

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SUSSEX COUNTY SHERIFF'S OFFICE,

Respondent,

-and-

Docket No. CI-2021-001

PBA LOCAL 378

Respondent,

-and-

PAUL C. LIOBE,

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 Paul C. Liobe against the Sheriff's Office and the PBA. The charge against the Sheriff's Office alleges that it violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act) by not properly compensating him for work details he performed for the Sussex County Municipal Utilities Authority (SCMUA). The charge against the PBA alleges that it violated the Act by breaching its duty of fair representation when it withdrew his SCMUA work detail grievance from arbitration. The Commission finds that the PBA's decision to withdraw Liobe's grievance from arbitration did not breach its duty of fair representation because the new PBA President evaluated the grievance and explained his rationale for not pursuing arbitration based on the best interests of the union and on his reasonable interpretation that the contract did not support the grievance. The Commission finds that, because Liobe has not asserted a viable breach of duty of fair representation claim against the PBA, he lacks standing to assert a claim against the Sheriff's Office for a failure to negotiate in good faith.

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 Sussex County Sheriff's Office,
Trimboli & Prusinowski, LLC, attorneys (James T.
Prusinowski, of counsel)

For the Charging Party, Paul C. Liobe, pro se

DECISION

Paul C. Liobe appeals from a decision of the Director of Unfair Practices (Director). That decision refused to issue a complaint on an unfair practice charge Liobe filed on July 6, 2020 against the Sussex County Sheriff's Office (Sheriff's Office) and PBA Local 378 (PBA). D.U.P. No. 2021-6, __ NJPER __ (¶_ 2021). The charge alleges that the Sheriff's Office violated subsections 5.4a(1), (5), and (7)^{1/} of the New Jersey

^{1/} These provisions prohibit public employers, their
(continued...)

Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., by not properly compensating him at the "special events overtime" rate for work details he performed for the Sussex County Municipal Utilities Authority (SCMUA). Liobe's charge against the PBA alleges it violated subsections 5.4b(1), (3), and (5)^{2/} of the Act by breaching its duty of fair representation when it withdrew his SCMUA work detail grievance from arbitration.

We summarize the pertinent facts as follows. The PBA represents all corrections officers, sergeants, lieutenants, and captains employed by the Sheriff's Office. The Sheriff's Office and PBA are parties to a collective negotiations agreement (CNA) effective through December 31, 2016. The CNA's grievance

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- 1/ (...continued)
representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by 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. . . . [and] (7) Violating any of the rules and regulations established by the commission."
- 2/ These provisions prohibit public 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. . . . (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. . . . [and] (5) Violating any of the rules and regulations established by the commission."

procedure ends in binding arbitration. Article 11 of the CNA contains overtime provisions stating that an employee who works "in excess of eight (8) hours per day or forty (40) hours in a work week" and "was not absent, without pay, within 72 hours immediately after the scheduled overtime" will be eligible for overtime pay. Sussex County (County) and the SCMUA are parties to a shared services agreement that provides that the SCMUA will reimburse the County for supplemental assistance provided by Sheriff's Office corrections officers at an overtime rate in accordance with the PBA-Sheriff's Office CNA.^{3/}

Liobe was employed by the Sheriff's Office as a corrections officer until he was laid off, effective October 31, 2019. Prior to his layoff, Liobe was a PBA unit member and PBA President. On June 15, 2019, Liobe worked an 8-hour SCMUA detail. On July 9, Liobe inquired why he did not receive overtime pay for his June 15 SCMUA detail and the Sheriff's Office responded that he was not eligible for overtime because he did not work in excess of 40 hours that week due to recent suspension days. On July 11, Liobe e-mailed Undersheriff Tomasula regarding overtime compensation for SCMUA details. On July 12, Tomasula replied, stating that

^{3/} The SCMUA agreement also provides a monthly overtime payment figure of \$60.16 per hour, which it says will be recalculated annually in accordance with the new PBA contract amount for those years.

there is no set "special overtime detail" rate but that officers are paid their individual overtime rate. He stated that Liobe did not get paid overtime because he did not work in excess of 40 hours the week he performed the June 15, 2019 SCMUA detail.

On July 25, 2019, Liobe, as PBA President, filed a grievance alleging that the Sheriff's Office failed to properly compensate him at the "special events overtime" rate for his June 15 SCMUA detail. On August 2, County Administrator Greg Poff denied Liobe's grievance, stating that the overtime provisions requiring an excess of 40 hours in a work week were properly applied to Liobe's June 15 SCMUA detail. On August 5, Liobe amended his grievance to allege that all PBA corrections officers below the rank of corporal who received regular overtime for their SCMUA details were paid less than the specified rate of overtime pay in the shared services agreement. On September 6, 2019, Liobe demanded binding arbitration on behalf of the PBA. The Sheriff's Office then filed a scope of negotiations petition (Dkt No. SN-2020-015) seeking to restrain arbitration. On October 31, 2019, Liobe was laid off from his employment with the Sheriff's Office. Liobe appealed his layoff to the Civil Service Commission and his appeal is pending. Unit employee Ashley Robbins replaced Liobe as PBA President until the subsequent PBA election.

On February 27, 2020, the PBA's newly-elected President, James Aumick, formally withdrew the PBA's grievance and arbitration in an e-mail to the arbitrator, Liobe, and counsel for the Sheriff's Office. Aumick wrote, in pertinent part:

PBA 378 is withdrawing this grievance and including arbitration. Mr. Liobe does not have the consent or support of PVA [sic] 378 to proceed forward for he has separated from our unit as of 11-1-19. I have emails from Mr. Liobe that he was keeping a quote "lid on" are [sic] legal expenses and the sum has now exceeded \$60,000. From these prior frivolous actions and for the best interest of our local we are withdrawing from this matter. Mr. Liobe is quoting the language of "special events overtime" in his grievance however this language does not exist in our contract it only exists in policy. It would be a negotiable item moving forward to get any language change from policy and placed into current contract. The contract that we currently operate under does not contain such language.

On February 27, 2020, the arbitrator acknowledged the PBA's withdrawal and dismissed the arbitration, noting that the CNA does not allow an individual grievant to proceed to binding arbitration. Due to the arbitration withdrawal, the Commission administratively dismissed the Sheriff's Office's scope of negotiations petition. On July 6, 2020, Liobe filed his unfair practice charge against the Sheriff's Office and the PBA.

In his April 5, 2021 decision, D.U.P. No. 2021-6, the Director found that the facts as alleged do not establish that

the PBA breached its duty of fair representation to Liobe because they do not indicate that the PBA's decision to withdraw the grievance arbitration was arbitrary, discriminatory, or in bad faith. The Director found that Liobe's claims against the Sheriff's Office are untimely, but also that without a viable claim against the PBA he lacked standing for those claims. Accordingly, the Director declined to issue a complaint and the unfair practice charge was dismissed.

Liobe's appeal asserts that he did not know that the PBA had abandoned his grievance arbitration prior to Aumick's February 27 withdrawal letter. He argues that he was "prevented" from filing an unfair practice charge against the Sheriff's Office until that date, so his charge against the Sheriff's Office was not untimely. On appeal Liobe also submitted new evidence, in the form of the text message exchange between himself and Robbins on December 2-3, 2019, which he asserts he had not been able to access without intervention from his cellular phone service provider. Liobe argues that these messages indicate that the PBA did not want to oppose the Sheriff's Office and therefore demonstrate that the PBA acted arbitrarily, discriminatorily, or in bad faith in withdrawing his grievance arbitration.

The Sheriff's Office responds that the time limitation on Liobe's charge did not determine this case and therefore the

Director's decision should not be disturbed. It asserts that the Director did not find Liobe's charge against the PBA untimely and that the Director found that even if Liobe's charge against the Sheriff's Office was timely, it would be dismissed for lack of standing. The Sheriff's Office argues that the text messages produced by Liobe should have suggested to him in December 2019 that there was an issue with his grievance. It also contends that in a January 28, 2020 settlement offer letter from the Sheriff's Office to Liobe, he was directly told "as you know, the PBA has stated it will no longer be involved in this matter."

The PBA did not file opposition to Liobe's appeal of D.U.P. No. 2021-6. The PBA did appear before the Director, where it filed a brief letter asserting that the PBA agreed as a union not to pursue Liobe's grievance through arbitration.

The Commission has authority to issue a complaint where it appears that a charging party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4©; N.J.A.C. 19:14-2.1. Where no complaint is issued, the charging party may appeal to the Commission, which may sustain the refusal to issue a complaint or may direct that further action be taken. N.J.A.C. 19:14-2.3(b).

The issue on appeal is Liobe's claim that the PBA violated its duty of fair representation by withdrawing his grievance

arbitration concerning "special events overtime" compensation for working SCMUA details. After a careful review of the parties' submissions, we sustain the Director's decision not to issue a complaint and dismiss Liobe's unfair practice charge.

Section 5.3 of the Act empowers a union to negotiate on behalf of all unit employees and to represent all unit employees in administering the collective negotiations 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 when a union's conduct towards a member of the negotiations unit is arbitrary, discriminatory or in bad faith. Id. at 191. New Jersey courts and the Commission have adopted the Vaca standard in deciding fair representation cases arising under the Act. See Belen v. Woodbridge Tp. Bd. of Ed., 142 N.J. Super. 486 (App. Div. 1976); Lullo v. International Ass'n of Fire Fighters, 55 N.J. 409 (1970); Saginario v. Attorney General, 87 N.J. 480 (1981); Jersey City Housing Auth., P.E.R.C. No. 2015-70, 41 NJPER 477 (¶148 2015), aff'd, 43 NJPER 255 (¶77 App. Div. 2017); Edison Tp. Ed. Assn. (Ziznewski), P.E.R.C. No. 2014-86, 41 NJPER 49 (¶13 2014); and OPEIU Local 133, P.E.R.C.

No. 84-60, 10 NJPER 12 (¶15007 1983). "The complete satisfaction of all who are represented is hardly to be expected" and "[a] wide range of reasonableness must be allowed a statutory bargaining 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)). A breach of the duty of fair representation violates subsection 5.4b(1) of the Act.

The Commission has held that a union should exercise reasonable care in investigating grievances and evaluate the merits of requests for arbitration in good faith. Middlesex Cty. and NJCSA, P.E.R.C. No. 81-62, 6 NJPER 555, 557 (¶11282 1980), aff'd, NJPER Supp.2d 113 (¶94 App. Div. 1982), certif. den., 91 N.J. 242 (1982); Carteret Ed. Ass'n, P.E.R.C. No. 97-146, 23 NJPER 390 (¶28177 1997); Camden Cty. College (LaMarra), P.E.R.C. No. 93-90, 19 NJPER 222 (¶24107 1993); Jersey City Medical Center (Shine), P.E.R.C. No. 87-19, 12 NJPER 740 (¶17277 1986); and Trenton Bd. of Ed. (Salter), P.E.R.C. No. 86-146, 12 NJPER 528 (¶17198 1986). However, the duty of fair representation does not require a union to arbitrate every grievance. Essex Cty. (Miller), P.E.R.C. No. 2019-16, 45 NJPER 195 (¶50 2018); Passaic Cty. Support Staff Ass'n, P.E.R.C. No. 2015-23, 41 NJPER 169 (¶60

2014).^{4/} Applying these standards, the Commission has frequently dismissed claims alleging that a union's decision not to process or arbitrate a grievance violated the duty of fair representation. See, e.g., Essex Cty. Sheriff (Moriarty), P.E.R.C. No. 92-81, 18 NJPER 96 (¶23043 1992); AFSCME, Co. 52, Loc. 888 (Brennan), P.E.R.C. No. 89-71, 15 NJPER 71 (¶20027 1988); Camden Cty. College (Porreca), P.E.R.C. No. 88-28, 13 NJPER 755 (¶18285 1987); TWU No. 225 (Metros), P.E.R.C. No. 85-99, 11 NJPER 231 (¶16089 1985); and Fair Lawn Bd. of Ed., P.E.R.C. No. 84-138, 10 NJPER 351 (¶15163 1984).

This case does not involve a situation where the union initially pursued or stated it would pursue arbitration, but failed to arbitrate with no reasonable basis. Compare N.J. Sports & Exposition Auth. (Andes), P.E.R.C. No. 98-163, 24 NJPER 357 (¶29170 1998) (union determined grievant's termination was without just cause but failed to pursue grievance arbitration with no explanation); Washington Tp. Ed. Ass'n (Petrone), H.E. No. 2020-3, 46 NJPER 251 (¶60 2019) (union failed to request arbitration after representing that it intended to arbitrate).

4/ Accord Vaca, 386 U.S. at 191-192 ("[t]hough we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement.")

Here, it was Liobe himself, as PBA President, who filed his own grievance and demanded binding arbitration on behalf of himself and others regarding SCMUA details. When Liobe was no longer employed by the Sheriff's Office and no longer PBA President, the new PBA leadership evaluated his pending grievance arbitration and determined not to pursue it. PBA President Aumick provided his reasons for not pursuing Liobe's grievance in his February 27, 2020 e-mail withdrawing from the arbitration.

Aumick stated that the PBA does not support proceeding with arbitration and cited legal expenses as a reason for why withdrawing the arbitration is "for the best interest of our local." As for his evaluation of Liobe's grievance on the merits, Aumick explained that the PBA's interpretation of the contract is not compatible with Liobe's assertion that the CNA supports the payment of "special events overtime." See Pennsauken Bd. of Ed. (Cream), P.E.R.C. No. 2009-63, 35 NJPER 148 (¶54 2009) (union's decision not to arbitrate compensation grievance was not arbitrary where it found no CNA violation); PBA Local 187, P.E.R.C. No. 2005-78, supra (PBA's decision not to arbitrate based on its interpretation of contract's seniority provisions was not arbitrary); and Essex Cty. (Miller), P.E.R.C. No. 2019-16, supra (union's determination that arbitration was unlikely to prevail was not arbitrary). Finally, Aumick related

the PBA's view that a policy of "special events overtime" would need to be negotiated into the contract.

Based upon the above, we find that Liobe has not asserted facts that, if true, would establish that the PBA acted arbitrarily or in bad faith in its evaluation that Liobe's grievance was not likely to succeed on the merits and its determination that it was in the best interest of the PBA not to pursue this arbitration but to instead collectively negotiate the issue of "special events overtime" into the CNA. The PBA's decision not to arbitrate Liobe's grievance falls within the range of reasonableness a majority representative must be afforded in servicing the unit as a whole, which does not necessarily satisfy every individual unit employee. Accordingly, we find that Liobe's charge against the PBA does not support a breach of the duty of fair representation and we dismiss the 5.4b(1) claim.

We further find that Liobe, as an individual employee, lacks standing for a 5.4b(3) claim alleging bad faith negotiations, as that obligation is owed to the employer. Essex Cty. (Miller), P.E.R.C. No. 2019-16, supra. We also dismiss Liobe's 5.4b(5) claim as there are no facts alleged which demonstrate that a Commission rule has been violated.

On appeal, Liobe produced a series of text messages between himself and interim PBA President Robbins from December 2-3, 2019. An appeal of a refusal to issue an unfair practice complaint "may not allege any facts not previously presented, unless the facts alleged are newly discovered and could not with reasonable diligence have been discovered in time to be presented." N.J.A.C. 19:14-2.3(b). As Liobe himself was part of the text message conversation, we do not view it as a newly discovered fact. He knew of the text messages from December 2019, yet did not supply them during the processing of his charge before the Director. "We are reluctant to allow a party to supplement a record in an unfair practice case after receiving an adverse ruling, particularly when that evidence was available at the time of the initial proceeding." Passaic Cty. Support Staff Ass'n, P.E.R.C. No. 2015-23, supra. Although Liobe claims he required the intervention of his cell phone service provider to obtain the copies of the text messages, we find that he was aware of the existence of the messages and that with reasonable diligence he could have obtained them prior to filing his charge. Accordingly, we cannot consider Liobe's newly submitted evidence as part of the record on appeal. Even if we considered Liobe's newly supplied evidence, his December 2019 text conversation with Robbins is consistent with the representations made by PBA

President Aumick in his formal February 27, 2020 arbitration withdrawal that the PBA did not support the arbitration.

We next address Liobe's charges against the Sheriff's Office. Individual employees normally do not have standing to assert a section 5.4a(5) violation because the employer's duty to negotiate in good faith only runs to the majority representative. N.J. Turnpike Authority, P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980), aff'd, NJPER Supp.2d 101 (¶85 App. Div. 1981); Essex Cty. (Miller). An individual employee may file an unfair practice charge and independently pursue a claim of a section 5.4a(5) violation only where that individual has also asserted a viable claim of a breach of the duty of fair representation against the majority representative. Id. Because there are insufficient facts to support Liobe's 5.4b(1) claim against the PBA that it breached its duty of fair representation by withdrawing the arbitration, Liobe does not have standing to establish a claim that the Sheriff's Office violated subsection 5.4a(5) of the Act.

Further, we dismiss Liobe's 5.4a(1) claim because his allegations failed to demonstrate that the Sheriff's Office interfered with his rights guaranteed under the Act. It was the PBA who chose not to arbitrate, there is no absolute right to arbitration under the Act, and the facts do not support that the PBA breached its duty of fair representation or that the

Sheriff's Office conspired with the PBA to breach its duty of fair representation. See N.J. Turnpike Authority, P.E.R.C. No. 81-64, supra; Essex Cty. (Miller). We also dismiss Liobe's 5.4a(7) claim as there are no facts alleged which demonstrate that a Commission rule has been violated.

Finally, we note that the Director also dismissed Liobe's charges against the Sheriff's Office as untimely. We clarify that, while the filing of a grievance does not toll a union's obligation to file a timely unfair practice charge, an individual charging party's claim against the employer may be timely if the charging party was delayed in filing it due to the union's alleged breach of its duty of fair representation by not arbitrating the charging party's grievance. Bridgewater-Raritan Bd. of Ed., P.E.R.C. No. 2010-43, 35 NJPER 455 (¶150 2009); North Caldwell Bor., P.E.R.C. No. 2008-51, 34 NJPER 69 (¶27 2008). Here, because Liobe's 5.4b(1) charge against the PBA did not meet the complaint issuance standard, the date of the PBA's arbitration withdrawal could not be used to toll the six month statute of limitations for Liobe's charge against the Sheriff's Office. N.J.S.A. 34:13A-5.4c.

ORDER

The Director's refusal to issue a complaint is sustained and Liobe's unfair practice charge is dismissed.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Ford, Papero and Voos voted in favor of this decision. Commissioner Jones voted against this decision. Commissioner Bonanni was not present.

ISSUED: May 27, 2021

Trenton, New Jersey