STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

DR. JAHI ISSA,	:	
Charging Party,	:	**ULP No. 13-02-887**
v.	:	
AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, DELAWARE STATE UNIVERSITY CHAPTER,	:	**HEARING OFFICER'S DECISION**
Respondent.	:	

APPEARANCES

Dr. Jahi Issa, Charging Party, pro se

Jonathan G. Axelrod, Esq. (Beins, Axelrod, P.C.) for AAUP, DSU Chapter

BACKGROUND

Dr. Jahi Issa ("Dr. Issa" or "Charging Party") is a former employee of Delaware State University ("DSU") within the meaning of Section 1302(o), of the Public Employment relations Act ("PERA"). 19 Del.C. Chapter 13 (1994). Dr. Issa was a non-tenured member of the bargaining unit of DSU faculty represented for the purposes of collective bargalining by the

American Association of University Professors, Delaware State University Chapter ("AAUP-DSU").

DSU is a public employer within the meaning of Section 1302(p) of the PERA. The AAUP-DSU is an employee organization within the meaning of Section 1302(i), of the PERA and the exclusive bargaining representative of the DSU faculty unit within the meaning of Section 1302(j) of the PERA.

The Charging Party was discharged from his employment as an Associate Professor at DSU effective August 17, 2012. On or about February 21, 2013, Dr. Issa filed an unfair practice charge with the Public Employment Relations Board ("PERB") alleging that the AAUP-DSU had interfered with, restrained or coerced him in his exercise of rights under PERA and had improperly acted in a racially discriminatory manner. The charge alleged violations of Sections 1303, 1304(a) and/or 1307(b)(1) of the PERA.

On August 26, 2013, a PERB Hearing Officer issued a decision on the merits dismissing the charge of discrimination against the AAUP-DSU but found that the "...AAUP-DSU failed to meet its obligation to provide fair representation to a bargaining unit member in violation of 19 Del.C. Section 1303

and Section 1307(b)(1)." The AAUP-DSU was ordered to cease and desist from engaging in conduct in violation of its duty of fair representation and to make Dr. Issa "whole for actual losses suffered for the period of August 17, 2012 through the end of his terminal contract at the end of the 2012-2013 academic year."

On August 30, 2013, AAUP-DSU filed an appeal with the full PERB of the Hearing Officer's August 26, 2012 decision. The AAUP-DSU sought the reversal of the decision and requested a stay of its implementation pending final adjudication. The stay was granted effective September 23, 2013.

On September 3, 2013, the Charging Party filed a Motion for Reconsideration, asserting that the remedy in the August 26, 2013 decision was insufficient. Dr. Issa advanced the proposition that the remedy should have properly provided for "promotion and tenure" and compensation for emotional damages as a result of the AAUP-DSU's breach of statutory duties.

On November 27, 2013 the PERB affirmed and adopted the Hearing Officer's finding that "...AAUP-DSU failed to meet its statutory obligation to provide representation by not providing a timely and meaningful response to Dr. Issa's

request for representation after he was notified of his termination."

The November 27, 2013 PERB decision specifically stated:

> The Union is obligated to meet no more and no less than the reasonable expectations of the parties to the collective bargaining agreement and to provide only that to which the bargaining unit members are reasonably entitled under the terms of that agreement. There is a substantial issue raised by the union on appeal that PERB does not have authority to hold the union responsible for the payment of wages through the end of the terminal employment contract as ordered by the Hearing Officer. Specifically, the union asserts it cannot be held responsible for the payment of damages absent a finding that the grievant would have been reinstated to serve the remainder of the terminal contract period but for the union's failure to provide him with adequate representation in grieving his termination. To require it to pay Dr. Issa's damages measured by wages he would have received through the end of the 2012-13 [academic year] affords Dr. Issa far more than the collective bargaining agreement contemplates.

That PERB decision further concluded:

> ... The Board unanimously denies Dr. Issa's request for reargument. There is clearly no basis in law to require the union to pay the damages Dr. Issa seeks through his Motion for Reconsideration, regardless of any breach by the union of its duty to fairly represent him.
>
> The Board unanimously affirms the Hearing Officer's finding AAUP-DSU violated 10 Del.C. Section 1303 and Section 1307(b)(1) by failing to advise Dr. Issa of his right under the negotiated collective bargaining agreement to demand arbitration ... Such a failure, in our view, falls short of good faith representation.
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> The Board remands the remedy portion of the Hearing Officer's decision for a determination and justification of the appropriate remedy. The Hearing Officer is directed to reopen the record for receipt of legal

> argument from the parties on the appropriate level of damages for violation of the duty of fair representation, under the specific circumstances of this case. The Hearing Officer may accept additional evidence if he determines it is necessary.
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> Upon issuance of the decision on remand, the parties will be provided the opportunity to again petition this Board for review, pursuant to 19 Del.C. Section 1309.

On June 2, 2014, the Hearing Officer issued a Decision on Remand in accordance with the above direction of the Board. That decision found that there were guiding standards found in National Labor Relations Board decisions. Specifically, the matter of *Iron Workers' Local Union 377*, 326 NLRB 375 (1998), was cited for the proposition that: "when only the Union is charged with a breach of the duty of fair representation (i.e. that employer is not joined in the charge), in order for a complainant to recover losses allegedly resulting from the breach, the complainant must establish two (2) elements: 1) that a breach of the duty occurred; and 2) that the complainant would have prevailed in the grievance-arbitration procedure, i.e., the grievance is meritorious."

The June 2, 2014 Hearing Officer's Decision on Remand set forth the following Decision and Order:

> 1. The AAUP/DSU shall take the necessary steps to activate and process the Charging Party's grievance through arbitration within 30 days of this Opinion and Decision.

2. AAUP/DSU shall notify the employer in writing (with a copy to Charging Party and the Public Employment Relations Board) that it wishes to proceed to arbitration concerning the Charging Party's grievance protesting his discharge.

3. In the event the Charging Party's grievance is determined to not be arbitrable, the AAUP-DSU shall immediately notify the Public Employment Relations Board which shall remand the case to the Executive Director for a hearing on the issue of whether Charging Party's grievance would have prevailed in arbitration. The Executive Director may designate a qualified hearing officer to hear this matter at her discretion.

4. If a hearing is scheduled pursuant to paragraph 3 above, the purpose of the hearing will be to determine whether a properly filed and properly processed grievance would have been successful. The hearing officer shall issue his/her decision within 30 days of the close of the record. The Charging Party will have the burden to establish by a preponderance of the evidence that he could have prevailed in challenging his termination under the terms of the parties' collective bargaining agreement. Should that burden be met, the hearing officer shall determine the appropriate back pay relief, if any.

5. If the hearing officer determines that his grievance would not have prevailed no further action is required and the unfair labor practice charge for failure to represent will be dismissed.

On August 15, 2014, the Executive Director, upon receiving notice that the Charging Party's grievance was not arbitrable, designated the undersigned Hearing Officer under paragraph 3 of the above order from the June 2, 2014 decision. Additionally, the dates of November 19, 2014 and November 20, 2014, were reserved for an evidentiary hearing.

DISCUSSION

The evidentiary hearing was convened on November 19, 2014. The AAUP-DSU and the Charging Party were both present and the record was opened. The Hearing Officer delineated for the parties the narrow scope of authority, established under paragraphs 3, 4 and 5 of the June 2, 2014 Decision on Remand, including the direction that the burden of proof, by a preponderance of the evidence, rests with the Charging Party.

The Hearing Officer further specified the procedures under which the evidentiary hearing would be held. It was set forth that the Charging Party would have the opportunity to present the initial opening statement, followed by that of AAUP-DSU. Dr. Issa would then be afforded the opportunity to present his case, including the right to call witness (subject to cross-examination) and to submit documentary evidence; the same would then be true for the AAUP-DSU following the Charging Party's case.

During Dr. Issa's opening statement, the Hearing Officer inquired as to how the points raised were related to the issue of whether the Charging Party would prove that he could have

prevailed in an arbitration regarding his termination. During the Charging Party's opening statement, only a short time into the hearing process, Dr. Issa abruptly rose and left the hearing room, indicating that he would no longer participate in the evidentiary hearing. This occurred prior to the presentation of any evidence at all in the hearing. The Charging Party presented no additional documentary evidence, nor were any witnesses called to provide testimony.

The Hearing Officer urged the Charging Party to reconsider and present his case. This was to no avail. The hearing was recessed for an additional thirty minutes, to provide the Charging Party an opportunity to reconsider and return to present his case. He did not return. The AAUP-DSU made a motion, on the record, to dismiss the matter. The motion was granted based upon the absence on any evidence presented on the record. Without the submission of any evidence, the Charging Party could not meet his burden of proving, by a preponderance of the evidence, that he could have prevailed in challenging his termination under the terms of the parties' collective bargaining agreement. The granting of the motion to dismiss is not formally entered until the issuance of this written decision.

The Charging Party has abandoned the processing of his unfair labor practice charge by leaving the November 19, 2014 hearing without presenting any evidence, documentary or testimonial, or calling any witnesses in support of his claim. This was done in the face of express notice that it was his burden to prove, by a preponderance of the evidence, that he could have prevailed in challenging his termination under the terms of the parties' collective bargaining agreement. The notice was provided: in the Decision on Remand issued on June 2, 2014; in the August 15, 2014 Notice of Hearing; in the November 7, 2014 correspondence from the PERB Executive Director; and in the procedural opening provided by this Hearing Officer at the hearing held on November 19, 2014.

By abandoning the hearing process, Dr. Issa has left the record without any evidence to support his burden of proving that he could have prevailed in arbitration, had the claim been processed under the collective bargaining agreement. Absent any evidence, the Hearing Officer must find that the Charging Party did not prove that a properly processed grievance would have been successful. Therefore, the Hearing Officer cannot find that the Charging Party could have prevailed under the contract.

The June 2, 2014 Decision on Remand is in accordance with the holding in *Iron Workers' Local Union 377*, 326 NLRB 375 (1998) and asserts that: "when only the Union is charged with a breach of the duty of fair representation (i.e. that employer is not joined in the charge), in order for a complainant to recover losses allegedly resulting from the breach, the complainant must establish two (2) elements: 1) that a breach of the duty occurred; and 2) that the complainant would have prevailed in the grievance-arbitration procedure, i.e., the grievance is meritorious." In the absence of any evidence that the Charging Party would have prevailed in grievance-arbitration, the Hearing Officer herein must find, under points 4 and 5 of the June 2, 2014 Order, that Dr. Issa's grievance would not have prevailed and that no further action is required; all the remaining elements of the unfair labor practice charge for failure to represent will be dismissed.

ORDER

In the absence of any evidence that the Charging Party would have prevailed in grievance-arbitration, under points 4 and 5 of the June 2, 2014 Order, no further action is required; IT IS HEREBY ORDERED that the remaining elements of the unfair labor practice charge for failure to represent are dismissed in their entirety.

Dated: December 6, 2014

Joel M. Weisblatt
Hearing Officer
Delaware Public Employment
Relations Board