D.U.P. NO. 97-26

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

In the Matter of

PEMBERTON TOWNSHIP BOARD OF EDUCATION
& PEMBERTON TOWNSHIP BUS DRIVERS
ASSOCIATION,

Respondents,

-and- Docket No. CI-95-75

ROBERT BAGGALEY & WILLIAM CLIVER,

Charging Parties.

SYNOPSIS

The Director of Unfair Practices refuses to issue a complaint on allegations raised by two bus drivers employed by a Board of Education against both the Board and Bus Drivers' Association. Charge that Association unlawfully refused to proceed to arbitration on drivers' grievance is dismissed where charge fails to allege facts indicating that union's refusal was arbitrary, discriminatory, or in bad faith. Director also dismisses allegations alleging Association violated subsection 5.4(b)(2), (3) or (4) of the New Jersey Public Employee-Employer Relations Act, N.J.S.A. 34:13A-1 et seq.; charging parties have no standing to raise these allegations since the rights protected by these subsections belong to the public employer. Charging Parties produced no facts showing how, when or where such violations occurred.

Charges alleging that the Board discriminated against drivers for protected activity and/or interfered with drivers' exercise of protected activity were dismissed where there were no facts suggesting that employees ever engaged in activity protected by the Act.

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Appearances:

For the Respondent Board of Education,
Frederick W. Hardt, attorney

For the Respondent Association,
Selikoff & Cohen, attorneys
(Steven R. Cohen, of counsel)

For the Charging Parties,
Stuart J. Alterman, attorney

REFUSAL TO ISSUE COMPLAINT

On May 10, 1995 and on October 29, 1996, Robert Baggaley and William Cliver, two bus drivers employed by Pemberton Township Board of Education, and members of the Pemberton Township Bus Drivers' Association, filed unfair practice charges against the Board and Association. They allege that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4,

subsections (a)(1), (2), (3), (4) and (5).[1/] and the Association violated subsections 5.4 (b)(1), (2), (3), (4) and (5) of the Act.[2/] It is specifically alleged that the Board violated the Act in September 1993 by refusing to assign them to extra bus runs and the Association violated the Act by refusing to proceed to arbitration with their grievance. On November 13, 1994, the

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1/ These subsections prohibit public employers, their representatives or agents are prohibited 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; and (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.

2/ 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; (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; (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 that unit; (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement and (5) Violating any of the rules and regulations established by the commission.

Association notified Baggaley and Cliver that it had dropped their grievance and cancelled the scheduled arbitration.[3/]

We have conducted an administrative investigation, including an exploratory conference.[4/] The following facts appear:

The Board and Association have a collective negotiations Agreement effective from July 1, 1991 through June 30, 1994. Bus drivers in Pemberton Township are assigned to regular daily bus routes ("runs") and, in addition, are entitled to three additional late activity extra runs. Article IX of the parties' negotiated agreement states:

> C. Shuttle Trips
>
> Extra contracts will be posted as vacancies occur, and the senior driver will be selected subject to the qualifying conditions as set forth for each respective contract. Also, any driver cannot hold more than three (3) separate contracts in addition to their basic contract. For the runs listed below, the amount is the value of the respective run for the applicable school year.[5/]

On November 16, 1992, a posting for a late activity bus run in Woodland Township was placed in the Pemberton Township schools

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3/ The charge does not contain a concise statement of the facts constituting the alleged unfair practices, but attached to the charge were several documents which explain the allegations.

4/ On November 15, 1996, we informed all parties of our tentative findings and conclusions and invited their responses. No responses were received.

5/ The contract then contains a list of eight possible runs, a description of the route, the time and the applicable pay rate.

bus garage. Woodland is not specifically identified as one of the listed runs. Baggaley and Cliver were awarded the Woodland run in addition to their existing contract. Neither believed that the Woodland run would be considered a "separate" contract for the purpose of allocating limited part-time extra contracts. The following year, on September 10, 1993, four "food service" shuttle runs were posted. Baggaley and Cliver applied for but were denied these bus runs. According to a memo from Transportation Supervisor Roger Gardener, each had a full allotment of extra bus runs, including the Woodland run awarded to them in the prior school year. Gardener's memo of September 20, 1993, states:

> Due to the fact that you already hold three separate contracts, I am unable to award you an additional food service contract.
>
> These conditions are consistent with those set forth in the "Memorandum of Agreement Between the Pemberton Township Board of Education and the Pemberton Township Bus Drivers' Association." The condition that "these extra shuttle trips are inclusive with respective late loads and are not to be counted as extra contracts" only applies to the Middle School to High School shuttles. All other stipends are to be counted as extra.

Baggaley and Cliver disagreed that the Woodland run should have been counted as part of their maximum allotment and filed a timely grievance which was denied by Superintendent Elder on December 21, 1993. On March 14, 1994, the Board denied the grievance.

There is no allegation that the Association refused to assist Baggaley and Cliver in filing their grievance. It is

uncontroverted that the Association filed for arbitration but on November 13, 1994, after the membership voted on the issue, the Association notified Charging Parties that it had withdrawn the arbitration request.

In a letter amendment filed on October 29, 1996, Charging Parties allege that the Association's failure to invite or permit them to address the membership on this issue of withdrawing their grievance was arbitrary. The amendment further adds that the Association's decision to drop the grievance was made "in bad faith, as well as under the undue influence of Mr. Gardener..." (the transportation supervisor).

* * * * *

Charging Parties' allegations against the Board are untimely. The Board denied them the extra bus routes in September 1993. The Board's final action on their grievance was on March 14, 1994. Charging parties knew of the Board's actions at the latest in March 1994, and did not file the charge until fourteen (14) months later on May 10, 1995. N.J.S.A. 34:13A-5.4(c) precludes the Commission from issuing a complaint where an unfair practice charge has not been filed within six (6) months of the alleged occurrence, unless the aggrieved person was prevented from filing the charge. See North Warren Bd. of Ed., D.U.P. No. 78-7, 4 NJPER 55 (¶4026 1977).

Even if the charges against the Board were timely, they fail to state facts which, if proven true, would constitute unfair

practices. Charging Parties allege no facts which support their allegations that the Board discriminated against them in retaliation for engaging in activity protected by the Act or having appeared at the Commission. Subsection 5.4(a)(3) and (4). No facts alleged show that Charging Parties ever engaged in protected activity or filed a charge or appeared at the Commission. These allegations are dismissed.

Mere claims of a violation of the contract do not make out a violation of (a)(5). State of New Jersey (Department of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). In general, 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. N.J. Turnpike, P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980). An individual employee/charging party may pursue a claim of an (a)(5) violation only where the charging party has also asserted a viable unfair practice claim of a breach of the duty of fair representation against the majority representative. N.J. Turnpike, D.U.P. No. 80-10, 5 NJPER 18 (¶10268 1979).

No facts were alleged which demonstrate that the Association violated subsection 5.4(b)(2), (3) or (4) or subsection 5.4(a)(2).[6/] Finally, Charging Parties do not allege how the

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6/ The October 29, 1996 letter amendment alleges that the Association was under the undue influence of Supervisor Gardener. This new allegation is untimely. N.J.S.A. 34:13A-5.4(c).

Board's actions tended to interfere with their rights to be active in the formation or administration of an organization for collective negotiations or to file grievances. Charging Parties' own documents show that the Board answered their grievance on December 21, 1993 by letter from Dr. Elder. Accordingly, I dismiss the charge against the Board in its entirety. The filing of a grievance does not toll the statute of limitations for an unfair practice charge.

The charge against the Association is that its refusal to proceed to arbitration without permitting Baggaley or Cliver to address the Association violated the Act. N.J.S.A. 34:13-5.3 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 interest of all such employees without discrimination and without regard to employee organization membership.

In OPEIU, Local 153, P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983), the Commission discussed the appropriate standards for reviewing a union's conduct in investigating, presenting and processing grievances:

> In the specific context of a challenge to a union's representation in processing a grievance, the United States Supreme Court has 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." Vaca v. Sipes, 386 U.S. 171, 190 (1967) ("Vaca").

The courts and this Commission have consistently applied the standards of Vaca in adjudicating such unfair representation claims. See, e.g., Saginario v. Attorney General, 87 N.J. 480 (1981); New Jersey Turnpike Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979).

The U.S. Supreme Court has also held that to establish a claim of a breach of the duty of fair representation, such claim "...carried with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." Amalgamated Assn. of Street, Electric, Railway and Motor Coach Employees of American v. Lockridge, 403 U.S. 274, 301, 77 LRRM 2501, 2512 (1971). Further, the National Labor Relations Board has held that where a majority representative exercises its discretion in good faith, proof of mere negligence, standing alone, does not suffice to prove a breach of the duty of fair representation. Service Employees International Union, Local No. 579, AFL-CIO, 229 NLRB 692, 95 LRRM 1156 (1977); Printing and Graphic Communication, Local No. 4, 249 NLRB No. 23, 104 LRRM 1050 (1980), reversed on other grounds 110 LRRM 2928 (1982).

Here, there are no alleged facts indicating arbitrary, discriminatory or bad faith conduct by the Bus Drivers' Association. Charging Parties did not have an absolute right to have their grievance taken to arbitration and assert no facts supporting a finding that the Association acted arbitrarily, discriminatorily or in bad faith in making its decision not to go to arbitration. The Association contends that its decision not to arbitrate their grievance was based upon its belief that the

grievance could not be won. An employee representative fulfills its statutory obligation to represent employees when it evaluates grievances on their merits and makes a judgment on whether arbitrating the issue is in the interests of its unit members as a whole. Employee organizations are entitled to a wide range of reasonableness in determining how to best service all of their members. Essex-Union Joint Meeting and Automatic Sales, Servicemen and Allied Workers, Local 575, D.U.P. No. 91-26, 17 NJPER 242 (¶22108 1991); Jersey City Bd. of Ed., D.U.P. No. 93-7, 18 NJPER 455 (¶23206 1992).

With regard to the allegation that the Association failed to permit Baggaley or Cliver to address the Association prior to its vote to drop the arbitration request, I do not find that this is a matter involving the Association's duty of fair representation. It is uncontroverted that the Association's membership voted to discontinue the grievance. The procedures leading to that decision are internal union matters.

Therefore, I do not believe that the Commission's complaint issuance standard has been met and decline to issue a complaint on the allegations of these charges.[7/]

The unfair practice is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

Edmund G. Gerber, Director

DATED: December 11, 1996
Trenton, New Jersey

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