

STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN ASSOCIATION OF UNIVERSITY	:	
PROFESSORS, DELAWARE STATE UNIVERSITY	:	
CHAPTER,	:	
	:	
Appellant,	:	PERB Review of Hearing
	:	Officer’s Decision
v.	:	
	:	
DR. JAH I ISSA,	:	<u>ULP No. 13-02-887</u>
	:	
Appellee.	:	

APPEARANCES

*Jonathan G. Axelrod, Esq., and Justin P. Keating, Esq., (Beins Axelrod PC)
and Perry F. Goldlust, Esq., for AAUP, DSU Chapter*

Dr. Jahi Issa, pro se

The American Association of University Professors of Delaware State University (“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 Delaware State University (“DSU”), within the meaning of §1302(j) of the PERA.

Dr. Jahi Issa (“Dr. Issa”) is a former DSU employee within the meaning of §1302(o), of the Public Employment Relations Act (“PERA”). 19 Del.C. Chapter 13 (1994). He was also a member of the bargaining unit and represented for purposes of collective bargaining by the American Association of University Professors of Delaware State University. Dr. Issa was not a tenured member of the DSU faculty; in April 2012 he

executed a terminal contract which limited his employment with DSU to the 2012-2013 academic year. On or about August 17, 2012 his employment with Delaware State University was terminated effective on that date, allegedly for cause. DSU and AAUP-DSU are parties to a current collective bargaining agreement which has a term of July 1, 2010 through August 31, 2015.

On February 1, 2013, Dr. Issa filed an unfair labor practice charge alleging conduct by AAUP-DSU in violation of §1303, §1304(a) and /or §1307(b)(1), of the Act.¹ Specifically, the Charge alleges that following his discharge on August 17, 2013, Dr. Issa “repeatedly attempted to secure representation from AAUP-DSU to challenge his termination.” Charge, ¶4. Charging Party claims that the AAUP-DSU “never got back to

¹§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 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.

§1304. Employee organization as exclusive representative.

- (a) The employee organization designated or selected for the purpose of collective bargaining by the majority of the employees in an appropriate collective bargaining 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. Where an exclusive representative has been certified, a public employer shall not bargain in regard to matters covered by this chapter with any employee, group of employees or other employee organization...

§1307. Unfair labor practices.

- (b) It is unfair labor practice for a public employee or for 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.

me regarding my request for assistance or provided requested representation.”

On March 13, 2013, AAUP-DSU filed its Answer to the Charge in which it denied engaging in conduct which violated the provisions of the PERA, as alleged. It also included in its Answer affirmative defenses challenging the validity and timeliness of the charge. On March 21, 2013, Dr. Issa filed a Response denying AAUP-DSU’s Affirmative Defenses.

A Probable Cause Determination was issued on April 2, 2013 and a hearing was convened over two days on May 14 and May 18, 2013. Thereafter, the parties were afforded the opportunity to submit written argument.

A decision on the merits was issued by the Hearing Officer on August 26, 2013 in which he dismissed the charge that AAUP-DSU had violated 19 Del.C. §1304(a) by discriminating against Dr. Issa, finding the evidentiary record was insufficient to support this allegation. The Hearing Officer did find that,

...[b]y failing to respond to Charging Party’s request for representation and to file a timely grievance contesting 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).

The Hearing Officer ordered AAUP-DSU to 1) cease and desist from engaging in conduct in violation of its statutory duty to fairly represent bargaining unit members; 2) 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 2012/13 academic year; 3) to immediately post a Notice of Determination in all areas of the campus where notices affecting bargaining unit employees are normally posted by AAUP-DSU; and 4) to notify PERB within sixty (60) calendar days of all steps taken to comply with the order.

On or about August 30, 2013, the Appellant, AAUP-DSU requested the full

Public Employment Relations Board review the Hearing Officer's decision, asserting the decision was contrary to law. AAUP-DSU requested the Board reverse the Hearing Officer's decision and dismiss all charges with prejudice. AAUP-DSU also requested a Stay of the Hearing Officer's Remedy in a separate motion filed on August 30, 2013.

The Appellee, Dr. Issa, responded on September 3, 2013, by filing a Motion for Reconsideration in which he requested that additional argument be entered concerning the remedy portion of the Hearing Officer's decision. Dr. Issa argued the damages "should reflect Charging Party's promotion and tenure" asserting that had AAUP-DSU not breached its statutory duties, he would have continued to be employed as a DSU faculty member for an additional twenty years. He also asserted he had suffered emotional damages for which the AAUP-DSU should be responsible.

Separately, on September 13, 2013, Dr. Issa filed a Motion to Dismiss Respondent's Motion to Stay and a Response to AAUP-DSU's Request for Review of the Decision of the Hearing Officer. Dr. Issa included legal argument in support of the Hearing Officer's decision in his response to AAUP-DSU's request for review.

On September 20, 2013, AAUP-DSU filed legal argument in support of its Request for Review and in opposition to Dr. Issa's Request for Reconsideration.

By letter dated September 23, 2013, the Chairwoman of the Public Employment Relations Board, acting in her capacity as the designated representative of the full Board, granted the Motion to Stay implementation of the remedy, pending the Board's decision on review of the Hearing Officer's decision.

A copy of the complete record in this matter was provided to each member of the Public Employment Relations Board. A public hearing was convened on October 28, 2013, at which time the full Board met in public session to hear and consider this request for

review. The parties were provided the opportunity to present oral argument and the decision reached herein is based upon consideration of the record and the arguments presented to the Board.

DISCUSSION

The Board's scope of review is limited to the record created by the parties and consideration of whether the decision is arbitrary, capricious, contrary to law, or unsupported by the record. After consideration of the record and the arguments of the parties on appeal, the Board must vote to either affirm, overturn, or remand the decision to the Executive Director for further action.

On appeal, AAUP-DSU argues that in order to find there was a failure to represent the Charging Party, the Hearing Officer must find the union acted arbitrarily or capriciously by failing or refusing to properly process a meritorious grievance. In the decision below, the Hearing Officer based his decision only on a conclusion that the AAUP-DSU failed to advise Dr. Issa as to his rights and to present a grievance challenging his termination but failed to consider whether such a grievance had any merit. Because AAUP-DSU has no means to compel the University² to submit the termination to arbitration, it argues the Board should remand the matter to the Hearing Officer to conduct a hearing to determine whether it is reasonable to believe that the Charging Party could have prevailed on the merits of the grievance. The union asserts this approach is consistent with federal law and the process followed by the Washington D.C., PERB in *Chisholm v. AFSCME Council 20, LU 2401 & DCOLRB* (DC PERB Case No. 99-U-32 & 99-U-33, Opinion No. 656, 48 DCR 789 (2001)).

AAUP-DSU argues the collective bargaining agreement clearly states that arbitration

² Because the University is not a party to this Charge and the window for filing a grievance which could be advanced to arbitration closed in the fall of 2012.

is the third step of the negotiated grievance procedure and asserts a grievance cannot be processed to arbitration unless it has been processed through the first and second steps. In this case, only the Charging Party had the right to file a grievance protesting his termination. Because he did not do so, there was no grievance for AAUP-DSU to advance to arbitration. Further, the union asserts that Dr. Issa has not, at any point following his termination, explained to the union how he believes the collective bargaining agreement was violated. It argues an employee has an obligation to exhaust the grievance procedure which the collective bargaining agreement expressly allows, but Dr. Issa did not do so. The union is only responsible for processing grievances where it acts as the gatekeeper. AAUP-DSU has no role to play in Dr. Issa's grievance of his termination until arbitration, which can only be invoked after Steps 1 and 2.

In the alternative, AAUP-DSU argues that should the Board affirm the Hearing Officer's decision, there is no basis on which to expand the remedy beyond the end of the terminal contract issued to Dr. Issa. Dr. Issa was undisputedly not a tenured professor at Delaware State University; consequently the University had the right under the collective bargaining agreement to issue a terminal contract. Dr. Issa signed the terminal contract for the 2012-2013 academic year. Regardless of the outcome of this unfair labor practice charge, Dr. Issa had no reasonable expectation of continued employment at DSU beyond the end of the academic year.

Dr. Issa argued the Hearing Officer properly found the University initiated a termination process and, despite his repeated requests, AAUP-DSU did nothing to assist him in challenging his termination. Every piece of correspondence he received from the University was also provided directly to the union. He argues the union was looking for ways to avoid providing him with representation. He asserts that had the union provided adequate representation, he would still be working at DSU and would not have suffered

severe financial, emotional, psychological and physical damages. Dr. Issa requests the Board remand the decision for purposes of reconsidering the remedy portion.

The Board affirms and adopts the Hearing Officer 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 motion made in the union's Executive Committee³ meeting does not suffice to support the union's assertion that it did consider his request because it addresses the question of paying for legal representation for a lawsuit rather than whether it would agree to pay its own counsel to represent Dr. Issa in an action under the Collective Bargaining Agreement to challenge the propriety of his termination. The record is insufficient to establish that the union ever met or communicated with Dr. Issa to advise him that he needed to file a grievance and/or that the AAUP-DSU could not file a grievance on his behalf. Accordingly, it did not act in good faith in discharging its duty of fair representation vis-à-vis Dr. Issa.

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 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

³ The August 30, 2012 minutes of the AAUP-DSU Executive Board reflect, in relevant part:

II Personnel Issues: Dr. Jahi Issa was officially discharged from the University two weeks ago, was involved in various issues. Our police reports to Attorney General. There was an administrative investigation, Dr Issa did not come to attend the meeting. He was found guilty. CBA 10.4.4 Discipline. Newton authorized phone calls and meeting with AAUP's lawyers (Justin Keating in Axelrod's office). Issa demanded that AAUP provide him with attorney at our expense for his lawsuit. Motion by Crawford: Do not provide attorney at our expense, seconded by Dujari, all in favor.

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 the wages he would have received through the end of the 2012-2013 affords Dr. Issa far more than the collective bargaining agreement contemplates.

The Board remands the remedy to the Hearing Officer for reconsideration and requests that he accept argument from the parties as to the appropriate remedy under the unique circumstances presented in this matter.

DECISION

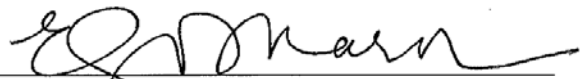
After reviewing the record and considering the arguments of the parties, the Board unanimously denies Dr. Issa's request for reargument. There is clearly no basis in law to require the union to pay the damages Dr. Issa seeks through his Motion for Reconsideration, regardless of any breach by the union of its duty to fairly represent him.

The Board unanimously affirms the decision of the Hearing Officer 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 CBA as a participant or party. Such a failure, in our view, falls short of good faith representation.


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.

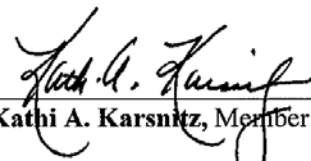
IT IS SO ORDERED.



Elizabeth D. Maron, Chairperson



R. Robert Currie, Jr., Member



Kathi A. Karsnitz, Member

DATE: November 27, 2013