate and eliminating the shift differential for part-time employees. As a result, the part-time employees' salaries were reduced. However, the settlement also allowed part-time nurses to keep the overpayment they had been paid

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6/ In Kager's response to my April 25, 2001 letter, she asserts that PACE and MCIA were aware of the discrepancy in wages prior to the completion of negotiations of the parties' current collective agreement. Even assuming that was the case, there is no dispute that the discrepancy was carried into the parties successor collective negotiations agreement and not corrected until April 2000.

from 1997 to April 2000. While the resolution may not have been what the part-time employees preferred, there are no facts alleged which demonstrate that the settlement of the full-time employees' grievance was arbitrary, discriminatory or in bad faith as to the Charging Parties. Moreover, had PACE refused to correct what it learned to be a mutual mistake, it would have risked committing an unfair practice. Essex Cty. Voc. Schl., P.E.R.C. No. 99-17, 24 NJPER 448 (¶29207 1998).

Finally, an employee representative fulfills its statutory obligation to represent employees when, as in this case, it evaluates grievances on the merits and makes a judgment as to whether arbitrating the issue is in the interests of its unit members as a whole. Jersey City Bd. of Ed. (Judge), D.U.P. No. 93-7, 18 NJPER 455 (¶23206 1992); Essex-Union Joint Meeting and Automatic Sales, Servicemen and Allied Workers, Local 575 (McNamara), D.U.P. No. 91-26, 17 NJPER 242 (¶22108 1991). Employee organizations are entitled to a wide range of reasonableness in determining how to best service all of their members. Id. The duty of fair representation does not require a union to process grievances which it believes are non-meritorious. Carteret Ed. Ass'n (Radwan), P.E.R.C. No. 97-146, 23 NJPER 390 (¶28177 1997); Camden Cty. College (Porreca), P.E.R.C. No. 88-28, 13 NJPER 755 (¶18285 1987). Here, PACE Local President Rivera referred the Charging Parties' complaints to the local's attorney. The attorney evaluated the facts and reviewed the case law and determined that

such a grievance would not be sustainable. Moreover, the attorney timely informed the local president and, shortly thereafter, the part-time employees were also promptly advised of his evaluation of the case. The local agreed with the attorney's evaluation. The local's evaluation of the merits of the potential grievance, reliance on its attorney's legal advice, and determination not to go forward is not evidence of bad faith or discriminatory conduct. OPEIU, Local 153.7/ That the Charging Parties might disagree with the decision and result does not establish a breach of PACE's representational duty.8/

7/ There are no facts presented in the Charging Parties' amendments to support their conclusion that PACE's counsel "had a conflict of interest" because he participated in the settlement of the wage miscalculation issue and, subsequently, advised PACE that it should not file a grievance over the resulting reduction in Charging Parties' wages.

8/ Charging Party Kager argues in her May 7 submission that PACE's failure to file a Step I grievance on behalf of the Charging Parties has circumvented their right to grieve under the negotiated grievance procedure (page 10 of submission). While the grievance procedure, as noted earlier herein, requires the steward to file at Step I, there is no allegation in the instant charge or the amendment that the Charging Parties were prevented from filing their own individual grievance after PACE investigated the potential grievance, was advised by counsel not to file, and informed the Charging Parties that PACE would not file. Moreover, the full-time nurses' grievance form submitted here by Kager to support the Charging Parties' allegation that PACE processed a grievance on behalf of the full-time nurses, shows the opposite. The form reveals that the full-time nurses filed their own grievance under their individual signatures with no

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As to the allegation that the Charging Parties' original offers of employment were removed from their personnel files, there is no allegation that PACE had possession of the offers or control over them. In the May 7 submission, Kager describes the dispute here as "First and foremost a case of Breach of Contract" and refers to the individual employment contracts as the contracts allegedly breached by MCIA. A conflict between the terms of an individual employment contract and the collective negotiations agreement with the employees' majority representative is to be resolved in favor of the collective negotiations agreement. See Dr. Leo Troy, et al. v. Rutgers, the State University, _ NJ __ (A-17-00, June 20, 2001). There is also no dispute that PACE attempted to locate the offers and informed Charging Parties of their efforts. Even if we assume that a more effective effort could have been made to address this issue, that circumstance, at most, may support a finding of negligence which does not constitute a breach of the duty of fair representation. See Passaic Cty. Community College Admin. Assn.,

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8/ Footnote Continued From Previous Page

reference to any PACE steward filing or processing the grievance on their behalf.

Additionally, as to the Charging Parties' request for additional time to file an unfair practice charge against MCIA, N.J.S.A. 34:13A-5.4(c) sets the limitations period for filing unfair practice charges. Charging Parties have alleged no facts in the charges or amendments to show that PACE took any action to prevent the Charging Parties from filing an unfair practice charge against MCIA. In these circumstances, no extension of time in which to file a charge against MCIA is appropriate.

OPEIU Local 153 (Wasilewski), P.E.R.C. No. 98-131, 24 NJPER 256 (¶29122 1998); Steelworkers v. Rawson, 495 U.S. 362, 134 LRRM 2153, 2158 (1990).

Although some of the charges here allege late notice of the reduction in wages, there are no allegations that PACE played any role in delaying such notice and no facts were presented to demonstrate any invidious, arbitrary or discriminatory actions by PACE with regard to providing notice to employees. Moreover, it was arguably MCIA's burden, not PACE's, to inform employees of the change.

Finally, Charging Parties Kager and Zaccagnino (Docket Nos. CI-2001-25 and CI-2001-32) allege that when they complained to a PACE representative about the reduction in wages, PACE responded that the original wages were a mistake in the first place and that Charging Parties could look for employment elsewhere if they were not satisfied with their wages. Unions are permitted a wide range of reasonableness in representing their membership. PBA Local 119 (Burns et. al), P.E.R.C. No. 84-76, 10 NJPER 41 (¶15023 1983); OPEIU Local 153 (Johnstone); see also New Jersey Transit; Jersey City Board of Education; Essex-Union Joint Meeting (McNamara). Taken by itself, an employee representative's "advice" to employees does not necessarily violate its duty of fair representation, particularly where, as in the instant cases, PACE was evaluating the employees' complaints in the context of earlier grievance settlements and the correction of the original wage mistake.

Based on the foregoing, I do not believe the Commission's complaint issuance standard has been met and I decline to issue a complaint on the allegations of these charges.9/

ORDER

The charges and amendments are dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

Stuart Reichman, Director

DATED: August 24, 2001
Trenton, New Jersey

9/ N.J.A.C. 19:14.2.3.