

D.U.P. NO. 2011-9

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

In the Matter of

LOCAL 1040, COMMUNICATIONS
WORKERS OF AMERICA,

Respondent,

-and-

Docket No. CI-2011-017

DEBRA WEISMAN,

Charging Party.

SYNOPSIS

The Deputy Director of Unfair Practices dismisses an unfair practice charge filed by Debra Weisman, an individual charging party, against CWA Local 1040. The Deputy Director finds that Weisman did not have standing to assert a violation of the Act because she had voluntarily resigned from her State employment and was no longer a public employee nor a member of the collective negotiations unit when she demanded that CWA process her grievance to arbitration. Further, Weisman's dispute with her employer did not arise during the course of her employment, it arose after she resigned and related to an ostensibly erroneous reference provided by her former employer.

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Appearances:

For the Respondent
Weissman & Mintz, LLC
(Jason L. Jones, of counsel)

For the Charging Party
Frank Finch, III, attorney

REFUSAL TO ISSUE COMPLAINT

On November 1, 2010, Debra Weisman (Weisman) filed an unfair practice charge against Communications Workers of America, Local 1040 (CWA). The charge alleges that on October 19, 2010, CWA violated its duty of fair representation by refusing to seek arbitration on a grievance after Weisman resigned her employment. CWA's conduct allegedly violates 5.4b(1) and (5)^{1/} of the New

^{1/} These provisions 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."

Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).

CWA denies violating the Act, asserting that Weisman resigned from her employment as part of a negotiated agreement, and is no longer a public employee or a member of CWA, having no legal standing to assert a violation of our Act.

The Commission has authority to issue a complaint where it appears that the Charging Party's allegations, if true, may constitute an unfair practice within the meaning of the Act. 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 may decline to issue a complaint. N.J.A.C. 19:14-2.3. Based upon the following, I find that the complaint issuance standard has not been met.

On November 12, 2009, Weisman, a charge nurse included in CWA's collective negotiations unit, was served a Preliminary Notice of Disciplinary Action seeking her removal for disciplinary reasons. Weisman, through CWA, filed a grievance which was subsequently scheduled for arbitration. Before the arbitration hearing, the grievance was submitted to mediation.

On April 16, 2010, a mediated settlement agreement was signed by Weisman and her employer in which Weisman's removal was converted to a resignation in good standing.

In June 2010, Weisman was offered employment with a private employer. When the prospective employer solicited confirmation of Weisman's employment at Ancora, it was erroneously advised that Weisman did not resign in good standing.^{2/}

On July 23, 2010, Weisman filed a grievance contesting the employer's error. On August 5, 2010, Don Mangus, an employer representative, issued a letter to Weisman, providing that the grievance was inappropriate and could not be processed because she resigned from her employment, effective April 16, 2010. On September 23, 2010, Weisman wrote to CWA, demanding that her grievance be processed to arbitration. On October 19, 2010, CWA advised Weisman that her resignation meant that she was no longer a State employee and not covered by the collective negotiations agreement between CWA and the State. It advised that her grievance would not be processed.

ANALYSIS

Weisman asserts that CWA violated its duty of fair representation because it refused to arbitrate her grievance contesting the public employer's failure to comply with an agreement which included her resignation from employment.

^{2/} An exploratory conference among the parties on January 31, 2011 revealed that Weisman's Final Notice of Disciplinary Action erroneously provided that she had resigned not in good standing. Immediately after the conference, CWA contested the error and the employer, Ancora, amended the Notice to provide that Weisman resigned in good standing.

An unfair practice charge may be filed by public employers, public employees, public employee organizations or their representatives. N.J.A.C. 19:14-1.1. N.J.S.A. 34:13A-3(d) provides that a public employee is ". . . any person holding a position, by appointment or contract, or employment in the service of a public employer . . ." (emphasis added). N.J.S.A. 34:13A-5.3 provides, in a relevant 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 . . ." (emphasis added).

Commission case law provides that individuals, following their resignation from public employment, lack standing to allege a duty of fair representation charge against their former majority representative. In Town of West New York, D.U.P. No. 2001-3, 26 NJPER 353 (¶31139 2000), the Director refused to issue a complaint, where an individual, Raymond Sancho, asserted a violation of the duty of fair representation. Sancho had been employed as a police officer but resigned from his position immediately prior to his guilty plea on federal criminal charges. After his resignation, Sancho sought severance benefits from the Town under the terms of the collective negotiations agreement between the Town and the PBA. The Town refused to pay the benefits and Sancho requested the PBA initiate a contractual grievance on his behalf contesting the Town's decision. The PBA

refused because he was no longer a member of the bargaining unit or an employee of the Town. The Director wrote:

Since Sancho resigned on January 28, 1999, he severed his relationship with both the Town and the PBA. He was no longer a public employee or a unit member when he requested the PBA to 'initiate proceedings' on his behalf. The PBA has no duty under the Act to represent him. Accordingly, the PBA's refusal to 'initiate proceedings' under these facts does not constitute an unfair practice and Sancho's charge against the PBA must be dismissed. [Id., 26 NJPER at 355]

See also, PBA Local 245 (Maggio), D.U.P. No. 97-27, 23 NJPER 72 (¶28043 1996); Borough of Belmar, P.E.R.C. No. 89-27, 14 NJPER 625 (¶19262 1988) (retired police officers not public employees under the Act); Oakcrest-Absegami Teachers Ass'n (Butler), D.U.P. No. 97-35, 23 NJPER 261 (¶28125 1997) (non-unit member lacked standing to allege fair representation claim); Teamsters Local 866 (Mejia), D.U.P. No.99-13, 25 NJPER 265 (¶30112 1999) (following resignation, public employee no longer had right to collective agreement).

Weisman voluntarily resigned from her employment as part of the April 16, 2010 settlement agreement with her employer. Upon her voluntary resignation, she was no longer a public employee nor a member of the collective negotiations unit when she demanded that her grievance proceed to arbitration. Nor did the dispute between Weisman and her former employer arise during the course of her employment; it arose after she resigned and relates

to an ostensibly erroneous reference provided by her former employer.

Even if I assume that Weisman has standing to file a charge against CWA, I find that she has not alleged facts indicating that CWA's decision not to arbitrate the matter was arbitrary, discriminatory or in bad faith.

Section 5.3 of the Act empowers an employee representative to represent employees in the negotiation and administration of a collective agreement. A violation of the 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, 64 LRRM 2369 (1967). The Commission and the New Jersey courts have adopted this standard. Saginario v. Attorney General, 87 N.J. 480 (1981); Lullo v. International Ass'n of Fire Fighters, 55 N.J. 409 (1970); Fair Lawn Bd. of Ed (Solomons), P.E.R.C. No. 84-138, 10 NJPER 351 (¶15163 1984); OPEIU Local 153 (Johnstone), P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983).

A wide range of reasonableness must be allowed a majority representative in servicing the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. PBA Local 187, P.E.R.C. No. 2005-78, 31 NJPER 173 (¶70 2005), citing Ford Motor Co. v. Huffman, 345 U.S. 330, 337-338 (1953). Thus, the duty of fair representation

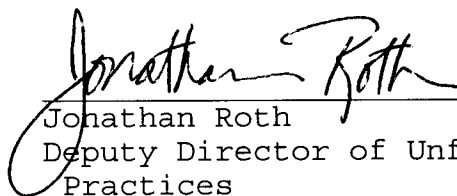
does not require a union to press non-meritorious grievances.

Carteret Ed. Ass'n (Radwan), P.E.R.C. No. 97-146, 23 NJPER 390, 391 (¶28177 1997); Camden Cty College (Porreca), P.E.R.C. No. 88-28, 13 NJPER 755 (¶18285 1987).

CWA had no duty to represent Weisman under the Act because she was no longer a public employee or a member of the negotiations unit. Assuming that Weisman had standing to assert a duty of fair representation claim, I glean no facts indicating that CWA acted arbitrarily, discriminatorily or in bad faith, particularly after it apprised the employer of the error which was corrected. Carteret. CWA's refusal under these circumstances is not an unfair practice.

ORDER

The unfair practice charge is dismissed.


Jonathan Roth
Deputy Director of Unfair
Practices

DATED: June 1, 2011
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 June 10, 2011.