

D.U.P. NO. 2002-6

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

In the Matter of

BERGEN COUNTY VOCATIONAL & TECHNICAL
SCHOOLS BOARD OF EDUCATION and BERGEN
COUNTY VOCATIONAL & TECHNICAL SCHOOLS
TEACHER ASSISTANTS/NJEA,

Respondents,

-and-

Docket No. CI-2001-40

PATRICIA BERTELLI,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses a charge alleging the employer and the majority representative acted in concert to deprive a former unit member of seniority and benefits. Charging Party's claims against the Board were untimely. Her claims against her former majority representative were also untimely and not supported by the facts of the case; she was no longer a unit member at the time she sought representation regarding potential grievances.

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Appearances:

For the Respondent Board of Education
Nowell Amoroso Klein Bierman, attorneys
(William C. Soukas, of counsel)

For the Respondent NJEA
Zazzali Fagella Nowak Kleinbaum & Friedman, attorneys
(Vincent J. Nolan, III, of counsel)

For the Charging Party,
Gutfleish Davis Digirolamo & Fittipaldi, attorneys
(Lisa M. Fittipaldi, of counsel)

REFUSAL TO ISSUE COMPLAINT

On November 27, 2000, Patricia Bertelli filed an unfair practice charge with the Public Employment Relations Commission alleging that the Bergen County Vocational and Technical Schools Board of Education (Board) and the Bergen County Vocational and Technical Schools Teacher Assistants/NJEA (Association) respectively

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

...in concert to deprive [her] of her association status, seniority and benefits as a member under the Collective Bargaining Agreement between the Board of Education and the Teacher Assistants by preventing her from grieving the involuntary transfer and loss of seniority. On June 30, 2000 [she] was discharged by her employer because of her loss of seniority and removal from the agreement caused by the involuntary transfers.

Respondents deny violating the Act, contend the charge is untimely, claim that Bertelli lacks standing, and otherwise dispute the allegations as pled.

An exploratory conference was held on February 7, 2001. Thereafter, processing was held in abeyance at Bertelli's request until July 11, 2001, when Bertelli requested we resume processing the charge.

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.

^{1/} Sections 5.4a(1) and (3) 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. Section 5.4b(1) prohibits 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.

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 October 22, 2001, I advised the parties that I was not inclined to issue a complaint in this matter and set forth the factual and legal basis for my conclusion. The parties were invited to respond. None were submitted.

Based on the following, I find the complaint issuance standard has not been met.

In November 1994, Bertelli was hired by the Board as a ten-month teacher assistant. She was included in a negotiations unit represented by the Association, which is affiliated with the NJEA. The unit included teacher assistants in the Board's vocational and technical schools, but excluded teacher assistants assigned to the day care center. The Board and Association were parties to a collective negotiations agreement covering the period July 1, 1996 through June 30, 1999. The agreement contained a grievance procedure for the resolution of disputes regarding employee working conditions including seniority rights.

From 1997 to 1998, Bertelli was assigned to various schools in the district. In April 1998, the Board notified her that her employment contract was not being renewed for the following school year. The Board contends that that decision was primarily based on performance -- specifically poor attendance. However, in August

1998, the Board offered her a ten-month teacher assistant position at its day care center, and she accepted. She signed a two-year individual employment contract for school years 1998-1999 and 1999-2000. Starting in September 1998, she was assigned to the day care center. She continued to receive the same wages and benefits she previously had, which apparently differed from other aides at the day care center.

The Association's collective agreement provides that "Teacher Assistants for Day Care shall be under a separate agreement for all terms and conditions of employment."^{2/} Because Bertelli was no longer covered by the Association's contract, her dues deduction stopped in September 1998. On some unspecified date, Bertelli allegedly asked the Association to grieve her September 1998 transfer to the day care center, but the Association declined to do so. Bertelli does not state when, how or to whom she made such a request.

Bertelli worked in the day care center through the 1998-1999 and 1999-2000 school years. In April 2000, she was advised by the Board that the day care center was being closed due to insufficient funding; that she, along with the other day care center employees, would not be re-employed the following school

^{2/} The teacher assistants assigned to the day care center are not represented by any collective negotiations representative.

year; and that she had no "seniority" rights to positions in the district's other schools.^{3/}

On June 28, 2000, Bertelli requested the Association's NJEA field office to file a grievance contesting her loss of seniority; she apparently received no response.

ANALYSIS

The charge describes two separate and distinct events: Bertelli's September 1998 transfer to the day care center and her 2000 non-renewal. Bertelli alleges the two events are linked by the Respondents' concerted activities to deprive her of her seniority and status as a unit member, and thus protection from layoff. The allegations are not supported by the facts. Therefore, a complaint is not warranted.

The 1998 Transfer

Bertelli contends that the Board violated section 5.4a(1) and (3) by transferring her in 1998 to a non-unit position, causing her to lose her seniority. She appears to allege that the Association violated the Act by its failure to grieve her 1998 transfer out of the unit. These allegations are untimely. The Act requires that an unfair practice charge be filed within six months of the alleged unfair practice. N.J.S.A. 34:13A-5.4c states, in relevant part:

^{3/} The center has since re-opened under the management of a parents group. Bertelli declined a position with the center.

...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.

See City of Newark (Montgomery), P.E.R.C. No. 2000-57, 26 NJPER 91 (¶31036 2000), adopting D.U.P. No. 2000-5, 25 NJPER 392 (¶30169 1999); N.J. Sports & Exposition Auth. (Moraites), D.U.P. No. 99-11, 25 NJPER 145 (¶30066 1999); City of Hoboken (Mancuso), D.U.P. No. 96-11, 22 NJPER 2 (¶27002 1995).

In application, the statute of limitations period normally begins to run from the date of some particular action, such as the date the alleged unfair labor practice occurred, provided the person(s) affected thereby 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. Thus, in order to be timely, a charge must be filed within six months of the operative date. Charges filed past that date are generally untimely, unless the charging party demonstrates that it was "prevented" from filing the charge prior to the expiration of the period.

Bertelli charges that she was involuntarily transferred to a non-unit position in September 1998. Thus, in order to have been timely filed, her charge had to be filed by March 1999; it was filed November 27, 2000. Bertelli offers no facts to suggest that she was prevented from timely filing her charge. Compare N.J. Tp. Auth. v. Kaczmarek and Local No. 194, P.E.R.C. No. 77-15, 2 NJPER 309 (1976),

aff'd NJPER Supp.2d 36 (¶26 App. Div. 1977), rev'd 77 N.J. 329 (1978); N.J. Turnpike Auth. (Beall), D.U.P. No. 80-10, 5 NJPER 518 (¶10268 1979), rev'd. in part, P.E.R.C. No. 80-106, 6 NJPER 106 (¶11055 1980); New Jersey Transit Bus Operations (Chimbumu), D.U.P. No. 95-23, 21 NJPER 54 (¶26038 1995) (charge timely where action initiated in court within six months of alleged illegal conduct, then refiled with the Commission); see also N.J. Institute of Technology (Giegold), P.E.R.C. No. 97-123, 23 NJPER 296 (¶28135 1997).

Bertelli's contention that it was not clear to her whether she continued to be a member of the Association following the transfer is not supported by the facts. The Association's collective agreement excludes teacher assistants assigned to the day care center. Bertelli stopped paying membership dues upon her transfer and signed two individual employment contracts with the Board for the two years following the transfer. Consequently, I find Bertelli was not prevented from timely filing her charge. Accordingly, I find that the allegations concerning Bertelli's 1998 transfer to the day care position, her removal from the Association's unit, and concomitant loss of unit seniority are outside the six-month statute of limitations.

Additionally, Bertelli's allegation that the Association failed to grieve her 1998 transfer also may not be the subject of a complaint, since there was no assertion that the Association's failure to do so occurred within the six-month statute of

limitations. Thus, I find the allegations concerning the 1998 events to be untimely and non-complaintable.

Moreover, absent a claim of retaliation or discrimination based upon activities protected by our Act, an employer's decision to transfer an employee to another position or its decision to lay off an employee does not violate the Act. Bridgewater Tp., 95 N.J. 235 (1984); Mercer Cty. (Dean), D.U.P. No. 2001-1, 27 NJPER 23, 24 (¶32013 2000). Accordingly, I dismiss the alleged 5.4a(3) and derivative a(1) claims concerning the 1998 events.

As to Bertelli's claim against the Association, section 5.3 of the Act empowers an employee representative to exclusively represent employees in the negotiation and administration of a collective agreement. With that power comes the duty to represent all unit employees fairly. The standards in the private sector for measuring a union's compliance with the duty of fair representation 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 toward a member of the negotiations unit is arbitrary, discriminatory, or in bad faith. Id. at 191. That standard has been adopted in the public sector. 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); OPEIU Local 153, P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983).

A majority representative does not have an obligation to file every grievance which a unit member asks it to submit. Carteret Ed. Ass'n (Radwan), P.E.R.C. No. 97-146, 23 NJPER 390 (¶28177 1997); Camden Cty. College (Porreca), P.E.R.C. No. 88-28, 13 NJPER 755 (¶18285 1987); Trenton Bd. of Ed. (Salter), P.E.R.C. No. 86-146, 12 NJPER 528 (¶17198 1986). Rather, an employee representative is obligated 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), P.E.R.C. No. 81-62, 6 NJPER 555 (¶11282 1980), aff'd NJPER Supp.2d 113 (¶94 App. Div. 1982), certif. den. 91 N.J. 242 (1982); Carteret Ed. Ass'n; N.J. Turnpike Employees Union Local 194 (Kaczmarek).

Bertelli's allegation that the Association failed to grieve her 1998 transfer to a non-unit position is not supported by any facts asserting that she asked the Association for assistance, or when and how such a request was made. Therefore, in the absence of information, I cannot consider the allegations concerning the Association's 1998 conduct and I dismiss the 5.4b(1) allegation concerning the 1998 events.

The 2000 Layoff

Bertelli's contention that the Board violated sections 5.4a(1) and a(3) by not renewing her employment in 2000, fails to

state facts implicating a violation of the Act. Section 5.4a(3) makes it an unfair practice for an employer to discriminate against an employee due to the employee's activities which are protected by the Act. Absent allegations of retaliation or discrimination based upon activities protected by the Act, we have no jurisdiction to review Bertelli's layoff claim. Bridgewater Tp.; Mercer Cty. (Dean). Accordingly, I dismiss the allegations against the Board concerning the 2000 layoff.

As to Bertelli's contention that the Association failed to take any action concerning her layoff in 2000, N.J.S.A. 34:13A-5.3 provides, in relevant part, that "[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...." (Emphasis added). Once Bertelli was transferred in 1998 to the non-unit position at the day care center, she lost her status as a member of the Association's negotiations unit. Therefore, at that point, she was no longer entitled to the rights, benefits or protections of the collective agreement, including seniority. More specifically, Bertelli was no longer a member of the unit in 2000 when she requested the Association to file a grievance on her behalf following her non-renewal at the day care center.

The Association has no duty under the Act to represent non-members. Accordingly, its refusal to initiate or continue proceedings under these facts does not constitute an unfair practice and her charge against the Association must be dismissed. See

generally, Borough of Belmar, P.E.R.C. No. 89-27, 14 NJPER 625 (¶19262 1988); West New York (Sancho), D.U.P. No. 2000-3, 26 NJPER 353 (¶31139 2000); Oakcrest-Absegami Teachers Ass'n (Butler), D.U.P. No. 99-13, 25 NJPER 265 (¶30112 1999); PBA Local 245 (Maggio), D.U.P. No. 97-27, 23 NJPER 72 (¶28043 1996).


Moreover, even if Bertelli were an Association member in 2000 when the Board closed the day care center, the State Supreme Court determined in State v. State Supervisory Assn., 78 N.J. 54, 84-90 (1978), that the decision to abolish positions is an exercise of inherent managerial prerogative and not arbitrable. See also State of New Jersey (Dept. of Military and Veterans Affairs), D.U.P. No. 94-12, 19 NJPER 520 (¶24240 1993). Therefore, the Association had no obligation to pursue a grievance over the Board's decision to lay off Bertelli.

Based on all of the foregoing, I find that the Commission's complaint issuance standard has not been met and I decline to issue a complaint on these allegations.^{4/}

ORDER

The charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES


Stuart Reichman, Director

DATED: November 20, 2001
Trenton, New Jersey

^{4/} N.J.A.C. 19:14-2.3.