P.E.R.C. NO. 2020-25

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF LAKEWOOD,

Respondent,

-and- Docket No. CI-2018-005

TEAMSTERS LOCAL 97,

Respondent,

-and-

SAMUEL SCHULMAN,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission sustains the refusal of the Director of Unfair Practices to issue a complaint on an unfair practice charge filed by Schulman against the Township and Local 97. D.U.P. No. 2020-2, 46 NJPER 41 (¶10 2019). The charge alleges that the Township violated the Act by terminating his employment, and that Local 97 violated the Act by failing to represent him fully and fairly in connection with his termination. Procedurally, the Commission finds that Schulman had standing to file the unfair practice charge because his separation from employment was disputed, and that Schulman's charge as to Local 97 was not untimely. Substantively, the Commission finds that Schulman has not demonstrated facts warranting the issuance of a complaint against Local 97 for an alleged breach of its duty of fair representation, and has submitted no facts supporting his charge against the Township, and therefore affirms the Director's dismissal of the charges.

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, Secare & Hensel, attorneys (Steven Secare, of counsel)

For the Respondent, Mets Schiro McGovern, LLP, attorneys (Brian J. Manetta, of counsel)

For the Charging Party, Oxfeld Cohen, attorneys (Sanford R. Oxfeld, of counsel)

DECISION

On July 22, 2019, Samuel Schulman appealed the decision of the Director of Unfair Practices that refused to issue a Complaint based on his unfair practice charge filed against his former employer, the Township of Lakewood (Township), and his former majority representative, Teamsters Local 97 (Local 97). D.U.P. No. 2020-2, 46 NJPER 41 (¶10 2019). Schulman's charge

alleges that the Township violated subsections 5.4a(1) and (7)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act), by terminating his employment on February 3, 2016. Schulman's charge further alleges that Local 97 violated subsections 5.4b(1) and (5)[2/] of the Act by failing to represent him fully and fairly in connection with his separation from employment. On July 31, 2019, Local 97 filed opposition to Schulman's appeal of the Director's refusal to issue a Complaint. The Township did not file a response to the appeal. After a careful review of the parties' submissions, we sustain the Director's decision not to issue a Complaint.

Procedurally, the Director's decision found that Schulman's charge was untimely pursuant to N.J.S.A. 34:13A-5.4c because it was filed more than six months after both his February 3, 2016 separation from employment and the March 1, 2016 letter from the Township informing Local 97 that the Township considered Schulman as having resigned on February 3, 2016. The Director's decision

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

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

also found that Schulman lacked standing to file a charge because once he ceased being a public employee in February 2016 the Commission no longer had jurisdiction over him and Local 97 no longer owed him a duty of fair representation.

Substantively, the Director's decision found that the charge failed to establish that Local 97 breached its duty of fair representation to Schulman. The Director cited multiple actions Local 97 and its counsel took in February and March 2016 based on Schulman's representations to them of adverse employment actions that occurred on February 3, 2016, including filing an appeal with the Civil Service Commission (CSC). The Director noted that by the time Local 97 was informed that the Township considered Schulman to have resigned on February 3, the CSC appeal deadline had already passed. As to the Township, the Director's decision found that Schulman submitted no facts supporting a finding that the Township violated 5.4a(1) or (7) of the Act.

We summarize the facts as follows. Schulman was employed by the Township as a heavy equipment operator for about 16 years. On February 3, 2016, he attended a meeting with the Township's Director of Public Works, Assistant Director of Public Works, and two Local 97 shop stewards. The purpose of the meeting was to serve Schulman with two Preliminary Notices of Disciplinary Action (PNDAs), one imposing a 30-day suspension, and one imposing 10-day suspension. Schulman was not served with the

PNDAs because, according to the Township's attendees, Schulman said he was quitting instead and he left the building. Schulman refuted the Township's assertion that he quit; he asserted that he only stated during the meeting that he was "thinking about moving on from the Township" and "thinking about . . . giving [the Director of Public Works] 2 weeks notice." Schulman asserted he left the premises because he thought his suspensions were beginning immediately.

After the meeting, Schulman received a February 3, 2016 letter signed by the Director of Public Works enclosing a form for the payment of unused vacation and sick leave, which stated, in pertinent part: "Pursuant to the resignation of employment tendered by you on Wednesday, February 3rd @ 7:10 a.m. . . . please complete and return the enclosed form." Schulman asserted that he did not complete that form because he understood it to only be for former employees and he had not resigned. Schulman did complete a February 4, 2016 form for COBRA health coverage, not because he considered himself resigned or terminated, but because he believed his combined 40 day suspension would make him ineligible for continued health insurance through the Township.

After the February 3, 2016 meeting, Schulman contacted the Local 97 Vice President to appeal his suspensions, and Local 97 requested Final Notices of Disciplinary Action (FNDAs) from the Township in order to initiate CSC appeals of the charges. The

Township did not issue FNDAs on Schulman's disciplinary charges. On March 1, 2016, counsel for the Township wrote to Local 97 explaining that the Township considered Schulman to have made a binding oral resignation that the Township had accepted. Local 97's Vice President certified that the Township's March 1 letter was Local 97's first notice that the Township considered Schulman resigned. By letter of March 11, 2016, the Township's Municipal Manager further explained to Local 97 the circumstances surrounding Schulman's resignation and clarified that the date of that meeting was February 3, 2016. In response, Local 97 e-mailed the Township on March 11 stating that Schulman denied that he resigned, that Local 97 intends to appeal, and that Local 97 is requesting that Schulman's health insurance be continued during the appeal process. By letter of March 14, the Township notified Schulman that it "is temporarily restoring your health benefits as a favor to your union."

Local 97 subsequently investigated the circumstances of the February 3, 2016 meeting, obtaining statements from Schulman and another union witness, and corresponded with its counsel regarding the situation. On March 21, 2016, Local 97's counsel emailed Local 97 with his legal opinion that an appeal to the CSC of Schulman's resignation would be unsuccessful. He also noted that, using the March 1, 2016 date of the Township's written notice to Local 97 of its position that Schulman resigned, March

21, 2016 would be the last day to appeal. Local 97 authorized an appeal to the CSC, which was filed on March 31, 2016, within 20 days of the March 11, 2016 letter from the Township that had the corrected resignation date.

On April 18, 2016, the CSC's Division of Appeals and Regulatory Affairs issued a letter finding Schulman's appeal untimely because his alleged resignation occurred on February 3 and personnel records indicate his resignation in good standing effective February 9, 2016. On May 10, 2016, counsel for Local 97 responded to the CSC letter, arguing that the appeal was timely filed because it was within 20 days of the March 11, 2016 formal notice from the Township indicating its position that Schulman had resigned. By email of May 16, 2016, counsel for Local 97 notified Schulman that the CSC appeal had been initially denied as untimely, but stated:

> We are disputing that finding with the CSC, since the appeal was filed within 20 days of being provided with written notice by the Township of its position. We anticipate filing briefs with the CSC on the matter, and there is some case law supporting our position.

On May 23, 2016, the CSC responded to Local 97 and the Township that it would decide the issue based on submissions from both sides.

On May 8, 2017, the CSC issued a Final Administrative Action on Schulman's appeal of his alleged resignation. The CSC

rejected the appeal as untimely, noting that Schulman had 20 days from February 3, 2016 to appeal a resignation, or as late as 20 days from February 9, 2016 (when the Township recorded his resignation) to appeal a disciplinary removal. The CSC noted there was documentary evidence that the Township notified Schulman of the resignation as early as the February 3, 2016 letter that accompanied the paid leave form, and therefore he had failed to show good cause to relax the filing deadline. The CSC further found: "Nonetheless, even assuming that the appellant timely filed his appeal, he has not submitted convincing evidence that he did not intend to resign." Counsel for Local 97 discussed the CSC decision with Local 97 on May 16, 2017 and with Schulman on May 19, 2017. Schulman did not appeal the CSC decision or request Local 97 to seek appellate review.

On appeal, Schulman asserts that his charge is not untimely because the applicable date for the start of the six month statute of limitations should be May 8, 2017, the date of the CSC's decision dismissing his appeal of his alleged resignation as untimely. He argues that the date of that final CSC determination was his notice that the union inappropriately represented him by filing his appeal late, thus his July 28, 2017 unfair practice charge was timely. Schulman further asserts that he did not lack standing to file an unfair practice charge because he did not voluntarily sever his employment with the

Township or his Local 97 membership. He argues that, as was the case in Vaca v. Sipes, 386 U.S. 171 (1967), the duty of fair representation applies to discharged members. He contends that it does not make sense that an employee who is wrongfully terminated cannot maintain a duty of fair representation claim against his union, yet has standing to file the same charge against the union if only suspended and not terminated. Schulman asserts that Local 97's conduct in how it represented him before the CSC in appealing his alleged resignation was arbitrary and therefore a breach of its duty of fair representation.

Local 97 responds that it investigated Schulman's alleged resignation as soon as it was aware of it, that it promptly e-mailed the Township to refute the resignation allegation, and that it got the Township to agree to continue his health benefits until the end of May 2016. It asserts that on April 7, 2016, Schulman's attorney forwarded him an email from Local 97's attorney including a summary of events including the union's filing of an appeal with the CSC on March 31, 2016. Local 97 notes that on May 16, 2016, its counsel emailed Schulman to inform him that the initial CSC appeal had been denied as untimely but that Local 97 was appealing that determination. Thus, it argues that Schulman knew timeliness of the CSC appeal was an issue as early as May 16, 2016 and his failure to file an unfair practice charge within six months of that date makes his

charge untimely. Local 97 asserts that its delay in filing the CSC appeal was attributable to Schulman's own conduct in not making it aware of the alleged February 3, 2016 resignation, which Local 97 only learned of from a March 1, 2016 letter from the Township. It states that the CSC found that Schulman's appeal was already out of time by then.

ANALYSIS

A union will breach its duty of fair representation and violate the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4b(1), when its conduct toward a negotiations unit member is arbitrary, discriminatory, or in bad faith. Vaca v. Sipes, 386 U.S. 171 (1967); 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 wide range of reasonableness must be allowed a majority representative in servicing the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. PBA Local 187, P.E.R.C. No. 2005-78, 31 NJPER 173 (¶70 2005), citing Ford Motor Co. v. Huffman, 345 U.S. 330, 337-338 (1953).

On the merits of Schulman's breach of the duty of fair representation claim against Local 97, we affirm the Director's determination that Schulman has not demonstrated facts that

warrant issuing a Complaint against Local 97. Following Schulman's February 3, 2016 resignation, Local 97, based on Schulman's representations, investigated his claims that he was suspended. Local 97 subsequently attempted to obtain disciplinary notices from the Township so that it could appeal the disciplinary actions to the CSC. It was not until March 1, 2016 that the Township notified Local 97 that Schulman had verbally resigned (though the date of resignation was incorrect). On March 11, 2016, the Township sent Local 97 a corrected letter explaining the circumstances of Schulman's alleged February 3 resignation. Local 97 then corresponded with the Township to refute its contention that Schulman had resigned, and proceeded to investigate the issue with Schulman and other Local 97 members. Specifically, on March 11, Local 97 immediately e-mailed the Township to notify them that Schulman refuted the resignation and would be appealing it. Local 97 also requested that the Township maintain Schulman's health insurance during the appeal process. On March 14, the Township did not concede the resignation issue, but agreed to temporarily restore Schulman's health benefits.

Local 97 then sought the advice of its legal counsel, who on March 21, 2016 offered its legal opinion that a CSC appeal of Schulman's February 3 resignation would be unsuccessful. Despite that legal opinion, Local 97 directed its legal counsel to file a

CSC appeal on Schulman's behalf, which it did on March 31. After the appeal was initially rejected as untimely, Local 97 continued to pursue the CSC matter by appealing the timeliness determination. Local 97 argued that the deadline should have run for 20 days from the Township's formal March 11 notification to Local 97 of Schulman's resignation. Local 97's legal counsel corresponded directly with Schulman on May 16, notifying him of the status of the CSC appeal, i.e., that it had been initially rejected as untimely but that Local 97 was appealing that determination.

Ultimately, however, the CSC's May 8, 2017 final determination held that the Township's February 3, 2016 letter to Schulman attaching the leave payout form indicated that he had resigned that day, and that the Township officially recorded the resignation on February 9. It found that the latest possible date for filing was February 29 and that there was no good cause for relaxing the 20-day filing deadline. Accordingly, it found that the CSC appeal of Schulman's termination was untimely. Furthermore, the CSC held that even if his appeal was timely, they would have found that Schulman had voluntarily resigned on February 3, 2016. The CSC found that Schulman resigned on February 3, 2016 and that the latest possible operative date of his resignation was February 9, 2016 (when the Township recorded it), thereby making his CSC appeal due no later than February 29,

2016. However, the record shows that it was not until March 1, 2016 that Local 97 was notified that the Township considered Schulman resigned. Therefore, Local 97 could not have been responsible for Schulman's untimely CSC appeal.

In sum, there is no evidence indicating that Local 97 acted in an arbitrary, discriminatory, or bad faith manner in how it represented Schulman in challenging his alleged resignation with the Township. Local 97 took action to represent Schulman based on the information it received from him and the Township, and pursued the CSC appeal. Local 97 also got the Township to extend Schulman's employer-sponsored health insurance coverage beyond what was required following his resignation. Based on all of these facts, we cannot find that Schulman's allegations support the issuing of a Complaint on a 5.4b(1) charge because they do not suggest that Local 97 breached its duty of fair representation to Schulman. Nor has Schulman submitted any facts supporting a 5.4b(5) violation of a Commission rule or regulation. We therefore affirm the Director's substantive determination that the charge does not meet the complaint issuance standard as to Local 97.

We also affirm the Director's conclusions regarding Schulman's charge alleging that the Township wrongfully terminated him. D.U.P. No. 2020-2 at 15-16. Schulman's charge fails to establish that the Township violated the Act, as he has

submitted no facts supporting an independent violation of 5.4a(1) or 5.4a(7). In the absence of a 5.4a(3) claim that the Township's adverse personnel action was motivated by the employee's exercise of rights protected under the Act, we ordinarily do not have jurisdiction to hear wrongful termination claims. Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984). We therefore affirm the Director's substantive findings that the charge does not meet the complaint issuance standard as to the Township.

Procedurally, we hold that Schulman had standing to file the unfair practice charge because his separation from employment was disputed. Unfair practice charges may be filed by public employers, public employees, public employee organizations, or their representatives. N.J.A.C. 19:14-1.1. N.J.S.A. 34:13A-3(d) defines an employee as a current employee or an individual who ceased work because of a labor dispute or unfair practice. Individuals who have voluntarily resigned or retired generally lack standing to file unfair practice charges against their former public employer or union. Weisman and CWA 1040, P.E.R.C. No. 2012-55, 38 NJPER 356 (¶120 2012) (union had no duty to enforce settlement agreement of employee who voluntarily resigned); Borough of Belmar, P.E.R.C. No. 89-27, 14 NJPER 625 (¶19262 1988) (retired police officers not public employees under the Act); But see City of Asbury Park, P.E.R.C. 2002-73, 28 NJPER

253 (¶33096 2002) (retiree had standing because unfair practice sought compensation for period in which he was public employee).

By contrast, individuals who have been terminated or involuntarily separated from employment have standing to file unfair practice charges pertaining to their loss of employment and/or their union's representation of them in challenging it. See, e.g., Jersey City Housing Authority and Independent Service Workers of America and Matthew Crawford, P.E.R.C. No. 2015-70, 41 NJPER 477 (¶148 2015), aff'd, 43 NJPER 255 (¶77 App. Div. 2017) (laid off employee filed charge against former employer and union); CWA Local 1040, CWA District One and the State of N.J. (Juvenile Justice) and Judy Thorpe, P.E.R.C. No. 2013-29, 39 NJPER 205 (¶66 2012), aff'd, 43 NJPER 353 (¶100 App. Div. 2017), certif. den., 231 N.J. 211 (2017) (terminated employee filed charge against former employer and union); State of New Jersey (Div. on Civil Rights) and CWA and Maria Jones, P.E.R.C. No. 94-116, 20 NJPER 273 (¶25138 1994), aff'd, 21 NJPER 319 (¶26204 App. Div. 1995), certif. den., 142 N.J. 571 (1995) (laid off employee filed charge against former employer and union).

Here, Schulman's allegations against the Township concern his employment separation, and his allegations against Local 97 concern whether its representation of him in connection with his employment separation was arbitrary. Thus, these facts are more similar to the cases of involuntary terminations, layoffs, and

non-renewals for standing purposes. See Jersey City Medical Center and AFSCME and Joseph Shine, P.E.R.C. No. 87-19, 12 NJPER 740 (¶17277 1986) (Complaint issued and Commission remanded for hearing an individual's charges against his union and employer alleging unjust termination and violation of duty of fair representation after he quit following a transfer). We therefore find that Schulman had standing to file the unfair practice charge because he was still an employee within the definition of the Act.

We next hold that Schulman's unfair practice charge was not untimely. N.J.S.A. 34:13A-5.4c states:

> [N]o 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 Act does not rigidly bar relief on all causes of action arising more than six months before a charge was filed. A charge may still be filed if the charging party was "prevented" from filing a charge on time and the six month period will not begin to run until the charging party was "no longer so prevented." N.J.S.A. 34:13A-5.4c. In determining whether a party was "prevented" from filing an earlier charge, the Commission 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; 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. See, e.g., Kaczmarek; State of New Jersey, P.E.R.C. No. 2003-56, 29 NJPER 93 (¶26 2003); City of Margate, P.E.R.C No. 94-40, 19 NJPER 572 (¶24270 1993); Hoboken Teachers Ass'n, P.E.R.C No. 91-110, 17 NJPER 331(¶22145 1991).

Here, Schulman did not know the CSC appeal of his separation from employment was finally dismissed as untimely until - at the earliest - the issuance of that decision on May 8, 2017.[3/] His unfair practice charge, which included the 5.4b(1) charge alleging the union did not properly represent him in connection

3/ The parties' submissions argue about how long after the issuance of the CSC decision Schulman was actually aware of it, whether from correspondence with Local 97 or otherwise, but determination of that specific date is unnecessary because there is no dispute that the charge was filed within 6 months of either the CSC decision date or the alleged dates when Schulman became aware of it.

with his termination in part by filing his CSC appeal late, was filed on July 28, 2017 and was therefore within the six month statute of limitations.

Local 97 argues that the operative date for the six month unfair practice statute of limitations was May 16, 2016, when Local 97's counsel notified Schulman that the CSC initially determined that the appeal was untimely. However, Local 97 also notified Schulman that "we are disputing that finding with the CSC," explained its basis for disputing it, and stated that "there is some case law supporting our position." On May 23, 2016, the CSC confirmed that it would consider Local 97's appeal of the initial rejection. Thus, although notified of the early procedural setback, Schulman had not yet received a final CSC determination and he knew Local 97 was challenging it with at least a colorable claim for tolling the 20-day filing deadline based on when the Township formally notified Local 97 of the alleged resignation. We find it reasonable, based on Local 97's explanation to him, that Schulman did not, as of May 16, 2016, know that his CSC appeal would ultimately fail. We do not think that, in order to preserve his unfair practice standing under our Act should the CSC appeal ultimately fail (allegedly due to Local 97's actions), Schulman was required to file a charge against Local 97 in the midst of its continued representation of him in the CSC appeal. Such a requirement could unnecessarily make unit

members and majority representatives adversaries, and have the detrimental effect of encouraging individuals to preemptively file charges against their unions during the pendency of negotiations, appeals, arbitrations, etc. based on perceived missteps before knowing the final outcome. Under these circumstances, we find that Schulman's unfair practice charge was timely filed within six months of the CSC's final decision rejecting his appeal of his alleged resignation as untimely. See CWA Local 1040 (Judy Thorpe), P.E.R.C. No. 2013-29 and P.E.R.C. No. 2014-71; Bridgewater-Raritan; and North Caldwell.[4/]

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Jones and Papero voted in favor of this decision. None opposed. Commissioner Voos was not present.

ISSUED: November 26, 2019

Trenton, New Jersey

4/ We note that had the charge been only against the Township, without the duty of fair representation claim against Local 97, the operative date might have been March 1 or March 11, 2016 at the latest (the dates the Township notified Local 97 of the resignation), making Schulman's July 28, 2017 charge untimely. Local 97's appeal of the resignation would not have tolled the statute of limitations as to the Township. Bridgewater-Raritan; North Caldwell; State of New Jersey (Stockton State College), P.E.R.C. No. 77-14, 2 NJPER 308 (1976), aff'd, 153 N.J. Super. 91 (App. Div. 1977), certif. den., 78 N.J. 326 (1978).