

D.U.P. NO. 2018-6

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

In the Matter of

HOLMDEL TOWNSHIP BOARD OF
EDUCATION,

Respondent,

-and-

Docket No. CI-2017-032

NEW JERSEY EDUCATION
ASSOCIATION,

Respondent,

-and-

MICHAEL J. ZAMBUTO, SR.,

Charging Party.

SYNOPSIS

The Director of Unfair Practices (Director) dismisses an unfair practice charge filed by Michael J. Zambuto, Sr. against the New Jersey Education Association (NJEA) and the Holmdel Township Board of Education (Board). Zambuto, a custodian, alleged the NJEA breached its duty of fair representation by not pursuing arbitration of his termination and not responding promptly to emails about the status of this grievance. Zambuto also alleged the Board violated the Act by terminating his employment for failing to obtain a Black Seal license within his first year of employment and by denying his request for a union representative when two Board representatives met with him to inform him of his termination. The Director found that the Board has a managerial prerogative to require the black seal license as a condition of Zambuto's employment and had no obligation to arrange for a union representative to be present since the meeting was not investigatory. The Director also found the NJEA, in filing a grievance and advocating in person and in writing on Zambuto's behalf, did not violate the duty of fair representation. The Director also conclude that the NJEA provided Zambuto with written updates about the status of his grievance and had not obligation to arbitrate his grievance.

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Appearances:

For the Respondent,
Schenck, Price, Smith & King, LLP, attorneys
(Paul H. Green, of counsel)

For the Respondent,
Selikoff & Cohen, attorneys
(Keith Waldman, of counsel)

For the Charging Party,
(Michael J. Zambuto, Sr., Pro se)

REFUSAL TO ISSUE COMPLAINT

On May 23 and June 23, 2017, Michael Joseph Zambuto, Sr.
(Zambuto or Charging Party) filed an unfair practice charge and
amended charge against the New Jersey Education Association
(NJEA) and the Holmdel Township Board of Education (Board). The
charge, as amended, alleges that the NJEA violated section

5.4b(1), (2) and (3)^{1/} of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., by refusing to appeal his October 1, 2016 termination of employment to an "arbitrator or mediator" and by not responding to his emails about a grievance the NJEA filed on his behalf. Zambuto also alleges that the Board violated section 5.4a(1), (2), (3), (4) and (5)^{2/} of the Act by denying his request for a union representative when two Board representatives advised him of his

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."

2/ These provisions 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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (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. (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. (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."

termination and by terminating his employment for failing to obtain a Black Seal license within his first year of employment.

On or about December 19, 2017, the NJEA filed and served a position statement, contending that it is not Zambuto's majority representative, but is instead "...an affiliate organization acting in advisory capacity to the HTEA [Holmdel Township Education Association], which is the majority representative." Assuming that it was acting as Zambuto's majority representative, the NJEA argues that it advocated on Zambuto's behalf in a reasonable manner and did not breach its duty of fair representation.

By letter dated September 18, 2017, the Board notified Zambuto of its position on his amended charge. The Board argues that it had a managerial prerogative to set the requirement of a Black Seal Boiler Operator's License (BSBOL) for Zambuto's position as custodian and to require Zambuto to obtain the BSBOL during his first year of employment. The Board also contends it had a managerial right to terminate Zambuto's employment for failing to obtain the BSBOL.

The Commission has authority to issue a complaint where it appears that a charging party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4(c); 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; CWA Local 1040(Weisman), D.U.P. No. 2011-9, 38 NJPER 93 (¶20 2011), aff'd P.E.R.C. No. 2012-55, 38 NJPER 356 (¶120 2012).

I find the following facts:

Zambuto is a former Board custodian and member of the Holmdel Township Education Association's (Association) collective negotiations unit. The Association is the majority representative of a unit of certificated and non-certificated employees, including custodians and maintenance personnel. The Board and Association are parties to a collective negotiations agreement extending from July 1, 2016 through June 30, 2019.

In 1993 and 1995, the Board adopted and revised a job description for custodians. Under the section in the job description entitled "Qualifications," a custodian must obtain a BSBOL or "qualify for such within one year of employment and maintain this license thereafter on a yearly basis." To obtain the BSBOL, a custodian must pass a state-wide examination.

Zambuto failed the BSBOL examination and did not obtain the BSBOL within the first year of his employment for the Board. On October 1, 2016, the Board terminated his employment for failing to obtain the BSBOL. The NJEA filed a grievance challenging the termination.

On October 1, 2016, Board representatives Ernie Tricomi and Steve Rogers^{3/} informed Zambuto in person that his employment had been terminated and that he was to turn over his keys and identification card immediately and leave the premises. Zambuto asked Tricomi and Rogers for a "union delegate" to be present and alleges his "Weingarten rights" were violated when his request was denied.

On or about October 12, 2016, Ron Villano, an NJEA UniServ Field Representative^{4/} assisting the Association with contesting Zambuto's termination, sent a letter to Board Counsel on Zambuto's behalf. Villano wrote that Zambuto's difficulty in reading may have resulted in his failing the BSBOL exam. Villano requested the Board to secure a reading tutor to assist Zambuto in advance of his retaking the exam. He also asked that Zambuto be reinstated as a custodian until he passed the examination. The Board denied the requests.

Villano participated in a grievance meeting with a Board representative to advocate for Zambuto and his reinstatement. By letter dated February 24, 2017, Villano apprised Association President Christin Williamson and Association Vice President John

^{3/} It is unclear from the charge and the parties' submissions what job titles Tricomi and Rogers held. I infer from the charge that they were acting on behalf of the Board.

^{4/} In its position statement, the NJEA describes itself as an "affiliate organization acting in an advisory capacity to the HTEA [Association]."

Graham of the meeting and informed them that his office "...is still pursuing the Michael Zambuto matter" and that since his termination, Zambuto retook and passed the BSBOL exam. Zambuto alleges he received a letter from the Association on February 10, 2017, "stating that I [Zambuto] was in good standing with the school [Board] but that my position had been filled."

On March 30, 2017, Villano wrote to the Board's Human Resources Director, Mandi Peart, on behalf of Zambuto. Villano wrote that Zambuto had passed the BSBOL examination, obtained the BSBOL and argued "there was no just cause in the loss of his former title. . ." Villano sent copies of his letter to the Association's Acting President, the Association's Grievance Chair, the Board's Superintendent, and Board Counsel. The Board did not re-hire Zambuto.

Zambuto also alleges that on March 10, 20 and 28, 2017 and April 7, 14 and 27, 2017 he emailed the "Grievance Committee"^{5/} and Villano a request to pursue "arbitration or mediation" of his grievance and received no response. On May 16, 2017, Villano sent a letter to Zambuto, apprising him of the status of his grievance and summarizing his efforts to secure his reinstatement, together with his assessment that the Board "acted within its scope of authority" in choosing not to rehire him.

^{5/} I infer Zambuto is referring to the Association's Grievance Committee.

Villano also advised Zambuto that the Board, despite his best efforts, had already filled Zambuto's position and that "no opening was available."

ANALYSIS

Zambuto alleges the NJEA violated section 5.4b(1), (2) and (3) of the Act by refusing to arbitrate or appeal his termination and by not responding to emails he sent to the Association's Grievance Committee concerning his grievance. Zambuto also alleges the Board violated the Act by denying his request for a union representative during a meeting informing him of his termination and by terminating his employment for failing to obtain a BSBOL. For the reasons that follow, I dismiss Zambuto's unfair practice charge.

Claims Against Union

Section 5.4b(1) Allegation

The gravamen of Zambuto's charge against the NJEA is that it breached its duty of fair representation (DFR) to him by not appealing his termination or responding promptly to his several emails about his grievance. The NJEA contends that it advocated on behalf of Zambuto in a reasonable manner and was not obligated under the Act to appeal or pursue arbitration of his termination, especially given the NJEA's good faith belief that the termination was a legitimate exercise of a managerial prerogative. Zambuto has not alleged sufficient facts indicating

that the NJEA may have violated the duty of fair representation.^{6/}

A majority representative breaches its duty of fair representation only when its conduct towards a unit employee is arbitrary, discriminatory, or in bad faith. Vaca v. Sipes, 386 U.S. 171, 190 (1967). To establish a DFR claim, the claimant must "adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." Amalgamated Assn. V. Lockridge, 403 U.S. 274, 301 (1971). The Commission and New Jersey courts have adopted these standards. Saginario v. Attorney General, 87 N.J. 480 (1981); Lullo v. IAFF, 55 N.J. 409 (1970); Belen v. Woodbridge Tp. Bd Ed., 142 N.J. Super. 486, 491 (App. Div. 1976); Middlesex Cty. and NJCSA (Mackaronis), P.E.R.C. No. 81-62, 6 NJPER 555 (¶11282 1980), aff'd NJPER Supp. 2d 113 (¶94 App. Div. 1982); CWA Local 1081 (Toscano), D.U.P. No. 99-3, 24 NJPER 505 (¶29234 1998).

In handling grievances, unions must exercise reasonable care and diligence in investigating, processing and presenting grievances and act in good faith in determining a grievance's

^{6/} I reject the NJEA's position that the Act does not apply to its conduct because the Association is Zambuto's majority representative. The facts indicate the NJEA was acting in collaboration with the Association and I infer the NJEA was acting as an agent of the Association in representing Zambuto.

merits while granting unit employees equal access to the grievance procedure and arbitration for similar grievances of equal merit. Middlesex County; Council of N.J. State College Locals (Dusenberry), D.U.P. No. 2002-1, 27 NJPER 342 (¶32122 2001). Unions are entitled to a wide range of reasonableness in determining how to best service their members. Id., 27 NJPER 343; Ford Motor Co. v. Huffman, 345 U.S. 330, 337-338, 73 S.Ct. 681, 97 L.Ed. 1048 (1953). Unions are not obligated to pursue arbitration of every grievance. N.J. Tpk. Auth. (Beall), P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980), aff'd NJPER Supp.2d 101 (¶85 App. Div. 1981) (union's decision not to arbitrate was based on good faith belief that grievance lacked merit); Carteret Ed. Ass'n (Radwan), P.E.R.C. No. 97-146, 23 NJPER 390 (¶28177 1997); Camden Cty. College (Porreca), P.E.R.C. No. 88-28, 13 NJPER 755 (¶18285 1987); Fair Lawn Ed. Ass'n. (Solomons), P.E.R.C. No. 84-138, 10 NJPER 351 (¶15163 1984) (no violation where union in good faith refused to take grievance to arbitration since it lacked merit); N.J. Tpk. Employees Union, Local No. 194 (Kaczmarek), P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979) (no breach of the duty of fair representation where the union decided that it could not win in arbitration).

The facts indicate that the NJEA did not breach its DFR to Zambuto in its representation of him following his termination. Villano advocated on multiple occasions in writing and in person

on behalf of Zambuto to Board representatives in an effort to secure his reinstatement. Villano and the Association also kept Zambuto apprised of the status of his grievance and explained the basis for its decision not to pursue arbitration. The NJEA declined to arbitrate Zambuto's termination, acknowledging the Board's managerial prerogative to require a BSBOL for custodians. West Windsor Bd. of Ed., P.E.R.C. No. 2000-26, 25 NJPER 436 (¶30191 1999) (Commission held a school board had a managerial prerogative to require a custodian hold a black seal license). Once Zambuto's vacant position was filled, there was little the NJEA could do for him, as Villano wrote in his May 16th letter to Zambuto.^{7/}

Zambuto also alleges the NJEA violated sections 5.4b(2) and (3) of the Act. Section 5.4b(2) prohibits employee organizations and their representatives or agents from "interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances." N.J.S.A. 34:13A-5.4b(2). Section 5.4b(3) prohibits employees organizations and their representatives or

^{7/} Zambuto does not allege any facts indicating the Grievance Committee's lack of responsiveness to his emails in March and April 2017 was arbitrary, discriminatory, or in bad faith. Indeed, Villano responded on the Association's behalf to Zambuto's question about the status of his grievance in the May 16th letter.

agents from "refusing to negotiate in good faith with a public employer. . . ." N.J.S.A. 34:13A-5.4b(3).

Zambuto does not allege facts in support of his 5.4b(2) claim and lacks standing to pursue a 5.4b(3) claim. Council of N.J. State College Locals (Roman), D.U.P. No. 2015-10, 41 NJPER 497 (¶154 2015), aff'd P.E.R.C. No. 2015-76, 42 NJPER 33 (¶8 2015) (Commission affirms decision by Director that only employers have standing to pursue a 5.4b(3) claim). I dismiss both allegations.

Claims Against the Board

_____ Weingarten Claim

Zambuto alleges that his "Weingarten rights" were violated when the Board denied his request for a union representative during a meeting with Board representatives informing him of his termination. I disagree and dismiss the claim.

An employee has a right to request and receive a union representative's assistance during an investigatory interview that the employee reasonably believes may lead to discipline. NLRB v. Weingarten Inc., 420 U.S. 251, 88 LRRM 2689 (1975); In re University of Medicine and Dentistry of New Jersey, 144 N.J. 511 (1996). However, the "Weingarten right does not attach if a meeting is called solely to announce a disciplinary action." State of New Jersey, P.E.R.C. No. 2001-51, 27 NJPER 167, 174 (¶32056 2001). Rather, the interview or meeting must be

investigatory such that an employee could reasonably believe discipline may result. Id.

Zambuto has alleged facts indicating only that on October 1, 2016, Board representatives Tricomi and Rogers informed him of his termination, asked for his keys to the school building and his identification card while escorting him from the premises. No facts indicate that this meeting was anything but an announcement of the Board's decision to terminate his employment. Since the meeting was not investigatory in nature, Zambuto did not have a right under Weingarten to union representation.

Termination Claim

Zambuto also alleges the Board violated the Act by terminating his employment for failing to obtain the BSBOL within his first year of employment. I disagree and dismiss Zambuto's claim.

A school board has a managerial prerogative to require a custodian hold a black seal license as a condition of his employment. West Windsor Bd. of Ed., P.E.R.C. No. 2000-26, 25 NJPER 436 (¶30191 1999). Inherent in that right is the ability to terminate an employee who fails to acquire the requisite license within a certain time frame. Livingston Tp., P.E.R.C. No. 2016-26, 42 NJPER 228 (¶64 2015). The Board's termination of Zambuto for failing to obtain the BSBOL within his first year of employment was a legitimate exercise of a managerial prerogative.

Zambuto does not allege any facts in support of his 5.4(a)1 through (5) claims. Zambuto also lacks standing to pursue an (a)(5) claim. N.J. Transit, D.U.P. No. 2017-2, 43 NJPER 84 (¶24 2016).

I therefore dismiss these allegations.

ORDER

_____The unfair practice charge is dismissed.

/s/ Jonathan Roth
Jonathan Roth for
Daisy B. Barreto, Esq.
Acting Director of
Unfair Practices

DATED: January 22 2018
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 February 1, 2018.