D.U.P. NO. 2015-8

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

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF COMMUNITY AFFAIRS),

Respondent,

-and- Docket No. CO-2014-101

COMMUNICATIONS WORKERS OF
AMERICA LOCAL 1039,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge alleging that the State of New Jersey, Department of Community Affairs (DCA) violated sections 5.4a(3) and (4) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act). The Communications Workers of America, Local 1039 (CWA) alleges in the charge that the DCA violated the Act when one of its supervisors admonished a CWA unit employee in writing for using overtime to perform an amusement ride inspection that allegedly could have been performed during a straight time shift. The writing was not added to the unit employee's personnel file and the employee was not disciplined for using overtime to complete the inspection; nor were the employee's terms and conditions of employment altered. The CWA alleged the writing "defamed" the unit employee's character and was done in retaliation for the filing of a grievance that was sustained by the DCA. The Director found that the writing did not constitute an adverse employment action, which is an essential element of section 5.4a(3) and (4) claims. In dismissing the charge, the Director also noted that the Commission lacks jurisdiction to decide defamation claims.

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Appearances:

For the Respondent,
John Jay Hoffman, Acting Attorney General
(Peter H. Jenkins, Deputy Attorney General)

For the Communications Workers of America
Local 1039,
(Brett Richter, Executive Vice President)

REFUSAL TO ISSUE COMPLAINT

On October 28, 2013, the Communications Workers of America, Local 1039 (Charging Party or CWA) filed an unfair practice charge against the State of New Jersey, Department of Community of Affairs (Respondent or DCA). The charge alleges that DCA violated section 5.4a(3) and (4)[1/] of the New Jersey Employer-

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1/ These provisions prohibit public employers, their representatives or agents from: "(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. (4) Discharging or otherwise discriminating against
(continued...)

Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., when a DCA supervisor issued a memorandum dated October 2, 2013 admonishing a CWA unit member for his use of overtime to complete a job duty. The charge also alleges that the memorandum "defamed" the CWA unit member's character.

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, 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 31, 2014, I issued a letter to the parties tentatively dismissing the charge and inviting responses. The CWA filed an amended charge on November 12, 2014. The DCA did not respond.

I find the following facts.

Thomas Murtha is a CWA unit member and a supervisor in the DCA's Division of Codes and Standards (Division). Murtha works

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1/ (...continued)
any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. "

in the Division's amusement ride inspection unit. In that capacity, Murtha inspects amusement rides for compliance with Division rules and safety standards. CWA and the DCA are parties to a collective negotiations agreement extending from July 1, 2011 through June 30, 2015 (Agreement).

On September 16, 2013, Michael Triplett, Murtha's supervisor, directed Murtha to perform an inspection of the "Mountain Coaster" ride at Mountain Creek on September 19, 2013. Triplett also directed Murtha to conduct the inspection in the evening to ensure that the lighting on the ride was sufficient.

Murtha's regularly scheduled shift on September 19 was 8 a.m. to 4 p.m.. In lieu of using overtime to perform the coaster inspection after his shift, Triplett instructed Murtha not to work his day shift to avoid overtime costs. Murtha objected to changing his shift, contending he should be permitted to work his regular shift and then use overtime to perform the evening inspection. Triplett disagreed.

On September 17, 2013, CWA filed a grievance on behalf of Murtha. The grievance alleged that Triplett's shift change directive violated the seven day notice provision for shift changes under the parties' Agreement, as well as another provision prohibiting the DCA from changing an employee's hours of work to avoid paying overtime. CWA requested that Murtha's schedule not be changed and that DCA pay Murtha overtime for work

performed after his regular shift. DCA promptly sustained Murtha's grievance. Murtha was paid overtime for the work he performed on September 19 after his regular shift.

On or about October 2, 2013, Michael Baier, Murtha and Triplett's supervisor, issued a memorandum admonishing Murtha for using overtime to perform the Mountain Coaster inspection. According to Baier, Murtha could have performed the Mountain Coaster inspection without using overtime by notifying Baier and Triplett well in advance that the roller coaster was scheduled to open the weekend of September 20. Baier wrote in the memorandum that the coaster inspection had been contemplated for several weeks prior to September 19 and that the inspection could have been completed during a straight time shift had Murtha notified Baier and Triplett weeks ago that the coaster was scheduled to run September 20. Instead, according to Baier, Murtha did not notify Triplett or Baier of the Mountain Coaster's opening on September 20 until September 16.[2/]

2/ In its amended charge, CWA alleges that Murtha provided notice to Triplett in July 2013 of the need to perform an evening inspection of the Mountain Coaster. CWA also disputes Baier's assertion that the use of overtime to perform the inspection on September 19 was avoidable. Accepting the CWA's position as true, I find that these allegations are not relevant to the legal question of whether or not the DCA imposed an adverse employment action against Murtha in retaliation for Murtha's exercise of protected activity.

The October 2 memorandum was not added to Murtha's personnel file and DCA did not take any disciplinary or corrective action against Murtha for his use of overtime. Murtha's terms and conditions of employment were not altered in response to Murtha's use of overtime.

The standards for determining whether an employer has violated N.J.S.A. 34:13A-5.4a(3) are set forth in In re Bridgewater Tp., 95 N.J. 235 (1984). No violation will be found unless the charging party has proved, by a preponderance of evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be demonstrated by direct evidence or circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile toward the exercise of protected rights. Id. at 246. The burden of proving a 5.4a(4) violation is, in general, identical to the burden of proving a 5.4a(3) violation under Bridgewater. Randolph Tp. Bd. of Ed., P.E.R.C. No. 82-119, 8 NJPER 365 (¶13167 1982), aff'd NJPER Supp.2d 136 (¶117 App. Div. 1983).

An adverse employment action is an essential element of 5.4 a(3) and (4) claims. Ridgefield Park Bd. of Ed., H.E. No. 84-052, 10 NJPER 229 (¶15115 1984), adopted P.E.R.C. No. 84-152, 10 NJPER 437 (¶15195 1984), aff'd NJPER Supp.2d 150 (¶133 App. Div. 1985); State of New Jersey (Judiciary), D.U.P. No. 2013-6, 40

NJPER 24 (¶10 2013). In Ridgefield Park Bd. of Ed., a section 5.4a(3) allegation was dismissed because "...there was no threat [or] change in any terms or conditions of employment." 10 NJPER at 438. Moreover, an evaluation admonishing an employee over his or her job performance is not an adverse employment action when unaccompanied by any tangible detriment or change to the employee's terms and conditions of employment. State of New Jersey (Judiciary); El Siofi v. St. Peter's University Hospital, 382 N.J. Super. 145, 176 (App. Div. 2005) (holding that, "...a negative employment evaluation, unaccompanied by a tangible detriment, such as a salary reduction or job transfer, is insufficient to rise to the level of an adverse employment action)."

In this matter, I dismiss CWA's 5.4a(3) and (4) allegations because no facts indicate that Murtha suffered an adverse employment action in retaliation for protected activity. Murtha was not disciplined for using overtime to perform the Mountain Coaster inspection, nor were his terms and conditions of employment altered by DCA. Although the October 2 memorandum negatively characterized Murtha's job performance, it was not added to Murtha's personnel file and did not have any disciplinary consequences. A negative, evaluative memorandum does not, by itself, (i.e., without a nexus to protected activity) rise to the level of an adverse employment action under

section 5.4a(3) and (4). In the absence of an adverse employment action, I dismiss CWA's charge.

CWA also alleges the October 2 memorandum "defamed" Murtha's character. We do not have jurisdiction to decide defamation claims. Newark Firemens Union Local 1846 (Bishop), P.E.R.C. No. 96-43, 22 NJPER 29 (¶27014 1995).

Based on the foregoing, I do not believe the Commission's complaint issuance standard has been met regarding CWA's 5.4a(3) and (4) claims.

ORDER

The unfair practice charge is dismissed.

Gayl R. Mazuco
Director of Unfair Practices

DATED: November 19, 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 December 1, 2014.