

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

In the Matter of

PASSAIC COUNTY VOCATIONAL TECHNICAL
MAINTENANCE & CUSTODIAL ASSOCIATION, N.J.E.A.,

Respondent,

-and-

Docket No. CI-2001-21

ABRAHAM J. MOORE,

Charging Party.

PASSAIC COUNTY VOCATIONAL SCHOOL
BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CI-2001-22

ABRAHAM J. MOORE,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses unfair practice charges filed by a custodian/school bus driver against his employer and majority representative. The Director finds that some of the allegations were either lacking in specificity or beyond the Commission's statute of limitations.

The remaining allegations that the Board violated various contractual rights, refused the employee's shift assignment request in retaliation for the exercise of protected activity and permitted another unit employee to supervise him are dismissed. The Director finds that an individual lacks standing to file a 5.4a(5) against an employer contesting the interpretation or application of a collective agreement. As to the 5.4a(3) claims, the Director finds no facts alleging employer hostility to the exercise of protected activity. Finally, the Director determines that the activities asserted in the charge are not indicative of statutory supervisory authority as defined in N.J.S.A. 34:13A-5.3.

As to the claims against the Association for allegedly refusing to process and file grievances, the Director dismisses the charge finding that the Association acted consistently with its duty of fair representation.

D.U.P. NO. 2001-15

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Appearances:

For the Respondent Association
Zazzali, Fagella & Nowak, attorneys
(Richard A. Friedman, of counsel)

For the Respondent Board of Education
Gerber & Samson, attorneys
(Mary Pat Gallagher, of counsel)

For the Charging Party,
Abraham J. Moore, pro se

REFUSAL TO ISSUE COMPLAINT

On October 18 and 19, November 2 and December 26, 2000,
Abraham Moore, an employee of the Passaic County Vocational School
Board of Education (Board), filed unfair practice charges and

amended charges with the Public Employment Relations Commission (Commission) against the Board and his majority representative, the Passaic County Vocational Technical Maintenance and Custodial Association, New Jersey Education Association (Association). As to the charge against the Board, Moore claims that it violated 5.4a(1), (2), (3) (4), (5), (6) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act)^{1/} when it denied Moore's requests for a day shift assignment and instead gave it to less senior employee Laketha Phillips; repeatedly changed his work hours; disciplined him for not cleaning his bus; and unequally distributed overtime assignments to Phillips, all in violation of his contractual rights. In addition, Moore alleges that Phillips, a transportation coordinator and unit member, improperly supervises him. Finally, Moore contends that the employer privatized the co-op bus run and hired part-time employees to work on the day shift.

^{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 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. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

Moore asserts that the Association violated 5.4b(1), (2), (3), (4) and (5) of the Act^{2/} by failing or refusing to represent him in various matters between January 27, 2000 and November 1, 2000, specifically concerning the Board's denial of Moore's requests for the day shift assignment, frequent changes in his work hours, the unequal distribution of overtime assignments, and the appeal of his discipline. Moore also complains that the Association failed to object when the Board hired part-time employees on the day shift and when it privatized the co-op bus run.

The Board denies that it committed an unfair practice and maintains generally that the allegations in the charge are beyond the Act's six-month statute of limitations. It asserts a managerial prerogative to assign work shifts and a contractual right to change employees' shifts with adequate notice. The Board further maintains that Moore's grievances were not contractually supported.

The Association denies Moore's allegations and also contends that the charge is untimely. It maintains that it has not breached its duty of fair representation owed to Moore.

^{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. (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. (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. In correspondence dated May 11, 2001, 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. No responses were received. Based upon the following, I find that the complaint issuance standard has not been met.

The Association represents all full-time custodial and maintenance employees, bus drivers and tradesmen employed by the Board. It does not represent cafeteria workers. Some of the Association's unit members hold the dual title custodian/bus driver.

The Board and the Association are parties to a collective negotiations agreement effective from July 1, 1996 through June 30, 1999. The parties are engaged in negotiating a successor agreement. The contract provides for a four-step grievance procedure ending in binding arbitration.

Article V of the contract, entitled "Tenure and Seniority", controls the application of seniority only as it relates to layoff and recall. Article VI entitled "Wages and Hours", provides in relevant part:

C. The Board agrees to make every effort for equal distribution of scheduled overtime work in each classification providing employees are capable of performing such duties within each classification taking into consideration the shift to which they are regularly assigned....

G. The Board may institute a third shift work week to commence on Monday evening. The shift will commence at 11:00 P.M. and end at 7:00 A.M. The Board reserves the right to change the starting and ending times of shifts, or to suspend the third shift at any time, particularly during the summer months.... Assignments to the third shift which are not voluntary, will be in the inverse order of seniority, subject, however, to a finding by the Board that the employee is qualified.... An employee shall be notified of a shift change fourteen (14) days before it is to be implemented.

J. All work hours of the week shall be assigned by the Business Administrator or his/her designee to conform with the work load.

Currently, the Board operates two shifts - the first shift (day shift) runs from 7:30 a.m. to 3:30 p.m. while the second shift (evening shift) begins at 3:30 p.m. and runs until 11:30 p.m. The Board does not presently operate a third shift. During the summer, all custodian/bus drivers are assigned to the day shift.

Approximately eight custodian/drivers work the day shift while about 16 custodian/drivers are assigned to the evening shift. The Board has frequently declined employee requests to be assigned to the day shift.

Moore was hired by the Board in May, 1992 as a custodian/bus driver. His duties include transporting students and

performing various custodial duties.^{3/} Since 1992 he has worked various hours on the evening shift. He has repeatedly requested to be assigned to the day shift, but has not been permitted to do so.

By letter of May 13, 1999 to his supervisor, Moore requested to be assigned to the day shift. This request, like all previous ones, was denied. Moore is currently working the evening shift, from 2:00 p.m. to 10:00 p.m., with two other custodian/drivers.

Laketha Phillips is a custodial employee and also holds the unit position of transportation coordinator. She has been employed by the Board for four years. Effective February 1, 2000 Phillips was transferred to the day shift because the Board wanted the transportation coordinator on this shift.

Moore promptly complained to Association President Ken Krattiger that Phillips was given a day shift assignment (while Moore was not) and, consequently, a greater share of overtime, in spite of her lesser seniority than Moore. Krattiger told Moore that there was no contractual basis to grieve since the Board was not required to consider seniority in making shift assignments. Moore disagreed with Krattiger's advice and on January 27, 2000, filed a first-step grievance with his immediate supervisor Dave Cox. Cox denied the grievance. Moore did not pursue it nor did he ask the Association to do so.

^{3/} In 1995, Moore had the added responsibility of acting as transportation coordinator, a unit position, and received a contractually determined stipend for that extra duty.

On March 2, 2000, Moore was given a written warning by Supervisor Rick Faulkner for failing to clean his bus. Faulkner had found Phillips cleaning Moore's bus and Phillips informed Faulkner that she had asked Moore to clean his bus before a state inspection, but he failed to do so. Faulkner issued a warning letter to Moore.

The Association grieved Moore's warning letter. On March 16, 2000, Krattiger requested a step-two grievance meeting with Board Business Administrator Richard Giglio to discuss the discipline as well as Moore's other complaints relating to the day shift assignment and the unequal distribution of overtime to Phillips.

Krattiger met with Giglio but Moore was not present.^{4/} Krattiger subsequently informed Moore that Giglio had denied the grievance. Moore did not ask the Association to pursue the discipline grievance or any of his other complaints to the next step.

Sometime in the spring of 2000 the Board privatized its co-op bus run, assertedly to free up more custodial/bus drivers to clean the schools. On April 20, 2000, the Board notified Moore that, effective May 8, 2000, his schedule would change from 12:00 p.m. to 8:00 p.m. to 3:30 p.m. to 11:30 p.m.^{5/} Moore again complained to Krattiger about the shift change. Krattiger told Moore that the contract permitted the Board to change shifts

^{4/} It is unclear why Moore was not present at the meeting.

^{5/} This shift change coincided with the privatization.

provided that it gave the employee fourteen days notice. Since the Board had complied with the notice provision, Krattiger refused to file a grievance on this issue.

Moore disagreed with Krattiger's assessment of his contractual rights. He felt that the involuntary shift change with notice provision in Article VI, paragraph G, applied only to the third shift. Therefore, Moore filed a grievance on May 2, 2000. On June 1, 2000, Cox denied this grievance. Moore did not pursue it and did not ask the Association to do so.

On June 8, 2000, Moore and other custodian/drivers were moved from the evening shift to the day shift to accommodate the school's summer schedule. Moore had no problem with this change and did not file a grievance.

On August 16, 2000, Cox notified Moore and two other custodian/drivers that effective September 6, 2000, they would be moved to the 2:00 p.m. to 10:00 p.m. shift. Moore again complained about the shift change to Krattiger, who reiterated his belief that there was no contractual basis to grieve since the Board complied with the contractual notice requirements. Moore disagreed with this advice but did not file a grievance.

Also on August 16, 2000, Phillips and Cox issued a memorandum to custodian/drivers requiring their attendance at a transportation meeting scheduled for August 21, 2000. Moore asserts that this directive, together with Phillips' having reported Moore for failing to clean his bus in March which resulted in the written

warning, are indicia of Phillips' supervisory authority creating a conflict of interest. However, no facts are alleged in the charge that Moore either raised this issue with the Association or the Board.

On November 1, 2000, Moore filed a grievance claiming the Board improperly hired part-time workers on the day shift after denying his request for a day shift assignment. These part-time employees are apparently non-unit cafeteria workers. Moore does not allege that he raised this issue with the Association or requested it to file a grievance on this issue.

ANALYSIS

Timeliness of the Charge

The Board and the Association assert that Moore's charge was filed beyond the Act's statute of limitations. The Act requires that an unfair practice charge must be brought within six months of the alleged unfair practice. 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.

See City of Newark (Montgomery), P.E.R.C. No. 2000-57, 26 NJPER 91 (¶31036 2000), aff'g 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).

The initial charges against the Association and the Board were filed on October 18 and 19, 2000, respectively, and amendments were filed on November 2, 2000, as against the Board and the Association and December 26, 2000, as against the Association. The following allegations, occurring before April 17, 2000, fall outside the six-month statute of limitations:

- A. The Board's denial of Moore's May 13, 1999 request for assignment to the day shift.
- B. The assignment of Laketha Phillips to the day shift effective February 2000 as well as the January 27, 2000 grievance relating to that assignment.
- C. The March 2, 2000 written warning to Moore concerning his failure to clean his bus, together with the Association's March 16, 2000 grievance relating to that discipline as well as Phillips' assignment to the day shift and alleged unequal distribution of overtime to Phillips.

Moore has not contended that he was prevented from filing an unfair practice charge concerning those allegations within six months of their occurrence. Therefore, I find that the allegations listed above -- all occurring before April 17, 2000 -- are outside the statutory time limits. Therefore, I do not issue a complaint on these allegations.

Moore also alleges that sometime in the spring of 2000, the Board privatized some of its bus operations and that the Association "let private buses come in and take over our work...." He further asserts that on some unspecified date the Board hired part-time workers on the day shift. N.J.A.C. 19:14-1.3(a) requires that a charge contain:

3. A clear and concise statement of the facts constituting the alleged unfair practice. The statement must specify the time and place the alleged acts occurred, the names of the persons alleged to have committed such acts and the subsection(s) of the Act alleged to have been violated. [emphasis added.]

Since the Commission is precluded from issuing a complaint concerning any allegation not occurring within six months prior to the filing of the charge, without specific dates set forth in the charge as to events alleged, I will not issue a complaint.

Certified Shorthand Reporters of New Jersey (Yuhasz), D.U.P. No. 2000-12, 26 NJPER 159 (¶31061 2000). Therefore, I do not issue a complaint on the undated allegations about the Board privatizing bus runs or hiring part-time workers. Nor do I issue a complaint on the undated companion allegations concerning the Association's alleged failure to prevent the Board from taking these actions.

The following allegations appear to be timely:

1. The April 20, 2000 notice to Moore of a shift change effective May 8, 2000, and the June 1, 2000 denial of Moore's grievance over this shift change.
2. The June 8, 2000, notice to Moore that he was moving to "summer" hours.
3. The August 16, 2000, notice to Moore that effective September 6, 2000 he would move to the 2:00 p.m. to 10 p.m. shift.
4. The use of Transportation Coordinator Laketha Phillips, a unit employee, to "supervise" other unit employees, including Moore, as evidenced by the August 16, 2000 memorandum she and Cox issued directing employees to attend a transportation meeting on August 21, 2000.
5. The Board's denial of Moore's November 1, 2000 grievance requesting a day shift assignment based upon his seniority over recently hired part-time workers.

Allegations Against the Board

Moore contends that the Board violated the Act and his contractual rights by repeatedly changing his shift, denying his requests for a day shift assignment, and ignoring his seniority rights by assigning less senior employees to the day shift.

The Board asserts that it is not contractually obligated to consider seniority in making shift assignments. In addition, the Board asserts a contractual right to assign work hours to meet workload needs and to change shift starting and ending times, provided it affords the employee with adequate notice. It asserts that it heard all grievances as presented.

* * *

N.J.S.A. 34:13A-5.3 requires an employer to negotiate with the majority representative over employees' terms and conditions of employment. Section 5.4(a)(5) of the Act makes it an unfair practice for an employer to refuse to negotiate in good faith with the majority representative. However, Charging Party, as an individual member of the Association, does not have standing to file a 5.4a(5) charge contesting the interpretation or application of the Association's collective agreement with the Board. Only the Association, as the majority representative, has standing to raise such a claim. See N.J. Turnpike Auth. (Beall), P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980), aff'd NJPER Supp.2d 101 (¶85 App. Div. 1981); Middlesex Cty. and NJCSA (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); City of Newark (Montgomery); West New York and PBA Local 88 (Sancho), D.U.P. No. 2000-3, 26 NJPER 353 (¶31139 2000).

Even if Moore had standing to claim that the Board violated the Association's contract, violations of a collective agreement are ordinarily not litigated as unfair practices. Rather, contract disputes are appropriately presented through the contractually negotiated grievance procedure. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). Here, Moore claims he is contractually entitled to shift preferences. The Board asserts that it has no contractual obligation to consider seniority regarding shift assignments and that the collective agreement permits the Board to change employee shifts with proper notice. Even if the Board's interpretation of the contract was incorrect, that does not amount to a violation of the Act. See Montgomery, where the Commission held that, "[a claimed] denial of contractual benefits to an individual employee is generally a breach of contract that does not rise to the level of an unfair practice. The Charging Party would have to pursue any breach of contract claim in another forum." (citation omitted).

Moore further alleges that the Board violated the Act by privatizing certain bus runs and hiring part-time cafeteria workers on the day shift. These allegation are not violations of the Act. In Local 195, IFPTE v. State, 88 N.J. 393 (1982), the New Jersey Supreme Court determined that a public employer has a management

right to subcontract government services. In addition, this Commission has held that an employer has a managerial prerogative to hire employees to fill positions. N. Bergen Bd. of Ed., P.E.R.C. No. 82-109, 8 NJPER 317 (¶13143 1982). Further, the part-time employees were apparently hired for cafeteria positions which are not included in this negotiations unit. Therefore, even if these allegations were timely filed, I find that the Board did not violate 5.4a(5) of the Act by subcontracting bus runs or hiring part-time cafeteria workers. Thus, I dismiss these allegations.

Moore also alleges that the Board violated the Act by permitting Transportation Coordinator Phillips, another unit employee, to supervise him and other employees. There may be instances when an employer illegally allows a union official to also act as the employees' supervisor. See Camden Cty. Bd. of Freeholders and Council 10 (Donlon), P.E.R.C. No. 83-113, 9 NJPER 156 (¶14074 1983). The facts here do not show such a violation. No facts were alleged in the charge which establish that Phillips acted as Moore's supervisor. Specifically, his assertion that she reported his failure to clean his bus and her notification of an employee meeting are not indicative of statutory supervisory authority as defined in N.J.S.A. 34:13A-5.3, namely the authority to "hire, discharge, discipline or effectively recommend the same." Therefore, I do not issue a complaint as to these allegations.

I next consider Moore's contention that the Board violated 5.4a(3). Section 5.4a(3) of the Act prevents an employer from

discriminating against employees because of their protected activities under the Act. Bridgewater Tp., 95 N.J. 235 (1984), establishes the standards for determining whether the Board unlawfully discriminated against the charging party in retaliation for his protected activity.^{6/} Under Bridgewater, the charging party must show that the protected conduct was a substantial or motivating factor in the adverse personnel action. Absent direct evidence, this may be done by a 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.

While Moore engaged in protected activity when he presented his grievances at step one, there are no facts asserted that he was denied a preferred shift because he filed grievances. Moore fails to assert any employer hostility to the protected activity. The denial of his grievances at level one does not, in and of itself, represent the kind of hostility addressed in Bridgewater, particularly where, as here, the employer had specific contractual

^{6/} At the exploratory conference, Moore asserted that assigning Phillips to the day shift was the result of gender-based discrimination against him. This was not alleged in the charge, and, therefore, I do not consider it for purposes of determining complaint issuance. Even so, we have no jurisdiction over alleged violations of employees' civil rights, including gender discrimination. New Jersey Network, D.U.P. No. 98-32, 24 NJPER 245 (¶29117 1998); Elizabeth Ed. Ass'n (Jefferson), D.U.P. No. 95-33, 21 NJPER 245 (¶26154 1995); Marlboro Tp. Bd. of Ed. (Watson), D.U.P. No. 91-1, 16 NJPER 420 (¶21176 1990).

defenses for its actions. Therefore, I dismiss the alleged 5.4a(3) and any derivative a(1) violations.

As to the alleged independent 5.4a(1) violation, an employer independently violates provision 5.4a(1) of the Act if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. Orange Bd. of Ed., P.E.R.C. No. 94-124, 20 NJPER 287 (¶25146 1994); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); New Jersey Sports & Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). Nothing that the Board did or did not do tended to interfere with Moore's statutory rights. Accordingly, I dismiss the independent 5.4a(1) violation.

Insofar as Moore alleges a violation of 5.4a(2), 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 the employer. Union Cty. Reg. Bd. of Ed., P.E.R.C. No. 76-17, 2 NJPER 50 (1976); Middlesex Cty. (Roosevelt Hospital), P.E.R.C. No. 81-129, 7 NJPER 266 (¶12118 1981); Camden Cty. Bd. of Chosen Freeholders, P.E.R.C. No. 83-113, 9 NJPER 156 (¶14074 1983). Moore has provided no factual support for a claim that the Board interfered with or dominated the Association as a whole, and I do not find that this allegation makes out a 5.4a(2) violation.

Finally, no facts were alleged in support of Moore's 5.4a(4), (6) or (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, that the Board refused to reduce a negotiated agreement to writing and to sign such an agreement, nor has he alleged any facts that our rules or regulations were violated.

Charge Against the Association

Moore charges the Association with violating N.J.S.A. 34:13A-5.4b(1), (2), (3), (4) and (5) by refusing to either file or process his grievances relating to his shift assignments between January 27 and November 1, 2000. Moore also claims that the Association failed to prevent the Board from privatizing the co-op run or assigning part-time employees to the day shift.

The Association asserts that it investigated Moore's claimed contract violations and advised him that it believed the collective agreement was not violated. The Association contends that the agreement provided for seniority rights in only three situations - layoffs, recalls or involuntary transfers to the third shift - and that the Board was not contractually obligated to consider seniority in assigning employees to the day shift. The Association maintains that it repeatedly told Moore that it would not process his shift selection grievances because they lacked contractual support. Further, the Association denies that it had any obligation to object to the Board's actions concerning the bus run privatization or the hiring of non-unit cafeteria part-time employees.

* * *

Section 5.3 of the Act empowers an employee representative to represent employees in the negotiations and administration of a collective agreement. With that power comes the duty to represent all unit employees fairly in negotiations and contract administration. 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 towards 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 (Johnstone), P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983).

A union should attempt 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. OPEIU Local 153; Middlesex Cty and NJCSA (Mackaronis); New Jersey Turnpike Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979); and AFSCME Council No. 1 (Banks), P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978).

Here, Moore does not assert facts which would amount to a breach of the Association's duty of fair representation.

Specifically, Moore presents no facts that demonstrate the Association treated him differently from any other Association member or that its refusal was arbitrary or done in bad faith.

The Association's refusal to process Moore's January 27, 2000 grievance over the assignment of the day shift to a less senior employee instead of Moore does not violate its duty of fair representation, even assuming timeliness. Association President Krattiger explained to Moore that the matter could not be successfully grieved because seniority rights are not triggered under the collective agreement in this situation. Moore disagreed and pursued a grievance on his own. There is no allegation that he was prevented from doing so.

An employee representative fulfills its statutory obligation to represent employees when, as in this case, it evaluates grievances on the merits and makes a judgment as to whether pursuing the issue is in the interests of its unit members as a whole. City of Asbury Park (Farrell), D.U.P. No. 2000-16, 26 NJPER 244 (¶31097 2000); Essex-Union Joint Meeting and Automatic Sales, Servicemen and Allied Workers, Local 575 (McNamara), D.U.P. No. 91-26, 17 NJPER 242 (¶22108 1991). Employee organizations are entitled to a wide range of reasonableness in determining how to best service all of their members. Id. The duty of fair representation does not require a union to process grievances which

it believes are non-meritorious. 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).

Here, the Association President assessed Moore's claim and determined that under the collective agreement, seniority is not a factor in assignment to the day shift. A plain reading of Articles V and VI of the parties' agreement shows that Krattiger's conclusions were reasonable. However, even if he were wrong, there is no violation of the Act unless the Association's conduct was arbitrary, discriminatory or in bad faith. No facts here support such a conclusion.

Similarly, regarding the discipline grievance filed by the Association, even if timely, Moore fails to establish that the Association breached any duty owed to him. When Moore was disciplined for not cleaning his bus, a grievance was filed by the Association. Krattiger met with the business administrator for a step-two grievance concerning the discipline. Also discussed were the denial of Moore's day shift request, Phillips' day shift assignment and the unequal distribution of overtime. Moore does not assert that he was treated differently than other unit members or that the Association acted in bad faith as to this grievance or that he had requested the Association to move the discipline grievance to the next step. Other unit employees were treated the same as Moore.

As to Moore's claim that the Association failed to assist him in processing his shift change grievance, there is no violation of the duty of fair representation demonstrated. When Moore approached Krattiger in April 2000 about this issue, Krattiger explained that under the collective agreement, the Board reserved the right to change the hours provided that adequate notice was given. Since Krattiger concluded that Moore had been given adequate notice, he declined to grieve this issue.

Moore disagreed with Krattiger's decision because he felt that the notice provisions of Article VI, paragraph G, only apply to third shift assignments. Even if Moore's interpretation of the contractual language is correct, mere negligence on the part of a union does not constitute a breach of the duty of fair representation. Pemberton Tp. Bd. of Ed., D.U.P. No. 97-26, 23 NJPER 70 (¶28042 1996); PBA Local 119, P.E.R.C. No. 84-76, 10 NJPER 41 (¶15023 1983). The Association's decision not to grieve was not arbitrary since it was based on Krattiger's review of the collective agreement. I therefore dismiss this allegation.

Finally, as to Moore's November 1, 2000 grievance concerning the hiring of part-time workers on the day shift, his assertions that Phillips inappropriately acted as his supervisor and his objection to the Board's privatizing of a bus run, there are no facts alleged in the charge that the Association was asked to take any action concerning these issues. Therefore, the Association cannot be charged with failing to fulfill its duty to fairly

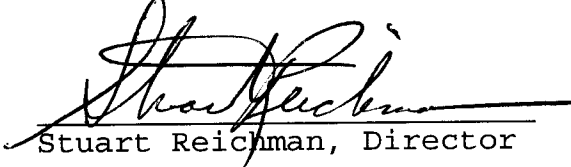
represent in the absence of any request by Moore to represent him. Even if Moore had asked the Association to take action, these two issues are apparently not matters over which an employee representative is obligated to represent employees. As noted above, the employer's decision to privatize its bus run appears to be a managerial prerogative, and, therefore, not arbitrable. Local 195. Further, the Association had no right to grieve the hiring of non-unit part-time employees, since that was not custodial/bus driver unit work. These allegations are dismissed.

Based upon 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 the allegations contained in these charges.^{7/}

ORDER

The charges are dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES


Stuart Reichman, Director

DATED: May 23, 2001
Trenton, New Jersey