

D.U.P. NO. 90-13

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

In the Matter of

ATU LOCAL 819 and
N.J. TRANSIT BUS OPERATIONS,

Respondents,

-and-

Docket Nos. CI-90-9
CI-90-10

BRENDA JEAN-PIERRE,

Charging Party.

SYNOPSIS

The Director of Unfair Practices refuses to issue Complaints against New Jersey Transit and ATU, Local 819. Most of the allegations in the charges occurred more than 6 months before the charge was filed. The Director found that ATU, Local 819 did not violate subsection 5.4(b)(3) when its Executive Board refused to take her promotion grievance to arbitration. The Director dismissed Jean-Pierre's allegations that New Jersey Transit failed to promote her in retaliation for protesting racial remarks -- not in retaliation for participation in an action before the Commission.

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Appearances:

For the Respondent ATU Local 819
Richard Outlaw, Vice-President

For the Respondent NJ Transit
Robert J. DelTufo, Attorney General;
(David S. Griffiths, Deputy Attorney General)

For the Charging Party
Brenda Jean-Pierre, pro se

REFUSAL TO ISSUE COMPLAINT

On July 19, August 7, and August 30, 1989 Brenda Jean-Pierre ("Charging Party") filed unfair practice charges and amended charges against New Jersey Transit and ATU, Local No. 819 ("Local 819"). Jean-Pierre alleges that she was harassed and discriminated against because she complained when Pat Russo, a co-worker and union representative, made racial remarks against her. She alleges that New Jersey Transit violated subsection

5.4(a)(4)^{1/} and ATU violated subsection 5.4(b)(3)^{2/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act").

The Commission has delegated its authority to issue complaints to me and established a standard upon which an unfair practice complaint may be issued. The standard provides that a complaint shall issue if it appears that the charging party's allegations, if true, may constitute unfair practices within the meaning of the Act.^{3/} If this standard has not been met, I may decline to issue a complaint.^{4/}

For the reasons set forth below, I find that the Commission's complaint issuance standards have not been met by these charges.

Brenda Jean-Pierre is a customer service representative at New Jersey Transit. She is a member of a bargaining unit represented by Local 819. Before August 4, 1989, Jean-Pierre had a record of good performance. She had never been disciplined.

1/ This subsection prohibits public employers, their representatives or agents from: "(4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act."

2/ This subsection prohibits employee organizations, their representatives or agents from: "(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."

3/ N.J.A.C. 19:14-2.1.

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

Jean-Pierre alleges that on August 4, 1988, Pat Russo, a co-worker and union representative, publicly made racial remarks to Jean-Pierre. Jean-Pierre filed a grievance concerning Russo's remarks with Local 819. The grievance requested that Russo be removed from her position as shop steward. Russo was subsequently removed as shop steward and has been on leave since the incident. The charge against Local 819 alleges that there has been "underlying tension" between Jean-Pierre and Local 819 since that incident.

In September 1988, Jean-Pierre was skipped over during a "bump pick" for assignment selections. Picks are typically posted for two weeks and are awarded by seniority. Jean-Pierre alleges that in this instance, the pick was posted for only five days.

In October 1988, Jean-Pierre was working the 3:30 pm to midnight shift. One night, her supervisor left at 11 p.m. After her supervisor left, she unplugged the phones and wrote a letter of complaint about the earlier problem with the picks. Jean-Pierre was given a reprimand for unprofessional job performance and her pay was docked. Jean-Pierre alleges another employee unplugged the phones the following week and was docked but apparently did not receive a letter.

Jean-Pierre also received a written warning for excessive lateness. She alleges that her time records were altered seven times. Five of the latenesses were considered false by Local 819 and subsequently were removed from her record. Two are still under investigation.

On or around November 10, 1988, Jean-Pierre's seat assignment was changed to a position where the sun was in her eyes. She complained to Operations Supervisor Pollard. Jean-Pierre alleges that despite the availability of many other seats, she was not allowed to change her seat. Allegedly, Pollard threw a chair at her, threatened to fire her and was verbally abusive to Jean-Pierre. Jean-Pierre moved to another seat. Pollard then clocked her out and told her not to come back without a union representative. She called Local 819, but her calls were not returned. When she reported to work the next day, Pollard told her to go home until Monday. Apparently, a Local 819 representative called New Jersey Transit and spoke with management, but did not speak with Jean-Pierre. Jean-Pierre repeatedly tried to reach the union but her calls were not returned. In spite of Pollard's direction, Jean-Pierre reported for work each day for the rest of the week but was sent home each day. When Local 819 contacted her, a union representative also told her not to report to work until accompanied by a union representative. On the following Monday, November 14, 1988, Jean-Pierre returned to work accompanied by a union representative. After Jean-Pierre returned to work, she was represented by Local 819 at a grievance hearing. Subsequently, she received a ten day suspension for this incident.

Jean-Pierre asked permission to report to work one hour late on Thanksgiving Day, 1988 so she could attend church services. The request was denied and she was threatened with discharge if she

did not report to work on time. She left work sick the night before Thanksgiving and was out sick on Thanksgiving. She was then given a written reprimand for failing to report to work on Thanksgiving.

On January 3, 1989, Jean-Pierre was terminated for failure to report to work on Thanksgiving, disrespect to her supervisor, abandonment of her position, insubordination, excessive lateness and absenteeism.

After contacting the National Association for the Advancement of Colored People (NAACP) and proceeding through step three of the grievance procedure, on February 8, 1989, Jean-Pierre was reinstated with a suspension.

While Jean-Pierre was separated from N.J. Transit, two promotions were posted and filled. After her reinstatement, on February 20, 1989, Jean-Pierre filed grievances with New Jersey Transit and Local 819 concerning the two promotions. She was told that she was not employed by New Jersey Transit when the promotions were awarded and therefore, she was not eligible to bid on them. Local 819 processed this promotions grievance through the third step and decided not to pursue the grievance to arbitration. Jean-Pierre asked Local 819's Executive Board to take her case to arbitration. The request was refused.

Jean-Pierre alleges that Local 819's representative presented her case poorly, did not have her files for the in-house hearing officer at her discharge hearing and generally abandoned her. She alleges that New Jersey Transit discriminated against her because she had filed grievances and because she opposed racism.

New Jersey Transit and Local 819 both assert that the charge is untimely because it concerns events occurring more than six months before the charge was filed. New Jersey Transit also asserts that none of the allegations against it constitute matters that might be violations of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

N.J.S.A. 34:13A-5.4(c) states:

...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 months period shall be computed from the day he was no longer so prevented.

Charging parties must allege that the unfair practice(s) charged occurred within the six-month limitation period in the Act. In the absence of timely allegations, I must decline to issue a complaint. N.J.S.A. 34:13A-5.4(c). No. Warren Bd. of Ed., D.U.P. No. 78-7, 4 NJPER 55 (¶4026 1977); N.J. Turnpike Employees Union, Local 914, IFPTE, AFL-CIO, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979). The charge against N.J. Transit was filed on July 19, 1989.

Accordingly, any allegedly illegal event which occurred before January 18, 1989, cannot be the subject of a complaint. Only two of Jean-Pierre's allegations -- (1) New Jersey Transit denied her a promotion while terminated and (2) Local 819 failed to take those grievances to arbitration -- concern events which occurred after January 19, 1989. In the absence of allegations that Jean-Pierre was prevented from filing timely charges concerning events occurring

before January 19, I will not issue a complaint on those portions of the charges against Local 819 and New Jersey Transit which precede that date. See Kaczmarek v. N.J. Turnpike Authority, 77 N.J. 329 (1978).

I also refuse to issue a complaint on Jean-Pierre's allegation that Local 819 violated its duty of fair representation when Local 819's Executive Board refused to take her promotion grievance to arbitration.

Under section 5.3 of the Act, a majority representative is responsible for representing the interests of all unit members without discrimination. Subsection 5.4(b)(1) makes it illegal for a majority representative to violate that obligation. Union County College Chapter of AAUP (Donahue), P.E.R.C. No. 85-121, 11 NJPER 374 (¶16135 1985). In Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967), the Supreme Court articulated the standard for determining whether a labor organization violated its duty of fair representation. The Court 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, capricious or in bad faith.
[Id. at 190, 64 LRRM 2376]

New Jersey has adopted the Vaca standard in deciding duty of fair representation cases. See Saginario v. Attorney General, 87 N.J. 480 (1981).

Prior to the filing of this charge, the union took Jean-Pierre's grievance through Step 3 of the grievance procedure,

presumably lost the case at step 3 and then made a preliminary decision to not take the grievance to arbitration. Jean-Pierre alleges no facts which indicate that this decision was arbitrary, capricious, or in bad faith. Vaca. Accordingly, based upon these allegations, it does not appear that Local 819 has violated the Act.

Moreover, on March 24, 1990, Local 819 filed for arbitration regarding Jean-Pierre's claim that she was entitled to the promotion at issue. Evidently, Local 819 reconsidered its earlier refusal to take these grievances to arbitration.

The Commission has adopted a policy of deferring the resolution of unfair practice charges to the parties' contractual grievance/binding arbitration mechanism where it is reasonably probable that the dispute underlying the alleged unfair practice will be resolved in the parties' contractual forum. See Brookdale Community College, P.E.R.C. 83-131, 9 NJPER 266 (¶14122 1983); N.J. Department of Human Services, P.E.R.C. 84-148, 10 NJPER 419 (¶15191 1984).^{5/}

Accordingly, I hereby defer the promotion-denial portion of Jean-Pierre's charge to the grievance arbitration procedure.

I further note that in her charge against Local 819, Jean-Pierre states that Local 819 violated subsection 5.4(b)(3). A majority representative violates subsection (b)(3) when it refuses to negotiate in good faith with a public employer. The statement of the charge does not allege any facts which constitute a violation of


^{5/} Since these matters are deferred to arbitration, the Commission shall retain jurisdiction of the charges in accordance with East Windsor Reg. Bd. of Ed., E.D. No. 76-6, 1 NJPER 59 (1976).

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subsection (b)(3). I therefore will not issue a complaint on the allegation that Local 819 violated subsection (b)(3).

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES


Edmund G. Gerber, Director

DATED: May 14, 1990
Trenton, New Jersey