

D.U.P. NO. 2005-3

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

In the Matter of

STATE OF NEW JERSEY (GREYSTONE),

Respondent,

-and-

Docket No. CI-2004-023

EMILIA CHERRY,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by former staff psychologist Emilia Cherry against the State of New Jersey, Greystone Psychiatric Hospital. The Director found that the issues raised in the charge were either outside of the Commission's jurisdiction, failed to concisely describe the factual basis for the allegation or involved allegations for which Cherry lacks standing.

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Appearances:

For the Respondent,
Peter C. Harvey, Attorney General
(Karen Selby, Deputy Attorney General)

For the Charging Party,
Emilia Cherry, pro se

REFUSAL TO ISSUE COMPLAINT

On October 15 and November 20, 2003, Emilia A. Cherry (Cherry) filed an unfair practice charge and an amended charge, respectively, containing 12 counts, against her former employer, State of New Jersey, Greystone Psychiatric Hospital (State or Hospital).^{1/} The charge alleges violations of N.J.S.A. 34:13A-

^{1/} On October 17, 2003, Cherry also filed unfair practice charges against CWA Local 1040, her majority representative. These charges were deemed withdrawn on July 7, 2004.

5.4a(1), (3), (5) and (7) (Act).^{2/} In counts 1 - 4, Cherry alleges that the Hospital violated the Act when:

1) Since February 28, 2003, it continuously changed her assignments for non-clinical reasons and against the best application of her skills;

2) it denied her computer, office, and mailbox access;

3) supervisors did not allow her to present her work to them, explaining that "it doesn't matter now, get over with it";

4) the State would not allow her grievances filed since March 28, 2003, to be heard because "it will not be needed any more,"

5) supervisors expressed hostility towards her which the State failed to address when Cherry reported it.

In count 5, Cherry claims that on or about August 19, 2003, access to her personnel file was unfairly denied in writing because the Hospital mistakenly thought Cherry's attorney would first have to be advised; however, Cherry did not have an attorney.

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

In counts 6 and 7, Cherry alleges that on August 21, 2003, the Hospital held a predetermination hearing in her absence, during which it used a representative on her behalf that was not known to and not authorized by her; she also asserts that at this August 21, 2003 hearing, the Hospital made unrealistic and unsupported charges in violation of her rights specified in the Hospital employee handbook. Cherry claims that these severe, unrealistic charges were based on supervisors' self-serving statements to which she did not have access. Cherry also claims these statements were sent to third parties, but not to her.

In count 8, Cherry claims that, by a September 25, 2003 Order, Judge Deanne M. Wilson issued instructions to the Hospital regarding Cherry's grievances and her predetermination hearing, but the Hospital failed to follow those instructions. According to Cherry, the Hospital failed to advise her of her rights to a full hearing, review of management documentation regarding her termination, back pay and activation of credit protection for her benefit. Cherry further asserts that there were flaws in the discovery process and with respect to witnesses. Moreover, Cherry claims her predetermination hearing did not take place because of the absence of a Hospital management representative and that this violated N.J.A.C.4A:2-3.1.

In counts 9-11, Cherry asserts that 5 days after the Judge's Order, the Hospital still failed to serve her with the charges

against her or the supportive documentation, in violation of the New Jersey Administrative Code. Cherry further claims that she requested restoration to her position, along with benefits, from both Hospital hearing officer Marilyn Connell and from Hospital CEO Janet Monroe, due to the problems with the predetermination hearing that were caused by the Hospital; however, neither granted her request.

Finally, in count 12, Cherry claims that in spite of the Judge's Order to process her grievances, the Hospital still interfered with the grievance and hearing process by:

- 1) not having a representative, in violation of state law;
- 2) without explanation, selectively submitting discovery material which was defective, irrelevant and self-serving, and that violated her privacy/confidentiality rights, along with those of patients and staff; and
- 3) instructing staff not to speak with Cherry and, thus, interfering with her ability to have her charges and grievances fully heard.

As a remedy, Cherry seeks: an unconditional return to her position as Staff Clinical Psychologist 3 and a return to her former assignment; 2) removal of any bias towards her regarding her training presentations at conferences and regarding her continuing education; 3) immediate restoration of back pay, seniority and benefits; 4) fair working conditions, including access to e-mail, office computers, mailbox and internal communications that were previously unavailable.

The State denies it violated the Act.^{3/}

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 August 9, 2004, 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. Neither party filed a response. Based upon the following, I find that the complaint issuance standard has not been met.

Emilia A. Cherry was employed by the State of New Jersey, Greystone Park Psychiatric Hospital as a Staff Clinical Psychologist and was a member of the collective negotiations unit represented by CWA Local 1040. Since March 28, 2003, Cherry has filed numerous grievances against the State.

On August 19 and 20, 2003, the State served her with several disciplinary charges. On August 21, 2003, a pre-determination hearing or "Loudermill" hearing, as required by New Jersey Civil

^{3/} The State was given the opportunity to file a position statement, but declined to do so.

Service law, N.J.A.C. 4A:2-25, was held between CWA and Hospital representatives regarding the charges against Cherry. Although given the opportunity to attend the hearing, Cherry chose not to attend. As a result of the hearing, Cherry was suspended without pay.

Cherry claimed the Hospital caused irregularities in the pre-determination hearing compelling her to file an action against the Hospital in New Jersey Superior Court. By a September 25, 2003 Order, Judge Deanne M. Wilson ordered:

1) That Greystone Park has granted Ms. Cherry a pre-determination hearing at the Personnel Office at Greystone Hospital at 9:00 am, Monday September 29, 2003, at which the following will occur:

a) Ms. Cherry's two previously filed grievances will be resolved, if they have not been resolved previously;

b) Ms. Cherry's termination will be resolved; and

c) The issue of back pay, if any, will be resolved.

2) Ms. Cherry will be allowed to take her asthma medication during the course of the hearing, if necessary.

3) Ms. Cherry will have access to her personnel file.

4) If the Pre-determination hearing is merely a listing of the charges against Ms. Cherry, she will be given a full explanation of her rights to a full hearing at which she will have a meaningful opportunity to be heard as a Step of the administrative grievance process to which she is entitled under N.J.A.C. 4A:2-2.5.

5. If Greystone has in fact terminated Ms. Cherry a representative must sign her credit insurance application.

6. This matter is dismissed to permit Ms. Cherry to pursue her administrative remedies.

Thereafter, on September 27, 2003, Cherry filed six grievances.

On September 29, and October 1, 2003, pursuant to Judge Wilson's Order, the Hospital, CWA representatives, and Cherry met to hold a fresh grievance and pre-determination or "Loudermill" hearing. Cherry, however, voiced objections on both dates, claiming irregularities with the hearing, specifically, that a management representative failed to appear, in violation of N.J.A.C. 4A:2-3.1 et. seq. The Hospital advised her at the October 1, 2003 hearing, that it was prepared to go forward. Cherry responded that she did not want to participate in the hearing and left the premises. The hearing, however, proceeded. The hearing officer found sufficient evidence to support the charges against Cherry and recommended that her suspension without pay be continued, effective August 21, 2003. On approximately October 1, 2003, Cherry was terminated.

By letter of October 2, 2003 to Hospital employee Dr. Steven Goodblatt, Cherry requested an unconditional return to her position. She also complained that on September 29, 2003, the Hospital did not provide an opportunity for her grievances to be heard; did not conduct a pre-determination hearing, in violation of Judge Wilson's Order; and did not allow her to respond to the

documents supporting the charges against her, in violation of the New Jersey Administrative Code.

By letter of October 7, 2003, Hospital Employee Relations Coordinator James L. Frey, Jr. notified Cherry of her right to an administrative hearing regarding her disciplinary charges and informed her that Robert Yeager, Staff Representative for CWA Local 1040, advised the Hospital that he would be representing Cherry during the departmental appeal proceedings. Frey's letter states:

In terms of your grievances, we met Judge Wilson's court order by attempting to hear your grievances on both Monday September 29, 2003 and Wednesday October 1, 2003. You walked out on both dates. Regarding your second pre-determination hearing, you were advised on October 1, 2003 at approximately 3:30 pm that we were prepared to go forward with the hearing. You indicated that you did not want to participate in the Loudermill hearing and left GPPH premises. We proceeded with the second Loudermill and the hearing officer once again found that management provided sufficient evidence to support the aforesaid charges and recommended that your suspension without pay be continued effective August 21, 2003.

Thereafter, she filed this charge on October 15, 2003.

A departmental hearing on Cherry's charges was then scheduled for November 17, 2003. By letter of October 30, 2003, Frey advised Cherry that her September 27, 2003 grievances could not be addressed, since she was on a suspension without pay pending her administrative appeal hearing scheduled for November 17, 2003. Cherry then requested that the hearing be postponed.

On November 20, 2003, she filed an amendment to her charge with the Commission.

ANALYSIS

Cherry's allegations do not meet our complaint issuance standard.

In counts 1 - 4, Cherry alleges that the State continuously changed her assignments for non-clinical reasons and against the best application of her skills, and further denied her computer, office and mailbox access. She claims that supervisors expressed hostility towards her and such hostility was not addressed when raised by her; she also asserts she was unfairly denied access to her personnel file on or about August 19, 2003. None of these allegations were tied to activity protected under our Act however; thus, they are dismissed.

Moreover, Cherry's allegation in count 4 that the State would not allow her grievances filed since March 28, 2003 to be heard lacks the specificity required by the Act. N.J.A.C. 19:14-1.3(a)3 provides that a charge must contain the following:

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.

The above-mentioned allegation fails to specify the time and places of the alleged actions and the names of the persons who allegedly committed them. Thus, pursuant to N.J.A.C. 19:14-1.3(a)3, that

allegation is dismissed. See CWA and Williams, D.U.P. No. 95-7, 20 NJPER 417 (¶25213 1994).

Cherry's allegation in count 5 that the Hospital unfairly denied her access to her personnel file does not involve activity protected by our Act. It is, therefore, dismissed.

Cherry makes several allegations in Counts 6-12 regarding irregularities and problems with her pre-determination or Loudermill hearing. However, the right to a fair Loudermill hearing is not guaranteed by our Act. A pre-determination or Loudermill hearing is a proceeding which falls under the jurisdiction of the New Jersey Department of Personnel. In fact, under Civil Service law, Cherry is guaranteed the right to an appeal de novo before the New Jersey Department of Personnel, Merit System Board. Consequently, the Commission lacks jurisdiction to hear her allegations related to irregularities or problems with Cherry's pre-determination or Loudermill hearing. See State of New Jersey Department of Corrections and PBA Local No. 105, D.U.P. No. 2002-10, 28 NJPER 230 (¶33083 2002); State of New Jersey Department of Human Services (Turner), D.U.P. No 93-20, 19 NJPER 95 (¶24043 1993).

Cherry's allegations in counts 8 and 12 that the State failed to follow the instructions contained in the Judge's Order are also outside of our jurisdiction. Rather, Cherry's recourse as to those matters was to file an action in Superior Court to enforce Judge

Wilson's Order. Cherry's claims of irregularities by the State with regard to the discovery process and witnesses are also outside of our jurisdiction. They are not inter-related with an allegation of an unfair practice under our Act; thus, they are dismissed.

In addition, Cherry's claim in count 12 that the Hospital interfered with her ability to have her grievances heard by instructing staff not to speak to her, lacks the specificity requirements of N.J.A.C. 19:14-1.3(a)(3), as cited above.

Cherry also lacks standing to assert a violation of 5.4a(5) of the Act. An a(5) violation occurs when an employer fails to negotiate an alteration of a mandatory subject of negotiations with the majority representative, knowingly refuses to comply with the terms of the collective negotiations agreement, or refuses to process grievances presented by the majority representative. The employer's duty to negotiate in good faith runs only to the majority representative. N.J. Turnpike Authority, P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980) aff'd. NJPER Supp. 2nd 101 (¶85 App. Div. 1981); Union Cty Ed. Services Com'n. and Westlake EA (Kelly), D.U.P. 2000-13, 26 NJPER 160 (¶31062 2000); Camden Cty. Highway Dept., D.U.P. No 84-32, 10 NJPER 399 (¶15185 1984). Therefore, an individual employee does not have standing to pursue a claimed a(5) violation.

To support a 5.4a(7) allegation a charging party must state which Commission rule the employer allegedly violated. Burlington

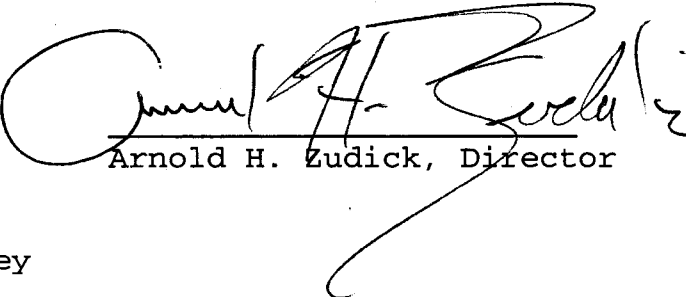
Tr. Bd of Ed., D.U.P. No 97-31, 23 NJPER 152 (¶28073 1997). Cherry failed to cite any rule alleged to be violated, consequently, I dismiss that allegations.

Based on the above, I find the Commission's complaint issuance standard has not been met. I, therefore, decline to issue a complaint on the allegations of this charge.^{4/}

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Arnold H. Zudick, Director

DATED: September 2, 2004
Trenton, New Jersey

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

Any such appeal is due by September 16, 2004.

^{4/} N.J.A.C. 19:14-2.3.

