

D.U.P. No. 2005-7

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

In the Matter of

BOROUGH OF SOUTH RIVER AND
UNITED SERVICE WORKERS, LOCAL 255,

Respondents,

-and-

Docket No. CI-2004-048
and CI-2004-049

MAX HILL, JR.,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses unfair practice charges filed by Max Hill, Jr. against his former employer, the Borough of South River, and also against Hill's majority representative, United Service Workers, Local 255 (USW). The Director found that the allegation that the Borough terminated Hill's employment in retaliation for his exercise of protected activity was not supported by the alleged facts. The Director found that many of the allegations in the charge occurred outside the Act's six-month statute of limitations; and that certain other allegations are outside the Commission's jurisdiction. The Director also found, with respect to the charge against USW, that the alleged facts, even if proven true, do not support the allegation that the USW breached its duty of fair representation. USW represented Hill at the termination hearing along with Hill's personal attorney, and also at a meeting with Borough representatives prior to its decision to terminate him.

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Appearances:

For the Borough,
Scarinci & Hollenbeck, attorneys
(Mark S. Tabenkin, of counsel)

For the USW,
Richard Greenspan, attorney
(Eric LaRuffa, of counsel)

For the Charging Party,
Max Hill, Jr., pro se

REFUSAL TO ISSUE COMPLAINT

On March 17, 2004 and July 14, 2004, Max Hill, Jr. filed an unfair practice charge and an amended charge against his former employer, the Borough of South River (Borough), and former majority representative, United Service Workers, Local 255 (USW or Local 255), with the Public Employment Relations Commission. In the charge against the Borough, Docket No. CI-2004-048, Hill alleges that the Borough violated the New Jersey Employer-

Employee Relations Act, N.J.S.A. 34:13A-5.4a(1) and (3)^{1/} (Act), when in September 2003, it indefinitely suspended him, and in February 2004, terminated his employment. The amended charge appears to remove the allegations that the Borough also violated 5.4a(2), (5), (6) and (7) of the Act.^{2/}

In the charge against USW, Docket No. CI-2004-049, Hill alleges that Local 255 violated 5.4b(1) of the Act,^{3/} by refusing or failing to represent him concerning his suspension and termination.

The Borough denies having violated the Act and asserts that it terminated Hill for cause. USW disputes the allegation that

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- 1/ These sections prohibit public employers, their agents or representatives from (1) interfering, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act; and (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.
 - 2/ These sections prohibit a public employer, its agents or representatives from "(2) Dominating or interfering with the formation, existence or administration of any employee organization; (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/ This section prohibits public employee representatives, their agents or representatives from: (1) interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.

it failed or refused to properly represent him and denies that it violated the Act. We have conducted an administrative investigation. The parties met with a Commission staff agent and were afforded the opportunity to submit position statements. In correspondence dated October 20, 2004, we advised the parties of our findings and tentative conclusions and invited their responses. Hill filed a response on November 17, 2004.

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. Based upon the following, I find that the complaint issuance standard has not been met.

Findings of Fact

Max Hill was employed as a laborer by the Borough from June 2002 until February 3, 2004. He was a member of the negotiations unit represented by USW Local 255. Hill worked in the Borough's department of public works and was assigned to collect trash from the curbside and place it in the garbage truck.

Hill alleges these facts, all of which occurred prior to September 17, 2003:

Within his second month of employment (August 2002), he was moved to another truck because of the lead driver's alleged ethnic bias.

On August 7, 2003, Hill alleges that he informed Director George Lyons that his driver's license was suspended and that to have the license reinstated, he needed to pay for (and attend) courses and pay surcharges. Hill alleges that his lack of a valid license did not impair his ability to perform his job duties. Hill asserts that Lyons stated that he was concerned about insurance requirements, not about Hill's ability to perform his job.

Hill was suspended for one day on August 8, 2003, for an earlier infraction.

During August 2003, Hill questioned USW Shop Steward Tylicki about the upcoming negotiations procedures and the union's decision not to include employee Roger Blacksheer in the negotiations sessions.

On or about August 27, 2003, Lyons cancelled all vacations due to a crew shortage, including Hill's pre-approved vacation. Hill asserts that he took the vacation off anyway.

On or about September 8, 2003, Tylicki allegedly informed Hill that Lyons had it "in" for Hill and wanted to get rid of him. Tylicki also advised Hill to get proof that he was trying to get his license restored, that he would give the proof to Lyons and that it would resolve the problem.

Hill alleges that on September 10, 2003, he and Lyons had a verbal altercation during which he cursed at Lyons. Hill alleges that Lyons ordered him to go home for aggressive behavior and cursing. Hill also alleges that his assistant shop steward advised him to comply with the directive and that both the shop steward and assistant steward refused to give him the union business agent's phone number.

Hill alleges that on September 13, 2003, he provided Lyons with a letter documenting that he was taking steps to have his license restored.

On September 17, 2003, the Borough suspended Hill indefinitely. On September 19 and 22, 2003, Hill spoke to a representative from the Joint Insurance Fund (JIF), which insures the Borough, who informed him that he did not see anything in the insurance document that indicates that a person who works on the back of a sanitation truck must have a valid driver's license.

On or about October 17, 2003, at Hill's request, a meeting was held to discuss his employment status. Present at the meeting were USW Business Representative Ed Kahn, Shop Steward David Tylicki, Borough Administrator Michael Jacobs and Public Works Director George Lyons. On November 17, 2003, Jacobs and Lyons wrote to Hill:

At your request, Mr. Lyons, Mr. Tylicki, Mr. Kahn and myself met on Friday, October 17, 2003, to discuss the status of your employment.

The Borough informed you that in order for you to retain employment with the Borough, you were required to provide a certified copy of your Driver Abstract from the Division of Motor Vehicles to confirm your assertion that you did in fact possess a valid drivers license on May 15, 2002, which was the date of your interview. During your interview on May 15, 2002, you stated to Mr. Lyons that you possessed a valid drivers license, which is a requirement for the job for which you applied.

On October 23, 2003, I received a copy of your certified driver abstract. After reviewing it with the Court Administrator, she stated that her investigation of this document reveals that you did not have a valid drivers license on May 15, 2002, and in fact still do not have a valid drivers license.

The purpose of this letter is to allow you until December 1, 2003, to provide the Borough with proof

that you did possess a valid drivers license on May 15, 2002. If proof satisfactory to the Borough is not received by December 1, 2003, we will recommend the termination of your employment from the Borough of South River.

[Letter from Lyons and Jacobs to Hill, dated November 17, 2003]

On December 5, 2003, the Borough formally charged Hill with "falsely representing the status of [his] New Jersey drivers license during [his] employment interview, inability to perform the essential functions of [his] job, insubordination, tardiness, and excessive use of sick leave . . ." (Letter to Hill December 5, 2003, from George Lyons).

On December 10, 2003, Hill was notified that the Borough Council would consider a recommendation to terminate his employment on December 23, 2003. The meeting was rescheduled to January 23, 2004. Between September 17, 2003 and January 2004, Hill contacted several elected Borough officials to lobby for his reinstatement. He asserts that he was assured by these officials that, in due course, he would be reinstated.

Kahn went to the Borough Council meeting on January 23, 2004, to represent Hill and there met Hill's private attorney, James Curran, who was also there on Hill's behalf. Kahn and Curran engaged in discussions with Borough Council members and the Borough's attorney aimed at resolving Hill's employment. Proposals to settle the issue were exchanged. No resolution was

reached and Hill's employment was terminated, effective February 3, 2004.

During the course of the discussions with the Borough, Kahn advised Hill that Local 255 would likely not arbitrate his discharge. The Local based its decision, in part, on a recent unsuccessful arbitration which involved an employee in circumstances similar to Hill's situation.

Analysis

The allegations in the charges that concern events which occurred more than six months prior to the filing of the charge, prior to September 17, 2003, must be dismissed as untimely. The Commission is precluded from issuing a complaint when a charge has not been filed within six months of the occurrence of the alleged unfair practice. N.J.S.A. 34:13A-5.4c. No evidence suggests that Hill was prevented from filing a charge over any of the events prior to September 17, 2003. Here, since the original charge was filed on March 17, 2004, all of the alleged incidents which occurred prior to September 17, 2003, are out of time. Therefore, I dismiss those allegations.

Other Charges against the Borough

Hill alleges that the Borough violated 5.4a(3) and derivatively, a(1) of the Act. Section 5.4a(3) makes it an unfair practice for an employer to retaliate against employees for exercising rights guaranteed to them by the Act. In Bridgewater

TP. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), the New Jersey Supreme Court set forth the standard for determining whether an employer's action violates 5.4a(3) of the Act. Under Bridgewater, no violation will be found unless conduct protected by our Act is a substantial or motivating factor in an adverse personnel action. Id. at 246. A party may prove a violation of 5.4a(3) by a showing that the charging party was engaged in protected activity, that the employer knew of charging party's activity, was hostile towards it and that its illegal motive was a substantial or motivating factor in the adverse action taken.

In this matter, no facts supporting a violation of 5.4a(3) have been presented. The alleged protected activity was Hill's lobbying for reinstatement between late September 2003 and January 2004, to several Borough councilmen and the mayor. Because this activity occurred after the Borough had already indefinitely suspended Hill by September 17, 2003, over his drivers license issues, his lobbying efforts after September 17 could not have contributed to the Borough's motive for deciding to terminate him over the license issues. Nevertheless, the lobbying efforts did not establish that the Borough's decision to terminate Hill was motivated by any exercise of protected activity. Accordingly, I dismiss the §5.4a(1) and (3) charges against the Borough (Docket No. CI-2004-048).

I found that the amended charge appeared to remove the allegations that the Borough violated 5.4a(2), (5), (6) and (7) of the Act. If these allegations were not removed, they are dismissed. Hill, as an individual charging party, with no viable 5.4b(1) claim, has no standing to assert either an a(5) or a(6) allegation. These two sections of the Act pertain, respectively, to the refusal of a public employer to negotiate in good faith with a majority representative, and an employer's refusal to reduce a negotiated agreement to writing and signing the agreement. Hill has no standing to allege a refusal by the Borough to negotiate with USW or to reduce a negotiated agreement to a written and signed agreement. The rights protected under these sections are collective rights and belong exclusively to majority representatives, not to individuals. See State of New Jersey (DEPE) and CWA Local 1037 & 1038, D.U.P. No. 93-43, 19 NJPER 388 (¶24170 1993) (Commission finds that only the majority representative has standing to assert claimed violations of subsection 5.4a(5)). No facts were presented to support the alleged violations of sections 5.4a(2) or (7). Accordingly, these allegations are also dismissed.

Finally, Hill has alleged race-based discrimination by the Borough or its agents. This issue is outside our jurisdiction and must be pursued in another forum. Therefore, that allegation is also dismissed.

Hill's November 17, 2004, three-page response to my letter of October 20, 2004, reiterated many of the facts already brought into the record. He referred to events occurring prior to the six-month limitations period. Those facts are out of time and are not considered. Hill also alleges race-based discrimination by his supervisors in the Borough. As explained earlier, that issue is one over which the Commission does not have jurisdiction. Hill re-asserts the fact that during the months after his suspension and before the Borough's final dismissal, several elected officials assured him that his termination would never happen and then did not deliver on these assurances. This fact, even if proven true, is not relevant to the unfair practice charges Hill has filed, and is outside of our jurisdiction to remedy. Hill also refers to some of the personal hardship he has suffered due to his dismissal. While we are sympathetic, we cannot remedy situations which are outside our limited jurisdiction.

Charge Against USW Local 255

Section 5.3 of the Act empowers a union to negotiate on behalf of all unit employees and to represent all unit employees in administering the contract. With that power comes the duty to represent all unit employees fairly in negotiations and contract administration. Section 5.3 specifically links the power to negotiate and administer with the duty to represent all unit

employees "without discrimination and without regard to employee organization membership." The standards in the private sector for measuring a union's compliance with the duty of fair representation were articulated in Vaca v. Sipes, 386 U.S. 171 (1967). Under Vaca, a breach of the statutory duty of fair representation occurs only when a union's conduct towards a member of the negotiations unit is arbitrary, discriminatory or in bad faith. Id. at 191. Those standards have been adopted in the public sector. Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976); see also, Lullo v. International Ass'n of Fire Fighters, 55 N.J. 409 (1970) and Carteret Ed. Assn. (Radwan), P.E.R.C. No. 97-146, 23 NJPER 390, 391 (¶28177 1997).

An employee organization is not required to take every grievance to arbitration. Rather, it must evaluate requests for arbitration on the merits and decide in good faith whether it believes the employee's claim has merit. See D'Arrigo v. New Jersey State Bd. of Mediation, 119 N.J. 74 (1990); Carteret Ed. Ass'n. (Radwan); Camden Cty. College (Porreca), P.E.R.C. No. 88-28, 13 NJPER 755 (¶18285 1987); Trenton Bd. of Ed (Salter), P.E.R.C. No. 86-146, 12 NJPER 528 (¶17198 1986).

Applying these standards here, it appears that USW did fairly represent Hill at the October 17, 2003 meeting with Borough officials, and also appeared on his behalf at the January

23, 2004 meeting of the Borough Council. Based upon Hill's licensure problems it was not illegal for the USW to decide not to arbitrate Hill's dismissal. The above standards do not require success be the outcome. Accordingly, I dismiss the section 5.4b(1) charge.

Therefore, I find that the Commission's complaint issuance standard has not been met and I decline to issue a complaint on the allegations of these charges.^{4/}

ORDER

The unfair practice charges are dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES


Arnold H. Zudick, Director

DATED: December 9, 2004
Trenton, New Jersey

This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3.

Any appeal is due by December 22, 2004.

^{4/} N.J.A.C. 19:14-2.3.