

D.U.P. NO. 91-28

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

In the Matter of

STATE OF NEW JERSEY (DEPARTMENT OF
HUMAN SERVICES) and C.W.A., LOCAL 1040,

Respondent,

-and-

Docket No. CI-91-52

EMILIA WISNIEWSKA,

Charging Party.

SYNOPSIS

The Director of Unfair Practices refuses to issue a complaint on an unfair practice charge filed by Emilia Wisniewska against her employer, the State of New Jersey, Department of Human Services, and her union the C.W.A. She alleged that the employer failed to properly investigate a complaint brought against her and the union failed to properly represent her in a grievance she brought concerning this matter. Wisniewska had a dispute over the informal manner which her union representative used in attempting to resolve the grievance. However, another union representative was substituted and did represent her. Wisniewska failed to allege facts which, if true, would constitute a violation of the union's duty of fair representation.

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Appearances:

For the Respondent State of New Jersey
Robert J. DelTufo, Attorney General
(Steven Schwartz, Deputy Attorney General)

For the Respondent CWA, Local 1040
Carolyn Wade, President

For the Charging Party
Emilia Wisniewska, pro se

REFUSAL TO ISSUE COMPLAINT

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on March 5, 1991 and amended on March 25, 1991 by Emilia Wisniewska ("Wisniewska") against the State of New Jersey ("State") and CWA Local 1040 ("CWA") alleging that they were engaging in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A.

34:13A-1 et seq. ("Act"), specifically subsections 5.4(a)(1), (4) and (7)^{1/} and (b)(1) and (5).^{2/}

N.J.S.A. 34:13A-5.4(c) sets forth in pertinent part that the Commission shall have the power to prevent anyone from engaging in any unfair practice, and that it has the authority to issue a complaint stating the unfair practice charged.^{3/} The Commission has delegated its authority to issue complaints to me and has established a standard upon which an unfair practice complaint may be issued. The standard provides that a complaint shall issue if it appears that the allegations of the charging party, if true, may

1/ These subsections 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. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (7) Violating any of the rules and regulations established by the commission."

2/ These subsections prohibit 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. (5) Violating any of the rules and regulations established by the commission."

3/ N.J.S.A. 34:13A-5.4(c) provides: "The commission shall have exclusive power as hereinafter provided to prevent anyone from engaging in any unfair practice.... Whenever it is charged that anyone has engaged or is engaging in any such unfair practice, the commission, or any designated agent thereof, shall have authority to issue and cause to be served upon such party a complaint stating the specific unfair practice charged and including a notice of hearing containing the date and place of hearing before the commission or any designated agent thereof...."

constitute an unfair practice within the meaning of the Act.^{4/}
The Commission's rules provide that I may decline to issue a
complaint.^{5/}

Wisniewska, a clinical psychologist employed by the State at the Adult Diagnostic and Training Center, alleges that her immediate supervisor, Dr. Jeffrey Allen, did not properly, confidentially and thoroughly investigate a report written by a custody officer (Johnston) and rumors circulated by the custody officer about her at the Center. She alleges that this improper investigation resulted in her being harassed by her supervisor, co-workers and inmates. Thus, by its improper investigation, she alleges that the State violated the Act.

Wisniewska also alleges that CWA breached its duty of fair representation by not representing her at a first step grievance hearing about the alleged harassment. Although CWA did represent her at a step two hearing, it failed to take her grievance to arbitration when it was denied at the second step.

The State contends it did not violate her rights under the Act. It contends that the report and rumors were investigated and neither discipline nor harassment resulted from the investigation of the Johnston report. If there is a dispute at all, the State believes it is between Wisniewska and the CWA.

4/ N.J.A.C. 19:14-2.1.

5/ N.J.A.C. 19:14-2.3.

CWA denies that it violated the Act. It contends it did not breach its duty of fair representation inasmuch as various CWA representatives were involved during the entire course of processing of Wisniewska's harassment grievance, through a step-two hearing. The decision not to appeal the grievance to arbitration was based on the merits of the case. CWA believed that the grievance did not concern an arbitrable issue and that an arbitrator would not award the requested remedy.

These facts appear.

Custody Officer Johnston wrote a report to the Director of Psychology, Jeffrey Allen, on August 30, 1990, alleging that Wisniewska was displaying "inmate favoritism." Wisniewska heard about the report and spoke to CWA shop steward Dr. Kay Jackson on the phone on September 13, 1990, because she wanted to file a grievance. Between September 24-28, 1990, Wisniewska and Jackson spoke again to clarify the subject of the grievance and the remedies Wisniewska was seeking. On September 25, 1990, Jackson filed a grievance.^{6/} Jackson later requested that the Personnel Office

^{6/} The grievance alleges a violation of Article II C6 of the CWA Professional Unit contract which says "the working environment shall be characterized by mutual respect for common dignity to which all individuals are entitled. It is agreed verbal and/or physical harassment of an employee is inappropriate." Wisniewska believed the Johnston report was discussed and distributed and that these actions harassed her and caused her distress. As a remedy, Wisniewska requested a copy of the letter and an indication of who had received the letter; clarification of why the letter was written; a formal apology; and a written reprimand of Johnston.

delay scheduling the formal first step grievance hearing while she investigated and tried to resolve the grievance informally.

Later that week, Jackson and Wisniewska had a heated discussion in front of other staff about Jackson's decision to try to resolve the grievance informally before scheduling a formal first step hearing. Wisniewska wanted to immediately proceed to a formal first step grievance hearing, but Jackson disagreed. Jackson arranged an informal meeting on October 17, 1990, to try to resolve the grievance. Jackson, Wisniewska, Johnston, Johnston's representative (Chief Swal) and Allen and Joan Bucher, representing management, were to attend that meeting.

On October 16, 1990, Jackson was told that Swal and Johnston were refusing to attend the meeting because Wisniewska had insisted on a formal investigation and formal first step grievance hearing. Jackson confronted Wisniewska about her pressing for a formal hearing and again they had a heated discussion. After that, Jackson informed Wisniewska that she (Jackson) would no longer represent Wisniewska because she distrusted Wisniewska's judgment, and Wisniewska was trying to handle the grievance without consulting the CWA. Jackson notified CWA by phone and letter that she would no longer act as Wisniewska's representative. Subsequently, no informal meeting to resolve the grievance occurred.

On December 5, 1990, a first step grievance hearing was conducted by Joan Bucher. Wisniewska represented herself and no one from CWA attended. The grievance was denied on December 21, 1990,

because the alleged violation was a contractual grievance which could only be processed by the union.

On December 24, 1990, CWA appealed the grievance to step two and indicated that Earl Blasingame would decide who the CWA representative would be at step two. The step two hearing was scheduled for January 17, 1991, but was rescheduled to February 4, 1991 at the request of the grievant. Wisniewska attended the step two hearing accompanied by CWA staff representative Roy Richardson who presented her case. CWA was notified of the step two decision denying the grievance on March 11, 1991. The hearing officer found no proof that the appointing authority harassed Wisniewska by conducting an investigation of Wisniewska after receiving Johnston's report. Wisniewska discussed this decision with CWA in mid-March 1991. On April 2, 1991, Richardson notified Wisniewska that CWA would not take her grievance to the next step (arbitration) because it believed that the grievance was without merit and not arbitrable; further, CWA believed that the remedies Wisniewska sought were not within the scope of an arbitrator's authority.

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

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 interest of all such employees without discrimination and without regard to employee organization membership.

In OPEIU, Local 153, P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983), the Commission discussed the appropriate standards

for reviewing a union's conduct in investigating, presenting and processing grievances:

In the specific context of a challenge to a union's representation in processing a grievance, the United States Supreme Court has 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." Vaca v. Sipes, 386 U.S. 171, 190 (1967) (Vaca). The courts and this Commission have consistently embraced the standards of Vaca in adjudicating such unfair representation claims. See, e.g., Saginario v. Attorney General, 87 N.J. 480 (1981); In re Board of Chosen Freeholders of Middlesex County, P.E.R.C. No. 81-62, 6 NJPER 555 (¶11282 1980), aff'd App. Div. Docket No. A-1455-80 (April 1, 1982), pet. for certif. den. (6/16/82) ("Middlesex County"); New Jersey Turnpike Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979) ("Local 194"); In re AFSCME Council No. 1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978). [footnote omitted]

We have also stated that a union should attempt to exercise reasonable care and diligence in investigating, processing and presenting grievances; it should exercise good faith in determining the merits of the grievance; and it must treat individuals equally by granting equal access to the grievance procedure and arbitration for similar grievances of equal merit. Middlesex County; Local 194. All the circumstances of a particular case, however, must be considered before a determination can be made concerning whether a majority representative has acted in bad faith, discriminatorily, or arbitrarily under Vaca standards. [OPEIU Local 153 at 13.]

The U.S. Supreme Court has also held that to establish a claim of a breach of the duty of fair representation, such claim "...carried with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." Amalgamated Assn. of Street,

Electric, Railway and Motor Coach Employees of American v. Lockridge, 403 U.S. 274, 301, 77 LRRM 2501, 2512 (1971). Further, the National Labor Relations Board has held that where a majority representative exercises its discretion in good faith, proof of mere negligence, standing alone, does not suffice to prove a breach of the duty of fair representation. Service Employees International Union, Local No. 579, AFL-CIO, 229 NLRB 692, 95 LRRM 1156 (1977); Printing and Graphic Communication, Local No. 4, 249 NLRB No. 23, 104 LRRM 1050 (1980), reversed on other grounds 110 LRRM 2928 (1982).

Based upon the foregoing, the Commission's complaint issuance standard has not been met in this matter. N.J.A.C. 19:14-2.1.

When Wisniewska wanted to file a grievance, CWA Steward Jackson promptly filed the grievance. Jackson further attempted to set up an informal meeting to try to resolve the grievance. Wisniewska, independently and without Jackson's agreement, tried to cancel the informal meeting and insisted on the formal step one hearing. Jackson did not attend the formal step one hearing because she believed Wisniewska was not cooperating with the CWA's strategy in handling the grievance.


CWA continued to assist Wisniewska with processing the grievance in a timely manner after it was denied at the first step. In fact, CWA provided a staff representative for her at the second step hearing. Wisniewska was disappointed with the denial of the

grievance at the second step. However, the grievant's desire to press on with her claim does not require CWA to automatically take the grievance to arbitration. AFSCME, Council 52, D.U.P. No. 86-14, 12 NJPER 316 (¶17121 1986). CWA did not take the grievance to arbitration because it believed that the "harassment" issue was not arbitrable; further, CWA believed that the remedies sought would not be awarded by an arbitrator. There are no allegations in the charge which, if true, would establish that CWA's decision was arbitrary, discriminatorily motivated or that it acted in bad faith. Rather, it appears that the decision not to arbitrate was based on a likelihood of success in the arbitration forum. AFSCME.

Similarly, no allegations in the charge warrant the issuance of a complaint against the State. The State investigated the matters raised by Custody Officer Johnston's report and found nothing which warranted any action. The State did not discipline Wisniewska as a result of the Johnston report and the State's subsequent investigation. Finally, there are no allegations in the charge which suggest that the State, in any way, prevented Wisniewska from processing her grievance or discriminated against her for filing her grievance.

The charge is hereby dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES


Edmund G. Gerber, Director

DATED: May 24, 1991
Trenton, New Jersey