D.U.P. NO. 2020-7

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

In the Matter of

CITY OF TRENTON,

Respondent,

-and- Docket No. CI-2016-050

TRENTON POLICE SUPERIOR OFFICES ASSOCIATION,

Respondent,

-and-

JASON WOODHEAD,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by Jason Woodhead, against his employer, the City of Trenton and his employee representative, the Trenton Superior Officers' Association. The Director finds that neither respondent committed an unfair practice when they negotiated and implemented an agreement that modified the employees' 2016 pay schedule to resolve a 27th pay period issue. The Director finds that the Association's conduct did not breach its duty of fair representation, despite Woodhead's personal dissatisfaction with the agreement the Association entered into with the City. The Director also dismisses Woodhead's allegation that the City violated N.J.S.A. 34:13A-8.2 when it failed to file the 2015-2018 collective negotiations agreement and memorandum of agreement with the Commission.

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Appearances:

For the Respondent,
Florio Perrucci Steinhardt & Fader LLC, attorneys
(Eric M. Wieghaus, of counsel)

For the Respondent,
Kroll Heineman Carton, attorneys
(Raymond G. Heineman, of counsel)

For the Charging Party,
Jason Woodhead, pro se

REFUSAL TO ISSUE COMPLAINT

On June 30, 2016 and July 14, 2016, Jason Woodhead (Woodhead) filed an unfair practice charge and amended charge against his employer, the City of Trenton (City) and the Trenton Superior Officers' Association (Association), his employee representative. Woodhead alleges that the City violated section

5.4a(1), (3), (5) and (6)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), when it (a) failed to timely file the 2015-2018 memorandum of agreement and collective negotiations agreement between the City and the Association with the Commission, violating N.J.S.A. 34:13A-8.2[2/]; (b) unilaterally changed a single payday from December 31, 2015 to January 1, 2016; and (c) implemented a "recoupment plan" that "included a deduction equaling 1/27 of a single biweekly pay" in each of the biweekly paychecks issued in 2016. Woodhead alleges that the Association violated section 5.4b (1), (3) and (4)[3/] of

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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;" and "(6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

2/ This statute provides:

> "The commission shall collect and maintain a current file of filed contracts in public employment. Public employers shall file with the commission a copy of any contracts it has negotiated with public employee representatives following the consummation of negotiations."

3/ These provisions prohibit employee organizations, their representatives or agents from: "(1) Interfering with,

(continued...)

the Act when it agreed to implement the City's 27th payroll adjustment, which " . . . was not in the best interest of the membership" and did not reduce that agreement to writing.

The City denies violating the Act, asserting that it engaged in negotiations with the Association regarding the 27th pay period issue and reached an agreement to move the last pay of the calendar year of 2015 to January 1, 2016, and calculate the employees' 2016 salaries over 27 pay periods. This agreed-upon change in the payroll calendar was memorialized in a memorandum to City employees dated June 30, 2015. It also denies violating N.J.S.A. 34:13A-8.2 because the parties' collective negotiations agreement was not finalized at the time the subject charge was filed. The City contends that Woodhead's charge is untimely, and fails to establish a violation of the Act.

The Association denies violating the Act and contends that the charge is untimely and fails to establish a breach of the duty of fair representation or refusal to execute a written agreement.

3/ (...continued)
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; and (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

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.

The Association is the majority representative of "all uniformed and non-uniformed officers between and including the ranks of Sergeant and Captain of the Division of Police of the Department of Public Safety of the City of Trenton."

In 2015, the parties negotiated a collective negotiations agreement, effective January 1, 2015 through December 31, 2018. This agreement was signed in November, 2016.

Section 9.03 c. of Article IX, (Wages) of the agreement provides: " . . . [t]he City shall have the option of implementing a City-wide payroll of twenty-four pay periods in a calendar year and, thereafter, all employees shall be paid on a semi-monthly basis. There shall be two payroll periods in each month." The parties' negotiated grievance procedure permits a grievance to be filed by an employee or the Association, and terminates in binding arbitration.

Woodhead is a police sergeant employed by the City and is a member of the Association.

Based on the calendar and the City's pay schedule, there were 27 pay periods in 2015. Consequently, its employees' annual salary should have been divided into 27 equal installments. However, due to the City's error, this adjustment was not made prior to the start of 2015. Without correction, employees would have received their entire salary over the first 26 pays of 2015, and would have received an extra 27th pay, resulting in their 2015 salaries exceeding their contractual salaries. On April 24, 2015, the City proposed to correct this matter by reducing employees' bi-weekly pay effective July 1, 2015, so that the employees would receive their negotiated annual salary for 2015 over the course of 27 pay periods.

On May 1, 2015, the Association and the City reached an agreement on the 2015-2018 collective negotiations agreement, including the City's proposal to correct the 27th pay issue by modifying employees' bi-weekly pay during the second half of the 2015 calendar year. The parties exchanged draft memoranda of agreement and the Association ratified the parties' agreement on May 12, 2015. Woodhead was present during the ratification and vote. Consistent with the parties' agreement regarding the 27th pay issue, the City's Personnel Officer, Steven Ponella announced the payroll adjustment to all City employees in a letter dated May 29, 2015.

On June 8, 2015, the City's mayor, Eric Jackson (Jackson), met with the majority representatives of various City employees to discuss the 27th pay period issue. During the meeting, the unions reached an agreement with the Mayor to complete the 2015 payroll as ususal, without the 27th pay modification. Instead, the parties agreed to move the last pay of the 2015 calendar year by one day from December 31, 2015 to January 1, 2016, creating 27 pay periods in 2016, and to calculate the employees' 2016 salary over 27 pay periods. According to the Association, this arrangement was preferable to the previously agreed-upon payroll adjustment because it spread the adjustment for the 27th pay over the entire 2016 calendar year, rather than the last 6 months of the 2015 calendar year. In a letter to all City employees dated June 30, 2015, Jackson announced the agreed-upon change in the payroll for calendar years 2015 and 2016. Specifically, Jackson wrote:

> Normally there are 26 pay periods in a year. An employee's salary is divided by the number of pay periods to determine their bi-weekly pay. However, approximately every nine (9) years, the City of Trenton experiences a year in which there are twenty-seven (27) pays instead of the usual twenty-six (26). This is based on the calendar and when pay-days fall. This year, 2015, is one of those years. Each employee's annual salary should have been divided into twenty-seven (27) equal installments to account for this unusual circumstance. However, this was not done.

> In order to correct this missed step, and ensure that all employees receive their correct annual salary, we were faced with two options . . . After discussing both options with all Union leadership, it was determined that the option of least impact is to have 27 pay periods in 2016. We will accommodate this option by facilitating payroll so that the last pay day dated December 31, 2015 is processed on January 1, 2016. Paychecks will still be available on December 31, 2015, and your annual salary for both years will be per your contract.

In a memorandum dated December 17, 2015, Business Administrator Terry McEwen (McEwen) advised all City police department employees of the mechanism for the adjustment in the 2016 department payroll. McEwen's memorandum was consistent with the agreement reached in June 2015 to resolve the 27th pay issue. Effective January 2016, the city implemented the terms of the agreement.

ANALYSIS

N.J.S.A. 34:13A-5.4(c) provides that no complaint shall issue based upon any unfair practice occurring more than six months before the filing of the charge unless the charging party was prevented from filing a charge earlier. In application, the statute of limitations period normally begins to run from the date of some particular action, such as the date the alleged unfair labor practice occurred, provided the person(s) affected thereby are aware of the action. The date of the action could be the date an action is announced and/or the date an action is

implemented. The action date is known as the "operative date," and the six-month limitations period runs from that date. Therefore, in order to be timely, a charge must be filed within six months of the operative date. Charges and amendments filed past that date are generally untimely. Irvington Board of Education, H.E. NO. 2003-9, 28 NJPER 560 (¶33174 2002). Two exceptions to timeliness requirements are (1) tolling of the limitations period and (2) a demonstration by the charging party that it was "prevented" from filing the charge prior to the expiration of the period.

The standard for evaluating statute of limitations issues was set forth in Kaczmarek v. N.J. Turnpike Auth., 77 N.J. 329 (1978). The Supreme Court explained that the statute of limitations was intended to stimulate litigants to prevent litigation of stale claims, but it did not want to apply the statute strictly without considering the circumstances of individual cases. Id. at 337-338. The Court noted it would look to equitable considerations in deciding whether a charging party slept on his rights. The Court still expected charging parties to diligently pursue their claims.

Woodhead does not allege facts showing that he was prevented from filing his claims before the tolling of the statute of limitations period. The issue is whether the operative event triggering the running of the six-month period was the

notification of the payroll adjustment or the date the payroll adjustment was implemented. If it is the former, Woodhead's claims are untimely and must be dismissed.

In Warren Hills Reg. Bd. of Ed., P.E.R.C. No. 78-69, 4 NJPER 188 (¶4094 1978), the Commission considered a timeliness claim regarding a charge asserting unilateral implementation of split sessions for the seventh grade. The charge alleged violations of 5.4a(1) and (5) of the Act. The Commission upheld the Hearing Examiner's dismissal of the charge as untimely but held that the operative event was not the Board's decision to institute the split session but the implementation of the decision. Similarly, in Jamesburg Bd. of Ed., P.E.R.C. No. 80-56, 5 NJPER 496 (¶10253 1979), the Commission considered the timeliness of a charge alleging unilateral change in a school calendar. The Commission found the charge was timely because it was filed within six months of the first day of school when the change was implemented. It determined the statute of limitations may run from the date a change is announced or from the date it is implemented. See also Monmouth Cty. Sheriff, 90-36, 16 NJPER 156 (¶21063 1990) (where a Hearing Examiner rejected the employer's timeliness argument, finding the six-month statute of limitations may run from the date announcing the change in automobile assignment policies or the date automobiles were actually assigned).

In this case, the implementation of the adjustment in the 2016 payroll occurred on January 1, 2016. The charge was filed on June 30, 2016, less than six months later. Consequently, Woodhead's claims are timely.

Woodhead has nevertheless failed to set forth any facts indicting that the Act was violated. Woodhead alleges that the City unilaterally altered employees' pay schedules by adding a 27th pay period in 2016 and changing the divisor used to compute salaries, in violation of 5.4a(1),(3),(5) and (6) of the Act, as well as "Chapter 173, Laws of New Jersey, 1965: Relating to Payment of Wages" and the Federal Fair Labor Standards Act.

N.J.S.A. 34:13A-5.3 gives public employees the right to organize and negotiate collectively. This section of the Act also provides:

> A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership . . . [T]he majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment . . . (Emphasis added).

The requirement that employers and majority representatives negotiate applies at all times, not just during negotiations for a new or successor contract. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 48-49 n. 9 (1978). In fact, section 5.3 of the Act requires an employer to negotiate with the majority representative over "[p]roposed new rules or modifications of existing rules governing working conditions." Thus, an employer seeking to change existing terms and conditions of employment during the term of an agreement must first seek to negotiate with the union.

The timing of paychecks is mandatorily negotiable. Township of West Orange, P.E.R.C. No. 2018-26, 44 NJPER 291 (¶81 2018); Brick Bd. of Ed., P.E.R.C. No. 2003-25, 28 NJPER 436 (¶33160 2002); Borough of Fairview, P.E.R.C. No. 97-152, 23 NJPER 398 (¶28183 1997). The Association and the City engaged in collective negotiations regarding the 27th pay issue and ultimately reached an agreement. Consequently, Woodhead's assertion that the City acted unilaterally is unfounded. No facts suggest that the City did anything other than what it was obligated to do, i.e., negotiate with the designated majority representative of its employees. The charge does not aver any factual allegations of fraud, collusion or arbitrary behavior by the City. Thus, in negotiating with the Association and reaching

an agreement on the 27th pay period issue, the City did not violate the Act.

Further, Woodhead lacks standing to assert a 5.4a(5) violation of the Act. A 5.4a(5) violation occurs when an employer fails to negotiate an alteration of a mandatory subject of negotiations with the majority representative; knowingly refuses to comply with the terms of the collective negotiations agreement; or refuses to process grievances presented by the majority representative. The employer's duty to negotiate in good faith runs only to the majority representative, not to individual unit members. New Jersey Turnpike Auth., P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980) aff'd NJPER Supp.2d 101 (¶85 App. Div. 1981); Union Cty. Ed. Services Comm'n and Westlake Ed. Ass'n, D.U.P. 2000-13, 26 NJPER 160 (¶31062 2000); Camden Cty. Highway Dep't., D.U.P. No. 84-32, 10 NJPER 399 (¶15185 1984).

Even if Woodhead has standing (individually) to claim that the City breached the 2015-2018 collective negotiations agreement by modifying the 2016 pay schedule, an allegation of a violation of a collective negotiations agreement is not properly litigated as an unfair practice. Rather, issues of contract violations are appropriately presented through the contractual grievance procedure. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15194 1984); City of Newark (Montgomery), P.E.R.C. No. 2000-57, 26 NJPER 91 (¶31036 2000)

(denial of contractual benefits to an individual employee is generally a breach of contract that does not rise to the level of an unfair practice).

Woodhead also lacks standing to assert a 5.4a(6) violation of the Act. A 5.4a(6) violation occurs when an employer refuses to reduce a negotiated agreement with the majority representative to writing and execute such an agreement. The employer's obligation runs only to the majority representative, not to individual unit members. N.J. Transit and ATU, H.E. No. 89-26, 15 NJPER 248 (¶20100 1989), aff'd in pt., P.E.R.C. No. 89-135, 15 NJPER 419 (¶20173 1989).

Woodhead's charge does not assert a 5.4a(3) violation of the Act. It is an unfair practice under 5.4a(3) for an employer to discriminate against an employee because of the employee's activities that are protected by the Act. Bridgewater Tp. v. Bridgewater Public Works Ass'n., 95 N.J. 235 (1984). Woodhead's charge raises no such allegations. Similarly, (and assuming that Woodhead's charge is timely), I find that the charge fails to establish that the Association violated 5.4b(1), (3) and (4) of the Act.

The Association's conduct did not breach its duty of fair representation. In Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Federation of Teachers, 142 N.J. Super. 486 (App. Div.

1976), the Court explained the standard to be applied in evaluating a union's conduct in collective negotiations:

> Designation of an exclusive bargaining agent under the New Jersey Employer-Employee Relations Act confers on a union broad power to represent the members of the bargaining unit and to negotiate the terms and conditions of their employment. Along with this power comes the obligation to represent all employees without discrimination. N.J.S.A. 34:13A-5.3.

The Court in Belen adopted the private sector model for assessing a majority representative's conduct in negotiations, as found in Ford Motor Company v. Huffman, 345 U.S. 330 (1953),

> 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 servicing the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. [Id. at 338]

The facts alleged do not indicate that the Association may have violated its duty to fairly represent unit employees. Simply stated, the Association and the City agreed to negotiate and resolved the 27th pay issue as a term and condition of employment.

In Council of New Jersey State College Locals, D.U.P. No. 81-8, 6 NJPER 531 (¶11271 1980), the Director dismissed a minority organization's charge alleging the majority representative failed to negotiate in good faith with the employer and reduce a

negotiated agreement to writing. In considering whether the majority representative breached its duty of fair representation, the Director wrote:

> The established standard for fair representation protects individual employees and classes of employees from indiscriminate treatment by the majority representative. Where a majority representative's activities affects all unit employees equally, the "quality" of representation, not its "fairness", is placed in issue and this conduct may not constitute an unfair practice. [Id. at 532]

Woodhead alleges that he is dissatisfied with the arrangement the Association entered into with the City on the 27th pay issue. Woodhead's personal dissatisfaction does not constitute a breach of the Association's duty. "Permitting individual employees to substitute themselves as the party with whom the employer must negotiate rather than the elected representative would be antithetical to the Act's exclusivity doctrine and must be rejected even in the case where the representative breached its duty to fairly represent the unit." Rutherford Free Public Library, D.U.P. No. 2000-17, 26 NJPER 295, 297 (¶31119 2000).

Woodhead also alleges that the Association violated section 5.4b(3) of the Act. The Commission has held that individual employees do not have standing to assert a 5.4b(3) violation. Only employers have standing to pursue a 5.4b(3) claim. State of N.J. (Juvenile Justice), CWA Local 1040 and CWA District 1 and Judy

Thorpe, P.E.R.C. No. 2013-29, 39 NJPER 205 (¶66 2012), recon. den. P.E.R.C. No. 2014-9, 40 NJPER 172 (¶66 2013); Hamilton Tp. Bd. of Ed., P.E.R.C. No. 79-20, 4 NJPER 476 (¶4215 1978); CWA Local 1034 and Renaldo A. King, D.U.P. No. 2004-2, 29 NJPER 367 (¶113 2003).

Similarly, the allegation of a 5.4b(4) violation must be dismissed. This section prohibits employee organizations, their representatives or agents from "refusing to reduce a negotiated agreement to writing and to sign such agreement". Just as an individual lacks standing to assert a 5.4a(6) violation (as explained above), the obligation to reduce a negotiated agreement to writing and execute such an agreement is one that the majority representative owes to the public employer, not to an individual.

No evidence supports Woodhead's allegation that the City violated N.J.S.A. 34:13A-8.2. This statute merely sets forth the Commission's responsibility to keep on file collective negotiation agreements provided by public employers. Here, the parties' agreement was not finalized at the time the subject charge was filed. Once the agreement was finalized, it was provided to the Commission, pursuant to N.J.S.A. 34:13A-8.2.

Finally, the Commission lacks jurisdiction over Woodhead's allegations that the City violated "Chapter 173, Laws of New Jersey, 1965: Relating to Payment of Wages" and the Federal Fair Labor Standards Act.

For all the reasons set forth above, I find that the Commission's complaint issuance standard has not been met and decline to issue a complaint on the allegations of this charge.[4/]

ORDER

The unfair practice charge is dismissed.

/s/ Jonathan Roth
Jonathan Roth
Director of Unfair Practices

DATED: November 14, 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 November 25, 2019.

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