D.U.P. NO. 2014-5

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

In the Matter of

State of New Jersey (Juvenile Justice Commission),

Respondent,

-and-

Docket No. CO-2013-203

Communications Workers of America, Local 1040,

Charging Party.

SYNOPSIS

The Director of Unfair Practices ("Director") dismisses an unfair practice charge filed by Communications Workers of America, Local 1040 ("CWA") against the State of New Jersey (Juvenile Justice Commission) ("State"). The charge alleges that the State violated subsections 5.4a(1) and (2) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. ("Act") when the State did not adhere to a "settlement agreement" by not offering a unit employee emergency transportation to a medical facility immediately following a physical assault upon the employee by a juvenile resident. The Director found that the terms of the settlement agreement are not so clear that one may infer its repudiation based solely upon the instance alleged in the charge. The Director determined that the charge, as filed, alleges a breach of the settlement agreement, which does not warrant the issuance of a Complaint.

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Appearances:

For the Respondent,
John Jay Hoffman, Acting Attorney General
(Ernest Bongovanni, Deputy Attorney General)

For the Charging Party,
Weissman & Mintz, attorneys
(Rosemarie Cipparulo, of counsel)

REFUSAL TO ISSUE COMPLAINT

On January 18, 2013, Communications Workers of America, Local 1040 ("CWA") filed an unfair practice charge against the State of New Jersey, Juvenile Justice Commission ("State"). The charge alleges that on January 9, 2013, immediately following a physical assault upon a unit employee by a juvenile resident/client at the Bordentown Medium Security facility, the State violated the terms of a "settlement agreement" by not offering the employee emergency transportation to a medical facility. The charge alleges that the assault occurred outside a

classroom while a class was in session; that the unit employee reported to the medical unit and was seen by a nurse but not offered transportation, as required by the agreement. The State's conduct (specifically, "not adhering to the settlement agreement") allegedly violates section 5.4a(1) and (2)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. ("Act"). CWA seeks an Order requiring the State to abide by the terms of the settlement agreement.

The State denies violating the Act. It claims that the unfair practice charge fails to state a claim upon which relief can be granted because the referenced settlement agreement is not applicable to the circumstances of this case.

On September 3, 2013, I issued a letter tentatively dismissing the charge. I assumed for purposes of analysis that the charge included an allegation that the State repudiated the settlement agreement, violating section 5.4a(5) of the Act, when in fact it did neither. I also noted in the letter that no facts suggested violations of 5.4a(1) and (2) of the Act (footnotes 5 and 6).

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."

On October 18, 2013, CWA filed a response urging the issuance of a Complaint. It contests my tentative finding that various provisions of the settlement agreement were not so clear that one may infer its repudiation, based solely on the instance alleged in the charge. The letter sets forth interpretations of provisions in the settlement agreement and collective negotiations agreement aimed at narrowing the State's discretion in providing transportation of injured employees to medical facilities. The response did not seek to amend the charge, conceding that "[it] was not artfully drafted" and agreeing that the omission of a 5.4a(5) allegation was an "oversight."

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. I find the following facts.

On January 9, 2013, Donald Cesaretti, a teacher II included in CWA's professional unit, was injured by a juvenile resident while attempting to assist a correctional officer who was being assaulted. Cesaretti was punched in the chest and knocked into a wall, hitting his head and hip. He reported to the medical unit

and was seen by the nurse on duty. He was not offered transportation to a medical facility.

An earlier-filed unfair practice charge concerning the same parties alleged among other things, that two other unit employees/teachers were attacked and seriously injured by residents; that at least one of the teachers suffered a head injury, and the other was attacked in a classroom. On May 10, 2012, CWA and the State signed a memorandum of agreement[2/] disposing of that charge (Docket No. CO-2012-206). The agreement provides in pertinent part:

> 1. By this agreement, the State does not admit any violation of the Employer-Employee Relations Act, nor does CWA make any concession that the Act was not violated.
> ***
>
> 3. The State (JJC) hereby reaffirms the agreement entered into in settlement of the A. Rivera grievance on September 13, 2011, as follows: . . . The existing policy for work related injuries 11H-14.3[3/] will be followed. Emergency transport will be called for any [*illegible*] suffering a head injury.
>
> 4. By this Agreement, neither party makes any admission or concession regarding whether the Act was violated.

2/ The document is entitled, "Memorandum of Agreement," but is described as a "settlement agreement" in the unfair practice charge.

3/ The correct policy number is "12H:14.3" and is entitled, "Work Related Injury/Illness"; the policy became effective on April 9, 2012. The policy sets forth the procedure to be used for reporting work related injuries and obtaining medical treatment. It does not address head injuries.

> 5. This Agreement shall have no precedential value and shall not be referred to with respect to any other dispute between the parties and is made without prejudice to the position of the parties.
>
> 6. This Agreement shall not serve to amend, change or modify the existing terms of the collective negotiations agreement between the parties.
> ***

Article 32E of the current collective negotiations agreement for the professional unit provides:

> If an employee incurs an on-the-job injury during regular hours of employment requiring professional medical attention, the State will expedite such medical treatment by calling for an ambulance, if required, or providing transportation to a recognized medical facility when the injured employee can be moved.

An alleged violation of a "settlement agreement" could implicate the duty to negotiate in good faith, protected by section 5.4a(5)[4/] of the Act. Although that numbered subsection is not set forth in CWA's charge, I infer from the narrative of facts in the charge that its omission is an oversight. Accordingly, I will analyze the case as if that subsection is listed on the charge, and view the listed a(1) subsection as

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4/ This provision prohibits public employers, their representatives or agents from: "(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."

derivative of an alleged refusal to negotiate in good faith.[5/] See e.g., Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004).

In City of Asbury Park (Farrell), P.E.R.C. No. 2002-73, 28 NJPER 253 (¶33096 2002), the Commission wrote:

> [W]e agree with the Director [of Unfair Practices] that a mere breach of a settlement agreement does not ordinarily violate the Act and that an unfair practice alleging such a breach does not warrant a Complaint and Notice of Hearing. Since a settlement agreement is essentially a contract between the parties, a mere difference of opinion concerning the extent to which compliance has been achieved does not rise to the level of a new unfair practice. See State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). We distinguish a repudiation of a settlement agreement where a party denies the existence of an agreement or otherwise does not comply with its clear terms. See, e.g., Red Bank Bd. of Ed., P.E.R.C. No. 87-39, 12 NJPER 802 (¶17305 1986) (in absence of exceptions, Chairman adopted recommendation to find a violation of the Act where employer had repudiated settlement agreement). Where the parties have entered into a settlement

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5/ An employer violates 5.4a(1) independently of any other violation if its action tends to interfere with the employee's statutory rights and lacks a legitimate and substantial business justification. UMDNJ-Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987); New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 (1979). CWA alleges that the State's obligation in this case is defined in a memorandum of agreement; the lawfulness of the State's "action" is inextricably tied to the meaning of that agreement and any tendency to interfere with an employee's statutory rights is derived from the duty to negotiate in good faith under section 5.4a(5).

> agreement and a party seeks enforcement of that agreement, that party must seek enforcement in the Superior Court. We have power to seek enforcement of Commission orders only. N.J.S.A. 34:13A-5.4f. [Id. at 254]

The "existing policy for work-related injuries" and Article 32E of the collective agreement do not specifically mandate transportation to a medical facility for head injuries. A provision in the disputed memorandum of agreement appears to mandate such transportation for unit employees suffering a head injury; however, other provisions of that agreement may narrow that mandate. For example, the agreement cannot modify the terms of the parties' collective negotiations agreement, nor can it have "precedential value". It can not be referenced in another dispute. Also, Article 32E of the collective negotiations agreement mandates transportation for those injured unit employees "requiring" professional medical attention, begging the question of how that requirement is achieved and who determines the need for medical attention. For these reasons, I conclude that the terms of the settlement agreement are not so clear that one may infer its repudiation based solely upon the instance alleged in the charge. Instead, I find that the charge, as filed, alleges a breach of the settlement agreement, which does not warrant the issuance of a Complaint.[6/]

6/ I also note that the charge has not been amended to include
(continued...)

The charge is dismissed.

Gayl R. Mazuco
Director of Unfair Practices

DATED: November 20, 2013
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 December 4, 2013.

6/ (...continued)
an allegation that the settlement agreement was "repudiated" by the State's conduct, violating 5.4a(5) of the Act.