D.U.P. NO. 98-32

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

In the Matter of

COMMUNICATION WORKERS OF AMERICA
LOCAL 1032 and NEW JERSEY NETWORK,

Respondents,

-and-

Docket No. CI-98-4

LORI ANN TAMBURO,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge brought by Lori Ann Tamburo, an individual. Tamburo alleged that CWA Local 1032 committed an unfair practice when it failed to file a grievance contesting her transfer from the Newark office of New Jersey Network (NJN) to the Trenton office. Tamburo also alleged that NJN violated the Act when it transferred her to the Trenton office in retaliation for complaints she made to the affirmative action officer relative to gender discrimination and harassment by her supervisor and station manager.

D.U.P. NO. 98-32

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

In the Matter of

COMMUNICATION WORKERS OF AMERICA
LOCAL 1032 and NEW JERSEY NETWORK,

Respondents,

-and-

Docket No. CI-98-4

LORI ANN TAMBURO,

Charging Party.

Appearances:

For the Respondent - CWA Local 1032,
Weissman & Mintz, attorneys
(Steven P. Weissman, of counsel)

For the Respondent - New Jersey Network,
Peter J. Verniero, Attorney General
(Peter Ullman, Deputy Attorney General)

For the Charging Party,
Patricia Adelle, attorney

REFUSAL TO ISSUE COMPLAINT

On July 18, 1997, Lori Ann Tamburo filed an unfair practice charge alleging that CWA Local 1032 violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.[1/] Tamburo alleges that the union failed to file a grievance contesting her transfer from the Newark office of New Jersey Network (NJN) to the Trenton office. Tamburo filed an amended charge on August 11,

1/ The charge filed on July 18 failed to specify a section of the Act allegedly violated.

1997 alleging that Local 1032 violated 5.4b(3), (4) and (5) of the Act.[2/] The amended unfair practice charge also alleges that NJN (The New Jersey Network) violated 5.4a(3), (4), (5) and (7) of the Act.[3/] Tamburo alleges that NJN transferred her from the Newark office to the Trenton office in retaliation for complaints she filed with the affirmative action officer and the acting director of

---

2/ These provisions prohibit 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. (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (5) Violating any of the rules and regulations established by the commission. Although not specifically pled, the narrative of the charge alleges a violation of 5.4b(1) of the Act which prohibits 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/ These provisions prohibit public employers, their representatives or agents from: (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.

engineering relative to harassing and discriminatory behavior by the station manager.4/

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.

CWA Local 1032 represents non-supervisory administrative and clerical employees employed by the NJN. NJN and Local 1032 entered into a collective negotiations agreement effective from July 1, 1995 through June 30, 1999.

The grievance procedure provides for a three-step processing of contractual and non-contractual grievances although only contractual grievances result in binding arbitration. In the case of a non-contractual grievance the decision of the department head at the second step in the grievance process is final. An individual can initiate either type of grievance although a contractual grievance can be processed only through union representation. The procedure provides for an initial informal step whereby the employee may orally present her complaint to her immediate supervisor for resolution.

4/ It is unclear but it appears that the charge also alleges that the acting director of engineering discriminated against Tamburo by denying her vacation requests in favor of a male co-worker.

On July 1, 1995, the engineering supervisor at the Newark office resigned and was replaced by Bill Schnorbus, acting director of engineering who supervised from the Trenton office. Tamburo alleges that Schnorbus and station manager Jeff Friedman immediately began harassing her by among other actions changing her title from Engineering Technician to Special Projects Secretary, denying her in-advance vacation requests and in October 1996 assigning her to work one day per week in the Trenton office doing data entry.[5/] Tamburo alleges that these acts were discriminatory in that a male co-worker was treated differently. Tamburo complained about all of these incidents to Beatrice Jones, the affirmative action officer. She alleges that subsequent to these complaints she was retaliated against, discriminated against and demoted when on January 23, 1997 she was notified of her permanent transfer to Trenton as Schnorbus' secretary effective February 10, 1997.[6/] Tamburo alleges that the transfer is a violation of the Americans with Disabilities Act (ADA) because she has a known disability, "fear of traveling long distances alone in unfamiliar areas" which she claims dates back to incidents which occurred in 1987.

NJN asserts that the transfer was the result of a decreased workload in Newark and an increased workload in Trenton. This workload shift from the Newark to the Trenton office has been

---

5/ Tamburo claims that this work was out of title for which she had no experience.

6/ Tamburo's title was Technical Engineer.

occurring over a period of four years. Several of the Newark employees have already been reassigned. Further, NJN has no record of the claimed disability relative to anxiety or fear of travel.

On January 24, 1997, Tamburo notified the union of the transfer and spoke to both Jimmy Tarlau and Dudley Burdge, staff representatives for CWA. Tamburo alleges that the union did "nothing" about her situation in January, February or March, 1997. In March, Tamburo's uncle called Tarlau to find out why a grievance had never been filed. The union informed Tamburo that its decision not to pursue a grievance on her behalf was based on its conclusion that the transfer of Tamburo was a non-negotiable managerial prerogative and, therefore, not a breach of contract. Further, the union concluded that since Tamburo claimed that a disability prevented her from making the commute to Trenton, she should request a reasonable accommodation for her disability. Subsequently, the union wrote to the NJN affirmative action officer requesting that NJN accommodate Tamburo's disability. When NJN refused to accommodate her disability and rescind the transfer, CWA recommended that Tamburo file a charge with the Division on Civil Rights.[7/]

The notification of the transfer allegedly caused Tamburo to become ill. She has not reported to work since February 6, 1997. Tamburo complains that she has been improperly denied sick leave injury, workers' compensation and temporary disability.

7/ Tamburo did file a charge with the EEOC.

Analysis

It is alleged that when the union failed to file a grievance protesting charging party's transfer it violated its duty of fair representation. However, the charge fails to meet the unfair practice standard.

A majority representative does not have an obligation to file every grievance which a unit member asks it to submit. Camden Cty. College (Porreca), P.E.R.C. No. 88-28, 13 NJPER 755 (¶10285 1987); Trenton Bd. of Ed., P.E.R.C. No. 86-146, 12 NJPER 528 (¶17198 1986). However, the majority representative has an obligation to investigate the claimed contract violation to determine if it has merit. In OPEIU Local 153, P.E.R.C. No. 84-60, 10 NJPER 12, 13 (¶15007 1983), the Commission stated:

> In a specific context of a challenge to a union's representation in processing a grievance, the United State Supreme Court has 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, discriminatory, or in bad faith. Vaca v. Sipes, 386 U.S. 171, 191 (1967).
>
> > The Courts and this Commission have consistently embraced the standards of Vaca in adjudicating such unfair representation claims. See, e.g., Saginario v. Attorney General, 87 N.J. 480 (1981); [Mackaronis and Middlesex County 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)] ("Middlesex County"); New Jersey Turnpike Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979) ("Local 194"); In re AFSCME Council #1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978).

> We have also stated that a union should attempt to exercise reasonably care and diligence in investigating, processing, and presenting grievances; it should exercise good faith in determining the merits of the grievance; and it must treat individuals equally by granting equal access to the grievance procedure and arbitration for similar grievances of equal merit. Middlesex Cty.; Local 194. All the circumstances of a particular case, however, must be considered before a determination can be made concerning whether a majority representative has acted in bad faith, discriminatorily, or arbitrarily under the Vaca standards.

The Commission recently addressed a matter similar to this case. In Carteret Education Association, P.E.R.C. No. 97-146, 23 NJPER 390 (¶28177 1997), Charging Party Saad Radwan alleged that the Association had deprived him of access to the grievance procedure. In September and October 1994, Radwan asked the Association to file grievances over three incidents. The collective agreement allowed unit employees to file grievances without going through the Association. The Association president told Radwan that he did not think that the incidents involved contract violations. Regarding the second and third incidents, the Association president told Radwan that the Association was not interested in filing nuisance grievances and that Radwan could do as he pleased. The hearing examiner found that the Association president's decision not to press non-meritorious grievances was not arbitrary, discriminatory or taken in bad faith. Consequently, the hearing examiner found that the Association president's decision did not breach its duty of fair representation. The Commission affirmed. However, the hearing

examiner found that the Association breached its duty of fair representation and violated of the Act when it failed to affirmatively inform Radwan that he could file a grievance on his own. The Commission reversed the hearing examiner's finding that the Association had an affirmative duty to inform Radwan that he could individually file a grievance. The Commission found that the Act does not require a majority representative to affirmatively notify an employee that s/he can individually file a grievance. The Commission found that since the Association did not mislead Radwan or otherwise impede his right to file a grievance on his own, and since the Association provided Radwan with a copy of the collective agreement when it became available and that agreement specified the employees' right to present their own grievances, no violation of the Act occurred.

Tamburo has not alleged facts which, if true, would demonstrate that the Union's conduct was arbitrary, discriminatory or in bad faith. The union reviewed Tamburo's complaint and determined that it did not allege a contractual violation since the transfer implicated a non-negotiable managerial prerogative. They concluded that her complaints concern Title VII violations relating to gender discrimination and violations of the ADA. The union advised Tamburo to file a complaint with the Division on Civil Rights which she did. The advise was reasonable and sound. Further, under the grievance procedure, Tamburo had the right to pursue a non-contractual grievance without union representation. She did not do so. No violation of the Act has occurred.

Insofar as a violation of 5.4b(3) is alleged, this provision prohibits a majority representative from refusing to negotiate in good faith with a public employer. This duty of good faith negotiations flows to the public employer rather than to individual unit members. The Commission has held that individual employees do not have standing to assert a 5.4(b)(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). Accordingly, I will not issue a complaint on the 5.4b(3) allegation against CWA.

I next consider whether the union violated 5.4b(4) and (5). Charging party has submitted nothing to establish that the union has failed to reduce a negotiated agreement to writing or that the union has violated a commission rule or regulation.

Finally, I consider whether the employer violated 5.4a(3), (4), (5) and (7) of the Act. Under all the circumstances of this case, I do not find violations.

Insofar as a violation of 5.4a(3) is alleged, Tamburo has failed to establish that she was engaged in protected activity -- i.e., collective negotiations, grievance processing or contract interpretation on behalf of the union or individually. In re Tp. of Bridgewater, 95 N.J. 235 (1984) articulates the standards for evaluating whether 5.4a(3) has been violated. A charging party must prove, by a preponderance of the evidence on the entire record, that

protected conduct was a substantial or motivating factor in an 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.

Tamburo has articulated no involvement in any union activity prior to her transfer nor did she file a grievance prior to the transfer. Her complaints to the affirmative action officer relative to alleged discrimination involving disparate treatment between Tamburo and a male co-worker were made solely on her own behalf and do not constitute protected concerted activity under the Act. Complaints of gender discrimination and handicap discrimination made to the affirmative action officer may be activities protected under another statutory scheme such as Title VII of the Civil Rights Act or the New Jersey Law against Discrimination but are not protected by our Act absent a nexus between the complaints and the employee's exercise of protected union activity within the meaning of N.J.S.A. 34:13A-1 et seq.

A violation of a(5) occurs when an employer fails to negotiate an alteration of an established practice with the majority representative or knowingly refuses to comply with the terms of the collective negotiations agreement. 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

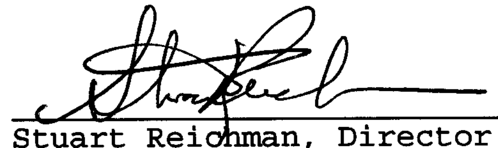
representative. N.J. Turnpike Authority, P.E.R.C. 81-64, 6 NJPER 560 (¶11284 1980). An individual employee/charging party may pursue a claim of an a(5) violation only where the charging party has also asserted a viable unfair practice claim of a breach of the duty of fair representation against the majority representative. Jersey City State College, D.U.P. No. 97-18, 23 NJPER 1 (¶28001 1996), N.J. Turnpike, D.U.P. No. 80-10, 5 NJPER 18 (¶10268 1979).

Here, Tamburo has not asserted a viable unfair practice claim of a breach of the duty of fair representation against her majority representative. Hence, her potential claim of an a(5) must fall.

Further, no facts were alleged in support of her a(4) and (7) claims. Specifically, she has alleged no facts that she was discriminated against based on the filing or signing of an affidavit, petition or complaint under the Act, nor has she alleged any facts that our rules or regulations were violated.

Therefore, I find that the Commission's complaint issuance standard has not been met and I will not issue a complaint on the allegations asserted in this charge. The charge is dismissed.[8/]

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Stuart Reichman, Director

DATED: April 2, 1998
Trenton, NJ

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