D.U.P. No. 2012-8

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

In the Matter of

CWA LOC 1040, CWA DISTRICT ONE,
AND STATE OF NEW JERSEY
(JUVENILE JUSTICE),

Respondents,

-and-

Docket Nos. CI-2010-046
CI-2010-047 and CI-2010-049

JUDY THORPE,

Charging Party.

Appearances:

For the Respondent - State,
Paula T. Dow, Attorney General
(Brady Connaughton, Deputy Attorney General)

For the Respondents - CWA,
Weissman & Mintz, LLC, attorneys
(Annmarie Pinarski, of counsel)

For the Charging Party,
Judy Thorpe, pro se

REFUSAL TO ISSUE COMPLAINT

On June 3, 2010 and August 9, 2010, Judy Thorpe filed unfair practice charges and amended charges against CWA Local 1040 (CI-2010-046) and CWA District 1 NYC (CI-2010-047).[1/] The amended charge concerns an EEOC complaint, a grievance arbitration case, and a closed unfair practice charge, Dkt. No. CO-2007-168. Thorpe alleges that CWA allowed her supervisor, Harold Brown, to

1/ The allegations against these Respondents are identical and not distinguished in this decision.

interrogate her about the EEOC complaint.[2/] She alleges that CWA exhibited gross professional misconduct at the grievance arbitration hearing by "coercing [her] into lying several times;" not allowing her ". . . to tell her side of the story" in the hearing; withholding "critical" information from the arbitrator; and not objecting to the State preparing its witnesses during the proceedings, all of which resulted in an unfavorable outcome. Thorpe also alleges that the arbitrator did not issue a timely decision and that CWA's failure to object to the "late" award is an unfair practice. Thorpe also alleges that CWA breached its duty of fair representation by not appealing an earlier dismissal of another charge, Dkt No. CO-2007-168, D.U.P. No. 2008-1, 33 NJPER 289 (¶110 2007). The CWA's actions allegedly violate 5.4b(1), (2), (3), (4) and (5)[3/] of the New

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2/ This portion of the charge does not meet the procedural requirements of N.J.A.C. 19:14-1.3 because it does not specify a date when the alleged act occurred. Accordingly, this portion of the charge is dismissed. N.J.A.C. 19:14-1.5(e).

3/ 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; (2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances; (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit; (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement; (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).

On June 9, 2010 and August 6, 2010, Thorpe filed a charge and amended charge against the State of New Jersey/Juvenile Justice Commission (JJC) (CI-2010-049). Thorpe alleges that the JJC's Director of Administration Roseanne Fairbanks provided false and misleading statements about her, including an allegation that she made a sexually inappropriate comment during a hearing, and that Fairbanks abused her authority by serving as "the source of an unlawful ban against [Thorpe]." The charge also addresses the grievance arbitration, alleging that JJC misrepresented facts; engaged in professional misconduct; violated work-related standards of conduct; intentionally withheld pertinent information; violated rules and regulations; failed to offer the appropriate policy governing medical and psychological fitness-for-duty evaluations; and ordered Thorpe to undergo an unwarranted fitness-for-duty evaluation. The charge alleges that the arbitrator would have reached a different conclusion if JJC had not misrepresented the facts. The State's actions allegedly violate 5.4a(1), (2), (3), (4), (5), (6) and (7)[4/] of the Act.

4/ 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; (3) Discriminating in regard to hire or tenure of employment or any term or condition of

(continued...)

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. On September 6, 2011, I wrote a letter to the parties, advising that I was not inclined to issue a complaint in this matter and set forth my reasons for that conclusion. The parties were provided an opportunity to respond. Thorpe was provided several extensions of time to file a response. On October 18, 2011, she filed a reply.

Thorpe reiterates her claims against the State and CWA and adds the following claims: CWA provided no reason(s) for agreeing that it was "reasonable for JJC to require [Thorpe's] attendance at a fitness-for-duty evaluation" during the arbitration; CWA failed to submit the medical evaluations of Drs. Holstein and Massey, which show that Thorpe was fit for duty and therefore,

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4/ (...continued)
employment to encourage or discourage 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; (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; (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement; (7) Violating any of the rules and regulations established by the commission."

the JJC unjustifiably terminated her for being unfit; CWA failed to inform her that grievance arbitration was final and binding and failed to advise her of the appeals process following the issuance of an arbitration award; the State denied her worker's compensation claim; the State violated the Conscientious Employee Protection Act; the State acted unlawfully when it required her to take a fitness-for-duty exam without any criteria or governing policy, regardless of whether Thorpe consented to or passed the exam; she submitted to the exam and, therefore, her supposed refusal to take the exam cannot be the basis of her termination; she has a medical condition but is without health insurance; and the JJC's barring her from discussing her Law Against Discrimination case violates her due process rights.

Based upon the following, I find that the complaint issuance standard has not been met.

Thorpe began her employment with the State in 1983. In 2005, she became the Supervisor of Nursing Services at the JJC's New Jersey Training School. On August 15, 2008, Thorpe received a Final Notice of Disciplinary Action, terminating her employment for insubordination for her refusal to submit to a psychological fitness-for-duty examination. CWA Local 1040 grieved the termination under its collective negotiations agreement with the State. The parties were unable to resolve the matter. CWA filed for grievance arbitration, and an arbitrator was subsequently appointed to hear the matter.

Rosemarie Cipparulo, Esq., of Weissman & Mintz, LLC, represented CWA at the arbitration. Before the arbitration hearing, Cipparulo met with Thorpe and CWA representatives Victor Waller and Chris Young to prepare the case. At a preparation meeting on or about December 4, 2009, Thorpe and her representatives differed on how to proceed with her case. CWA considered and reconsidered cancelling the grievance arbitration. The arbitrator conducted the hearing on December 10, 2009.

The State presented three witnesses at the hearing - Robert Kanen, a psychiatrist the State retained to evaluate Thorpe, Fairbanks, and the JJC's Human Resources Manager. CWA presented two witnesses - Thorpe and Young. Both parties submitted documents to the arbitrator. During the hearing, the State was provided an opportunity to speak to its witnesses in advance of their testimonies. The arbitrator represented that a decision would be rendered within twenty days of the hearing. The arbitrator issued an award on February 12, 2010, denying the grievance and upholding Thorpe's termination.

On December 4, 2006, CWA filed an unfair practice charge against the State (Dkt. No. CO-2007-168). The charge alleged that the State violated the Act when it denied Thorpe her Weingarten rights. On August 15, 2007, the Director of Unfair Practices issued a decision dismissing the charge, finding that Thorpe did not have a reasonable expectation that a meeting to discuss her work duties and responsibilities would lead to discipline, as required under the Weingarten standards. D.U.P.

No. 2008-1, 33 NJPER 289 (¶110 2007). The decision provided a right to appeal by August 27, 2007. No appeal was filed.

Analysis

N.J.S.A. 34:13A-5.4c provides:

> . . . no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the 6-month period shall be computed from the day he was no longer so prevented.

See No. Warren Bd. of Ed., D.U.P. No. 78-7, 4 NJPER 55 (¶4026 1978); N.J. Turnpike Employees' Union, Local 194, IFPTE, AFL-CIO, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1980).

Thorpe's allegation that CWA violated the Act when it failed to appeal an administrative decision in 2007 is untimely. Thorpe has not presented any facts indicating that she was prevented from filing a timely charge. Since Thorpe did not file her charge and amendment until June 3, 2010 and August 9, 2010, respectively, this allegation is outside of the six month statute of limitations period. N.J.S.A. 34:13A-5.4c. I dismiss this portion of the charge.

Portions of the charges related to the grievance arbitration are timely. For purposes of this decision, I consider the operative date to be February 12, 2010, when the grievance arbitration award issued. Although some of Thorpe's allegations concern events more than six months older than the date she filed the charge, I presume that no charge would have been filed if she

had prevailed in the arbitration award. Accordingly, for purposes of this analysis, I will consider those portions of the charges to be timely filed.

A violation of N.J.S.A. 34:13A-5.4a(5) occurs when an employer fails to negotiate with the majority representative before changing a mandatory subject of negotiations, or knowingly refuses to comply with the terms of the collective negotiations agreement, or refuses to process grievances presented by the majority representative. Individual employees normally do not have standing to assert an a(5) violation because the employer's duty to negotiate in good faith runs only to the majority representative. N.J. Turnpike Authority, P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980); Camden Cty. Highway Dept., D.U.P. No. 84-32, 10 NJPER 399 (¶15185 1984). An individual employee may file an unfair practice charge and independently pursue a claim of an a(5) violation only where that individual has also asserted a viable claim of a breach of the duty of fair representation against the majority representative. Jersey City College, D.U.P. No. 97-18, 23 NJPER 1 (¶28001 1996); N.J. Turnpike, D.U.P. No. 80-10, 5 NJPER 518 (¶10268 1979).

N.J.S.A. 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 U.S. 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]

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).

Thorpe alleges that CWA irresponsibly presented her case at arbitration. Employee organizations are entitled to a wide range of reasonableness in determining how to best service their members. See Camden Cty. College, P.E.R.C. No. 88-28, 13 NJPER 755 (¶18285 1987). CWA's representatives were entitled to decide how to proceed with the case, so long as they did not act discriminatorily, arbitrarily or in bad faith. That CWA did not act in accordance with Thorpe's expectations, or achieve the results Thorpe desired, does not demonstrate bad faith. IBEW Local 64, D.U.P. No. 98-37, 24 NJPER 395 (¶29180 1998). No facts indicate that a different strategy at the arbitration would have resulted in a rescission or reduction of the discipline imposed.

Specifically, Thorpe asserts that CWA's failure to supply the arbitrator with reports from Drs. Holstein and Massey evidences its irresponsibility. Thorpe however, does not assert that either doctor was authorized by the JJC to perform the requisite fitness-for-duty exam on behalf of the JJC. Since Thorpe was terminated for her failure to submit to the requisite fitness-for-duty exam rather than being unfit for duty, neither doctor's report would have likely resulted in a rescission or reduction of the imposed discipline. Accordingly, the charge alleges no facts indicating that CWA acted arbitrarily, discriminatorily or in bad faith in its handling of Thorpe's grievance arbitration case.

CWA's alleged failure to advise Thorpe that grievance arbitration was final and binding and that an arbitration award may be appealed in court does not, without more, violate the duty of fair representation. Even if CWA was obligated to advise Thorpe that arbitration was final and binding, or that a statutorily-based appeal could be filed, she has not alleged facts indicating that CWA's omission was arbitrary, discriminatory or in bad faith. Cf., Hotel, Restaurant & Cafeteria Employees Union, Local No. 3 (Dasent), P.E.R.C. No. 2004-60, 30 NJPER 103 (¶40 2004) (the union's alleged *fraudulent* failure to advise an employee of her right to appeal warranted a complaint). No facts suggest that CWA misled Thorpe into believing that it/she had no right to appeal the award under N.J.S.A. 2A:24-8. See Carteret Ed. Assn. (Radwan), P.E.R.C. No. 97-146, 23 NJPER 390 (¶28177 1997). Accordingly, I find that CWA did not breach its duty of fair representation.

Under these circumstances and applicable law, I find that Thorpe has no legal standing to allege that her employer violated 5.4a(5) of the Act. I dismiss that allegation. N.J. Turnpike Authority; Jersey City College.

The Commission has also held that individual employees do not have standing to assert a 5.4b(3) or (4) violation. Only a public employer has standing to allege such violations. See Hamilton Tp. Bd. of Ed., P.E.R.C. No. 79-20, 4 NJPER 476 (¶4215 1978); Edison Tp. and Joseph Cies, D.U.P. No. 99-15, 25 NJPER 274 (¶30116 1999); CWA Local 1034 and Renaldo A. King, D.U.P. No. 2004-2, 29 NJPER 367 (¶113 2003); State of New Jersey (Hagedorn) and Knapp, D.U.P. No. 99-17, 25 NJPER 311 (¶30132 1999). Accordingly, I dismiss those allegations.

Thorpe also alleges a violation of 5.4b(1) and (2) of the Act. I have already dismissed allegations that CWA violated its duty during the grievance arbitration process. No other facts support either of these allegations. Although Thorpe has also alleged a violation of 5.4b(5), she has not cited any Commission rule or regulation which was violated. Accordingly, I dismiss that allegation.

Finally, I find no allegations in the charge which support a claim that the State has violated N.J.S.A. 34:13A-5.4a(1), (2), (3), (4), (6), or (7). Thorpe's allegations concern testimony and evidence which the State proffered at the grievance arbitration hearing. Under the parties' collective negotiations agreement, the arbitrator's award is final and binding. N.J.S.A. 2A:24-8 sets

forth the appeal standard to challenge a grievance arbitration award.[5/] Accordingly, I dismiss these alleged violations, also.

Lastly, allegations concerning Thorpe's rights under worker's compensation law, the Conscientious Employee Protection Act, and the Law Against Discrimination, and her access to health benefits, are beyond the Commission's jurisdiction.

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION

Jonathan Roth
Deputy Director of Unfair Practices

DATED: December 15, 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 December 27, 2011.

5/ Thorpe's assertions that the State acted unlawfully when it ordered her to take a fitness for duty exam and that she submitted to the fitness-for-duty exam concern the merits of her grievance, and are appropriately addressed in the context of the arbitration award.