

D.U.P. NO. 2023-16

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

In the Matter of

EDISON TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CI-2018-003

EDISON TOWNSHIP CUSTODIAL MAINTENANCE
ASSOCIATION,

Respondent,

-and-

NEW JERSEY EDUCATION ASSOCIATION
REGIONAL OFFICE 11/12,

Respondent,

-and-

PATRICK H. WRIGHT,

Charging Party.

SYNOPSIS

The Acting Deputy Director of Unfair Practices dismisses an unfair practice charge filed by Patrick Wright (Wright) against Edison Township Board of Education (Board), Edison Township Custodial Maintenance Association (ETCMA), and New Jersey Education Association Regional Office 11/12 (NJEA). Wright, a former custodian employed by the Board, alleges that the Board issued unfair evaluations of him that led to the non-renewal of his contract, and that the Board's non-renewal of his contract was in retaliation for Wright's filing of a charge with the Commission in December 2016. Wright also alleges that ETCMA and NJEA improperly represented him with regard to the unfair evaluations and non-renewal, and improperly refused to file a grievance on his behalf. Wright alleges that the Board's actions violate subsection 5.4a(1), (2), (3), (4), (5), and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act), and that ETCMA and NJEA's actions allegedly violate subsection 5.4b(1), (3), and (5) of the Act.

The Acting Deputy Director determined that the charge was not timely filed against ETCMA and NJEA, and that Wright did not allege any facts indicating that the Board violated subsection 5.4a(1), (2), (3), (4), (5), and (7), or that ETCMA and NJEA violated subsection 5.4b(1), (3), and (5) of the Act. Thus, the Assistant Deputy Director dismissed the charge.

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PATRICK H. WRIGHT,

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Appearances:

For the Respondent,
Busch Law Group, attorneys
(Ari D. Schneider, of counsel)

For the Respondent,
Selikoff and Cohen, attorneys
(Keith Waldman, of counsel)

For the Respondent
Zazzali Fagella Nowak and Kleinbaum, attorneys
(Jason Sokolowksi, of counsel)

For the Charging Party,
(Patrick H. Wright, pro se)

REFUSAL TO ISSUE COMPLAINT

On July 21, 24, and 25, 2017, Patrick Wright (Wright) filed an unfair practice charge, and amended charges, against his employer, Edison Township Board of Education (Board). On January 18, 2018, Wright filed a third amended charge against the Board and a charge against his majority representative, Edison Township Custodial Maintenance Association (ETCMA) and New Jersey Education Association Regional Office 11/12 (NJEA). Wright, a former custodian employed by the Board, alleges that on November 22, 2016, and March 22, 2017, the Board issued unfair evaluations of him that led to the non-renewal of his contract that expired on June 30, 2017. Wright alleges that the Board's non-renewal of his contract was in retaliation for Wright's filing of a charge with the Commission in December 2016.^{1/} Wright also alleges that ETCMA and NJEA improperly represented him with regard to the unfair evaluations and non-renewal, and improperly refused to file a grievance on his behalf. Wright alleges that the Board's actions violate subsection 5.4a(1), (2), (3), (4), (5), and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A.

1/ Although Wright alleges that he filed a charge with the Commission on December 13, 2016, the Commission has no record of any filing by Wright at any time before the original charge was filed in this matter on July 21, 2017. Wright also references a filing with Public Employees Occupational Safety and Health (PEOSH) in his charge, but includes no additional detail or dates about that alleged filing.

34:13A-1, et seq. (Act),^{2/} and that ETCMA and NJEA's actions allegedly violate subsection 5.4b(1), (3), and (5) of the Act.^{3/}

On October 20, 2017, the Board submitted a position statement arguing that Wright's claims do not constitute violations of the Act, but rather constitute alleged contractual violations of the negotiated grievance procedure set forth in the collective negotiations agreement (CNA) between the Board and ETCMA. Therefore, the Board argues that Wright's claims should be resolved through the parties' grievance procedure. The

2/ 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 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 the unit, or refusing to process grievances presented by the majority representative; and (7) Violating any of the rules and regulations established by the commission."

3/ These subsections 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 employees in the unit; and (5) Violating any of the rules and regulations established by the commission."

current CNA between the Board and ETCMA runs from July 1, 2018 through June 30, 2021.

On February 2, 2018, ETCMA submitted a position statement arguing that the charge against it was untimely because more than six months had passed since the alleged events occurred. Specifically, ETCMA argues that after the Board issued what Wright alleges to have been unfair evaluations on November 22, 2016, and March 22, 2017, ETCMA advised Wright on May 25, 2017, that ETCMA would not file a grievance on his behalf. However, ETCMA argues that Wright did not file a charge against ETCMA until January 18, 2018, more than six months after May 25, 2017. Furthermore, ETCMA argues that even if the later date of June 30, 2017 (the date on which Wright's contract with the Board expired without being renewed) was "considered the last operative event constituting an unfair practice by" ETCMA, Wright's charge filed on January 18, 2018 would still be untimely by almost three weeks. ETCMA further argues that Wright does not allege that he was prevented from filing a timely charge against ETCMA, and there are no exceptional circumstances that would make his charge against ETCMA timely filed.

On February 5, 2018, the NJEA submitted a position statement, which, similar to ETCMA's position statement, argued that Wright's charge against the NJEA is untimely because more than six months passed between the filing of the charge against

NJEA on January 18, 2018 and May 25, 2017 (ETCMA's notification to Wright that it would not file a grievance on his behalf contesting his non-renewal) or June 30, 2017 (the date on which Wright's contract with the Board expired).

The Commission has authority to issue a complaint where it appears that the 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. I find the following facts.

Wright was employed as a custodian by the Board at John Adams Middle School. On November 22, 2016, and March 22, 2017, Wright received two unsatisfactory evaluations: one prepared by the Board's facility manager, Nicholas Meli, and the other prepared by John Adams Middle School principal, Joan Valentine. Wright also received "Employee Warning Notices" dated December 12, 2016, January 10, 2017, January 27, 2017, and February 24, 2017. On April 28, 2017, he was advised by the Board that his contract would not be renewed for the 2017-2018 school year at the expiration of his contract on June 30, 2017. On May 24, 2017, Wright was advised by the Board that he was being released from his duties effective immediately due to "inappropriate behavior," i.e., a verbal altercation with other custodians, but

that Wright would be paid and receive benefits through the end of his contract on June 30, 2017.

On May 25, 2017, Wright was notified by ETCMA that it would not pursue a grievance on his behalf contesting the non-renewal of his contract for the 2018-19 school year given that the Board was going to maintain Wright's full salary and benefits through June 30, 2017.

ANALYSIS

With regard to Wright's claims against ETCMA and the NJEA, N.J.S.A. 34:13A-5.4c establishes a six-month statute of limitations period for the filing of unfair practice charges.

The statute provides in pertinent part:

. . . that no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such a charge in which event the 6-month period shall be computed from the day he was no longer so prevented.

In Kaczmarek v. N.J. Turnpike Authority, 77 N.J. 329 (1978), our Supreme Court explained that the statute of limitations was intended to stimulate litigants to prevent the litigation of stale claims, and cautioned that it would consider the circumstances of individual cases. Id. at 337-338. The Court noted that it would look to equitable considerations in deciding whether a charging party slept on its rights.

On May 25, 2017, Wright was advised that ETCMA would not pursue any grievance on his behalf because the Board was continuing to pay his full salary and benefits through June 30, 2017, despite its April 28, 2017 decision not to renew his contract for the next school year and terminate his employment effective June 30, 2017. Wright filed the third amended charge, naming ETCMA and NJEA as respondents for the first time, on January 18, 2018, more than six months after both May 25, 2017, and June 30, 2017. Wright has not alleged any facts suggesting that he was prevented from filing a timely charge against ETCMA and/or NJEA. Under these circumstances, I find that Wright's "amended" charge against ETCMA and NJEA is untimely.

Even if Wright's charge against ETCMA and NJEA is timely filed, the uncontested facts do not indicate that ETCMA and NJEA acted arbitrarily, discriminatorily, or in bad faith in deciding not to file a grievance on Wright's behalf in violation of 5.4b(1). N.J.S.A. 34:13A-5.3 provides in part:

A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership.

In Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967), the U.S. Supreme Court articulated the standard for determining whether a

labor organization violated its duty of fair representation. The Court held:

A breach of the statutory duty of fair representation occurs only when a union's conduct towards a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith. [Id. at 190, 64 LRRM 2376]

New Jersey has adopted the Vaca standard in deciding fair representation cases arising under the Act. See Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976); see also Lullo v. International Ass'n of Fire Fighters, 55 N.J. 409 (1970); Saginario v. Attorney General, 87 N.J. 480 (1981); OPEIU Local 153 (Johnstone), P.E.R.C. No 84-60, 10 NJPER 12 (¶15007 1983).

Employee organizations are entitled to a wide range of reasonableness in determining how to best service their members. See Camden Cty. College, P.E.R.C. No. 88-28, 13 NJPER 755 (¶18285 1987). ETCMA and NJEA representatives acted within the ambit of their discretion when determining whether or how to contest Wright's poor evaluations and non-renewal, so long as they did not act discriminatorily, arbitrarily, or in bad faith. That ETCMA and NJEA did not act in accordance with Wright's expectations, or achieve the results Wright desired, does not demonstrate bad faith. IBEW Local 64, D.U.P. No. 98-37, 24 NJPER 395 (¶29180 1998). No facts indicate that a different strategy by ETCMA and NJEA would have either prevented or resulted in a

rescission of Wright's poor evaluations or non-renewal. In this case, ETCMA advised Wright that it would not pursue any grievance on Wright's behalf because the Board was maintaining Wright's full salary and benefits through June 30, 2017, which was the end of Wright's employment contract with the Board. These uncontested facts do not support Wright's 5.4b(1) allegations that ETCMA and/or NJEA acted arbitrarily, discriminatorily, or in bad faith in their decision not to file a grievance on his behalf.

I also dismiss Wright's 5.4b(5) allegations given that he has failed to cite a Commission rule or regulation that was violated and given that the uncontested facts do not support such claim. See City of Elizabeth, P.E.R.C. No. 82-74, 8 NJPER 121 (¶13052 1982); Palisades Park Bor., D.U.P. No. 78-1, 3 NJPER 238 (1977).

The Commission has also held that individual employees do not have standing to assert a 5.4b(3) violation. Only a public employer has standing to allege such violations. See Hamilton Tp. Bd. of Ed., P.E.R.C. No. 79-20, 4 NJPER 476 (¶4215 1978); Edison Tp. and Joseph Cies, D.U.P. No. 99-15, 25 NJPER 274 (¶30116 1999); PESU Local 1034 and Renaldo A. King, D.U.P. No. 2004-2, 29 NJPER 367 (¶113 2003); State of New Jersey (Hagedorn) and Knapp, D.U.P. No. 99-17, 25 NJPER 311 (¶30132 1999). Accordingly, I dismiss Wright's 5.4b(3) allegations.

Additionally, individual employees normally do not have standing to assert a 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 a 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). In the absence of facts indicating that ETCMA acted arbitrarily, discriminatorily or in bad faith, I find that Wright does not have standing to allege that the Board violated 5.4a(5) of the Act. I dismiss that allegation. N.J. Turnpike Authority; Jersey City College.

Furthermore, Wright has not alleged any facts indicating that the Board violated subsection 5.4a(1), (2), (3), (4), or (7) of the Act. Although Wright alleges that the Board's non-renewal of his contract was in retaliation for Wright's filing of a charge with the Commission on December 13, 2016,^{4/} the Commission

^{4/} See n.1.

has no record of any filing by Wright at any time before the original charge was filed in this matter on July 21, 2017.

Thus, even if Wright had filed a timely charge against ETCMA and NJEA, he has not alleged any facts indicating that the Board violated subsection 5.4a(1), (2), (3), (4), (5), and (7), or that ETCMA and NJEA violated subsection 5.4b(1), (3), and (5) of the Act. Accordingly, I conclude that this charge does not meet the Commission's complaint issuance standard and dismiss the charge. N.J.A.C. 19:14-2.2 and 2.3.

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE ACTING DEPUTY
DIRECTOR OF UNFAIR PRACTICES

/s/ Joseph P. Blaney
Joseph P. Blaney
Acting Deputy
Director of Unfair Practices

DATED: December 30, 2022
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 January 12, 2023.