

STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

DR. JAH I ISSA,	:	
	:	
Charging Party,	:	
	:	
v.	:	<u>ULP No. 13-02-887</u>
	:	
AMERICAN ASSOCIATION OF UNIVERSITY	:	DECISION ON REMAND
PROFESSORS, DELAWARE STATE UNIVERSITY	:	
CHAPTER,	:	
	:	
Respondent.	:	

APPEARANCES

Dr. Jahi Issa, Charging Party, pro se
Perry F. Goldlust, Esq., Justin Keating, Esq. and 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 the Delaware State University¹ (“DSU”) within the meaning of §1302(o), of the Public Employment Relations Act (“PERA”). 19 Del.C. Chapter 13 (1994). He was also a non-tenured member of a bargaining unit of DSU faculty represented for purposes of collective bargaining by the American Association of University Professors of Delaware State University (“AAUP-DSU”).

The AAUP-DSU is an employee organization within the meaning of §1302(i), of the PERA and the exclusive bargaining representative of a bargaining unit of faculty and related employees of DSU, within the meaning of §1302(j) of the PERA.

Dr. Issa was discharged from his employment as an Associate Professor at DSU effective

¹ Delaware State University is a public employer within the meaning of 19 Del.C. §1302(p).

August 17, 2012. On or about February 21, 2013, he filed an unfair labor practice charge with the Public Employment Relations Board (“PERB”) alleging the AAUP-DSU had interfered with, restrained or coerced him in the exercise of his rights under the PERA and had improperly acted in a racially discriminatory manner.² The AAUP-DSU filed its Answer denying the allegations contained in the Charge and asserting New Matter on March 13, 2013. Dr. Issa filed his response denying the asserted New Matter on March 21, 2013. A Probable Cause Determination was issued on April 2, 2013, and a hearing was held on May 14 and 28, 2013.

A decision on the merits was issued by the PERB Hearing Officer on August 26, 2013, which dismissed the charge of discrimination against the AAUP-DSU, but found that “by failing to respond to Charging Party’s request for representation and to file a timely grievance concerning his termination, AAUP-DSU failed to meet its obligation to provide fair representation to a bargaining unit member in violation of 19 Del.C. §1303 and §1307(b)(1).” 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,” as well as to post notice and to advise the PERB of all actions taken to comply with the Order.

Thereafter, on August 30, 2013, AAUP-DSU filed an appeal of the Hearing Officer’s decision with the full PERB, requesting the decision be reversed and that all charges be dismissed with prejudice. It also requested implementation of the award be stayed pending final adjudication; the requested stay was granted effective September 23, 2013.

Dr. Issa filed a Motion for Reconsideration on September 3, 2013 in which he asserted the remedy was insufficient and should properly reflect his “promotion and tenure”. He also

² Charging Party Issa alleged violations of 19 Del.C. §1303, §1304(a) and/or §1307(b)(1).

asserted the remedy should be modified to compensate him for emotional damages as a result of the AAUP-DSU's breach of its 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 Board further stated:

The union is obligated to meet no more and no less than the reasonable expectations of the parties to the collective bargaining agreement³ and to provide only that to which 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.

The Board concluded in its decision:

... 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 19 Del.C. §1303 and §1307(b)(1) by failing to advise Dr. Issa of his right under the negotiated collective bargaining agreement to demand arbitration, a proceeding to which the union is expressly precluded by the collective bargaining agreement as a participant or party. Such a failure, in our view, falls short of good faith representation.

³ The Board of Trustees of the Delaware State University and the Delaware State University Chapter of the American Association of University Professors are the parties to the current collective bargaining agreement which has a term of July1, 2010 through August 31, 2015.

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.

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. §1309.

The Hearing Officer initiated a teleconference with the parties for the purpose of considering the further processing of the Board's remand order. Dr. Issa chose not to provide a number where he could be reached in order to participate in the teleconference and by email dated December 20, 2013, notified the Hearing Officer that he would not participate. The hearing Officer determined additional evidence was not required and established a briefing schedule for the receipt of argument. Written argument was received from both parties and considered in reaching the following decision on remand.

PRINCIPAL POSITIONS OF THE PARTIES

AAUP-DSU: The AAUP-DSU argues PERB cannot impose back pay, other monetary or make whole remedies for a failure to arbitrate a grievance unless it first finds that the grievance itself was meritorious. A remedy is not reasonable or appropriate unless there is proof that an actual injury was suffered. In this case, the requisite injury would be a proof that Dr. Issa's contractual rights were violated and that the union failed or refused to bring a proper grievance. Citing to PERB's decision in *Brooks v. AFSCME Council 81*⁴, AAUP-DSU asserts there has been no showing in this case that Dr. Issa suffered irreparable harm because it did not file or advise him how to file a grievance to protest his discharge.

⁴ ULP 09-08-701/669, VII PERB 4483, 4491 (2010).

It further asserts that case law from the NLRB and agencies similar to PERB can and should provide guidance in this case. In a “hybrid” suit, the employee alleges first that the employer violated his rights by breaching the collective bargaining agreement; and that the union then breached his statutory right to fair representation by mishandling the grievance and arbitration proceedings. The employee must, however, prove both the breach of contract and a breach of the duty of fair representation to prevail against either the employer or the union. The AAUP-DSU contends that, like the instant charge, the two claims are “inextricably interdependent” and must stand or fall together. The AAUP argues it cannot be required to compensate the Charging Party for lost compensation unless there is a finding that he was wrongfully discharged from his employment.

It also asserts that Dr. Issa can and has challenged the validity of his discharge by filing a Complaint in federal court against the University. *Issa v. Delaware State University, et al.*, CA 14-168 (D.Del., Complaint filed Feb. 7, 2014). AAUP-DSU asserts this EEOC Complaint is currently pending and that §14.7 of the parties’ collective bargaining agreement precludes the filing of a grievance when the issue is the same as a claim submitted “to an outside agency”, citing the EEOC as an example. It contends Dr. Issa would also have a cause of action for breach of contract against the University in state court. Although Dr. Issa has not brought a timely unfair labor practice charge against the University, the AAUP asserts these are available alternatives for adjudication of the merits of his claim that he was improperly discharged.

AAUP-DSU also argues that it cannot be held liable for monetary damages without a determination that Dr. Issa attempted to mitigate his losses by seeking alternative employment after discharge. The union can also not be required to remedy the University’s alleged breach of the collective bargaining agreement because the union played no part in Dr. Issa’s termination. It argues that where a union’s breach is subsequent to, and independent of, the employer’s breach

of contract, the governing principle established by the U.S. Supreme Court in *Vaca v. Sipes*⁵ is:

...apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused the union's refusal to process the grievance should not be charged to the employer. In this case, even if the Union had breached its duty, all or almost all of [the employee's] damages would still be attributable to his allegedly wrongful discharge by [the employer].

Dr. Issa: Dr. Issa argues that the scope of the damages awarded by the Hearing Officer was overly narrow in that it was limited to the payment of actual losses from employment suffered from the date of his discharge on August 17, 2012 through the expiration of his terminal contract at the conclusion of the 2012-2013 academic year. His written submission included a list of injuries he asserts he suffered as a result of his termination, including: "loss of employment; loss of social consortium; victim of white skin privilege; lack of due process; breach of contract; bad faith; embezzlement; Racketeer Influenced and Corrupt Organizations Act; money laundering; conspiracy of rights; deprivation of rights; ineffective assistance of counsel/interference with my privilege affairs/lack of full disclosure; emotional distress; fraud; discrimination of minorities; conflict of interest; lack of protection of employee rights; theft of service; loss of academic progress and pursuit; collusion with DSU management; and cause of homelessness".⁶ In order to remedy these injuries, he requested the remedy be modified to include the following:

- 1) All union dues paid back with interest;
- 2) Job back at DSU with no union dues for 5 years with back pay and front pay and job at another AAUP university with a positive letter of recommendation with compensatory damages \$100,000.00;
- 3) Or full scholarship to attend law school and cover all expenses including

⁵ 368 US 171, 197-198 (1967)

⁶ Charging Party's "Affidavit of Injuries and Lawful Demand for Remedy".

- room and board for four years and three years front pay and back pay;
- 4) Paid medical insurance policy for 10 years;
 - 5) Paid academic life membership to five professional organizations;
 - 6) Formal apology;
 - 7) Birthday gifts for wife and children from August 2012-present (\$10,000);
 - 8) \$10,000 in Christmas gift cards for his children not having Christmas presents (Visa card);
 - 9) Legal fees (\$10,000);
 - 10) Paid subscription to 10 academic search engines;
 - 11) Shipment of my books and private research papers from my office at the ETV building to West Africa to promote Libraries for Africa program;
 - 12) Decertification of DSU-AAUP.

DISCUSSION

In response to the opportunity to file legal argument in support of the parties' respective positions on the appropriate remedy and justification, Dr. Issa chose to file a document he entitled, "Affidavit of Injury and Lawful Demand for Remedy." This document expanded the damages to which he asserted he was entitled from those listed in his "Motion for Reconsideration".⁷

Following receipt of opening argument on remand from both Dr. Issa and the AAUP-DSU, this Hearing Officer afforded both parties a period of three weeks in which to file

⁷ Charging Party's Motion for Reconsideration was filed on September 13, 2013, prior to the Board's review of the request for review and issuance of its Remand Order. It stated:

The Charging Party in this matter respectfully moves for a reconsideration as it regards the plaintiff's winning award that makes him whole again.

- 1) Damages should reflect Charging Party's Promotion and Tenure. If the DSU-AAUP had not breached the COLLECTIVE BARGAINING AGREEMENT Dr. Issa would have worked at DSU for more than 20 years. The award should reflect salary increments and interest of 3% for 20 years. Charging Party believes that efforts to make Dr. Issa whole should reflect the above remedy.
- 2) All efforts to make Charging Party whole should include emotional damages...

responsive argument. Dr. Issa chose not to file any argument in response to AAUP-DSU's opening brief.

The PERA circumscribes PERB's authority to remedy an unfair labor practice in 19 Del.C. §1308(b)(1):

- (b)(1) If, upon all the evidence taken, the Board shall determine that any party charged has engaged or is engaging in any such unfair practice, the Board shall state its findings of fact and conclusions of law and issue and cause to be served on such party an order requiring such party to cease and desist from such unfair practice, and to take such reasonable affirmative action as will effectuate the policies of this chapter, such as payment of damages and/or the reinstatement of an employee...

There is no statutory provision for the awarding of punitive damages.

In its November 27, 2013 decision on review and remand order, the Board specifically held:

After reviewing the record and considering the arguments of the parties, 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.

Consequently, expansion of damages beyond the initial remedy provided in the decision on the merits has been expressly rejected by the Board.

A substantial portion of the AAUP-DSU's argument concerns the decision of the Public Employment Relations Board affirming AAUP-DSU breached its statutory duty of fair representation. Having been affirmed, this finding is not subject to the reconsideration on remand. The limited issue raised by the PERB's remand order concerns:

...the remedy portion of the Hearing Officer's decision for a determination and justification of the appropriate remedy.

The AAUP-DSU argues that the initial decision of the hearing officer is unsupported by

the PERA, PERB precedent⁸, decisions by other public sector adjudicatory agencies similar to the Delaware PERB⁹, and the decisional body of law developed by the National Labor Relations Board (NLRB)¹⁰ interpreting and applying the federal National Labor Relations Act (NLRA).

Concerning the Delaware PERB's decision in the matter of *Brooks v. AFSCME Local 640*, the case is not on point with the facts in the instant charge and therefore has no bearing upon a determination of appropriate remedy. In that case, the grievant suffered no irreparable harm because at the time she filed the Charge, the grievance contesting her termination was still being processed by the union through the grievance procedure. The issue of just cause for her termination was deferred to the contractual grievance and arbitration procedure and the unfair labor practice was held in abeyance pending the outcome of that process. The Brooks case was subsequently resolved by the parties so that no decision concerning the pending unfair labor practice charge was forthcoming and a determination of appropriate remedy for a breach of the duty of fair representation was unnecessary.

Turning to the impact of federal case law, the United States District Court for the District of Delaware held in *Cofrancesco v. City of Wilmington*¹¹:

Delaware law extends to [public sector] employees many of the same rights to organize and bargain collectively that the LMRA¹² affords to employees in the private sector. 19 Del.C. §1301, *et seq.* In cases where the problems raised under Delaware labor laws are similar to those that arise under the LMRA, Delaware can be expected to consider and, in all likelihood, follow federal law.

⁸ Citing *Brooks v. AFSCME Council 81, LU 640*, ULP 09-08-701, VII PERB 4483 (2010).

⁹ Citing *Chisholm v. AFSCME Council 20, Local 2401 and DC Office of Labor Relations and Collective Bargaining*, Washington, D.C. PERB Case Nos. 99-U-32 & 99-U-33, Opinion 656, 48 DCR 789 (2001), *et seq.*

¹⁰ Citing *Iron Workers Local Union 377*, 326 NLRB 375 (1998).

¹¹ D.Del., 419 F.Supp. 109, 93 LRRM 2387 (1976)

¹² The National Labor Relations Act (1935, also known as the Wagner Act) was amended by the Taft-Hartley Act in 1947 and was thereafter also referred to as the Labor Management Relations Act (LMRA).

The Delaware Supreme Court noted the “more than passing relevance of federal labor law”¹³ in interpreting and applying state collective bargaining statutes. Numerous decisions of the Public Employment Relations Board have held that where Delaware law mirrors federal statutes, the PERB looks to federal case law for guidance.

Under the LMRA, the statutory source of the duty of fair representation is found in §8(b)(1)(A), which states:

(b) It shall be an unfair labor practice for a labor organization or its agents

(1) to restrain or coerce (A) in the exercise of the rights guaranteed in section 7...

[Sec. 7] Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual Aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Under the PERA, the duty of fair representation is found in sections §1307(b)(1) and §1303, of the Act, which provide:

(b) It is an unfair labor practice for a public employee or an employee organization or its designated representative to do any of the following:

(1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.

1303. Public employee rights.

Public employees shall have the right to:

1) Organize, form, join or assist any employee organization except to the extent that such right may be affected by a collectively bargained agreement requiring the payment of

¹³ *City of Wilmington v. Wilmington Firefighters Local 1590*, Del.Supr., 385 A.2d 720 (1978)

a service fee as a condition of employment.

- 2) Negotiate collectively or grieve through representatives of their own choosing.
- 3) Engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection insofar as any such activity is not prohibited by this chapter or any other law of the State.
- 4) Be represented by their exclusive representative, if any, without discrimination.

The duty of fair representation by an exclusive bargaining representative (union) is further strengthened by 19 Del.C. §1304, Employee organization as exclusive representative, which states, in relevant part:

- (a) The employee organization designated or selected for the purpose of collective bargaining by the majority of the employees in an appropriate unit shall be the exclusive representative of all the employees in the unit for such purpose and shall have the duty to represent all unit employees without discrimination

The NLRA was a primary source for the drafting of the Delaware PERA and the similarity of the foregoing provisions is apparent.¹⁴

The instant Charge presents a case of first impression, specifically in determining the appropriate remedy where a union has not met its duty of fair representation to an employee who expressed a desire to challenge his termination under the contractual grievance and arbitration procedure. The determination of the damages, if any, to be awarded where a breach of the duty of fair representation has occurred has been addressed by the NLRB and the federal courts on numerous occasions.

The United States Supreme Court determined that in order to breach the “duty of fair

¹⁴ The duty of fair representation in Delaware is further strengthened by section 1304, Employee organization as exclusive representative, of the PERA which provides, in relevant part:

- (a) The employee organization designated or selected for the purpose of collective bargaining by the majority of the employees in an appropriate unit shall be the exclusive representative of all the employees in the unit for such purpose and shall have the duty to represent all unit employees without discrimination.

representation” in matters concerning the grievance-arbitration process “a union’s conduct toward a member of the bargaining unit [must be] ‘arbitrary, discriminatory, or in bad faith’.¹⁵ In *Vaca v. Sipes*¹⁶, the United States Supreme Court held that even where a breach of the duty of fair representation for failing to process a meritorious grievance is proven, the Union may not be required to pay damages attributable solely to the employer’s breach of contract. The principle that each party causing damage to an employee should be held responsible only for the damages it caused was reaffirmed by the Supreme Court in *Bowen v. Postal Service*, 459 U.S. 212 (1983). *Del Costello v. NLRB*, 462 U.S. 151 (1983).

In 1986, the Ninth Circuit reasoned that in cases where a breach of the duty of fair representation has occurred, it was an incorrect application of the NLRA to award an order of back pay against a Union without first finding a contractual violation by the employer. *San Francisco Pressman v. NLRB*, 794 F. 2d 420 (1986); *Mail Handlers Local 305 v. NLRB*, 929 F. 2d 125 (1991).

In 1998, the NLRB adopted the standard set forth *San Francisco Pressman* and *Mail Handlers* decisions. In *Iron Workers Local Union 377* the NLRB held that when only the Union is charged with a breach of the duty of fair representation (i.e., the employer is not joined in the charge), in order for a complainant to recover losses allegedly resulting from that 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. This standard remains in effect as recently as April 30, 2014,¹⁷ for cases involving a breach of the duty of fair representation. The determination of damages in any breach of fair

¹⁵ The Delaware PERB affirmed the decision of the Hearing Officer that a breach of the duty of fair representation occurred but that discrimination was not an underlying cause.

¹⁶ *Supra*.

¹⁷ *Amalgamated Transit Union Local 1498 (Jefferson Partners L.P.) and Raymond Jones*, 360 NLRB 96 (2014).

representation case turns on the specific facts and circumstances of the case.

Consistent with the *Iron Workers* rationale and decision in the federal sector, once a breach of the duty of fair representation has been established, the Union will be directed to attempt to adjudicate the underlying grievance in a manner consistent with its duty of fair representation. If the grievance is resolved in this manner, no further proceedings will be necessary. If the underlying issue cannot be resolved through the contractual grievance procedure, it is the Board's responsibility, (exclusively for the purpose of deciding whether make-whole relief is appropriate ¹⁸) to appoint a neutral party to determine whether Charging Party would have prevailed on a properly processed grievance. In that type of proceeding, the Charging Party has the burden to establish by a preponderance of the evidence that a properly filed and properly processed grievance would have been successful.

DECISION

In conformance with the *Iron Workers' Local 377* decision the Hearing Officer's decision is modified as necessary to conform to the following 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 Charging Party's grievance protesting his discharge.
3. In the event 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

¹⁸ Punitive damages are not awarded in breach of the duty of fair representation cases. Attorney's fees have been awarded where egregious circumstances are present.

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.

IT IS SO ORDERED.

Dated: June 2, 2014



Charles D. Long, Jr.,
Del. Public Employment Relations Bd.