D.U.P. NO. 2002-4

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

In the Matter of

FRATERNAL ORDER OF POLICE,

Respondent,

-and- Docket No. CI-2001-17

STEVEN D. STANKOVITS,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge alleging that FOP Lodge 62 breached its duty of fair representation to the charging party in violation of N.J.S.A. 34:13A-5.4 when it changed legal defense plan attorneys and refused to reimburse the charging party for legal fees for a private attorney he had hired.

The Director finds that FOP Lodge 62 had no obligation to provide charging party with any attorney, did not act arbitrarily, discriminatorily or in bad faith toward the charging party, and did provide an attorney for the charging party during the processing of a grievance and the appeal of his termination.

As to the charging party's July 20, 2001 amendment to his original charge, the Director finds that the allegations contained in the amendment are untimely pursuant to N.J.S.A. 34:13a-5.4(c).

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Appearances:

For the Respondent,
Robert Cannan, attorney

For the Charging Party
Steven D. Stankovits, pro se

REFUSAL TO ISSUE COMPLAINT

On September 28, 2000, Steven Stankovits (Stankovits or Charging Party), a police officer employed by Rutgers, the State University of New Jersey (Rutgers) filed an unfair practice charge against Fraternal Order of Police Lodge 62 (FOP), alleging violations of N.J.S.A. 34:13A-5.4b(1).[1/] Specifically, Stankovits alleges that in April 2000, FOP "arbitrarily and capriciously" switched attorneys under its legal protection plan (plan) leaving Stankovits without representation from either

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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."

attorney. At the time Stankovits was the subject of an ongoing internal investigation which subsequently led to his termination. Stankovits seeks reimbursement for his expenses for private legal counsel.

The FOP denies that it failed to provide Stankovits with legal representation under the plan. FOP admits that on April 1, 2000, it changed attorneys under the legal services plan, but denies any lapse in legal coverage. It argues that when Stankovits told the FOP he had hired an attorney outside the plan, it warned him that the FOP would not pay for outside counsel fees.

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 July 10, 2001, I advised the parties that I was not inclined to issue a complaint in this matter and set forth the basis upon which I arrived at that conclusion. I provided the parties with an opportunity to respond.

On July 20, 2001, Charging Party Stankovits submitted an amended charge in which he alleged for the first time that he was treated differently than "every other member of the union;" that he was denied equal access to the grievance procedure; that the

FOP failed to respond to his request for a copy of the retainer agreement between FOP and its current counsel; and that the FOP "represented" to him that it would contribute to his legal defense costs and subsequently recanted.

Based upon the following, I find that the complaint issuance standard has not been met. I further find that the unfair practice allegations contained in the July 20, 2001 amended charge are untimely.

Stankovits was employed by the Rutgers University police department for eight or nine years prior to being discharged on or about April 25, 2000, for various alleged violations of the department's code of conduct and departmental procedures.

FOP Lodge 62 is the collective negotiations representative for Rutgers' police officers, including Stankovits. The FOP's current collective agreement with Rutgers includes a "Police Officers Bill of Rights" (Article 5) and a grievance procedure (Article 7), which provides in pertinent part as follows:

> Article 5
>
> 10. If an officer is being questioned about his/her work performance or conduct and if the officer has a reasonable belief that the answers to such questions will result in discipline, then the officer may request that an FOP representative be present.
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> 11. For the purpose of this Article, "FOP-P representative" or "FOP-P representation" shall mean a University police officer designated by the FOP for that purpose or one chosen by the individual police officer affected.

Article 7

6. At steps one, two and three of this procedure, neither the FOP-P nor the University will be represented by an attorney.

As a benefit of membership, active dues-paying FOP members may participate in the FOP legal plan by paying an annual fee. FOP contracts with a law firm of its choice to provide the services covered by the plan. Prior to April 1, 2000, FOP contracted with attorney Anthony Fusco to service its members through the plan. In March 2000, the FOP executive board decided to terminate its legal services contract with Fusco effective April 1, 2000. FOP informed Fusco of its decision in a letter which appears to have been received by Fusco on or about March 29, 2000.2/ FOP also entered into an "Agreement to Provide Legal Services" under the plan with attorney Cannan effective April 1, 2000.

Stankovits' termination on April 25, 2000, was the result of an internal investigation into his activities during several days in mid-March 2000. On or about March 25, Stankovits was interviewed by a Rutgers police captain who had been assigned to the investigation. An associate of Fusco's law firm was present during that March 25 investigatory interview. The FOP asserts that sometime in late March it posted and distributed a letter to all FOP members informing them of the change in plan attorneys. Stankovits alleges that he was unaware of that letter. After March 25 and

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2/ Stankovits attached the letter to Fusco to the unfair practice charge.

before April 1, the FOP verbally informed Stankovits that Fusco would no longer be the plan attorney and it instructed Stankovits to get in touch with attorney Cannan. Stankovits asserts that he called Cannan, who told him that since Fusco was the original attorney representing him when Stankovits' discipline was initiated, Fusco should continue to represent him. On or about April 3, Cannan told Stankovits that he (Cannan) would represent him at a pre-termination conference among Rutgers, the FOP and Stankovits which was scheduled for April 7, 2000. Thereafter, sometime in early April, Stankovits talked to Fusco, who told him then that Cannan should be the one to represent him under the FOP plan.

The pre-termination conference scheduled for April 7 was adjourned to a later date. Between the initial March 25 investigatory interview, at which an associate from Fusco's firm was present, and his early April telephone conversation with Cannan, during which Cannan told Stankovits that he would represent him, Stankovits asserts that he "believed" that the FOP had allowed services under the plan to lapse. Stankovits also "believed" he needed "immediate legal representation." As a result, sometime between March 25 and April 1, Stankovits hired a private attorney to represent him. By April 6 Stankovits informed the FOP that he had retained his own counsel.

The FOP contends that as of April 6 it notified Stankovits in writing that it had no opposition to his representation by private counsel, but that the FOP would not disperse or reimburse

any money for the services of Stankovits' private attorney. From early April to early May 2000, Stankovits used the services of a private attorney who wrote several letters to Rutgers on behalf of Stankovits regarding his termination.

By May 10, Stankovits had requested that attorney Cannan represent him in processing a grievance concerning his termination. As permitted by Article 7 of the collective agreement, FOP officers represented Stankovits at the Step I and II grievance hearings held on May 18 and June 19, respectively, and at a Step III grievance meeting which was held sometime thereafter. Stankovits' grievance was denied and the FOP filed for arbitration. Cannan continues to represent Stankovits on his grievance. Stankovits' grievance is scheduled for an arbitration hearing on September 12, 2001. Cannan, as FOP legal services plan attorney, will represent Stankovits at the arbitration.

Stankovits is seeking reimbursement from FOP for costs and fees charged by his private attorney from late March to early May.

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. 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).

Initially, an employee organization has no obligation under our Act to provide employees with an attorney, much less one of the employee's choosing. Providing members with counsel or paying their legal fees under a union's legal defense plan are internal union matters; a union's failure to provide those benefits is not an unfair practice except where the union's decision not to provide legal representation was arbitrary, discriminatory or in bad faith. See Bergen Community College Faculty Association, P.E.R.C. No. 84-117, 10 NJPER 262 (¶15127 1984)(issue of providing legal assistance to unit employees is internal organizational matter not generally within the Commission's jurisdiction); N.J.E.A. (Esser), P.E.R.C. No. 90-113, 16 NJPER 161 (¶21065 1990), aff'g. D.U.P. No. 90-9, 16 NJPER 161 (¶21065 1990)(charge dismissed where union allegedly declined to provide charging party counsel for internal union appeals); P.B.A. Local 105 (Giordano), D.U.P. No. 90-1, 15 NJPER 457 (¶20186 1989)(union's refusal to provide legal counsel or

reimburse legal fees for an employee's departmental hearing is not illegal where charge does not allege that such refusals were made arbitrarily, discriminatorily or in bad faith); Camden County College, D.U.P. No. 89-11, 15 NJPER 171 (¶20072 1989)(charge dismissed on allegation that union refused to provide legal assistance to a unit member for a Commission hearing).

Finally, 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, there are no facts alleged which suggest arbitrary, discriminatory or bad faith conduct by the FOP. The FOP provided Stankovits with an attorney to represent him at the March 25 investigatory interview with Rutgers' police captain. Thereafter, Stankovits requested that the FOP represent him in processing a grievance concerning his termination. Pursuant to the provisions of Article 7 of the FOP contract, FOP officers represented him in

filing and processing a grievance at Steps I, II, and III of the grievance procedure. The FOP has subsequently filed for arbitration of Stankovits' termination and has authorized plan attorney Cannan to represent him at that stage of the process. Therefore, the FOP did not breach its duty to fairly represent Stankovits in the administration of the collective agreement or in conjunction with the appeal of his termination.

With respect to the allegations contained in Stankovits' July 20, 2001 amendment, N.J.S.A. 34:13A-5.4(c) precludes the Commission from issuing a Complaint where an unfair practice charge has not been filed within six (6) months of the occurrence of the alleged unfair practice, unless the aggrieved person was prevented from filing the charge. Here, conduct alleged to be an unfair practice is alleged for the first time by Stankovits in his July 20, 2001 amendment to the original unfair practice charge. The amendment refers to the conduct occurring sometime after late March 2000. There is no specific date referred to in the amendment. Given the date of Stankovits' amendment, any conduct alleged to have occurred before January 20, 2001, is beyond the Commission's six-month statue of limitations. There is no allegation, nor are there facts to support an allegation, that Stankovits was prevented from filing an amendment within the six-month period from the occurrence of the unfair practice conduct alleged. Therefore, the conduct alleged in the July 20, 2001 amendment cannot, by statute, be the subject of a complaint. N.J.S.A. 34:13A-5.4(c).

Based upon the foregoing, I find that the Commission's complaint issuance standard has not been met and I decline to issue a complaint on the allegations of this charge.3/

ORDER

The charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

Stuart Reichman, Director

DATED: September 6, 2001
Trenton, New Jersey

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