

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEWARK TEACHERS UNION,

Respondent,

-and-

Docket No. CI-H-2000-10

ETHEL BLAKE SYKES,

Charging Party.

SYNOPSIS

A hearing examiner recommends dismissing a pro se Charging Party's complaint alleging the Newark Teachers Union (NTU) violated its duty of fair representation by failing to respond to a faxed and certified mailed written request for a meeting with NTU representatives to discuss certain grievances. Charging Party failed to prove, by a preponderance of the evidence, that the NTU failed to respond to her letter. The record suggests an NTU representative did try to call her on two occasions following receipt of the faxed letter. Additionally, the NTU demonstrated it maintains an informal, open-door policy. Members do not need appointments to meet with representatives to discuss possible grievances and Charging Party previously had occasion to go to NTU headquarters without an appointment. Succinctly, there was insufficient evidence Charging Party was treated differently than other NTU members. Alternatively, even if the NTU representative did not make the two calls, at worst, that conduct may be negligent; mere negligence is insufficient to find that an employee organization breached its duty of fair representation.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which 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, Szaferman, Lakind, Blumstein, Watter & Bladder, attorneys (Stuart Tucker, of counsel)

For the Charging Party, Ethel Blake-Sykes, pro se

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On October 1, 1999 and August 1, 2000, Ethel Blake Sykes (Sykes or Charging Party) filed an unfair practice charge and amended charge against the Newark Teachers Union (NTU) alleging violations of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4b(1) and (2).^{1/} She contends the NTU failed to respond to a September 14, 1999 fax and certified mailed written request for a

^{1/} These subsections 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."

meeting with NTU representatives to discuss certain grievances. She further contends the NTU acknowledged receiving her request for a meeting, that it was referred to the NTU president and that he would "take care of it" but he did not. She alleges she was not aware she could file her own grievance without the NTU's assistance and contends the NTU discriminated against her due to her status as an agency fee payer.

The NTU denies it failed to respond to Sykes' request for a meeting. It contends that after it received the faxed request for a meeting its representative placed several telephone calls to her and left messages but Sykes failed to respond.

On September 27, 2000, a complaint and notice of hearing issued and the matter was scheduled for a prehearing conference and hearing November 2 and 9, 2000, respectively; both parties subsequently requested numerous adjournments of these proceedings.^{2/}

^{2/} The initial prehearing conference and hearing were adjourned at NTU's request. Proceedings were rescheduled for January 18 and 25, 2001, respectively. The January 25, 2001 hearing date was adjourned at Respondent's request and rescheduled for April 12, 2001. That hearing date was adjourned at Charging Party's request and rescheduled for July 10, 2001. Charging Party, contending she was a 10-month school employee and was therefore not available for a July hearing, requested that date be adjourned. The matter was rescheduled to September 12, 2001. In light of the tragic events in New York, Pennsylvania and Washington, D.C. on September 11, 2001, the parties jointly requested the September 12th hearing be postponed; it was rescheduled for October 30, 2001. That hearing date was also cancelled at Charging Party's request for medical reasons.

During the prehearing conference on January 18, 2001, Charging Party withdrew her claim that the NTU discriminated against her due to her status as an agency fee payer. The NTU, having failed to answer the complaint, filed a motion to file a late answer.^{3/}

A January 25th hearing date was adjourned because the parties were discussing a voluntary resolution of this matter. When settlement efforts failed, Respondent moved for "summary disposition pursuant to R10:11-6.9." As it was not clear what procedural mechanism Respondent sought to invoke and the motion did not otherwise comport with regulations governing motions in unfair practice proceedings, it was denied.

On August 17, 2001, NTU filed a motion for summary judgment with the Commission. It was referred to me for disposition. N.J.A.C. 19:14-1.8.^{4/}

On December 3, 2001, the motion was granted in part and denied in part. H.E. No. 2002-8, 28 NJPER 73 (¶33024 2002). I found that Charging Party, as an individual, lacked standing to assert NTU violated N.J.S.A. 34:13A-5.4b(2). As to the claim that

^{3/} The motion was granted, together with several other procedural matters, on May 3, 2001.

^{4/} NTU's request for oral argument was initially granted and scheduled to immediately precede the opening of the hearing. Given the number of adjournments in this proceeding, however, including the October 30, 2001 hearing date, Respondent withdrew its request for oral argument. The parties were provided an opportunity to supplement their written positions by November 16, 2001.

NTU violated its duty of fair representation by failing to respond to her request for a meeting to discuss certain grievances, NTU's motion was denied. NTU contended that the complaint should be dismissed because the underlying grievances were untimely pursuant to the operative collective negotiations agreement. This part of the motion was denied because the issue in this case was not whether the underlying grievances has substantive or procedural merit, but whether NTU owed Charging Party a response to her request for a meeting. The facts of this case suggested there was a dispute regarding what, if anything, NTU did following its receipt of Sykes' request for a meeting, thus a hearing was necessary to determine those facts.

A hearing was held on March 6, 2002,^{5/} during which the parties entered stipulations, presented witnesses and submitted exhibits.^{6/} Post hearing briefs were due May 20, 2002. Respondent filed its brief May 21, Charging Party did not file a brief.^{7/}

Based on the entire record, I make the following findings and recommendations.

^{5/} Transcript references are T.

^{6/} Exhibit References are C - Commission, and R - Respondent. Charging Party offered no exhibits.

^{7/} Although late, I have reviewed and considered Respondent's brief.

FINDINGS OF FACT

1. Charging Party is a teacher employed in the Newark School District (District). The District is a public employer within the meaning of the Act (T57, T82).

NTU represents the District's 5,200 teaching and support staff; it is Charging Party's majority representative. Charging Party is not an NTU dues paying member, she is an agency fee payer. She is also a negotiator for the Newark School Nurses who are represented by a different majority representative (T18-T19, T27, T57, T82).

2. NTU and the District are parties to a collective negotiations agreement covering the term July 1, 1997 through June 30, 2000 (CNA). It contains a grievance procedure for the resolution of disputes concerning terms and conditions of employment contained within the agreement. It requires grievances be initiated within thirty school days following the employee becoming aware of the act or circumstances giving rise to the grievance. Failure to initiate a grievance within that time constitutes a waiver. The grievance procedure consists of four steps ending in binding arbitration. Each step may be initiated and processed by the employee or the NTU (T21-T27, T58-T60, T82; R-1).

Approximately 4,700 grievances have been filed by NTU since 1970 that have progressed to at least step 2 of the procedure. NTU therefore averages approximately 150 grievances per year (T60).

3. During the Fall of 1998 Charging Party filed a complaint in the Superior Court of New Jersey, Law Division, Special Civil Part, Essex Vicinage, Docket No. R-18548-1998 against the District alleging it improperly withheld money from her salary during a seven-day period from September 10, 1998 to September 17, 1998. She amended the complaint in January 1999 alleging the District "arbitrarily deprived [her] of six weeks pay..." She did not specify whether the six weeks were inclusive of the seven days originally plead (T28, T79, T80, T82; R-2, R-3, R-4).

On September 1, 1999, the complaint and amended complaint were dismissed for lack of subject matter jurisdiction; Charging Party failed to exhaust her administrative remedies before filing in Superior Court (T30, T32-T33, T36, T80, T82; R-4, R-5).

4. On or about September 14, 1999, Charging Party faxed a letter to NTU President Joseph DelGrosso requesting an appointment to discuss two grievances she wanted to file against the District. One grievance related to the payment of monies the District allegedly withheld from her during the 1997-1998 and 1998-1999 school years (salary grievance). The other grievance related to alleged racial discrimination by a school principal who transferred Sykes' students to another teacher (student transfer grievance). NTU Executive Director Pietro Petino acknowledged receiving the faxed letter request for a meeting (T12, T40-T42, T56).

Sykes contends she also sent the letter by certified mail but she did not offer into evidence any copies of the letter or the return receipt card which generally accompanies certified mail. I make no factual findings regarding the mailed version of the letter because Petino acknowledged receiving it via fax (T63).

5. What happened after Sykes mailed the letter is disputed.

She contends that shortly after sending the letter, receiving no response, she called the NTU and spoke to Petino and was advised that NTU President DelGrosso would take care of the matter. She contends NTU representatives were to call her back to set-up a meeting to discuss the potential grievances or otherwise respond to her letter but nobody did (T12, T40-T42).

Petino's initial testimony acknowledged the possibility of a telephone conversation with Sykes (T64-T65). During his testimony, after refreshing his recollection, he denied having any telephone conversations with Sykes about her September 1999 letter or proposed grievances. He contends that when he received the faxed letter he tried calling Sykes on two occasions but that he never heard back from her (T65-T66, T72, T75).

I find the alleged Sykes-Petino telephone conversations, and thus any statements she ascribes to him during same, did not occur. I also find that Petino did place two unsuccessful calls to Sykes following his receipt of the faxed letter. The absence of independent, corroborative evidence to support Sykes' claim,

together with her questionable credibility on these points, are determining factors.

Sykes did not establish a date, time or location of her alleged call to Petino. She offered no personal or phone records substantiating the call. No other witnesses verify she placed the call or heard her end of the conversation. As to her denial that Petino called her twice, she contends she had an answering service but never received a message from him. On cross-examination, when asked why she did not follow-up with the NTU later in the Fall of 1999, when she had not received a response to the faxed letter or her purported telephone conversation with Petino, Sykes responded that she was mentally and/or medically unable to, due to a work-related injury (T43, T47-T50). NTU then offered into evidence Sykes' motion to vacate the dismissal of her Superior Court claim -- prepared, dated and filed by Sykes on October 20, 1999 (T50, T81; R-6). Hesitantly, she explained that she was able to file the document with the court but was not able to make any follow-up inquiries with the NTU (T50-T51). Her explanation is illogical, and in my view, undermines her credibility on this point.

Admittedly, there is no direct evidence supporting Petino's claim that he called her twice after receiving her letter, however, I find there is sufficient circumstantial evidence to support his claim.

NTU processed a 1998 grievance for Sykes regarding an increment withholding; it is still pending arbitration (T67). During the early stages of that matter Sykes went to NTU headquarters without appointments to duplicate documents and prepare the case for processing, therefore, she knew or should have known she did not need an appointment to go to the NTU headquarters (T43-T47, T67).

Additionally, the 1998 grievance is apparently still pending due in part to difficulties the NTU has had communicating with Sykes. Petino has called her telephone number several times to schedule the arbitration hearing date and discuss the arbitration and has been advised the telephone line is not operational (T72-T73). Moreover, certified mail sent to her address by the NTU was returned undelivered (T72-T73, T82; R-8). The certified letter envelope, bearing NTU's return address, listed the same address to which the Commission has sent mail, both regular and certified, to Sykes during the processing of this matter. NTU's letter was returned undelivered but I take administrative notice that the Commission's letters, identified on the face of the envelopes as coming from the Commission and sent to the same address as mail from the NTU, have not been returned as undelivered and the Commission has received the return receipt card signed by Sykes (R-8; T74).

These vagaries and difficulties of communicating with Sykes suggest that Sykes or someone at her abode is selective in

the receipt of certified mail. She offered no contrary explanation. Additionally, I take administrative notice of my letter to Sykes dated October 26, 2000 detailing difficulty in reaching her by telephone for scheduling purposes in this case.

Moreover, Sykes' self-interest in this proceeding and corollary efforts in Superior Court cloud her credibility. She is a long-time (since 1985) union negotiator for a different union (T20). That organization apparently has a different practice when processing grievances and requires union representatives to meet with the grievants before filing (T25). NTU, by contrast, maintains an informal, open-door policy; members do not need appointments to speak to NTU representatives about grievances (T61-T62). The NTU grievance procedure is self-executing and specifically allows individuals to initiate their own grievances without union involvement (T59, T71; R-1).

Sykes, however, does not acknowledge she can file a grievance on her own (T22-T27). Her position can be explained by one of two reasons, either she harbors hope that prevailing in this forum will allow her to resurrect her Superior Court claims or, despite her years as a unionist, she does not understand or wish to acknowledge that the NTU contractual grievance procedure is different from the one she may administer for the other union (T22-T27). Neither reason supports her claims.

Based on the foregoing, I find that the alleged telephone conversation between Sykes and Petino did not occur. I also find

that Petino placed two calls to her following his receipt of the September 14, 1999 letter requesting a meeting.

ANALYSIS

Standards of Review

Section 5.3 of the Act grants employee organizations the right to represent employees in the negotiation and administration of collective agreements. With that right comes the duty to represent all union employees fairly in negotiations and contract administration. A majority representative violates 5.4b(1) of the Act if its actions tend to interfere with, restrain or coerce employees in the exercise of rights guaranteed them by the statute, provided the actions lack a legitimate and substantial organizational justification. FOP Newark Lodge #12 (Colasanti), P.E.R.C. No. 90-65, 16 NJPER 126 (¶16212 1985); FMBA Local No. 35 (Carragino), P.E.R.C. No. 83-144, 9 NJPER 336 (¶14149 1983). Read together, these statutory provisions set forth the majority representative's duty of fair representation.

A majority representative violates its duty of fair representation when its conduct towards a unit member is arbitrary, capricious or in bad faith. Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967). The New Jersey courts and the Commission have adopted the Vaca standard. Saganario v. Attorney General, 87 N.J. 480 (1981); see also Lullo v. International Ass'n of Fire Fighters, 55 N.J. 409 (1970); Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App.

Div. 1976); OPEIU Local 153 (Johnstone), P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007) 1983); Fair Lawn Bd. of Ed., P.E.R.C. No. 84-138, 10 NJPER 351 (¶15163 1984).

A majority representative should attempt to exercise reasonable care and diligence in investigating, processing and presenting grievances. It should exercise good faith in determining the merits of the grievance. It must treat individuals equally by granting equal access to the grievance procedure and arbitration for similar grievances of equal merit. OPEIU Local 153; 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), certif. den. 91 N.J. 242 (1982); New Jersey Tpke Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJ 412 (¶10215 1979); and AFSCME Council No. 1 (Banks), P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978).

As to Sykes' claim that the NTU breached its duty of fair representation by failing to respond to her request for a meeting, I find she has not proven, by a preponderance of the evidence, N.J.A.C. 19:14-6.8, that the NTU did not respond to her letter.

Petino did try to call her on two occasions. That he did not reach her, while unfortunate, does not constitute a violation of section 5.4b(1). While contemporary business practices suggest he could or should have followed-up with her by letter when he did not reach her by telephone, NTU's actions, or inactions after the two calls, did not legitimately tend to interfere with, restrain

or coerce Sykes in the exercise of protected activity. If Sykes did not hear from the NTU she could have followed-up with another letter and/or simply walked into NTU headquarters.

The NTU has demonstrated it maintains an informal, open-door policy. Members do not need appointments to meet with representatives to discuss possible grievances and Sykes, herself, has had occasion to go to NTU headquarters without an appointment. Succinctly, there does not appear to be any evidence that Sykes was treated differently than other NTU members. Under these circumstances there is insufficient evidence to conclude NTU violated its duty of fair representation or that its conduct was arbitrary, capricious or in bad faith.

Even if Petino did not make the two calls to Sykes, at worst, his conduct would be negligent. Mere negligence is insufficient to find that an employee organization breached its duty of fair representation when it exercises its discretion in good faith. SEIU, Local No. 579, AFL-CIO, 229 NLRB 692, 95 LRRM 1156 (1977); Printing and Graphic Communication, Local No. 4, 249 NLRB 23, 104 LRRM 1050 (1980) rev'd on other grounds 110 LRRM 2928 (1982). Sykes simply puts too much weight on her contention that the NTU failed to return her telephone call. Even if it did, it was not fatal to any other legal rights she may have.

NTU also contends in its brief that since the underlying grievances Sykes sought to discuss with the union were untimely under the collective negotiations agreement, the NTU could not

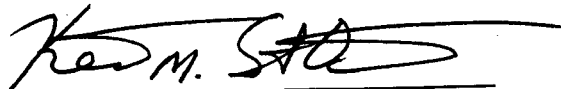
have violated its duty of fair representation because the grievances would have been dismissed. NTU also contends Sykes' claims are analogous to a legal malpractice action in that any act or omission by NTU was not the proximate cause of Sykes' damages.

For the reasons discussed supra, I need not consider NTU's "legal malpractice" analogy nor its contention regarding the timeliness of the potential grievances. I do note, however, its contention regarding the timeliness of the grievances essentially states an affirmative defense the District might have been able to assert in defense of Sykes' proposed grievances. I am not persuaded that a speculative affirmative defense by an employer absolves a union of its obligations to investigate potential grievable matters, make informed decisions about whether to process those matters and reasonably communicate the decision to process or not process the matter to the employee. See generally, Jersey City Med. Ctr., P.E.R.C. No. 87-19, 12 NJPER 740 (¶17277 1986) (summary judgment premature, in part, because factual dispute existed regarding whether union investigated basis of potential grievance). That issue is not implicated in this matter because it appears NTU did attempt to investigate the basis of Sykes' grievances.

I recommend the complaint be dismissed. It does not appear Sykes was treated differently than other NTU members or agency fee payers. She has failed to demonstrate that NTU's conduct was arbitrary, discriminatory and in bad faith. Thus, I find NTU did not breach its duty of fair representation.

RECOMMENDED ORDER

I recommend the complaint be dismissed.

A handwritten signature in black ink, appearing to read "Kevin M. St. Onge", written over a horizontal line.

Kevin M. St. Onge
Hearing Examiner

Dated: May 30, 2002
Trenton, New Jersey