H.E. NO. 94-12

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OPERATED SCHOOL DISTRICT
OF THE CITY OF JERSEY CITY,

Respondent,

-and- Docket No. CI-H-91-61

ROSEMARIE ERCOLANO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss Ercolano's Unfair Practice Charge, alleging that the District violated Sections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act. The facts as alleged and proven were that the Respondent did nothing more than deny a grievance by which the Charging Party sought placement in a certain title at a certain level of compensation. Basically, the Hearing Examiner had to recommend dismissal based on Beall (6 NJPER 560) since an individual employee has no standing to file a §5.4(a)(5) charge in the absence of proof of a DFR by the collective negotiations representative. Thus, dismissal was recommended.

A Hearing Examiner's decision to dismiss is not a final administrative determination of the Public Employment Relations Commission. The Charging Party has ten (10) days from the date of the decision to request review by the Commission or else the case is closed.

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-and- Docket No. CI-H-91-61

ROSEMARIE ERCOLANO,

Charging Party.[2/]

Appearances:

For the Respondent, Murray, Murray & Corrigan, Attorneys
(Regina W. Joseph, of counsel)

For the Charging Party, Rosemarie Ercolano, Pro Se

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on April 2, 1991 by Rosemarie Ercolano ("Charging Party" or "Ercolano") alleging that the State Operated School District of the City of Jersey City ("Respondent" or "District") has engaged in unfair practices within

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1/ As amended at the hearing.

2/ As amended at the hearing.

the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act").[3/]

In the charge against the District, Ercolano alleged that on January 7, 1991, a grievance hearing was conducted with representatives from the District, Local No. 2262 and Ercolano present. She charges that the District failed to negotiate in good faith with her majority representative and that her "certification for Senior Food Service Inspector" was never recognized and that during "the time in question" another person acted in her place. Additionally, reprimands were placed in her file as continued harassment of her by the District. Also, grievances filed by her majority representative were not processed as rapidly as possible. Finally, with respect to compensation, the "audit was a review of Mr. Apruzzese position..." (sic).

All of the foregoing was alleged by Ercolano to be in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act.[4/]

3/ Ercolano also filed an Unfair Practice Charge with the Commission on April 2, 1991 [docketed CI-91-62], alleging that her collective negotiations representative, AFSCME Council 52 and its Local No. 2262 had violated the Act. This was withdrawn by Ercolano on August 13, 1992, prior to the issuance of the Complaint and Notice of Hearing in this matter, infra (Tr 36, 37).

4/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative.

A Complaint and Notice of Hearing was issued on September 1, 1992. The many agreed-upon adjournments appear in the record. Most involved requests to accommodate Ercolano, who first sought to have AFSCME Council 52 represent her in this proceeding. But when this was unavailing, she sought representation by a private attorney. [Tr24-28].

The hearing was held on October 14, 1993 in Newark, New Jersey, at which time the Charging Party appeared and was given an opportunity to examine witnesses, present relevant evidence and argue her case to the Hearing Examiner. Before proceeding with Ercolano's testimony, I reviewed with her, on the record, the various papers constituting her Unfair Practice Charge. Also, I explained to her the subsections of the Act that she had claimed the District violated, i.e., §§5.4(a)(1) and (5). [Tr11-14].

It became apparent from my colloquy with Ercolano that her basic complaint, as set forth in the first paragraph of her Unfair Practice Charge, was her dissatisfaction with the compensation that Apruzzese was receiving as opposed to the salary that she was receiving (Tr15). The dispute between Ercolano and Apruzzese originated with a classification/title dispute dating back to 1985 (Id.).

Immediately after Ercolano was sworn, the Respondent made a Motion to Dismiss on the record. The grounds, as stated by counsel for the Respondent, were that Ercolano had no standing to allege a violation of §§5.4(a)(1) and/or (5) of the Act and, indeed, Ercolano

had not even met the Commission's Complaint issuance standard. [Tr17, 18] The Respondent also urged that the claim of Ercolano that Appruzzese had improperly taken her job title and duties had been fully and finally adjudicated by the Department of Personnel. Therefore, the Commission has no jurisdiction over the matter. [Tr20-22].5/

The Respondent's Motion was held in abeyance at that time since the Charging Party had not rested. Ercolano's response to the Motion was to again bring up Apruzzese's position of Senior Inspector since 1985, claiming that he had not been certified in that title and that grievances by Ercolano, over the years, had been unavailing (Tr19, 20).6/

Ercolano at this point acknowledged that the matter of her title (and compensation) before DEP was "...the core of the case..." [before me]. [Tr19, 23].

I formally granted the Respondent's Motion to Dismiss at Tr37, based upon the reasons set forth at Tr33-35: New Jersey Turnpike Authority (Jeffrey Beall), P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980), which held that an employee had no standing to file a

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5/ Ercolano acknowledged that she had filed with DEP had not prevailed (Tr 21-23).

6/ To provide continuity in the testimony of Ercolano, I caused to be placed in the record as Commission Exhibits three letters and one memorandum, covering the period January 10, 1989 through February 21, 1991 [C-3 through C-6 (Tr30, 31)]. Also, I likewise had placed in evidence as Commission Exhibits four grievances of Ercolano, dated June 21, 1990 through October 18, 1990 [C-7; Tr32].

subsection (a)(5) allegation unless he or she first established a breach of the Duty of Fair Representation (DFR) by the collective negotiations representative under §5.4(b)(1) of the Act and collusion between the parties. Further, there was not here a scintilla of evidence that the Respondent District independently violated §5.4(a)(1) of the Act.

When this hearing was adjourned, Ercolano was to decide whether or not she intended to appeal my Motion to Dismiss to the Commission. I was promptly notified of her intention to do so as of October 25, 1993.[7/]

* * * *

Upon the record made by the Charging Party only, I make the following:

FINDINGS OF FACT[8/]

1. The State Operated School District of the City of Jersey City is a public employer within the meaning of the Act, as amended. Rosemarie Ercolano is a public employee within the meaning of the same Act.

2. Ercolano agreed that the core of her case involved her dissatisfaction with Apruzzese, who had since 1985 been working in

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7/ The transcript was received on November 9, 1993, and this Decision has followed.

8/ Due to the various admissions made by Ercolano during the course of the hearing, and to some extent by counsel for the Respondent, the Findings of Fact now necessary to dispose of this Motion are few in number.

the title of Senior Food Service Inspector at $18,000 per year, a title for which he had not been certified. Ercolano had been certified for this title but had never been so recognized. She has not, therefore, been compensated at the level of Apruzzese. [Tr14, 15, 19, 20]. Ercolano has grieved her situation many times but never to arbitration. She appealed to the Department of Personnel, which rejected her claim. [Tr14, 15, 19-24].

3. The allegations in Ercolano's Unfair Practice Charge that were litigated at the hearing pertained solely to her having attended a meeting on her grievance on January 7, 1991 with representatives of the District and Local No. 2262. The Charge does not indicate that there was any resolution of the grievance pending at that time (but see ¶5, infra).

4. Various grievances filed by Ercolano remained at the initial level of the grievance procedure and "...never moved further..." (Tr19, 20).

5. On February 21, 1991, Robert Y. Schaefer of the District sent a letter to the President of Local No. 2262, in which he answered the Ercolano grievance heard on January 7, 1991, supra. He noted that Ercolano had filed the same grievance several years previously which had been fully processed. Therefore, the current grievance is denied. He also noted that there had been a Civil Service audit. [C-6].

ANALYSIS

The Applicable Standard On a Motion To Dismiss.

The Commission in N.J. Turnpike Authority, P.E.R.C. No. 79-81, 5 NJPER 197 (¶10112 1979) restated the standard that it utilizes on a motion to dismiss at the conclusion of the Charging Party's case, namely, the same standards used by the New Jersey Supreme Court: Dolson v. Anastasia, 55 N.J. 2 (1969). The Commission noted that the courts are not concerned with the worth, nature or extent, beyond a scintilla, of the evidence, but only with its existence viewed most favorably to the party opposing the motion. While the process does not involve the actual weighing of the evidence, some consideration of the worth of the evidence presented may be necessary. Thus, if evidence "beyond a scintilla" exists in the proofs adduced by the Charging Party, the motion to dismiss must be denied.

The Respondent District's Motion To Dismiss Is Granted Since The Charging Party Has Failed To Adduce Even A Scintilla Of Evidence That §§5.4(a)(1) and/or (5) Of The Act Were Violated

It is well settled under Commission precedent that an individual employee has no standing to file a charge that his or her employer has violated Section 5.4(a)(5) of the Act. This is solely the prerogative of the majority representative: Camden County Highway Dept., D.U.P. No. 84-32, 10 NJPER 399, 400 (¶15185 1984), citing at footnote 5, New Jersey Turnpike Authority (Jeffrey Beall), D.U.P. 80-10, 5 NJPER 518, 520 (¶10268 1979); following some interim procedural matters, a Complaint was issued as to alleged violations

of §§5.4(a)(1) and (5) by the Turnpike Authority. This resulted in a Commission decision, dismissing the Complaint for lack of standing, supra. [P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980), aff'd. App. Div. Dkt. No. A-1263-80T3 (1981)].

In Camden County an individual employee alleged that when his request to be reassigned to another truck had been denied he had filed a grievance that was not timely pursued through the steps of the contractual grievance procedure. He then filed an Unfair Practice Charge, alleging a violation of the collective agreement under Section 5.4(a)(5). The Director of Unfair Practices found that a claim under subsection (a)(5) is within the exclusive province of the majority representative and "...An individual employee may not stand in the shoes of the majority representative unless there are extenuating circumstances... (not present here)..."[9/]

In another Camden County case, this one involving Camden County College, D.U.P. No. 89-15, 15 NJPER 292 (¶20131 1989) where the Director of Unfair Practices stated that

> ...an individual, lacks standing to maintain a claim that an employer has violated subsection 5.4(a)(5). Rutgers University, P.E.R.C. No. 88-130, 14 NJPER 414

9/ In footnote 5 of the Camden County decision, supra, the Director stated at one point that "...unless it is claimed that the majority representative has violated its responsibility to fairly represent the interest of a unit member when a contract has been breached..." no complaint will issue "...alleging that the employer has violated its responsibility to the majority representative..." (10 NJPER at 400).

(¶19166 1988); City of Atlantic City, D.U.P. No. 88-6, 13 NJPER 805 (¶18308 1987); City of Jersey City, P.E.R.C. No. 87-56, 12 NJPER 853 (¶17329 1986)...[15 NJPER at 293].

In New Jersey Dept. of Higher Ed., P.E.R.C. No. 85-77, 11 NJPER 74 (¶16036 1985), the Commission explained that the issue under N.J.A.C. 19:14-1.1 [who may file] is not procedural but substantive. As a general rule, individual employees, in the absence of alleged collusion and unfair representation, lack standing to litigate charges against their employers concerning negotiations because the exclusive right to negotiate is vested in the majority representative. [11 NJPER at 78].

Even assuming, arguendo, that Ercolano was able to overcome her lack of standing to file a Section 5.4(a)(5) unfair practice charge, supra, she would still be confronted by the Commission's decision in New Jersey Turnpike Authority (Jeffrey Beall), [supra at 6 NJPER 560, 561] where it rendered a definitive decision on when, and under what circumstances, an individual may charge a public employer with having violated subsection (a)(5) of the Act.

Following Beall's termination for work-related reasons, he filed a grievance that was processed through the grievance procedure to an administrative hearing, the step immediately prior to arbitration. The hearing officer sustained his discharge. He then requested that his union proceed to arbitration. This the union refused to do because it concluded that there was little likelihood of success. The employer refused Beall's request that it proceed to arbitration with him alone. The Hearing Examiner rejected Beall's

contention that the employer and the union had colluded to deprive him of his right to pursue his grievance to arbitration.

The Commission in Beall also found no evidence of collusion, noting that he was attempting to have the merits of his discharge grievance adjudicated as an unfair practice, i.e., that his discharge was not for just cause under the agreement. The Commission also stated that under Section 5.3 of the Act only a majority representative may file a Section of 5.4(a)(5) unfair practice charge, alleging a claimed breach of the collective agreement. Since Beall's charge amounted to exactly such a claim, the Commission stated: "As a general matter, we do not believe that an individual employee, in the absence of any allegations of collusion or unfair representation by the majority representative, can use the unfair practice forum to litigate an alleged breach of a collective negotiations agreement unrelated to union activity..." (6 NJPER at 561).

* * * *

One marginal case to be cited at this point is Dept. of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984) where the Commission ended many years of confusion as to when an Unfair Practice Charge presented a true refusal to negotiate in good faith as opposed to instances where the charge presented a mere breach of contract claim. The standing of Ercolano to have filed a charge under §5.4(a)(5) of the Act is dubious at best. Even if I were to assume arguendo that she had such standing, I would still

have to dismiss her claim based on Human Services, supra. Clearly, hers was a mere breach of contract claim, i.e., that the District breached the collective negotiations agreement when it failed to place her in the proper title and at the proper level of compensation.

* * * *

Accordingly, upon the foregoing, and upon the testimony and documentary evidence adduced in this proceeding by the Charging Party only, I make the following:

RECOMMENDED ORDER

Upon the entire record adduced by the Charging Party, the Hearing Examiner concludes that the Respondent District did not violate N.J.S.A. 34:13A-5.4(a)(1) or (5) and hereby grants the Respondent District's Motion to Dismiss. The Complaint is, therefore, dismissed in its entirety.

Alan R. Howe
Hearing Examiner

Dated: December 14, 1993
Trenton, New Jersey