

D.U.P. NO. 2016-1

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

In the Matter of

NEW JERSEY TRANSIT,

Respondent,

-and-

Docket No. CI-2014-017

ATU DIVISION 540,

Respondent,

-and-

JAMAR T. COLEY,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by Jamar Coley against his employer, New Jersey Transit (NJT), and against his majority representative, Amalgamated Transit Union Local 540 (ATU). He alleges that NJT violated his contractual rights by assigning certain jobs to co-workers with less seniority than he has, and that ATU unlawfully declined to file the grievance that he brought to it regarding the alleged contractual violations. The Director held that, even if Coley's allegations were true, he only establishes a mere breach of contract claim against NJT over which the agency lacks jurisdiction, and that ATU's refusal to file his grievance does not rise to the level of a DFR violation.

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Appearances:

For the Respondent,
(Michael J. Gonnella, DAG)

For the Respondent,
Oxfeld Cohen
(Arnold Cohen, Esq.)

For the Charging Party,
(Jamar T. Coley, Pro Se)

REFUSAL TO ISSUE COMPLAINT OR DECISION

On September 16 and 27, 2013, Jamar T. Coley (Charging Party) filed an unfair practice charge and an amended charge respectively, against New Jersey Transit (NJT) and the Amalgamated Transit Union Local 540 (ATU). As amended, the

charge alleges that NJT violated 5.4a(3), (5), (6) and (7)^{1/} of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., and that ATU violated 5.4b(1), (2) and (3)^{2/} of the Act. Coley claims that NJT violated his contractual rights in August and September 2013 by assigning certain jobs to co-workers with less seniority than he has. Coley also claims that around August 9, 2013, the ATU unlawfully declined to file the grievance that he brought to the president of the ATU regarding the alleged contract violations. For relief, Cooley seeks to have NJT post all assignments so that employees may bid for them based on seniority. He also seeks to be reimbursed for all

1/ These provisions prohibit public employers, their representatives or agents from "(3) [d]iscriminating in regard to hire or tenure of employment or any term and condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act[;] (5) [r]efusing 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[;] (6) [r]efusing to reduce a negotiated agreement to writing and to sign such agreement[;] (7) [v]iolating any of the rules and regulations established by the commission."

2/ These provisions prohibit employee organizations, their representatives or agents from "(1)[i]nterfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by this Act[;] (2) [i]nterfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances[;] (3) [r]efusing 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."

missed opportunities for work when he was available and for dues during those months in which ATU permitted the alleged contract violation to continue.

The Commission has authority to issue a complaint where it appears that a 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.

On September 4, 2015, I issued a letter to the parties setting forth my tentative findings and conclusions. I invited the parties to respond by the close of business on September 11, 2015. No party filed a response. Based upon the following facts, I find that the complaint issuance standard has not been met.

Cooley works at NJT's garage in Hamilton, New Jersey. NJT is a public employer within the meaning of the Act. ATU is the majority representative for Cooley's title. The applicable collective negotiations agreement extends from July 1, 2008 through June 30, 2010. This contract remains in effect.

In his amended charge, Cooley identifies the following instances in which he alleges that NJT violated the contract by giving assignments to co-workers with less seniority than him:

(1) on August 9, 2013, when a co-worker was assigned to perform an air conditioning job; (2) on August 26, 2013, when several coworkers were assigned to install a new communication system in the buses; and (3) between August and September 2013, when another coworker received the wheelchair preventative maintenance assignment. Coley asserts that certain daily assignments, like air conditioning and preventative maintenance, typically allow for some overtime. He maintains that the alleged contract violations represent an ongoing practice by NJT in its administration of the contract.

Coley claims that Article XXIII Section 2 and Article XXI Section 3 of the parties' contract require NJT to base all work assignments on seniority. Section 3 of Article XXI is entitled "Garage Employees Layoffs and Promotions" and provides that "[s]eniority shall be used in the selection of consecutive days off, shifts and jobs." Section 2 of Article XXIII is entitled, "Garage Work Week and Overtime" and provides in pertinent part:

All garage work shall be dispensed according to seniority. Overtime work shall be offered first to the men who are actually performing the work prior to the overtime assignment. In the event the employee so affected does not desire the overtime offered, the senior qualified man will be offered the overtime work.

Coley alleges that on or around August 9, 2013, he filed a grievance with ATU to address the issue. The parties' contract sets forth a multi-step grievance procedure. Only NJT or ATU can

file grievances, as each step of the parties' grievance procedure refers only to representatives of management and the union.

Coley claims that the president denied his grievance.

On July 23, 2014, an informal exploratory conference was held with the parties. The parties were unable to reach a voluntary resolution.

At the conference, ATU did not dispute that it declined to file Coley's grievance. It contends that under the contract, employees are not entitled to pick daily work assignments and it had never been a past practice. Therefore, it did not agree with Coley's view that NJT violated the contract.

NJT asserts that Coley's charge is an attempt to circumvent management's contractual right to control the work force and the assignment of work. It maintains that Coley was afforded his right to choose his assignment at the general pick, according to his seniority. NJT contends that Cooley wants to choose additional, regular pieces of work on a daily basis based on seniority, which it claims would interfere with its ability to control work flow and efficiently complete necessary tasks. NJT cites Section 1 of Article II of the parties' contract, which governs management's rights. It provides:

[t]he Union recognizes the rights of the Company to retain fully, all functions of management relating to the direction of the working forces and the operation of the department and division, including, but not

limited to . . . the assignment of work . . .

Claims Against ATU

Coley's charge alleges that ATU violated the Act because it declined to file his grievance seeking to contest NJT's alleged contract violations. For the following reasons, I find that Coley has not alleged facts indicating that ATU may have violated the Act.

In Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 64 LRRM 2369 (1967), the United States Supreme Court ruled that unions owe a duty of fair representation, which is breached ". . . only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith." New Jersey courts have consistently adopted and applied the Vaca standard. See e.g., Lullo v. International Ass'n of Fire Fighters, 55 N.J. 409 (1970); Belen v. Woodbridge Tp. Bd. of Ed., 142 N.J. Super. 486 (App. Div. 1976), certif. den. 72 N.J. 458 (1976). A breach of the duty of fair representation violates 5.4b(1) of the Act. Id.

In examining a duty of fair representation claim, the majority representative must be afforded a wide range of reasonableness in serving the unit it represents. PBA Local 187, P.E.R.C. No. 2005-78, 31 NJPER 173, 175 (P70 2005)(citing Belen, 142 N.J. Super. at 490-91). The duty of fair representation does not require a union to file every grievance a unit member asks it to submit. Id. at 174 (citing Carteret Ed. Ass'n, P.E.R.C. No.

97-146, 23 NJPER 390 (P28177 1997)). Rather, an employee representative is obligated to exercise reasonable care and diligence in investigating, processing, and presenting grievances; to make a good faith determination of the merits of a grievance; to treat unit employees equally by granting equal access to the grievance procedure and arbitration for similar grievances of equal merit. Middlesex Cty. (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). "[M]ere negligence, poor judgment, or ineptitude in grievance handling," alone do not suffice to prove a breach of the duty of fair representation. Id. (citing Glen Ridge School Personnel Ass'n, P.E.R.C. No. 2002-72, 28 NJPER 251 (¶33095 2002)(additional citations omitted).

ATU interprets "all garage work shall be dispensed according to seniority" under Article XXIII, Section 2 of the parties' contract to mean that unit members are entitled to choose assignments based on seniority during the general pick, but are not entitled to choose additional pieces of work that arise on a daily basis. NJT also interprets that contractual provision to refer to assignments during the garage's general pick. This interpretation is one colorable reading of the contractual provision.

The charge only establishes that Coley disagrees with ATU's view that NJT's assignment of work did not violate his overtime or seniority rights under the parties' contract. While Coley's interpretation is also plausible, the contractual provision is not so clear to enable a finding that his interpretation is the only viable as one. Moreover, no facts suggest that ATU arrived at its interpretation in a bad faith, discriminatory or arbitrary manner, and therefore, breached its duty of fair representation. At most, Coley's charge could support a finding that the ATU was negligent, and as discussed above, mere negligence is insufficient to establish a viable duty of fair representation claim. For these reasons, the alleged facts, even if true, do not establish a breach of the duty of fair representation. Accordingly, I dismiss the 5.4(b)(1) claim.

Coley also alleges a violation of 5.4b(2) and (3). No facts in the charge support these claims. Therefore, I dismiss those claims.

Claims Against NJT

Coley's charge further alleges that NJT violated 5.4a (3) of the Act. In Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), the New Jersey Supreme Court upheld the Commission's standard for determining whether an employer's action violates subsection 5.4a(3) of the Act. The charging party must prove by a preponderance of the evidence on the entire

record that protected activity was a substantial or motivating factor in the employer's adverse action. Id. at 244. This may be done by direct or circumstantial evidence which demonstrates all of the following: (1) the employee engaged in protected activity under the Act; (2) the employer knew of this activity; and (3) the employer was hostile toward the exercise of the protected activity. Id. at 246. Protected activity in this context refers to conduct by public employees that implicates their right under the Act "to form, join and assist any employee organization or to refrain from any such activity . . ." N.J.S.A. 34:13A-5.3. The filing of a grievance is a "fundamental example of protected activity" under our Act. Pine Hill Bd. of Ed., P.E.R.C. No. 86-126, 12 NJPER 434, 437 (¶17161 1986).

I find that Coley has not alleged facts indicating that NJT violated 5.4a(3) of the Act. According to his charge Coley filed a grievance "around/about" August 9, 2013, and therefore engaged in protected activity. Coley then identifies August 9, 2013 and August 26, 2013, as instances where NJT assigned work to employees with less seniority and did not place the work up for bidding. Coley alleges that this "practice" occurred in August and September 2013 and is an "ongoing issue." Coley's charge lacks any facts indicating that the conduct he views as a contract violation is a consequence of his August 9 grievance. At most, it establishes that NJT has consistently applied its

understanding of the contract in assigning work. Therefore, Coley has not alleged that NJT's actions are in response to any type of protected activity.

Instead, Coley's charge simply describes the instances in which he believes NJT violated the contract. It is a well-settled principle that the Commission does not have jurisdiction over mere breach of contract claims. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). Charging parties are not entitled to substitute the Commission's jurisdiction for a grievance procedure that is the agreed-upon method for resolving a contractual dispute. Id. at 421. However, in Human Services, the Commission specified circumstances in which an alleged breach of contract could ". . . rise to the level of a refusal to negotiate in good faith." Id. For example, claims of contract "repudiation" and charges revealing "specific indicia of bad faith" may warrant the exercise of the Commission's jurisdiction. Id.

I find that Coley's charge provides only his colorable but differing interpretation of "all garage work," as set forth in Section 2 of Article XXIII of the contract. Both NJT and ATU proffered a colorable interpretation that garage work refers to the assignments unit members choose based on seniority during the general pick, but does not refer to the additional pieces of work that arise on a daily basis. Coley disagrees. Thus, the facts

as alleged, do not indicate anything more than a good faith contractual dispute. Pursuant to Human Services, our unfair practice jurisdiction cannot be substituted for the parties' grievance procedure. Although Coley cannot turn to the grievance procedure to contest NJT's interpretation since ATU determined that there was no violation, such conduct alone does not convert a contractual dispute into an unfair practice under our Act.

I also find that Coley lacks legal standing to allege that NJT violated subsection 5.4a(5) of the Act. Individual employees generally lack standing to assert an 5.4a(5) violation because the employer's duty to negotiate in good faith runs only to the majority representative. N.J. Turnpike Authority, P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980); Camden Cty. Highway Dept., D.U.P. No. 84-32, 10 NJPER 399 (¶15185 1984). An individual employee may file an unfair practice charge and independently pursue a claim of an 5.4a(5) violation only where that individual has also asserted a viable claim of a breach of the duty of fair representation against the majority representative. Jersey City College, D.U.P. No. 97-18, 23 NJPER 1 (¶28001 1996); N.J. Turnpike, D.U.P. No. 80-10, 5 NJPER 518 (¶10268 1979). Because, as discussed above, I find that ATU did not breach its duty of fair representation, I find that Coley lacks standing to claim a violation of section 5.4a(5) of the Act.

Coley further alleges that NJT violated 5.4a(6) of the Act, which prohibits public employers from "refusing to reduce a negotiated agreement to writing and to sign such agreement."

Individual employees lack standing to make such a claim, as the obligation under this subsection is owed only to the majority representative. Rutherford Free Public Library, D.U.P. No. 2000-17, 26 NJPER 295 (¶31119 2000)(citing N.J. Transit and ATU (Elder), H.E. No. 89-26, 15 NJPER 248 (¶20100 1989, aff'd in part, P.E.R.C. No. 89-135, 15 NJPER 419 (¶20173 1989)).

Therefore, I find that Coley as an individual lacks standing to assert a violation of 5.4a(6) of the Act. Assuming Coley had standing to assert such a claim, I nonetheless dismiss it because Coley has not alleged facts in support of this claim.

Lastly, Coley's charge alleges that NJT violated 5.4a(7) of the Act, which prohibits public employers from violating the Commission's rules and regulations. A charging party must cite to the specific rule or regulation that was allegedly violated for a complaint to be issued. High Point Reg. Bd. of Ed., D.U.P. No. 80-23, 6 NJPER 214, 215 (¶11105 1980). Coley's charge does not identify a specific rule or regulation established by the Commission that the State violated. Coley did not allege facts in support of this claim, and it is accordingly, dismissed.

For all these reasons, I conclude that the charge does not meet the complaint issuance standard.

ORDER

The unfair practice charge is dismissed.

Gayl R. Mazuco
Director of Unfair Practices

DATED: September 14, 2015
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 September 24, 2015.