

P.E.R.C. NO. 2023-57

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(OFFICE OF EMPLOYEE RELATIONS),

Respondent,

-and-

Docket No. CO-2023-119

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Charging Party.

SYNOPSIS

The Commission grants an appeal by the Communications Workers of America, AFL-CIO (CWA), from the Director of Unfair Practices' refusal to issue a complaint and dismissal without prejudice of an unfair practice charge filed by CWA against the State of New Jersey, Office of Employee Relations (State), alleging the State violated the Act by hiring employees that the State acknowledges are performing unit negotiations work into non-unit titles and employee-relations groups. The Commission finds: (1) CWA's allegations that the State itself placed into non-unit titles certain newly hired employees that the parties apparently agreed were performing negotiations unit work, if true, may state an unfair practice warranting the issuance of a complaint; and (2) if in the course of processing the unfair practice complaint other questions of representation arise, a clarification of unit petition may be filed.

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.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(OFFICE OF EMPLOYEE RELATIONS),

Respondent,

-and-

Docket No. CO-2023-119

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Charging Party.

Appearances:

For the Respondent, Matthew J. Platkin, Attorney
General (Eric A. Zimmerman, Deputy Attorney General, on
the brief)

For the Charging Party, Weissman & Mintz LLC, attorneys
(Patricia A. Villanueva, of counsel)

DECISION

On April 17, 2023, the Communications Workers of America, AFL-CIO (CWA) appealed from a letter decision issued by the Director of Unfair Practices (Director) on April 6, refusing to issue a complaint and dismissing without prejudice an unfair practice charge filed by CWA against the State of New Jersey, Office of Employee Relations (State). The charge, filed on January 19, 2023, alleges the State violated sections 5.4a(1), (5) and (7)^{1/} of the New Jersey Public Employer-Employee

^{1/} These provisions prohibit public employers, their
(continued...)

Relations Act, N.J.S.A. 34:13A-5.1, et seq. (Act), by hiring employees that the State acknowledges are performing unit negotiations work into non-unit titles and employee-relations groups (ERGs).^{2/}

According to its charge, the four negotiations units represented by CWA include employees in ERGs respectively designated A, P, R, and S (APRS). A is the Administrative and Clerical Services Unit; P is the Professional Unit; R is the Primary Level Supervisors Unit; and S is the Higher Level Supervisors Unit. The charge states that CWA does not represent State employees in certain other otherwise exempt ERGs, designated V, W, X, and Y (VWXY), except as pursuant to a memorandum of agreement (MOA) executed by the parties on April 6, 2021, and an attachment to the MOA entitled "Schedule A."^{3/}

1/ (...continued)
representatives or agents from: "(1) Interfering with, restraining or coercing 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"; and "(7) Violating any of the rules and regulations established by the commission."

2/ The ERGs represent different groupings or classifications of State employees. Information about the ERGs is available on the New Jersey Civil Service Commission's website at <https://www.state.nj.us/csc/>.

3/ Entitled "VWXY Coverage under 2019-2023 CWA/State Collective Negotiations Agreements," the MOA is, according to the
(continued...)

The MOA provides that effective upon its execution, "all provisions of the parties' 2019-2023 collective negotiations agreements [(CNAs)] shall apply to all employees identified on Schedule A." As defined in the MOA, Schedule A is a list of "Covered Employees" occupying titles in the VWXY ERGs. As to Covered Employees in V, W, and Y ERGS whose titles "have a step and range," the MOA specifies that they "will be included in one of the CWA units [and] will remain on the current step of their existing range until eligible for movement on the step." With respect to Covered Employees occupying titles in the X ERG "that have a range and steps," the MOA specifies that "the parties will agree upon the appropriate range for the title on CWA's salary schedule and employees will be placed on the appropriate step of that range."

The MOA further specifies, in pertinent part:

For 12 months following the effective date of this MOA, whenever an employee is hired into a position in a VWXY employee relations grouping, the State shall provide the following information to CWA within ten (1)

3/ (...continued)
charge, a product of the parties' efforts after the CWA filed CU petitions in 2011 "on behalf of all employees in the A, P, R, S, V, W, X, and Y employee relations groups ('ERGs') who should now be included in the four negotiations units represented by CWA due to . . . statutory changes to the definitions of 'managerial executive' and 'confidential employees'" set forth in N.J.S.A. 34:13A-3(f) and (g), as amended by P.L. 2009, c. 314, § 1, eff. Jan. 18, 2010. The MOA and its Schedule A are attached to the charge as exhibits.

working days from the date of hire: (a) the name of the employee; (b) his/her position; (c) department; (d) worksite; (e) a brief description of the duties the employee will be performing; and (f) identify the basis for their exclusion from the unit for example, as a political appointee, a confidential employee . . . or a managerial executive within the meaning of the EERA. Upon request, OER [Office of Employee Relations] shall meet with CWA to discuss whether the employee should be in a unit negotiations title. At the end of 12 months, the parties will discuss whether or not to continue this procedure.

The MOA further provides that the parties "shall add employees to Schedule A as they continue to identify employees currently on the dispute list who will be included in CWA units," and that those employees so added "will be covered by the terms of this MOA, prospectively."

The charge alleges that an employee's placement in Schedule A "reflects an agreement between the parties that the employee is performing negotiations unit work and is appropriate for inclusion in a negotiations unit because (a) they are neither a confidential employee nor a managerial executive and (b) there is no supervisory conflict."^{4/}

^{4/} According to the charge, the parties to date "have agreed to the inclusion of approximately 1,044 VWXY employees in a CWA negotiations unit" as identified on Schedule A. The charge further alleges the parties have additionally "agreed to the inclusion of 45 VWXY titles "in a CWA negotiations unit," as to whom the Civil Service Commission has begun converting their VWXY titles into APRS titles.

The charge includes emails from 28 different occasions, between July 1, 2021 and December 6, 2022, when the State allegedly provided CWA with notifications advising that newly-hired VWXY employees would be added to Schedule A. The charge also alleges that on June 10, 2022, CWA communicated via email to the State that "this practice of departments hiring into VWXY titles, then sending them to CWA orientations clearly demonstrates that departments need to stop hiring into VWXY titles and hire into APRS titles." The charge further alleges, at paragraph 15 (emphasis added):

As this process continued, the State continued hiring employees performing negotiations unit work into V, W, X, and Y titles that are not part of a CWA negotiations unit. After hire, however, the State would communicate to CWA that the employees are appropriate for inclusion in a CWA negotiations unit.

As a consequence of this practice, the charge alleges, the State is "avoiding its obligations under the collective negotiations agreement that should govern the initial terms and conditions of employment of those employees."

In his April 6 letter dismissing the charge the Director determined CWA's charge raised a question concerning representation that must be resolved in a CU petition, notwithstanding CWA's objection, filed March 10, 2023, that it does not raise a representation question but "concerns only the State's practice of hiring employees indisputably performing

negotiations unit work into non-negotiations unit titles and thereby placing them outside CWA negotiations units . . . [and] outside the protections of the parties' collective negotiations agreement." The Director's letter concluded that CWA may file a CU petition "for the newly created titles referenced in the charge," in accordance with a Commission decision affirming the dismissal of a prior related CU petition^{5/} filed by CWA. This appeal ensued.

CWA filed a letter brief and exhibits in support of its appeal. The State, in opposition, relied upon its previous reply to the Director dated March 20, 2023, asserting the charge should be dismissed because "the first question" it presents is "what is negotiations unit work," given CWA's contention that employees were "indisputably" performing such work.

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

^{5/} State of New Jersey (Office of Employee Relations), P.E.R.C. No. 2023-25, 49 NJPER 353 (¶84 2023). CWA asserts on appeal that the instant unfair practice charge makes no claims regarding the 49 employees that were the subject of the previously dismissed CU petition.

relevant legal and factual issues, the Director shall issue and serve a formal complaint...

Applying that standard here, we conclude that the allegations in the charge, if true, may constitute unfair practices on the part of the State. In particular, we focus on CWA's allegations that: (1) the State hired employees performing negotiations unit work into titles that are not part of a CWA negotiations unit; (2) the State then placed those employees onto Schedule A of the MOA; and (3) as a party to the MOA, the State agreed by its terms that Schedule A employees would be covered by "all provisions of the parties' 2019-2023 collective negotiations agreements" and "will be included in CWA units."

The State contends the charge, including these allegations, should be dismissed because there is a question as to whether Schedule A employees are "indisputably" performing negotiations unit work. However, the emails included with the unfair practice charge may support that the State itself placed certain newly hired employees on Schedule A, and that the parties were in apparent agreement that the employees were performing negotiations unit work. Thus, if the State were initially placing newly hired employees who were performing unit work into non-unit titles, that may be an unfair practice warranting the issuance of a complaint. N.J.A.C. 19:14-2.1a. As the charging party, CWA has the burden of proving its allegations by a

preponderance of the evidence, including its allegation that the titles of the employees at issue "are not part of a CWA negotiations unit." N.J.A.C. 19:14-6.8.

Finally, if in the course of processing the unfair practice complaint, other questions of representation arise that are best resolved in a CU petition, our decision today does not preclude the filing of same.

ORDER

CWA's appeal from the Director of Unfair Practices' refusal to issue a complaint and dismissal without prejudice of CWA's unfair practice charge is granted. The Director's decision is reversed. We transfer this case to the Director for the issuance of a complaint and further processing.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, Papero and Voos voted in favor of this decision. None opposed.

ISSUED: June 29, 2023

Trenton, New Jersey