H.E. NO. 2016-14

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

In the Matter of

ELIZABETH BOARD OF EDUCATION,
Respondent,

-and- Docket No. CI-2014-046

ELIZABETH EDUCATION ASSOCIATION,
Respondent,

-and-

ANTHONY ISAZA,
Charging Party.

SYNOPSIS

A Hearing Examiner grants a Respondent Association's motion for summary judgment on a Complaint filed by a (former) unit employee alleging that it violated the duty of fair representation by not compelling binding arbitration of a contractual grievance seeking the charging party's reinstatement following a reduction in force ordered by the public employer Board of Education (also a Respondent). The charge alleged that the Association violated section 54b(1) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. and that the Board violated section 5.4a(5) of the Act.

The Hearing Examiner found that the charge was not filed within the six-month statute of limitations set forth at N.J.S.A. 34:13A-5.4(c) and that the Charging Party was not prevented from filing a timely charge. Kaczmarek v. New Jersey Turnpike Auth., 77 N.J. 329 (1978). . The Hearing Examiner also found that in the absence of a viable claim of a breach of the duty of fair representation, the Charging Party did not have standing to allege that the Board violated section 5.4a(5) of the Act.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that 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.

H.E. NO. 2016-14

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

In the Matter of

ELIZABETH BOARD OF EDUCATION,

Respondent,

-and- Docket No. CI-2014-046

ELIZABETH EDUCATION ASSOCIATION,

Respondent,

-and-

ANTHONY ISAZA,

Charging Party.

Appearances:

For the Elizabeth Board of Education
Schwartz, Simon, Edelstein & Celso, attorneys
(Syrion A. Jack, of counsel)

For the Elizabeth Education Association
Bucceri & Pincus, attorneys
(Sheldon Pincus, of counsel)

For the Charging Party
Law Office of Robert Brotman
(Robert Brotman, of counsel)

HEARING EXAMINER'S DECISION ON MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION OPPOSING MOTION FOR SUMMARY JUDGMENT

On April 24 and May 15, 2014, Anthony Isaza, a former "security" employee of the Elizabeth Board of Education ("Board"), filed an unfair practice charge and amended charge

against the Board and the Elizabeth Education Association ("Association"), his former majority representative. The charge, as amended, alleges that following a Board-ordered reduction-in-force (RIF), terminating Isaza's employment on June 30, 2010, the Association filed a contractual grievance (on behalf of Isaza and others similarly situated) on August 10, 2010, resulting in the Commission's appointment of a grievance arbitrator on September 23, 2010.[1/] The charge alleges that the Board, ". . . repeatedly adjourned the binding arbitration date" and the Association failed to "compel arbitration," among other omissions, violating its duty of fair representation. The charge alleges that the ". . . last scheduled arbitration date was April 24, 2013" and was, ". . . once again adjourned by the Board." The charge also alleges that Isaza was advised by the Association that the matter would be rescheduled.

The charge alleges that On November 20 and 22, 2013, Isaza filed a civil complaint and amended complaint in Superior Court against the Board, which also ". . . detailed the Association's

---

1/ I take administrative notice of the September 23, 2010 Commission letter issued to respondents' representatives designating a named arbitrator by "mutual request" (Dkt. No. AR-2011-223). The triggering grievance contends that the Board violated Article IV-H of the collective negotiations agreement when it, ". . . laid off the grievant [Jay Mills] and similarly situated employees due to a reduction in force and budgetary constraints." The proposed remedy seeks, ". . . reinstate[ment] of the grievant and similarly situated employees to their positions according to their seniority and otherwise made whole."

failure to meet the statute of limitations under [N.J.S.A. 34:13A-5.4c]." The Board's conduct allegedly violates section 5.4a(5)[2/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), and the Association's conduct allegedly violates section 5.4b(1)[3/] of the Act.

On July 14, 2015, a Complaint and Notice of Hearing issued. On August 14 and 31, 2015, the Association and Board, respectively, filed motions to dismiss the Complaint, in lieu of Answers. On September 1, 2015, I wrote to the parties, advising that a Commission hearing examiner does not have authority to decide such motions, citing Englewood Bd. of Ed., P.E.R.C. No. 93-119, 19 NJPER 355 (¶24160 1993). I wrote that the respondents could file motions for summary judgment or seek special permission to appeal. N.J.A.C. 19:14-4.8.

On September 3, 2015, the Association filed a motion for summary judgment, together with a brief, certification and documents. On September 4, 2015, the Board filed an Answer,

---

2/ This provision prohibits public employers, their representatives or agents from: "(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."

3/ This provision 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."

denying many factual allegations, asserting numerous defenses and denying that it violated the Act. On September 28, 2015, Counsel for Isaza filed a cross-motion seeking dismissal of the Association's motion, together with a certification and brief. Counsel for Isaza also contends that the Board is not entitled to dismissal and that the Commission must ". . . defer to the grievance/arbitration procedure for a determination of the grievance filed in 2010 and still pending."

On October 30, 2015, the Commission referred the motions to me for a decision. N.J.A.C. 19:14-4.8.

Summary judgment will be granted:

> if it appears from the pleadings, together with the briefs, affidavits and other documents filed, there exists no genuine issue of material fact and the movant . . . is entitled to its requested relief as a matter of law. [N.J.A.C. 19:14-4.8(e)]

Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995), sets forth the standard to determine whether a "genuine issue" of material fact precludes summary judgment. The fact-finder must ". . . consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the moving party." If that issue can be resolved in only one way, it is not a genuine issue of material fact. A motion for summary judgment should be granted cautiously -- the procedure may not be

used as a substitute for a plenary hearing. Baer v. Sorbello, 177 N.J. Super. 182 (App. Div. 1981); Essex Cty. Ed. Serv. Comm., P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982).

Applying these standards and relying upon the parties' submissions, I make the following:

FINDINGS OF FACT

1. Anthony Isaza was employed by the Board among non-certificated "security personnel," as set forth in Article I (Recognition) of the 2009-2012 collective negotiations agreement signed by the Board and Association. The collective negotiations unit includes certificated employees and non-certificated employees. Isaza had been employed for about 15 years when he received a Board notice of his RIF, effective June 30, 2010.

2. The (applicable) collective negotiations agreement includes Article III (Grievance Procedure) and Article IV (Employee Rights). Article III provides a multi-step grievance procedure, ending in binding arbitration (for "an inequitable, improper or unjust application, interpretation or violation of Board policy, this agreement or administrative decision"), if the Association, ". . . desires to initiate [it]" by sending a "written demand" to the Commission, with a copy to the Board Superintendent. The procedure dictates that the Board and Association, ". . . shall agree upon an arbitrator for the

purpose of holding scheduled arbitral hearings during the months of November, February and May." It provides:

> Grievances to be heard shall be mutually agreed to by the authorized representatives of the Board and the Association. Hearings shall be timely cancelled in the absence of any agreement as to grievances.

Article III also provides for "class grievances:"

> If, in the judgment of the Association, a grievance affects a group or class of employees which has common issues of fact and law, the Association may initiate and submit such grievance in writing at the Superintendent's level of the grievance procedure set forth in this Article. The Association may process such grievance through all levels of the grievance procedure.

Article IV (Employee Rights) H. Layoff and Recall, establishes a "joint committee of equal representatives" to create ". . . a procedure of layoff and recall of bargaining unit members not covered by a statutory schedule for layoff and recall in the teachers', custodians' and cafeteria contracts." This provision continues:

> The parties agree that seniority shall be the method utilized for such new provision; that an employee shall enjoy a maximum of five (5) years on a recall list; that if an individual is recalled to employment at the Board and declines an offer of reemployment, said individual shall be removed from a recall list; that a dispute on the application of the layoff/recall provision shall be subject to expedited arbitration before a mutually selected arbitrator and the arbitrator shall not have the authority to award back pay but shall be limited in authority to ordering a

> different employee be recalled or placed on layoff.

3. On August 10, 2010, the Association filed a grievance (number 08-10-02) on a designated form with Board Superintendent Pablo Munoz at "level II" [a step of the contractual grievance procedure mandating a written response within 10 workdays]. The grievant is set forth as, "Jay Mills, et al" in the title of "security." The grievance contests:

> The Board and/or its agent did violate Article IV - H and any other relevant articles of the collective bargaining agreement when it laid-off the grievant and similarly situated employees due to a reduction in force and budgetary constraints.

The remedy sought specifies that, "the grievant and similarly situated employees [shall] be reinstated to their positions according to their seniority and otherwise made whole." The grievance was signed by President Rose Carreto on behalf of the Association.

4. On or about September 21, 2010, New Jersey Education Association UniServ Field Representative Jack Spear filed a letter with the Commission Director of Conciliation and Arbitration, together with copies of the grievance (see finding no. 3), grievance procedure (see finding no. 2) and an August 12, 2010 cover letter written by Association President Carreto identifying the grievance and addressed to the Board Superintendent. Spear's letter advises:

> By mutual request, the attached grievance should be submitted to ___[name]_____ for binding arbitration in accordance with the rules and regulations of PERC.

5. On September 23, 2010, a Commission representative in the Division of Conciliation and Arbitration issued a letter to Spear and to Karen Murray, Esq., Board Executive Director of Human Resources. The letter advises:

> Pursuant to a mutual request in accordance with N.J.A.C. 19:12-5.3, I hereby appoint the below-named arbitrator . . .
>
> The parties are referred to N.J.A.C. 19:12-5.4[4/] et seq. concerning the conduct of the arbitration proceedings. The arbitrator shall communicate with the parties to arrange for a mutually satisfactory date, time and place for a hearing.

The letter sets forth the arbitrator's name [and address] provided in NJEA representative Spear's letter (see finding no. 4).

4/ N.J.A.C. 19:12-5.5 mandates that the arbitrator communicate with the parties to arrange a "mutually satisfactory date, time and place for a hearing." It advises that in the absence of an agreement, the arbitrator has authority to set the date, time and place for the hearing and shall "submit a notice" with the hearing arrangements within a "reasonable period of time before the hearing."

N.J.A.C. 19:12-5.6 gives the arbitrator authority to grant adjournments for "good cause shown," upon either party's application or the arbitrator's own motion.

N.J.A.C. 19:12-5.7 provides that, "after duly scheduling the hearing, the arbitrator shall have the authority to proceed in the absence of any party who, having failed to obtain an adjournment, does not appear at the hearing."

6. On February 28, 2012, Counsel for Isaza wrote a letter to Association representative Spear, advising that ". . . nothing has been done with respect to [the RIF grievance]" since June, 2010. Counsel wrote that other security personnel with less seniority than Isaza who were non-renewed at the same time as he, ". . . have been recalled and rehired." He wrote that seniority is "the key component of recall and rehire" and that the recall list is maintained for five years. Counsel wrote:

> It is my position that [the Association] as representative of covered employees under the contract with [the Board] has an obligation to demand and secure an expedited arbitration proceeding on behalf of Mr. Isaza. He should have been recalled a long time ago. He certainly is entitled to back pay at least since the first security personnel with less seniority was rehired.
>
> I am ready to file a lawsuit in the Superior Court of New Jersey for relief and damages . . . However, I will withhold the suit for fifteen days to give your office and the Board an opportunity to schedule an 'expedited arbitration' proceeding.
>
> Kindly advise.

7. On an unspecified date, the Association scheduled the grievance for binding arbitration. On unspecified date[s], the Board repeatedly adjourned the binding arbitration date[s] for the grievance. A scheduled April 24, 2013 arbitration proceeding was adjourned by the Board.

8. On an unspecified date, the Association advised Isaza that the matter would be rescheduled.

9. On July 18, 2013, Counsel for Isaza wrote a letter to the Board "legal department," advising that Isaza had been terminated from employment and "deprived of his right to expeditious arbitration" for 3 years. Counsel wrote that the Board's failure to proceed at arbitration is ". . . without good faith, unjustifiable, outrageous and malicious, with significant adverse consequences to those affected." Counsel wrote that Isaza's requirement to exhaust the "administrative remedy . . . has now been constructively exhausted" and a "Notice of Claim" is being filed with the Board. A copy of the letter was sent to the Association.

10. On November 22, 2013, Counsel for Isaza filed a civil action in the Superior Court of New Jersey - Union County (Dkt. No. UNN-L-4299-13) against the Board and the Association. The complaint alleges in pertinent part that Isaza filed a grievance with the Association, ". . . but this grievance over the course of nearly three and one-half years has not been moved, notwithstanding many demands by [Isaza] to do so made to both [the Association and Board]." The complaint avers that either or both defendants, ". . . have either intentionally or negligently failed to schedule an arbitration proceeding required by their contract;" and that re-hiring of employees should be governed by employee seniority.

11. On July 2, 2014, Superior Court Judge Alan Lesnewich issued an Order dismissing, ". . . for lack of subject matter jurisdiction," the Complaint filed on behalf of Isaza against the Board and Association. The Order provides that the Complaint is dismissed, ". . . with prejudice" and the Court, ". . . does not retain jurisdiction."

A copy of the transcript of the Court's decision provides that Isaza's claim that the Association, ". . . either intentionally or negligently failed to schedule an arbitration proceeding is an unfair labor practice allegation" and is an alleged breach of the duty of fair representation under N.J.S.A. 34:13A-5.4b(1). The decision provides that such an alleged unfair practice falls within, ". . . the exclusive jurisdiction of PERC." In so ruling, Judge Lesnewich analogized the circumstances to those in Kaczmarek v. New Jersey Turnpike Auth., 77 N.J. 329 (1978). Identifying Kaczmarek as a ". . . claim alleging a breach of the duty of fair representation" initiated by a complaint filed in the Law Division, Judge Lesnewich said:

> [Our Supreme] Court stated that Kaczmarek's 'misfiling' of the unfair representation charge in the Law Division was a 'mistake.' After analyzing the law pertaining to the commencement of an action in a Court that lacks subject matter jurisdiction over a case, the Court concluded that once the trial judge ascertained it did not have subject matter jurisdiction, the matter should have

> been transferred to PERC. Id., [77 N.J.] at 343-44.
>
> Following that logic and decision, in this particular situation, Isaza's amended complaint needs to be dismissed for the very same reasons. The complaint asserts very clearly, among other things, a breach of the duty of fair representation against both the Association and Board for failure to process his grievance. As such, this Court lacks subject matter jurisdiction over such a claim.
> [transcript of decision, 7/2/14 p. 8]

ANALYSIS

N.J.S.A. 34:13A-5.4(c) provides that:

> No complaint shall issue based on any unfair practice charge occurring more than six months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the six-month period shall be computed from the day he was no longer prevented.

In Kaczmarek, our Supreme Court explained that the statute of limitations is intended to stimulate litigants to prevent litigation of stale claims, cautioning that it would consider the circumstances of individual cases. Id. at 337-338. In determining whether a party was "prevented" from filing an earlier charge, the Commission must conscientiously consider the circumstances of each case and assess the Legislature's objectives in prescribing the time limits as to a particular claim. The word "prevent" ordinarily connotes factors beyond a complainant's control disabling him or her from filing a timely charge, but it includes all relevant considerations bearing upon

the fairness of imposing the statute of limitations. Id. Relevant considerations include whether a charging party sought timely relief in another forum; whether the respondent fraudulently concealed or 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. Sussex Cty. Com. Col., P.E.R.C. No. 2009-55, 35 NJPER 131, 132 (¶46 2009); State of New Jersey, (Dept. of Human Services) and CWA, P.E.R.C. No. 2003-56, 29 NJPER 93 (¶26 2003) [app. dism. App. Div. Dkt. No. A-003951-02T1 (4/7/04)].

More than seventeen months after the Commission issued a letter assigning the grievance to the mutually agreed-upon arbitrator, Counsel for Isaza wrote to the designated Association representative, threatening to file a lawsuit within fifteen days unless the Association and Board agreed to an "expedited" arbitration hearing on the pending grievance. Counsel wrote that other similarly situated RIFed employees with less seniority than Isaza had been recalled and re-hired and that the Association, as his client's majority representative, has "an obligation to demand and secure an expedited arbitration proceeding on behalf of Mr. Isaza, [who] should have been recalled a long time ago." In all but name, Counsel's February 28, 2012 letter sets forth an alleged violation of the duty of fair representation (presumably

rooted in an arbitrary -- if not, worse -- omission). Vaca v. Sipes, 286 U.S. 171 (1967); Saginario v. Attorney General, 87 N.J. 480 (1981); D'Arrigo v. New Jersey State Bd. of Mediation, 119 N.J. 74 (1990). Isaza's Counsel did not file any action in any forum until November 22, 2013, when he filed a civil action in Superior Court (thereby fulfilling the threat he issued twenty-one months earlier).

Isaza's Superior Court filing would not have been timely under our statute, if he had filed a charge with the Commission, instead. The same or substantially similar facts comprising Isaza's duty of representation claim were known to him by February, 2012, when his Counsel threatened the Association with litigation for failing to arbitrate the "class grievance" assigned to the arbitrator in September, 2010. Counsel's letter complained specifically of disparate treatment of Isaza and a need for an "expedited" arbitration hearing date.

Isaza contends that the Association's failure to file an unfair practice charge against the Board (following the latter's adjournment of the April 24, 2013 arbitration hearing) within six months -- by October 24, 2013 -- yielded another six-month period -- to April 24, 2014 -- in which he could (and did) file a "timely" unfair practice charge against the Association (brief at pages 5 and 11).

I disagree. The Association's failure to file an unfair practice charge did not change facts Isaza already knew that comprised his duty of fair representation claim, including the Association's previous scheduling(s) of the grievance arbitration hearing (see finding no. 7, for example). The several previous schedulings were fruitless, undercutting Isaza's claim of his reasonable detrimental reliance on the Association's representation to him on an unspecified date after April 24, 2013 that it would reschedule the hearing (brief at 12).

Isaza's unmentioned and apparent purpose in identifying a conceivable Association unfair practice claim commencing April 24, 2013 is to assert a "continuing violation" of section 5.4b(1), based on the Association's omission(s), consequently rendering his charge timely filed. I do not find that Isaza has alleged facts establishing a "continuing violation," as defined under case law. Local Lodge No. 1424, International Association of Machinists v. N.L.R.B., 362 U.S. 411, 45 LRRM 3212 (1960); Salem Cty. Bd. of Freeholders, P.E.R.C. No. 87-159, 13 NJPER 584 (¶18216 1987).

RECOMMENDED ORDER

The Elizabeth Education Association's motion for summary judgment is granted. Anthony Isaza's cross-motion is denied. The unfair practice complaint is dismissed.[5/]

/s/Jonathan Roth
Jonathan Roth
Hearing Examiner

DATED: December 31, 2015
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman 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. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by January 11, 2016.

5/ In dismissing the Complaint against the Association, I find that Isaza does not have standing to maintain his charge that the Board violated 5.4a(5) of the Act. Beall and N.J. Turnpike Auth., P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980), aff'd NJPR Supp.2d 101 (¶85 App. Div. 1981); Passaic Cty. Support Staff Assn. (Ernst), P.E.R.C. No. 2015-23, 43 NJPER 203 (¶69 2014).