

D.U.P. NO. 2004-6

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

In the Matter of

ATLANTIC CITY HOUSING AUTHORITY,

Respondent,

-and-

Docket No. CI-2003-027

DENNIS NICKSON,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by Dennis Nickson against the Atlantic City Housing Authority. Nickson alleged that the Authority violated the Act by failing to restore him to the overtime rotation as agreed in settlement of a previous unfair practice charge. Nickson further alleged that the Authority made job assignments and approved overtime for other employees in violation of the collective bargaining agreement. The Director found that under State of New Jersey, Department of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984), contract disputes must be resolved pursuant to the negotiated grievance procedure. The Director further found that the Authority had apparently returned Nickson to the overtime rotation as agreed.

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Appearances:

For the Respondent,
Charles Hargrove, Executive Director

For the Charging Party,
Dennis Nickson, pro se

REFUSAL TO ISSUE COMPLAINT

On February 26, 2003, Dennis Nickson, an employee of the Atlantic City Housing Authority (Authority), filed an unfair practice charge with the Public Employment Relations Commission.^{1/} The charge alleges that the Authority violated N.J.S.A. 34:13A-5.4a(3),^{2/} when it failed to honor an agreement

1/ The charge was held in abeyance pending the outcome of related representation matters, RD-2003-9 and RO-2003-84.

2/ This subsection prohibits 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." The charge also appears to allege a violation of N.J.S.A. 34:13A-5.4(b), pertaining to employee

(continued...)

reached with Nickson in settlement of a previous unfair practice charge.

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. In correspondence dated March 9, 2004, I advised the parties that I was not inclined to issue a complaint in this matter and set forth the basis upon which I arrived at that conclusion. I provided the parties with an opportunity to respond. Neither party filed a response.^{3/} Based upon the following, I find that the complaint issuance standard has not been met.

2/ (...continued)
organizations; however, no employee organization is named as a respondent to the charge.

3/ The March 9 correspondence was mailed to Nickson by certified mail, but was returned to the Commission due to an incorrect address. A Commission secretary telephoned Nickson and remailed the correspondence by certified mail to the address Nickson supplied. Any reply by Nickson was due on March 29; however, the mail receipt was not returned to the Commission. On March 29, the correspondence was remailed to Nickson by regular mail and the date for reply set for April 26. Nickson did not file a reply.

Charging Party Nickson has been employed by the Atlantic City Housing Authority since approximately February 1997 as a maintenance repairer. On June 24, 2002, Nickson filed unfair practice charges against the Authority (CI-2002-67) and AFSCME Council 71, Nickson's majority representative (CI-2002-68). The charge against the Authority alleged that the Authority illegally denied Nickson the opportunity to "hang," (utilize for additional compensation) his boiler operator's license. Nickson further alleged that after he filed a charge of race discrimination with the Equal Employment Opportunity Commission in March 2001, he was subjected to harassment including a December 2002 suspension, transferred, and denied the opportunity to attend a plumbing class which was provided to the assistant foreman and employees with less seniority than Nickson.

The charge against AFSCME alleged that AFSCME failed to properly represent Nickson in connection with several grievances Nickson filed, including a grievance Nickson filed on or around December 31, 2001, contesting his two-day suspension on charges he falsified overtime and failed to complete a work assignment. Nickson further alleged AFSCME "allowed the Atlantic City Housing Authority to break the law by not having boiler operators around the clock," and that due to AFSCME's lack of representation, he was denied training opportunities provided to less senior employees, and continued to be denied overtime opportunities two

and a half months after his suspension, all in violation of the Act.

On August 9, 2002, a Commission staff agent conducted an exploratory conference. The Authority agreed to restore Nickson to the overtime rotation, and include Nickson among the participants in a plumbing training class expected to begin in January 2003, assuming that he chose to continue in his current title of maintenance repairer performing work that would require plumbing skills. AFSCME agreed to meet with Nickson to discuss scheduling a meeting between Nickson, AFSCME staff representative Masoline Hopkins, and AFSCME's local president to discuss Nickson's concerns. After the conference, the staff agent confirmed the parties' respective agreements in writing. In exchange for the respective representations, Nickson withdrew the unfair practice charges.

The present unfair practice charge alleges that the Housing Authority failed to honor the settlement agreement by returning Nickson to the overtime rotation. In a supplemental position statement, Nickson appears to further allege that the Housing Authority improperly approved overtime for other employees in violation of the seniority provisions of Article X (C) and (E) of the collective bargaining agreement; and that certain employees lack sufficient licensure to work in the Authority's boiler room. Nickson also asserts that he did not commit the falsification of

overtime infraction which resulted in his initial removal from the overtime rotation.

The Housing Authority responds that Article X of the collective bargaining agreement provides that overtime "shall be paid for all hours actually worked in excess of forty (40) hours per week", not to include sick time, worker's compensation, vacation or any other leave. The Authority provides attendance records indicating that Nickson was absent for a total of 107 work days in 2002; including 75 days without pay; and as of March 7, 2003, had been absent 21.5 days, including 10.5 days without pay.

The Authority further states:

Out of the 52 weeks (260 workdays) in the year of 2002; Mr. Nickson worked 11 weeks in which he would have been able to benefit from overtime pay. Within those 11 weeks, he worked overtime 7 times (3 of those weeks). During weeks when Mr. Nickson did not actually work 40 hours because of using sick time, vacation time and absent without pay; he would not have been able to receive overtime pay until he had actually worked 40 hours.

The Authority also states that "based on Mr. Nickson's attendance and frequency of absences, it is difficult to schedule him in a normal rotation of on-call duty but he has been offered overtime a number of times and has refused to work."

ANALYSIS

In State of New Jersey (Department of Human Services),
P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984), the Commission
held:

a mere breach of contract claim does not state a cause
of action under subsection 5.4(a)(5) which may be
litigated though unfair practice proceedings and
instead parties must attempt to resolve such contract
disputes through their negotiated grievance procedures.
[10 NJPER at 421].

Based upon the foregoing, it appears that, at best,
Nickson's charge raises a dispute concerning whether he was
contractually entitled to the assignment of overtime, which
should be addressed by the filing of one or more grievances, not
an unfair practice charge. The Commission will not substitute
its unfair practice jurisdiction for the parties' agreed-upon
grievance procedure to resolve contract disputes. Human
Services.

Although Nickson's charge alleges a violation of 5.4a(3), it
appears from the facts that after entering into the settlement
agreement, the Authority returned Nickson to the overtime
rotation as agreed. However, as explained above, the Commission
lacks jurisdiction to determine the amount of overtime to which
Nickson may be contractually entitled, or whether he was properly
removed from the overtime rotation in the first instance. Even
assuming that the Authority incorrectly determined that Nickson

was not eligible for additional overtime assignments, such does not amount to a violation of the Act. See City of Newark (Montgomery), P.E.R.C. No. 2000-57, 26 NJPER 91 (¶31036 2000), wherein the Commission held that, "(a) denial of contractual benefits to an individual employee is generally a breach of contract that does not rise to the level of an unfair practice). Moreover, the Commission lacks jurisdiction to consider issues related to the Authority's use of boiler operators; such staffing determinations are matters of managerial prerogative. A public employer has a managerial prerogative to determine when governmental services will be delivered and the staffing levels associated with the delivery of those services. See Old Bridge Bd. Of Ed., P.E.R.C. No. 2003-79, 29 NJPER 228 (¶70 2003); City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982). Since the Commission lacks jurisdiction over the amount of overtime dispute, I dismiss the unfair practice charge.

The charge does not raise any facts implicating a violation of 5.4b(5). Consequently that section of the charge is also dismissed.

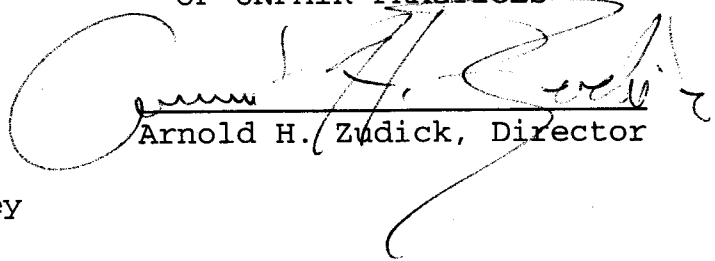
Therefore, I find that the Commission's complaint issuance standard has not been met and I decline to issue a complaint on the allegations of this charge.^{4/}

^{4/} N.J.A.C. 19:14-2.3.

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Arnold H. Zudick, Director

DATED: May 5, 2004
Trenton, New Jersey