D.U.P. NO. 2014-10

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

In the Matter of

PATERSON STATE OPERATED SCHOOL DISTRICT,

Respondent,

-and- Docket No. CI-2009-034

NEW JERSEY EDUCATION ASSOCIATION,

Respondent,

-and-

RODNEY DOTSON,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge alleging that the New Jersey Education Association violated the duty of fair representation by providing wrong legal advice to a unit employee during a grievance arbitration hearing in March and April, 2007 and by failing to present unspecified exculpatory facts to the arbitrator. This charge also alleges that the NJEA unlawfully omitted to advise the employee of his right to appeal the adverse award. The charge also alleged that the Paterson State Operated School District violated "its own contract" by disciplining him.

The Director determined that the charge was untimely filed. N.J.S.A. 34:13A-5.4c. She also determined that the allegations, if true, did not meet the complaint issuance standard. N.J.A.C. 19:14-2.3. Vaca v. Sipes, 386 U.S. 171 (1967); Hines v. Anchor Motor Freight, 424 U.S. 554 (1976).

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Appearances:

For the Respondent
Paterson State Operated School District
(Laurie Maloney, General Counsel)

For the Respondent
Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys
(Genevieve M. Murphy-Bradacs, of counsel)

For the Charging Party
Rodney Dotson, pro se)

REFUSAL TO ISSUE COMPLAINT

On March 4, 2009 and April 15, 2009, Rodney Dotson filed an unfair practice charge and amended charge against Paterson State Operated School District (District), New Jersey Education Association and Paterson Education Association (PEA) and a named

grievance arbitrator.[1/] The charge was filed upon our request after a Superior Court Judge ordered on October 24, 2008 and November 5, 2008 that Dotson's civil complaint, as amended, be transferred to the Commission for processing. Specifically, we issued a letter to Dotson on December 1, 2008, advising him to file an unfair practice charge, after which we would address ". . . jurisdictional and other issues." Dotson filed his civil complaint on December 21, 2007 and amended complaint in July and August, 2008.

The charge alleges that an arbitration award [issued September 13, 2007] dismissing a contractual grievance contesting Dotson's termination from the District should be vacated as contrary to public policy; that the PEA and its attorney violated the duty of fair representation by providing "wrong advice" and failing to present ". . . statements, documents and information" at the arbitration hearing conducted in March and April, 2007; and wrongfully advised, ". . . that there was no fruitful basis [to] appeal" the arbitration award. Dotson alleges that he was ". . . treated differently than other [unit] members in that I did not get the same level of representation." Among the remedies Dotson seeks is a finding that the District violated

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1/ On April 30, 2009, the then-Director of Unfair Practices issued a letter dismissing the portion of the charge concerning the arbitrator because it did not comply with N.J.S.A. 34:13A-5.4 and N.J.A.C. 19:14-1.3(a)(2).

"it's own teacher's contract . . . when it brought theft charges against him." The amended charge alleges that the District's and PEA's omissions violate N.J.S.A. 34:13A-5.4a(1), (2), (3) and (7)[1/] and 5.4b(1), (3) and (5)[2/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq.

On December 21, 2007,[3/] July 18, 2008 and sometime in August, 2008, Dotson filed a verified civil complaint and amended complaint (with attachments) with the New Jersey Superior Court contending that the arbitration award should be set aside; that the PEA violated the duty of fair representation; that a named PEA attorney had engaged in "malpractice" and was "biased" in

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1/ 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. (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."

3/ The civil complaint apparently was not served upon Defendant PEA (or NJEA) until July or August, 2008.

discharging his duties; and that the arbitration award should be set aside because the PEA and its attorney breached the duty of fair representation. The civil complaint as amended was transferred to the Commission by November 5, 2008.

On July 28, 2009, the PEA filed a letter seeking dismissal of the amended charge because it is untimely; the PEA has no duty to appeal an arbitration award or to advise an employee about appealing one because only a majority representative can initiate an action to vacate an award.

On September 4, 2009, the District filed a letter urging dismissal. It contends that the charge is barred by the six-month statute of limitation (N.J.S.A. 34:13A-5.4c); the Commission lacks jurisdiction over claims of racial discrimination; Dotson has no standing to pursue an alleged violation of section 5.4a(2) of the Act; and the facts do not support allegations that the district violated section 5.4a(3) and (7) of the Act.

On December 2, 2013, I issued a letter to the parties advising of my tentative findings and conclusion that a complaint will not issue on the unfair practice charge. I also invited replies. No substantive response was filed.

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.

Rodney Dotson was employed as a non-tenured teacher by the District from January, 2004 through December, 2004. He was included in a collective negotiations unit of certificated staff represented by the PEA. The applicable 2005-2008 collective negotiations agreement includes a grievance procedure ending in binding arbitration (Article 3) and a "just cause" discipline provision (Article 4). On or about December 2, 2004, the District terminated Dotson's employment for disciplinary reasons, providing him 60 days notice. His last day of employment was on or around January 31, 2005.

On or about February 15, 2005, the PEA filed a contractual grievance contesting that Dotson's termination was for just cause. On or about September 19, 2006, a parallel criminal investigation of Dotson's conduct apparently resulted in his admittance to a pre-trial intervention program and several admissions including his acquiring computer software from the District; his failure to return it; and that probable cause existed for his arrest.

On March 29, 2007 and April 17, 2007, an arbitration hearing on the grievance contesting Dotson's termination was conducted by the designated grievance arbitrator. Dotson alleges in his amended civil complaint (and by extension in his charge) that the PEA violated the duty of fair representation during the arbitration proceeding by numerous acts or omissions, including the assigned PEA attorney's failure to present "statements, documents and information" implicating the veracity of opposing witness testimony; and the PEA attorney's "professional negligence." On or about April 4, 2007, Dotson emailed a New Jersey Education Association representative, complaining that the PEA attorney ". . . did not aggressively challenge the District's witnesses;" "seemed more of the District's advocate than mine;" and agreed to ". . . get [Dotson] to back down." On April 10, 2007, Dotson again emailed the same NJEA representative advising that the PEA attorney's ". . . advocacy for him has been compromised;" that the "trust relationship has been damaged" and that ". . . all local NJEA representatives have tried to conspire with the [District] to sweep this major injustice under the rug by quashing my entitlement to a fair hearing."

On September 13, 2007, the designated grievance arbitrator issued a lengthy "opinion and award." The arbitrator found that based upon his review of the evidence and testimony of the witnesses in the proceeding, the District proved that it had just

cause to terminate Dotson. The arbitrator specifically concluded that Dotson's testimony was not credible. The arbitrator denied the grievance.

On September 19, 2007, the PEA attorney/UniServ Field Representative wrote a letter to the PEA President (with a copy to Dotson) advising of the grievance arbitration determination and award, setting forth a standard of review applied to challenges to such awards; and recommending that the PEA not seek to vacate the award.

N.J.S.A. 34:13A-5.4c provides that:

> No complaint shall issue based on any unfair practice charge 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 prevented.

On September 13, 2007, a grievance arbitration award issued denying Dotson's contractual grievance contesting his January 31, 2005 termination from the District. A timely unfair practice charge alleging a violation of the duty of fair representation under section 5.4b(1) of the Act should have been filed by March 13, 2008. The charge was not filed until almost one year later. Unless Dotson can show that he was prevented from filing a timely charge, the charge must be dismissed.

In determining whether a party was "prevented" from filing a timely charge, we must conscientiously consider the circumstances

of each case and assess the Legislature's objectives in prescribing the time limits to a particular claim. The word "prevent" ordinarily connotes factors beyond a complainant's control, disabling him or her from filing a timely charge, but it includes all relevant considerations bearing upon the fairness of imposing the statute of limitations. Kaczmarek v. New Jersey Turnpike Auth., 77 N.J. 329 (1978). Relevant considerations include whether a charging party sought timely relief in another forum; whether the respondent fraudulently concealed and misrepresented the facts establishing an unfair practice; when a charging party knew or should have known the basis for its claim; and how long a time has passed between the contested action and the charge. State of New Jersey, P.E.R.C. No. 2003-56, 29 NJPER 93 (¶26 1003).

I find that Dotson was not "prevented" from filing a timely charge. Although his December, 2007 filing of a civil complaint in part suggests that Dotson sought timely relief in another forum, that complaint was not served upon the Defendant New Jersey Education Association or PEA. No facts suggest that Dotson's omission was beyond his control. This circumstance varies from that in Kaczmarek, where the Defendant (and Respondent) public employer had been served the civil complaint during the statutory period.

Dotson filed another civil complaint or refiled his original one about seven months later, in July, 2008, and amended it in August, 2008, apparently with service upon the NJEA and/or PEA. No facts explain that delay in filing, particularly in light of Dotson's memorialized dissatisfaction with PEA's representation of him beginning in April, 2007. Also, nothing suggests that the PEA has concealed or misrepresented any facts indicating a violation of the duty of fair representation. Under all of the circumstances, I find that our six-month statute of limitation should not be tolled.

I also find that Dotson has not alleged facts indicating that the PEA violated its duty of fair representation. In the specific context of a challenge to a union's representation in processing a grievance, the United States Supreme Court has held: "A breach of the statutory duty of fair representation occurs only when a union's conduct towards a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith." Vaca v. Sipes, 386 U.S. 171, 190 (1967); Hines v. Anchor Motor Freight, 424 U.S. 554, 91 LRRM 2481 (1976). Our Supreme Court and the Commission have consistently applied Vaca standards in adjudicating such unfair practice claims. See, e.g., Saginario v. Attorney General, 87 N.J. 480 (1981); In re Bd. of Chosen Freeholders of Middlesex Cty., P.E.R.C. No. 81-62, 6 NJPER 555

(¶11282 1980), aff'd App. Div. Docket No. A-1455-80 (4/1/82), pet. for certif. den. 6/16/82).

Dotson has alleged that PEA's attorney was provided "information, statements and documents" that were "essential" for the cross-examination of District witnesses at the arbitration hearing and that the attorney "failed" to present them. Dotson avers that the District witnesses "did not tell the complete truth and contradicted statements that had been previously made." Dotson also alleges that the PEA attorney said in an off-the-record discussion in the presence of the designated arbitrator and District representatives that the PEA ". . . will get Dotson to back down." Dotson also alleges that the PEA attorney provided him ". . . unsound and legally inaccurate advice" and specifically, that ". . . there was no fruitful basis of appeal [of the arbitration award]."

I find that these allegations -- individually and collectively -- do not suggest that PEA's conduct was arbitrary, discriminatory or in bad faith. Considered together, I find that Dotson's allegations suggest that PEA's conduct at the arbitration hearing was not worse than negligent.

Dotson has not specifically set forth a context in which one may assess whether an off-the-record remark by the PEA or its attorney in the presence of an arbitrator and a representative of the District compromised Dotson's defense in any way. Even if

Dotson provided the PEA with "information, statements and documents" that may have questioned or contradicted the "complete truth" of some witness testimony, one may only speculate about the specifics and significance of those disclosures. Dotson has not provided facts indicating how he has been disparately treated by the PEA. Finally, Dotson has not set forth facts suggesting that a possible appeal of the arbitration award would have succeeded or that the PEA's decision not to appeal was arbitrary, discriminatory or in bad faith. See, e.g., Liotta v. National Forge Co., 473 F.Supp. 1139, 102 LRRM 2348 (WD Pa. 1979), cert. den., 451 U.S. 970, 107 LRRM 2144 (1981) (failure to call certain witnesses or to make certain objections to testimony did not constitute breach of the duty of fair representation); Sear v. Cadillac Auto Co., 654 F.2d 4, 107 LRRM 3218 (CA 1, 1981) (refusal to seek to vacate arbitrator's award does not breach duty of fair representation because such action was not within the contractual remedies to which the employee was entitled).

An individual employee may pursue a claim of an a(5) violation against a public employer only where a viable claim of a breach of the duty of fair representation against the majority representative has been asserted. See Jersey City College, D.U.P. No. 97-18, 23 NJPER 1 (¶28001 1996). Dotson has not set forth facts sufficiently indicating that the PEA violated the duty of fair representation. I will not assess consequently,

whether the District violated any provision of the parties' collective negotiations agreement. Also, Dotson has not set forth any facts indicating that the District violated 5.4a(1), (2), (3) and (7) of the Act. I dismiss those allegations against the District.

Under all of the circumstances, I find that no facts warrant the tolling of our statute of limitations. N.J.S.A. 34:13A-5.4c. I also find that Dotson's allegations, if true, do not meet the complaint issuance standard; specifically, they do not indicate that the PEA violated the duty of fair representation in litigating the grievance arbitration or in not pursuing an appeal of the award or advising Dotson that award could or should have been appealed. I also dismiss all portions of the charge alleging that the District violated the Act. N.J.A.C. 19:14-2.3.

ORDER

The unfair practice charge is dismissed.

Gayl R. Mazuco
Director of Unfair Practices

DATED: January 17, 2014
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 January 27, 2014.