D.U.P. NO. 94-1

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

In the Matter of

RUTGERS, THE STATE UNIVERSITY
and AFSCME, COUNCIL 52,

Respondents,

-and-

Docket No. CI-93-46

DANIEL SEARIGHT,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by Daniel Searight against Rutgers, the State University and AFSCME, Council 52. The Director finds that Searight failed to show that AFSCME breached its duty of fair representation by refusing to take his case to arbitration and failed to show that the University and AFSCME conspired to not timely file his grievance.

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Appearances:

For the Respondent Rutgers
Christine Mowry, Director, Office of Employee Relations

For the Respondent AFSCME
Arthur Delo, Associate Director

For the Charging Party
Gerald D. Goldstein, attorney

REFUSAL TO ISSUE COMPLAINT

On December 14, 1992, Daniel Searight filed an unfair practice charge with the Public Employment Relations Commission against the American Federation of State, County and Municipal Employees, Council 52 and Rutgers University. The charge alleges that AFSCME violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically, subsections

5.4(b)(1), (2), (3), (4) and (5)[1/] and that the University violated subsections 5.4(a)(1), (2), (3), (4), (5), (6) and (7)[2/] of the Act when AFSCME and the University conspired to not timely file his December 2, 1991 grievance until July 18, 1992 and only after repeated communications from him. The charge further alleges that the union continued in its conspiratal actions when, after the grievance was denied at step three, it refused to take his case to arbitration.

1/ These subsections 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 subsections 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."

AFSCME denies any conspiracy between it and the University. It claims that it did timely file Searight's grievance, but it was lost in the campus mail. It notes that despite Searight's claim of repeated communications, Searight was completely out of touch with the union from December 1991 to early June 1992. In any event, the grievance was heard at a third step hearing in September 1991, where Searight was represented by the local shop steward and union president and the Associate Director of AFSCME, Council 52. AFSCME then reviewed Searight's case and, based upon the merits, made a determination not to proceed to arbitration.

The University also denies any conspiracy between it and AFSCME, and notes that Searight has not provided any facts in support of this alleged conspiracy. It also points out that Searight had the right to file his own grievance at steps one and two of the grievance procedure, but did not do so.

We have conducted an administrative investigation into the allegations of the charge. The following facts appear.

Searight was terminated by the University on November 27, 1991 for his failure to report to work or notify the University of his absence for a four-day period. He had previously been suspended for excessive tardiness and absenteeism three times. On December 2, 1991, Searight signed a Step 2 grievance form, which was also signed by shop steward Lorraine Berry. AFSCME claims that, on that date, it placed the grievance in the campus mail. On December 10, 1991, local union president Mattie Gillus called Chris Mowry of the

University's Office of Employee Relations and told her a grievance on Searight's termination was forthcoming. However, the grievance was not received by the University until July 18, 1992.

During the period between December 2, 1991 and July 18, 1992, Searight claims to have contacted the union several times to ask about the status of his grievance. On January 13, 1992, Searight's attorney wrote to Gillus and asked the status of his grievance. Searight's attorney again wrote to Gillus on July 23, 1992, about his grievance.

Finally, a step three hearing was conducted on the grievance on September 15, 1992, which was attended by Searight, Berry, Gillis, Associate Director of AFSCME, Council 52 Art Delo, Mowry and two other representatives from the University.

On September 25, 1992, Mowry issued a decision denying Searight's grievance. She found that the grievance was untimely filed; nevertheless, she considered the merits of the grievance. She found that even if the grievance had been timely filed, Searight's termination was for just cause. Searight requested that the union take his case to arbitration. However, by letter dated October 14, 1992, AFSCME informed Searight that, after careful consideration of the matter, it had decided not to proceed to arbitration.

ANALYSIS

N.J.S.A. 34:13-5.3 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) ("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).

Here, there is no evidence of discrimination that is intentional, severe and unrelated to legitimate union objectives. AFSCME may have been negligent in taking several months to schedule a hearing on Searight's grievance, but mere negligence, standing alone, does not suffice to prove a breach of the duty of fair representation. Service Employees. Moreover, and of particular significance regarding the timeliness of the grievance, Searight could have pursued the grievance himself under the terms of the grievance procedure, but he did not do so. In any event, the grievance was finally filed with Rutgers, the merits of it were heard, and a decision on the merits was in fact rendered.

In addition, there is no evidence that AFSCME violated the Act in refusing to take Searight's case to arbitration. Searight did not have an absolute right to have his grievance taken to arbitration. Vaca. Rather, the union is allowed a wide range of reasonableness in servicing its members. Essex-Union Joint Meeting and Automatic Sales, Servicemen and Allied Workers, Local 575, D.U.P. No. 91-26, 17 NJPER 242 (¶22108 1991). Here, there is no evidence that AFSCME acted arbitrarily, discriminatorily or in bad faith in deciding not to take Searight's case to arbitration. Absent such evidence, the union's refusal to arbitrate his case is not an unfair practice. Jersey City Bd. of Ed., D.U.P. No. 93-7, 18 NJPER 455 (¶23206 1992).

Finally, Searight's assertions that the University and AFSCME conspired to not file his grievance for several months and conspired to not take his case to arbitration are wholly unsupported. No evidence was presented of any conspiracy between AFSCME and the University. Thus, based on the foregoing, we fail to find that the Commission's complaint issuance standard has been met and refuse to issue a complaint on the allegations of this charge. N.J.A.C. 19:14-2.3. Accordingly, the charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

Edmund G. Gerber, Director

DATED: July 15, 1993
Trenton, New Jersey