P.E.R.C. NO. 2009-36

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CWA LOCAL 1084,
Respondent,
-and- Docket No. CI-2007-066
DONNA LYNN BURNS-MELTZER,
Charging Party.

CAMDEN COUNTY BOARD OF SOCIAL SERVICES,
Respondent,
-and- Docket No. CI-2007-067
DONNA LYNN BURNS-MELTZER,
Charging Party.

SYNOPSIS

The Public Employment Relations Commission remands to the Director of Unfair Practices for further proceedings one allegation in consolidated unfair practice charges filed by Donna Lynn Burns-Meltzer against CWA Local 1084 and Camden County Board of Social Services. The Director refused to issue a complaint on most of the allegations in the charges. D.U.P. No. 2009-1, 34 NJPER 278 (¶99 2008). Burns-Meltzer appealed to the Commission the Director's refusal to issue a complaint as to three allegations: that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4 et seq., when it ended payment for accumulated sick leave for employees retiring after December 1, 2009 and when the Board changed health care co-pays during the course of negotiations; and that the CWA violated the Act by failing to submit for a ratification vote to its membership changes in the 2006-2009 agreement that differed from a proposed agreement previously ratified. The Commission finds the allegation that the CWA did not submit for ratification proposed changes to the parties' agreement, if true, might constitute an unfair practice and remands that allegation back to the Director to issue a complaint. The Commission sustains the refusal to issue a complaint on the remaining two allegations.

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, CWA Local 1084, Weissman and Mintz, attorneys (Rosemarie Cipparulo, of counsel)

For the Respondent, Camden County Board of Social Services, Capehart and Scatchard, attorneys (Michael Heston, of counsel)

For the Charging Party, Guerin and Meltzer, attorneys (Martin C. Meltzer, of counsel)

DECISION

On June 7, 26, and July 19, Donna Lynn Burns-Meltzer filed an unfair practice charge and amended charges against her

majority representative, CWA Local 1084. The charges allege that the CWA violated N.J.S.A. 34:13A-5.4b(1), (3) and (5), part of the New Jersey Employer-Employee Relations Act.[1] On June 7, and August 17, the charging party filed an unfair practice charge and amended charge alleging that her employer, the Camden County Board of Social Services, violated N.J.S.A. 34:13A-5.4a(1) and (5).[2]

On September 10, 2008, the Director of Unfair Practices issued D.U.P. No. 2009-1, 34 NJPER 278 (¶99 2008). That decision refused to issue complaints on most of the allegations made in the charges and amended charges.[3] On September 22, the

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1/ 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. . . . (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. . . . and (5) Violating any of the rules and regulations established by the commission."

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. . . . 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."

3/ The Director ordered that complaints and a notice of hearing be issued on the charging party's allegations relating to: (1) her right to complain and grieve about promotional procedures; (2) delays in permitting her to move into a new

(continued...)

charging party appealed the Director's decision.[4/] She asserts that a complaint should have issued with respect to three allegations that the Director held would not constitute unfair practices. Briefly, the allegations assert: that the CWA and the Board violated the Act by ending payments for accumulated sick leave for employees retiring after December 1, 2009; that the Board violated the Act by unilaterally changing health care co-pays during the course of negotiations; and that the CWA violated the Act by failing to submit for a ratification vote changes in the 2006-2009 agreement that differed from a proposed agreement previously ratified. On October 2, 2008, the CWA filed a response urging that the Director's decision was correct.

Applying our complaint issuance rule and pertinent case law, we will order that the Director issue a complaint concerning one of the three allegations raised in the charging party's appeal.[5/]

3/ (...continued)
position as a social worker; and (3) the CWA's interference with her right to file grievances and unfair practice charges.

4/ Challenges to a partial refusal to issue a complaint are to be made within five days through an appeal on special permission. See N.J.A.C. 19:14-2.3(c); N.J.A.C 19:14-4.6. But, D.U.P. 2009-1 advises that an "appeal" may be filed pursuant to N.J.A.C. 19:14-2.3 by September 22, 2008, the time limit that applies when a charge is completely dismissed. See N.J.A.C. 19:14-2.3(b). Under these circumstances we will consider the charging party's appeal. However, we deny her request for oral argument.

5/ As this ruling will not completely resolve these cases, our
(continued...)

N.J.A.C. 19:14-2.1 provides:

> (a) After a charge has been processed, if it appears to the Director of Unfair Practices that the allegations of the charge, if true, may constitute unfair practices on the part of the respondent, and that formal proceedings should be instituted in order to afford the parties an opportunity to litigate relevant legal and factual issues, the Director shall issue and serve a formal complaint including a notice of hearing before a hearing examiner at a stated time and place.

The charging party asserts that the CWA and the Board violated the Act through their agreement to end, as of December 1, 2009, retirement payments based on unused sick leave. She alleges that the agreement adversely affects both retirement-eligible employees and others who have substantial amounts of unused sick leave but who are not retirement-eligible. The charging party cites Morris School Dist. Bd. of Ed. and The Ed. Ass'n of Morris, 310 N.J. Super. 332 (App. Div. 1998), certif. den. 156 N.J. 407 (1998). She argues that Morris makes the agreement illegal and contrary to public policy.[6/]

5/ (...continued)
action is interlocutory.

6/ In 2007, the Legislature adopted $15,000.00 caps on payments at retirement for unused sick leave. N.J.S.A. 11A:6-19.1, applies to the Board, a Civil Service jurisdiction. The statute's terms (and those applicable to other political subdivisions) appear to apply prospectively, but they have not yet been construed. We asked the parties to comment on their relevance to the charging party's allegations regarding the phase-out of payments for unused sick leave.
(continued...)

Morris affirmed a Commission ruling, P.E.R.C. No. 97-142, 23 NJPER 437 (¶28200 1997), that the cap on accumulated sick leave payments at retirement could not be reduced absent a knowing and intentional waiver by the parties adversely affected.[7/]

Morris arose under our jurisdiction to issue negotiability rulings at the request of a majority representative or a public employer. N.J.S.A. 34:13A-5.4(d). Although Morris and this dispute involve a similar benefit, the charging party's claims arise in a different factual setting and must be evaluated under the standard governing the duty of fair representation, rather than the test for determining mandatory negotiability.

In Morris, the majority representative did not agree to a proposal that would have reduced or abolished the existing maximum payments on unused sick leave. Instead, the majority representative challenged the legality of a fact-finder's recommendation that, if adopted, would have lowered the caps for unused sick leave on retirement. Here, the CWA and the Board agreed to discontinue accumulated sick leave payments after December 1, 2009. That agreement was made after the proposed

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6/ (...continued)
All parties filed supplemental arguments.

7/ Because the employer and the majority representative in Morris had not agreed to limit payments for unused sick leave, the Court and the Commission did not decide whether and how a majority representative could waive contractually acquired rights to deferred compensation.

change was submitted to, and discussed by, the membership. A new contract with language ending the payments was ratified.

The duty of fair representation shouldered by majority representatives of public employees is the same as that established in the private sector. See Farber v. City of Paterson, 440 F.3d 131, 143-144 (3rd Cir. 2006); Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Federation of Teachers, 142 N.J. Super. 486 (App. Div.), certif. den. 72 N.J. 458 (1976). In Belen, a group of school psychologists asserted that the majority representative breached the duty of fair representation because it entered into an agreement with the Board that reduced the psychologists' compensation and lengthened their work hours. The Court adopted the private sector standard for adjudicating such claims and applied it to the Act:

> In Vaca v. Sipes, 386 U.S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967), the United States Supreme Court stated: "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Thus, the mere fact that a negotiated agreement results, as it did here, in a detriment to one group of employees does not establish a breach of duty by the union. The realities of labor-management relations which underlie this rule of law were expressed in Ford Motor Co. v. Huffman, 345 U.S. 330, 73 S. Ct. 681, 97 L. Ed. 1048 (1953), where the court wrote:
>
> > Any authority to negotiate derives its principal strength from a delegation to the negotiators of a

> discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. A major responsibility of negotiators is to weigh the relative advantages and disadvantages of differing proposals.
>
> * * *
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> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.
>
> Compromises on a temporary basis, with a view to long range advantages, are natural incidents of negotiation. Differences in wages, hours and conditions of employment reflect countless variables.
> [142 N.J. Super. at 491]

Belen held that the majority representative did not violate the Act's duty of fair representation as the facts did not show bad faith and its actions were not arbitrary, discriminatory, deceptive, or misleading. Id. at 492.

We hold that the charging party's allegations, if true, would not establish that the CWA breached the duty of fair representation. It is undisputed that the proposed elimination of payments for unused sick leave was presented to the membership and openly discussed. A new contract with that change was later ratified by the membership. For these reasons, we sustain the refusal to issue a complaint regarding the December 1, 2009 phase-out of payments for unused sick leave.

Given this determination, the charging party's claim that the Board violated N.J.S.A. 34:13A-5.4a(5) in connection with the phase out of payments for unused sick leave does not warrant issuance of a complaint as an individual cannot prosecute an alleged violation of an employer's obligation to negotiate over the terms and conditions of employment with the majority representative. See Beall and N.J. Turnpike Auth., NJPER Supp.2d 101, 102 (¶85 App. Div. 1981), aff'g P.E.R.C. No. 81-64, 6 NJPER 560, 561 (¶11284 1980) (N.J.S.A. 34:13A-5.4a(5) protects rights of majority representative; absent duty of fair representation breach, individual may not seek relief under that subsection).

The charging party asserts that the Board violated N.J.S.A. 34:13A-5.4a(5) by unilaterally raising health insurance co-pays. This allegation does not warrant the issuance of a complaint. The Director found:

> In January 2007, the State modified certain provisions of the [State Health Benefits

> Plan]. Among the changes were increases in physician and prescription co-pay amounts. Local 1084 and the Board were engaged in negotiations at that time and incorporated the State's changes into their negotiations. No grievances were filed by Local 1084 over the co-pay changes.
> [D.U.P. No. 2009-1 at 12, 34 NJPER at 281]

The charging party argues that the CWA should have reacted to the co-pay increase by filing a grievance. Her assertion, if true, would not establish that the CWA acted outside the "wide range of reasonableness" permitted a majority representative under Belen. Had such a change been imposed during the term of an existing agreement, a grievance or other challenge might have been made. But, as negotiations were ongoing, a majority representative cannot be faulted for seeking to put the issue to rest through a bilateral agreement that was incorporated into the new contract. As the charging party has not made a threshold showing that the majority representative may have violated its duty of fair representation concerning the co-pay changes, she lacks standing, as an individual employee, to pursue a claim that the employer violated N.J.S.A. 34:13A-5.4a(5). See Beall.

We direct that a complaint issue on the allegation that, following ratification of the 2006-2009 agreement, the CWA breached the duty of fair representation, by subsequently agreeing to, or acquiescing in, changes in that agreement without a further ratification vote. While it is true that there is no obligation that a majority representative submit proposed

agreements to its membership for ratification, if it chooses to do so, deviations from that practice may raise duty of fair representation concerns. See, e.g., SEIU Local 455/74, P.E.R.C. No. 94-117, 20 NJPER 275 (¶25139 1994) (union may breach its duty of fair representation by its actions surrounding ratification). Such issues are fact sensitive. See Higgins v. Int'l Union, 398 F.3d 384, 388 (6th Cir. 2005) (where union had practice of modifying contract without ratification, summary judgment granted dismissing claimed breach of duty of fair representation). We remand this allegation to the Director to issue a complaint so that the charging party will have an opportunity to present her evidence that there were changes in the terms of the 2006-2009 agreement that was ratified by the membership and that those alterations were required to be submitted for another ratification vote.[8/]

ORDER

This matter is remanded to the Director of Unfair Practices to issue a complaint on the allegation that, following ratification of the 2006-2009 agreement, the CWA breached the duty of fair representation, by subsequently agreeing to, or acquiescing to changes to that agreement without further

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8/ We make no judgment at this time. We hold only that those allegations, if true, may constitute an unfair practice.

ratification. The remainder of the allegations appealed are dismissed.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Branigan, Buchanan, Colligan, Fuller, Joanis and Watkins voted in favor of this decision. None opposed.

ISSUED: January 29, 2009

Trenton, New Jersey