D.U.P. NO. 2014-14

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

In the Matter of

STATE OF NEW JERSEY,
DEPARTMENT OF CORRECTIONS,

Respondent,

-and- Docket No. CO-2013-250

AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES, COUNCIL 71,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge brought by AFSCME Council 71 (AFSCME). AFSCME alleged that the State, Department of Corrections (DOC) violated the Act by refusing to conduct a hearing on employee Craig Ward's grievance contesting a "counseling document" placed in his personnel file. AFSCME alleged that employees are unlawfully prohibited from contesting counseling documents through the negotiated grievance procedure, in violation of subsections 5.4a(1), (2), (3), (4) and (7) of the Act.

Citing State of New Jersey (Dept. Of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984), the Director found that to the extent AFSCME contends that a letter of counseling is discipline subject to the grievance procedure, its remedy is to pursue the case to arbitration and/or appeal to Civil Service. As the charge alleged no any facts suggesting that the State violated section 5.4a(1), (2), (3), (4) or (7), the Director dismissed those allegations as well.

D.U.P. NO. 2014-14

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

In the Matter of

STATE OF NEW JERSEY,
DEPARTMENT OF CORRECTIONS,

Respondent,

-and- Docket No. CO-2013-250

AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES, COUNCIL 71,

Charging Party.

Appearances:

For the Respondent
John J. Hoffman, Attorney General
(Ernest Bongiovanni, Deputy Attorney General)

For the Charging Party
Joseph Waite, Staff Representative

REFUSAL TO ISSUE COMPLAINT

On February 27, 2013, AFSCME Council 71 (AFSCME) filed an unfair practice charge against the State of New Jersey (Department of Corrections) (DOC). The charge alleges that on or about January 14, 2013, the DOC violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4a(1), (2), (3), (4) and (7)[1/] by refusing to conduct a hearing on collective

---

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 (continued...)

negotiations unit employee Craig Ward's grievance contesting a "counseling document" placed in his personnel file. AFSCME alleges that DOC's policy requiring that counseling documents 'must remain in an employee's file for two years unilaterally changes the collective agreement between AFSCME and DOC, without negotiations. It alleges that unit employees are unlawfully prohibited from contesting counseling documents through the negotiated grievance procedure. AFSCME requests that DOC discontinue the practice, and permit employees to pursue grievances under the parties' negotiated procedure.

On May 21, 2013, the State filed a letter arguing that the issuance of counseling letters is not grievable or appealable under DOC policy. It also contends that on January 25, 2013, its representative issued a written denial of the grievance, which AFSCME did not appeal.

The Commission has authority to issue a complaint where it appears that the Charging Party's allegations, if true, may

---

1/ (...continued)
interfering with the formation, existence or administration of any employee organization. (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."

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 will decline to issue a complaint. N.J.A.C. 19:14-2.3. On March 17, 2014, I issued a letter to the parties tentatively dismissing the charge and inviting responses. On March 21 and 24, AFSCME filed responses reiterating the allegations of the charge. The March 21 submission was described as an amendment but raised no new facts.

I find the following facts.

AFSCME represents all full-time and regularly employed part-time employees in the State Department of Corrections' Health, Care and Rehabilitation Services Unit.

The parties' current collective negotiations agreement extends from 2011 through 2015. The agreement sets forth a three step grievance procedure ending in binding arbitration (Article 7). A "grievance" is defined as:

> A.1. a claimed breach, misinterpretation, or improper application of the terms of this Contract expressed herein (hereafter referred to as contractual); or
>
> 2. a claimed violation, misinterpretation or misapplication of rules or regulations, existing policies, administrative orders, or laws applicable to the Agency or Department which employs the grievant affecting the terms and conditions of employment which are not included in A.1 above

(hereinafter referred to as non-contractual).

Article 7E1a. provides that disputes arising concerning certain matters outside the defined scope of grievance shall be referred directly to the Civil Service Commission upon proper notice to local management.

Article 7F2e. provides:

> In the event that the grievance has not been satisfactorily resolved at Step Two and the grievance involves an alleged violation of the Contract as described in the definition of a grievance in A.1., then a request for arbitration may be brought only by the Union . . . within fifteen calendar days from the date the Union received the Step Two decision. . . .

Article 8 (Discipline) of the agreement provides in pertinent part:

> B.1. Discipline of an employee shall be imposed only for just cause. Discipline under this Article means official written reprimand, fine, suspension without pay, record suspensions, reduction in grade or dismissal from service, based upon the personal conduct or performance of the involved employee.

The South Woods State Prison Human Resources Level III Internal Management Procedures (also known as OER IMP PSM.001.LOC.HRB), effective June 2006 and revised in June 2011, provide in pertinent part:

> **Personnel**
> **Letter of Counseling**
> I. Purpose. To establish a procedure authorizing the use of a Letter of Counseling

> when documentation of constructive discussion between South Woods State Prison supervisor [sic] and employee is desired.
>
> ***
>
> III. Policy. A Letter of Counseling is not categorized as a form of discipline and, therefore, cannot be appealed under the disciplinary appeal process as contained in the various bargaining unit agreements and Civil Service Commission regulations. The Letter of Counseling sets forth the error made and specifies the desired corrective measure that the employee is reasonably expected to undertake to ensure proper future performance.
>
> ***
>
> IV. Procedures.
> I. Two years from the date of counseling, the affected employee may request that the Letter of Counseling be removed from record providing no further counseling or sustained disciplinary actions have occurred within the above referenced time frame.

Under the policy, a letter of counseling shall inform the employee that a copy of the letter will be placed in his or her personnel file only, and that the employee shall be informed of his or her right to submit a written response to be attached to the letter of counseling in the employee's personnel file. If the employee requests that the letter be removed after two years has passed, ". . . (t)he facility administrator's written decision to the respective employee . . . is final and will remain as a non-appealable matter as referenced under Section III, Policy."

Craig Ward is employed as an institutional trade instructor 1 (ITI 1) at South Woods State Prison (Prison). On October 18, 2012, Ward filed a non-contractual grievance specifying: "On October 2, 2012, I received a letter of counseling from John Moro, Ind Mgr and it says nothing regarding remarks." Ward requested that the letter of counseling be removed from his personnel file.

A grievance hearing was scheduled for October 18, 2012. AFSCME alleges that the hearing officer refused to conduct a hearing, stating that Ward's redress ". . . was to file an exception and attach the exception to the letter of counseling and put it in his personnel file." The grievance was denied at the first step.

Ward appealed to the second step. On or about January 25, 2013, Jason Strapp, Employee Relations Coordinator, wrote to Ward. The letter provides:

> The above-referenced step two grievance has been referred to me for appropriate action.
>
> In your grievance dated 10-18-12 you state a non-contractual violation by management. Specifically, you state that you received a Letter of Counseling on 10-2-12. Your remedy to the grievance is to retract the letter of counseling.
>
> Please be advised that a Letter of Counseling is not discipline, but rather a tool utilized by Management in an effort to influence a positive change in an employee's behavior and attitude toward his professional responsibilities. Further, the contents of a

> Letter of Counseling are not appealable per PSM.001.007. Please also note that the same policy also describes the steps one must take in order to request that a letter of counseling be removed from a personnel file.
>
> Accordingly, your grievance is outside the scope of the grievance procedure and is considered denied.

AFSCME's allegations apparently implicate section 5.4a(5)[2/] of the Act, despite that section's omission from the charge. I shall assume that section's omission is an oversight. For the reasons that follow, I find that the complaint issuance standard has not been met.

ANALYSIS

N.J.S.A. 34:13A-5.3 entitles a majority representative to negotiate on behalf of unit employees over their terms and conditions of employment. Section 5.3 also defines an employer's duty to negotiate before changing working conditions, and prohibits a public employer from unilaterally establishing or changing mandatorily negotiable terms and conditions of employment. See Middletown Tp. and Middletown PBA Local 124, P.E.R.C. No. 98-77, 24 NJPER 28 (¶20916 1997), aff'd 334 N.J. Super. 512 (App. Div. 1999), aff'd 166 N.J. 112 (2000), see also Passaic Cty. Bd. of Ed., P.E.R.C. No. 89-98, 15 NJPER 257 (¶20106

2/ (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."

1989), Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n., 78 N.J. 25 (1975); Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd NJPER Supp.2d 130 (¶111 App. Div. 1983).

AFSCME alleges that DOC's "letter of counseling" policy represents a unilateral change in the collectively negotiated agreement in effect between AFSCME and DOC. Specifically, AFSCME alleges that the initial placement of a letter of counseling in an employee's personnel file should be subject to challenge through the parties' negotiated grievance procedure.

The charge sets forth no facts indicating that any contractual term or employment condition was unilaterally changed without negotiations. The policy, instituted in 2006 and amended in 2011, specifies that letters of counseling are not considered to be "discipline" and are not appealable through the parties' negotiated disciplinary appeal process. No facts suggest that AFSCME was unaware of the policy or that it previously challenged the policy either during negotiations, or by filing a grievance or unfair practice charge. The parties' negotiated grievance procedure in turn, specifies what is "discipline," omitting "letters of counseling." The allegations of the charge do not indicate that DOC made any change in a term and condition of employment that could trigger a negotiations obligation. See Middletown.

The facts of the charge indicate that Ward's "non-contractual" grievance was denied at steps 1 and 2 of the parties' negotiated grievance procedure. To the extent that AFSCME contends that a letter of counseling is discipline that is subject to the grievance procedure, its possible remedy appears to be pursuing the case to arbitration and/or appealing the case to the Civil Service Commission as set forth in the negotiated grievance procedure. State of New Jersey (Dept. of Human Svcs.), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

The charge does not allege any facts suggesting that DOC violated section 5.4a(1), (2), (3), (4) and (7). I dismiss those allegations, as well.

I do not believe that the Commission's complaint issuance standard has been met and decline to issue a complaint on the allegations of this charge. N.J.A.C. 19:14-2.3.

Gayl R. Mazuco
Director of Unfair Practices

DATED: May 6, 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 May 16, 2014.

The facts of the charge indicate that Ward's "non-contractual" grievance was denied at steps 1 and 2 of the parties' negotiated grievance procedure. To the extent that AFSCME contends that a letter of counseling is discipline that is subject to the grievance procedure, its possible remedy appears to be pursuing the case to arbitration and/or appealing the case to the Civil Service Commission as set forth in the negotiated grievance procedure. State of New Jersey (Dept. of Human Svcs.), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

The charge does not allege any facts suggesting that DOC violated section 5.4a(1), (2), (3), (4) and (7). I dismiss those allegations, as well.

I do not believe that the Commission's complaint issuance standard has been met and decline to issue a complaint on the allegations of this charge. N.J.A.C. 19:14-2.3.

Gayl R. Mazuco
Director of Unfair Practices

DATED: May 6, 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 May 16, 2014.