D.U.P. No. 2006-11

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

In the Matter of

TOWN OF HARRISON AND
PBA LOCAL 22,

Respondents,

-and- Docket No. CI-2005-040

DARREN RAEFSKI,

Charging Party.

SYNOPSIS

The Director of Unfair Practices refuses to issue a complaint in a charge by an employee alleging a variety of violations by his employer, the Town of Harrison, and his employee representative, PBA Local 22. The charging party alleged in part that the parties violated the Act based upon their positions and presentations in interest arbitration, during negotiations, and the PBA by refusing to move certain grievances to arbitration.

The Director concluded that the charging party did not file an appeal of the Interest Arbitration Award within the time provided by Commission Rules, that other allegations were not filed within the six-month statute of limitations provision established by the Act, and concluded that the PBA did not act arbitrarily, discriminatorily or in bad faith by refusing to move certain grievances to arbitration.

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Appearances:

For the Respondent - Town,
The Murray Law Firm, LLC, attorneys
(Karen A. Murray, of counsel)

For the Respondent - PBA,
Detzky & Hunter, attorneys
(Stephen B. Hunter, of counsel)

For the Charging Party,
Fusco & Macaluso, P.A.
(Ciro Spina, of counsel)

REFUSAL TO ISSUE COMPLAINT

On June 29, 2005, Charging Party Darren Raefski filed an unfair practice charge against his employer, the Town of Harrison (Town), and his majority representative, Harrison PBA Local 22 (PBA). Charging Party Raefski alleges that the Respondent Town violated N.J.S.A. 34:13A-5.4a(1), (3), (4) & (7)[1/], and that the

1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the (continued...)

Respondent PBA violated N.J.S.A. 34:13A-5.4b(1), (3) and (5)[2/], by failing to bargain in good faith with respect to sick time and the field officer training designation; Charging Party Raefski asserts that the Respondents' unlawful actions resulted in the issuance of an "unfair" interest arbitration award on October 30, 2004.

Specifically, Raefski contends that the PBA acted unlawfully by pursuing the designation of field training officer predicated upon the arbitrary basis of an officer's score on the sergeant's test, rather than upon an officer's non-test based qualifications for the position. Further, according to Raefski, the Town acted improperly when it failed to provide important information to the arbitrator on the sick time provision, which omission he claims

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1/ (...continued)
rights guaranteed to them by this act. (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. (7) Violating any of the rules and regulations established by the commission."

2/ 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. (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. (5) Violating any of the rules and regulations established by the commission."

might have affected the award. Raefski contends that he asked the PBA to pursue these matters and appeal the award, but the PBA refused. Finally, he asserts that after the Town denied two grievances he had filed regarding these issues, the PBA improperly refused to move those grievances to arbitration.

Both the Town and the PBA deny engaging in any conduct which may constitute unfair practices and claim that Raefski's charge fails to state facts that would support finding an unfair practice under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4 et seq. (Act). Rather, according to the Respondents, Raefski's charge merely constitutes an expression of dissatisfaction with the October 30, 2004 interest arbitration award.

Moreover, the Town and the PBA assert that the charge is simply a second attempt to appeal the outcome of the interest arbitration award - - inasmuch as in December 2004, Raefski had filed a complaint in New Jersey Superior Court attempting to overturn the award on bias grounds. That suit was dismissed with prejudice in May 2005 and, according to the Respondents, Raefski is now improperly seeking to re-litigate those claims, which Respondents' contend are both untimely and meritless.

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 May 25, 2006, 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. None of the parties filed a response. Based upon the following, I find that the complaint issuance standard has not been met.

* * * *

The PBA is the majority representative of a unit of approximately 75 uniformed police employees below the rank of Chief. The Town and the PBA are parties to a collective negotiations agreement effective from January 1, 2004 to December 31, 2006. Raefski is a uniformed police employee of the Town, a member of PBA's unit and a third party beneficiary to the negotiated agreement and is President of the Harrison Fraternal Order of Police (FOP), a rival labor organization to the PBA.[3/]

In 2004, the Town and the PBA began negotiations for a successor to their agreement which ran from January 1, 2002 to

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3/ In 1991, the FOP unsuccessfully sought to sever the Town's rank and file officers from the wall-to-wall PBA unit and, thereafter, in 1993 and 1995, unsuccessfully challenged the majority representative status of the PBA, in representation filings before the Commission.

December 31, 2004; they agreed to reopen the agreement to negotiate terms and conditions of employment for an extension through December 31, 2006. During negotiations, the PBA proposed that a field training officer position be created and that the amount of sick leave given to officers under the agreement be increased from 15 days annually to 1 year, as permitted by N.J.S.A. 40A:14-147.

The issue of the amount of sick leave granted to unit members has a long negotiations history. From the inception of the parties' negotiations relationship through December 31, 1985, the PBA negotiated and secured for unit members "unlimited" sick leave under N.J.S.A. 40A:14-147. From January 1, 1986 until December 31, 2004, the PBA negotiated for and secured 15 sick days per year, which could accumulate and be carried over to future years, along with a terminal leave payment provision, which allowed an officer to be paid for unused sick leave upon retirement. In the most recent negotiations, the PBA again sought to have the statutory "unlimited" sick leave provision included in the contract, to be effective January 1, 2005.

The Respondents - - the Town and the PBA - - were unable to come to an agreement on the contract and reached impasse. They entered into interest arbitration on May 12, 2004, pursuant to N.J.S.A. 34:13A-14A, before Commission-designated Interest

Arbitrator James W. Mastriani. At the interest arbitration proceeding, the PBA presented the following pertinent proposals:

> 1. Field Training Officer salary adjusted to equal current Police Sergeant salary. The field training officers will be those five employees who scored highest on the 2001 Police Sergeant exam, excluding the 1 sergeant who was promoted.
>
> 2. Effective January 1, 2005, unlimited sick leave for all employees. Discontinuation of payment for unused sick leave.

The Town found the PBA's sick leave proposal to be attractive, inasmuch as it would end the terminal leave payments, which had become substantial in recent years.

On October 30, 2004, Arbitrator Mastriani issued his interest arbitration decision and award, accepting and awarding the PBA's field training officer and sick leave proposals. He further clarified that the unlimited sick leave program awarded would initially be in effect for a one-year trial period, and that the Town would have the discretion to revert back to the prior sick leave provision (15 days annually with the accumulation feature), if it determined that provision was more appropriate. He also awarded 4% pay increases over each of three years and no change in employees' hospitalization and prescription coverage.

Thereafter, on November 23, 2004, Raefski filed a grievance against the Town, challenging the interest arbitration award's field training officer provision. Specifically, Raefski

complained that the award's designation of field training officers being determined based upon an officer's score on the sergeant's promotional exam lacked merit, since it did not consider other qualifications, including certifications from the Division of Criminal Justice. This selection method adversely impacted upon Raefski, who is certified as a field training officer by the Division, but who did not score high enough on the sergeant's test (placing 7th) to be designated as a training officer.

In correspondence dated November 29, 2004, the Town, surmising that Raefski's grievance was filed on behalf of the FOP, denied it. The Town explained, "as such, this grievance cannot be processed by the FOP, as the PBA is the legally designated bargaining/grievance agent at this time." The Town further advised Raefski that a grievance can be processed by an individual if the PBA is present and allowed participation.

Also on November 29, 2004, Raefski filed a second grievance against the Town, challenging the interest arbitration award as it pertained to the sick leave provision. The grievance, in pertinent part, stated:

> It is our contention that the arbitrator in question was unaware of the abuses that have occurred in our department in regards to sick time. Every sick time abuser is a member of the bargaining unit, including its president. That information should have been made available to said arbitrator prior to rendering a decision.

> . . . we hereby challenge the PBA's right to bargain away our individual monetary benefits and failure to bargain in good faith. The award was blatantly discriminatory.

According to Raefski, those officers with the most sick time, thus those who were most adversely affected by the new provision, were FOP members like himself, rather than PBA members.

On December 9, 2004, the Town responded to Raefski's second grievance, again rejecting it. The Town indicated,

> In your conclusionary paragraph, you have written that "we hereby challenge the PBA's right to bargain away our individual monetary benefits and failure to bargain in good faith." You further challenge the arbitration award as discriminatory.
>
> Thus, from a clear reading of your own correspondence your first alleged claim is against the PBA, and therefore, does not fall within the grievance procedure. Another forum must be examined by yourself if you wish to pursue the PBA. Your second claim challenges the Interest Arbitration Award. The proper forum to challenge this award is the Public Employment Relations Commission. However, our attorney has advised that the period for challenging an Interest Arbitration Award is fourteen (14) days from the date of issuance; we are clearly past that date and there has not been a timely appeal filed by anyone.
>
> As a concluding remark, the issues that you raise deal with terms and conditions of employment that are subject to negotiations and both parties to a labor contract are free to pursue increases or decreases and the final result is binding on everyone.
>
> As final observation, your concerns are more appropriately directed to your majority

> representative which is the PBA and not the Town of Harrison.

Then, on December 10, 2004, Raefski informed the Town of his intention to arbitrate his grievances, pursuant to the agreement. Charging Party then approached the PBA and sought to proceed to arbitration on these grievances. The PBA responded to Charging Party noting that it had evaluated the grievances and decided that they lacked merit and therefore, declined to move them to arbitration.

On December 11, 2004, Raefski filed a complaint in New Jersey Superior Court against the Town, the PBA, and Arbitrator Mastriani, seeking to vacate the October 30, 2004 interest arbitration award. Specifically, Raefski claimed the portions of the award involving sick leave and the field training officer designation were the result of partiality by Mastriani, since the sick leave provision adversely affected mostly FOP members and the field training officer designation provision adversely affected Raefski.

Thereafter, by letter of December 21, 2004, the PBA informed the Town of its desire "to discuss some pressing matters involving one of the provisions of our current collective bargaining agreement and the subsequent arbitration award." On December 22, 2004, the Respondents' engaged in post-interest arbitration negotiations pursuant to N.J.S.A. 34:13a-19. During these negotiations, the PBA submitted a proposal modifying the

arbitrator's award as it related to the field training officer position. Specifically, the PBA sought to eliminate the position and disburse the monies designated for training officers to all officers on the sergeant's list and all other unit employees. The Town accepted the PBA's proposal and on January 19, 2005, passed an Ordinance which adopted the arbitrator's award with the modification regarding the field training officer monies; the sick leave award remained the same.

On May 16, 2005, the Superior Court dismissed Raefski's Complaint against the Town, with prejudice. On June 29, 2005, Raefski filed the instant charge.

For the reasons provided below, I decline to issue a complaint on the charge against the Town and the PBA.

ANALYSIS

The instant charge seeks to overturn specified provisions of the October 30, 2004 interest arbitration award issued by Arbitrator Mastriani. Under the Commission's interest arbitration rules, specifically N.J.A.C. 19:16-8.1, an appeal of an interest arbitration award must be filed with the Commission within 14 days after the award was received. Raefski failed to appeal the award to the Commission - - or anywhere else - - within the 14-day period; thus, the instant attempt to overturn the award is improper and must be dismissed. Allowing such a

collateral attack on an interest arbitration award could undermine the interest arbitration process.[4/]

Further, Raefski's charge also appears untimely.

N.J.S.A. 34:13A-5.4(c) provides 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-month period shall be computed from the day he was no longer so prevented.

Here, the alleged unfair practices by Respondents' regarding the negotiations, interest arbitration presentations, and the interest arbitration award, occurred on or before October 30, 2004 - - the date the award was issued. Raefski filed his charge on June 29, 2005, 8 months later; thus, his charge is well beyond the six-month statute of limitations set forth in N.J.S.A. 34:13A-5.4(c). See e.g., Certified Shorthand Reporters, et al., D.U.P. No. 97-14, 22 NJPER 336 (¶27175 1996).

Moreover, Raefski's alleged unfair practices regarding the Town's treatment of his grievances occurred by or before November 29, 2004. Again, these alleged unfair practices would have occurred more than six months prior to the filing of his

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4/ Even assuming that Raefski had submitted an appeal of the Interest Arbitrator's Award to the Commission within the prescribed 14-day period, it seems unlikely that Raefski would have been considered to be "an aggrieved party" within the meaning of N.J.A.C. 19:16-8.1, and thus, his "appeal" of the award would likely have been dismissed due to his lack of standing to file such an appeal.

charge and, thus, they are also untimely under N.J.S.A. 34:13A-5.4(c).

In addition, as an individual, Raefski lacks standing to assert a 5.4(b)(3) allegation against the PBA - - a refusal to negotiate in good faith - - and thus no complaint may issue concerning such allegations. CWA Local 1034 and King, D.U.P. No. 2004-2, 29 NJPER 367 (¶113 2003); Tp. of Berkeley, D.U.P. No. 86-2, 11 NJPER 543 (¶16190 1985); Trenton Bd. of Ed., D.U.P. No. 81-26, 7 NJPER 406 (¶12179 1981). Moreover, Charging Party Raefski fails to indicate which Commission rule(s) or regulation(s) the Town and the PBA have allegedly violated with respect to the 5.4(a)(7) and b(5) allegations; accordingly, no complaint may issue regarding these allegations. See Burlington Tp. Bd. of Ed., D.U.P. No. 97-31, 23 NJPER 152 (¶28073 1997).

Further, I find that the duty of fair representation allegations against the PBA do not support any unfair practice under the Act. Section 5.3 of the Act empowers an employee representative to represent all unit employees fairly in negotiations and contract administration. The standards 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. That standard has been specifically adopted in the public sector. Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Tp. Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976); see also Lullo v. International Ass'n of Firefighters, 55 N.J. 409 (1970); OPEIU Local 153 (Johnstone), P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983). In Lullo, the Court stated that, while the exclusive representative has the sole right to negotiate a contract for all unit employees,

> . . . the right to do so must always be exercised with complete good faith, with honesty of purpose and without unfair discrimination against a dissident employee or group of employees. 55 N.J. at 427-428.

As the Court explained in Ford Motor Co. v. Huffman, 346 U.S. 330 (1953):

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. Ford Motor Co., at 338.

Thus, absent indicators of bad faith or fraud, unions may make compromises which adversely affect some members of a negotiations unit and result in greater benefits for other members. The fact that a negotiated agreement results in less than complete

satisfaction for certain members of the unit does not establish a breach of the union's duty of fair representation. Belen v. Woodbridge Tp. Bd. of Ed., 142 N.J. Super. 486 (App. Div. 1976); Lawrence Tp. PBA, Local 119, P.E.R.C. No. 84-76, 10 NJPER 41 (¶15073 1983); Union City and F.M.B.A., P.E.R.C. No. 82-65, 8 NJPER 98 (¶13040 1982); Hamilton Tp. Ed. Assn., P.E.R.C. No. 79-20, 4 NJPER 476 (¶4215 1978).

While Raefski may believe the PBA acted unlawfully with respect to the field training officer and sick leave provisions that were implemented by the interest arbitration award, nothing in the PBA's actions regarding these issues was ostensibly unlawful. Even if only some unit members (including Raefski) were adversely affected by these provisions, it is neither uncommon nor unlawful for an employee representative to negotiate an agreement which may result in a detriment to one employee or one group of employees while giving a benefit to other employees; such a result in negotiations does not, without more, establish a breach of the duty of fair representation by the employee representative. See Belen, and Ford Motor Co., supra.

The Respondents' subsequent negotiations and agreement to changes in the initial interest arbitration award with regard to the field training officer designation at issue similarly did not violate the Act. These changes resulted in the elimination of the field training officer position entirely and further resulted

in the disbursement of monies designated for field training officers to all unit members on the sergeant's list, including Raefski, as well as to all other unit members, including FOP members. In all of their alleged actions during the course of negotiations, there is simply no basis to support an unfair practice against the Town or the PBA regarding the field training officer issue.

Further, the factual allegations also do not support an unfair practice with regard to the negotiation of the sick leave provision. The PBA proposed the change in the sick leave allowance from 15 days per year to the statutory "unlimited" sick leave provision allowing up to one year's sick leave in exchange for eliminating terminal leave. This change, as recognized by Arbitrator Mastriani, amounts to an excellent benefit for officers suffering a catastrophic illness or injury which causes them to miss more than 15 days per year. This benefit would enure to all unit employees. Further, as the PBA notes, because the new sick leave provision may decrease the Town's costs for this benefit, additional resources could become available for other benefits for unit members. In any event, Arbitrator Mastriani provided that this unlimited sick leave program would be in effect on a one-year trial basis and that the Town would retain the discretion to return to the prior sick leave provision - - the one supported by Raefski - - after this period.

The expectation that negotiators will propose trade offs in the course of negotiations was addressed by the Court in Belen:

> . . . . Thus, the mere fact that a negotiated agreement results, as it did here, in a detriment to one group of employees does not establish a breach of duty by the union. The realities of labor-management relations which underlie this rule of law were expressed in Ford Motor Co. v. Huffman, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048, where the court wrote:
>
> Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. A major responsibility of negotiators is to weigh the relative advantages and disadvantages of differing proposals. Belen v. Woodbridge Tp Bd. of Ed., 142 NJ Super. 486, 490-491 (1976).

Although Raefski contends that the new sick leave provision unfairly adversely affects himself and other FOP members, standing alone, this assertion would not establish that the PBA or the Town acted unfairly with respect to the negotiations. Indeed, this "new" sick leave package had been agreed to and utilized by the parties previously for many years. The fact that it may presently result in a greater benefit to some employees and a lesser benefit to others, does not make it an unfair practice. Further, even if Charging Party does establish that the Town failed to provide certain information to the arbitrator regarding sick leave issues, this would not set forth an unfair

practice under the Act. Rather, such an allegation appears to be part of a broader attack on the interest arbitration process and the award which is governed by and appealable under N.J.A.C. 19:16-8 et seq.

Finally, Raefski claims the PBA's failure to take his grievances to arbitration also constitutes a violation of the Act. However, the Commission has repeatedly held that an employee organization is not required to take every grievance to arbitration. Rather, a union is allowed a "wide range of reasonableness in servicing its members." An employee organization must evaluate an employee's request for arbitration on the merits and decide, in good faith, whether it believes the employee's claim has merit. See Ford Motor Company v. Huffman, 345 U.S. 330, 337-338, 73 S.Ct. 681, 97 L.Ed. 1048 (1953); Essex-Union Joint Meeting and Automatic Sales, Servicemen & Allied Workers, Local 575 and Brian McNamara, D.U.P. No. 91-26, 17 NJPER 242 (¶22108 1991); D'Arrigo v. New Jersey State Bd. of Mediation, 119 N.J. 74 (1990); Carteret Ed. Ass'n.(Radwan), P.E.R.C. No. 97-146, 23 NJPER 390, 391 (¶28177 1997); 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).

Here, the PBA evaluated Raefski's grievances and made a good faith determination that they were based upon fairly negotiated

and arbitrated contract provisions, that the grievances lacked merit and therefore, it declined to move them to arbitration. Thus, the Charging Party's assertions regarding the PBA's treatment of its grievances do not amount to conduct under the New Jersey Employer-Employee Relations Act that is arbitrary, discriminatory, or in bad faith. See, Belen, supra. Accordingly, the PBA's refusal to arbitrate Raefski's grievance does not constitute an unfair practice. See Belen; Camden Cty. College (Porreca); and Trenton Bd. of Ed. (Salter), supra.

Based upon the foregoing, I find that the Commission's complaint issuance standard has not been met and therefore, I decline to issue a complaint on the allegations of this charge.[5/]

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

Arnold H. Zudick, Director

DATED: June 13, 2006
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 June 26, 2006.

5/ N.J.A.C. 19:14-2.3.