

D.U.P. NO. 2015-6

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

In the Matter of

STATE OF NEW JERSEY (CORRECTIONS),

Respondent,

-and-

Docket No. CO-2013-337

COMMUNICATIONS WORKERS OF
AMERICA LOCAL 1040, AFL-CIO,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismissed an unfair practice charge filed by the Communications Workers of America, Local 1040 (CWA) against the State of New Jersey, Department of Corrections (DOC). The CWA alleged in its charge that the DOC violated sections 5.4a(1), (2) and (7) of the New Jersey Employer-Employee Relations Act (Act) when a DOC hearing officer allowed the DOC an opportunity to present witness testimony at a second day of hearing to determine whether a CWA unit employee received an Official Written Reprimand (OWR) without just cause. On the first day of hearing, the DOC submitted written statements from four witnesses to the hearing officer in lieu of presenting witness testimony. CWA objected to the written statements as hearsay that deprived the CWA the opportunity to cross examine DOC's witness. The DOC hearing officer sustained CWA's objection and afforded the DOC an opportunity to present its witness testimony at a second day of hearing and allow CWA to cross examine the DOC's witnesses. The CWA did not appear at the second day of hearing and objected to the hearing officer's decision to allow witness testimony, contending the hearing officer should have dismissed the disciplinary charge at the conclusion of the first day of hearing since the DOC failed to satisfy its burden of proving just cause. Under the parties' negotiated disciplinary review procedure, the hearing officer's decision on OWR determinations was final and could not be appealed in another forum. After the hearing officer sustained the OWR, the CWA filed an unfair practice charge challenging the hearing officer's determination. Citing Section 5.3 of the Act and State of New Jersey (Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (par. 15191, 1984), the Director dismissed the charge, finding the Commission lacked jurisdiction to decide what was essentially a disciplinary appeal that was expressly prohibited by the parties' negotiated disciplinary review procedures. The Director also found there was no 5.4a(1) violation since the hearing officer's decision provided both parties a full and fair opportunity to present their case without interfering with their statutory or due process rights.

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Appearances:

For the State of New Jersey,
John Jay Hoffman, Acting Attorney General
(Adam Verone, Deputy Attorney General)

For the Communications Workers of America,
Local 1040 AFL-CIO,
(Robert O. Yaeger, Principal Staff Representative)

REFUSAL TO ISSUE COMPLAINT

On May 23, 2013, the Communications Workers of America, Local 1040, AFL-CIO (CWA) filed an unfair practice charge against the State of New Jersey, Department of Corrections (DOC). The charge alleges that on or about May 15, 2013, DOC violated section 5.4a(1), (2) and (7)^{1/} of the New Jersey Employer-Employee

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

(continued...)

Relations Act (Act), N.J.S.A. 34:13A-1 et seq., when a DOC hearing officer allowed DOC a second hearing day in order to present witnesses at a just cause hearing involving a CWA unit employee. DOC had submitted written statements from four witnesses to the hearing officer on the first day of hearing. Responding to CWA's objection to admitting such documents as hearsay, the hearing officer scheduled another date of hearing to allow testimony of DOC's witnesses. CWA alleges that the DOC hearing officer violated the Act by permitting DOC to present testimony of some or all of the four witnesses at a second day of hearing instead of dismissing the disciplinary charge at the conclusion of the first day of hearing.

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(c); 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; CWA Local 1040(Weisman), D.U.P. No. 2011-9, 38 NJPER 93 (¶20 2011), aff'd P.E.R.C. No. 2012-55, 38 NJPER 356 (¶120 2012).

On October 22, 2014, I issued a letter tentatively dismissing the charge and inviting responses. No responses were filed.

I find the following facts.

CWA is the exclusive majority representative of employees in the State professional unit. The unit includes professional employees assigned to the Garden State Correctional Facility (GSCF). The GSCF is controlled and operated by DOC. CWA and the State are parties to a collective negotiations agreement covering professional employees that extends from July 1, 2011 through June 30, 2015 (Agreement).

Rachel Forman is a "classification officer 2" at the GSCF and a CWA unit employee. On April 9, 2013, Forman received an official written reprimand (OWR) from a DOC official for allegedly making "condescending" remarks towards a co-worker in violation of DOC's Equal Employment Discrimination Policy (EED). The CWA challenged the OWR for lack of just cause under Article V of the Agreement.

Article 5 is " . . . the exclusive procedure for the processing of disciplinary actions for employees covered by this Agreement." (Article 5(F) of Agreement). Under Article 5(H), the CWA may request a departmental hearing to challenge a preliminary notice of discipline. The DOC bears the burden of proving just cause for discipline. After a request for hearing is made by

CWA, the DOC will appoint a hearing officer who will render a decision within twenty (20) days of the hearing. Article 5(H)(4). The hearing officer's decision on OWRs is final under Article 5(H)(8), which provides that ". . . official written reprimands may not be appealed beyond the departmental hearing." The Agreement does not limit the number of days for a hearing.

Citing Article 5, Forman appealed the OWR and requested a hearing. On May 14, 2013, the DOC assigned departmental hearing officer Susan Sautner to conduct the hearing. The hearing took place on May 14; DOC did not call any witnesses at the hearing. In lieu of witness testimony, DOC submitted four written statements from witnesses as evidence. CWA Local 1040 Executive Vice President Donald Klein, representing Forman, objected to the admission of the writings, contending they were hearsay that denied CWA an opportunity to cross-examine DOC witnesses. After hearing the closing statements of both parties, Sautner sent a letter to Klein on May 15, 2013 advising that she would resume the hearing to allow DOC the opportunity to present witness testimony and afford CWA the opportunity to cross-examine DOC's witnesses.

Klein objected to Sautner's determination, contending that it gave DOC "two bites at the apple." Klein contended that DOC failed to produce competent evidence at the May 14 hearing date and that Sautner should have dismissed the DOC's disciplinary

charge for failure to prove just cause. Although a second day of hearing was conducted, neither CWA nor Forman appeared at the proceeding.

On May 20, 2013, Klein filed a grievance with the DOC challenging Sautner's decision to continue the hearing.^{2/}

On May 23, 2013, the CWA filed the instant unfair practice charge.

Section 5.3 of the Act provides, in pertinent part:

Public employers shall negotiate written policies setting forth grievance and disciplinary review procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions, including disciplinary determinations, affecting them, provided that such grievance and disciplinary review procedures shall be included in any agreement entered into between the public employer and the representative organization.

....

Grievance and disciplinary review procedures established by agreement between the public employer and the representative organization **shall be utilized for any dispute covered by the terms of such agreement** [N.J.S.A. 34:13A-5.3] [emphasis added].

In State of New Jersey (Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984), the Commission interpreted Section 5.3 as a legislative directive that contractual disputes be resolved

^{2/} It is unclear whether or not the grievance has been addressed by the employer.

in accordance with the parties' negotiated grievance and disciplinary review procedures.

In Human Services, the Commission dismissed an unfair practice charge that alleged the employer violated the Act by denying a unit employee a hearing prior to terminating his employment. The majority representative contended that the unit employee was a professional who was entitled to a pre-termination hearing under the grievance or disciplinary review procedures in the parties' collective negotiations agreement. The employer countered that the collectively negotiated grievance procedures did not permit a pre-termination hearing for an unclassified employee. The parties' grievance procedure did not provide for binding arbitration of this dispute. Instead, the ". . . parties specifically agreed that the decision of the employer's department head or designee would be final." Human Services, 10 NJPER at 423. Relying on this provision, the Commission ". . . specifically declined to substitute our processes for a grievance procedure which the parties explicitly and carefully negotiated for the resolution of this dispute." Id.

The rationale for dismissing the unfair practice charge in Human Services controls the outcome of this case. CWA and DOC negotiated a disciplinary review procedure that is the exclusive procedure for appealing OWRs. Under Article 5(H)(8) of the Agreement, Hearing Officer Sautner's decision regarding the OWR

is final and may not be appealed beyond the departmental hearing. Just as the parties in Human Services agreed that the department head or designee's decision was "final" on a disciplinary termination, the parties here agreed that Sautner's decision regarding OWRs was final and cannot be challenged in another forum. As explained in Human Services, we will not substitute our processes for an agreed-upon disciplinary review procedure that resolves all OWR challenges. To do so would contravene Section 5.3's command that the parties utilize the disciplinary review procedures in their Agreement to review disciplinary determinations.

I am also dismissing CWA's 5.4a(1) allegation. An employer independently violates this section if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979).

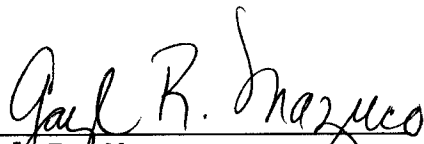
CWA is alleging a 5.4a(1) violation based on the claim that DOC denied Forman due process by continuing the hearing for a second day after the DOC failed to prove just cause on the first day of hearing. However, Sautner's decision to proceed and afford the CWA an opportunity to cross-examine DOC's witnesses does not appear to interfere with Forman's statutory rights. As a matter of due process, Sautner's decision to continue the

hearing both afforded DOC an opportunity to present witness testimony, and CWA an opportunity to cross-examine those witnesses. Each party was given a full and fair opportunity to present its case. Although CWA did not attend the second day of hearing, DOC's actions did not tend to interfere with Forman or with CWA's statutory or due process rights. No facts have been presented which indicate that CWA was prevented from attending the second day of hearing.

Accordingly, I find the CWA's 5.4a(1) allegations do not satisfy the complaint issuance standard.^{3/}

ORDER

The unfair practice charge is dismissed.


Gayl R. Mazuco
Director of Unfair Practices

DATED: November 12, 2014
Trenton, New Jersey

This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3.

Any appeal is due by November 24, 2014.

^{3/} The CWA has alleged no facts indicating that the DOC's conduct violates 5.4a(2) and (7) of the Act. I dismiss those allegations, also.