

D.U.P. NO. 2014-16

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

In the Matter of

NEW JERSEY EDUCATION ASSOCIATION
UNISERV OFFICE 29,
Respondent,

-and-

Docket No. CI-2013-064

STEPHEN THOMAS ERNST,
Charging Party,

PASSAIC COUNTY COLLEGE,
Respondent,

-and-

Docket No. CI-2013-065

STEPHEN THOMAS ERNST,
Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses two unfair practice charges filed by Stephen Thomas Ernst, against the College, Ernst's employer, and the Passaic County Supportive Staff Association, Ernst's majority representative. The charge filed against the Association alleged that it failed to properly represent Ernst in connection with a wage grievance, in violation of 5.4b(1), (2), (3) and (5) of the Act. The charge filed against the College alleges that it ignored or refused to process the grievance, violating 5.4a(5) and (7) of the Act.

The Director concluded that the Association informed Ernst in April 2012 that it did not consider his allegations actionable, well over six months before Ernst filed his June 2013 charges, therefore, the charge against the Association was untimely. As to Ernst's charge against the College, the Director noted that individual employees normally do not have standing to assert an 5.4a(5) violation because the employer's duty to negotiate in good faith runs only to the majority representative, unless that employee has also asserted a viable claim of a breach of the duty of fair representation against the majority representative. Since the facts did not indicate that the Association breached its duty of fair representation, Ernst had no legal standing to allege a violation of section 5.4a(5) of the Act.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent,
Bucceri and Pincus, attorneys
(Sheldon Pincus, of counsel)

For the Respondent,
(Michael Silvestro, Vice President Human Resources)
(Passaic County College)

For the Charging Party,
(Stephen Thomas Ernst, pro se)

REFUSAL TO ISSUE COMPLAINT

On June 20, 2013, Stephen Thomas Ernst filed an unfair practice charge against the Passaic County Supportive Staff Association/NJEA (Association) (Dkt. No. CI-2013-064) and a charge against Passaic County Community College (College) (Dkt.

No. CI-2013-065). The charge filed against the Association alleges that Association representatives, including its president, "[n]eglected and/or refused to actively support and/or obtain legal representation of a wage grievance for underpayment of the union's wages for fiscal 2010-2013;" refused to acknowledge a violation of the contract; denied Ernst due process by "misdirection" and failed to represent him in the grievance in a timely manner, violating the New Jersey Employer-Employee Relations Act (Act), et seq., specifically, section 5.4b(1), (2), (3) and (5).^{1/} Ernst seeks legal representation and arbitration of the grievance.

The unfair practice charge filed against the College alleges that it ". . . ignored or refused to process a wage grievance for underpayment of base salary for rank [and] file union employees;" and that ". . . [m]anagement through misdirection has denied

^{1/} These provisions 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; (2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances; (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; (5) Violating any of the rules and regulations established by the commission."

(Ernst) due process by union contract," violating 5.4a(5) and (7)^{2/} of the Act.

On July 29, 2013, the Association filed a letter contending that the charge is untimely and that it fails to establish a breach of the duty of fair representation. The Association writes that it reviewed Ernst's claim, met with the College on his behalf and secured some monetary relief in December 2010. It also contends that it heard nothing further from Ernst after that sum was paid to him and assumed that his silence for more than one year indicated his satisfaction with the resolution. It also wrote that when Ernst raised the issue again in February 2012, it informed him in December 2012 that it could not discern any grievable issue.

On July 24, 2013, the College filed a letter denying that it refused to process Ernst's wage grievance; asserting that it met with him and/or his union representatives on multiple occasions to discuss and respond to his complaints; and, after investigation, concluded that Ernst has been paid appropriately for his work at the College.

2/ These provisions prohibit public employers, their representatives or agents from: "(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."

On April 2, 2014, I issued a letter to the parties advising of my tentative findings and conclusion that a complaint will not issue on the unfair practice charge. I also invited replies. The College did not file a reply.

On April 14, Ernst filed a reply. Ernst provided a time line of events from 2010 through 2013; reiterated that his charge concerns not receiving a negotiated increase in 2010-2011, in clear violation of contract; and asserted that he never abandoned his claim, but actively pursued the issue until May 2013, when the union first told him the matter was closed. Ernst also claims that local vice president Frank Amerasno was told by the local president and NJEA representatives not to talk to Ernst.

On April 21, after an extension of time, the Association filed a response. It contends that Ernst's reply should not be considered because it raises additional facts not set forth in the charge or at the conference and are not properly styled as an amendment and are contradictory; and that in sum, Ernst denies that NJEA consultant Bernson informed him the issue was resolved on December 17, 2012.

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 the following facts.

The Passaic County Community College Supportive Staff Association is the majority representative of all full-time support staff personnel at Passaic County Community College. The parties' most recent executed collective negotiations agreement extended from July 1, 2007 through June 30, 2010. A successor agreement extending from July 1, 2010 through June 30, 2013 was ratified by the Association and is pending execution by the College's Board of Trustees.

Article VII, (Salary) of the agreement provides: "The College has established the minimum and maximum salary of all supportive staff titles covered by the Agreement. Such minimum and maximum salary schedule is attached as Appendix B." Article XXXII, (Pay Procedure) provides: "Employees will be paid in accordance with procedures established by the Payroll Department of the College." The parties' negotiated grievance procedure permits a grievance to be filed by an employee or the Association, and terminates in advisory arbitration.

Ernst is employed by the College as a mechanical services technician. Ernst is a member of the negotiations unit represented by the Association and a member of the Association.

On June 29, 2010, Gilbert Rivera, the College's Vice President for Human Resources, emailed the college community advising of 27 pay periods during fiscal year 2010-2011, compared with the 26 pay periods during fiscal year 2009-2010. Rivera wrote: "Since your compensation will be spread over this increased number of pay periods, effective July 1 you will note a decrease in your biweekly pay of approximately 3%. However, your total compensation for the year will remain unchanged."

On an undisclosed date after the payroll change (probably sometime between September and December 2010), Ernst wrote a letter to Steven Rose, College President. In his letter, Ernst contested with specificity the accuracy of the College's projected percentage reduction in bi-weekly compensation, complaining that he and others were being "deprived of monies owed." Ernst requested that the matter be corrected by the next pay period.

Patricia Bernson is an NJEA consultant. Eva Ruiz is Association President. Maurice Feigenbaum is the College's Vice President for Finance. On or about December 6, 2010, in response to Ernst's letter, Bernson, Ruiz, and Feigenbaum met with Ernst to discuss the issue. College representative Feigenbaum contended that Ernst, paid an annual salary under the collectively negotiated agreement, received correctly calculated compensation. The College acknowledged however, a different

error in calculating salary for about 40 collective negotiations unit employees, including Ernst, who had either commenced employment after the start of the year, or left employment before the end of the year. As a result, the College paid Ernst and each of the affected unit members \$700 in back pay.

On an undisclosed date after the meeting, Ernst wrote to Feigenbaum, thanking him for the correction of payroll from his first few months of employment. He reiterated his previously-written complaint:

[T]he issue I brought forth was the 3.5% deduction on my bi-weekly (sic) paycheck due to there being 27 pay dates in the schools (sic) current fiscal period as opposed to the normal 26. The payroll department's simplistic approach to this extra payday is WRONG (emphasis supplied).

He requested an adjustment to "the employees' gross pay to reflect the monies deducted since July 1, 2010 and refund them as soon as possible." The College apparently did not take any action in response to Ernst's letter.

In December 2011 or January 2012, Ernst met with the College's human resources manager, NJEA consultant Ron Topham, and Amerasno to discuss the 27-pay period issue and other pay issues.

On February 21, 2012, Amerasno, Topham, and College Vice President for Human Resources, Michael Silvestro, met with Ernst and discussed the "27 pay-period" issue. Between February, 2012

and August, 2012, the Association purportedly reviewed various payroll records from both the College and Ernst in an effort to determine if the facts supported Ernst's contention that the College's percentage reduction of unit employee bi-weekly compensation in the 27 pay-period year was wrong. In April 2012, Amerasno told Ernst that Topham said the pay issues were probably not actionable, but that he was "still investigating." In December, 2012, Bernson informed Ernst that the Association could not find sufficient evidence to justify "resurrecting" the issue.

On an undisclosed date, Bernson asked NJEA Field Representative Chris Berzinski to review the issue. Berzinski asked Topham to again speak with Ernst and with the College administration to mutually determine the validity of Ernst's allegation. On April 9, 2013, Berzinski wrote to his NJEA supervisors that the Association could not determine any basis for a grievance based on Ernst's claim of a pay discrepancy and that the matter should be closed. In May 2013, Topham reiterated to Ernst that the matter was closed. No grievance was apparently filed by Ernst or by the Association on his behalf.

ANALYSIS

Our Act requires that an unfair practice charge be filed within six months of the date that the unfair practice occurred. Charges filed later than six months after the date of the unfair practice are untimely unless the charging party was prevented

from filing within the statutory period. N.J.S.A. 34:13A-5.4c. In determining whether a party was "prevented" from filing a charge within a statutory period, the Commission must conscientiously consider the circumstances of each case and assess the Legislature's objectives in prescribing the time limits to a particular claim. The word "prevent" ordinarily connotes factors beyond a complainant's control disabling him or her from filing a timely charge, but it includes all relevant considerations bearing upon the fairness of imposing the statute of limitations. Kaczmarek v. New Jersey Turnpike Auth., 77 N.J. 329 (1978) (case transferred to Commission where employee filed court action within six months of alleged unfair practice). Relevant considerations include whether a charging party sought timely relief in another forum; whether the respondent fraudulently concealed and misrepresented the facts establishing an unfair practice; when a charging party knew or should have known the basis for its claim; and how much time passed between the contested action and the charge. Wayne Tp. (Shenekji), P.E.R.C. No. 2012-68, 39 NJPER 37 (¶12 2012); Sussex Cty. Com. Col. (Stephenson), P.E.R.C. No. 2009-55, 35 NJPER 131 (¶46 2009); State of New Jersey, P.E.R.C. No. 2003-56, 29 NJPER 93 (¶26 2003).

In February 2012, when Ernst again raised the 27 pay-period issue with the Association, Amerasno and Topham met with him and

again investigated the issue until August, 2012. In April 2012, Amerasno informed Ernst that Topham had concluded that the pay issues were not actionable. In December, 2012, Bernson also informed Ernst that the Association could not find sufficient evidence to support resurrecting the issue. For this reason, I find that the six-month statutory period commenced in April 2012, well over six months before Ernst filed his June 2013 charges. N.J.A.C. 34:13A-5.4c.

Even if the charge were considered to be timely filed, I find that Ernst has not set forth any facts indicating that the Association's decision not to grieve was arbitrary, discriminatory or in bad faith. Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967); Saginario v. Attorney General, 87 N.J. 480 (1981). In December 2010, and then again from February, 2012 until August, 2012, the Association considered various facts and circumstances regarding Ernst's complaint about reduced compensation in the 27 payroll period year and discussed the issue with the College representatives. It first concluded in December 2010 that no grievance should be filed, and subsequently reiterated that decision to Ernst in April and December, 2012. No facts suggest that the Association changed its position on the validity of Ernst's claim after April 2012. Bernson nevertheless asked other NJEA field representatives, Chris Berzinski and Ron Topham, to continue reviewing the issue through August 2012 and

in early 2013. Topham again spoke with Ernst and College administration to try to mutually determine the validity of Ernst's allegation. In April 2013, Berzinski wrote to his NJEA supervisors that the Association could not determine any basis for a grievance based on Ernst's claim of a pay discrepancy, and Topham reiterated to Ernst that the matter was closed.

Although Ernst wrote about the matter comprehensively and discussed it with Association representatives thoroughly, he has alleged no facts showing that the Association's determination was arbitrary, discriminatory or in bad faith. The circumstances might suggest that the Association failed to appreciate the merits of Ernst's argument. In that case, the Association's decision not to process a grievance would be merely negligent and insufficient to warrant the issuance of a complaint. See OPEIU (Wasilewski), P.E.R.C. No. 98-131, 24 NJPER 256 (¶29123 1998).

In his charge against the College, Ernst alleges violations of section 5.4a(5) and (7). Individual employees normally do not have standing to assert an 5.4a(5) violation because the employer's duty to negotiate in good faith runs only to the majority representative. N.J. Turnpike Authority, P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980); Camden Cty. Highway Dept., D.U.P. No. 84-32, 10 NJPER 399 (¶15185 1984). An individual employee may file an unfair practice charge and independently pursue a claim of an 5.4a(5) violation only where that individual

has also asserted a viable claim of a breach of the duty of fair representation against the majority representative. Jersey City College, D.U.P. No. 97-18, 23 NJPER 1 (¶28001 1996); N.J. Turnpike, D.U.P. No. 80-10, 5 NJPER 518 (¶10268 1979). I have found that the facts do not indicate that the Association breached its duty of fair representation. Accordingly, I find that Ernst has no legal standing to allege a violation of section 5.4a(5) of the Act.^{3/}

Ernst alleges that NJEA and the College conspired to misinform him for two years in order to "run out the statute of limitations for a civil suit." No facts support this allegation, nor do any facts indicate that the College's conduct violates 5.4a(7) of the Act.

^{3/} Ernst cited two cases ostensibly supporting his charge against the College; Passaic Community College, P.E.R.C. No. 93-54, 19 NJPER 59 (¶24027 1992), recon. den. P.E.R.C. No. 93-67, 19 NJPER 147 (¶24072 1993) (Commission dismissed unfair practice charge challenging the College's conversion of payroll from a semi-monthly to a bi-weekly system as a dispute that was appropriate for the parties' grievance procedure); and Irvington Tp. and Irvington PBA Local 29, P.E.R.C. No. 2005-76, 31 NJPER 148 (¶66 2005) (Commission permitted arbitration of grievances challenging a change in pay periods for the 2004 calendar year; award requiring the employer to pay employees two additional weeks of salary confirmed in Irvington and Irvington PBA Local 29 SOA and Irvington Workers Association, 35 NJPER 124, N.J. App. Div. Dkt. No. A-0152-08T1 (October 21, 2009)). These cases hold that issues of the timing and calculation of paychecks are mandatorily negotiable and legally arbitrable. Only the majority representative however, has standing to raise these issues with the public employer.

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

Gayl R. Mazuco
Director of Unfair Practices

DATED: June 5, 2014
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 June 18, 2014.

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