

D.U.P. No. 2007-10

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

In the Matter of

HOBOKEN PARKING AUTHORITY,

Respondent,

-and-

HOBOKEN MUNICIPAL EMPLOYEES ASSOCIATION,

Respondent,

Docket No. CI-2006-25

-and-

FIDEL MANRIQUE WILCHES,

Charging Party.

SYNOPSIS

The Director of Unfair Practices refused to issue a complaint against the Hoboken Parking Authority and the Hoboken Municipal Employees Association in a charge filed by Fidel Wilches. The Director found that the charge was untimely filed, and that there was insufficient evidence that the action taken against him by the Authority was for engaging in activity protected by the New Jersey Employer-Employee Relations Act. The Director also found that the Association attempted to fairly represent Wilches and did not treat him in a discriminatory manner.

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Appearances:

For the Respondent Employer,
Scarcinci and Hollenbeck, attorneys
(Sean Dias, of counsel)

For the Respondent Association,
Loccke, Correia, Schlager, Limsky & Bukosky, attorneys
(Marcia Tapia, of counsel)

For the Charging Party,
Fidel Manrique Wilches, pro se

REFUSAL TO ISSUE COMPLAINT

On December 16 and 29, 2005, Fidel Manrique Wilches filed an unfair practice charge and amended charge against his former employer, the City of Hoboken Parking Authority (Authority) and his employee representative, the Hoboken Municipal Employees Association (Association). Wilches alleges that the Authority

violated the New Jersey Employer Relations Act, N.J.S.A. 34:13A-5.4a(3)^{1/} by terminating him discriminatorily and denying him a hearing. He alleges that the Association violated 5.4b(1)^{2/} of the Act by failing to represent him.

The Authority asserts that the termination did not violate the Act. The Association asserts that it attempted to respond to Wilches' request for representation; that he was uncooperative; and that it represented Wilches at the scheduled disciplinary hearing. It denies violating the Act.

The Commission has authority to issue a complaint where it appears that the Charging Party's allegations, if true, may constitute unfair practices 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.

^{1/} This section prohibits public employers, their agents or representatives from "(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/} 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."

FINDINGS OF FACT and PROCEDURAL HISTORY

The Hoboken Parking Authority is a civil service employer. Wilches was hired as a provisional parking enforcement officer and employed by the Authority from January 8, 2004 until June 2005. Wilches did not apply for and take a civil service test to become a permanent employee.

On May 19 and 20, 2005, respectively, Wilches was served with two Preliminary Notices of Discipline. He was charged with failing to follow towing procedures and conducting unauthorized videotaping while on duty. The latter charge amounted to insubordination because Wilches had been previously disciplined and warned against repeated unauthorized videotaping.

Wilches appears to assert that he was terminated in retaliation for having issued too many parking tickets, and especially for having ticketed a City police officer and ordering the towing of his vehicle.

He alleges that he contacted his Association representative several times, seeking assistance in contesting his termination. The Association asserts that it attempted to contact Wilches several times, often leaving messages, and that he did not respond.

It is unclear why a hearing was not timely scheduled, but according to the City, under civil service law, only permanent employees are entitled to disciplinary hearings. The Association

asserts that it advised Wilches that he bore the responsibility of requesting such a hearing. This charge ensued.

At an exploratory conference conducted on March 6, 2006, with the assigned Commission staff agent, Wilches, the Association and the City agreed to have the charge held in abeyance, pending the scheduling of a disciplinary hearing. Sometime after the conference and before the disciplinary hearing Wilches hired an attorney. On or about April 18, 2006, the Association developed a formal settlement proposal of Wilches' employment matter, which the City declined to sign.

On July 13, 2006, the City's designated hearing officer, Vincent LaPaglia, convened a hearing. Association President Joseph Grossi appeared on Wilches' behalf. Wilches failed to appear at the hearing. (Wilches contends that he was not properly notified of the hearing date because his telephone did not work on the day that the union called him). The hearing officer found that Wilches was a provisional employee and not entitled to a disciplinary hearing. Notwithstanding that disqualification, the hearing officer concluded that the City had the right to terminate Wilches, and his failure to take the civil service examination (to obtain permanent status), mandated the City's action.

Wilches does not dispute that he was a provisional employee. He contends that he was told that he would not be required to take a civil service exam leading to a permanent appointment.

ANALYSIS

Charge Against the Authority

The Act provides a six-month statute of limitations for unfair practice charges to prevent the litigation of stale claims. N.J.S.A. 34:13A-5.4(c) provides:

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

The statute of limitations period normally begins to run from the date(s) the alleged unfair practice occurred, provided the affected person is aware of the action. These dates are known as the "operative dates," and the six-month limitations period runs from these dates. To be timely, a charge must be filed within six months of the operative date(s). Two exceptions to the timeliness requirements are: (1) tolling of the limitations period, and (2) a demonstration that the charging party was "prevented" from filing the charge prior to the expiration of the period. Tolling the limitations period means extending the limitations period for equitable reasons other than having been prevented from filing.

Wilches filed the charge against the City on December 16 and 29, 2005. Only the alleged delay in affording him a hearing occurred within six months before that date (on or after June 29, 2005). Conduct occurring before June 29, 2005 - his receipt of the notices of discipline - falls beyond the statutory limit and is untimely.

Even if the City's termination of Wilches fell within the statutory period, I would decline to issue a complaint. Wilches asserts that the Authority's motive to terminate him was discriminatory; that is, he was treated differently than other employees. Our jurisdiction is limited to discrimination for conduct protected by the Act, including the right of public employees to form, join and assist a labor organization. N.J.S.A. 34:13A-5.3. The Act prohibits employers from treating employees who exercise that right differently than other employees.

The standards for proving a 5.4(a)(3) violation are set forth in Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984). No violation will be found unless the charging party proves that protected conduct was a substantial or motivating factor in the adverse action. Wilches does not allege that he was involved in any activity protected by our Act. Thus, even if all the alleged facts were true, we would find no violation of 5.4a(3). Similarly, we have no jurisdiction over Wilches' allegation that the employer delayed or denied him a

disciplinary hearing. The New Jersey Merit System Board regulates procedures for disciplining and terminating certain civil service employees, including Wilches. Under the circumstances, no Complaint may issue against the Authority.

Charge Against the Association

Wilches alleges that the Association violated 5.4b(1) of the Act by not obtaining a disciplinary hearing for him after his termination. Section 5.3 of the Act mandates that an employee representative represents 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).

A union is allowed a wide range of reasonableness in servicing its members. An employee organization must evaluate an employee's request to arbitrate or otherwise appeal discipline 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); D'Arrigo v. New Jersey State Bd. of Mediation, 119 N.J. 74 (1990); Essex-Union Joint Meeting (McNamara), D.U.P. No. 91-26, 17 NJPER 242 (¶22108 1991); 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).

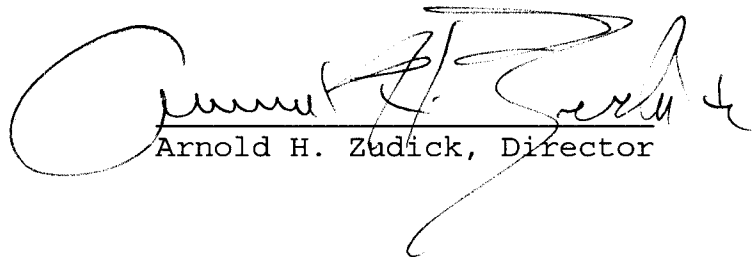
Wilches repeatedly requested the Association to obtain a disciplinary hearing for him. After months of delay, the City's hearing officer scheduled a disciplinary hearing. At the proceeding, conducted on July 13, 2006, (which Wilches did not attend), the Association appeared on Wilches' behalf. The hearing officer ruled that provisional employees, including Wilches, did not have the right to a hearing on the merits under civil service law. Wilches has not asserted that he requested the Association's assistance after that date. Wilches' contention that the Association's conduct was discriminatory because it had successfully represented other ("less-deserving") employees on appeal, is not supported by any evidence. Only the Association's alleged failure to promptly obtain a hearing for Wilches arguably implicates the duty of fair representation. Even assuming that the Association was obliged to demand a disciplinary hearing under civil service guidelines, no facts

suggest that its omission was worse than negligent. That duty was discharged by the scheduling and conduct of that hearing and by the Association's appearance on Wilches' behalf. Accordingly, the charges against the Association do not meet the Commission's complaint issuance standard, and I refuse to issue a complaint.

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Arnold H. Zudick, Director

DATED: March 6, 2007
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 March 19, 2007.