D.U.P. NO. 2017-1

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

In the Matter of

COMMUNICATIONS WORKERS OF AMERICA,

Respondent,

-and- Docket No. CI-2015-054

CRISSY B. NICHOLSON,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed against a majority representative alleging that the majority representative breached its duty of fair representation when it elected not to provide the charging party paid representation in an arbitration of four Final Notices of Disciplinary Action filed on her behalf. The Director noted that majority representatives do not have the duty to process every grievance to arbitration, and declines to issue a Complaint where a majority representative has decided not to pursue a grievance to arbitration and there are no allegations that it engaged in unlawful conduct during the appeal process.

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Appearances:

For the Communication Workers of America,
(Ruth Barrett)

For the Charging Party,
(Crissy B. Nicholson, pro se)

DECISION

On May 26, 2015, Crissy Nicholson (Nicholson) filed an unfair practice charge against her majority representative, Communication Workers of America and Communication Workers of America Local 1040 (CWA). The charge alleges that on May 12, 2014, CWA unlawfully refused to provide Nicholson paid representation in an arbitration of four Final Notices of Disciplinary action (FDNA) filed on Nicholson's behalf. Each FDNA concerns separate disciplinary terminations imposed by Nicholson's former employer, the State of New Jersey (Woodbridge Developmental Center). CWA's conduct allegedly violates

5.4b(1)[1/] of the New Jersey Public Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act).

CWA denies violating the Act, contending that it negotiated a settlement that would permit Nicholson to return to work and then rejected it upon Nicholson's demand. The CWA also contends that it is not obligated to take Nicholson's case to arbitration to fulfill its duty of fair representation.

The Commission has authority to issue a complaint where it appears that the charging party's allegations, if true, may constitute unfair practices on the part of the respondent. 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. We have conducted an administrative investigation to determine the facts. N.J.A.C. 19:1-2.2. An investigatory conference was held on August 19, 2015. No disputed substantial material facts require us to convene an evidentiary hearing. N.J.A.C. 19:11-2.2 and 2.6. On June 15, 2016, I wrote a letter to the parties, advising that I was not inclined to issue a complaint in this matter and setting forth the reasons for that conclusion. The parties were provided an

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1/ This provision prohibits employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act."

opportunity to respond no later than the close of business (5 p.m.) on June 24, 2016. In an email dated June 22, 2016, Nicholson requested an additional seven to ten days to respond to our letter. I advised her that I was unable to extend the deadline without the consent of her adversary. At 6:51 p.m. on June 24, 2016 I received an email from Nicholson with an attached audio file that was inaudible. I responded stating that the audio file could not be considered as it was inaudible, unauthenticated and received after the expiration of the deadline for submissions. On June 29, 2016, Nicholson filed an Amendment to the charge, contending that CWA deliberately failed to represent her, and should be required to pay for an attorney to arbitrate her discipline. I find the following facts.

Nicholson was employed as a principal clerk typist by the State of New Jersey at the Woodbridge Developmental Center. Her title is included in a collective negotiations unit represented by CWA, which signed a collective negotiations agreement with the State extending from July 1, 2011 to June 30, 2015. The agreement includes a grievance procedure (Article 4) that ends in binding arbitration. Article 4.C.4.a. of the agreement provides that ". . . arbitration may be brought only by the Union, through its designee [within specified time periods]."

Nicholson was issued four separate FNDA removing her from her state employment effective June 18, 2013. CWA Local 1040

grieved all four of the terminations through the grievance procedure set forth in Article 4 of the collective negotiations agreement. The parties were unable to resolve the matter and CWA determined that it would arbitrate the State's decision to terminate Nicholson. The grievances were consolidated and an arbitrator was assigned with hearing dates scheduled for May 2 and May 12, 2014.

On March 31, 2014, Nicholson, counsel for the union Justin Schwam, and two union representatives met to prepare the matter for arbitration. During this meeting Nicholson authorized union counsel to conduct settlement negotiations with counsel for the State and the Department of Human Services. On April 9, 2014, counsel for the State forwarded a draft agreement to the union proposing to reinstate Nicholson, rescind two FNDAs and modify the remaining removal actions; the proposal also required Nicholson to agree to attend an appointment with Employee Advisory Service (EAS) and any recommended treatments or follow-up appointments. On April 11, 2014, Nicholson met with Schwam and the union representatives to review the State's proposal. On April 21, 2014, the same parties participated in a conference call wherein Nicholson expressed concern with the proposal, specifically her stated inclination that the terms would only pave the path for additional disciplinary action in the future. Schwam indicated that he would attempt to negotiate with the

State for a more favorable proposal. During the same conversation, Nicholson was advised that "in light of the offered settlement, the union would not recommend that representation continue through to arbitration."

On April 22, 2014, the parties agreed to adjourn the May 2, 2014 arbitration date given the progress in settlement discussions. On April 24, 2014, the State forwarded a second proposed agreement to Schwam, reducing the days of suspension from five (5) to four (4) on the disturbance charge, and from forty five (45) to twenty (20) on the remaining insubordination charge; in addition, it was proposed that Nicholson would only need to attend one EAS appointment, with no required follow-up.

The terms of the revised settlement agreement were communicated to Nicholson on or around April 28, 2014. Nicholson initially requested time to think about the proposal, and later the same day indicated that she intended to accept the settlement, but wanted an opportunity to have it reviewed. Schwam requested that Nicholson meet at his office where they could review it in detail, but Nicholson declined the offer to meet. On May 1, 2014, Nicholson e-mailed Schwam notifying him of problems that she had with the agreement, namely Section G, which contained boilerplate language regarding waiver of all claims with respect to the events, information or disputes relating to the subject action. Nicholson also requested to move forward

with the arbitration on May 12, 2014. In response, Schwam advised Nicholson that given the settlement agreement obtained, the Union would not be moving forward with the arbitration on May 12, 2014.

On May 6, 2014, Schwam requested that Nicholson forward a signed copy of the settlement by May 8, 2014, at 10:00 am, if she intended to accept it. In a letter to Schwam dated May 7, 2014, Nicholson raised new issues with nearly every element of the proposed settlement. Based on Nicholson's last minute objections to the agreement, as well as the foregoing history, CWA concluded that settlement was no longer achievable.

On May 12, 2014, CWA Representative Ruth Barrett informed Nicholson that the CWA was no longer going to provide her with representation for the arbitration, also notifying her of her rights to appeal that determination. Nicholson timely appealed the denial to CWA Area Director, Hetty Rosenstein. On June 5, 2014, Rosenstein issued a decision to Nicholson, denying the appeal. On June 21, 2014, Nicholson appealed Rosenstein's decision to District 1 Vice President Chris Shelton. On August 5, 2014, Shelton denied Nicholson's appeal. On September 2, 2014, Nicholson appealed Shelton's decision to CWA President Larry Cohen. Cohen denied Nicholson's appeal on October 3, 2014. On December 19, 2014, Nicholson appealed Cohen's decision to the CWA Executive Board. The Board rejected Nicholson's appeal on

February 24, 2015 and notified her that she had exhausted her internal appeal procedures and no further action would be taken by the CWA.

Analysis

N.J.A.C. 34:13A-5.3 provides in part:

> A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership.

In Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967), the Supreme Court articulated the standard for determining whether a labor organization violated its duty of fair representation. The Court held:

> . . . [A] breach of the statutory duty of fair representation occurs only when a union's conduct towards a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith. [Id. at 190, 64 LRRM 2376]

Vaca concerned the refusal of a union to process a grievance to binding arbitration. The Court wrote:

> . . . Nor do we see substantial danger to the interests of the individual employee if his statutory agent is given the contractual power honestly and in good faith to settle grievances short of arbitration . . . [386 U.S. 192, 64 LRRM 2377]

New Jersey has adopted the Vaca standard in deciding fair representation cases arising under the Act. See Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976); See also Lullo v. International Ass'n of Fire Fighters, 55 N.J. 409 (1970); Saginario v. Attorney General, 87 N.J. 480 (1981); OPEIU Local 153 (Johnstone), P.E.R.C. No 84-60, 10 NJPER 12 (¶15007 1983).

A union is allowed a "wide range of reasonableness in servicing its members." Essex-Union Joint Meeting and Automatic Sales, Servicemen and Allied Workers, Local 575, D.U.P. No. 91-26, 17 NJPER 242 (¶22108 1991). An employee organization must evaluate an employee's request for arbitration on the merits and decide, in good faith, whether it believes the employee's claim has merit. See Ford Motor Company v. Huffman, 345 U.S. 330, 337-338, 73 S.Ct. 681, 97 L.Ed. 1048 (1953); D'Arrigo v. New Jersey State Bd. of Mediation, 119 N.J. 74 (1990).

The charge alleges no facts indicating that CWA acted arbitrarily, discriminatorily or in bad faith when it negotiated rescission of two disciplinary notices seeking termination, and respective four (4) and twenty (20) day suspensions on the remaining two removals. No facts indicate that CWA could have negotiated a better settlement than it did or that an arbitration proceeding would have resulted in a rescission or reduction of the discipline imposed. By representing Nicholson before her employer;

by negotiating a reduction of Nicholson's discipline; by informing her of facially legitimate reasons (i.e., the State's offers of settlement) for declining to advance her case to arbitration; by advising her of the means to appeal that decision and how to advance the case to arbitration without its assistance, Nicholson has not alleged facts indicating that CWA has violated its duty of fair representation.

I find that in this circumstance, CWA was not obligated to arbitrate Nicholson's disciplinary charges. In D'Arrigo v. N.J. State Bd. of Mediation, our Supreme Court held that, ". . . absent clear language in the [collective negotiations] agreement conferring [the right to invoke the arbitration machinery of the contract], the employee organization has the exclusive right to invoke the arbitration provisions of the contract." Id., 119 N.J. at 75-76. I conclude that the current agreement between the State and CWA neither confers the right to arbitrate grievances to unit employees, individually, nor mandates that CWA proceed to arbitration in every instance. For these reasons, I find that Nicholson has not alleged facts warranting the issuance of a Complaint on the 5.4b(1) allegation.

ORDER

The unfair practice charge is dismissed.

Very truly yours,

/s/Gayl R. Mazuco
Director of Representation

DATED: July 27, 2016
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 August 10, 2016.