

D.U.P. NO. 2021-6

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

In the Matter of

SUSSEX COUNTY SHERIFF'S OFFICE,

Respondent,

-and-

Docket No. CI-2021-001

PBA LOCAL 378,

Respondent,

-and-

PAUL C. LIOBE,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by Paul Liobe against his employer, Sussex County Sheriff's Office (Sheriff's Office) and his majority representative, PBA Local 378 (PBA). The charge alleged that the Sheriff's Office violated N.J.S.A. 34:13A-5.4a(1), (5) and (7) when it failed to properly compensate him and other corrections officers below the title of corporal for working "special events overtime." The charge further alleges that the PBA violated the duty of fair representation when it withdrew Liobe's grievance regarding the compensation issue from arbitration in violation of N.J.S.A. 34:13A-5.4b(1), (3) and (5). The Director finds that the PBA has not breached its duty of fair representation. Further, the Director finds that allegations against the Sheriff's Office are outside the Commission's six month statute of limitations and even if the allegations were timely, Liobe lacks standing to pursue such claims.

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Appearances:

For the Respondent,
Trimboli & Prusinowski, LLC, attorneys
(James T. Prusinowski, of counsel)

For the Respondent,
(James Aumick, President, PBA Local 378)

For the Charging Party,
(Paul C. Liobe, pro se)

REFUSAL TO ISSUE COMPLAINT

On July 6, 2020, Paul C. Liobe (Liobe) filed an unfair practice charge against his employer, Sussex County Sheriff's Office (Sheriff's Office), and his majority representative, Police Benevolent Association, Local 378 (PBA). Liobe alleges that the Sheriff's Office failed to compensate him for eight (8) hours of "special events overtime" performed on June 15, 2019, in

violation of the parties' collective negotiations agreement (CNA). Liobe alleges that he and every correction officer below the title of corporal were not properly compensated for working "special events overtime" both before and after June 15, 2019. Liobe also alleges that in February, 2020, the Sheriff's Office entered a shared services agreement with another entity and that agreement modified terms and conditions of employment that were not negotiated with the PBA. Liobe asserts that the Sheriff's Office's actions violate 5.4a(1), (5) and (7)^{1/} of the Act.

Liobe alleges that PBA violated its duty of fair representation by withdrawing from arbitration his grievance regarding the compensation issues pertaining to "special events overtime." Liobe alleges that the PBA's actions violate section

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, retraining or coercing employees on the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with the 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 by the commission."

5.4b(1), (3) and (5)^{2/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act).

On August 6, 2020, the Sheriff's Office filed a letter asserting that Liobe's charge is without merit because his claims are outside the scope of the parties' CNA; and that Liobe is attempting to enforce a contract (the shared services agreement) that does not apply to him.

On September 14, 2020, Liobe filed a reply to the Sheriff's Office letter. Liobe again asserted that he has not been paid any compensation for working 8 hours on June 15, 2019. Liobe further indicates that the Sheriff's Office has committed a "salary and wage violation" per the parties' CNA "due to a federal labor laws", specifically the Fair Labor Standards Act.

On December 8, 2020, the PBA filed a brief letter asserting that the PBA agreed as a union not to pursue Liobe's grievance through arbitration.

On December 22, 2020, Liobe file a response to the PBA's letter wherein he again reiterated the claims alleged in his charge.

^{2/} 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 employers, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in the unit. (5) Violating any of the rules and regulations established by the commission."

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:

The Sheriff's Office is a public employer within the meaning of the Act. The PBA represents all corrections officers, sergeants, lieutenants and captains employed by the Sheriff's Office. The Sheriff's Office and the PBA signed a CNA that extended from January 1, 2014 through December 31, 2016.

Liobe was employed by the Sheriff's Office as a corrections officer until he was the subject of a layoff, effective October 31, 2019. Liobe appealed his layoff to the Civil Service Commission and his appeal is pending. Prior to the layoff, Liobe was included in the collective negotiations unit represented by the PBA. Liobe also served as president of the PBA until his layoff.

The grievance procedure (Article 19) of the parties' CNA provides a multi-step process ending in binding arbitration. The CNA defines a grievance as "any dispute between the parties concerning the application or interpretation of this Agreement or

any complaint by an employee as to any action or non-action taken towards him/her which allegedly violates any right relating to wages, hours”

Pursuant to Section 1 of Article 11 of the parties' CNA,

To be eligible for overtime pay described herein, an employee shall work in excess of eight (8) hours per day or forty (40) hours in a work week and provided the employee was not absent, without pay, within 72 hours immediately after the scheduled overtime. Hours worked that do not meet this criteria shall be paid at straight time.

Section 2 of Article 11 provides:

An employee who works in excess of eight (8) hours per day or forty (40) hours in a work week shall be paid at the rate of time and one-half for all hours he/she works in excess of eight (8) hours per day or forty (40) hours in a work week, provided the employee meets the criteria listed in Section 1.

Sussex County (County) and Sussex County Municipal Utilities Authority (SCMUA) signed a shared services agreement to provide supplemental assistance to SCMUA by using the services of the Sheriff's Labor Assistance Program/Work Assistance Program. Sheriff's Office corrections officers are used as part of that assistance. Part B of the shared services agreement provides in a pertinent part:

1. SCMUA will reimburse the County an annual overtime rate that is in accordance with the current Sussex County PBA Local #378 Contract (monthly overtime payments shall be made in the amount of \$60.16 per hour in Year 1, utilizing the 2014 rate; and for Year 2 and

Year 3, the contract will be re-visited annually and hourly rates/payments will be recalculated in accordance with the new PBA contract amount for each of those years).

On June 15, 2019, Liobe worked an 8 hour SCMUA detail. On July 25, 2019, Liobe, as PBA president, filed a Step 3 grievance alleging that the County failed to compensate him for the 8 hours SCMUA detail he completed on June 15, 2019. Liobe's argument, as set forth in the grievance, is that SCMUA overtime is "special events overtime," separate and apart from "regular overtime." Instead of receiving "regular overtime" as outlined in the parties' CNA, Liobe avers that he should have received the hourly rate provided in the shared services agreement between the County and SCMUA. On August 2, 2019, Sussex County Administrator, Greg Poff, responded to Liobe's grievance:

To be eligible for overtime pay, an employee shall work in excess of eight (8) hours per day or forty (40) hours in a work week and provided the employee was not absent, without pay, within 72 hours immediately after the scheduled overtime. Hours worked that do not meet this criteria shall be paid at straight time.

The County Administrator denied Liobe's grievance, finding that the overtime provisions in the parties' CNA were properly applied to the 8 hours Liobe worked on June 15, 2019 and that Liobe was entitled to his straight time rate for the work completed.

On August 5, 2019, Liobe moved the grievance to Step 4. At Step 4, Liobe amended his grievance, alleging that any

corrections officer, below the title of corporal, who worked the SCMUA detail throughout the years, had been paid the incorrect rate for such work. Liobe received no response to the grievance at Step 4.

On September 6, 2019, Liobe demanded arbitration on behalf of the PBA. On October 15, 2019, the County filed a Petition for Scope of Negotiations Determination (Dkt. No. SN-2020-015). The grievance arbitration proceeding was held in abeyance pending a Commission decision on the petition.

Liobe was laid off from his employment with the Sheriff's Office, effective October 31, 2019. Unit employee Ashley Robbins replaced Liobe as PBA president until the subsequent PBA election. Robbins informed the Sheriff's Office that the PBA would no longer pursue the grievance filed by Liobe. On February 27, 2020, the PBA's newly-elected president, James Aumick, withdrew the PBA's demand for arbitration. Aumick wrote in his withdrawal request that the PBA would not pursue the grievance because Liobe was separated from employment and that the PBA believed that the issue would be more appropriately addressed in collection negotiations. The parties' CNA affords the PBA, not the individual grievant, the right to proceed to arbitration if it is not satisfied with the Step 4 result. As a result of the PBA's withdrawal of Liobe's grievance from arbitration, PERC

administratively dismissed the scope petition and the arbitrator dismissed the pended grievance arbitration.

In February, 2020, Sussex County and SCMUA signed a new shared services agreement that included modifications to Part B of the agreement. Part B now provides in a pertinent part:

B. Payment:

SCMUA will reimburse the County at the established outside detail hourly rate of \$80.00, the County will invoice SCMUA on a monthly basis,

1. The County shall provide one (1) Sussex County Sheriff's Officer or Sussex County Corrections Officer to supervise a SLAP/SWAP crew of two (2) to seven (7) inmates each Saturday from 7:00 am to 2:00 pm.

ANALYSIS

Charge against the PBA

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. A majority representative breaches its duty of fair representation "only when [its] conduct towards a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Vaca v. Sipes, 386 U.S. 171, 190 (1967). The Commission subsequently adopted this standard, the violation of which would arise under Section 5.4b(1) of the Act. Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976); Lullo v.

International Ass'n of Fire Fighters, 55 N.J. 409 (1970); OPEIU Local 153 (Johnstone), P.E.R.C. No. 84-60, 10 NJPER 12, 13 (¶15007 1983).

A union is afforded a "wide range of reasonableness in servicing its members," and "[t]he fact that a union's decision results in a detriment to one unit member does not establish a breach of duty." Essex-Union Joint Meeting and Automatic Sales, Servicemen & Allied Workers, Local 575 (McNamara), D.U.P. No. 91-26, 17 NJPER 242 (¶22108 1991) (citing Ford Motor Co. v. Huffman, 345 U.S. 330 (1953)). There is no absolute right to grievance arbitration. Id. (citing Vaca, supra). The Commission has frequently dismissed duty of fair representation claims based on allegations that a union's representation was negligent, inadequate or otherwise unsatisfactory from the grievant's perspective. Passaic Cty. Comm. Coll. Admin. Ass'n (Wasilewski), P.E.R.C. No. 98-131, 24 NJPER 256 (¶29123 1998); Council of N.J. State College Locals, AFL-CIO (Roman), P.E.R.C. No. 2015-76, 42 NJPER 33 (¶8 2015); ATU Local 540 (Warfield), D.U.P. No. 2016-003, 42 NJPER 376 (¶107 2015), aff'd P.E.R.C. 2016-046, 42 NJPER 336 (¶96 2016).

The facts as alleged do not establish that the PBA breached its duty of fair representation. Liobe, as PBA president, filed the grievance regarding compensation for a SCMUA detail he worked on June 15, 2019. Thereafter, Liobe amended the grievance at

Step 4 to include all corrections officers below the title of corporal. (No facts indicate that the amendment was prompted by the request(s) or circumstances of any other unit employees or members). When the grievance was denied, Liobe sought and scheduled arbitration. Following Liobe's layoff, the PBA, under new leadership, decided not to pursue the grievance.

Liobe alleges that the PBA withdrew his grievance from arbitration because he was laid off, ". . . from the permanent position of County Corrections Officer from the Employer."^{3/} Although Liobe's "separation from the unit" was one of the reasons included in the PBA's letter requesting that the matter be withdrawn from arbitration, the letter also provides that the PBA determined that the issue would be better resolved through the collective negotiations process. No facts indicate that the PBA's decision or change in tactics was arbitrary, discriminatory or in bad faith. The facts indicate that its decision falls within the reasonable discretion parameters afforded to unions in determining how to represent members. Rutgers University, D.U.P. 2020-008, 46 NJPER 308 (¶75 2020). Accordingly, I dismiss the section 5.4b(1) allegation.

The charge also alleges that the PBA violated section 5.4b(3) and (5) of the Act. A union's duty of good faith

^{3/} Liobe has appealed his layoff; he remains a public employee within the meaning of the Act. N.J.S.A. 34:13A-3(d).

negotiations is owed to the employer, not individual unit members. Individual employees do not have standing to raise these issues. Council of New Jersey State College Locals, D.U.P. No. 81-8, 6 NJPER 531 (¶11271 1980). Accordingly, I dismiss the section 5.4b(3) allegation. Additionally, because there are no facts alleged which demonstrate that a Commission rule or regulation has been violated, I also dismiss the section 5.4b(5) allegation.

Charge against the Sheriff's Office

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 a 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 longer so provided.

The Commission has held that "[t]he Act does not rigidly bar relief on all causes of action arising more than six months before a charge was filed" and "[i]n determining whether a party was 'prevented' from filing an earlier charge, the Commission must conscientiously consider the circumstances of each case and assess the Legislature's objectives in prescribing the time limits as to a particular claim." State of New Jersey (Juvenile Justice) and Judy Thorpe, P.E.R.C. No. 2014-71, 40 NJPER 512

(¶164 2014), aff'd 43 NJPER 353 (¶100 App. Div. 2017), certif. den. 231 N.J. 211 (2017). "Relevant considerations include whether a charging party sought timely relief in another forum; whether the respondent fraudulently concealed and misrepresented the facts establishing an unfair practice; when a charging party knew or should have known the basis for its claim; and how long a time has passed between the contested action and the charge." Id. (citing Kaczmarek v. New Jersey Turnpike Auth., 77 N.J. 329 (1978)); accord West Orange Bd. of Ed., H.E. No. 2018-11, 44 NJPER 426 (¶120 2018), adopted P.E.R.C. No. 2019-10, 45 NJPER 144 (¶37 2018).

Liobe's claims against the Sheriff's Office are untimely because they were not filed within the six month statute of limitations. N.J.S.A. 34:13A-5.4c. That an employee initially chooses to pursue a claim through the contractual grievance process does not toll the period for filing an unfair practice charge. New Jersey Dept. of Human Services, P.E.R.C. No. 85-48, 10 NJPER 638 (¶15306 1984); Camden Vocational Bd. of Ed., P.E.R.C. No. 83-28, 8 NJPER 558 (¶13256 1982). Liobe has failed to provide any reason he was "prevented" from filing an unfair practice charge against the Sheriff's Office regarding the SCMUA compensation issues within the required six months statute of limitations.

Even if Liobe's claims against the Sheriff's Office were timely, they would be dismissed because Liobe does not have standing to assert those claims. Individual employees normally do not have standing to assert a section 5.4a(5) violation because the employer's duty to negotiate in good faith only runs 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 section 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 Authority, D.U.P. No. 80-10, 5 NJPER 518 (¶10268 1979). In the absence of facts indicating that the PBA acted arbitrarily, discriminatorily or in bad faith, I find that Liobe does not have standing to allege that the County violated section 5.4a(5) of the Act. N.J. Turnpike Authority; Jersey City College.

With respect to section 5.4a(1) claims alleged by an individual public employee, the Commission has explained that a public employer does not interfere with the rights afforded by the Act when a majority representative refuses to process a grievance to arbitration because there is no absolute right to

arbitration. N.J. Turnpike Authority. In the absence of facts sufficiently indicating that the PBA breached its duty of fair representation, Liobe does not have standing to allege that the Sheriff's Office violated section 5.4a(1) of the Act.

Finally, the Commission lacks jurisdiction over Liobe's allegations that the Sheriff's Office violated the Federal Fair Labor Standards Act. City of Trenton, D.U.P. No. 2020-007, 46 NJPER 219 (¶50 2019).

For all the reasons set forth above, I find that the Commission's complaint issuance standard has not been met and decline to issue a complaint on the allegations of this charge. N.J.A.C. 19:14-2.3.

ORDER

The unfair practice charge is dismissed.

/s/ Jonathan Roth
Director of Unfair Practices

DATED: April 5, 2021
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 April 15, 2021.