

STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

DR. JAHİ İSSA,	:	
	:	
Charging Party,	:	
	:	
v.	:	<u>ULP No. 13-02-887</u>
	:	
AMERICAN ASSOCIATION OF UNIVERSITY	:	DECISION ON APPEAL OF REMAND
PROFESSORS, DELAWARE STATE UNIVERSITY	:	
CHAPTER,	:	
	:	
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 the Delaware State University¹ (“University”) 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 University 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 the University, within the meaning of §1302(j) of the PERA.

Dr. Issa was discharged from his employment as an Associate Professor at the University

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

effective August 17, 2012, allegedly for “just cause.” Prior to his discharge, Dr. Issa was employed by DSU under a terminal contract which limited the duration of his employment based on non-reappointment to the end of the 2012-2013 school year. 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 because it failed to challenge his discharge.²

A decision on the merits was issued by the PERB Hearing Officer on August 26, 2013, which dismissed the charge of discrimination based on race, 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 notices and to advise the PERB of all actions taken to comply with the Order.³

Thereafter, on August 30, 2013, AAUP-DSU filed an appeal of the Hearing Officer’s decision with the full PERB in which it challenged both the determination that it had violated its duty of fair representation and the measure of damages. Dr. Issa filed a Motion for Reconsideration on September 3, 2013 contending that the Hearing Officer’s determination of damages should have reflected “salary increments and interest of 3% for 20 years.” On November 27, 2013 the PERB affirmed and adopted the Hearing Officer’s finding that

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

³ *Issa v. AAUP-DSU Chapter*, ULP 13-02-887, VIII PERB 5825 (HO Decision on the Merits, 8/26/13).

“...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.”⁴ We did not, however, accept the Hearing Officer’s determination that Dr. Issa was entitled to an award of damages measured by the salary he would have received between the date of his discharge and the end of his terminal contract. Accordingly, we stated:

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.

Following receipt of argument from the parties, the Hearing Officer held:⁵

Consistent with the *Iron Workers*⁶ 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 appropriate⁷) 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.

The AAUP-DSU was directed to take the following actions:

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.

⁴ *AAUP-DSU Chapter v. Issa*, ULP 13-02-887, VIII PERB 5885 (PERB Board on Review, 11/27/13).

⁵ *Dr. Jahi Issa v. AAUP-DSU*, ULP 13-02-887, VIII PERB 6075, 6087 (Hearing Officer’s Decision on Remand, 6/2/14).

⁶ *Iron Workers Local Union 377*, 326 NLRB 375 (1998).

⁷ 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.

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 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.⁸

Thereafter, the AAUP-DSU provided the Executive Director with the University's response to its request to arbitrate Dr. Issa's termination:

We have reviewed the Remand Decision referenced above and your request that Delaware State University agree to arbitrate the grievance of Dr. Issa. Given the language of section 10.4.4 of the AAUP-DSU Collective Bargaining Agreement, we do not believe that Dr. Issa or any other nontenured faculty member is entitled to an arbitration for a disciplinary discharge.

Further, as you may be aware, Dr. Issa has filed a complaint against

⁸ *Issa v. AAUP-DSU Chapter*, ULP 13-02-887, VIII PERB 6075 (HO Decision on Remand, 6/2/14).

DSU in federal court raising substantially the same issues as he proposes to raise in an arbitration dealing with his termination from DSU. Pursuant to section 14.7 of the CBA, Dr. Issa is not entitled to pursue relief under the CBA procedures, including arbitration, where he has filed substantially the same claim in court.

Under these circumstances, the University cannot and will not agree to the requested arbitration.

An independent Hearing Officer was appointed by PERB⁹ on August 15, 2014, and the parties were notified the hearing was scheduled for November 19 and 20, 2014. The purpose of the hearing was noted on the Hearing Notices:

A public hearing in this matter will be convened by the Public Employment Relations Board before the Board's designated Hearing Officer, Joel M. Weisblatt, Esq., for the purpose of receiving evidence and argument to establish a record on which a determination can be made concerning:

Whether a properly filed and properly processed grievance would have been successful in contesting the termination of the Charging Party under the terms of the collective bargaining agreement between Delaware State University and the AAUP. Should that burden be met, the Hearing Officer shall determine the appropriate back pay relief, if ANY.

The hearing was convened as scheduled, at which time both Dr. Issa and the AAUP-DSU were present. Dr. Issa was afforded the opportunity to make the initial opening statement. He first objected to the absence of local counsel (the AAUP-DSU is represented by an attorney admitted *pro hoc vice*); he then argued that in light of DSU's refusal to submit the discharge to arbitration, he was entitled to have the union file suit on his behalf in Court. He then argued that he filed an argument (presumably on the proper measure of damages) that was not considered by the Hearing Officer on remand.¹⁰ When asked by the Hearing Officer to explain what the issues

⁹ Pursuant to 19 Del.C. §1306.

¹⁰ A seven page Affidavit of Injury and Demand for Remedy was filed by Dr. Issa on February 5, 2014. In it, he outlines a demand for remedies which include, among other things, a refund of his union dues with interest, reinstatement, a paid medical policy for ten years, a formal apology, birthday gifts for his wife and children from August, 2012 to the present, and decertification of the AAUP-DSU.

articulated by Dr. Issa had to do with the hearing, Dr. Issa continued to challenge the participation of counsel to the AAUP-DSU. Characterizing the process as a “kangaroo court,” Dr. Issa stated: “[I]m out of here.” In his decision, the Hearing Officer noted:

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 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 was any witnesses called to provide testimony.

The Hearing Officer’s decision was issued on December 11, 2014¹¹ with the following order:

In the absence of any evidence that the Charging party would have prevailed in the 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.

By email dated December 16, 2014, Dr. Issa requested review of the Hearing Officer’s decision by the full Public Employment Relations Board. 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 January 21, 2015, at which time the full Board met in public session to consider this request for review. Written argument was received from both parties and the parties were also provided the opportunity to present argument at the hearing. 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 below is arbitrary, capricious, contrary to law, or

¹¹ Although dated December 6, 2014, the Hearing Officer’s decision was received by PERB on December 11, 2014 and promptly forwarded to the parties on the same date.

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, Dr. Issa argued he was entitled to union representation to challenge his termination because he was a dues-paying member in good standing. He alleged the union did not provide him with adequate representation because it provided him with an attorney who was not admitted to the Delaware Bar to accompany him to a pre-termination meeting with the University's administration. Dr. Issa filed a complaint with the Delaware Supreme Court's Office of Disciplinary Counsel, which was dismissed. By these actions, Dr. Issa asserts the AAUP, PERB and the Office of Disciplinary Counsel have violated his civil rights.

Additionally, he asserted in oral argument that PERB attempted to force him to violate his Fifth Amendment protection against self-incrimination by scheduling the evidentiary hearing for November 19, 2014. He alleged he was scheduled to stand trial on criminal charges (which he asserts are related to his termination) in January, 2015. He argued that as a professor of history, he understands the law and the constitution and that he was deprived of due process at the evidentiary hearing before the Hearing Officer.

With respect to Dr. Issa's assertion that the hearing on remand implicated his Fifth Amendment rights, there is no evidence in the record below that either the PERB or its Hearing Officer had any knowledge in August, 2014 (when the November 19-20, 2014 hearing was scheduled and noticed) that a criminal proceeding involving Dr. Issa was scheduled for January, 2015. Further, at no point prior to November 19, 2014 did Dr. Issa request the hearing be postponed or continued, notify PERB of a scheduled, related criminal proceeding, or notify the Hearing Officer on November 19, 2014 that he chose not to proceed at that time because he was invoking his Fifth Amendment protection.

Although Dr. Issa is familiar with and has taught American history, he does not seem to appreciate either the scope of PERB's statutory jurisdiction or the basic tenets of Delaware's public sector collective bargaining law which circumscribe the relationship between a union and its membership. By paying dues to a labor organization, a bargaining unit employee is not "contracting and paying for" union representation in any circumstance in which that individual believes he is entitled to or should have assistance concerning issues arising in the workplace. The union, as the certified exclusive bargaining representative of the bargaining unit, is obligated under the law to represent each bargaining unit member fairly and without discrimination, regardless of whether he or she is a dues-paying member of the organization. That representational responsibility, however, is limited to negotiation and enforcement of the collective bargaining agreement between the union and the employer. Bargaining unit employees are not in a direct contractual relationship with their employer, *vis-à-vis* the negotiated collective bargaining agreement; rather, they are beneficiaries of the agreement between the employer and the union, which negotiates in the collective interest of the whole bargaining unit. The union is also limited in its duty and responsibility to represent bargaining unit employees by the terms of the collective bargaining agreement and the PERA.

This charge arose because Dr. Issa was terminated by his employer, Delaware State University. The letter of termination stated he was permanently discharged "predicated upon ... fitness to perform" his professional responsibilities. He was specifically charged with the following violations (which constitute cause for discharge under the parties' collective bargaining agreement):

10.4.3 A. Failure to perform professional responsibilities either through incompetence, persistent negligence, refusal to carry out reasonable assignments, or disregard for or failure to meet scholarly and professional standards and ethics.

10.4.3. E. Serious misconduct of such a nature as to warrant and

evoke the condemnation of the academic community.

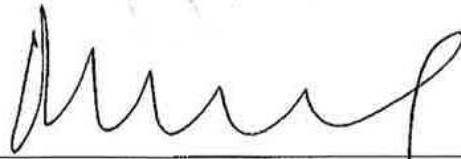
In response to a request from Dr. Issa to challenge his discharge, the AAUP-DSU characterized the request to its decision making body as a demand that the union pay for an attorney to file a lawsuit on behalf of Dr. Issa. We affirmed the Hearing Officer's finding that the AAUP-DSU's response to Dr. Issa failed to discharge its obligation to fairly represent him *under the terms of the collective bargaining agreement* because it did not advise Dr. Issa of what rights he arguably possessed under the CBA to challenge his discharge, rights which do not include litigation *per se*.

In order to return the parties to the status quo prior to the breach of duty, this Board provided Dr. Issa the opportunity to present to a neutral Hearing Officer his evidence and argument that, had he been fairly represented by the union, he could have successfully challenged his discharge. Although he was repeatedly notified and reminded of the scope and purpose of the hearing, he chose not to participate and did not provide any evidence in support of his claim.

Based on a review of the record below, the Board unanimously affirms the decision of the Hearing Officer that the Charging Party failed to meet his burden to establish by a preponderance of the evidence that he could have prevailed in challenging his termination under the terms of the applicable collective bargaining agreement. The unfair labor practice charge is, therefore, dismissed in its entirety.

IT IS SO ORDERED.


Elizabeth D. Maron, Chairperson



R. Robert Currie, Jr., Member



Kathi A. Karsnitz, Member

Dated: January 29, 2015