

D.U.P. NO. 2000-11

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

In the Matter of

STATE OF NEW JERSEY,
(DEPARTMENT OF COMMUNITY AFFAIRS),

Respondent,

-and-

Docket No. CI-2000-1

ALVIN J. DYOTT,
ROBERT HORNER AND SHEILA JEROME,

Charging Parties.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by employees of the State of New Jersey, Department of Community Affairs (Department). The Director finds allegations contained in the charge based on activity which occurred in November 1997 and September 1998 are untimely under N.J.S.A. 34:13A-5.4(c). The Director also finds that PERC does not have jurisdiction over allegations involving the employees' request for title reclassifications, alleged violations of Title VII, The Americans with Disabilities Act, Executive Orders No. 61 and No. 39, and N.J.S.A. 1A-7-1R et seq. The Director dismisses these allegations. As to allegations that the Department violated 5.4a(5), 5.4a(3) and 5.4a(7) of the Act, the Director finds respectively that; pursuant to the parties' collectively negotiated self-executing grievance procedure the Department's alleged failure to respond to grievances is not actionable as an unfair practice; there are no facts alleged that the employees were engaged in protected activity, that the Department was motivated by union animus or that the Department took any adverse action against the employees; and that no Commission Rule or regulation is set forth which the Department allegedly violated. Therefore, alleged violations of 5.4a(5), (3) and (7) of the Act are dismissed. Finally, the Director finds no facts provided in the charge which support the alleged 5.4a(1) and (4) allegations. Those allegations are also dismissed.

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Appearances:

For the Respondent,
State of New Jersey, Office of Employee Relations
(Philip Whitcomb, Director)

For the Charging Parties,
Alvin Dyott, Robert Horner & Sheila Jerome, pro se

REFUSAL TO ISSUE COMPLAINT

On July 8, 1999, State Department of Community Affairs employees Alvin J. Dyott, Robert Horner and Sheila Jerome (Charging Parties)^{1/} filed an unfair practice charge alleging that the New Jersey State Department of Community Affairs (Department) violated the New Jersey Employer-Employee Relations

^{1/} A fourth Charging Party, employee Ralph Diaz, subsequently withdrew from the charge.

Act, N.J.S.A. 34:13A-5.4a(1), (3), (4), (5) and (7)^{2/} when it denied the Charging Parties' requests for title reclassification and refused to support or assist them with regard to their requests. In addition, the Charging Parties allege that the Department violated N.J.A.C 4A:3-3.5(b) and 4A:3-3.9(c)(d) by failing to answer their request for information about the status of their title reclassification request pending before the New Jersey State Department of Personnel (DOP). Finally, the Charging Parties allege that the Respondent's conduct also violated: 1) Title VII of the Civil Rights Act of 1994; 2) the Americans with Disabilities Act; 3) Executive Order No. 61, P.L. 1992, C.146; 4) Executive Order No. 39; and 5) N.J.S.A. 1A7-1R et seq.

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.

^{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. (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."

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.

Charging Parties were covered under a collective negotiations agreement between the State and SEIU Local 518 for the period July 1, 1995 through June 30, 1999.^{3/} That agreement provides a Grievance Procedure at Article VII for employees to individually grieve "contractual grievances" and "non-contractual grievances" through at least step 2 of the grievance procedure. Section E of the Grievance Procedure article provides that

(3) Should a grievance not be satisfactorily resolved, or should the employer not respond within the prescribed time periods, either after initial receipt of the grievance or after a hearing, the grievance may be appealed within ten (10) calendar days to the next step...."

Section F of the Grievance Procedure Article permits a grievant not satisfied with the outcome of her/his grievance at step one of the grievance procedure to "appeal to the highest management representative or other designated individual" (step 2).

I also note that section C of Article VII provides,

(1) It is understood by the parties that this grievance procedure represents the exclusive process for the resolution of disputed matters arising out of the grievance definition, A.1. and 2 above, except for those specific matters listed below:

^{3/} I take administrative notice of the collective agreement.

(a) The following matters may only be appealed directly to the Department of Personnel subsequent to proper notification to the responsibility local management officials: ... (2) position classification and re-evaluation review....

Charging Parties filed a grievance on November 25, 1997, which included (1) a request to have their titles upgraded or reclassified pursuant to DOP regulation N.J.A.C. 4A:3-3.5 and 3.9, and (2) sought compensatory time when they did not report to their official work station. Representatives of the Department met with Charging Parties on December 10, 1997, and rejected their grievance.

On December 19, 1997, the Charging Parties again met with the Department representatives, who allegedly "promised" to investigate and use other avenues to address the Charging Parties' November 25, 1997 request for a title upgrade. On December 26, 1997, the Department advised Charging Parties that they must complete a DOP Position Classification questionnaire, and that, while an employee's title and compensation is not grievable, Charging Parties may grieve the Division's compensatory time policy. The Respondent also provided Charging Parties with salary and title information for all code compliance officers within the Bureau of Housing Inspection.

On January 5, 1998, Charging Parties withdrew their November 25, 1997 grievance allegedly in return for the Department's promise to investigate and use other means to address their request for reclassification or title upgrade.

On March 9, 1998, the Charging Parties asked the Department for an update on the progress of its investigation into the Charging Parties' request for title reclassification/upgrading. On March 18, 1998, the Department interviewed and requested information from Charging Parties regarding their request.

On June 18, 1998, the Department advised Charging Parties that the investigation on their title reclassification/upgrade request was "moving forward" and that additional information would be forthcoming. On July 2, 1998, Charging Parties again asked for an update from the Department. On September 8, 1998, the Charging Parties refiled their grievance regarding their original November 25, 1997 title reclassification/upgrading request.

On September 24, 1998, Charging Parties asked the Department for a response to their September 8, 1998 grievance. The Charging Parties indicated that they would construe a failure to respond as a negative response to both their original November 25, 1997 and the September 8, 1998 refiled grievances.

On September 24, 1998, the Department advised Charging Parties that an employee's title and rate of compensation are not grievable; however, an employee's right to request title reclassification/upgrading can be reviewed pursuant to N.J.A.C 4A:3-3.9.

On October 5, 1998, the Department advised Charging Parties that all support or assistance regarding their title

reclassification/upgrading request was denied, as well as the Charging Parties' request for reclassification itself. On October 8, 1998, Charging Parties advised the Department that they would pursue other venues regarding the Department's alleged "failure to abide by its statutory duty and responsibility." Also, on October 8, 1998, Charging Parties requested discovery from the Department for business records regarding title reclassification/upgrading. On December 16, 1998, the Department denied Charging Parties' discovery request and informed them that the title reclassification had been submitted to the DOP on or about December 3, 1998.

On May 10, 1999, Charging Parties requested the Department to provide a status update on the title reclassification request that had been submitted to DOP in December 1998. The Department allegedly failed to respond. On June 9, 1999, Charging Parties advised the Department that its continued failure to respond would result in their filing an unfair practice charge. The charge was filed on July 8, 1999.

ANALYSIS

Parts of the charge concern events which occurred more than six months prior to the filing of the charge, thus must be dismissed as untimely. The Commission is precluded from issuing a complaint when a charge has not been filed within six months of the occurrence of the alleged unfair practice. N.J.S.A.

34:13A-5.4(c). Here, the Charging Parties' allegations that the Respondent violated the Act when it denied the Charging Parties' November 25, 1997 and September 8, 1998 requests for title reclassification/upgrading, and further refused support or assistance with regard to their requests are untimely under N.J.S.A. 34:13A-5.4(c).

The allegations of the charge do not state facts which, if true, would constitute violations of the Act. Rather, the charge appears to involve a DOP matter -- a title reclassification/upgrading request and the Respondent's alleged failure to respond to such request. Such a matter is outside of our jurisdiction. Further, we do not have jurisdiction over the allegations that Title VII, The Americans with Disabilities Act, Executive Orders No. 61 and No. 39, and N.J.S.A. 1A:7-1R et seq. were violated. Therefore, all of these allegations are dismissed. See e.g., Atlantic City Convention and Visitors Authority, D.U.P. No. 98-2, 23 NJPER 247 (¶28197 1997); State of New Jersey (Department of Human Services), D.U.P. No. 97-12, 22 NJPER 333 (¶27173 1996); Marlboro Tp. Bd. of Ed., D.U.P. No. 91-1, 16 NJPER 420 (¶21176 1990).

Moreover, Charging Parties appear to be contending that the Department failed to process their grievance in violation of 5.4a(5). This allegation is not actionable as an unfair practice. Under the contractual grievance procedure, the grievant is permitted to appeal an adverse response or no response to step

2 of the procedure. Where the grievance procedure is self-executing, any flaws in processing at intermediate steps will not be litigated as an unfair practice. State Div. of Taxation (Kupersmit), D.U.P. No. 91-2, 16 NJPER 421 (¶21177 1990); State of New Jersey, D.U.P. No. 88-9, 14 NJPER 146 (¶19058 1988); City of Trenton, D.U.P. No. 87-7, 13 NJPER 99 (¶18044 1986) and Tp. of Millburn, D.U.P. No. 81-24, 7 NJPER 370 (¶12168 1981). Further, it is not an unfair practice for an employer to require that an employee follow established grievance procedures for filing grievances. Kupersmit. Here, the Department accepted the Charging Parties' grievances, responded by indicating that the title classification issue in the "grievance" was not grievable under the collective agreement, and explained that any grievance regarding compensatory time needed to be submitted on a grievance form. There is no allegation that Charging Parties were prevented from taking their grievance to the next step of the grievance procedure. Accordingly, we will not issue a complaint on this allegation.

Charging Parties also allege that the Department violated 5.4a(3) of the Act. 5.4a(3) makes it an unfair practice for the employer to retaliate against employees for exercising rights guaranteed to them by the Act. In Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), the New Jersey Supreme Court set forth the standard for determining whether an employer's action violates 5.4a(3) of the Act. Under Bridgewater, no

violation will be found unless conduct protected by our Act is a substantial or motivating factor in an adverse personnel action. Id. at 246. In this matter, no facts supporting a violation of 5.4a(3) have been alleged. Charging Parties have not alleged any facts that they engaged in protected activities under our Act, nor do the facts establish that the employer's conduct was motivated by union animus. The Department took no adverse action against Charging Parties. Thus, the 5.4a(3) allegation is dismissed.

Moreover, the 5.4a(7) allegation is dismissed, as Charging Parties fail to set forth which Commission rule or regulation the Respondent allegedly violated. See Burlington Tp. Bd. of Ed.

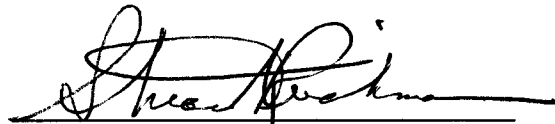
Finally, the Charging Parties provide no facts in support of their 5.4a(1) and (4) allegations and, therefore, they are likewise dismissed.

Based on the above, I find that the Commission's complaint issuance standard has not been met and I decline to issue a complaint on the allegations in the charge.^{4/}

ORDER

The charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES


Stuart Reichman, Director

DATED: January 24, 2000
Trenton, New Jersey