D.U.P. NO. 2019-3

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

In the Matter of

BOROUGH OF RED BANK,

Respondent,

-and- Docket No. CI-2017-014

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 1075

Respondent,

-and-

DOUGLAS HOWARD,

Charging Party.

**SYNOPSIS**

The Director of Unfair Practices dismisses an unfair practice charge filed by an individual against his employer and his majority representative. The charge alleges that the employer violated the Act by unilaterally imposing a new requirement that all Public Works employees must possess a commercial driver's license (CDL), and then terminating the individual because he did not possess one. The charge also alleges that the majority representative violated the duty of fair representation by improperly processing the individual's grievance contesting both the new CDL requirement and his termination.

The Director determined that the charge was untimely, and that the individual lacked standing to pursue his claims because he had not been a public employee since 2015. The Director also determined that, even if the charge was timely and the individual had been a public employee at the time of the filing, requiring a CDL is within the scope of the employer's managerial prerogative, and the facts did not indicate that the employer violated 5.4a(1), (3), (5), (6) and (7), or that the majority representative violated 5.4b(1), (3), (4) and (5) of the Act.

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Appearances:

For the Respondent,
Weiner Law Group, LLP, attorneys
(Margaret A. Miller, of counsel)

For the Respondent,
Law Offices of Barry D. Isanuk
(Barry D. Isanuk, of counsel)

For the Charging Party,
Bernard M. Reilly, LLC, attorneys
(Bernard M. Reilly, of counsel)

**DECISION**

On December 12, 2016, and January 17, 2017, Douglas Howard filed an unfair practice charge and an amended charge, respectively, against his employer, Borough of Red Bank (Borough), and his majority representative, Communications Workers of America, Local 1075 (CWA). Howard, a former laborer

in the Borough's Department of Public Works (DPW), alleges that in 2014, the Borough unilaterally imposed a new requirement that all Public Works employees must possess a commercial driver's license (CDL), and then terminated Howard on February 15, 2015 because he did not possess one. Howard alleges that CWA improperly processed his grievance contesting both the new CDL requirement and his termination. Howard alleges that the Borough's actions violate sections 5.4a(1), (3), (5), (6) and (7)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act), and that CWA's actions violate sections 5.4b(1), (3), (4) and (5)[2/] of the Act.

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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;" "(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;" "(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 the 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."

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;" "(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;" "(5) Refusing to negotiate in good faith with a

(continued...)

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. I find the following facts.

Howard was hired as a DPW laborer in 2000, when the Borough did not require laborers to possess a CDL. During Howard's employment as a laborer, he was never required to drive a vehicle that required a CDL to operate. During that time, no requirement for a CDL appeared in the collective negotiations agreement(s), the job description for laborer, or the personnel manual. There was a separate job category in DPW, driver, that required a CDL and paid higher rates of pay.

On January 23, 2014, the Borough unilaterally announced that all DPW employees, including laborers, must have a CDL by January 1, 2015. By that date, Howard was 58 years old and for various

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2/ (...continued)
majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in the 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."

reasons, including "a learning disability," he could not obtain a CDL. The Borough terminated his employment on February 12, 2015.

On February 27, 2015 Howard filed a grievance contesting his termination which the Borough denied at Step 2 on March 5, 2015. A grievance hearing was held on April 15, 2015, at which CWA and the Borough agreed that Howard could have until June 15, 2015 to obtain a CDL, and if he did not obtain one by then, CWA would withdraw the grievance. This agreement was memorialized in a letter dated April 15, 2015 from CWA President Kevin Tauro to the Borough Administrator Stanley Sickels.

On April 29, 2015, Bernard Reilly, Howard's attorney, wrote a letter acknowledging the agreement between CWA and the Borough that Howard would attempt to obtain a CDL by June 15, 2015, but also demanded that the grievance proceed to arbitration. On May 20, 2015, CWA advised Reilly that CWA "made a good faith decision not to pursue the matter to arbitration if Mr. Howard decides not to obtain the CDL or now wishes to renege on his agreement" to withdraw the grievance if he does not obtain a CDL by June 15, 2015. Howard did not obtain a CDL by June 15, 2015, and CWA did not pursue the grievance to arbitration.

## ANALYSIS

N.J.S.A. 34:13A-5.4c establishes a six-month statute of limitations period for the filing of unfair practice charges. The statute provides in pertinent part:

> . . . 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 a charge in which event the 6-month period shall be computed from the day he was no longer so prevented.

In Kaczmarek v. N.J. Turnpike Authority, 77 N.J. 329 (1978), our Supreme Court explained that the statute of limitations was intended to stimulate litigants to prevent the litigation of stale claims, and cautioned that it would consider the circumstances of individual cases. Id. at 337-338. The Court noted that it would look to equitable considerations in deciding whether a charging party slept on its rights.

The facts show that by February 15, 2015, Howard knew that he was terminated from his position, and that on May 20, 2015, he knew that CWA would not proceed to arbitration on his grievance. Howard filed the charge on December 12, 2016, over a year and one-half later. Howard has not alleged any facts suggesting that he was prevented from filing a timely charge. Therefore, I dismiss the charge as untimely.

Also, the Commission ". . . does not have jurisdiction over individuals who are no longer public employees, such as individuals who have resigned or retired," Asbury Park, D.U.P. No. 2002-9, 28 NJPER 160 (¶33057 2002), aff'd P.E.R.C. 2002-73, 28 NJPER 253 (¶33096 2002). Nor does a union owe a duty of fair representation to individuals who are no longer public employees

within the meaning of the Act. Weisman and CWA 1040, P.E.R.C. No. 2012-55, 38 NJPER 356 (¶120 2012); Sarapuchiello and Local 2081, D.U.P. No. 2009-4, 34 NJPER 453 (¶142 2009), aff'd P.E.R.C. 2009-47, 35 NJPER 66 (¶251 2009). Once a charging party ceases to be a public employee within the meaning of the Act, the Commission no longer retains jurisdiction over any subsequent disputes between the former public employee and his or her former public employer and majority representative.

In Asbury Park, supra, the Director refused to issue a complaint on an unfair practice charge filed on June 20, 2001, more than seven (7) months after the charging party retired from service on December 1, 2000. In reaching this determination, the Director explained that when, "[the charging party] retired, he ceased to enjoy the rights guaranteed to public employees by our Act." Id. at 161. Consequently, the Director concluded, that the charging party lacked standing to pursue the June 20, 2011 unfair practice charge since he no longer was a public employee within the meaning of the Act.

Howard has not been a public employee since 2015. He lacks standing to pursue the claims set forth in his unfair practice charge. Nor do the facts show that CWA owed Howard any duty on December 12, 2016, a year and a half after he was no longer a public employee within the meaning of the Act. See Weisman, P.E.R.C. No. 2012-55, 38 NJPER 356 (¶120 2012).

No allegations in the charge support a claim that the Borough violated N.J.S.A. 34:13A-5.4a(1). Howard alleges that the Borough unlawfully imposed a requirement that DPW laborers obtain a CDL, but requiring a CDL is within the scope of the Borough's managerial prerogative. See Township of Livingston, P.E.R.C. No. 2016-26, 42 NJPER 228 (¶64 2015)(employer has the managerial prerogative to determine the qualifications required of a job, including whether a CDL is required).

Even if Howard had filed a timely charge, and even if he was a public employee at the time of that filing, he has not alleged any facts indicating that the Borough violated 5.4a(1), (3), (5), (6) and (7) of the Act, or that CWA violated 5.4b(1), (3), (4), and (5) of the Act. Accordingly, I conclude that this charge does not meet the Commission's complaint issuance standard and dismiss the charge. N.J.A.C. 19:14-2.2 and 2.3.

**ORDER**

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION

/s/ Jonathan Roth
Jonathan Roth
Director of Unfair Practices

DATED: May 6, 2019
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 May 16, 2019.**