D.U.P. NO. 2001-2

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

In the Matter of

BOROUGH OF LEONIA,

Respondent,

-and- Docket No. CI-99-38

VICKI RESTEL, et al.,

Charging Parties.

SYNOPSIS

The Director of Unfair Practices dismisses unfair practice charges alleging that the Employer failed to pay certain dispatchers retroactive overtime in accordance with the collective negotiations agreement between the Employer and Charging Parties' majority representative. The Director found that only the majority representative, not individual employees, has standing to raise allegations concerning the Employer's negotiations obligation. Moreover, the allegation amounts to a purely contractual dispute. The Director issues a Complaint issued on the remaining allegation that the Employer violated 5.4a(1) by disparaging Charging Parties' pursuit of the charge.

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Appearances:

For the Charging Parties
Gittleman, Muhlstock, Chewcaskie & Kim, attorneys
(Steven Muhlstock, of counsel)

For the Respondent
Cuccio & Cuccio, attorneys
(Emil S. Cuccio, of counsel)

DECISION

On December 2, 1998 and February 16, 1999, Vicki Restel, Stacey Schmidt, Debra Bonkowski, and Kenneth Eisen (Charging Parties) filed an unfair practice charge and an amendment against the Borough of Leonia (Borough). The charges allege that the Borough violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), provisions 5.4a(1), (3) and (5)[1/] by failing to pay

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1/ 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. (3) Discriminating

Footnote Continued on Next Page

retroactive overtime in accordance with the collective negotiations agreement between the Borough and Local 29, and by retaliating against and threatening the Charging Parties for the filing of this unfair practice charge through certain comments made by the Borough administrator.

The Borough denies it engaged in unfair practices. It asserts that this matter is improperly before the Commission as Local 29 is not a party to the charge. The Borough disputes that Charging Parties are entitled to overtime under the Local 29 contract. The Borough further maintains that the Borough administrator's alleged comments were taken out of context and did not violate 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. In correspondence dated June 15, 2000, I advised the parties that I was not inclined to issue a Complaint on the allegation concerning the

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1/ Footnote Continued From Previous Page

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. (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."

payment of retroactive overtime under the collective negotiations agreement, and I set forth the basis for reaching that conclusion. I provided the parties with an opportunity to submit additional facts or argument by June 26, 2000. No responses were received. Based upon the following, I find that the Complaint issuance standard has not been met with regard to the overtime payment allegation.

Charging Parties Vicki Restel, Stacey Schmidt, Debra Bonkowski, and Kenneth Eisen are employed by the Borough of Leonia as communications officers (dispatchers). On August 31, 1998, Local 29 signed a successor collective agreement with the Borough which covered the Borough's employees, including dispatchers, for the period January 1, 1996 to December 31, 1999. That agreement provided in pertinent part, as follows:

> Article VIII - Hours of Work, Overtime and Standby.
>
> C. Time and one-half premium pay shall be paid for all hours in excess of eight (8) hours worked in one day. Time and one-half premium pay shall be paid for any work performed on Saturday. Employees who work on Sunday shall receive double time premium for these hours. Any employee required to work on a holiday shall receive his pay for that day plus additional time and one half for all hours worked.

Local 29's contract includes a grievance procedure consisting of three steps, and terminating in non-binding mediation. Charging Parties orally initiated a grievance at step one of the grievance procedure, requesting overtime pay, retroactive to January 1, 1996, for working twelve hour shifts, Saturdays, and Sundays. On September 16, 1998, Charging Parties met with Police

Chief Robert Vodde and Lieutenant Greiner. Chief Vodde denied the grievance, stating that the communications officers would have to "negotiate" with the Borough. By memorandum dated September 29, 1998, charging parties moved the grievance to step two before Borough Administrator Victor Lapychak. By memorandum dated November 2, 1998, Lapychak denied the grievance, saying that retroactive overtime was not contemplated by the collective negotiations agreement.

On December 2, 1998, Charging Parties filed this unfair practice charge. On February 16, 1999, Charging Parties filed an amendment to the charge, alleging that, during a January 4, 1999 meeting with Local 29 representatives, the Borough administrator threatened charging parties and retaliated against them for having filed their charge.

The charge alleges that the Borough failed to follow contractual provisions concerning the payment of overtime in violation of 5.4a(5) of the Act. The Borough argues that the charge should be dismissed because it was not filed by Local 29. Charging Parties respond that Local 29 is not an indispensable party because an unfair practice proceeding may be prosecuted by the party filing the charge or by the employees' authorized representative pursuant to N.J.A.C. 19:14-1.1. Charging Parties contend that they were contractually entitled to overtime payments retroactive to January 1996; that they average over a 40-hour workweek; that the overtime claimed was authorized by the supervisory personnel who prepared the

work schedule; and that the overtime provisions of the agreement apply because the Borough schedules them an additional four hours each work day. Charging Parties assert that this is not a matter of contract interpretation, but the Borough's simple refusal to honor the overtime provisions of the agreement.

I find that the Complaint issuance standard has not been met regarding the claim that the Borough failed to pay retroactive overtime in accordance with the collective agreement. Charging Parties lack standing to bring this claim. N.J.S.A. 34:13A-5.3 requires an employer to negotiate exclusively with the majority representative. Section 5.4a(5) makes it an unfair practice for an employer to refuse to negotiate in good faith. Because the employer's duty to negotiate in good faith runs only to the majority representative, only the majority representative, not individual employees, has standing to assert 5.4a(5) violations. N.J. Turnpike Auth. (Beall), P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980), aff'd NJPER Supp.2d 101 (¶85 App. Div. 1981); Essex County College, P.E.R.C. No. 87-81, 13 NJPER 75 (¶18034 1986).

While N.J.A.C. 19:14-1.1 permits unfair practice charges to be filed by "any public employer, public employee, public employee organization, or their representatives," this Rule provision must be read together with the rights guaranteed to the respective parties by the Act itself. As the Commission observed in Beall,

> ...A charge must allege a violation of a right of the charging party protected by the statute. Since the right to negotiate is that of the majority representative, not an individual

> employee or even a group of individual employees, only the majority representative may charge the employer with a violation of the duty to negotiate. [6 NJPER at 561, n. 7.]

Only the majority representative, which negotiates and administers the contract, has standing to allege that the employer has committed an unfair practice by avoiding its contractual obligations.2/ Based upon the foregoing, I find that charging parties have no standing to pursue the allegation that the Borough violated subsection 5.4a(5) by failing to pay retroactive overtime under the agreement.

In State of New Jersey (Department of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419, 421 (¶15191 1984), the Commission held that:

> a mere breach of contract claim does not state a cause of action under subsection 5.4(a)(5) which may be litigated through unfair practice proceedings and instead parties must attempt to resolve such contract disputes through their negotiated grievance procedures.

It appears that, at best, the Borough and the employees disagree over the correct interpretation of the contract provisions in question. The Commission will not substitute its unfair practice jurisdiction for the parties' grievance procedure to resolve contract disputes. It appears that the underlying facts of the

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2/ Individual employees may have rights as third party beneficiaries of the collective agreement to address such claims before the courts. City of Newark (Montgomery), P.E.R.C. No. 2000-57, 26 NJPER 91 (¶31036 2000).

charge merely involve a dispute over the terms of the collective agreement and, therefore, must be dismissed. Human Services.[3/]

Charging Parties have also alleged that the Borough violated 5.4a(1) by denying their overtime request. A public employer independently violates a(1) of the Act if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. Jackson Tp., P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988); UMDNJ -- Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); N.J. Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). The Charging Parties have not asserted conduct in the unfair practice charge filed on December 2, 1998 which would tend to interfere with their statutory rights. Consequently, I dismiss that allegation as well. Therefore, I do not believe that the Commission's complaint issuance standard has been met and I will not issue a complaint on the claim alleged in the charge concerning the payment of overtime.[4/]

The amended unfair practice charge contains no allegation that any actual adverse personnel action was taken against the Charging Parties as a result of protected activity. Where no adverse personnel action is alleged, there can be no finding that

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3/ We make no finding concerning whether the overtime clause entitles the dispatchers to overtime compensation.

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

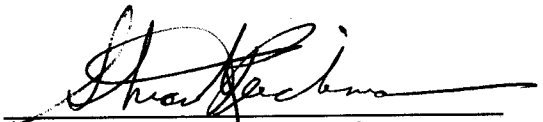
5.4a(3) was violated. See In re Bridgewater Tp., 95 N.J. 234, 244-246 (1984); Mine Hill Tp. Therefore, I dismiss the 5.4a(3) allegation set forth in the February 16, 1999 amendment.

However, it appears that the 5.4a(1) allegation contained in the amendment -- the Borough administrator's comments to Local 29's representatives about the Charging Parties' pursuit of this charge -- meets the complaint issuance standard and may constitute an unfair practice. Therefore, I will issue a Complaint and Notice of Hearing on that allegation.

ORDER

The unfair practice charge allegation concerning the Borough's failure to pay overtime under the collective negotiations agreement in violation of 5.4a(1), (3) and (5) of the Act is dismissed. FN@N.J.A.C. 19:14-2.3.@ A Complaint will issue forthwith on the remaining alleged violation of 5.4a(1) as set forth in the February 16, 1999 amendment.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Stuart Reichman, Director

DATED: July 11, 2000
Trenton, New Jersey