

D.U.P. NO. 2023-2

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

In the Matter of

UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA,

Respondent,

-and-

Docket No. CI-2022-018

CHENICQUA SIMS,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by Chenicqua Sims ("Sims") against the United Brotherhood of Carpenters and Joiners of America, Local No. 253 ("Local 253" or "Union"). The Charge alleges that Local 253 violated section 5.4b(1) through (5) of the New Jersey Employer-Employee Relations Act ("Act") by failing or refusing to present evidence of alleged harassment at a March 9, 2022 arbitration hearing contesting Sims' termination from her position as a carpenter at the Housing Authority for the City of Newark ("NHA"). Local 253 argues that the charge was filed outside of the applicable six-month statute of limitations N.J.S.A. 34:13-5.4c), and that Sims failed to allege facts showing that the Union breached its duty of fair representation or otherwise violated any section of the Act.

The Director agrees with Local 253 and finds that the charge is time barred, as Sims filed the charge more than six months after she knew, or should have known, that the Union would not present harassment evidence at the arbitration hearing contesting her termination. The Director also finds that Sims failed to establish that the Union breached its duty of fair representation, as no plead facts suggest the Union's conduct was arbitrary, discriminatory, in bad faith, or outside normal discretionary parameters afforded to unions in representing members. The Director also dismisses section 5.4b(2), (4), and (5) allegations, finding that Sims' failed to allege facts sufficient to support the finding of such violations. The Director also dismissed the 5.4b(3) violation, finding that Sims did not have standing to raise it in the charge.

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Appearances:

For the Respondent,
Kroll, Heineman, Ptasiwicz & Parsons, attorneys
(Raymond Heineman, of counsel)

For the Charging Party,
(Chenicqua Sims, pro se)

REFUSAL TO ISSUE COMPLAINT

On February 16, 2022 and March 24, 2022, Chenicqua Sims ("Sims") filed an unfair practice charge and amended charge against her former majority representative, United Brotherhood of Carpenters and Joiners of America, Local No. 253 ("Local 253" or "Union"). The charge, as amended, alleges that Local 253 failed or refused to present evidence of alleged sexual harassment of Sims at a March 9, 2022 arbitration hearing contesting her termination from her position as a carpenter at the Housing Authority for the City of Newark ("Newark Housing Authority" or "NHA"). Sims alleges that Local 253's actions violate section

5.4b(1) through (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. ("Act").

On March 31, 2022, Local 253 filed correspondence asserting that Sims' charge is time-barred by N.J.S.A. 34:13-5.4c.^{2/} In support of this position, Local 253 submitted email exchanges between Counsel for the Union and Counsel for Sims^{3/} suggesting that Sims was aware (or should have been aware) since June 22, 2020 that the Union would not present evidence regarding sexual harassment at the arbitration hearing. Therefore, Local 253 argues, the unfair practice charge (filed February 16, 2022) was outside of the applicable six month period specified in the Act.

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- 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 representatives for the purpose of negotiations or adjustment of grievances (3) Refusing to negotiate in good faith with a public employers, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in the unit. (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (5) Violating any of the rules and regulations established by the commission."
- 2/ This Section provides, in part, that "no complaint shall issue based upon any unfair practice occurring more than six months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge. . . ."
- 3/ Daniel Kirschbaum of the Derek Smith Law Group, PLLC, represented Sims in connection with her termination and New Jersey Law Against Discrimination ("NJLAD") complaint. However, Sims proceeds without representation in the instant unfair practice charge.

Local 253 also argues that it did not violate the Act by declining to present evidence regarding Sims' claims of sexual harassment at arbitration because the Union has the exclusive right to decide whether to arbitrate under the Collective Negotiations Agreement ("CNA") and applicable law. The Union asserts that it conducted an investigation into the alleged harassment and determined that it would be unlikely to prevail on those allegations before an Arbitrator. In these circumstances, the Union asserts, the decision to proceed to arbitrate Sims' termination without presenting evidence of harassment does not violate the Act.

On April 22, 2022, Sims produced a copy of an email addressed to her from her privately hired attorney dated January 13, 2022 advising that he spoke with Local 253's Counsel, who represented to him that the Union would ask the Arbitrator to "expand the arbitration" to include certain evidence, if Sims' NJLAD claim was dismissed. On May 2, 2022, Counsel for the Union filed a letter denying that he had such a conversation with Counsel for Sims.

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:

Local 253 is an employee organization representing a unit of employees of the NHA. NHA and the Essex County Building and Construction Trades Council, an affiliate of Local 253, are parties to a CNA which covered the term of April 1, 2004 through March 31, 2007. The grievance and arbitration procedure and "just cause" provisions in the 2004-07 CNA are unchanged and are applied in appropriate circumstances.

Sims was employed as a carpenter at NHA and was represented by Local 253 until her termination on January 6, 2020.

Article XIII of the CNA provides a multi-step grievance procedure ending in binding arbitration. The CNA defines a grievance as "a dispute arising from the interpretation, application or alleged violations of this Agreement and may be raised by the Union in its own behalf where applicable or on behalf of an employee" Step three of the Grievance Procedure provides, in part, "[i]f the grievance is not resolved at Step Two, the Union representative may submit the grievance to arbitration"

On or about May 24, 2019, Sims filed a complaint with the NHA Human Resources Department alleging that she was sexually harassed by a supervisor. After an NHA investigation and

hearing, Sims and her supervisor were both issued five day suspensions. No grievances were filed contesting either five day suspension.

In July, 2019, Sims underwent surgery and was away from work for a period of recuperation. In November, 2019, Sims filed a grievance pursuant to the CNA regarding the five day suspension and sexual harassment by her supervisor.

On or about January 6, 2020, Sims sought to return to work on a light duty assignment. NHA determined that no light duty assignment was available and it terminated her employment. Sims subsequently obtained a doctor's note authorizing her return to full duty, but NHA did not offer reinstatement. Following the termination, the Union amended the pending grievance to include Sims' termination. Sims retained private counsel and filed a NJLAD complaint against NHA in New Jersey Superior Court, Essex County.

On June 22, 2020, Counsel for Local 253 advised Counsel for Sims that the Union had conducted an investigation into the alleged sexual harassment following an April 8, 2020 grievance hearing. Local 253's investigation included interviews of eight witnesses identified by Sims; none of the interviewed witnesses provided corroborative evidence of harassment. The Union determined that, ". . . [it] could not prevail before an arbitrator on the harassment grievance, in the absence of

corroboration by Ms. Sims co-workers" and that it would not be "proceeding to arbitration on Ms. Sims' harassment grievance."

On December 3, 2020, the Union sent a letter to the Arbitrator assigned to hear the termination grievance, with a copy to Counsel for Sims. The Union wrote that the scheduled arbitration hearing "concerns only the termination of the Grievant, Chenicqua Sims, following her physician's clearance for her to return to full duty on or about January 22, 2020 following knee surgery in July of 2019." Local 253 also wrote that, "Grievant has retained individual counsel to pursue a claim for sexual harassment under the NJLAD in Essex County Superior Court. However, the Union determined not to submit the discrimination claim to arbitration."

The arbitration hearing regarding Sims' termination was held on March 9, 2022. As of the date of the filing of the amended charge in this matter, a decision on the termination grievance has not issued.

ANALYSIS

N.J.S.A. 34:13A-5.4c establishes a six-month statute of limitations period for the filing of unfair practice charges.

The statute provides in pertinent part:

. . . 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 a charge in which

event the 6-month period shall be computed from the day he was no longer so provided.

The Commission has held that “[t]he Act does not rigidly bar relief on all causes of action arising more than six months before a charge was filed” and “[i]n determining whether a party was ‘prevented’ from filing an earlier charge, the Commission must consider the circumstances of each case and assess the Legislature’s objectives in prescribing the time limits as to a particular claim.” State of New Jersey (Juvenile Justice) and Judy Thorpe, P.E.R.C. No. 2014-71, 40 NJPER 512 (¶164 2014), aff’d 43 NJPER 353 (¶100 App. Div. 2017), certif. den. 231 N.J. 211 (2017). “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 long a time has passed between the contested action and the charge.” Id. (citing Kaczmarek v. New Jersey Turnpike Auth., 77 N.J. 329 (1978)); accord West Orange Bd. of Ed., H.E. No. 2018-11, 44 NJPER 426 (¶120 2018), adopted P.E.R.C. No. 2019-10, 45 NJPER 144 (¶37 2018).

Sims’ claims against the Union are untimely because they were not filed within the six month statute of limitations. N.J.S.A. 34:13A-5.4c. Sims has failed to provide any reason(s) why she was “prevented” from filing a timely unfair practice

charge against the Union. Since Sims' charge was initially filed on February 16, 2022, three weeks before the March 9, 2022 arbitration, Sims does not and cannot allege, for example, that the failure to present harassment evidence was discovered after or when the arbitration hearing was held. The facts show that on June 22, 2020, the Union notified Counsel for Sims that it would not proceed to arbitration on the claims of sexual harassment, and it again notified her Counsel on December 3, 2020. No facts suggest that Sims or her counsel, on her behalf, communicated a protest of or disagreement with Local 253's advice to Local 253 during the next thirteen months. The charge, therefore, is untimely and must be dismissed.

Sims produced a January 13, 2022 email from her own attorney to her advising that the Union would expand the arbitration to include evidence of harassment, in the event that the pending NJLAD claim was dismissed. This hearsay email does not disavow the Union's expressed determination to Sims on June 22, 2020 and December 3, 2020 that it would proceed to arbitration only on the termination and not the sexual harassment allegations.

Accordingly, I find that Sims knew, or should have known, that the Union would not present evidence of alleged harassment as early as June 22, 2020 and not later than December 3, 2020.

Even if Sims' claims regarding Local 253 are considered timely, her unfair practice charge would be dismissed because she

has failed to allege facts showing that the Union breached its duty of fair representation or otherwise committed a violation of the Act.

A majority representative has a duty to represent all unit employees fairly and without discrimination on the basis of union membership. N.J.S.A. 34:13A-5.7. A majority representative breaches its duty of fair representation "only when [its] conduct towards a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Vaca v. Sipes, 386 U.S. 171, 190 (1967). The Commission subsequently adopted this standard, the violation of which would arise under Section 5.4b(1) of the Act. Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976); 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, 13 (¶15007 1983).

A union is afforded a "wide range of reasonableness in servicing its members," and "[t]he fact that a union's decision results in a detriment to one unit member does not establish a breach of duty." Essex-Union Joint Meeting and Automatic Sales, Servicemen & Allied Workers, Local 575 (McNamara), D.U.P. No. 91-26, 17 NJPER 242 (¶22108 1991) (citing Ford Motor Co. V. Huffman, 345 U.S. 330 (1953)). There is no absolute right to grievance arbitration. Id. (citing Vaca, supra). The Commission has

frequently dismissed duty of fair representation claims based on allegations that a union's representation was negligent, inadequate or otherwise unsatisfactory from the grievant's perspective. Passaic Cty. Comm. Coll. Admin. Ass'n (Wasilewski), P.E.R.C. No. 98-131, 24 NJPER 256 (¶29123 1998); Council of N.J. State College Locals, AFL-CIO (Roman), P.E.R.C. No. 2015-76, 42 NJPER 33 (¶8 2015); ATU Local 540 (Warfield), D.U.P. No. 2016-003, 42 NJPER 376 (¶107 2015), aff'd P.E.R.C. 2016-046, 42 NJPER 336 (¶96 2016).

An employee organization must exercise reasonable care and evaluate an employee's request for arbitration on the merits and decide, in good faith, whether it believes the employee's claim has merit. See Ford Motor Co., supra, at 337-338; 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); 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).

The alleged facts do not suggest that Local 253 breached its duty of fair representation. In January, 2020, when Sims was terminated from NHA, Local 253 amended a pending grievance from November, 2019 to include her termination. Upon investigating

the grievance and interviewing the numerous witnesses identified by Sims, the Union determined it was unable to offer any corroboration of Sims' claims of sexual harassment, and concluded that it was unlikely to prevail on the sexual harassment claims at arbitration. The Union did proceed to arbitration on the termination grievance on March 9, 2022.

No facts suggest that the Union's decision to proceed to arbitration without presenting evidence of sexual harassment was arbitrary, discriminatory, or in bad faith. Similarly, no facts suggest that Local 253's decision falls outside the reasonable discretion parameters afforded to unions in determining how to represent members. Rutgers University, D.U.P. 2020-008, 46 NJPER 308 (¶75 2020). Accordingly, I dismiss the 5.4b(1) allegation.

The charge also alleges that Local 253 violated section 5.4b(2) and (4) of the Act. No alleged facts suggest that the Union interfered with or coerced a public employer in the selection of representatives for negotiations or adjustment of grievances, or that the Union failed to reduce a negotiated agreement to writing or to sign such agreement. Accordingly, I dismiss the section 5.4b(2) and 5.4b(4) allegation.

Finally, the charge alleges that Local 253 violated section 5.4b(3) and (5) of the Act. A union's duty of good faith negotiations is owed to the employer, not individual unit members. Individual employees do not have standing to raise

these issues. Council of New Jersey State College Locals, D.U.P. No. 81-8, 6 NJPER 531 (¶11271 1980). Accordingly, I dismiss the section 54b(3) allegation. Additionally, because the charge does not allege that any rule or regulation of the Commission was violated, I dismiss the section 5.4b(5) allegation.

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

ORDER

The unfair practice charge is dismissed.

/s/ Jonathan Roth
Jonathan Roth
Director of Unfair Practices

DATED: August 9, 2022
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 August 19, 2022.