D.U.P. NO. 99-5

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

In the Matter of

TOWNSHIP OF TEANECK,

Respondent,

-and-

Docket No. CI-98-45

JOSEPH DeNARO,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses in part an unfair practice charge brought by Joseph DeNaro, an individual. DeNaro alleged that the Township committed an unfair practice when it refused to give a raise to DeNaro during negotiations for a successor contract, when the Township refused to process a grievance, when the union voted not to pursue an unfair practice charge on his behalf during contract negotiations and when DeNaro was transferred in retaliation for a grievance which he filed related to doing out of title work. The Director found that DeNaro has no standing to assert a violation of 5.4 a(5) and dismisses that portion of the charge. The Director also dismisses the charge which asserts a violation of 5.4 a(2) finding that the union's decision not to file an unfair practice charge does not rise to the level of interference or domination by the employer contemplated by the Act. The Director also found that the charge alleges no facts in support of a claim of violations of 5.4 a(4) or (7).

The Director issues a complaint on the facts alleging a violation of 5.4 a(1) and (3) relating to DeNaro's filing of a grievance for doing out of title work and his claim of retaliatory transfer.

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Appearances:

For the Respondent,
Peckar & Abramson, attorneys
(Gregory R. Begg, of counsel)

For the Charging Party,
William J. Brennan, Representative

DECISION

On December 8, 1997, Joseph DeNaro filed an unfair practice charge with the Public Employment Relations Commission alleging that the Township of Teaneck violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., 5.4a(1), (2), (3), (4), (5) and (7) [1/] when its Township Manager, Gary Saage, threatened

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1/ These provisions 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

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to cease negotiations with the majority representative in retaliation for the filing of an unfair practice charge, refused to process a grievance and retaliated against DeNaro, a vice president of the union, by transferring him and denying him a raise. DeNaro filed an amended charge on March 2, 1998, specifically alleging that on December 3, 1993, during negotiations for a successor collective negotiations agreement, Saage stated that DeNaro and P. Salmeri would receive no increases for the next contract because of their attitudes. The charge also alleges that in a letter dated August 7, 1997, the business agent for the majority representative, Local 29, requested that Saage move DeNaro's grievance to the Town Manager's level and requested a meeting.[2/]

It is also alleged that at a meeting which occurred on August 7, 1997, the Township Manager stated that DeNaro would receive no raise until the other foremen's salaries "caught up" to his rate. Finally, it is alleged that during a union meeting on

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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.

2/ The charge does not specify the nature of the grievance or when it was filed.

September 11, 1997, the union stated that DeNaro's problem was to be settled during negotiations and that if the union filed the unfair practice charge, contract negotiations would stop. The union voted not to "grieve" the unfair practice charge.[3/]

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. Our understanding of the facts appears below.

Until approximately March 1998, RWDSU Local 29 represented blue collar supervisors employed by the Township of Teaneck in the Department of Public Works. Joseph DeNaro is currently employed in the title of assistant supervisor, public works although at pertinent times he has held the title of assistant supervisor, maintenance repair.[4/]

3/ It is unclear from the allegations contained in the charge whether DeNaro is referring to the filing of an unfair practice charge with the Commission or the filing of a grievance with the Township as he uses the terms interchangeably throughout his recitation of allegations. It is also unclear from a reading of the charge what the substance of the grievance/unfair practice charge was and whether either was filed and, if so, by whom.

4/ The title of assistant supervisor, public works was created for the 1993-1996 contract. Prior to that time, DeNaro held the title of assistant supervisor, maintenance repair.

Teaneck and Local 29 entered into a collective negotiations agreement effective from January 1, 1993 through December 31, 1996. Negotiations for a successor contract are continuing.[5/]

During negotiations for the 1993-96 contract, the Township took the position that there would be no raise for DeNaro and another supervisor since their salaries were substantially higher than that of the other unit supervisors.[6/] DeNaro was vice president of Local 29 at this time but was not a member of the negotiations team. Eventually, the contract was finalized and DeNaro and another supervisor received $750.00 for the three-year period while other supervisors received $1250.00.

On or about May 1997, DeNaro filed a grievance alleging that he was performing out-of-title work. He had been acting supervisor in maintenance from September 1996 until July 1997, but did not receive supervisor's pay.[7/] By letter dated June 4, 1997,

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5/ Local 29 agreed in October 1997 to put the negotiations for the supervisor's contract on hold pending the outcome of the blue collar non-supervisory unit contract negotiations which are currently in fact finding. However, as of March 1998, Local 29 no longer represents the blue collar supervisors unit. Nevertheless, negotiations are continuing for the supervisors by an independent union, the Teaneck DPW Supervisors Association.

6/ It appears that the disparity in salaries was the result of a reorganization of departments which occurred in the late 1980's.

7/ At the time that DeNaro was acting supervisor, he was not eligible for permanent appointment because he was not on the

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Local 29 indicated to the Township that if there was no resolution of the grievance, it would file an unfair practice charge. The Township responded suggesting that the best way to resolve the grievance was through the negotiations for a successor contract. By correspondence dated June 23, 1997, Local 29 agreed with the Township to settle DeNaro's grievance as part of the negotiations process.

At some point in June 1997, DeNaro wrote to the New Jersey State Department of Personnel (DOP) and requested a desk audit of his title. Subsequently, in July 1997, DeNaro was transferred from the maintenance department where he had been working since 1986 to the parks department.[8/] His salary and title of assistant supervisor, public works remained the same. DeNaro alleges that the transfer was done in retaliation for the filing of the May 1997 grievance for doing out of title work. The Township responds that the transfer was effectuated specifically to accommodate the results of the DOP desk audit which had been requested by DeNaro, that if it

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7/ Footnote Continued From Previous Page

existing civil service list for that title. When he was subsequently transferred to the parks department in July 1997, a new list had not been issued. On May 21, 1998, the new eligibility list contained DeNaro's name, but he was number 2 on the list. The Township appointed the number 1 eligible on the list to be supervisor in maintenance.

8/ Although the charge references a "retaliatory transfer", it provides no specific facts relative to the date of the transfer or the details of the transfer. However, at the exploratory conference it was stated that the transfer occurred in July 1997.

had not transferred DeNaro the result would have been a lower salary to DeNaro and that the transfer was one of several done at the same time.

ANALYSIS

A violation of a(5) occurs when an employer fails to negotiate an alteration of a mandatory subject of negotiations with the majority representative or knowingly refuses to comply with the terms of the collective negotiations agreement or refuses to process grievances presented by the majority representative. However, an individual employee normally does not have standing to assert an a(5) violation, as the employer's duty to negotiate in good faith runs only to the majority representative. Camden Cty. Highway Dept., D.U.P. No. 84-32, 10 NJPER 399 (¶15185 1984); N.J. Turnpike Authority, P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980). An individual employee may file an unfair practice charge and independently pursue a claim of an a(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 State College, D.U.P. No. 97-18, 23 NJPER 1 (¶28001 1996); N.J. Turnpike, D.U.P. No. 80-10, 5 NJPER 18 (¶10268 1979).

DeNaro has not claimed that his majority representative has breached its duty of fair representation. Further, the union agreed to settle the grievance with the employer through the negotiations process for the new contract, and at a union meeting in September 1997, the membership voted not to file an unfair practice based on

the failure to process DeNaro's grievance. The employer has not violated its duty to process grievances presented by the majority representative in violation of 5.4a(5). Moreover, DeNaro has no standing as an individual to assert a violation of a(5). N.J. Turnpike Authority; Jersey City State College.

Insofar as a violation of 5.4a(3) is alleged, DeNaro asserts that he filed a grievance in May 1997 for doing out-of-title work, and that he was transferred in July 1997 in retaliation for the filing of the grievance. He also alleges that he is vice-president for the union.

In re Tp. of Bridgewater, 95 N.J. 235 (1984), articulates the standards for evaluating whether 5.4a(3) has been violated. A charging party must prove, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in an adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246. As applied under the Bridgewater standards, the facts alleged in the charge, if true, constitute an unfair practice within the meaning of the Act, and I am issuing a complaint as to the facts alleged relative to the transfer issue.

However, any facts alleged in the charge relating to the denial of raises for DeNaro and another foremen and/or the Township's negotiations position that DeNaro and another foreman

were to receive no increments in the new contract do not support a violation of a(3). Since no contract has been negotiated, the entitlement to raises has not matured, and there has been no denial. Further, taking a position during collective negotiations relative to salaries does not constitute an adverse action and, consequently, does not violate the Act. Tp. of Mine Hill, P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986).[9/]

DeNaro has also claimed that the Township violated 5.4a(2) which prohibits employer domination or interference with the formation, existence or administration of any employee organization. Commission cases dealing with a(2) claims generally involve organizational rights or the actions of an employee with a conflict of interest caused by his membership in a union and his position as an agent of an employer. Union County Regional Bd. of Ed., P.E.R.C. No. 76-17, 2 NJPER 50 (1976); Middlesex County (Roosevelt Hospital), P.E.R.C. No. 81-129, 7 NJPER 266 (¶12118 1981); Camden County Board of Chosen Freeholders, P.E.R.C. No.

9/ It is well established that the duty to negotiate in good faith is not inconsistent with a firm position on a given subject. "Hard bargaining" is not necessarily inconsistent with a sincere desire to reach an agreement. A firm position that limits wage proposals to existing levels is not necessarily a failure to negotiate in good faith. State of New Jersey, E.D. No. 79, 1 NJPER 39 (1975), aff'd 141 N.J. Super. 470 (App. Div. 1976). See also, Tp. of Mine Hill. Moreover, an employee organization is free to agree to terms which might result in a detriment to one unit member but not another. Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); see also, Humphrey v. Moore, 375 U.S. 335 (1964).

83-113, 9 NJPER 156 (¶14074 1983). While motive is not an element of an a(2) offense, there must be a showing that the acts complained of actually interfered with or dominated the formation, existence or administration of the employee organization. Cf., Charles J. Morris (editor), The Developing Labor Law; The Board, The Courts and the National Labor Relations Act (B.N.A. 2nd ed. 1983), p. 279, citing Garment Workers (Bernard Altman Texas Corp.) v. NLRB, 366 U.S. 731 (1961). DeNaro has alleged no facts which would constitute a violation of this provision. The fact that the union membership voted not to file an unfair practice charge against the Township and decided to pursue settlement of DeNaro's grievance through the collective negotiations process does not rise to the level of interference or domination by the employer as contemplated by the Act.

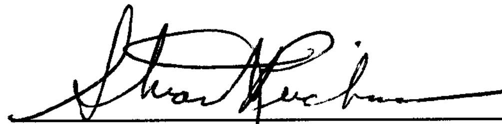
Further, no facts were alleged in support of DeNaro's a(4) and (7) claims. Specifically, he has alleged no facts that he was discriminated against based on the filing or signing of an affidavit, petition or complaint under the Act, nor has he alleged any facts that our rules or regulations were violated.

ORDER

The allegations relative to violations of 5.4a(2), (4), and (7) are dismissed. The alleged violations of 5.4a(5) based on the denial of raises to DeNaro and another foreman or based on the Township's negotiations position concerning the receipt of

increments in the new contract by DeNaro and another foreman are dismissed. I will issue a complaint relative to violations of 5.4a(1) and (3) concerning DeNaro's filing of the May 1997 grievance and his July 1997 transfer.[10/]

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Stuart Reichman, Director

DATED: October 28, 1998
Trenton, New Jersey

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