D.U.P. NO. 86-2

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

In the Matter of

TOWNSHIP OF BERKELEY

Respondent,

-and-

BERKELEY TOWNSHIP SUPERVISORS ASSOCIATION,

DOCKET NO. CI-85-75

Respondent,

-and-

FRANK J. MC CLINTIC

Charging Party.

SYNOPSIS

The Charging Party filed unfair practice charges against Respondent Township of Berkeley alleging that it violated §§5.4(a)(3), (5) and (7) and against Respondent Berkeley Township Supervisors Association alleging that it violated §§(b)(1), (3) and (5). The Director of Unfair Practices declined to issue a complaint against the Respondent employer on several grounds. The (a)(3) charge failed to allege a prima facie case pursuant to Township of Bridgewater. The (a)(5) charge concerns the interpretation of a Collective Negotiations Agreement and the Charging Party does not have standing to bring such an action and, moreover, both allegations are untimely.

The Director also declined to issue a complaint against the Respondent employee organization. The (b)(1) charge does not allege facts whlich constitute a breach of the Association's duty of fair representation. The Charging Party does not have standing to allege a (b)(3) violation.

Finally, the Charging Party failed to allege any facts which would constitute violations of either (a)(7) or (b)(5).

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Appearances:

For the Respondent Township
Murray & Granello, Esqs.
(James P. Granello of counsel)

For the Respondent Association
Oxfeld, Cohen & Blunda, Esqs.
(Mark J. Blunda of counsel)

For the Charging Party
Laura Thompson, Esq.

REFUSAL TO ISSUE COMPLAINT

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on November 16, 1984

by Frank J. McClintic ("Charging Party") against the Township of Berkeley ("Township") and the Berkeley Township Supervisors Association ("Association") alleging that the Township and the Association engaged 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 N.J.S.A. 34:13A-5.4(a)(3) and (7) and (b)(1) and (5).[1/]

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

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1/ N.J.S.A. 34:13A-5.4(a) prohibits public employers, their representatives or agents from : "(3) Discriminating in regard to hire or tenure of employment for any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (7) Violating any of the rules and regulations established by the commission."

N.J.S.A. 34:13A-5.4(b) prohibits public 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. (5) Violating any of the rules and regulations established by the commission."

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 or is engaging in any such practice, the commission, or any designated agent thereof, shall have

(Footnote continued on next page)

has delegated its authority to issue complaints to me and has established a standard upon which an unfair practice complaint may be issued. The standard provides that a complaint shall issue 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 relevant legal and factual issues.[3/] The Commission's rules also provide that I may decline to issue a complaint.[4/]

On March 8, 1985, a Commission staff agent conducted an exploratory conference with regard to the matters and allegations raised in the Unfair Practice Charge. For the reasons stated below, it is clear to me that the Commission's complaint issuance standards have not been met in this case.

Charge Against Township of Berkeley

The Charging Party, an individual, alleges that the Township has violated section 5.4(a)(3) of the Act. The Charging Party contends that the "Township discriminated against [him]

(Footnote continued from previous page)
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 hearing before the commission or any designated agent thereof..."

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

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

because [he] critized certain practices of the Township with regards to revenue collected through the Construction Department..." and, because he testified before the State Commission of Investigation in December 1983. It is well settled that in order to establish a prima facie case with regard to a §(a)(3) claim, the Charging Party must show that (1) he/she was engaged in protected activity; (2) the employer had knowledge of such activity; and (3) the employer was hostile toward the protected activity. Township of Bridgewater v. Bridgewater Public Works Assn., 95 N.J. 235 (1984). See also, East Orange Public Library v. Taliaferro, 180 N.J. Super 155 (App. Div. 1980); In re Black Horse Reg. Bd. of Ed., P.E.R.C. No. 83-73, 9 NJPER 36 (¶ 14017 1982). The Charging Party has alleged no facts which would tend to establish that he was engaged in protected activity or that the employer was hostile toward such activity. Charging Party's criticism of the Township's revenue collection practices and testimony before the State Commission of Investigation do not, in themselves, constitute activities protected by §5.3 of the Act. Accordingly, inasmuch as the Charging Party has failed to establish any nexus between the Township's actions and his exercise of any rights guaranteed to him under the Act, I must decline to issue a complaint with regard to the §(a)(3) count of the Charge.

The Charging Party has not alleged a violation of §(a)(5).[5/] The facts set forth in his charge do, however,

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5/ This subsection 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.

suggest that Charging Party may be claiming an §(a)(5) violation for he alleges the employer unilaterally altered terms and conditions of employment when it failed to properly calculate his accrued unused sick leave in accordance with the Agreement.

The Commission has upheld the refusal to issue a complaint in §(a)(5) cases where the unfair practice charge merely alleges a dispute which is essentially concerned with an interpretation of contractual language. In re State of New Jersey (Dept. of Human Services), D.U.P. No. 84-11, 9 NJPER 682 (¶ 14299 1983) and In re State of New Jersey (Office of Employee Relations), D.U.P. No. 84-12, 10 NJPER 3 (¶ 14002 1983), consolidated and aff'd , P.E.R.C. No. 84-148, 10 NJPER 419 (¶ 15191 1984). In re N.J. Turnpike Authority and Jeffrey Beall, P.E.R.C. No. 81-86, 6 NJPER 560 (¶11284 1980). Mr. McClintic's dispute with the Township over the propriety of the calculation of his accrued sick leave is the real issue of contention. Such dispute is purely a matter of contract interpretation and the Commission has held that an individual employee has no standing to challenge the interpretation of an agreement arrived at in good faith between the employer and majority representative. However, it is not necessary to make a formal determination on said factual allegations here since the Charging Party has not specifically alleged a violation of §5.4(a)(5)

Pursuant to N.J.S.A. 34:13A-5.4(c), the Commission is precluded from issuing a complaint where the Unfair Practice Charge

has not been filed within six (6) months of the occurrence of the alleged unfair practice. For this reason as well, a complaint against the Township cannot issue here. More specifically, N.J.S.A. 34:13A-5.4(c) provides:

> ... 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 in which event the six months period shall be computed from the day he was no longer so prevented.

Accordingly, it has been determined that it is incumbent upon a charging party to allege the occurrence of unfair practices within the six month limitation; in the absence of such an allegation, I must decline to issue a complaint. See, In re North Warren Bd. of Ed., D.U.P. No. 78-7, 4 NJPER 55 (¶ 4026 1977).

As previously indicated, the Unfair Practice Charge in the instant matter was filed on November 16, 1984. The threshold question in terms of the timeliness issue is the establishment of the operative date on which the statutory time period began to run.

On April 18, 1984, the Charging Party submitted his letter of resignation, to be effective May 4, 1984, and simultaneously requested that he be paid for all benefits due him. On May 10, 1984, the Charging Party sent the Township a letter wherein he set forth his position regarding the amount of time owed to him by the Township and the rate at which such time should be paid. In

correspondence dated May 14, 1984, the Township Administrator sent a letter of response to the Charging Party's attorney detailing the Township's differing position with regard to the amount of time owed Mr. McClintic. The Township's May 14, 1984, letter was received by the Charging Party's attorney on May 15, 1984. On that date, the Charging Party's attorney wrote a letter advising him that the Township disputed his calculation of accrued unused sick time. Charging Party received this letter on or about May 17, 1984. Charging Party contends that the operative date for the purpose of the timeliness of the instant Charge is May 17, 1984. I disagree.

May 15, 1984, the date on which the Charging Party's attorney received the letter in which the Township disputed the Charging Party's claim, is the date that the six (6) month limitation period began to run. There can be no serious dispute that service upon one's attorney constitutes effective service upon one's self. Further, it is clear that the limitations period commences to run on the date an employee receives unequivocal notice of his employer's determination concerning a given matter. See In re U.S. Postal Service, 271 NLRB No. 61, 116 LRRM 1417 (1984). Accordingly, since there are no facts alleging that the Charging Party was in any way prevented from filing his charge sooner, I must conclude for the reasons set forth above that the charge against the Township is untimely filed and for this reason as well, must be dismissed.

Finally, Charging Party alleges a violation of §(a)(7). Charging Party alleges no facts which would establish that the Township violated any of the Commission's rules. Accordingly, this count of McClintic's charge must also be dismissed.

Charge Against The Berkeley Township Supervisor's Association

The facts set forth in the Charging Party's pleadings indicate that prior to his resignation on May 4, 1984, McClintic was aware of a discrepancy between his calculation and the Township's calculation of the amount of accrued unused sick leave due him. In a supplement to the Unfair Practice Charge dated December 14, 1984, Charging Party states in Paragraph 5, "McClintic, through his attorney, requested that Berkeley Township Supervisors Association represent him in this matter, and on October 22, 1984, they refused, citing a provision in the contract's grievance procedure which requires that all grievances must be brought within thirty (30) days of the disputed action. However, Mr. McClintic had initiated the request long ago, prior to his retirement in May 1984." (Emphasis added).

McClintic's allegations as to when his cause of action against the Association arose, are inconsistent. As stated above, McClintic's December 14, 1984 supplement to the charge alleges that he sought Association representation prior to his retirement on May 4, 1984. This would seem to indicate that McClintic had some

information and belief that a dispute existed regarding his accrued unused sick leave. However, McClintic's argument in support of the timeliness of his instant charge against the Township states that he was not aware of a discrepancy in accrued leave time (or of any action the Township intended to take in light of such discrepancy) until May 17, 1985. The two allegations, when read together leave only one conclusion. There was no reason for the Association to proceed with a grievance before May 4 because, prior to that date, there was no indication of any wrongdoing on the part of the Township. Assuming arguendo that the Association breached its duty of fair representation by having not presented the Charging Party's grievance, prior to his retirement, McClintic is clearly beyond the six (6) month limitation period with respect to his pre-resignation request for Association representation.

McClintic's dispute with his employer arose on May 14, and, consequently the Association obligation to represent McClintic in this dispute arose at the same time.However, rather than seek Association representation in this dispute with the Township, Mr. McClintic instead chose to sit on his rights regarding Association representation and had his grievance presented to the Township on an individual basis through privately retained counsel. 6/

6/ It is, of course, Charging Party's right to have his grievances made known to his public employer. N.J. Constitution (1947), Article I, Para 19.

McClintic finally sought Association representation some time in October 1984. On October 22, 1984, the Association refused McClintic's request for represention in his dispute with the Township over his accrued unused sick leave. Charging Party claims the Association's October refusal to represent him constitutes a breach of its duty of fair representation in violation of §(b)(1) of the Act. The Association cites the Grievance Procedure in defense of McClintic's charge. Article XIV, paragraph 2, Grievance Procedure, states the following:

> 2. No grievance may be instituted by any employee or the Association more than thirty (30) calendar days of the alleged incidence occurring.

Charging Party waited well in excess of 120 days before asking the Association to represent him in his grievance. The Association relied upon the express language of the Agreement when it refused to process the Charging Party's grievance in October 1984.

N.J.S.A. 34:13A-5.3 provides that a majority representative shall represent the interests of all unit employees without discrimination and without regard to employee organization membership. While a majority representative normally has a statutory obligation to initially present grievances to a public employer on behalf of a unit member, there is no statutory obligation that the majority representative process grievances through specified levels of the grievance procedure. Whenever a

majority representative violates its duty to fairly represent a unit employee such a violation of is cognizable under N.J.S.A. 34:13A-5.4(b)(1). In re Jersey City Bd. of Ed., D.U.P. No. 81-13, 7 NJPER 180 (¶ 12079 1981).

The Commission has adopted the test for determining the breach of the duty of fair representation enunciated in Vaca v. Sipes, 366 U.S. 171, 87 S. Ct. 903 (1967). See also, Belen v. Woodbridge Tp. Bd. of Ed., 142 N.J. Super 486 (App. Div. 1976); In re Lawrence Tp. PBA Local 199, P.E.R.C. No. 84-76, 10 NJPER 41 (¶15023 1983); In re Union City, P.E.R.C. No. 82-65, 8 NJPER 98 (¶13040 1982); In re New Jersey Turnpike, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979); and In re Union Cty. College Chapter, AAUP, P.E.R.C. No. 85-121, 11 NJPER 374 (¶16135 1985). In the context of grievance proceedings, an employee representative violates its duty of fair representation only where its decision concerning a grievance is arbitrary, discriminatory or in bad faith. In re Jersey City, Bd. of Ed., supra.

Consequently, while this cause of action may be timely pursuant to N.J.S.A. 34:13A-5.4(c), the Association's decision to refuse to process Charging Party's grievance on the basis of unequivocal contract language cannot be said to be arbitrary, discriminatory or in bad faith. Accordingly, there is no breach of the duty of fair representation on the part of the Association, and I must decline to issue a complaint with regard to the §(b)(1) charge.

In the December 14, 1984, supplement to his Unfair Practice Charge, Charging Party alleges that the Association violated §5.4(b)(3) of the Act.[7/] Charging Party contends that the Association refused "to negotiate in good faith with a public employer by reason of their failure to process his grievance concerning payment for unused sick days." Charging Party further alleges that the Association violated §b(3) of the Act "by refusing to negotiate with the Township concerning the unused sick days due Mr. McClintic."

A majority representative owes only the public employer an obligation to negotiate. A minority representative or individual employee has no standing to allege a violation of §(b)(3) and "that [such] claims are not appropriate for litigation in an unfair practice forum, and that a complaint shall not issue thereunder." In re Trenton Bd. of Ed., D.U.P. No. 81-26, 7 NJPER 406 (¶ 12179 1981). See, In re Council of New Jersey State College Locals, D.U.P. No. 81-8, 6 NJPER 531 (¶ 11271 1980). Accordingly, I must decline to issue a complaint concerning Charging Party's §(b)(3) allegations.

7/ This subsection prohibits employee organizations, their representatives or agents from: "(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."

Finally, Charging Party alleges a violation of §5.4(b)(5). Charging Party alleges no facts which would establish that the Association has violated any of the Commission's rules and therefore, I decline to issue a complaint upon Charging Party's §5.4(b)(5) allegations.

Accordingly, for all of the reasons stated above, I decline to issue a complaint upon the instant charge against either the Township of Berkeley or the Berkely Township Supervisors Association.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

Edmund G. Gerber, Director

DATED: August 1, 1985
Trenton, New Jersey