

D.U.P. No. 86-4

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

In the Matter of

N.J. TRANSIT BUS OPERATIONS,
INC. and AMALGAMATED TRANSIT UNION,
LOCAL 822,

Respondents,

-and-

DOCKET NO. CI-85-73

QUEEN WALKER,

Charging Party.

SYNOPSIS

The Director of Unfair Practice Proceedings refuses to issue a complaint on an unfair practice charge on the basis that it was not filed within the requisite six month statutory limitation.

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Appearances:

For the Respondent Public Employer
Jeffrey Burstein, D.A.G.

For the Respondent Employee Organization
Anthony Cairo, Business Agent

For the Charging Party
Mitchell, Taylor & Young, attorneys
(Catherine P. Mitchell of counsel)

REFUSAL TO ISSUE COMPLAINT

On October 29, 1984, an Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") by Queen Walker (Charging Party) alleging that New Jersey Transit Bus Operations, Inc. ("N.J. Transit Bus") and the Amalgated Transit Union, Local #822 ("Local 822") were engaging in unfair practices

within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. ("Act"), specifically, §5.4(a)(1) and (3) and §(b)(1) and (3), respectively. ^{1/}

On December 3, 1984, the Charging Party was requested to amend the instant Unfair Practice Charge so as to specify dates of the acts alleged and, pursuant to Commission rules, provide a clear and concise statement of the facts constituting the alleged unfair practice. Walker was advised that pursuant to N.J.S.A. 34:13A-5.4(c), the Commission is precluded from issuing a complaint where an unfair practice charge has not been filed within six months of the occurrence of any unfair practice, unless the aggrieved person was prevented from filing the charge. I advised the Charging Party that it is incumbent upon her to allege the occurrence of an unfair practice within the six month limitation requirement.

^{1/} N.J.S.A. 34:13A-5.4(a) prohibits 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. (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." N.J.S.A. 34:13A-5.4(b) prohibits 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."

Subsequently, the Charging Party filed an amended Unfair Practice Charge dated November 26, 1984.

On January 22, 1985, a Commission staff agent conducted an administrative investigation into the matters and allegations contained in the Charge.

The investigation reveals the following:

1. N.J. Transit Bus Operations, Inc. is a public employer within the meaning of the Act, is subject to its provisions and is the employer of the Charging Party in this matter.

2. The Amalgamated Transit Union, Local #822 is an employee representative within the meaning of the Act and is subject to its provisions.

3. Queen Walker is public employee within the meaning of the Act and is subject to its provisions.

4. Walker states that on August 28, 1983, she requested a transfer from the Market Street Garage to the Oradell Garage. In accordance with the collective negotiations agreement between New Jersey Transit Bus and Local 822, the Charging Party executed a waiver of union seniority in order to effectuate her voluntary transfer to the Oradell Garage. The Charging Party contends that N.J. Transit Bus and Local 822 knew or had reason to know at the time of her transfer, that N.J. Transit Bus intended to implement a reorganization plan at the Oradell facility. Charging Party further

contends that she was not advised by either N J. Transit Bus or Local 822 that upon her transfer to the Oradell Garage, she would start at the entry wage level, a procedure allegedly in violation of the collective negotiations agreement. Additionally, Walker claims that neither N.J. Transit Bus nor Local 822 advised her that she would be subsequently transferred back to the Market Street facility upon implementation of the reorganization plan and that, upon such re-transfer, she would not be returned to the union seniority level which she had previously accrued while at Market Street.

5. On March 10, 1984, Walker was transferred back to the Market Street Garage. The Charging Party alleges that upon her transfer, her union seniority and pay rate were adjusted in a manner violative of the collective agreement.

6. Charging Party states that on March 21, 1984, she requested that Local 822 file a grievance on her behalf or allow her to file an individual grievance. Charging Party contends both requests were denied.

7. Walker contends that on March 26, 1984, she requested a Local 822 shop steward to file a grievance with regard to her claims of breach of the collective agreement but her request was denied. Additionally, on March 26, 1984, Charging Party alleges that she apprised N.J. Transit Bus of her contention that errors were made with respect to the calculation of her union seniority

and pay scale and requested that N.J. Transit Bus make appropriate adjustments. Charging Party indicates that N.J. Transit Bus denied her request.

8. On June 18, 1984, Charging Party spoke to a Local 822 shop steward and again requested that a grievance be filed on her behalf or that she be allowed to file an individual grievance. Charging Party claims that those requests were denied.

9. It is the position of Local 822 that it has committed no unfair practice. Local 822 asserts two arguments in its defense: first, it had no knowledge that N.J. Transit Bus intended to implement the reorganization which resulted in Walker's transfer from the Oradell Garage back to the Market Street Garage; and second, the manner in which the Charging Party's seniority and wage rate were calculated was in complete compliance with the collective negotiations agreement.

10. N.J. Transit Bus takes the position that its conduct in regard to the instant matter does not constitute a violation of the Act. N.J. Transit Bus points out that the allegations raised by the Charging Party referred to actions taken by N.J. Transit Bus in August and September of 1983 and in March 1984. N.J. Transit Bus contends that by calculating a six month period of limitations from March 1984, the instant charge must be found to be untimely filed. With regard to the §(a)(3) claim alleged by the Charging Party, N.J.

Transit Bus asserts that the Charging Party has proffered no factual allegations to support its contention that N.J. Transit Bus interfered with any protected rights guaranteed to the Charging Party by the Act.

N.J.S.A. 34:13A-5.4(c) sets forth in pertinent part that the Commission shall have the power to prevent anyone from engaging in any unfair practice and that it has the authority to issue a complaint stating the unfair practice charge. ^{2/} The Commission has established a standard upon which an unfair practice complaint may be issued. The standard provides that a complaint shall be issued if it appears that the allegations of the charging party, if true, may constitute an unfair practice within the meaning of the Act and that formal proceedings in respect thereto should be instituted in order to afford the parties an opportunity to litigate the legal and factual issues. ^{3/} The Commission's rules provide

^{2/} N.J.S.A. 34:13A-5.4(c) provides: "The commission shall have exclusive power as hereinafter provided to prevent anyone from engaging in any unfair practice ... Whenever it is charged that anyone has engaged in any such unfair practice, the commission, or any designated agent thereof, shall have authority to issue and cause to be served upon such party a complaint stating the specific unfair practice charged and including a notice of hearing containing the date and place of the hearing before the commission or any designated agent thereof...."

^{3/} N.J.A.C. 19:14-2.1

that I may decline to issue a complaint. ^{4/}

On June 26, 1985, I sent the Charging Party a letter (with copies to the other involved parties) in which I indicated that I was not inclined to issue a complaint in this matter and set forth the rationale for my determination. I invited the charging party to submit additional factual allegations which warrant the issuance of a complaint.

While neither of the Respondents submitted additional factual allegations, Charging Party Walker submitted a letter dated July 3, 1985 listing two exceptions to my June 26, 1985 letter. The exceptions pertain to the issues of timeliness and the allegation that another similarly situated employee suffered no loss of seniority under similar circumstances. These exceptions are addressed below.

It is incumbent upon the charging party to allege the occurrence of unfair practices within the six month limitation requirement and in the absence of such allegations, I must decline to issue a complaint. See, In re North Warren Board of Education, D.U.P. No. 78-7, 4 NJPER 55 (¶4026 1977). See also, In re New Jersey Turnpike Employees Union, Local 194, IFPTE, AFL-CIO, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979).

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

Ms. Walker's charge here is outside the six month statutory limitation. See, In re State of New Jersey, P.E.R.C. No. 77-14, 2 NJPER 308, 309 (1976).

In In re Camden Cty. Voc. School, H.E. 82-8, 7 NJPER 566 (¶ 12252 1981) aff'd. P.E.R.C. No. 83-5, 8 NJPER 432 (¶ 13201 1982), aff'd on motion for reconsideration, P.E.R.C. No. 83-28, 8 NJPER 558 (¶ 13256 1982), a charge was brought against a union for its alleged failure to process a grievance. In granting the union's motion for summary judgment dismissing the unfair practice charge, it was held that the operative date for the purpose of determining the timeliness of the unfair practice charge was the point in time when the charging party was first told by the employee representative that it had not filed her grievance.

In the instant matter, on March 21, March 26 and June 18, 1984, Walker asked Local 822 to file a grievance on her behalf regarding her contention that her wages and union seniority were improperly calculated; each time, Local 822 denied Walker's request. The operative date for the purpose of determining the timeliness of the Charge begins to run from the first time Local 822 advised Walker that it would not file a grievance on her behalf. Charging Party's subsequent requests to Local 822 to file a grievance on her behalf -- and Local 822's repeated refusals -- do not constitute new violations, but merely are restatements of 822's

earlier decision. See, North Plainfield Ed. Assn. v. Bd. of Ed. of the Borough of North Plainfield, 96 N.J. 587 (1984). Thus, the operative date for a determination of timeliness in this case (concerning the (b)(1) allegations) is March 21, 1984.^{5/} Further, there is no indication in the charge that Charging Party was prevented from filing her charge before she did.^{6/}

In the exceptions, Walker asserts that her charge was filed on or about May 7, 1984 and, consequently, should not be considered time barred. The facts relating to Charging Party's claim are as follows. On May 10, 1984, Charging Party filed an Unfair Practice Charge (Docket No. CI-84-81) which raised the identical issues alleged in the instant matter. In correspondence

^{5/} Even assuming arguendo that March 26, 1984 was the proper operative date, Charging Party's filing herein would still be well beyond the statutory six month period of limitations. It is only if the June 8, 1984 date is taken as the operative date concerning when the six-month statute of limitations began to run that Charging Party's (b)(1) allegations could be considered timely. For the reasons stated in the text, supra, I decline to so hold.

^{6/} On March 26, 1984, the Charging Party requested N.J. Transit Bus to adjust her union seniority and pay scale. While the facts on this point are somewhat unclear, it appears that the Charging Party had the opportunity to at least present her complaint to N.J. Transit Bus, notwithstanding Local 822's alleged refusal to process a formal grievance. Thus, Charging Party was not denied her right to have her grievances made known to her public employer. N.J. Constitution (1947), Article I, para. 19.

dated May 31, 1984, we advised the Charging Party that her charge, as filed, was deficient in a number of areas, and set forth instructions for the purpose of assisting the Charging Party in amending and perfecting her charge. On June 8, 1984, Charging Party filed an Amended Unfair Practice Charge. On July 24, 1984, we advised the Charging Party of continued defects in her charge and requested the Charging Party to supply facts which would substantiate the claim that the majority representative breached its duty of fair representation to the Charging Party. By letter dated August 28, 1984, a Commission staff agent advised the Charging Party that, to date, the Commission had received neither an amended unfair practice charge nor any other submission from her pursuant to the terms of the July 24, 1984 letter. The staff agent advised Walker that if no response was received by the established return date (September 4, 1984) it would be assumed that the Charging Party had no further interest in pursuing the matter, and that such failure to respond would be deemed a withdrawal of the charge pursuant to N.J.A.C. 19:14-1.5(d). The Charging Party failed to respond to either the July 24, 1984 or the August 28, 1984 letter, consequently, on September 27, 1984, the Administrator, pursuant to N.J.A.C. 19:14-1.5(d), properly deemed the charge (Docket No. CI-84-81) withdrawn and closed the case.

Thus, two things are clear from the facts set forth above. First, the Charging Party was afforded more than ample

opportunity to seek counsel and/or perfect her charge docketed as CI-84-81. Second, the charge docketed as CI-84-81 was formally deemed withdrawn and closed in accordance with the Commission's rules. The subsequent charge docketed as CI-85-73 constitutes the filing of a new charge for purposes of determining timeliness.

N.J.S.A. 34:13A-5.3 requires a majority representative to represent the interests of all unit employees without discrimination and without regard to employee organization membership. In In re Jersey City Bd. of Ed., D.U.P. NO. 81-13, 7 NJPER 180 (¶12079 1981), the Director stated:

While a majority representative has a statutory obligation to initially present grievances to the public employer on behalf of a unit member, there is no statutory obligation that the majority representative process grievances through various levels. However, under section 5.3, the majority representative has a statutory obligation to fairly represent the interests of all employees within its unit and a violation of such a duty is cognizable under N.J.S.A. 13A-5.4(b)(1). In the context of grievance proceedings, a union violates the duty of fair representation only where it has acted arbitrarily, discriminatorily or in bad faith in failing to further pursue the grievance. In re Jersey City Bd. of Ed., supra.

In order to establish a §(b)(1) claim, the Charging Party must allege, on a timely basis, facts which would constitute a violation of this section of the Act. See, In re New Jersey

Turnpike Auth., supra. Such timely factual allegations are not present herein.

Walker also contends that Local 822 violated §5.4(b)(3). It is well established that an individual employee may not normally assert a violation of §5.4(b)(3) of the Act. Ordinarily, only a public employer may file and process a §5.4(b)(3) charge, since the duty owed by a majority representative to negotiate in good faith accrues only to the public employer, not to individual employees. In re Trenton Bd. of Ed., D.U.P. No. 81-6, 7 NJPER 406 (¶12179 1981). See also, In re Council of N.J. State College Locals, D.U.P. No. 81-8, 6 NJPER 531 (¶11271 1980).

With regard to Walker's allegations that N.J. Transit Bus Operators, Inc. violated §§5.4(a)(3) and derivatively (a)(1), it appears that these allegations are also untimely. The alleged unlawful conduct occurred well outside the six month limitation period (the latest incident of such conduct is alleged to have occurred in March 1984).

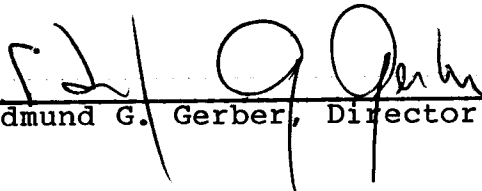
Further, Charging Party has not alleged any facts which would indicate that the claimed changes in her wage or union seniority calculations constituted conduct undertaken by New Jersey Transit Bus in retaliation for her exercise of rights protected under the Act. Therefore, there is no factual basis to support Charging Party's allegation that N.J. Transit Bus' conduct violates §§5.4(a)(3) and derivatively (a)(1).

In the exceptions, Charging Party asserts that our June 26, 1985 letter failed to address or dispose of the Charging Party's allegations that another similarly situated employee suffered no loss of seniority under similar circumstances to that of Charging Party. Charging Party relies upon the January 25, 1985 letter from N.J. Transit Bus' attorney as substantiation for its claim of disparate treatment. However this allegation, even if true, does not cure the timeliness defect.

Moreover, the facts in the instant matter do not support Charging Party's claim. While in the January 25, 1985 letter from Deputy Attorney General Burstein (Attorney for N.J. Transit Bus), it was conceded that a similarly situated employee suffered no loss of seniority under similar circumstances to that of Charging Party, it was also pointed out that the treatment of such employee was an error which was corrected immediately upon discovery. The employee's union seniority was adjusted downward.

Accordingly, for all of the reasons set forth above, I have determined that the Commission's complaint issuance standard has not been met and I decline to issue a complaint in this matter.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICE PROCEEDINGS


Edmund G. Gerber, Director

DATED: August 8, 1985
Trenton, New Jersey