

D.U.P. NO. 2014-1

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

In the Matter of

New Jersey Education Association
UniServ Office 7,

Respondent,

-and-
George DaPonte,

Docket No. CI-2012-045

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge brought by George DaPonte, an individual. DaPonte alleged that the Barnegat Education Association violated subsections 5.4a (1) and (3) of the Act when it failed to provide counsel for three legal actions against his former employer, Barnegat Board of Education, and when it failed to answer certain questions DaPonte emailed to the Barnegat Education Association following the Board's termination of DaPonte's employment in June 2010.

The Director dismissed the charge. The Director found that the charge was not timely filed. The Director also concluded that the Barnegat Education Association's failure to provide legal counsel to DaPonte did not breach its duty of fair representation because such a decision is an internal organizational matter beyond the Act's jurisdiction. The Director further determined that DaPonte's allegation that the Barnegat Education Association failed to answer certain emailed questions did not meet the procedural requirements of the Act because the charge did not identify any dates on which he submitted his questions. Finally, the Director concluded the charge warranted dismissal because DaPonte did not amend the charge to identify the subsections of the Act pertaining to unfair practices committed by employee organizations, despite written notification of this defect.



STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

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August 15, 2013

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George DaPonte
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Toms River, New Jersey 08753

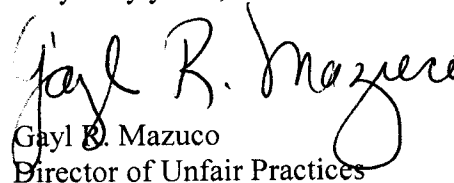
Re: NJEA UniServ Office 7
-and-
George DaPonte
Docket No. CI-2012-045

Dear Ms. O'Driscoll and Mr. DaPonte:

Enclosed is an errata to my decision, **DUP 2014-8**, which was issued **August 8, 2013** in the above-captioned matter. The correct decision number is **DUP-2014-1**.

Please correct your records accordingly.

Very truly yours,


Gayl B. Mazuco
Director of Unfair Practices

GRM/pac
Enclosure

D.U.P. NO. 2014-1

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NEW JERSEY EDUCATION ASSOCIATION
UNISERV OFFICE 7,

Respondent,

-and-

Docket No. CI-2012-045

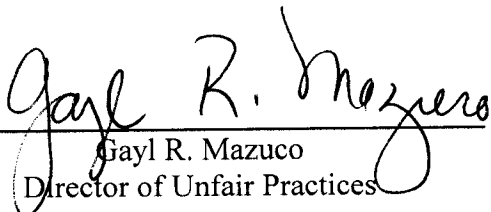
GEORGE DAPONTE,

Charging Party.

ERRATA

The Director's decision in the above matter, issued **August 8, 2013**, is hereby amended as follows:

<u>Page</u>	<u>Line</u>	<u>Replace</u>	<u>Insert</u>
All		DUP 2014-8	DUP 2014-1



Gayl R. Mazuco
Director of Unfair Practices

DATED: August 15, 2013
Trenton, New Jersey

D.U.P. NO. 2014-1

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

In the Matter of

New Jersey Education Association
UniServ Office 7,

Respondent,

-and-
George DaPonte,

Docket No. CI-2012-045

Charging Party.

Appearances:

For the Respondent,
Zazzali, Fagella, Nowak, Kleinbaum & Friedman,
attorneys
(Aileen O'Driscoll, of counsel)

For the Charging Party,
(George DaPonte, pro se)

REFUSAL TO ISSUE COMPLAINT

On May 8, 2012, George J. DaPonte (Charging Party) filed an unfair practice charge against two individuals with the Barnegat Education Association (Respondent or BEA). The charge specifically identifies Joan Szlaga, the UniServe representative for the New Jersey Education Association (NJEA) Region 7 office, as the first respondent and Lou Balka, the former President of the BEA, as the second respondent.^{1/}

^{1/} The New Jersey Employer-Employee Relations Act provides the Commission with jurisdiction over the conduct of public employers, public employee representatives, and their agents. N.J.S.A. 34:13A-1 et seq. The named individuals
(continued...)

The charge alleges that Association representative Szlaga violated 5.4a(1) and (3)^{2/} of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., by failing to provide DaPonte with counsel for three separate legal actions against his former employer, Barnegat Board of Education (Board), after he filed an application for representation with the New Jersey Education Association Legal Services Program on March 22, 2012. The charge also alleges that Balka violated 5.4a(1) and (3) of the Act by failing to answer certain questions that DaPonte emailed to the Association, following the Board's termination of DaPonte's employment in June 2010. For relief, DaPonte seeks to have the Commission order Respondent to provide legal representation and answers to the questions he emailed.

The Commission has authority to issue a complaint where it appears that a charging party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4(c); N.J.A.C. 19:14-2.1. The Commission has

1/ (...continued)
will be considered as agents of the organization that they represent, rather than as separate respondents.

2/ These provisions prohibit public employers, their representatives or agents from "(1) [i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act" and "(3) [d]iscriminating in regard to hire or tenure of employment or any term and condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

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. By letter dated June 19, 2013, I advised the parties of my tentative findings and conclusions, and invited responses. Neither party filed a reply. A review of the submissions reveals the following facts.

The BEA is the majority representative of a broad-based negotiations unit comprised of professional and non-professional employees of the Board, including teachers, paraprofessionals, secretaries and custodians. The Board is a public employer within the meaning of the Act. The applicable collective negotiations agreement extends from July 1, 2009 through June 30, 2012.

DaPonte was a non-tenured employee of the Board, who taught marketing and entrepreneurship at Barnegat High School. He was terminated from this position on or around June 3, 2010.

On an undisclosed date after his termination, DaPonte emailed questions to BEA President Balka, seeking the names of the security personnel who escorted him involuntarily from Barnegat High School's premises at the time of his termination. DaPonte also asked Balka to confirm or deny his participation in escorting DaPonte off the premises. DaPonte alleges that Balka never responded to his questions.

On January 6, 2012, DaPonte received notice from the Board of Trustees of the Teachers' Pension and Annuity Fund (TPAF) that it had granted him ordinary disability retirement benefits, but denied his application for an accidental disability retirement. DaPonte had retained his own lawyer for that proceeding.

DaPonte alleges that on March 22, 2012, he completed and submitted to Uniserve representative Szalga, a document entitled "NJEA/NEA Legal Services Program, Application & Agreement Member (Form A)" via post mail and email. In the form, DaPonte sought legal representation for the following employment-related actions: (1) a workers' compensation claim; (2) an appeal challenging the denial of his accidental disability retirement claim by TPAF; and (3) the re-filing of his workplace retaliation claim against the Board in the Superior Court of New Jersey, Law Division.

On May 24, 2012, we issued a letter to the Charging Party, advising him of certain defects that prevented the processing of his charge. The letter explained that the charge appeared to be untimely under N.J.S.A. 34:13A-5.4(c), and that it alleged unfair practices committed by an employee organization, but cited subsections of the Act pertaining only to unfair practices committed by a public employer. DaPonte was requested to file an amended charge correcting these defects or to provide a written explanation addressing these defects.

On May 31, 2012, DaPonte emailed us, advising that "nothing was done" after his termination, and thus he was prevented from filing a timely charge. DaPonte added that TPAF only notified him of its disability determination by letter dated January 6, 2012. DaPonte did not amend the charge to identify the subsections of the Act that apply to conduct by employee organizations.

ANALYSIS

Generally, unfair practice charges must be filed within six months of the alleged unfair practice. N.J.S.A. 34:13A-5.4(c). The sole exception to the Act's statute of limitations arises when the charging party was prevented from filing a timely charge. Id. If a charging party meets this exception, the six month period will be computed from the date that he or she was no longer prevented from filing. Id.

In Kaczmarek v. N.J. Turnpike Authority, 77 N.J. 329 (1978), our Supreme Court explained that the purpose of the statute of limitations was to encourage litigants to pursue their claims diligently while allowing for consideration of individual cases' circumstances. Id. at 337-38. The word "prevent" ordinarily connotes factors beyond a complainant's control, disabling him or her from filing a timely charge, and it includes all relevant considerations bearing upon the fairness of imposing the statute of limitations. Id. at 340. 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 (Department of Human Services), P.E.R.C. No. 2003-56, 29 NJPER 93 (¶26 2003).

DaPonte's unfair practice charge concerning his request for counsel in three legal disputes is untimely. DaPonte's legal claims all concern his status as an employee on the date he was terminated -- June 3, 2010. If DaPonte was not otherwise prevented from filing a charge, the six month statute of limitations in this matter would have lapsed on December 3, 2010.

No facts suggest that on or before December 3, 2010, DaPonte had communicated to the BEA (or its representatives) an interest in filing or processing workers' compensation or workplace retaliation claims or that the BEA had undertaken the responsibility to process such claims on DaPonte's behalf. Also, DaPonte's receipt of the disability notice did not prevent the timely filing of a charge because no facts indicate that the BEA was involved in the processing of that claim.

Additionally, DaPonte's failure or refusal to amend the charge to set forth the subsections of the Act that pertain to unfair practices committed by majority representatives, warrants

dismissal of the charge. DaPonte alleged that the BEA violated sections 5.4(a)1 and 5.4(a)3 when it failed to provide him with legal representation. However, section 5.4(a) sets forth prohibitions on certain conduct by public employers, and section 5.4(b) sets forth prohibitions on certain conduct by majority representatives. Although DaPonte was advised of this defect in our May 24 letter, he never amended his charge to identify subsections that pertain to majority representatives. Accordingly, his failure to amend warrants dismissal of the charge.

Even assuming that the timeliness and procedural defects were cured, I dismiss the charge because Respondent did not breach its duty of fair representation by failing to provide DaPonte with legal counsel. Although DaPonte did not specifically allege in his charge that the union breached its duty of fair representation by failing to provide counsel for his three legal disputes, the substance of his charge asserts a duty of fair representation claim against the BEA. Accordingly, his claims will be analyzed under the duty of fair representation framework.

In Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 64 LRRM 2369 (1967), the United States Supreme Court ruled that unions owe a duty of fair representation, which is breached ". . . only when a union's conduct toward a member of the collective bargaining unit

is arbitrary, discriminatory or in bad faith." New Jersey courts have consistently adopted and applied the Vaca standard. See e.g., Lullo v. International Ass'n of Fire Fighters, 55 N.J. 409 (1970); Belen v. Woodbridge Tp. Bd. of Ed., 142 N.J. Super. 486 (App. Div. 1976), certif. den. 72 N.J. 458 (1976).

A majority representative's decision to provide legal counsel to a unit member has long been held to be an internal organizational matter beyond our Act's jurisdiction, and does not amount to an unfair practice, absent facts demonstrating that the decision was arbitrary, discriminatory or in bad faith. See Bergen Community College Faculty Ass'n, P.E.R.C. No. 84-117, 10 NJPER 262 (¶15127 1984) (Commission finding no unfair practice when Association withdrew legal assistance from an employee pursuing a federal court case); P.B.A. Local 105 (Giordano), D.U.P. No. 90-1, 15 NJPER 457 (¶20186 1989) (charge dismissed where Local refused to provide legal counsel or reimburse legal fees for employee's departmental hearing); Newark Teachers Union, D.U.P. No. 95-32, 21 NJPER 194 (¶26128 1995) (charge dismissed where union did not provide legal representation to contest involuntary transfer).

No facts suggest that the BEA breached its duty of fair representation. In the charge, DaPonte claims that he filed an application with the Respondent's legal services program on March 22, 2012 seeking legal representation on his workers'

compensation, accidental disability and workplace retaliation claim. DaPonte also claims that by letter dated March 16, 2012, Respondent "further restrained and discouraged any action on all issues" when an NJEA attorney allegedly informed DaPonte that NJEA "would not/could not provide representation" for the workers' compensation and workplace retaliation claims and declined to provide representation for the accidental disability appeal because Respondent "simply assum[ed] my appeal would fail."

DaPonte's dispute with Respondent over its failure to provide legal representation is an internal union matter and beyond the purview of our Act, absent a showing that Respondent's decision was arbitrary, discriminatory or in bad faith. DaPonte alleges no such facts. Moreover, the March 16 letter from the NJEA attorney referenced in his charge indicates that Respondent considered, investigated and evaluated the merits of DaPonte's legal claims, rather than serving as evidence of arbitrary or bad faith conduct. Although DaPonte may disagree with the conclusion reached by the NJEA attorney after reviewing his legal claims, he provides no facts indicating that the BEA's review or decision not to provide legal counsel was arbitrary, discriminatory or in bad faith. Accordingly, I decline to issue a complaint on the allegations regarding this aspect of the charge.

Finally, DaPonte's unfair practice charge, as it concerns his emails to Balka, does not meet the complaint issuance standard. DaPonte's charge does not identify any dates on which he emailed Balka. This aspect of the charge does not satisfy the procedural requirements of N.J.A.C. 19:14-1.3(a)^{3/}. His charge also alleges that the union's failure to provide information violated 5.4a(1) and (3) of the Act, which pertain only to unfair practices committed by public employers.

On May 24, 2012, DaPonte was notified of both defects. Despite that notification, DaPonte did not identify the dates on which he emailed Balka, nor did he amend his charge to identify the subsections of the Act pertaining to unfair practices committed by an employee organization. His failure to amend provides another reason to dismiss the unfair practice charge.

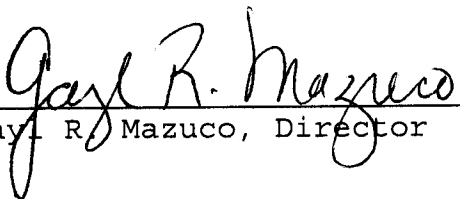
For all these reasons, I find that the complaint issuance standard has not been met.

^{3/} This provision provides, inter alia, that the charging party is required to set forth in an unfair practice charge a short factual statement that "specif[ies] the date and place the alleged acts occurred"

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Gayl R. Mazuco, Director

DATED: August 8, 2013
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 August 19, 2013.