

P.E.R.C. NO. 2009-16

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF TRANSPORTATION),

Respondent,

-and-

Docket No. CI-2007-065

JANE LYONS,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission remands an unfair practice charge to the Director of Unfair Practices for further processing. The charge was filed by Jane Lyons against the State of New Jersey (Department of Transportation) alleging that the State violated the New Jersey Employer-Employee Relations Act. The Director refused to issue a Complaint on Lyons' charge and dismissed the unfair practice charge. He found her claim that she was unlawfully reassigned to be untimely, her discrimination claims and allegations of discipline to be outside the Commission's jurisdiction, that she had not claimed a breach of the duty of fair representation, no facts suggested a violation of N.J.S.A. 34:13A-5.4a(3) and derivatively a(1) of the Act and that she had not identified any Commission rule that had been violated. The Commission finds that Lyons' charge was timely filed within six months of the date she became aware that her reassignment was permanent. The Commission remands the charge to the Director to afford Lyons one last opportunity to amend the charge to clarify her allegations that her reassignment was in retaliation for complaints, whether the complaints constitute protected activity, and whether the State refused to accept her grievances. The Director may then reassess whether those allegations, if true, might constitute a violation of the Act.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Respondent, Anne Milgram, Attorney General of New Jersey (Geri Benedetto, Deputy Attorney General, on the brief)

For the Charging Party, Jane Lyons, pro se

DECISION

_____ On July 14, 2008, Jane Lyons appealed the decision of the Director of Unfair Practices refusing to issue a complaint based on an unfair practice charge Lyons filed against her employer, the State of New Jersey (Department of Transportation). D.U.P. No. 2008-7, 34 NJPER 135 (¶57 2008). On August 22, the State filed a brief opposing the appeal as untimely and arguing that we should affirm the Director's decision refusing to issue a complaint.

Lyons's appeal was filed with us within the time frame established by a two-week extension of time. The appeal was not received by respondent until July 30, 2008. We will consider the

appeal since it was timely filed and the respondent was not prejudiced by the late service. On the merits, we remand the case to the Director for further processing.

On May 25, 2007, Lyons filed her unfair practice charge. She alleges that the State violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. Her narrative states that:

- 1) on May 7, 2007, she received a letter from the New Jersey Department of Transportation addressing her August 28, 2007 grievance^{1/};
- 2) the State reassigned her from her resident engineer position in the field to an administrative assignment in the regional field office;
- 3) her reassignment was in retaliation for the issues that occurred when she was on a field job;
- 4) she has filed many grievances challenging the reason for her reassignment;
- 5) she has been disciplined without due process;
- 6) her Performance Evaluation System ("PES") has not been properly completed;
- 7) the reassignment each year is being used as a tool to continuously discipline her and she is not being afforded a chance to respond to her deficiencies;
- 8) the Department of Transportation criticized her and retaliated against her because of her role in emailing a contractor while working as a resident engineer in November 2005;
- 9) she was told that she cannot go back to the field because of her reckless and inappropriate conduct;

^{1/} The charge states that the grievance was dated August 28, 2007, but that date was in the future.

10) her responsibilities since that time have been as an office engineer;

11) she has been in the office for over a year and has continued to file grievances and management has refused to accept some of her grievances;

12) the contract provides that involuntary reassignments should be in reverse order of seniority and if temporary, less than six months; and

13) the reassignment is now a permanent assignment and she perceives this as an unfair practice, retaliation and discrimination because she is a female resident engineer and it gives the State an out for issues that contractors have with her supervising them.

On June 1, 2007, the Deputy Director of Unfair Practices notified Lyons that her charge needed to include the subsections of the Act alleged to have been violated; the dates of the alleged unfair practices; and that she needed to serve a copy of her charge and any amendments on the respondents.

On June 11, 2007, Lyons filed an amended charge alleging that the State violated 5.4a(1) through (7)^{2/} and stating that

^{2/} 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 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
(continued...)

the date of the unfair practice is May 7, 2007. That is the date Lyons alleges in her initial unfair practice charge that she received a letter from the State addressing an August grievance.

On January 11, 2008, the Director notified the parties that he was inclined to dismiss the charge. He found that:

- 1) the disputed reassignments occurred in November 2005, more than six months before the filing of the charge;
- 2) Lyons had not alleged any circumstances indicating that she was prevented from filing a timely charge;
- 3) the allegation that the November 2005 reassignment was discriminatory on the basis of gender and violated civil rights laws falls outside our jurisdiction;
- 4) other allegations involved mere breaches of contract, not unfair practices, and that Lyons did not have standing to assert an allegation that the State refused to accept some of her grievances; and
- 5) Lyons had not alleged any facts to support a finding that a Commission rule was violated.

The Director informed Lyons that if additional facts should be considered, she could amend her charge or if she disagreed with the Director's legal conclusions, she could file a brief supporting her position.

2/ (...continued)
concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

On January 22, 2008, Lyons wrote to the Director and the State asserting that:

- 1) her charge was timely because it concerns the grievance hearing and appeal that were heard in 2007;
- 2) the gist of her complaint is that a new permanent position was created that in effect Changed her temporary reassignment to a permanent one;
- 3) she has used the grievance procedure and has been denied the ability to represent herself as retaliation for filing a grievance;
- 4) management has retaliated against her because she has filed too many complaints and management Needs to take away her mechanism to complain; and
- 5) her reassignment was retaliation for filing her complaints.

On June 19, 2008, the Director issued his decision refusing to issue a complaint. D.U.P. No. 2008-7. He found that:

- 1) Lyons's challenge to her November 14, 2005 and earlier reassignments are untimely;
- 2) her discrimination claims and allegations of discipline are outside the Commission's jurisdiction;
- 3) Lyons could not pursue her 5.4a(5) allegation about a refusal to accept some grievances about her reassignment because she had not also claimed that her union had breached its duty of fair representation;
- 4) no facts suggest that the State violated 5.4a(3) or derivatively a(1) of the Act; and
- 5) Lyons had not identified any Commission rule that had been violated.

Lyons's appeal to us focuses on the timeliness of her claim that the State unlawfully reassigned her permanently.

Unfair practice charges must be filed within six months of the alleged unfair practice, unless the charging party was prevented from filing a timely charge. N.J.S.A. 34:13A-5.4(c). The Director found that Lyons did not allege any circumstances indicating that she was prevented from filing a timely charge. On appeal, Lyons argues that her charge was timely filed because she did not become aware that her reassignment was permanent until January 2007 and that she filed her charge within six months of that date.

Lyons alleges that in 2007, a new permanent position was created which in effect changed her temporary reassignment to a permanent one. Since she filed her charge within six months of that date, an allegation that the position change was in retaliation for activity protected by the Act is timely and would ordinarily warrant a complaint. Should a complaint issue, the parties may still litigate the issue of when Lyons knew or should have known that she was permanently reassigned.^{3/}

However, although Lyons states that the permanent reassignment was in retaliation for her complaints, it is not clear what complaints she is referring to so we are unable to determine whether such complaints constitute protected activity

^{3/} For purposes of this decision, we will assume that there is a difference between a temporary and a permanent reassignment. Whether there is a difference and the significance of that difference can also be addressed should a complaint issue.

under the Act. Nor has Lyons alleged specific facts or dates about her allegation that the State refused to accept her grievances. Such a refusal might violate 5.4a(1) of the Act by interfering with an employees statutory right to present a grievance. See Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122 (1978). Accordingly, we will remand this matter to the Director to afford Lyons one last opportunity to amend her charge to clarify those two allegations and for the Director to then reassess whether those allegations, if true, might constitute a violation of the Act.

ORDER

The unfair practice charge is remanded to the Director of Unfair Practices for further processing consistent with this opinion.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Branigan, Buchanan, Fuller and Joanis voted in favor of this decision. None opposed. Commissioner Watkins was not present.

ISSUED: September 25, 2008

Trenton, New Jersey