

D.U.P. NO. 99-15

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

In the Matter of

TOWNSHIP OF EDISON and
SOA/PBA LOCAL 75,

Respondents,

-and-

Docket No. CI-99-23

JOSEPH CIES,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge brought by Lt. Joseph Cies, an individual. Cies alleged that SOA/PBA Local 75 and the Township interfered with his rights at a grievance hearing by refusing to agree to a stenographic transcript of the proceeding in contravention of a previous settlement agreement authorizing the arbitration and N.J. Board of Mediation rules. Cies also claims that the SOA violated the Act when it cross examined witnesses even though Cies was represented by his own attorney. Finally, Cies alleged that the Township and SOA discriminated against him because of his membership in the FOP and that the result of their actions was to deprive him of due process in the arbitration proceeding.

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Appearances:

For the Respondent Township
Louis N. Rainone, attorney

For the Respondent SOA/PBA
S.M. Bosco Associates
(Dr. Simon M. Bosco, Consultant)

For the Charging Party,
A.J. Fusco, Jr., P.A.
(Ronald J. Ricci, of counsel)

REFUSAL TO ISSUE COMPLAINT

On October 20, 1998, Lt. Joseph Cies filed an unfair practice charge against the Township of Edison, his employer, and SOA/PBA Local 75, his majority representative, alleging that they violated provisions 5.4a(1), (2), (3), (4), (5) and (7)^{1/} and

^{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. (2) Dominating or interfering with the formation, existence or administration

Footnote Continued on Next Page

5.4b(1), (2), (3) and (5)^{2/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., respectively. Cies alleges that during a grievance arbitration the Township and SOA refused to agree to his demand that a stenographic record be made of the proceeding. Cies asserts that their refusal violated N.J. Board of Mediation rules and was in contravention of a previous settlement agreement authorizing the arbitration. Cies also claimed that the SOA cross-examined witnesses, even though Cies was represented by his own attorney. Cies asserts that the Township and SOA discriminated against him because of his membership in the FOP and

1/ Footnote Continued From Previous Page

of any employee organization. (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. (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. (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. (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. (2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances. (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. (5) Violating any of the rules and regulations established by the commission."

that the result of their actions was to deprive him of due process in the arbitration proceeding.

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. Based upon the following, I find that the Complaint issuance standard has not been met.^{3/}

Joseph Cies is a lieutenant employed by the Township of Edison police department. The SOA is his majority representative although Cies is not a member. Cies is a member of FOP Lodge 101.

The SOA represents sergeants, lieutenants and captains employed by the Township of Edison police department. The Township and SOA are parties to a collective negotiations agreement effective January 1 1996 through December 31, 2000.

Article 11 entitled Discrimination & Coercion states:

There shall be no discrimination, interference or coercion by the Employer or any of its agents against the Employees represented by the S.O.A. because of membership or activity in the S.O.A.. The S.O.A. shall not intimidate or coerce Employees into membership. Neither the Employer

^{3/} By letter dated April 15, 1999, I summarized the facts as they appeared and provided the parties with an opportunity to submit additional arguments or amend their pleadings and responses. All such submissions were due by April 26, 1999. No additional submissions were received.

nor the S.O.A. shall discriminate against any Employee because of race, creed, color or national origin or political affiliation.

On May 18, 1998, Cies filed an unfair practice charge (Docket No. CI-98-87) alleging discrimination by the Township in failing to promote him because of his membership in the FOP and because of his age. The parties executed a settlement agreement in that matter and a related Scope of Negotiations Petition (Docket No. SN-98-77).

The settlement agreement provides in part that the parties agree to arbitrate the following issue:

Whether or not the Township violates Article XI of the collective negotiations agreement regarding discrimination and coercion as a result of Lt. Cies' membership in the FOP and as a result of his age when the Township failed to promote Lt. Cies to the position of captain. If so, what shall be the remedy.

The SOA agreed to pursue the grievance arbitration and to permit Cies to be represented by his own attorney. The fees for Cies' attorney were to be paid by Cies although the cost of the arbitration was to be shared by the Township and SOA.

Cies specifically agreed as part of the settlement that the SOA is a party of record in the arbitration and will be present at any pre-arbitration conferences, telephone calls, settlement meetings and at "any and all formal arbitration hearings in order to ensure that the integrity of the contract and bargaining unit is protected." (See Settlement Agreement, paragraphs 1 and 2.) The Township agreed in the settlement to waive all procedural objections to the processing of Cies' grievance/arbitration.

Pursuant to the settlement, the parties proceeded to arbitration. On September 10, 1998, Arbitrator John P. Miraglia was appointed to hear the arbitration.

On September 30, 1998, the first scheduled day of hearing, Cies' attorney, Ronald Ricci, requested that a court stenographer be present to provide a stenographic transcript of the arbitration. The SOA objected on the grounds that they were never notified in advance of this request. The Township also objected. The arbitrator sustained the objections. The hearing proceeded on this date with Cies calling and examining witnesses and the Township and SOA conducting cross-examination.

Prior to the second hearing date on October 19, 1998, Cies requested that the arbitrator recuse himself because of his ruling on the court stenographer. The arbitrator denied the motion.

Subsequently, Cies requested an adjournment of the second hearing date in order to file an unfair practice charge relating to the denial of the request for a stenographic transcript of the arbitration hearing. The SOA and Township objected to the adjournment. The arbitrator denied the request and proceeded on October 19, 1998 with the hearing.^{4/}

On this second hearing date, Ricci refused to go forward and the arbitrator deemed this refusal as Cies' resting his

^{4/} It appears that no unfair practice charge was actually pending at the time of the adjournment request nor was a charge filed until October 20, 1998, the date of the present charge.

case.^{5/} The Township proceeded with its case. On November 3, 1998, the arbitrator issued his decision holding that the Township did not violate Article XI of the collective agreement when it did not promote Cies.

Cies asserts that the arbitration was so unfair and irregular and the result so repugnant to the Act that it was as if the grievance issue was not litigated. Specifically, he argues that the objection by the SOA and Township to his request for a stenographic transcript and the questioning of witnesses by the SOA at the hearing violated his due process rights. Cies also contends that the Township's and SOA's opposition to his motion for a stenographic transcript and the SOA's participation at the hearing in questioning witnesses represented discrimination against him for his FOP membership.^{6/}

The SOA denies that it failed in its duty to fairly represent Cies. It argues that Cies voluntarily entered into a settlement agreement wherein he opted to be represented by his own counsel at the arbitration and thereby waived representation by the

^{5/} Charging Party admits that he was never prevented from calling or cross-examining witnesses. He asserts that he voluntarily refused to go forward when the arbitrator denied his motion to recuse.

^{6/} Cies relies on the terms of the settlement agreement, specifically paragraphs 1 and 2, in support of his position that the SOA was to be present at the arbitration only as an observer with no rights to call or cross-examine witnesses. However, as noted above, paragraphs 1 and 2 provide for the SOA to be a party of record with all the attendant rights of a participating party.

SOA. Further, at no time prior to the arbitration did Cies or his attorney seek advice from the SOA.

The SOA contends that until the first day of the arbitration it had no knowledge of Cies' request that a stenographic record be made, that historically stenographic records were not made during arbitrations and that had it agreed to such a request it would establish a precedent detrimental to its membership which it did not wish to follow for future arbitrations, namely establishing a de novo proceeding in any future attempt to enforce or vacate an award. It argues that this was not the intention of the parties when they agreed to final and binding arbitration in the collective negotiations agreement as the terminal step of the grievance procedure.

Finally, the SOA responds that it has a duty to represent all of its members. The settlement agreement did not act as a waiver of its duty to fairly represent its membership and/or bar its participation in the arbitration process. It asserts that the arbitration impacted not only on the failure to promote Cies but on the promotion of other unit members in his stead. In addition, the SOA argues that the doctrine of res judicata precludes Cies from relitigating the issue of discrimination relating to the decision not to promote Cies based on union affiliation or age.

The Township denies that it discriminated against Cies. It asserts that its objection to the request for a stenographic record is within its rights, namely it was not a violation of its agreement

in the settlement to waive all procedural objections to the processing of the arbitration, and that the rules of the State Board of Mediation do not apply in this instance since the parties' contract provides for a selection of arbitrators from the PERC panel. It also argues that Cies is attempting to relitigate the issues raised in the first charge and at the grievance arbitration. Finally, it contends that Cies chose not to proceed on the second day of the arbitration hearing and is now precluded from claiming that he was denied due process.

ANALYSIS

Cies alleges that when the SOA objected to the stenographic transcript and examined witnesses at the grievance arbitration, it violated its duty of fair representation. However, I find that the allegations do not meet the complaint issuance standards.

A majority representative must represent the interests of all unit members without discrimination. N.J.S.A. 34:13A-5.3. A breach of the duty of fair representation occurs only when a representative's conduct toward a unit member is "arbitrary, discriminatory, or in bad faith." OPEIU, Local 153, P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983); Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976), citing Vaca v. Sipes, 386 U.S. 171 (1967).

A union should attempt to exercise reasonable care and diligence in investigating, processing and presenting grievances; it

should exercise good faith in determining the merits of the grievance. Mackaronis and Middlesex Cty. and NJCSA, P.E.R.C. No. 81-62, 6 NJPER 555 (¶11282 1980), aff'd NJPER Supp.2d 113 (¶94 App. Div. 1982), certif. den. 91 N.J. 242 (1982); New Jersey Turnpike Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979) ("Local 194"); AFSCME Council No. 1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978).

Cies alleges that the SOA treated him discriminatorily when it objected to the request of his attorney for a stenographic transcript. However, the SOA asserts, and Cies does not deny, that it does not request stenographic transcripts of any of its arbitration hearings and to do so would set a precedent which it does not wish to establish. It has treated Cies no differently than it has treated any other member regarding grievance/arbitration presentation. Therefore, I find that the SOA has not discriminated against him.

Cies also asserts that the SOA violated its duty of fair representation when it examined witnesses during the arbitration, and that it did so in contravention of the parties' settlement agreement. The SOA disagrees and counters that its duty of fair representation extends to all its members and that it never agreed to waive that duty.

A review of the plain and unambiguous language of the settlement agreement demonstrates that the SOA remained a party to the arbitration proceedings. Accordingly, unless clearly and

unequivocally waived, a "party" retains the right to participate fully in the arbitration including the examination of witnesses. Our cases and statute support its duty to represent all of its members without discrimination. OPEIU, and N.J.S.A. 34:13A-5.3. Had the SOA not questioned witnesses or refused to participate in the arbitration, it would expose itself to a charge from the promoted superior officers that it had failed in its duty to fairly represent them. Accordingly, I refuse to issue a complaint on the 5.4b(1) allegation against the SOA.

Insofar as a violations of 5.4b(2) and (3) are alleged, these provisions prohibit a majority representative from interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances and from refusing to negotiate in good faith with a public employer. These rights of selecting a representative and good faith negotiations flow to the public employer rather than to individual unit members. The Commission has held that individual employees do not have standing to assert a 5.4b(3) violation. Hamilton Tp. Bd. of Ed., P.E.R.C. No. 79-20, 4 NJPER 476 (¶4215 1978); Trenton Bd. of Ed., D.U.P. No. 81-26, 7 NJPER 406 (¶12179 1981); Plainfield Bd. of Ed., D.U.P. No. 93-13, 18 NJPER 507 (¶23235 1992). Under the circumstances here, Cies has no standing to allege violations of these provisions of the Act. Accordingly, I refuse to issue a complaint on the 5.4b(2) and (3) allegations against the SOA.

I next consider whether the SOA violated 5.4b(5). Charging party has submitted nothing to establish that the SOA has violated a commission rule or regulation.

Finally, I consider whether the employer violated 5.4a(1), (2), (3), (4), (5) and (7) of the Act. Under all the circumstances of this case, I find no violations.

A violation of a(5) occurs when an employer fails to negotiate an alteration of a mandatory subject of negotiations with the majority representative or knowingly refuses to comply with the terms of the collective negotiations agreement or refuses to process grievances presented by the majority representative. However, an individual employee normally does not have standing to assert an a(5) violation, as the employer's duty to negotiate in good faith runs only to the majority representative. N.J. Turnpike Authority, P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980); Camden Cty. Highway Dept., D.U.P. No. 84-32, 10 NJPER 399 (¶15185 1984).

An individual employee may file an unfair practice charge and independently pursue a claim of an a(5) violation only where that individual has also asserted a viable claim of a breach of the duty of fair representation against the majority representative. Jersey City State College, D.U.P. No. 97-18, 23 NJPER 1 (¶28001 1996); N.J. Turnpike Authority, D.U.P. No. 80-10, 5 NJPER 518 (¶10268 1979). I have already found that Cies has not asserted a viable claim of a breach of the duty of fair representation against the SOA. Therefore, he has no standing to assert a 5.4a(5)

violation. N.J. Turnpike Authority, D.U.P.No. 80-10; Jersey City State College.

I next consider whether the Township violated 5.4a(3). In re Bridgewater Tp., 95 N.J. 235 (1984), establishes the standards for determining whether the Township unlawfully discriminated against the charging party in retaliation for his protected activity. Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

It is undisputed that the charging party engaged in protected activity when he processed his grievance and that the employer was aware of that activity. However, Cies fails to demonstrate hostility to the protected activity. The objection to an arbitrator's ruling on a motion proffered during the arbitration does not, in and of itself, represent the kind of hostility addressed in Bridgewater. Therefore, I dismiss the alleged a(3) and any derivative a(1) violations.

As to the alleged independent a(1) violation, an employer independently violates provision 5.4a(1) if its action tends to interfere with an employee's statutory rights and lacks a legitimate

and substantial business justification. Orange Bd. of Ed., P.E.R.C. No. 94-124, 20 NJPER 287 (¶25146 1994); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); New Jersey Sports & Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). The charging party need not demonstrate an illegal motive. New Jersey Sports & Exposition Auth.; Orange Bd. of Ed., citing Hardin, The Developing Labor Law, at 75-78 (3d ed. 1992). The only action allegedly taken by the employer in the instant matter is its refusal to agree to a stenographic record. The arbitrator considered Cies' request and the opposition of the Township and SOA and ruled against Cies. The arbitrator had the authority and took the action which resulted in no stenographic record being made of the arbitration.^{7/} Cies chose not to go forward on the second day of the hearing, thereby resting his case. Nothing that the employer did or did not do tended to interfere with his statutory rights. Accordingly, I dismiss the independent a(1) violation.

Insofar as Cies alleges a violation of a(2), Commission cases dealing with a(2) claims generally involve organizational rights or the actions of an employee with a conflict of interest caused by his membership in a union and his position as an agent of an employer. Union Cty. Reg. Bd. of Ed., P.E.R.C. No. 76-17, 2 NJPER 50 (1976); Middlesex Cty. (Roosevelt Hospital), P.E.R.C. No.

^{7/} The forum for challenging the arbitrator's award is not before PERC. Cies advised that he has filed a motion to vacate the award in Middlesex County Superior Court.

81-129, 7 NJPER 266 (¶12118 1981); Camden Cty. Bd. of Chosen Freeholders, P.E.R.C. No. 83-113, 9 NJPER 156 (¶14074 1983). While motive is not an element of an a(2) offense, there must be a showing that the acts complained of actually interfered with or dominated the formation, existence or administration of the employee organization. Cf. Charles J. Morris (editor), The Developing Labor Law; The Board, The Courts and the National Labor Relations Act (B.N.A. 2nd ed. 1983), p. 279, citing Garment Workers (Bernard Altman Texas Corp.) v. NLRB, 366 U.S. 731 (1961). Cies has provided no evidence of actual employer interference with or domination of the employee organization as a whole, and I do not find an a(2) violation.

Finally, no facts were alleged in support of Cies' a(4), (6) or (7) claims. Specifically, he has alleged no facts that he was discriminated against based on the filing or signing of an affidavit, petition or complaint under the Act, that the Township refused to reduce a negotiated agreement to writing and to sign such an agreement, nor has he alleged any facts that our rules or regulations were violated.

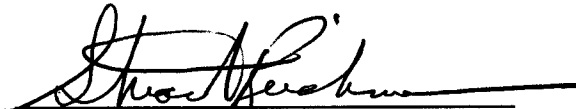
Accordingly, based on the foregoing, I find the Commission's complaint issuance standard has not been met and refuse to issue a complaint on the allegations of this charge.^{8/}

^{8/} N.J.A.C. 19:14-2.3.

ORDER

The charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES


Stuart Reichman, Director

DATED: May 12, 1999
Trenton, New Jersey