

D.U.P. NO. 95-23

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

In the Matter of

NEW JERSEY TRANSIT BUS OPERATIONS

Respondent Employer,

-and-

AMALGAMATED TRANSIT UNION DIVISION 819, Docket Nos. CI-94-69;
CI-94-70

Respondent Employee Representative,

-and-

MAGGIE CHIMBUMU,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses a charge filed by a former employee of New Jersey Transit Bus Operations against the company and a companion charge against her employee representative.

The Director finds that the facts alleged do not support the employee's claim that her union breached its duty to represent her when it refused to arbitrate her termination.

The Director also dismisses the employee's charge alleging New Jersey Transit discharged her without just cause and without a full and fair hearing. These facts do not warrant the issuance of a Complaint.

specifically, subsections 5.4(b)(1) and (3) of the Act.^{1/} Chibumu simultaneously filed an unfair practice charge alleging that her employer, New Jersey Transit Bus Operations, violated subsections 5.4(a)(1), (3) and (5).^{2/} Chibumu charges that ATU breached its duty to represent her by failing to properly represent her in grievance hearings, by refusing to arbitrate her termination, and by failing to properly advise her of the appeal process of that decision. She charges that New Jersey Transit violated the ATU contract by discharging her without just cause and without a full and fair hearing.

Both Respondents argue the charge was filed outside the Commission's six-month statute of limitations and should be dismissed. N.J.S.A. 34:13A-5.4(c) precludes the Commission from

^{1/} These subsections 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.

^{2/} These subsections 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; and (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 that unit, or refusing to process grievances presented by the majority representative.

issuing a Complaint where an unfair practice charge has not been filed within six (6) months of the occurrence of any unfair practice, unless the aggrieved person was prevented from filing the charge. See North Warren Bd. of Ed., D.U.P. No. 78-7, 4 NJPER 55 (¶4026 1977). Charging Party argues that under Kaczmarek v. N.J. Turnpike, 77 N.J. 329 (1978), the charge should not be dismissed as untimely. On March 11, 1994, Chibumu filed an action in federal district court challenging her termination. Chibumu asserts that she was unaware New Jersey Transit Bus Operations is a public employer under the jurisdiction of our Act. When Charging Party learned the complaint was filed in the wrong forum, she withdrew it and filed her unfair practice charges here. Charging party argues that all parties had proper notice that Chibumu was asserting these claims when the complaint was originally filed in federal court. It appears that charging party's argument may be legitimate. See Jersey City Medical Center, P.E.R.C. No. 87-19, 12 NJPER 740 (¶17277 1986), fn. 3. In any event, I find that these unfair practice charges are not outside the Commission's statute of limitations.

* * *

Chibumu alleges that New Jersey Transit charged her with fighting on duty and initiated termination proceedings against her. A disciplinary hearing was held on September 15, 1993, and she was terminated effective September 17, 1993. She initiated a grievance and ATU represented her at her first step grievance hearing. At the union's request, a second hearing was conducted sometime before October 31, 1993. The ATU represented her at that hearing and apparently attempted to negotiate a settlement of the grievance.

Thereafter, ATU requested a third hearing pursuant to its contract grievance procedure. The ATU was unsuccessful in obtaining Chibumu's reinstatement. Chibumu contends that ATU breached its duty of fair representation at the second and third step hearings.

In November, 1993, the ATU executive board denied Chibumu's request to submit her termination grievance to arbitration. The ATU informed Chibumu that she had the right to appeal the executive board's decision. However, Chibumu alleges that she was not informed that a quorum was needed at a membership meeting in order to request review of the executive board's decision not to arbitrate.

Charge Against ATU

N.J.S.A. 34:13-5.3 provides in part:

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.

In OPEIU, Local 153, P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983), the Commission discussed the appropriate standards for reviewing a union's conduct in investigating, presenting and processing grievances:

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) (Vaca). The courts and this Commission have consistently embraced the

standards of Vaca in adjudicating such unfair representation claims. See, e.g., Saginario v. Attorney General, 87 N.J. 480 (1981); In re Board of Chosen Freeholders of Middlesex County, P.E.R.C. No. 81-62, 6 NJPER 555 (¶11282 1980), aff'd App. Div. Docket No. A-1455-80 (April 1, 1982), pet. for certif. den. (6/16/82); New Jersey Turnpike Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979); In re AFSCME Council No. 1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978). [10 NJPER 13]

The U.S. Supreme Court has also held that to establish a claim of a breach of the duty of fair representation, such claim "...carried with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." Amalgamated Assn. of Street, Electric, Railway and Motor Coach Employees of American v. Lockridge, 403 U.S. 274, 301, 77 LRRM 2501, 2512 (1971). Further, the National Labor Relations Board has held that where a majority representative exercises its discretion in good faith, proof of mere negligence, standing alone, does not suffice to prove a breach of the duty of fair representation. Service Employees International Union, Local No. 579, AFL-CIO, 229 NLRB 692, 95 LRRM 1156 (1977); Printing and Graphic Communication, Local No. 4, 249 NLRB No. 23, 104 LRRM 1050 (1980), reversed on other grounds 110 LRRM 2928 (1982).

Here, there are no allegations or facts demonstrating discrimination, bad faith or arbitrary conduct against Chibumu by ATU. It appears that it represented Chibumu through at least two steps in the grievance process as well as at the initial disciplinary hearing. While she alleges that the ATU "failed to

represent [her] at these proceedings," she raises no specific facts which would meet the standard set forth above.

Further, Chibumu did not have an absolute right to have her grievance taken to arbitration. While she asserts that the union's decision not to arbitrate her case violated the Act, she asserts no facts to support a finding that ATU acted arbitrarily, discriminatorily or in bad faith. Vaca. The ATU contends that its decision not to arbitrate her termination grievance was based upon its belief that the grievance could not be won. An employee representative fulfills its statutory obligation to represent employees when it evaluates grievances on their merits and makes a judgment on whether arbitrating the issue is in the interests of its unit members as a whole. Employee organizations are entitled to a wide range of reasonableness in determining how to best service all of their members. Essex-Union Joint Meeting and Automatic Sales, Servicemen and Allied Workers, Local 575, D.U.P. No. 91-26, 17 NJPER 242 (¶22108 1991); Jersey City Bd. of Ed., D.U.P. No. 93-7, 18 NJPER 455 (¶23206 1992).

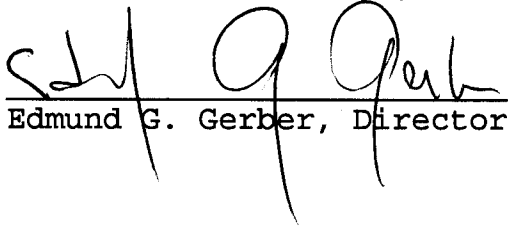
With regard to Chibumu's allegation that the union failed to explain the appeal process to her with regard to its decision not to arbitrate her termination, I do not find that that is a matter involving the union's duty of fair representation. It is enough that the Union's executive board made a decision in good faith and based upon the merits of the claim, that arbitration would not be successful, and it advised her that she could appeal to the union membership. It owed Chibumu no further obligation.

Charge Against New Jersey Transit

There are no facts alleged which would constitute a violation of the Act by New Jersey Transit. Chibumu does not allege her termination was in retaliation for any involvement in activities protected by our Act. To show a violation of 5.4(a)(3), the charging party must show that the employee's protected activity was a substantial motivating factor in the employer's personnel decision. Bridgewater Tp., 95 N.J. 235 (1984). Chibumu pleads no facts in support of such a proposed violation. Further, no facts are alleged which would support a conclusion that the employer refused to process a grievance in violation of 5.4(a)(5). To the extent that Chibumu claims New Jersey Transit breached the contract with ATU by discharging her without just cause, that is not a matter which can be litigated in the unfair practice forum absent a viable duty of fair representation claim against the employee representative.

Based upon the above, I find that the Commission's complaint issuance standard has not been met and I decline to issue a complaint on the allegations of these charges.^{3/} The charges are dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Edmund G. Gerber, Director

DATED: January 9, 1995
Trenton, New Jersey

^{3/} N.J.A.C. 19:14-2.3.