D.U.P. NO. 2003-10

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

In the Matter of

HOTEL, RESTAURANT & CAFETERIA
EMPLOYEES UNION LOCAL 3,

Respondent,

-and- Docket No. CI-2002-32

DIANA KATHY DASENT,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by Diana Dasent alleging that the Hotel, Restaurant and Cafeteria Employees Union, Local 3, failed to properly represent her in connection with her termination from employment with the Newark State Operated School District, in violation of N.J.S.A. 34:13A-5.4b(1). The Director found that Local 3's conduct in declining to arbitrate Dasent's claim or pursue an appeal to the Merit System Board on her behalf, or its failure to advise her of her appeal rights, did not constitute unfair practices. Additionally, the Director found that the charge was filed outside the Commission's six-month statute of limitations.

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Appearances:

For the Respondent,
Ruby Evans, President

For the Charging Party,
John M. Esposito, attorney

REFUSAL TO ISSUE COMPLAINT

On January 23 and February 14, 2002, Diana Kathy Dasent, a former employee of the State Operated School District of the City of Newark (District), filed an unfair practice charge against her employee representative, Hotel, Restaurant and Cafeteria Employee Union Local 3 (Local 3). Dasent alleges that Local 3 violated section 5.4b(1)[1/] of the New Jersey Employee Relations Act, N.J.S.A. 34:13A-1.1 et seq., when it failed to appeal her

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1/ This provision 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."

termination to the New Jersey State Merit System Board or advise her of her rights to appeal on her own.

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. By letter of December 27, 2002, I advised the parties that I did not intend to issue a Complaint on any of the allegations as set forth in the charge, and I explained the basis for that conclusion. I provided the parties with an opportunity to respond. Local 3 filed no response.

On January 7, 2003, Dasent filed an amendment to the charge. Dasent contests the District hearing officer's factual findings upon which her termination was based. Dasent specifically denies that she assaulted another employee or that her several transfers were due to interpersonal difficulties. She alleges additional facts in the amendment including that, upon receiving her termination notice, she asked Local 3 to "take whatever steps were necessary" to challenge her removal. Dasent alleges that Local 3 prejudicially deprived her of her rights by failing to file an appeal before the New Jersey State Merit System Board and by failing to advise her of her right to do so.

Based upon the following, I find that the complaint issuance standard has not been met.

Dasent was employed by the Newark State Operated School District as a food service worker beginning in 1981. The Hotel, Restaurant and Cafeteria Employees Union, Local 3, AFL-CIO is the majority representative for all non-supervisory cafeteria workers employed by the school district. Local 3 and the District were parties to a collective negotiations agreement effective from March 1, 1998 to February 28, 2001. The parties' grievance procedure terminates in binding arbitration.

On December 18, 2000, the District's Area Food Services Manager Arthur Dean Rawls issued Dasent three memoranda. The first two memoranda warned her that her continued tardiness and absenteeism patterns would result in discipline. The third memorandum recounted a December 15, 2000 argument between Dasent and a lead worker and warned that such further behavior could result in discipline.

On March 28, 2001, the District's Paralegal Technician Carol Bowles requested a disciplinary hearing on charges that Dasent engaged in conduct unbecoming an employee. The memorandum alleged that Dasent engaged in a verbal confrontation with another employee and that Dasent struck the other employee in the chest. Both employees were placed on disciplinary suspension.

On April 9, 2001, a disciplinary hearing was conducted by District Hearing Officer Pamela Davis-Clarke. By decision dated May 15, 2001, the hearing officer sustained the charges and ordered Dasent's termination. On May 22, 2001, Dasent received a notice of termination based on conduct unbecoming a public employee.

Dasent asserts that she then went to Local 3 to ask for union assistance. She maintains that she asked Local 3 to "take whatever steps were necessary" to challenge her removal. On June 21, 2001, Local 3 filed a grievance on Dasent's behalf alleging discrimination. The employer denied the grievance on July 24, 2001. Local 3 did not file a request for arbitration.

Dasent alleges that in December, 2001, she consulted with counsel and learned that she had the right to appeal her termination to "the Merit Board and then to the Appellate Division of the Superior Court if necessary."

Dasent contends that by filing an "ineffectual" grievance rather than taking "elemental steps" on her behalf to protect her right to appeal at the Merit System Board, Local 3 prejudiced Dasent in bad faith. Dasent contends that "other unions representing public employees routinely preserve [the employees'] rights by filing the appeal on their behalf."

Dasent additionally contends that Local 3 fraudulently failed to advise her of her right or deadline to appeal. Dasent asks that the Commission order Local 3 to pay a fine, penalty based upon her

lost income, interest, attorney's fees and costs; and that it require Local 3 to take any action necessary to gain Dasent's reemployment.

Local 3 denies engaging in any unfair practice. It avers that based upon Dasent's prior disciplinary record, the nature of the disciplinary charges, and Dasent's damaging testimony on her own behalf at the disciplinary hearing, it determined not to pursue Dasent's termination through arbitration.

ANALYSIS

Section 5.3 of the Act empowers an employee representative to represent employees in the negotiations and administration of a collective agreement. With that power comes the duty to represent all unit employees fairly in negotiations and contract administration. The standards in the private sector for measuring a union's compliance with the duty of fair representation were articulated in Vaca v. Sipes, 386 U.S. 171 (1967). Under Vaca, a breach of the statutory duty of fair representation occurs only when a union's conduct towards a member of the negotiations unit is arbitrary, discriminatory, or in bad faith. Id. at 191. That standard has been adopted in the public sector. Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976); see also Lullo v. International Ass'n of Fire Fighters, 55 N.J. 409 (1970); OPEIU Local 153 (Johnstone), P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983).

A union should attempt to exercise reasonable 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. OPEIU Local 153; Middlesex Cty (Mackaronis), 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); New Jersey Turnpike Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979); and AFSCME Council No. 1 (Banks), P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978).

Dasent alleges that she asked Local 3 to take all necessary steps to appeal her termination. She apparently disagrees with Local 3's decision to file a grievance on her behalf rather than filing before the Merit System Board, the forum she asserts had jurisdiction to hear an appeal of her termination. Dasent's unfair practice is premised on two assumptions: (a) the Merit System Board is the appropriate forum; and (b) the majority representative's duty to fairly represent employees in the negotiation and administration of a collective negotiations agreement also extends to representing employees in appealing discipline and termination before the New Jersey Merit System Board. Even assuming all of the above, I find that Local 3's failure to file Dasent's appeal before the Merit System Board may, at most, constitute negligence. An

organization's mere negligence, standing alone, is not sufficient to establish a breach of its duty of fair representation. OPEIU (Wasilewski), P.E.R.C. No. 98-131, 24 NJPER 256 (¶29122 1998) aff'g H.E. No. 98-4, 23 NJPER 573 (¶28287 1997). There are no facts to show that Local 3's conduct was arbitrary, discriminatory or in bad faith. More likely, its conduct was born from a lack of knowledge. See also, Glen Ridge Ed. Assn. (Tucker), P.E.R.C. No. 2002-72, 28 NJPER 251 (¶33095 2002).

In any event, Local 3 asserts that it evaluated her termination on the merits and believed that it would not likely be successful in its efforts to appeal the District's determination. An employee organization is not required to take every case to arbitration. Rather, it must evaluate requests for arbitration on the merits and decide in good faith whether it believes the issue has merit. See, Carteret Ed. Assn. (Radwan), P.E.R.C. No. 97-146, 23 NJPER 390 (¶28177 1997); Fairlawn Bd. of Ed., P.E.R.C. No. 84-138, 10 NJPER 351 (¶15163 1984). It apparently did that here, and decided that her wrongful termination claim lacked merit. Whether Local 3 declined to arbitrate or declined to appeal to the Merit System Board the same result is reached -- a decision not to appeal the termination. Therefore, I find that Local 3's conduct in not filing an appeal to the Merit System Board does not constitute an unfair practice.

Dasent also argues that Local 3 violated the Act when it failed to advise her that she had appeal rights before the New Jersey Merit System Board. We have previously held that, in the absence of bad faith, the union is not obligated to inform its members about their contractual rights. See Egg Harbor Tp. Ed. Assn. (Zeliq), P.E.R.C. No. 2002-21, 28 NJPER 249 (¶33094 2002); Carteret Ed. Assn. (Radwan). It follows then that the majority representative has no statutory obligation to inform its members about potential statutory rights which are, in any event, a matter of public record. I find that the facts alleged do not support a claimed violation of the Act.

* * *

Additionally, N.J.S.A. 34:13A-5.4(c) establishes a six-month statute of limitations period for the filing of unfair practice charges. The statute provides in pertinent part:

> . . . that no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such a charge in which event the 6 months period shall be computed from the day he was no longer so prevented.

I find Dasent's charge against Local 3 also to be outside the Commission's statute of limitation. Dasent was terminated on May 22, 2001. The allegations in the charge do not indicate whether she made a request of Local 3 to appeal her termination, and if so, when such a request was made. But pursuant to N.J.A.C. 4A:2-1.1(b)

and 4A:2-2.8(a), any appeal to the New Jersey Merit System Board must be filed within 20 days of the employee's termination.[2/] She alleges that Local 3's failure to appeal her termination or advise her that she could have appealed to the Merit System Board violated the Act. Therefore, the operative date that Local 3 could have appealed or advised Dasent that she could have appealed, was on or about June 11, 2001. However, Dasent's charge was not filed until February 14, 2002 -- eight months after Dasent knew or should have known that Local 3 was not appealing her termination. Dasent offers no justification for her contention that she was prevented from filing her charge in a timely manner.

While Dasent asserts that she did not learn that her termination could have been appealed to the Merit System Board until December, 2001, that lack of knowledge is insufficient to toll the statute of limitations. Atlantic City Special Services (Postal), D.U.P. 99-14, 25 NJPER 272 (¶30115 1999).

Based upon all of the foregoing, I find that Dasent's allegations against Local 3, even if true, would not be a violation of the Act, and, therefore, are insufficient to meet the Commission's complaint issuance standard. In addition, I find that the allegations that Local 3 failed to file an appeal or to advise

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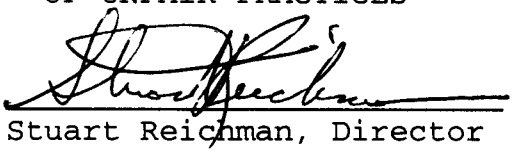
2/ Local 3 asserts that it decided not to appeal Dasent's termination "to arbitration." We need not decide which venue might have been appropriate to seek appeal of the termination. Either forum for appeal would have had to be filed promptly upon notice of the termination.

Dasent of her appeal rights, were filed beyond the Commission's statute of limitations and, therefore, no Complaint may issue on those allegations.[3/]

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Stuart Reichman, Director

DATED: May 15, 2003
Trenton, New Jersey

3/ N.J.A.C. 19:14-1.5.