D.U.P. NO. 91-2

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

In the Matter of

STATE OF NEW JERSEY
(DIVISION OF TAXATION),

Respondent,

-and-

Docket No. CI-90-56

HAROLD P. KUPERSMIT,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses a State Treasury Department employee's charge which alleges the State failed to give him clear, written work directives; negotiated a grievance settlement in bad faith with CWA; violated the CWA contract; violated his Weingarten rights; and improperly terminating him.

The Director finds that the charging party has not asserted facts which warrant Complaint issuance. The Director holds that an individual employee cannot normally file an (a)(5) charge asserting the employer negotiated in bad faith. Further, under Human Services, no complaint will issue based upon the alleged contract violations. Also, the Director found that none of the meetings detailed in the charge were investigatory interviews which might violate the employee's Weingarten rights. Finally, the charging party alleged no protected activities to support his (a)(3) charge concerning his termination.

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Appearances:

For the Respondent
Robert J. DelTufo, Attorney General
(Michael L. Diller, Deputy Attorney General)

For the Charging Party
Harold P. Kupersmit, pro se

REFUSAL TO ISSUE COMPLAINT

On February 15, 1990, Harold Kupersmit ("Kupersmit") filed an unfair practice charge with the Public Employment Relations Commission ("Commission") alleging the State of New Jersey, Division of Taxation ("State") violated subsections 5.4(a)(1), (3), (4), (5) and (7)[1/] of the New Jersey Employer-Employee Relations Act,

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1/ These subsections 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; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of

Footnote Continued on Next Page

N.J.S.A. 34:13A-1 et seq. ("Act"). Kupersmit filed amendments to the charge on February 20, 21, 22, 23, and 28, 1990. His charge, as amended, alleges that the State violated the Act by (a) failing to give him clear, written work directives and procedures, (b) negotiating his transfer with Communications Workers of America ("CWA") to resolve a grievance in bad faith; (c) refusing to hear and resolve grievances in a timely manner, (d) violating the collective negotiations agreement between the State and CWA by refusing to provide him with a copy of his personnel file prior to a disciplinary hearing; (e) violating his Weingartern rights, (f) wrongfully terminating him on February 22, and removing him from his work facility, and (g) failing to provide "plain notice" of his termination hearing in violation of the Veteran's Tenure Act.

The Commission has delegated its authority to issue complaints to me and 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 charging party's

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1/ Footnote Continued From Previous Page

employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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; (7) Violating any of the rules and regulations established by the commission."

allegations, if true, may constitute unfair practices within the meaning of the Act.[2/] If this standard has not been met, I may decline to issue a complaint.[3/] Based upon Kupersmit's allegations, we find that the Commission's complaint issuance standards have not been met. The following facts appear.

Kupersmit charges that the State failed to provide him with clear, written work policies and procedures. This allegation simply does not state a claim which might violate the Act.

Kupersmit claims the State negotiated his transfer with CWA in bad faith. Kupersmit was employed as an Auditor III in the State Division of Taxation, a position covered by a collective negotiations agreement between the State and CWA (professional unit). As his exclusive negotiations representative, CWA apparently initiated discussions with Taxation Division Chief Richard Pallay concerning possible settlement of certain grievances filed by Kupersmit. At a meeting in September, 1989 a transfer was discussed as a potential settlement of these grievances. Kupersmit refused the settlement offer. No facts have been presented which suggest that the State negotiated this grievance settlement in bad faith. Further, while an employer may violate N.J.S.A. 34:13A-5.4(a)(5) by bad faith negotiations with the majority representative, normally, such a charge can be filed only by the party to whom negotiations

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

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

rights and obligations flow, i.e., the majority representative. New Jersey Turnpike Auth., P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980), aff'd. App. Div. Dkt. No. A-1263-80T2; Rutgers Univ., P.E.R.C. No. 88-130, 14 NJPER 414 (¶19166 1988); City of Jersey City, P.E.R.C. No. 87-56, 12 NJPER 853 (¶17329 1986); Town of Morristown, D.U.P. 90-15, 16 NJPER ___ (¶ 1990); City of Atlantic City, D.U.P. No. 88-6, 13 NJPER 805 (¶18308 1987) and Camden Cty. Hwy. Dept., D.U.P. No. 84-32, 10 NJPER 399 (¶15185 1984). Accordingly, as an individual employee, Kupersmit lacks standing in this matter to charge that the State has refused to negotiate in good faith in violation of subsection 5.4(a)(5) of the Act.

Next, the charge alleges that the State failed to process grievances in a timely manner. Information submitted with the charge shows Kupersmit filed three non-contractual first-step grievances on February 13, 1990. Kupersmit's own submission indicates that his supervisor responded to the grievances by indicating they were not submitted on grievance forms, even though Kupersmit had been provided with such forms. It is not an unfair practice for an employer to require that an employee follow established grievance procedures for filing grievances. Moreover, the Commission has routinely held that where the parties' grievance procedure is self-executing, an employer's failure to respond at intermediate steps is not unlawful. State of New Jersey, D.U.P. 88-9, 14 NJPER 146 (¶19058 1988); City of Trenton, D.U.P. 87-7, 13

NJPER 99 (¶18044 1986) and Tp. of Millburn, D.U.P. No. 81-24, 7 NJPER 370 (¶12168 1981). There is no allegation that Kupersmit was prevented from taking his grievances to the next step of the grievance procedure. Accordingly, we will not issue a complaint on this allegation.

Kupersmit alleges the State violated the collective negotiations agreement by failing to provide him with his personnel file to prepare his disciplinary appeal. Kupersmit did not cite the portion of the contract he claimed was violated and more importantly the Commission will not issue a complaint where a charge merely alleges a violation of the parties' contract. New Jersey Department of Human Services and CWA, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). Thus, this allegation is also not appropriate for complaint issuance.

Kupersmit alleges that his Weingarten rights were violated on several occasions. According to documents submitted with the charge, on September 22, after receiving a "final warning" concerning his work performance, Kupersmit wrote his immediate supervisor Karl Marosovitz requesting "a union representative be present at all future conferences between myself and any division supervisor in accordance with my "Wilkenson" (sic) rights."

On January 19, 1990 Supervising Auditor Daniel Billak requested Kupersmit meet with him and Marosovitz concerning Kupersmit's work on a particular file. Kupersmit refused to meet without his union representative present. Billak spoke to

Kupersmit's union representative Jon Wineland, and told Wineland the purpose of the meeting was to discuss Kupersmit's work performance. Kupersmit also spoke with Wineland, and then met with Marosovitz and Billak. During the meeting, Kupersmit's work performance was discussed. Billak advised Kupersmit that refusals to meet to discuss work performance would be considered insubordination and "would be dealt with severely." On January 22, Supervisor Palley advised Kupersmit in writing that he was not entitled to union representation when the subject of discussion was job performance.

On February 13, Kupersmit filed grievances concerning the denial of his request for paid time to "prepare his defense". On February 15, Palley noticed Kupersmit working on his disciplinary appeal rather than his normal work. Palley directed him to return to his work assignments. Kupersmit asserts he "invoked his 'Weingarten' rights to be represented at this two-on-one meeting, and would do nothing further until [CWA representative] Wineland returned my call. I then exited when he refused my request."

On February 20, Palley recommended Kupersmit's termination. On February 22, a pre-departmental disciplinary ("Loudermill") hearing was conducted on the termination. Kupersmit contends that his Weingarten rights were also violated at this proceeding although he does not allege any facts in support of this legal conclusion.

In NLRB v.Weingarten, 420 U.S. 251, 88 LRRM 2689 (1975), the U.S. Supreme Court held that a private sector employee is entitled to have a union representative present at an investigatory

interview which the employee reasonably believes may result in discipline. In East Brunswick Bd. of Ed., P.E.R.C. No. 80-31, 5 NJPER 398 (¶10206 1979), aff'd in part, rev'd in part, App. Div. Dkt. No. A-280-79 (1980), Weingarten was specifically adopted by the Commission. For Weingarten rights to attach, there must be (a) an investigatory interview, (b) a reasonable apprehension by the employee that discipline may result, and (c) a request for union representation prior to or during the interview by the employee. See D'Arrigo v. N.J. State Board of Mediation, 228 N.J. Super. 189 (App. Div. 1988), certif. granted 115 N.J. 73 (1989), rev'd ___ N.J. ___ (1990); State of N. J. (Dept. of Human Services), P.E.R.C. No. 89-16, 14 NJPER 563, 565 (¶19236 1988), adopting H.E. No. 88-55, 14 NJPER 374, 377, 378 (¶19146 1988); Jackson Tp., P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988), adopting H.E. No. 88-49, 14 NJPER 293, 304, 305 (¶19109 1988); Dover Municipal Utilities Authority, P.E.R.C. No. 84-132 (10 NJPER at 333) ("Dover"); Stony Brook Sewage Authority, P.E.R.C. No. 83-138, 9 NJPER 280, 281 (¶14129 1983); East Brunswick Tp., P.E.R.C. No. 83-16, 8 NJPER 479 (¶13224 1982), adopting H.E. No. 82-59, 8 NJPER 400, 401 (¶13183 1982); Camden County Vo-Tech School, P.E.R.C. No. 82-16, 7 NJPER 466, 467 (¶12206 1981); and Cape May County, P.E.R.C. No. 82-2, 7 NJPER 432 (¶12192 1981) ("Cape May"). The reasonableness of the employee's belief that discipline may result from the interview is measured by objective standards under the circumstances of each case. Dover; Cape May.

Kupersmit has not alleged specific facts which would implicate a violation of Weingarten rights. None of the meetings in the charging party's charge are investigatory interviews. The stated purpose of the January 19 meeting with Billak and Marosovitz was to discuss "a particular file" and not seek out facts or otherwise conduct an investigation. Accordingly, based upon the factual allegations in the charge, we will not issue a complaint on these allegations.

Kupersmit alleges that he was terminated and removed from his work site illegally. On February 22, Kupersmit was suspended with intent to terminate his employment. He was charged with "failure to perform duties according to written procedures and oral instructions; substandard and unsatisfactory performance of duties; and repeated refusal to meet and discuss work performance with supervisor[s]." On February 23 he was removed from the Taxation Department facilities.

Whether the State's personnel actions were illegal under N.J.S.A. 34:13(a)(3) or (4) is determined by the test found in Bridgewater Tp., 95 N.J. 235 (1984) ("Bridgewater"). Under Bridgewater, charging party must first establish a prima facie case that protected activity was a substantial or motivating factor in the employer's disputed personnel action. The prima facie case may be proven by direct evidence of anti-union motivation, or by circumstantial evidence showing (a) that employees were engaged in protected activity; (b) the employer knew of this activity; and (c)

the employer was hostile toward the exercise of protected rights. Bridgewater at 246. If a prima facie case is established, the employer must show that the same action would have taken place even in the absence of protected activity. Bridgewater at 244. Kupersmit does not allege that his suspension, termination or removal from the building were in retaliation for any protected activities. Accordingly, we will not issue a complaint concerning the alleged violation of 5.4(a)3 or (4).

Finally, Kupersmit alleges that his termination violated the Veteran's Tenure Act. N.J.S.A. 38:16-1 et seq. The Commission is not the proper forum for the adjudication of alleged violations of this statute. Accordingly, no complaint will issue concerning this allegation.

Based upon the foregoing, the Commission's complaint standard has not been met and I decline to issue a complaint. The charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

Edmund G. Gerber, Director

DATED: July 17, 1990
Trenton, New Jersey