

D.U.P. No. 2008-4

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

In the Matter of

TEAMSTERS LOCAL NO. 469,

Respondent,

-and-

Docket No. CI-2007-012

WILLIAM McDANIEL,

Charging Party,

BOROUGH OF NORTH CALDWELL,

Respondent,

-and-

Docket No. CI-2007-013

WILLIAM McDANIEL,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by William McDaniel against the Borough of North Caldwell and Teamsters Local No. 469. The Director found several of McDaniel's allegations against Local 469 and the Borough to be untimely and that no circumstances justified a tolling of the statutory period. The Director further found McDaniel's allegations that the Borough discriminated against him for filing various complaints with the Department of Labor, the Borough police department and the EEOC to be outside Commission jurisdiction. Finally, the Director found that McDaniel failed to set forth any facts showing that Local 469's investigation of McDaniel's grievance of his termination and its ultimate decision not to pursue it to arbitration was arbitrary, discriminatory or in bad faith, or that it discriminated against him on the basis of payment of union dues.

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Appearances:

For the Respondent, Teamsters Local 469
(Timothy R. Hott, P.C., attorney)

For the Respondent, Borough of North Caldwell
Piro, Zinna, Cifelli, Paris & Gentitempo, attorneys
(David M. Paris, of counsel)

For the Charging Party,
William M. McDaniel, pro se

DECISION

On October 2 and 16, 2006, William McDaniel (Charging Party or McDaniel) filed an unfair practice charge and amended charge (CI-2007-012) against Teamsters Local Union No. 469 (Local 469),

alleging violations of subsections 5.4b(1) and (3)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. On the same dates, McDaniel filed another unfair practice charge and amended charge (CI-2007-013) against the Borough of North Caldwell (Borough), alleging violations of subsections 5.4a(1) and (4)^{2/} of the Act.

In CI-2007-012, McDaniel alleges that Local 469 representative Michael Broderick gave false testimony against him in the summer of 2004; that Local 469 acted egregiously towards him by ignoring his March and August 2004, and April 2005 harassment complaints against the Borough; that Local 469 has shown bias towards him by not advancing his December 2005 grievance to arbitration and then waiting seven months to inform him of that decision, thereby delaying his filing of the charge;

^{1/} 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."

^{2/} 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; (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."

and that Local 469 has discriminated against him on the basis of payment of union dues.

In CI-2007-013, McDaniel alleges that the Borough discriminated against him for filing contractual grievances and various complaints with the Occupational Safety and Health Administration (OSHA); the Department of Labor; the Borough Police Department; and the Equal Employment Opportunity Commission (EEOC). He alleges that the Borough repeatedly harassed him after he won a March 2005 grievance arbitration award in which he was ordered reinstated to his employment position; and, that it unlawfully terminated him on December 5, 2005 by coercing a fellow employee to accuse him of refusing a work assignment.

Local 469 denies violating the Act, claiming it has always fairly represented McDaniel with due diligence. Local 469 asserts that it successfully processed his grievance contesting an earlier termination to arbitration, resulting in his reinstatement. It asserts that it also diligently processed McDaniel's grievance contesting the December 2005 (second) termination; carefully considered advancing the matter to arbitration, and determined not to proceed because it had little likelihood for success.

The Borough denies that it violated the Act, claiming that it had just cause to terminate McDaniel; that his amended charge

is untimely; and that his allegations, even if timely, fail to set forth an unfair practice under the Act.

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. I find that the complaint issuance standard has not been met. I find the following facts.

Local 469 is the majority representative of a unit of Borough roadman/maintenance employees and has signed a collective negotiations agreement with the Borough extending from January 1, 2001 through December 31, 2005. Section VII of the agreement sets forth a grievance procedure ending in binding arbitration.

McDaniel was hired by the Borough in August 2001 as a roadman/maintenance worker in its Department of Public Works (DPW) and has been a member of Local 469. In July, 2005, McDaniel filed a racial discrimination complaint with the New Jersey Division on Civil Rights (Division), and numerous complaints with OSHA. In December, 2005 and in January, 2006, respectively, McDaniel filed a complaint under Title VII of the Civil Rights Act and a complaint with the Division, alleging that he was wrongfully terminated, based upon racial and disability

discrimination, and in retaliation for his previous complaints with other agencies.

McDaniel's First Termination

In early August, 2004, McDaniel caused a disturbance while attending a DPW meeting with Borough Administrator John Kosko. On August 24, 2004, at the request of Borough police, McDaniel submitted to questioning at the police department building. He was accompanied by the DPW foreman. At the department, McDaniel became anxious and soon left the building. He returned to Borough Hall where he caused several disturbances and shouted profanities. He left the building and did not return to work.

Borough officials reviewed McDaniel's work record and decided that he should be discharged. Two days later, on August 26, 2004, McDaniel was terminated.

Local 469 filed a grievance on McDaniel's behalf and pursued it through the negotiated grievance/arbitration procedure. The grievance arbitrator essentially changed McDaniel's discharge to a major suspension. The arbitrator cautioned that if McDaniel "commits such an act of misconduct again in the future, it is doubtful that any arbitrator will deny the employer's decision to discharge. . . ." On April 18, 2005, McDaniel was reinstated to his former position.

McDaniel's Second Termination

On November 29, 2005, McDaniel was scheduled to work until 3:00 p.m. At about 3:15 p.m., the foreman observed that McDaniel was still working and asked him why he had not quit for the day. McDaniel replied he was working until 4:00 p.m. The foreman then asked him to assist another employee. McDaniel was angered and screamed at the foreman, telling him that other employees could provide the assistance. He also said that if he had to help, he would rather leave for the day; he then punched his time card and left. About 45 minutes later, McDaniel returned to the DPW and continued his tirade against the foreman.

The next day, November 30, McDaniel reported to work and was injured on the job. He returned to work on December 5, 2005, whereupon he was terminated. The termination letter advised of his "inappropriate behavior" on November 29; that the conduct was "unacceptable, particularly when viewed in the context of prior outbursts." The letter reiterated the grievance arbitrator's warning that:

. . . should any act of misconduct take place in the future it would be doubtful that any Arbitrator would question [North Caldwell's] decision to discharge you from employment.

The letter advised McDaniel that his "current negative behavior" warranted his immediate termination. Finally, the letter noted his arrest for "alleged illegal possession of a handgun and

hollow-point bullets" were of concern in light of his previous "aggressive and angered displays."

On December 5, 2005, Local 469 filed a grievance on McDaniel's behalf, challenging the most recent termination. On December 21, 2005, Local 469 representative Michael Broderick wrote to McDaniel, asking him to call the union attorney to schedule a meeting to review his case. On December 27, 2005, Broderick met with DPW employees to gather information on McDaniel's case, and, by letter of January 9, 2006, advised the Borough of Local 469's continuing investigation of the circumstances of McDaniel's discharge and the possibility of proceeding to arbitration. On March 1, 2006, Broderick again met with DPW employees and McDaniel to collect more written statements and, by letter of March 5, 2006, informed McDaniel that Local 469 was continuing to investigate and gather information on his grievance.

On April 5, 2006, Broderick wrote a letter to McDaniel requesting to discuss his case with him; McDaniel did not respond. On May 1, 2006, Broderick obtained additional written statements from DPW employees. On June 6, 2006, Broderick again met with DPW employees and McDaniel regarding his case. Between March 5 and June 6, 2006, Broderick called McDaniel at least four times and left messages; McDaniel called back only once.

Local 469 representatives conducted a July 5, 2006 grievance review meeting at which they reviewed McDaniel's case. They concluded that there was little likelihood of success on the grievance and decided not to advance it to arbitration. Broderick issued McDaniel a letter advising him of their decision.

ANALYSIS

CI-2007-012

N.J.S.A. 34:13A-5.4(c) provides 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 charge in which event the 6-month period shall be computed from the day he was no longer so prevented.

The standard for evaluating statute of limitations issues was set forth in Kaczmarek vs. N.J. Turnpike Auth., 77 N.J. 329 (1978). Our Supreme Court explained that the statute of limitations was intended to stimulate litigants to pursue their claims diligently and to prevent the litigation of stale claims, but did not want to apply the statute strictly without considering the circumstances of individual cases. Id. at 337-338. The Court noted that it would look to equitable considerations in deciding whether a charging party slept on its rights.

Allegations that Local 469 ignored McDaniel's March 2004 complaints, and that representative Broderick "gave false testimony against him" in June 2004, are beyond the statutory period. The charge and its amendment were filed in October 2006, about 16 months after those alleged unfair practices occurred. No circumstances justify a tolling of the Act's six-month statute of limitations and they are hereby dismissed. See e.g., Certified Shorthand Reporters, et al. D.U.P. No. 97-14, 22 NJPER 336 (¶27175 1996).

For argument sake, I will assume without deciding that McDaniel argues he relied upon Local 469's continuing investigation of the circumstances of his second termination to his detriment. Specifically, I will assume that McDaniel argues he filed a timely charge asserting a violation of the duty of fair representation when Local 469 refused to advance the second termination grievance (filed December 5, 2005) to arbitration.

Section 5.3 of the Act empowers an employee representative 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 set forth 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).

McDaniel has not set forth any allegations or facts showing Local 469's conduct was arbitrary, discriminatory or in bad faith. Belen. For several months after McDaniel's discharge, Local 469 investigated the circumstances of the termination, conducting several meetings with DPW employees and McDaniel and collecting numerous written statements from them. Local 469 representative Broderick contacted McDaniel several times by letter and by telephone to schedule meetings among themselves and Local 469's attorney to review the case. McDaniel largely did not respond to those efforts.

In any event, Local 469 pursued McDaniel's grievance through the grievance procedure and then reviewed it to determine whether to advance it to arbitration. It, declined, after concluding there would be little likelihood of success on the merits.

Majority representatives are not obligated to present every grievance submitted. Rather, a union is allowed a "wide range of reasonableness in servicing its members." Ford Motor Company v. Huffman, 345 U.S. 330, 337-338, 73 S.Ct. 681, 97 L.Ed. 1048

(1953). An employee organization must evaluate an employee's request for arbitration on the merits and decide, in good faith, whether it believes the employee's claim has merit. Ford Motor Company v. Huffman; D'Arrigo v. New Jersey State Bd. of Mediation, 119 N.J. 74 (1990); Carteret Ed. Ass'n. (Radwan), P.E.R.C. No. 97-146, 23 NJPER 390, 391 (¶28177 1997); Camden Cty. College (Porreca), P.E.R.C. No. 88-28, 13 NJPER 755 (¶18285 1987); Trenton Bd. of Ed. (Salter), P.E.R.C. No. 86-146, 12 NJPER 528 (¶17198 1986); Essex-Union Joint Meeting and Automatic Sales, Servicemen & Allied Workers, Local 575 and Brian McNamara, D.U.P. No. 91-26, 17 NJPER 242 (¶22108 1991).

No facts indicate that Local 469 acted arbitrarily or in bad faith when it determined not to advance McDaniel's second termination grievance to arbitration. I specifically note the "last chance" warning set forth in the grievance arbitration award ordering reinstatement following McDaniel's first termination. That Local 469 took months to inform McDaniel of its decision not to arbitrate the second termination is not an unfair practice. The delay in making that decision is attributable to its investigation of the case and nothing suggests that the lapsed period waived any of McDaniel's rights under the collective agreement. Additionally, Local 469's delay in deciding the arbitration issue did not prevent McDaniel from filing a charge after the second termination.

Finally, McDaniel has not asserted any facts supporting the claim that Local 469 discriminated against him "on the basis of payment of union dues." Similarly, the b(3) allegation that Local 469 refused to negotiate in good faith with the Borough lacks support. Accordingly, these claims are also dismissed.

CI-2007-013

McDaniel alleges that the Borough repeatedly harassed him after he was reinstated and then unlawfully terminated him in December, 2005. McDaniel's unfair practice charge and amendment were not filed until October 2 and 16, 2006 - more than 10 months after the last of all the alleged unlawful actions - well outside the 6-month limitations period. The filing of a grievance does not toll the statutory period. State of New Jersey (Stockton State College), P.E.R.C. No. 77-14, 2 NJPER 308 (1977). Local 469's alleged delay in informing him that it would not pursue his grievance to arbitration, does not toll the limitations period for the filing of an unfair practice charge against the Borough. McDaniel obviously knew of the second termination and could have filed a charge over that termination while Local 469 was deciding the arbitrability of the grievance filed over that termination. Consequently, these allegations are untimely and must be dismissed. See, e.g., Certified Shorthand Reporters, et al.

McDaniel also alleges that the Borough discriminated against him for filing various complaints with the Department of Labor,

the Borough Police Department and the EEOC. Such actions fall outside of our jurisdiction. See Oakcrest-Absegami Teachers' Assn. (Medica and Butler), D.U.P. No. 97-35, 23 NJPER 261 (¶28125 1997); State of New Jersey, D.U.P. No. 97-15, 22 NJPER 339 (¶27176 1996), Elizabeth Ed. Ass'n (Jefferson), D.U.P. No. 95-33, 21 NJPER 245 (¶26154 1995).

McDaniel also alleges that the Borough discriminated against him for filing complaints with OSHA in or around July, 2005. The Commission has held that an employee's filing of a PEOSHA complaint is protected activity remediable under our Act. West Deptford Tp. Bd. of Ed., P.E.R.C. No. 99-68, 25 NJPER 99 (¶30043 1999); N.J.S.A. 34:6A-25 et. seq. In West Deptford, the majority representative alleged that a supervisor told the Association representative that he had made a "big mistake" by complaining to PEOSHA about hazardous workplace conditions and that he would "get the union man who called PEOSHA." The Commission was constrained to dismiss the allegation because it fell outside our statute of limitations. Similarly, McDaniel's allegation does not fall within the statutory period. It also lacks any of the specificity of time, place and identity of individuals that were apparent in West Deptford. Accordingly, I must also dismiss this allegation.

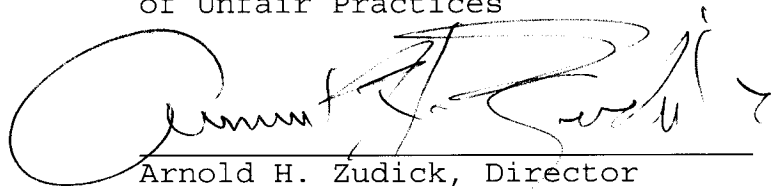
The Commission's complaint issuance standard has not been met concerning any of the allegations in both of McDaniel's

amended charges, CI-2007-012 and CI-2007-013. I decline to issue a complaint.

ORDER

The amended unfair practice charges, CI-2007-012 and CI-2007-013, are dismissed.

By Order of Director
of Unfair Practices



Arnold H. Zudick, Director

DATED: January 10, 2008
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 January 23, 2008.