

D.U.P. NO. 2002-11

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

In the Matter of

BURLINGTON COUNTY SHERIFF,

Respondent,

-and-

FOP LODGE NO. 166,

Docket No. CI-2001-43

Respondent,

-and-

KEN PHILLIPS,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by Ken Phillips against both the County of Burlington (County) and the Fraternal Order of Police, Lodge No. 166 (FOP) because all of the the allegations are untimely.

The Director finds that even if the allegations were timely, he would dismiss them. As to the allegation that the County violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act) by threatening to file unfair practice charges against the FOP, the Director found that the County cannot be found to have violated the Act by announcing that it would do something lawful under the Act. The Director would also dismiss allegations that the FOP violated the Act by failing to follow its own by-laws in the selection of a negotiations committee, failing to present the entire tentative contract to the membership before ratification, and ignoring a petition filed by members to delay the ratification vote. The Director finds that these are internal union matters outside of the Commission's jurisdiction. The Director notes that negotiating an agreement which affords greater benefits to some but not all unit members would not be an unfair practice since the complete satisfaction of all who are represented cannot reasonably be expected. Finally, the Director notes that no alleged facts support the contention that the County discriminated against Phillips because of activity protected by the Act.

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Appearances:

For the Respondent County
Daniel Hornickel, Assistant County Solicitor

For the Respondent FOP
James Ott, President

For the Charging Party
George R. Saponaro, attorney

REFUSAL TO ISSUE COMPLAINT

On December 14, 2000 and January 2, 2001, Ken Phillips filed an unfair practice charge and an amended charge with the Public Employment Relations Commission (Commission) against both the County of Burlington (County) and the Fraternal Order of Police, Lodge No. 166 (FOP). The charge alleges that the County violated

section 5.4a(1) and (3)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), when on May 17, 2000, it threatened to file unfair practice charges against the FOP if the FOP failed or refused to ratify the tentative collective negotiations agreement between the FOP and County.

The charge also alleges that the FOP violated section 5.4b(1) and (2) of the Act^{2/} by failing to follow its own by-laws in the selection of a negotiations committee; failing to present the entire tentative contract to the membership before ratification, and ignoring a petition filed by members to delay the ratification vote.

The charge alleges that the County and FOP jointly violated the Act by ratifying the agreement in spite of the concerns raised by certain members. The charge also claims that the parties jointly violated the Act by negotiating an agreement which unfairly discriminates against senior unit members in salary levels/pay increases, and by failing to make such members aware of these differences in advance of ratification.

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. (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.

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; and (2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances.

On May 19, 2000, Charging Party filed an Order to Show Cause in New Jersey Superior Court, Burlington County, seeking to have the ratification vote restrained. On May 31, 2000, the County and FOP signed the agreement which is effective from January 1, 2000 to December 31, 2002. Thus, it appears the Court did not restrain the County and FOP from concluding negotiations by executing the current agreement.

On January 30, 2001, we wrote to the County, FOP and Charging Party and invited position statements and/or responses to the charges. On February 9, 2001, the County responded. The FOP has not filed a response. The County denies violating the Act, contends that the charge is untimely, and asserts that at all times it negotiated in good faith with the authorized representative of the Charging Party's majority representative.

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. In correspondence dated March 22, 2002, I advised the parties that I was not inclined to issue a complaint in this matter and set forth the basis upon which I arrived at that conclusion. I provided the parties with an opportunity to respond. Neither party filed a response. Based upon the following, I find that the complaint issuance standard has not been met.

The County recognized FOP Lodge 166 as the exclusive representative of approximately 42 sheriff's officers in September 1999. Negotiations for a new agreement took place over several months and an agreement was reached by the parties in May 2000.

FOP Local 166 President James Ott was the chief negotiator for the FOP and he appointed a negotiations committee. It is alleged that the FOP's by-laws and constitution provide for a secret ballot election of bargaining committee members. It is also asserted that Ott is a council member for Riverside Township and a member of the same political party as are the members of the County's Board of Freeholders and that his dual roles violate the local government ethics law.

On an unspecified date prior to May 19, 2000, the FOP presented a proposed agreement to the membership for ratification. On May 19, 2000, certain unit members, including Phillips, filed a verified complaint with Superior Court in Burlington County, seeking to restrain the County and FOP from continuing negotiations and/or ratifying the proposed contract and to restrain the County from filing an unfair practice charge against the FOP. The complaint filed in Superior Court includes the allegation that the unit members did not have the "entire body of the proposed contract...and as such [the membership] was left uninformed." (verified complaint page 3, number 12).

ANALYSIS

The County alleges that the charge is untimely filed. The Act requires that an unfair practice charge be filed within six

months of the date the unfair practice occurred. N.J.S.A.

34:13A-5.4c states, in relevant part:

...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 charge in which event the 6-month period shall be computed from the day he was no longer so prevented.

The statute of limitations normally begins from the date the alleged unfair labor practice occurred, provided the person(s) affected are aware of the action. The date of the action is known as the "operative date," and the six-month limitations period runs from that date. Therefore, in order to be timely, a charge must be filed within six months of the operative date. Charges filed after that date are generally untimely unless the charging party demonstrates that it was "prevented" from filing the charge prior to the expiration of the limitations period.

The standard for evaluating statute of limitations issues was set forth in Kaczmarek vs. N.J. Turnpike Auth., 77 N.J. 329 (1978). The Supreme Court explained that the statute of limitations was intended to stimulate litigants to pursue their litigation diligently and to prevent the litigation of stale claims, but it did not want to apply the statute strictly without considering the circumstances of individual cases. Id. at 337-338. The Court noted it would look to equitable considerations in deciding whether a charging party slept on its rights. But the Court still expected charging parties to diligently pursue their claims.

Here, all of the events Phillips complains of occurred in May 2000, including the parties' signing of the successor contract on May 30, 2000. The last date a timely charge could have been brought was November 30, 2000 -- six months after the last event occurred. However, the charge was not filed until December 14, 2000. Accordingly, I find that the charge is untimely.

Moreover, there are no circumstances which suggest that Phillips was prevented from filing within the statute of limitations. He knew as of May 19, 2000, that the FOP's chief negotiator had an alleged conflict of interest, that the FOP selected rather than elected a negotiations committee, that the County had threatened to file unfair practice charges, and that the members were not given a complete contract on which to conduct a ratification vote. All of these facts were part of the pleadings in Superior Court. I find that the allegations in the charge are all outside the statute of limitations and, therefore, do not meet the Commission's complaint issuance standards. Even if the allegations against the County and the FOP were timely, it does not appear that these allegations constitute violations of the Act.

Phillips alleges that the County violated the Act by threatening the FOP with an unfair practice charge if it did not ratify the contract. I find that such action by the County does not violate the Act. N.J.S.A. 34:13A-5.5 identifies certain prohibited conduct, by employers as well as by employee representatives, and gives this Commission jurisdiction to hear allegations that the Act was violated. Unfair practice charges may be filed by public

employers, public employees, or employee representatives. N.J.A.C. 19:14-1.1. Since parties have a legally protected right to file charges with us, it cannot therefore be an unfair practice to "threaten" to file charges. In addition, I declined to issue a complaint on the 5.4a(3) allegation, since none of the alleged facts support this allegation. Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984) (no violation will be found unless protected conduct was a substantial or motivating factor in the adverse action). Therefore, I find that the County's alleged conduct did not violate the Act.

As to the allegation that the FOP violated the Act by negotiating contract terms that were less favorable to senior unit members, unions are afforded a wide range of reasonableness in collective negotiations, since no union can be expected to fully satisfy all of its members. The mere fact that one group receives less generous terms and conditions as the result of negotiations does not constitute an unfair practice by a majority representative. In Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Federation of Teachers, 142 N.J. Super. 486 (App. Div. 1976), the Court explained the standard to be applied in evaluating a majority representative's conduct in a negotiations context:

Designation of an exclusive bargaining agent under the New Jersey Employer-Employee Relations Act confers on a union broad power to represent the members of the bargaining unit and to negotiate the terms and conditions of their employment. Along with this power comes the obligation to represent all employees "without discrimination." N.J.S.A. 34:13A-5.3. This duty

of fair representation of a union toward its members has received extensive development in the experience and adjudications under the National Labor Relations Act, which we find to be an appropriate guide for the interpretation of our own enactment. See Lullo v. Intern. Ass'n of Fire Fighters, *supra*. In Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967), the United States Supreme Court stated (at 190, 87 S.Ct. at 916): "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith."

* * *

...[T]he mere fact that a negotiated agreement results, as it did here, in a detriment to one group of employees does not establish a breach of duty by the union. The realities of labor-management relations which underlie this rule of law were expressed in Ford Motor Co. v. Huffman, 345 U.S. 330, 73 S. Ct. 681, 97 L.Ed. 1048 (1953), where the court wrote:

...the complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in servicing the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.... [Id. at 337-338, 73 S. Ct. at 686.]

[142 N.J. Super. at 490-491.]

See also Humphrey v. Moore, 375 U.S. 335 (1964); Hamilton Tp. Ed. Ass'n, P.E.R.C. No. 79-20, 4 NJPER 476 (¶4215 1978). Accordingly, absent bad faith, fraud or invidious discrimination, an employee organization may make compromises which adversely affect some members of a negotiations unit, while resulting in greater benefits for other members. See Jersey City (O'Brien), P.E.R.C. No. 87-56, 12 NJPER 853 (¶17329 1986); AFT Local 481 (Jackson, et al.),

P.E.R.C. No. 87-16, 12 NJPER 734 (¶17274 1986) adopting H.E. No. 87-7, 12 NJPER 628 (¶17237 1986); Bridgewater Raritan Ed. Ass'n, D.U.P. No. 86-7, 12 NJPER 239 (¶17100 1986). Here, there are no facts alleged that would support a claim that the FOP made a deliberate decision in bad faith to cause Phillips economic harm. Accordingly, I find that this allegation does not meet the Commission's complaint issuance standard.

Further, as to the allegation that FOP Lodge 166 violated 5.4b(3) of the Act, Phillips, as an individual employee, has no standing to allege a violation of section b(3) because a majority representative's obligation to negotiate runs only to the public employer. Tp. of Berkeley, D.U.P. No. 86-2, 11 NJPER 543 (¶16190 1985); Trenton Bd. of Ed., D.U.P. No. 81-26, 7 NJPER 406 (¶12179 1981). Accordingly, even if they were timely I would dismiss these allegations.


I also note that the courts have jurisdiction to enforce a union's constitution or by-laws; the Commission does not. See Teamsters Local 331 (McLaughlin), P.E.R.C. No. 2001-30, 27 NJPER 25 (¶32014 2000). Additionally, the alleged local government ethics violation is not a matter appropriately before us. Therefore, these claims would not rise to the level of a violation of our Act even if they had been timely filed. Finally, the Commission does not ordinarily hear disputes concerning contract ratification procedures, which are essentially internal union matters. See McLaughlin; Camden County College Faculty Ass'n (Zaleski), D.U.P. No. 87-13, 13 NJPER 253 (¶18103 1987).

Based upon all of the above, I decline to issue a complaint.

ORDER

The unfair practice charge and amended charge are dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Stuart Reichman, Director

DATED: April 5, 2002
Trenton, New Jersey

