D.U.P. NO. 2020-2

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

In the Matter of

TOWNSHIP OF LAKEWOOD,

Respondent,

-and- Docket No. CI-2018-005

TEAMSTERS LOCAL 97,

Respondent,

-and-

SAMUEL SCHULMAN,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by Samuel Schulman against his former employer, the Township of Lakewood (Township) and his former majority representative, Teamsters Local 97 (Union). The charge alleges that the Township violated N.J.S.A. 34:13A-5.4a(1) and (7) when it terminated Schulman's employment, and that the Union failed to properly and timely represent Schulman in connection with his termination, in violation of N.J.S.A. 34:13A-5.4b(1) and (5). The Director finds that the allegations against both the Township and the Union are outside the Commission's six month statute of limitations and that Schulman lacks standing to pursue his claims because he is no longer a public employee. The Director also finds that even if the charge was timely filed, the facts do not support a finding that the Township committed a violation of the Act or that the Union breached its duty of fair representation.

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Appearances:

For the Respondent,
Secare & Hensel, attorneys
(Steven Secare, of counsel)

For the Respondent,
Mets Schiro McGovern, LLP, attorneys
(Brian J. Manetta, of counsel)

For the Charging Party,
Oxfeld Cohen, attorneys
(Sanford R. Oxfeld, of counsel)

REFUSAL TO ISSUE COMPLAINT

On July 28, 2017, Samuel Schulman (Schulman), a former employee of the Township of Lakewood (Township), filed an unfair practice charge against the Township and Teamsters Local 97 (Union), Schulman's former employee representative. Schulman alleges that the Township terminated his employment on February

3, 2016 in violation of N.J.S.A. 34:13A-5.4a(1) and (7)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act). Schulman further alleges that the Union failed to properly represent him in connection with his termination, in violation of N.J.S.A. 34:13A-5.4b(1) and (5)[2/] of the Act.

The Union denies engaging in any unfair practice. It contends that it acted in good faith on Schulman's behalf and did not breach its duty of fair representation. It also asserts that the charge was filed well beyond the Commission's six-month statute of limitations and should be dismissed. The Township also denies engaging in any unfair practice, asserting that Schulman does not allege facts indicating that it violated the Act.

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

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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; and (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; and (5) Violating any of the rules and regulations established by the commission."

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. Under all the circumstances, I find that the complaint issuance standard has not been met in this matter. I find the following facts.

Schulman was employed by the Township as a heavy equipment operator for about sixteen (16) years. On February 3, 2016, Schulman was called to a meeting with several attendees; his supervisor, Anthony Arecchi (Arecchi), the Township's Director of Public Works; James Casey (Casey), the Township's Assistant Superintendent of Public Works; and Local 97 shop stewards Raymel Guzman (Guzman) and Mike Cava (Cava). The ostensible purpose of the meeting was to serve Schulman with two prepared preliminary notices of disciplinary action (PNDA). One PNDA, imposing a ten (10) day suspension, charged Schulman with phoning a radio station on January 27, 2016, during his workday, and making "disparaging, critical, insubordinate and negative comments about the Township management" in violation of various subsections of N.J.A.C. 4A:2-2.3.[3/] The other PNDA, imposing a thirty (30) day suspension, charged Schulman with "abandon[ing] [his] assignment and lea[ving] Public Works despite being ordered to work" on January 23, 2016.

3/ This regulation provides the general causes for which an employee may be subject to major discipline.

According to Arecchi and Casey, before the PNDAs were in fact served, Schulman said service was not necessary because he was quitting. Arecchi assertedly asked Schulman if he was giving notice of his resignation and Schulman affirmatively stated that he was giving two weeks' notice. Arecchi assertedly advised Schulman that two weeks' notice was not needed and that he was free to leave the building. Schulman then assertedly left the premises.

Schulman refutes the Township's account of the February 3rd meeting. Schulman contends that he told Arecchi, ". . . that he was thinking about putting in his two (2) week notice" and "moving on from the Township." Schulman contends that Arecchi asked him to write his stated intention so that his resignation could be processed. Schulman contends that later in the meeting, Casey advised him that Arecchi wanted him to leave the premises immediately. Schulman assumed that he was being asked to leave to start serving his suspensions immediately.

Schulman acknowledges that after the meeting he received documents from the Township, including a February 3, 2016 letter with an enclosed form soliciting information for the payment of unused vacation and sick leave time off, and a February 4, 2016 letter regarding his rights, pursuant to the Consolidated Omnibus Budget Reconciliation Act (COBRA). The February 3rd letter, signed by Arecchi, advises ". . . [p]ursuant to the resignation

of employment tendered by you on Wednesday, February 3rd @ 7:10 a.m., from the position of Equipment operator-Heavy for the Township of Lakewood Department of Public Works, please complete and return the enclosed form." The letter concludes, "[t]he Township of Lakewood wishes you continued success in your endeavors." Schulman completed the COBRA coverage application to obtain health insurance for his family. Schulman asserts that he did not complete the form for payment of his unused sick and vacation time, as he understood that form to pertain only to employees whose employment had been terminated.

According to Union Vice-President, Pat Guaschino, Schulman contacted him after the February 3, 2016 meeting and asked that the Union appeal the two suspensions. Guaschino requested from Township officials a Final Notice of Disciplinary Action (FNDA) for each of the charges against Schulman so that the Union could initiate appeals of the charges to the Civil Service Commission (CSC). He also requested, and the Township agreed, to continue to provide Schulman with health insurance while the appeals were pending.

The Township did not issue FNDAs on Schulman's disciplinary charges. Instead, on March 1, 2016, counsel for the Township wrote to Guaschino, advising that ". . . it is the position of the Township that Mr. Schulman resigned pursuant to the Township Ordinance, the personnel policy, as well as Civil Service law."

In response, Guaschino informed the Township that the resignation date set forth in the letter - September 19, 2011 - was incorrect and requested a corrected letter. On March 11, 2016, Township Municipal Manager Thomas Henshaw wrote to the Union, describing the circumstances of Schulman's resignation, and providing a "corrected" resignation date of February 3, 2016. Henshaw wrote that Schulman had been notified that his resignation was accepted by the Township, pursuant to Township Ordinance No. 10-9.4, and that he was issued a notice regarding his COBRA rights.

According to the Union, the Township's March 1, 2016 letter was the first notice it received advising that Schulman had resigned on February 3, 2016. It had previously relied on Schulman's account that he had been advised of his suspension at the meeting. Following its receipt of the Township's March 1st letter, the Union investigated the veracity of Schulman's account of events in the February 3rd meeting. The Union learned of a factual dispute about those events and that FNDAs would not be issued because the Township had "accepted" Schulman's resignation. Counsel for the Union recommended against pursuing an appeal to the CSC, pursuant to the Union's internal investigation. Specifically, Union Counsel advised that it was likely that the CSC would determine that Schulman had resigned (verbally), and that the Township was not obliged to rescind his resignation. Union President John Gerow nevertheless directed

its Counsel to file an appeal because he believed that Schulman, a veteran Union member, deserved "the benefit of the doubt." Consequently, an appeal to the CSC was filed on Schulman's behalf on March 31, 2016. Schulman first informed the Union of his receipt of the Township's February 3rd letter (acknowledging Schulman's "resignation") no earlier than late March, 2016.

In a letter dated April 18, 2016, the CSC Division of Appeals and Regulatory Affairs advised Schulman that his appeal "was not filed within a reasonable time of the notice of the adverse action, namely his alleged resignation, N.J.A.C. 4A:2-1.1 and N.J.A.C. 4A:2-6.1(d) . . . or removal from employment, N.J.S.A. 11A:2-15 and N.J.A.C. 4A:2-2.8" and as such, his file was closed.

On May 10, 2016, Counsel for the Union wrote to the Division of Appeals and Regulatory Affairs, asserting that the CSC erred in closing Schulman's file and requesting that it reconsider its decision and reopen the case.

On May 12, 2016 and June 1, 2016, Counsel for the Township wrote to the Division of Appeals and Regulatory Affairs, asserting that Schulman's resignation was properly tendered and accepted on February 3rd. Township Counsel wrote that the resignation was confirmed in a Township letter sent to Schulman later on the same date of his purported resignation, and that Schulman clearly knew the Township's position when he received

the February 3rd letter. Counsel concluded that Schulman's CSC appeal was not timely because it was filed more than twenty (20) days after February 3, 2016.

In a decision dated May 8, 2017, the CSC denied the Union's appeal to reopen Schulman's case and dismissed the appeal. The CSC found that although Schulman claimed that he did not resign, ". . . the record clearly shows that the appointing authority considered him resigned on February 3, 2016." The CSC highlighted that Schulman did not dispute receiving the February 3, 2016 letter from the Township advising that ". . .[p]ursuant to the resignation of employment tended by you on Wednesday, February 3rd @ 7:10 a.m. . . ." The CSC concluded from his receipt of the letter that Schulman "should reasonably have known that the [Township] accepted a resignation from him." The CSC noted that because there was documentary evidence from the Township concerning the resignation (the February 3rd letter), there was no basis to extend or relax the twenty (20) day deadline for appeal. The CSC also determined that even if it assumed that Schulman's appeal was timely filed, there was no "convincing evidence" that he did not intend to resign.

Schulman did not appeal the final administrative decision of the CSC, nor did he request the Union to seek appellate review.

ANALYSIS

The Act requires that an unfair practice charge be filed within six months of the date the unfair practice occurred. N.J.S.A. 34:13A-5.4c states, in relevant part:

> . . . 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.

On February 3, 2016, Schulman may or may not have voluntarily resigned his employment in a meeting with Township representatives. On an unspecified date soon after the meeting, in a letter to Schulman bearing the same date of the meeting, a Township supervisor and meeting participant, Anthony Arecchi, wrote that Schulman had (verbally) tendered his resignation and enclosed a form for him to complete providing for payment of his unused vacation and sick leave time off. On February 4, 2016, the Township issued a written notice to Schulman regarding his rights to receive health insurance under COBRA. Later, on March 31, 2016, in the same calendar month that the Union first learned that the Township considered Schulman to have resigned on February 3rd, the Union filed an appeal of the "resignation" determination with CSC. The unfair practice charge was not filed until more than one year later. Unless Schulman 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).

The facts show that although Schulman knew on or about February 3, 2016 that the Township regarded him as having resigned his employment, the Union was unaware of that purported employment status until March 1, 2016, (when it received Township correspondence memorializing that belief) about one week late for a CSC contest of the Township's determination. In this regard,

Schulman did not seek timely relief at CSC nor provide the Union notice so that it could timely seek redress. The Union, apparently relying on Schulman's representations in the interim before March 1, 2016, sought FNDAs from the Township in order to appeal Schulman's "suspensions." Nothing indicates that the Union fraudulently concealed or misrepresented facts; it pursued appeals of CSC's "resignation" determination (over Union counsel's objection), to no avail. No circumstances warrant a determination that Schulman was prevented from filing a timely unfair practice charge or that our statute of limitations should be "tolled" for the duration of the CSC appeals.

Even if I assume that the charge is timely filed, 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, 161 (¶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, 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, 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.

Schulman has not been a public employee since February, 2016; he lacks standing to pursue the claims set forth in his unfair practice charge filed in July, 2017.

Even if I assume that Schulman filed a timely charge, and also assume that he is a public employee with legal standing to file an unfair practice charge, I find that he has not alleged any facts indicating that the Union violated 5.4b(1) and (5) of the Act.

Schulman's charge fails to establish that the Union breached its duty of fair representation. 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 collective

negotiations agreement. 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 a collective negotiations agreement 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, 87 S.Ct. 903, 17 L.Ed. 2d 842 (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 New Jersey 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. Assoc. (Radwan), P.E.R.C. No. 97-146, 23 NJPER 390, 391 (¶28177 1997).

In this case, the Union investigated the events surrounding Schulman's departure from work on February 3, 2016; convinced the Township to maintain Schulman on its health care plan following his separation; directed its counsel to file an appeal on Schulman's behalf to the CSC; and actively pursued that appeal for more than one year. No facts suggest that the Union's

representation of Schulman was ever tainted by discriminatory or arbitrary motives. The facts show that from the outset, the Union believed Schulman's description of events at the February 3, 2016 meeting and assumed that the matter concerned disciplinary suspensions, not a resignation. (Schulman did not inform the Union of the Township's February 3rd letter until late March, 2016, at the earliest). When the Union was informed that the Township considered Schulman to have resigned, it authorized its counsel to file an appeal with the CSC, despite counsel's recommendation to the contrary. Even if the Union's assessment not to immediately file an appeal with the CSC was an error in judgment, a Union is not liable for errors in judgment if they are made honestly and in good faith. Amalgamated Assoc. of Street, Electric Railway and Motor Coach Employees of America v. Lockridge, 403 U.S. 274, 301, 77 LRRM 2501, 2512 (1971); OPEIU Local 153. Moreover, the facts show that even if the Union immediately appealed to CSC at the beginning of March, 2016 (when it first learned from the Township of Schulman's alleged "resignation"), its appeal would have been untimely.

Finally, Schulman's charge fails to establish that the Township violated the Act. The essence of Schulman's charge against the Township is that it wrongfully terminated him without cause. In the absence of a 5.4a(3) claim that the Township's adverse personnel action was motivated by the employee's exercise

of rights protected by our Act, we ordinarily do not have jurisdiction to hear wrongful termination claims. Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984). Schulman has submitted no facts supporting an independent violation of 5.4a(1) or 5.4a(7). See, for example, New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421 (¶4189 1978); N.J. Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979).

For all of these reasons, I conclude that the charge does not meet the complaint issuance standard.

ORDER

The unfair practice charge is dismissed.

/s/ Jonathan Roth
Jonathan Roth
Director of Unfair Practices

DATED: July 11, 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 July 22, 2019.