P.E.R.C. NO. 2010-43

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BRIDGEWATER-RARITAN REGIONAL
BOARD OF EDUCATION,

Respondent,

-and- Docket No. CI-2009-045

STAN J. SERAFIN,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission remands an unfair practice charge filed by Stan J. Serafin against the Bridgewater-Raritan Regional Board of Education to the Director of Unfair Practices for further processing. The charge alleges that Serafin was terminated by the Board in violation of the New Jersey Employer-Employee Relations Act, 34:13A-5.4a(1), (3), (4) and (7), in retaliation for his alleged protected activity. The Director dismissed the charge finding that the allegations fall outside of the six-month statute of limitations. The Commission finds that under the circumstances of the case, Serafin may have been prevented from filing a timely charge due to an alleged breach of the duty of fair representation on behalf of his majority representative. The Commission gave Serafin ten days to amend his charge to clearly and concisely allege how he was terminated for activity protected by the Act.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Respondent, Schwartz, Simon, Edelstein, Celso & Zitomer, LLC, attorneys (Joseph L. Roselle, of counsel)

For the Charging Party, Stan J. Serafin, pro se.

DECISION

Stan J. Serafin has appealed the decision of the Director of Unfair Practices refusing to issue a Complaint based on the unfair practice charge Serafin filed against the Bridgewater-Raritan Regional Board of Education. The Board has filed a brief and exhibits in opposition to the appeal. We remand the case to the Director for further processing.

On May 29, June 23 and 30 and July 10, 2009, Serafin filed an unfair practice charge and amended charges against the Board. The charge, as amended, alleges that the Board violated the New

Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (3), (4) and (7)[1/], when:

- on May 1, 2008, Serafin was told that he engaged in threatening actions toward a female co-worker, Bridgewater-Raritan Transportation Association President Carol Weinreich;

- on May 5, a slanderous document was surreptitiously placed in his personnel file and copied to the Business Administrator claiming that he engaged in the threatening conduct;

- on May 23, Serafin was terminated after he sent an email alleging discrimination;

- on September 17, the Administration slandered him a second time;

- on September 30, over Serafin's objections, UniServ Representative Henry John Klein skipped level 2 of the grievance procedure;

- on December 2, Serafin received an Affirmative Action Report;

- on December 4, he received notice that the local Association, presided over by Weinreich, voted to deny level 4 arbitration;

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 . . . (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 . . . (7) Violating any of the rules and regulations established by the commission."

- on December 9, Klein informed Serafin that the NJEA would no longer be supporting him and that his arbitration was dead;

- on January 20, 2009, the Affirmative Action Officer informed Serafin that he would not be clarifying discrepancies in his Affirmative Action Report.

Serafin also filed an unfair practice charge against the Association alleging that it breached its duty of fair representation (CI-2009-046). That charge is still pending.

As for the charge against the Board, on June 15, 2009, the Deputy Director of Unfair Practices wrote Serafin advising that his alleged termination date fell outside of the six-month statute of limitations. N.J.S.A. 34:13A-5.4(c). The Deputy Director then advised Serafin that if he was prevented from filing a timely charge, he could amend his charge to explain how and that his charge had to be filed within six months from the date he was no longer prevented.

On June 23, 2009, Serafin filed one of his amendments. It alleged that "there is no statute of limitations for defamation of character," noting that the Board refuses "to remove the slanderous material from his personnel file." Serafin also wrote several dates from May 5, 2008 to April 7, 2009 on which various letters were written by, about or to him by Board officials and agents.

On June 30, 2009, Serafin filed two additional amendments. One notes that the Commission is obligated to follow "state law,"

referencing an attached newspaper editorial article concerning an Appellate Division decision about a requirement of the Open Public Records Act. The second alleges that an employer representative refused to clarify certain "contradictory statements" set forth in a report pertaining to Serafin's employment with the Board.

On July 10, 2009, Serafin filed his final amendment, alleging that the Board "claims that it has irrefutable videotape evidence to support their documentation" and that we need to "request to see the videotape." Serafin also wrote that we should "begin formal proceedings and afford me an unbiased opportunity to litigate relevant legal and factual issues." Serafin attached numerous documents dated from May 5, 2008 through April 7, 2009.

On July 21, 2009, the Director dismissed Serafin's charge finding that the allegations fall outside of the six-month statute of limitations.

N.J.S.A. 34:13A-5.4(c) provides that:

> no complaint shall issue based on any unfair practice charge occurring more than six months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the six-month period shall be computed from the day he was no longer so prevented.

Serafin argues on appeal that the slander and defamation of character is ongoing and therefore falls within the six-month

statutory window. However, slander and defamation standing alone do not violate the Act.

It is the termination that, if motivated by hostility to protected activity, could have led to an unfair practice finding, but only if the unfair practice charge was filed within six months, or if Serafin was prevented from filing a timely charge. Serafin was terminated effective June 30, 2008. To be timely, his charge had to be filed by December 30, 2008. It was not filed until May 29, 2009 - eleven months after his termination. However, if Serafin can prove that his delay in filing a charge was caused by his union's breach of the duty of fair representation, he might be able to overcome the timeliness bar. Borough of North Caldwell, P.E.R.C. No. 2008-51, 34 NJPER 69 (¶27 2008); cf. Robinson v. Central Brass Manuf. Co., 987 F.2d 1235 (6th Cir. 1993) (statute of limitations against employer tolled until it denied grievance and union did not request arbitration).

In determining whether a party was "prevented" from filing a timely charge, we must conscientiously consider the circumstances of each case and assess the Legislature's objectives in prescribing the time limits as to a particular claim. The word "prevent" ordinarily connotes factors beyond a complainant's control disabling him or her from filing a timely charge, but it includes all relevant considerations bearing upon the fairness of imposing the statute of limitations. Kaczmarek v. New Jersey

Turnpike Auth., 77 N.J. 329 (1978). Relevant considerations include whether a charging party sought timely relief in another forum;[2/] whether the respondent fraudulently concealed and misrepresented the facts establishing an unfair practice; when a charging party knew or should have known the basis for its claim; and how long a time has passed between the contested action and the charge. State of New Jersey, P.E.R.C. No. 2003-56, 29 NJPER 93 (¶26 2003). The filing of a grievance does not toll a union's obligation to file a timely charge. North Caldwell. But it might toll an individual employee's obligation to file a timely charge against an employer, if that employee filed a grievance against the employer with the majority representative and can prove that the majority representative breached its duty of fair representation in processing that grievance.

Because the Director dismissed Serafin's charge against the Board on timeliness grounds, he did not consider whether the allegations, if true, might constitute an unfair practice. Serafin's charge, as amended, alleges among other things, that he was terminated after he sent an email alleging discrimination.

2/ Serafin argues that his Superior Court filing should toll the statute of limitations. Even if that were the case, it would only do so if he filed in court within the six month statute of limitations. Here, his Superior Court complaint was filed on May 4, 2009, more than six months after his termination. Contrast Kaczmarek (case transferred to Commission where employee filed court action within six months of alleged unfair practice).

That allegation does not meet our specificity requirement that a charge provide a clear and concise statement of the alleged unfair practice. However, Serafin's appeal states that he requested to view the videotape of his alleged misconduct, he reported to the Transportation Coordinator's office with two Association representatives, and they were turned away with the Coordinator stating that the union was making a circus out of this. Serafin goes on to state that he then emailed the Association's UniServ representative detailing the Coordinator's refusal to show the Association the tape; and the next day emailed the Coordinator alleging discrimination because four female employees had viewed the tape while Serafin, a male, was denied. Serafin then states that a few hours later, he was retaliated against for alleging discrimination.

Our Act protects against retaliation for the exercise of protected activity. In State of New Jersey, P.E.R.C. No. 2006-11, 31 NJPER 276 (¶109 2005), we explained in detail when employee activity is and is not protected by the Act. We repeat that explanation here so that Serafin can determine whether the activity he alleges triggered his termination comes within the protections of the Act. If so, we will grant him one last opportunity to amend his charge.

> Our Act gives public employees the right, without fear of penalty or reprisal, to form, join and assist any employee organization. N.J.S.A. 34:13A-5.3. The Act

also covers concerted activity engaged in for employees' mutual aid and protection. See City of Margate, P.E.R.C. No. 87-145, 13 NJPER 498, 500 n.3 (¶18183 1987) (protection for "mutual aid" derives from the Act's broad definition of "representative" as encompassing a "group of public employees", N.J.S.A. 34:13A-3, and from the right of public employees, pursuant to Article I, par. 19 of the New Jersey Constitution, to present grievances through representatives of their own choosing). Drawing on case law interpreting 29 U.S.C. §157 of the National Labor Relations Act (NLRA), we have held that protected activity may include individual conduct - such as complaints, arguments, objections, letters or similar activity - related to enforcing a collective negotiations agreement or preserving or protesting working conditions of employees in a recognized or certified unit. North Brunswick Tp. Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451, 454 n.16 (¶4205 1978), aff'd NJPER Supp.2d 63 (¶45 1979), citing Dreis v. Krump Mfg. Co., 345 F.2d 320 (7th Cir. 1976) and NLRB v. Interboro Contractors, Inc., 388 F.2d 455 (2d Cir. 1967). However, mere "personal griping" does not constitute protected concerted activity. Compare Capitol Ornamentental Concrete Specialities, Inc., 248 NLRB 851, 1518 (1980) (employee's complaint about condition of road leading to new parking area not protected activity where there was no evidence that he acted in concert with any other employee and no reason to infer that his complaint touched a matter of common concern) and Salisbury Hotel Inc., 283 NLRB 685 (1987) (non-unionized employees were engaged in concerted activity to change employer's lunch hour policy where employees had balked at the new policy and complained among themselves and to management; therefore, discharged employee's complaints to other employees, and her individual complaints to the employer, were part of that concerted effort).

> In North Brunswick, we held that a secretary engaged in protected, concerted activity when she strenuously objected to her supervisor about a change in work hours – an existing working condition that pertained to a certified negotiations unit but that was not set out in the negotiated agreement. See North Brunswick Tp. Bd. of Ed., H.E. No. 79-1, 4 NJPER 269, 270-271 (¶4138 1978). Similarly, in Atlantic Cty. Judiciary, P.E.R.C. No. 93-52, 19 NJPER 55 (¶24025 1992), aff'd 21 NJPER 321 (¶26206 App. Div. 1994), we relied on North Brunswick in finding that an employee engaged in protected conduct when, during a group meeting called by management to discuss a new evaluation system, he questioned the proposed changes. We reasoned that he was commenting on a working condition affecting all employees.[3/] By contrast, in Essex Cty. College, P.E.R.C. No. 88-32, 13 NJPER 763 (¶18289 1987), we found that where the college had a policy of distributing paychecks at 4 p.m., a part-time employee did not engage in protected activity when she complained to the college president about not receiving her paycheck at the end of her workday at 1:15 p.m. She was not acting on behalf of an employee organization; she did not act in concert with anyone; and her complaint was on behalf of herself individually and did not relate to enforcing a collective negotiations agreement or changing the working conditions of employees other than herself. See also State of New Jersey (Public Defender), P.E.R.C. No. 86-67, 12 NJPER 12 (¶17003 1985), recon. den. 12 NJPER 199 (¶17026 1986), aff'd NJPER Supp.2d 169 (¶148 App. Div. 1987) (personal opinions about how office should be organized and the practice of law conducted were not related to terms and conditions of employment and did

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3/ The charge in Atlantic Cty. was ultimately dismissed on the grounds that, while the employee's transfer was partly motivated by his protected conduct, he would have been transferred even absent that conduct. 19 NJPER at 57.

> not constitute protected activity; complaints about office Christmas party were protected but employer showed that attorney was terminated for poor performance).

Under these circumstances, we remand this matter to the Director. Serafin shall have ten days from the date of this decision to amend his charge to clearly and concisely allege how he was terminated for activity protected by the New Jersey Employer-Employee Relations Act. The Director shall then consider any such amendment in deciding whether Serafin's allegations against the Board, if true, might constitute unfair practices.

ORDER

This matter is remanded to the Director of Unfair Practices for further processing consistent with this Decision.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Branigan, Buchanan, Fuller, Joanis and Watkins voted in favor of this decision. None opposed. Commissioner Colligan recused himself.

ISSUED: December 17, 2009

Trenton, New Jersey