P.E.R.C. NO. 2023-29

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ESSEX COUNTY,

Respondent,

-and- Docket No. CO-2022-205

CWA LOCAL 1081,

Charging Party.

SYNOPSIS

The Commission reverses a decision by the Director of Unfair Practices which refused to issue a complaint and dismissed an unfair practice charge filed by CWA Local 1081 alleging the County of Essex threatened to discipline Local 1081's president in connection with the County's investigation of a discrimination/harassment complaint filed by a Local 1081 member asserting the president's speech during an after-hours, off-premises virtual union meeting, particularly his use of the term "girlfriend" to describe a black woman, was offensive, inappropriate and racist. On CWA's appeal from the Director's decision, the Commission finds the complaint issuance standard has been met, as the allegations present questions as to whether there is a sufficient nexus between the workplace and the comment made during the off-hours, off-site union meeting; whether the County's letter to Local 1081's president regarding the results of the investigation is discipline or the threat of discipline as alleged by CWA; and how to balance the County's interest in investigating the employee's affirmative action complaint against the need to protect employees from interference, coercion and restraint in the exercise of rights under our Act.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Respondent,
(Sylvia Hall, Director of Labor Relations)

For the Charging Party, David Tykulsker & Associates, attorneys (David Tykulsker, of counsel)

DECISION

On September 30, 2022, Communication Workers of America Local 1081 (CWA or Local 1081) appealed from a decision by the Director of Unfair Practices (D.U.P. No. 2023-9), refusing to issue a complaint and dismissing an unfair practice charge filed by CWA against Essex County (County). On October 7, 2022, the County filed a brief in opposition to CWA's appeal.

N.J.S.A. 19:14-2.3(b) requires us to rule on CWA's appeal on the basis of its contents as a self-contained document. Having done so, we reverse the Director's decision and remand for the issuance of a complaint.

The charge alleges that on or about February 22, 2022, the County threatened to discipline Local 1081 President D.W. for his

speech to Local 1081 members at an after-hours, off-premises virtual union meeting, in violation of section 5.4a(1), (2) and (3)[1/2/] of the New Jersey Public Employer-Employee Relations Act, N.J.S.A. 34:13A-5.1, et seq. (Act). CWA's certification, attached to its charge, states that this was a regularly scheduled meeting of Local 1081 membership that was not open to County management.

The Director based his decision on the following facts, which CWA does not dispute on appeal:

> On or about January 6, 2022, . . . [D.W.] addressed members during an off-hours, off-site virtual (Zoom) union meeting. During the meeting, the President referred to the former Director of the County's Division of Family Assistance and Benefits as "girlfriend."
>
> On or about January 7, 2022, a Local 1081 unit member filed a discrimination/harassment complaint with the County alleging that the

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1/ The Director dismissed the 5.4a(3) charge following CWA's failure to withdraw or amend it after the Director notified CWA that this portion of the charge failed to satisfy the pleading standards set forth in N.J.A.C. 19: 14-1.3. (D.U.P. n.2 and n.4.) On appeal, CWA does not challenge that decision.

2/ 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, and (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employee in the exercise of the rights guaranteed to them by the act."

> President's use of the term "girlfriend" to describe a black woman is "offensive, inappropriate and racist."
>
> County Policy Number CHAP VI-11 provides in pertinent part:
>
> > . . . the County of Essex to provide a working environment which is conducive to efficient and professional work performance and is free from harassment of any kind including sexual harassment and harassment based on race, color, religion, national origin, disability, sexual orientation or any other bias prohibited by law.
>
> The County investigated the complaint. On February 22, 2022, the President received a letter from the County advising that the investigation had been completed and was considered closed by the Office of Inspector General or the Affirmative Action Office. The letter advised that, "Based on the investigation, there has been a finding of a violation of a County Policy and Procedure or other law and your respective department will take appropriate action." No disciplinary charges were brought against the President.
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> [(D.U.P. at 3-4.)]

On appeal, CWA argues only that the allegations in the charge establish a 5.4a(1) violation, and does not challenge the dismissal of the 5.4a(2) allegation. As such, we address the Director's decision only as it relates to the 5.4a(1) dismissal. For the purposes of the charge, CWA accepts that D.W.'s remarks were either racist or sexist, as the County found, and it shares a commitment to render the union free from all forms of status discrimination. But CWA argues: on its face, the "reprimand" of

D.W. for matters discussed at a closed union meeting interferes with public employees' right to organize, in violation of 5.4a(1); the Director's decision is based upon insufficient case law; and the unit member who filed a discrimination/harassment complaint against D.W. had an obligation to first exhaust other available remedies.

This matter is distinguishable from the Director's citations[3/], CWA argues, because it does not involve a "workplace nexus" sufficient to justify the County's investigation of the unit member's complaint or the issuance of the letter in question: D.W.'s speech occurred in a closed, private union meeting, not in the context of employer-employee meetings or a public forum where the union and employer were addressing one another; the complaining unit member did not allege a hostile "work" environment in connection with D.W.'s statement at the union meeting; the alleged discrimination had no impact on the employer-employee relationship as D.W. holds no supervisory position with the County and cannot be seen as acting on its

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3/ These include: City of Hoboken, P.E.R.C. No. 2016-79, 42 NJPER 559 (¶154 2016); Hillsborough Tp., P.E.R.C. No. 2000-82, 26 NJPER 207 (¶31085 2000); State of New Jersey (Trenton State College), H.E. No. 90-48, 16 NJPER 337 (¶21139 1990), adopted P.E.R.C. 91-1, 16 NJPER 419 (¶21175 1990; State of New Jersey, Dept. of Treasury (Glover), P.E.R.C No. 2001-57, 27 NJPER 167 (¶32056 2001); State of New Jersey, Dept. of Human Services (Garlanger), P.E.R.C No. 2001-52, 27 NJPER 167 (¶132057 2001); Rockaway Tp. Bd. of Ed., D.U.P. No. 2014-6, 40 NJPER 293 (¶112 2013); and Montclair Bd. of Ed., H.E. No. 2007-9, 33 NJPER 171 (¶59 2007).

behalf; and the County also has no rule governing off-duty conduct. CWA further argues that this case does not concern a unit with a paramilitary structure involving a "special need" to maintain order and discipline or an injury to the "chain of command," as in some cases cited by the Director.

CWA contends the complaining unit member's other available remedies included: internal union remedies; the ability to file an unfair practice charge against Local 1081 alleging a breach of the duty of fair representation; and the opportunity to bring an action at the New Jersey Division on Civil Rights or in Superior Court alleging a violation of the New Jersey Law Against Discrimination.

The County responds that the Director's decision should be left undisturbed. There has been no adverse action that would violate section 5.4a(1), the County argues, as no disciplinary action, charge or written reprimand was (or will be) brought or issued against D.W. for his offensive speech during the union meeting. CWA's contention is factually incorrect that the letter sent to D.W. from the affirmative action officer constitutes any such discipline, the County argues, as same would have to be accomplished by following Civil Service rules and the negotiated disciplinary process. The County further maintains that the letter in no way interfered with any right held by any employee, or with D.W.'s role as President of Local 1081.

The County further argues that it had a managerial prerogative and a legitimate and substantial business justification to take prompt action under relevant laws and policies to address the employee's complaint against D.W. There is a sufficient workplace nexus based on the County's concerns and obligations centered on those policies, it contends, as D.W. is a County employee and his role as union president does not insulate him from the County's obligation to conduct an investigation. The County further argues that the Director's decision is based on sufficient case law, as an analysis based on "paramilitary structure" is not required to establish a workplace nexus here, nor is a "chain of command" environment a prerequisite for fostering and enforcing affirmative action policies.

Finally, the County argues that any "fair representation" claim by the unit member (who filed the discrimination complaint against D.W.) is hers to make, and such independent action does not usurp the County's responsibility under its affirmative action policies. The requirement to exhaust administrative remedies also does not apply here, the County argues, as the cases relied upon by CWA for that proposition involve a union member's obligation, under a collective negotiations agreement, to do so before filing a lawsuit.

Analysis

N.J.S.A. 34:13A-5.4a(1) prohibits employers from "interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act." The Director's decision cited the correct standard for evaluating a 5.4a(1) charge, as set forth in New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73 5 NJPER 550 (¶10285 1979)("It shall be an unfair practice for an employer to engage in activities which . . . tends to interfere with, restrain or to coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification").

In evaluating the 5.4a(1) allegation, the Director also properly focused on the actions taken by the employer, and the question of whether those actions lacked a legitimate and substantial business justification; that is, the actions taken by the County in response to the discrimination/harassment complaint, pursuant to the County's affirmative action policies. The requirement to conduct that analysis is not altered by the alleged failure of the complaining employee to exhaust other administrative remedies available to her before filing her complaint with the County. CWA also makes clear in its brief that while it does not condone D.W.'s comment, it is alleging that the matter is an internal union matter and not one within

the employer's authority to handle. The Director also thoroughly discussed relevant Commission precedent. See n.3, supra.

Our standard for issuing a complaint is set forth in N.J.A.C. 19:14-2.1(a), which states, in pertinent part (emphasis supplied):

> After a charge has been processed, if it appears to the Director of Unfair Practices that the allegations of the charge, if true, may constitute unfair practices on the part of the respondent, and that formal proceedings should be instituted in order to afford the parties an opportunity to litigate relevant legal and factual issues, the Director shall issue and serve a formal complaint...

Applying that standard to the facts as alleged in the 5.4a(1) charge, we find the complaint issuance standard has been met here. At this early stage of the proceeding, the allegations present questions as to: whether there is a sufficient nexus between the workplace and the comment made by D.W. during the off-hours, off-site union meeting; whether the County's February 22 letter to D.W. is discipline or the threat of discipline as alleged by CWA; and how to balance the County's interest in investigating the employee's affirmative action complaint about D.W.'s remark against the need to protect employees from interference, coercion and restraint in the exercise of rights under our Act.

As these questions require a fuller development of the facts to allow for a closer scrutiny of the applicable law as applied

to those facts, we find dismissal of the charge was not warranted. The circumstances of this matter are sufficiently distinct from the cases discussed by the Director as to require fact-finding to confirm whether those cases control here in the manner as described by the Director.

As CWA argues, this matter does not involve a paramilitary organization, as in Hoboken and Hillsborough, supra, and the employee's complaint against the CWA president, who was not a supervisor as in Hoboken, did not arise from conduct that occurred at the workplace, as in Rockaway Tp., supra. Nor did the conduct occur at the negotiations table, in grievance discussions, or in an investigatory interview, as discussed in State of New Jersey, Dept. of Treasury (Glover), supra.

However, as here, the dispute in Glover did not involve a paramilitary organization and chain of command. Thus, the following passages from Glover have relevance for determining when protected representation crosses over into unprotected conduct that may be subject to discipline (emphases added):

> An employer may criticize a representative's conduct at such meetings, but it may not discipline the representative as an employee when that conduct is unrelated to job performance
> . . .
> [D]espite the leeway allowed for impulsive and adversarial behavior, representational conduct may lose its statutory protection if it indefensibly threatens workplace discipline, order, and respect.
> . . .

> To determine whether conduct is indefensible in the context of the dispute involved, it is necessary to balance the employees' heavily protected right to representation . . . against the employer's right to maintain workplace discipline.
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> [State of New Jersey, Dept. of Treasury (Glover), P.E.R.C. No. 2001-57, 27 NJPER 167 (¶32056 2001).]

In the proceedings that will follow, the County will have an opportunity to present further facts and argument to support the establishment of a sufficient workplace nexus; including as to whether the employer reasonably would have a concern that D.W.'s alleged offensive conduct, which was addressed to fellow County employees at a union meeting, is related to job performance in the sense that it could threaten workplace discipline, order, and respect under the circumstances presented. Likewise, CWA will have an opportunity to present further facts and argument that may establish whether the February 22 letter constitutes discipline or the threat of discipline for protected activity.

The Director's decision is reversed.

ORDER

We transfer this matter to the Director of Unfair Practices for the issuance of a complaint and further processing consistent with this decision.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Ford, Papero and Voos voted in favor of this decision. None opposed. Commissioner Bonanni was not present.

ISSUED: January 26, 2023

Trenton, New Jersey