D.U.P. NO. 88-6

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

In the Matter of

CITY OF ATLANTIC CITY and
I.B.T.C.W.H.A., LOCAL 331,

Respondents,

-and-

Docket No. CI-87-86

MARY ANN WOOLBERT,

Charging Party.

SYNOPSIS

The Director of Unfair Practices refuses to issue a complaint. The first count of the charge alleged only a violation of Civil Service Rules, and was therefore outside of the Commission's jurisdiction. The second count alleged the City refused to pay the Charging Party for unused sick leave upon her termination, but set forth no contractual support for this purported obligation which could give rise to a claim of repudiation under Dept. of Human Services , P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). Further, the Director noted that even if a sufficient claim were asserted, an individual has no standing to bring an action alleging the employer violated a contractual term and condition of employment. Only the majority representative can bring such an action. Lastly, the third count alleged the union breeched its duty of fair representation by refusing to take the Charging Party's unused sick leave grievance to arbitration, but set forth no facts to support a claim that the union's conduct was arbitrary, discriminatory or in bad faith. The Director held that an union is not obligated to take every case to arbitration.

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Appearances:

For the Respondent City of Atlantic City
Murray and Murray, Esqs.
(Karen A. Murray, of counsel)

For the Respondent Local 331
Markowitz and Richman, Esqs.
(Joel G. Scharff, of counsel)

For the Charging Party
Horn, Kaplan, Goldberg, Gorny and Daniels, Esqs.
(James R. Birchmeier, of counsel)

REFUSAL TO ISSUE COMPLAINT

On February 4, 1987, Mary Ann Woolbert ("Woolbert" or "Charging Party") filed a Complaint in Atlantic County Superior Court, Law Division, against the City of Atlantic City ("City") and the International Brotherhood of Teamsters, Local 331 ("Union" or "Teamsters"). On May 22, 1987, Judge Gerald Weinstein signed an Order transferring the Complaint to the Public Employment Relations Commission ("Commission"). On June 18, 1987, the Commission's General Counsel received a letter from Woolbert's counsel enclosing

the Complaint and Order and requesting that the matter be filed with the Commission. By letter dated June 24, 1987, we acknowledged receipt of Woolbert's Complaint but asked that a more formal unfair practice charge be submitted. On July 2, 1987, the above-captioned charge was docketed.

Woolbert alleges that the City and the Union, respectively, violated subsections 5.4(a)(1), (3), (5) and (7)[1/] and 5.4(b)(1), and (3)[2/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). The substance of the allegations are set forth in the charge through attachment of the Superior Court Complaint as follows:

First Count: The City violated Civil Service Rules by discharging Woolbert on September 15, 1986, from her position as a

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1/ These subsections 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; (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 subsections 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."

principal clerk typist in the City's Police Department, Towing Division.

Second Count: The City violated the collective bargaining agreement between it and Woolbert's majority representative, Teamsters Local 331, by refusing to pay her for 92 accumulated sick leave days upon her termination.

Third Count: The union violated its duty of fair representation to Woolbert by refusing to institute arbitration proceedings to challenge the City's refusal to pay Woolbert for her 92 days of accumulated sick leave.

On March 6, 1987, the Teamsters filed an answer to the Superior Court complaint. Said answer is relied upon by the union as its statement of position in response to the unfair practice charge. It admits that Woolbert was terminated from her provisional status position on September 13, 1986, but denies that her discharge was without cause. It further admits that it is Woolbert's majority representative, and that it is a party to the January 1, 1986, through December 31, 1988, contract with the City. The Union denies, however, that under that contract Woolbert was entitled to payment for her unused sick days upon her termination. Lastly, it denies any breach of duty of fair representation in failing to pursue Woolbert's grievance to arbitration.

On July 13 and August 3, 1987, the City filed statements of position urging us to dismiss the charge.

The City argues that Woolbert's charge is devoid of allegations that her termination was motivated by employer anti-union animus or she was interfered with, coerced or restrained in the exercise of her rights protected under our Act. On the issue of the alleged failure to compensate Woolbert for the 92 accumulated sick leave days, the City asserts that the matter involves no more than a mere breach of contract claim and should be deferred to the parties' negotiated dispute resolution mechanism, consistent with the Commission's decision in Dept. of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). Further, with regard to the alleged breach of the duty of fair representation claim, the City maintains that since Woolbert's charge contains no allegations of employer collusion with the union or arbitrary and capricious behavior, the City cannot be held liable on this count. Finally, the City claims that the entire charge is untimely.

We first consider the issue of timeliness. In Kazmarek v. New Jersey Turnpike Authority, 77 N.J. 329 (1978), the Supreme Court addressed the question of tolling the Commission's six month statute of limitations where a Superior Court complaint containing unfair practice allegations was filed with the Court within six months of the occurrence of the unfair practice and the Court transferred the matter to the Commission. In finding the matter timely filed before the Commission, the New Jersey Supreme Court stated:

> Here the appellant originally filed his case in the law division. Once the trial judge ascertained that he did not have subject matter jurisdiction, he should have transferred the case

> to PERC. Under the circumstances of this case, had he done so, the charge would have been timely brought before the proper tribunal. 77 N.J. at 344.

Woolbert's Superior Court complaint, filed on February 4, 1987, alleged unfair practices occurring on September 13 and September 23, 1986. Thus, had the charge been filed with the Commission at the time it was filed in Superior Court, it would have been timely filed under our Act. Accordingly, we find the matter to be timely filed and decline to dismiss on those grounds.

Nevertheless, we find that the Commission's complaint issuance standard has not been met. The first count of Woolbert's charge concerning her termination alleges only a violation of Civil Service Rules. This agency administers the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., and has no jurisdiction over purely Civil Service matters.

The second and third counts of the charge involve the City's alleged failure to compensate Woolbert for the 92 unused sick days and the union's alleged refusal to institute arbitration proceedings on Woolbert's grievance.

In N.J. Turnpike Employees Union, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979), the Commission set forth the standards for finding a breach of the duty of fair representation:

> In considering a union's duty of fair representation, certain principles can be identified. The union must exercise reasonable care and diligence in investigating, processing and presenting grievances; it must make a good faith judgment 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.
> 5 NJPER at 413.

See also, Council #1, AFSCME, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978); Vaca v. Sipes, 386 U.S. 1171, 64 LRRM 2369 (1967). Here, the charge does not describe any conduct which is facially improper. The Charging Party admitted that a grievance was filed on behalf of Woolbert by the Teamsters. Woolbert only contests the Union's failure to take the grievance through arbitration. In the absence of factual allegations by Woolbert of arbitrary, discriminatory, or bad faith conduct on the part the union, the Teamsters' choice not to process her grievance through arbitration is an act within that organization's permissible discretion. N.J. Sports and Exposition Authority, D.U.P. No. 84-3, 9 NJPER 463 (¶14197 1983). A union is not obligated to take every case to arbitration, and there is no contention that other employees had similar grievances which were taken to arbitration. See N.J. Turnpike Employee's Union, supra.

Similarly, we can find no basis for a complaint against the City with regard to the duty of fair representation. As was set forth in N.J. Turnpike Authority and Jeffrey Beall, P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980), aff'd App. Div. Docket No. A-1263-80T3 (10/30/81), such an unfair practice charge against a public employer may be considered independently of any actionable charge against the union. However, the Commission has determined that the litigation of such charges nevertheless must be grounded upon a claim that the majority representative, either alone or in

collusion with the employer, violated the duty of fair representation. In the instant matter, Woolbert has neither supported her claim against the union nor alleged conspiracy or collusion with the City.

Finally, as to the City's alleged obligation to pay Woolbert for the 92 days, our review of the collective bargaining agreement reveals no provision expressly setting forth such an entitlement. Rather, the charge simply alleges Woolbert's interpretation that other provisions in the contract give her that right. It appears that these allegations, if true, involve no more than a breach of contract, do not rise to the level of a contract repudiation and, therefore, do not constitute an unfair practice. See Human Services, supra. Moreover, an individual has no standing to bring a claim that a contractual term and condition of employment has been violated by an employer. Only the majority representative, the Teamsters, can bring such an action. City of Jersey City and POBA, P.E.R.C. No. 87-56, 12 NJPER 853 (¶17329 1986).

Accordingly, for all the reasons set forth above, we have determined that the Commission's complaint issuance standard has not been met and decline to issue a complaint in this matter.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

Edmund G. Gerber, Director

DATED: October 21, 1987
Trenton, New Jersey