

D.U.P. NO. 2000-13

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

UNION COUNTY EDUCATIONAL SERVICES
COMMISSION AND WESTLAKE EDUCATION
ASSOCIATION,

Respondents,

-and-

Docket No. CI-98-11

LEONARD KELLY,

Charging Party.

SYNOPSIS

The Director of Unfair Practices refuses to issue a Complaint on a charge brought by a teacher, claiming his employer and his employee representative violated the Act by their conduct during 1996 negotiations for a successor agreement. The teacher also alleges that his employee representative violated the Act by its conduct during the contract ratification vote, and by its illegal waiver of its contractual obligations to participate in grievances.

The Director dismisses the charge, finding that the allegations were beyond the Commission's six-month statute of limitations. The Director also finds that, even if timely, the allegations would not be violations of the Act.

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Appearances:

For the Respondent,
Union County Educational Services Commission,
Buttermore Mullen Jeremiah & Phillips, attorneys
(William Jeremiah, of counsel)

For the Respondent,
Westlake Education Association,
Klausner & Hunter, attorneys
(Stephen B. Hunter, of counsel)

For the Charging Party,
Milton Diamond, attorney

REFUSAL TO ISSUE COMPLAINT

On August 21, 1997, Leonard Kelly filed an unfair practice charge with the Public Employment Relations Commission against the Union County Educational Services Commission (Employer) and the

Westlake Education Association (Association).^{1/} On February 17, 1998, and March 22, 1999, Kelly filed amended charges. Kelly alleges that the Employer violated 5.4a(1), (2), (3), (4), (5), (6) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"),^{2/} and that the Association violated 5.4b(1), (4) and (5) of the Act,^{3/} by their conduct during

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- ^{1/} In addition to the Employer and the Association, Kelly named six individuals as respondents. The New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. grants us jurisdiction over the conduct of public employers and employee representatives and their agents. The named individuals will be considered as agents of the organizations they represent, not as separate respondents.
- ^{2/} These provisions 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; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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; (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement; and (7) Violating any of the rules and regulations established by the commission."
- ^{3/} These provisions prohibit employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement and (5) Violating any of the rules and regulations established by the commission."

negotiations for a successor collective agreement in 1996. Kelly also alleges that the Association violated the Act by its conduct of a ratification vote held on or about June 24, 1996.

The Commission has authority to issue a Complaint where it appears that the Charging Party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the Complaint issuance standard has not been met, I may decline to issue a Complaint. N.J.A.C. 19:14-2.3. In correspondence dated March 10, 1999, I advised the parties that I was not inclined to issue a complaint in this matter and set forth the basis upon which I arrived at that conclusion. I provided the parties with an opportunity to respond. Kelly filed a response on March 22, 1999, which we treated as an amendment to the charge. Subsequently, both Respondents also responded to the amendment.

In his March 22, 1999 amended charge, Kelly objects to our findings that the allegations are untimely. He also disputes our conclusions that he lacks standing as an individual to challenge the Respondents' negotiations conduct or the terms of the negotiated agreement; that many of the allegations concern internal union matters over which the Commission does not assert jurisdiction; and that no specific facts supported some of his allegations.

Further, in the March 22, 1999 amendment, Kelly alleges for the first time that on June 6 and October 9, 1997, the Employer

illegally transferred him. Kelly also raises for the first time that on or about May 15, 1997, the Employer scheduled a meeting in violation of Kelly's contractual right "to be represented by a person of [his] choosing." In the March 1999 amendment, Kelly also alleges for the first time that on or about June 8, 1997, the Association illegally advised the Employer that it waived its contractual requirements to file grievances through Level III on Kelly's behalf, thus permitting Kelly to file personal grievances, but reserving its right to be kept informed about developments in all grievances.

Both the Employer and the Association responded that any of the "new" allegations should be considered untimely and that the charge should be dismissed in its entirety.

I have considered the charge, including the amendments. Based upon the following, I find that the Complaint issuance standard has not been met.

The Association represents a collective negotiations unit of teachers and paraprofessional employees. During 1996, the parties negotiated their most recent successor agreement which was effective from July 1, 1996 through June 30, 1999. Kelly is employed by the Employer as a teacher and was one of seven members of the Association's negotiations committee for the current agreement. As an affiliate of the New Jersey Education Association ("NJEA"), the Association was assisted in negotiations by NJEA Representative Jack Spear.

On June 6, 1996 the parties' negotiations committees signed the following "Memorandum of Understanding":

The negotiating committees agree to recommend to their respective bodies a settlement of negotiations upon the following terms and conditions:

1. Salary increases of 3.5% over the base salary of the preceding year for each year of three years (step and increment included).
2. Salary guides shall be mutually developed before ratification.
3. The term of the contract shall be for three years ending June 30, 1999.
4. All other terms of the existing agreement shall remain in full force and effect.

Five members of the Association's negotiations committee, including Kelly, and four members of Employer's negotiations committee signed the Memorandum. Kelly alleges that on June 17, 1996, NJEA Representative Spear notified the Association committee that the Employer had rejected the terms of the Memorandum and was counter-proposing alternate terms. Kelly further asserts that Spear coerced the Association's team into agreeing to the new terms. On or about June 24, 1996, the Association conducted a ratification vote. Kelly alleges that this vote was "illegal" in that it was not based on the earlier memorandum, that the voting unit members were given an informational flyer rather than a full agreement, and that the ballots were "uncontrolled." A majority of the voting unit members approved the terms of the proposed agreement. The Employer then also ratified the agreement.

In July 1996, Kelly requested a copy of the final agreement, but received no reply. Between June and December 1996, the parties developed final salary guides and a final agreement. On December 31, 1996, the Association and Employer signed a final agreement. Kelly received of a copy of the final agreement on February 27, 1997.

ANALYSIS

Charges Against the Employer

Kelly alleges that the Employer violated the Act by: negotiating in early 1996 with only a few select members of the Association's negotiating committee and with unauthorized persons, and delaying negotiations; unilaterally changing the terms of the agreement it made with the Association in the June 6, 1996 Memorandum of Understanding concerning length of in-service training days, health care coverage, and "step freezes"; failing to reduce to writing and abide by terms memorialized in the June 6, 1996 Memorandum of Agreement; failing to sign the final agreement for six months; failing to distribute copies of the final agreement within thirty (30) days of the parties' ratification; failing to begin negotiations with the Association by February 15, 1996; violating N.J.A.C. 19:12-1.1^{4/} and 2.1 by failing "to commence negotiations

^{4/} N.J.A.C. 19:12-1.1 et seq. regulates the time of commencement of negotiations and sets procedures for mediation and factfinding for the resolution of negotiations impasses prior to the employer's required budget submission dates.

with the Association 120 days prior to the implementation of the salary provisions"; and threatening one unit member, altering contractual rights to personal leave days and discriminating against employees who complained about the Employer's conduct on unspecified dates.^{5/}

Most of Kelly's allegations against the Employer were filed beyond the Act's six-month statute of limitations and must be dismissed. N.J.S.A. 34:13A-5.4(c) states that:

No complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the 6 months period shall be computed from the day he was no longer so prevented.^{6/}

^{5/} N.J.A.C. 19:12-2.1(a) provides: "The parties to a collective negotiations agreement shall commence negotiations for a successor agreement, or in the case of an agreed reopener provision shall commence negotiations pursuant to such reopener provision, no later than 120 days prior to the public employer's required budget submission date. The term "required budget submission date" shall refer to the first budget implementing the successor agreement or the agreement pursuant to the reopener provision, as the case may be. In circumstances where the Commission has not determined the public employer's required budget submission date, the public employer shall notify the employee representative in writing of the required budget submission date no later than 150 days prior to such date."

^{6/} Cases interpreting this subsection include N.J. Turnpike Employees Union Local 914, IFPTE, AFL-CIO, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979); Piscataway Township Teachers Association, NJEA (Abbamont) D.U.P. No. 90-10, 16 NJPER 162 (¶21066 1990); No. Warren Bd. of Ed., D.U.P. No. 78-7, 4 NJPER 55 (¶4026 1977).

The Legislature provided a six-month statute of limitations for unfair practice charges to prevent the litigation of stale claims. The Legislature included only one exception to the statute, which is where a party is prevented from filing a charge. City of Margate, P.E.R.C. No. 94-40, 19 NJPER 572 (¶24270 1993).

The New Jersey Supreme Court described how someone is prevented from filing a charge in Kaczmarek v. N.J. Turnpike Authority, 77 N.J. 329 (1978):

The term 'prevent' may in ordinary parlance connote that factors beyond the control of the complainant have disabled him from filing a timely complaint. Nevertheless, the fact that the Legislature has in this fashion recognized that there can be circumstances arising out of an individual's personal situation which may impede him in bringing his charge in time bespeaks a broader intent to invite inquiry into all relevant considerations bearing upon fairness of imposing the statute of limitations. Cf. Burnett v. N.Y. Cent. R.R., supra, 380 U.S. at 429, 85 S. Ct. at 1055, 13 L.Ed.2d at 946. The question for decision becomes whether, under the circumstances of this case, the equitable considerations are such that appellant should be regarded as having been 'prevented' from filing his charges with PERC in timely fashion. [Id. at 340.]

Kelly's charge was first filed in August 1997. Kelly asserts that the Employer violated the duty of good faith negotiations by refusing to execute and abide by the terms of the June 6, 1996 Memorandum of Understanding. As stated in the charge, Kelly knew that the Employer had rejected these terms in June 1996. Yet he did not file the charge until August 21, 1997, more than a year later. The operative date for the statute of limitations to begin is late June 1996, the date when Kelly was first put on notice

that the Employer had rejected the Memorandum's terms. Therefore, I find that all of the events concerning negotiations, as well as contract approval and execution, are outside the Commission's statute of limitations and, accordingly, must be dismissed. Nothing in Kelly's March 1999 amendment alters the conclusion that these allegations are untimely.

Further, even if we found that these allegations were timely filed, Kelly does not have standing as an individual to assert that the Employer failed to negotiate in good faith. The employer owes a duty to negotiate in good faith only to the majority representative of the employees, not to employees individually. N.J. Turnpike Authority, P.E.R.C. 81-64, 6 NJPER 560 (¶11284 1980), aff'd NJPER Supp.2d 101 (¶85 App. Div. 1981). Therefore, only the majority representative has standing to charge the employer with failing to negotiate in good faith.

Kelly further alleges that the Employer failed to distribute copies of the final agreement within 30 days of the parties' ratification. Failure to distribute copies of the final agreement within 30 days is not an unfair practice. Compare, Sports Arena Employees Local 137 (Cooke), D.U.P. No. 98-23, 24 NJPER 42 (¶29025 1997), app. den., P.E.R.C. No. 98-117, 24 NJPER 208 (¶29097 1998). Here, the contract was not "final" until it was signed by both parties on December 31, 1996. It was distributed within a reasonable period thereafter. Therefore, I am dismissing this allegation.

Finally, Kelly charges that the Employer threatened a unit member; altered contractual rights to personal leave days; and discriminated against employees who complained about the Employer's conduct. As to altering personal leave days, this complaint may be asserted through the negotiated grievance procedure and does not rise to the level of an unfair practice. State of New Jersey (Department of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). No other alleged facts support the claim that Employer threatened or discriminated against any employees for complaining about its conduct. No other alleged facts state when such conduct occurred. Accordingly, I find that these allegations must also be dismissed.

In his March 1999 amendment, Kelly raised for the first time that he was illegally transferred by the Employer in both June and October 1997. Kelly does not state how these transfers are "illegal." Disciplinary transfers may be challenged through procedures outlined in N.J.A.C. 19:18-1 et seq., which provide that petitions contesting disciplinary transfers "shall be filed no later than the 90th day from the date of receipt of a notice of transfer." N.J.A.C. 19:18-2.3. Such contested transfer case was not timely filed. Any allegation of adverse personnel actions taken in violation of N.J.S.A. 34:13A-5.4a(3) must be filed within the Act's six-month statute of limitations, or no later than April 1998. Accordingly, in the context of an a(3) claim, Kelly's allegations are untimely and are dismissed.

Charges Against the Association

Kelly alleges that, between June and July 1996, the Association violated the Act by coercing unit members into approving an agreement which did not reflect the negotiated terms of the June 6, 1996 Memorandum of Understanding, engaging in behind-closed-door negotiations and failing to include all of the Association's negotiations committee members in those negotiations. Kelly also alleges that the Association violated the Act by conducting a ratification vote on June 24, 1996 based only on an informational flyer, and violating the Association's by-laws by failing to hold a secret ballot ratification vote; and, entering into a final agreement which included terms that differed from those presented at the Association's ratification meeting.

The first three allegations above are dismissed because they were filed outside of the statute of limitations. By July 1996, Kelly knew about the alleged conduct but did not file his charge until, August 1997, over a year later. Only the final allegation -- entering into a final agreement which included terms that were inconsistent with those presented in the ratification -- is arguably timely filed. Kelly arguably learned about the terms of the final executed agreement when he received it on February 27, 1997. The charge, first filed on August 21, 1997, appears to be timely filed. However, if this allegation is timely, it concerns an internal union matter over which the Commission does not assert jurisdiction.

A majority representative violates 5.4b(1) when its actions tend to interfere with, restrain or coerce employees in the exercise of rights guaranteed them by the Act, provided the actions lack a legitimate and substantial organizational justification. FOP Newark Lodge #12 (Colasanti), P.E.R.C. No. 90-65, 16 NJPER 126 (¶16212 1985); FMBA Local No. 35 (Carragino), P.E.R.C. No. 83-144, 9 NJPER 336 (¶14149 1983). A majority representative violates its duty of fair representation only when its conduct towards a unit member is arbitrary, capricious or in bad faith. Vaca v. Sipes 386 U.S. 171, 64 LRRM 2369 (1967). The Commission and the New Jersey courts have adopted the Vaca standard. Saganario v. Attorney General, 87 N.J. 480 (1981); Fair Lawn Bd. of Ed., P.E.R.C. No. 84-138, 10 NJPER 351 (¶15163 1984).

Private organizations "must have considerable latitude in rule-making in order to accomplish their objectives, and their private rules are generally binding on those who wish to remain members." Calabrese v. PBA Local 76, 157 N.J. Super. 139, 146 (App. Div. 1978). The Commission has relied on Calabrese in stating it is "reluctant to intercede in what is only an intra-union dispute...." Jersey City Supervisors Assn., P.E.R.C. No. 83-32, 8 NJPER 563, 565 (¶13260 1982). The Director has ruled that a union's failure to follow by-laws is a strictly "internal matter which does not fall under the guise of the Act...." ATU Local 824, D.U.P. No. 85-9, 10 NJPER 600, 601 (¶15279 1984).

We have also declined jurisdiction over disputes concerning contract ratification. See Newark Building Trades Council, D.U.P. No. 82-34, 8 NJPER 333 (¶13151 1982) (the Act fails to prescribe any procedure for contract ratifications and is considered "...an internal union matter...."); Camden County College Faculty Ass'n, D.U.P. No. 87-13, 13 NJPER 253 (¶18103 1987) (ratification process affects all members of the unit and is "...essentially an internal union matter....").

The allegation that the final agreement's terms differed from those Kelly voted on in the ratification vote affected all unit members and amounts to an internal union matter. Accordingly, since this allegation is one over which we have no jurisdiction, it is dismissed.

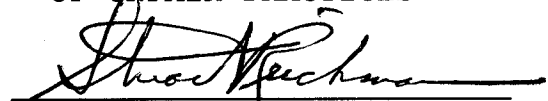
The allegation, first raised in March 1999, concerning the Association's June 8, 1997 waiver of its right to be the sole agent authorized to file grievances through level three of the procedure, is untimely and is dismissed.

For the reasons stated above, I find that all of the allegations in Kelly's charge do not meet the Commission's complaint issuance standards and I decline to issue a complaint on the allegations of this charge.^{7/}

ORDER

The unfair practice charge and all amendments are dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES


Stuart Reichman, Director

DATED: February 25, 2000
Trenton, New Jersey