

D.U.P. NO. 2016-3

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

In the Matter of

AMALGAMATED TRANSIT UNION, LOCAL 540,

Respondent,

-and-

Docket No. CI-2014-026

THEODORE WARFIELD,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge alleging the Amalgamated Transit Union, Local 540 (ATU) breached its duty of fair representation (DFR) by not providing adequate representation of the Charging Party at the intermediate steps of a grievance procedure. The Charging Party, Theodore Warfield, filed a grievance challenging his termination and the ATU assigned a representative to attend meetings with management concerning the grievance. ATU did not argue or present evidence at the meetings, but did hire an experienced labor attorney to handle Warfield's at arbitration. The Director found that ATU's lack of representation at the intermediate steps of the grievance procedure was, at most, negligence and did not rise to the level of a DFR violation. The Director also noted that Warfield did not criticize ATU's handling of his grievance at the arbitration and there were no facts indicating he was prejudiced at the arbitration by ATU's representation at earlier steps of the grievance procedure.

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Appearances:

For the Respondent,  
Oxfeld Cohen, attorneys  
(Samuel B. Wenocur, of counsel)

For the Charging Party,  
(Theodore Warfield, Pro Se)

**REFUSAL TO ISSUE COMPLAINT**

On November 8, 15, and December 31, 2013; March 19, 2014; and May 4, 2015, Theodore Warfield (Warfield or Charging Party) filed an unfair practice charge and amended charges against Amalgamated Transit Union, Local 540 (ATU or Respondent). The charge, as amended, alleges the Respondent violated section 5.4b(1),(3),(4) and (5)<sup>1/</sup> of the New Jersey Employer-Employee

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<sup>1/</sup> These provisions 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; (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  
(continued...)

Relations Act (Act), N.J.S.A. 34:13A-1 et seq., by not providing Warfield representation at steps one, two and three of the grievance procedure set forth in ATU's collective negotiations agreement (CNA) with New Jersey Transit Mercer, Inc. (NJ Transit). Warfield also alleges that ATU violated the Act by refusing to provide him discovery related to his disciplinary hearing and by "conspiring" with management at NJ Transit to "keep [him] fired before and during the above [grievance] steps."

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-5.4(c); 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; CWA Local 1040, D.U.P. No. 2011-9, 38 NJPER 93 (¶20 2011), aff'd at P.E.R.C. No. 2012-55, 38 NJPER 356 (¶120 2012).

On October 20, 2015, I issued a letter to the parties tentatively dismissing the charge and inviting responses by October 27, 2015. Warfield emailed responses on October 20 and November 5, 2015, largely reiterating his previous allegations

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1/ (...continued)  
employees in that unit; (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement; and (5) violating any of the rules and regulations established by the commission."

and contentions and urging us to conduct a hearing. The November 5 email is untimely and Warfield does not provide any reasons for its lateness. The November 5 email will not be considered.

I find the following facts.

ATU is the exclusive majority representative of all NJ Transit Mercer, Inc. (NJ Transit) "drivers, garage employees and designated salaried personnel employed" by NJ Transit. NJ Transit and ATU are parties to collective negotiations agreement (CNA) extending from July 1, 2008 through June 30, 2010.<sup>2/</sup> Beginning in 2006, Warfield was employed as a repairman at NJ Transit's Hamilton garage and was an ATU unit employee.

Article V of the CNA sets forth a grievance procedure. The grievance procedure consists of three steps where a disciplinary matter or contractual issue "shall be discussed" between different NJ Transit representatives and an ATU representative or ATU Executive Board Member. The first three steps of the grievance procedure provide informal opportunities for management and labor representatives to meet, discuss and resolve differences over contractual issues and/or pending discipline.<sup>3/</sup>

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2/ Neither party provided a copy of a successor CNA and it is unclear what the status of a successor CNA is.

3/ At Step 1, discussions occur between the Superintendent of Transportation or the Superintendent of Maintenance for NJ Transit, an ATU Executive Board Member or other ATU designee, and the individual grievant. Step 2 provides for discussions between a NJ Transit General Manager or other

(continued...)

The grievance procedure does not reference the right to a "hearing" or other proceeding at Steps 1, 2 and 3.

Pursuant to Article V, Section (2), if the dispute remains unresolved after the Step 3 meeting, either ATU or NJ Transit may make a written demand for an arbitration hearing before a tripartite panel consisting of a representative selected by ATU, a representative selected by NJ Transit and a "neutral arbitrator" selected by the New Jersey State Board of Mediation.

On March 4, 2014, NJ Transit management representatives Stephen Barany and Damian Hall met with Warfield and ATU representative Ricardo Neblett, pursuant to Step 1 of the grievance procedure. At the meeting, Barany served Warfield and Neblett with disciplinary charges calling for Warfield's discharge. The charges allege Warfield was found by his supervisor, Anthony Moran, to have slept while on duty on an NJ Transit bus on or about January 30, 2014. The charges also allege that Warfield was "belligerent" towards Moran on January 31, 2014 and that Warfield had yelled obscenities at Moran in an intimidating manner.

A Step 2 meeting was also conducted, although the parties provide little information about what happened at the meeting.

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3/ (...continued)  
designee and the ATU President, Executive Board Member or other ATU designee. Step 3 permits discussion between the Manager of Labor Relations or his designee and the ATU President. See Article V, Section 1.

According to Warfield, while ATU representative Neblett attended both the Step 1 and Step 2 level discussions concerning the discipline against him, Neblett "did not say a word" at either meeting and was not helpful to him during those meetings.

By letter dated March 26, 2014, Abdul Momoh, ATU's Recording Secretary, sent Warfield a letter enclosing the discovery materials Warfield had requested concerning his March 4 disciplinary charge. Warfield then sent a letter dated April 1, 2014 to Neblett, Michael F. Cribb, ATU's President, and William J. Volonte, Esq., counsel for ATU. The April 1 letter enclosed the discovery Warfield received from Momoh and included notations by Warfield about the materials. Warfield's letter also stated, in pertinent part:

I have not received any help from the union. Not even a call. Recardo [Neblett] did the 1<sup>st</sup> & 2<sup>nd</sup> Steps of the hearing. He did not know what was going on at the 1<sup>st</sup> and 2<sup>nd</sup> Step hearings. The union should have made sure he was ready to do these hearings or had another Executive Board member do the hearing. Recardo did nothing at the hearing. He did not write or say a word. I have not received any representation from the union. This is illegal you have to represent me and keep me updated. I am requesting a detailed letter from you explaining what the union is doing about my case and remember you are the bargaining agent for ATU Local 540 [and] it is your duty to provide this information to me.

ATU then filed a grievance requesting arbitration over Warfield's discharge pursuant to Article V, Section 2 of the CNA.

ATU hired attorney Arnold S. Cohen to represent Warfield at the arbitration hearing. On February 25, 2015, a hearing was conducted before the tripartite arbitration panel. ATU's counsel appeared at the arbitration hearing in support of Warfield's grievance seeking reinstatement with back pay and reimbursement for lost benefits. On April 21, 2015, the panel issued an opinion and award denying Warfield's grievance. Warfield does not allege ATU's representation at arbitration was inadequate or flawed in any way.

#### ANALYSIS

A majority representative has a duty to represent all unit employees fairly and without discrimination on the basis of union membership. N.J.S.A. 34:13A-5.7; CWA Local 1034 (King), D.U.P. No. 2004-2, 29 NJPER 367 (¶113 2003). The standards governing a union's duty of fair representation (DFR) in the private sector were articulated in Vaca v. Sipes, 386 U.S. 171 (1967). Under Vaca, a breach of the statutory duty of fair representation occurs only when a union's conduct towards a unit employee is arbitrary, discriminatory, or in bad faith. Id. At 191. Our Supreme Court and Commission have adopted this standard for DFR claims in the public sector. See, e.g., Saginario v. Attorney General, 87 N.J. 480 (1981); 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. denied 91 N.J. 242 (1982).

In the context of a union's handling of unit member grievances, the courts and Commission have held that a union 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; and it must treat individuals equally by granting equal access to the grievance procedure and arbitration for similar grievances of equal merit. Middlesex Cty. (Mackaronis); CWA Local 1034 (King); Belen v. Woodbridge Bd of Ed., 142 N.J.Super. 486 (App. Div. 1976); AFSCME Council No. 1 (Banks), P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978). However, a union's negligence in the processing and presentation of a grievance is not a breach of the duty of fair representation. Newark Library and IUOE Local 68 (Shaw), D.U.P. No. 2005-6, 30 NJPER 494 (¶168 2004); Monmouth Cty. and CWA Local 1034 (White), D.U.P. No. 2011-5, 36 NJPER 393 (¶153 2010). We have frequently rejected DFR claims based on allegations that a union's representation of a grievant was inadequate or incompetent. Passaic Cty. Comm. Coll. Admin. Ass'n (Wasilewski), P.E.R.C. No. 98-131, 24 NJPER 256 (¶29122 1998); Council of N.J. State College Locals, AFL-CIO (Roman), D.U.P. No. 2015-10, 41 NJPER 497 (¶154 2015), aff'd P.E.R.C. No. 2015-76, 42



NJPER 33 (¶8 2015); CWA Local 1034 (King); Monmouth Cty. and CWA Local 1034 (White).

In Passaic Cty. Comm. Coll. Admin. Ass'n (Wasilewski), supra, the Commission rejected Wasilewski's claim alleging her union failed to properly assist her prior to and during her termination hearing before a college board of trustees. While evidence was presented to support Wasilewski's position that the union's representation at the termination hearing was "unremarkable" and inadequate (because the union did not present witnesses), the Commission nonetheless held that these facts did not rise to the level of a DFR violation. Id., 24 NJPER at 258. In so holding, the Commission wrote:

Nor do we find arbitrary, discriminatory or bad faith conduct in Local 153's representation of Wasilewski in connection with her termination. Heffernan [union representative] appeared on Wasilewski's behalf before the Board of Trustees, which had the sole discretion to decide whether to terminate her based on the president's recommendation to do so. Even if we assume that a more effective presentation could have been made, that circumstance would at most support a finding of negligence, which does not constitute a breach of the duty of fair representation.

[24 NJPER at 258]

See also, Council of N.J. State College Locals, AFL-CIO (Roman)

(Commission rejects DFR claim of inadequate and incompetent representation of a grievant, noting that, "even if the [grievant] could show that the [union] could have provided better advice,

developed a better case strategy, offered more evidence or witnesses, or provided a better representative, [the grievant's] allegations of ineffective or incompetent representation do not indicate bad faith, different treatment than others, or arbitrariness in the way her case was handled") 41 NJPER at 497.

I dismiss Warfield's unfair practice charge since there are no factual allegations indicating ATU's representation of Warfield was arbitrary, discriminatory, or in bad faith. Passaic Cty. Comm. Coll. Admin. Ass'n (Wasilewski); Council of N.J. State College Locals, AFL-CIO (Roman). ATU representative Neblett was present at both Step 1 and 2 meetings concerning Warfield's discipline and ATU hired an experienced labor attorney to challenge NJ Transit's discipline of Warfield at an arbitration hearing. ATU sent Warfield the discovery materials he requested in connection with his discipline prior to arbitration. Warfield does not criticize ATU's handling of his case during the arbitration process. Although he alleges that Neblett was "silent" and unhelpful at the Step 1 and 2 meetings, that conduct is, at most, negligent and not a violation of DFR. While Warfield contends ATU could have provided more effective representation at Steps 1 through 3 of the grievance procedure, that claim does not rise to the level of a DFR violation. Passaic Cty. Comm. Coll. Admin. Ass'n (Wasilewski).

Warfield also alleges the ATU violated section 5.4b(3) of the Act. The Commission has held that individual employees do not have standing to assert a 5.4b(3) violation. Only employers have standing to pursue a 5.4b(3) claim. State of N.J. (Juvenile Justice), CWA Local 1040 and CWA District 1 and Judy Thorpe, P.E.R.C. No. 2013-29, 39 NJPER 205 (¶66 2012), recon. den. P.E.R.C. No. 2014-9, 40 NJPER 172 (¶66 2013); Hamilton Tp. Bd. of Ed., P.E.R.C. No. 79-20, 4 NJPER 476 (¶4215 1978); CWA Local 1034 and Renaldo A. King, D.U.P. No. 2004-2, 29 NJPER 367 (¶113 2003). I am, therefore, dismissing Warfield's 5.4b(3) allegation.

I am also dismissing Warfield's 5.4b(4) and (5) allegations since no specific facts have been alleged to support these claims, nor have any facts been alleged indicating NJ Transit and ATU "conspired" to ensure Warfield's discharge. N.J.A.C. 19:14-1.3(a)(3).

Warfield's October 20 email does not raise any new facts or legal arguments justifying the issuance of a complaint. Accordingly, I find Warfield's allegations do not satisfy the complaint issuance standard..<sup>4/</sup>

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

ORDER

The unfair practice charge is dismissed.

/s/Gayl R. Mazuco  
Director of Unfair Practices

DATED: November 17, 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 December 1, 2015.**