

D.U.P. No. 2006-8

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

In the Matter of

CITY OF CAPE MAY,

Respondent,

-and-

Docket No. CE-2006-004

UAW LOCAL 2327,

Charging Party.

SYNOPSIS

The Director of Unfair Practices refuses to issue a Complaint on an employer's charge alleging that the union violated the Act by skipping a step in the parties' contractual grievance procedure and prematurely filing for arbitration, and by filing its own unfair practice charge. The Director finds that defects in the processing of a grievance are, at most, a breach of the contractual grievance procedure, and not an unfair practice. Additionally, the Director reiterates the long-standing principle that the filing of an unfair practice charge is a protected statutory right, and therefore, such filing cannot be an unfair practice.

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Appearances:

For the Respondent,
Cleary & Josem, attorneys
(Jeremy E. Meyer, of counsel)

For the Charging Party,
Monzo Catanese, attorneys
(Ronald J. Gelzunas, Jr., of counsel)

REFUSAL TO ISSUE COMPLAINT

On August 23, 2005, the City of Cape May (City) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that UAW Local 2327 (UAW) violated subsections 5.4b(3)^{1/} and (5)^{2/} of the New Jersey

1/ This subsection prohibits 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."

2/ This subsection prohibits employee organizations, their representatives or agents from: "(5) Violating any of the rules and regulations established by the commission."

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). The City's first count alleges that the UAW violated the Act and changed a term and condition of employment during negotiations by filing a request for submission of panel of arbitrators on July 25, 2005 (Docket No. AR-2006-056), more than ten days after the City denied the grievance.

The City's second count alleges that the UAW violated the Act by filing a grievance with the City on June 22, 2005, and then, following the City's June 24, 2005 denial of the grievance, filing an Unfair Practice Charge (CO-2005-338) on June 29, 2005 based on the same issue and circumstances. The City also asserts that the following actions by the UAW based on the issues in the denied grievance violated the Act: an Application for Interim Relief on July 15, 2005; the above-mentioned Arbitration Request on July 25, 2005; and filing an Amended Unfair Practice Charge on August 30, 2005 (CO-2005-338).

As a remedy, the City seeks an Order restraining the UAW from: (1) proceeding with the Arbitration; and (2) filing any further unfair practice charges or taking any other action prior to the Commission's decision on CO-2005-338.

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.

FACTS

On June 22, 2005, the UAW, represented by Shop Steward David Elder, filed a grievance with the City, which the City claims was received by the Superintendent of Public Works, Robert H. Smith, on the morning of June 23, 2005. The parties' negotiated grievance procedure, Article 3(B), Step One (b), requires the City's designated representative to "render a decision promptly within five (5) working days after receipt of the grievance." A Step One decision was timely issued by Superintendent Smith's June 24, 2005 letter to Shop Steward Elder concluding that the grievance was unfounded and denying the UAW's requested relief.

Step Two (a) of the Grievance Procedure states: "In the event a satisfactory settlement has not been reached, the employee shall, in writing and signed, file his complaint with the chief executive of the City or a designated representative. Such action must be taken within ten (10) working weekdays following the determination by the supervisor." The City claims, and the UAW does not deny, that the UAW failed to proceed to Step Two (a) because it did not file a complaint in response to the City's Step One denial within ten working weekdays.

It was not until July 20, 2005, which the City claims was eighteen (18) working days after their June 24, 2005 grievance denial, that the UAW responded to the denial and addressed the parties' inability to resolve the grievance. That UAW letter informed the City that "the Union has no alternative than to proceed to arbitration." The City responded by letter of July 25, 2005, citing the UAW's failure to proceed to Step Two of the grievance procedure and the City's opinion that under the agreement this meant that the grievance was considered settled and it was ineligible to proceed to Step Three (Arbitration). On July 25, 2005, the UAW filed a Request for Submission of a Panel of Arbitrators (Docket No. AR-2006-056) with the Commission for arbitration of the UAW's June 22, 2005 grievance.

In a related charge before the Commission (Docket No. CO-2005-338), the UAW filed an Unfair Practice Charge against the City on June 29, 2005 based on the issues in the June 22, 2005 grievance. The UAW applied for interim relief on that charge. The interim relief application was denied on July 18, 2005. City of Cape May, I.R. No. 2006-001, 31 NJPER 213 (184 2005). On August 30, 2005, the UAW filed an Amended Unfair Practice Charge (Docket No. CO-2005-338) against the City. By letter of February 2, 2006, the UAW withdrew its grievance/arbitration request.

By letter of February 23, 2006, I informed the parties that I was inclined to refuse to issue a complaint in this case (CE-

2006-004) because the UAW had withdrawn its arbitration request, but that I was inclined to issue a complaint on the amended charge in CO-2005-338. On March 3, 2006, the City submitted a written brief in response to my letter, and on March 20, 2006 the UAW submitted a written response to the City's brief.

ANALYSIS

The City's charge requested restraining the UAW from proceeding with arbitration and restraining the UAW "from filing any further Unfair Practice Charges or taking any other action prior to the Commission rendering a decision on Unfair Practice Charge Docket No. CO-2005-338." That request is denied. Since the underlying grievance/arbitration request has been withdrawn, that issue is moot. Additionally, the filing of grievances pursuant to a collective agreement, and the filing of unfair practice charges with the Commission are both protected conduct. Absent evidence of harassment, the mere filing of a grievance or charge generally cannot be the basis of an unfair practice even if they are out of time or lack merit.

The Commission has stated on multiple occasions that filing a grievance is a fundamental example of protected activity. Camden Bd. of Ed., P.E.R.C. No. 89-78, 15 NJPER 94, 95 (¶20042 1989); State of New Jersey (Dept. Of Human Services), P.E.R.C. No. 87-88, 13 NJPER 117 (¶18051 1987); Hunterdon Cty. Sheriff, P.E.R.C. No. 87-13, 12 NJPER 685 (¶17259 1986); Pine Hill Bd. of

Ed., P.E.R.C. No. 86-126, 12 NJPER 434 (¶17161 1985); Dover Municipal Utilities Authority, P.E.R.C. No. 84-132, 10 NJPER 333 (¶15157 1984); Lakewood Bd. of Ed., P.E.R.C. No. 79-17, 4 NJPER 459, 460 (¶4208 1978); In re Dover Township Board of Education, P.E.R.C. No. 77-43, 3 NJPER 81 (1977). In Lakewood Bd. of Ed., the Commission outlined its position in response to the employer's contention that the filing of a grievance is not a protected activity:

"Briefly, Article I, paragraph 19 of the New Jersey Constitution, coupled with N.J.S.A. 34:13A-5.3, makes abundantly clear that public employees have a right to present grievances either through their majority representative or where no such majority representative exists, in their individual capacities. By asserting that public employees have no such rights, the Board is in effect declaring that it may retaliate against an employee who files a grievance and thereby effectively inhibit that employee and other employees from availing themselves to the grievance machinery. If public employers were granted such liberties, the prompt resolution of disputes and the promotion of peaceful and harmonious labor relations would be impossible. N.J.S.A. 34:13A-2." [4 NJPER at 460]

Here, the City alleges that the UAW unilaterally changed the parties' grievance procedure when it failed to proceed to Step Two within ten (10) days after the Step One denial and instead skipped to Step Three/Arbitration about eighteen (18) weekdays after the Step One denial. While that may have been a violation of the grievance procedure, the facts do not suggest that the UAW's deviation from the grievance procedure was a repudiation or in bad faith.

In Pine Hill Bd. of Ed., the Commission found that the employer's deviation from the normal grievance procedure did not warrant finding an unfair practice.

Later, in NJ Transit Bus Operations, P.E.R.C. No. 94-32, 19 NJPER 546 (¶24258 1993), the Commission held that an isolated deviation from the parties' past practice at a particular step of the grievance procedure amounted to a mere breach of contract ". . . presumably curable through the subsequent steps of the grievance procedure" 19 NJPER at 547.

Here, as in NJ Transit Bus Operations, the parties' contractual grievance procedure culminates in binding arbitration. The UAW's move to file for this arbitration after Step One rather than after Step Two of the grievance procedure is similarly at most a breach of contract. Had the arbitration not been withdrawn, the arbitrator would have been able to determine whether the grievance was properly brought according to the parties' contract and then choose to resolve that issue and/or the issues underlying the grievance.

In Bergen Community College, P.E.R.C. No. 87-153, 13 NJPER 575 (¶18210 1987), the union alleged that the employer committed an unfair practice by violating the parties' grievance procedure when it was three days late in submitting a written response to the union's grievance, but the Commission held that the late response was at most a breach of contract instead of an unfair

practice. The Commission adopted the Hearing Examiner's findings of fact and conclusions of law, which included the following:

"Based upon the record in this case and the foregoing, I conclude that the Association's allegations concerning the processing of the docking grievance are not sufficient to support a charge alleging a unilateral change of terms and conditions of employment, but rather amount to a mere breach of contract. Even assuming arguendo that the College's actions herein would be determined to be a unilateral change of terms and conditions of employment, I decline to find a violation...Assuming the Association's contractual interpretation argument is correct, the College's action in delaying its written response to the Association by three days was but a technical violation of the grievance procedure." [Bergen Community College, H.E. No. 87-67, 13 NJPER 451 (¶18171 1987)]

Accordingly, the City's allegation of a unilateral change in the terms and conditions of the parties' grievance procedure must be dismissed because it is more an underlying breach of contract claim than an alleged failure to negotiate in good faith. State of New Jersey, Dept. of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

The City's allegation that the UAW's filing the charge in Docket No. CO-2005-338 over the same allegations as presented in its grievance violated the Act, lacks merit. Absent evidence of filing charges as harassment, the mere filing of charges is protected conduct and not, in and of itself, an indication of bad faith. See University of Medicine and Dentistry of New Jersey, P.E.R.C. No. 2006-51, 32 NJPER 12 (¶6 2006); Mercer County

Community College, P.E.R.C. No. 86-30, 11 NJPER 585, 586 (¶16204 1985), adopting H.E. No. 85-40, 11 NJPER 352, 361 (¶16127 1985).

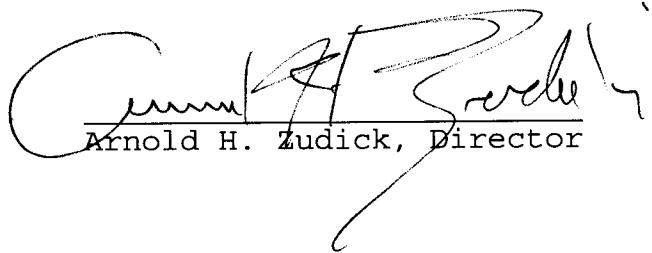
Finally, the City's brief requested that the UAW be ordered to reimburse the City for the portion of the arbitration cancellation fee which it incurred. The Commission may not supply such a remedy where the parties' agreement stipulates shared arbitration costs and is silent on cancellation fees.

Based upon the above facts and analysis, I find the Commission's complaint issuance standard has not been met and I decline to issue a complaint on the allegations of this charge.

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES


Arnold H. Zudick, Director

DATED: May 2, 2006
Trenton, New Jersey

This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3.

Any appeal is due by May 15, 2006.