D.U.P. No. 2012-14

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

In the Matter of

STATE OF NEW JERSEY (HUMAN SERVICES),

Respondent,

-and-

COMMUNICATION WORKERS OF AMERICA, LOCAL 1040,

Docket No. CI-2010-036

Respondent,

-and-

MARGO MORGAN,

Charging Party.

SYNOPSIS

The Director of Unfair Practices declines to issue a complaint on a charge filed by Ms. Morgan against her majority representative, the CWA, and her employer, the State of New Jersey. In dismissing the charge, the Director found that the CWA did not breach its duty of fair representation when it agreed to accept a written response to a grievance in lieu of a step two hearing and electing not to pursue the grievance beyond step two of the grievance procedure. The Director also concluded that the State did not violate the Act when it failed to post an available position. Additionally, the Director determined that the charge failed to allege facts which support a claim of retaliation for the exercise of protected activity or interference with rights guaranteed by the Act.

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Appearances:

For the Respondent - State,
Jeffrey S. Chiesa, Attorney General
(Brady Connaughton, Deputy Attorney General)

For the Respondent - CWA,
Weissman & Mintz, LLC, attorneys
(Molly Richardson, of counsel)

For the Charging Party,
Geoffrey B. Gompers, attorney

REFUSAL TO ISSUE COMPLAINT

On April 27, August 12, and December 20, 2010, Margo Morgan filed an unfair practice charge and amended charges against the State of New Jersey (State) and Communication Workers of America Local 1040 (CWA). The charge, as amended, alleges that the State

violated 5.4a(1), (3), and (5)[1/] of the New Jersey Employer-Employee Relations Act (Act) when it failed to post an available position; failed to provide Morgan a grievance decision following a step one grievance hearing concerning the posting, and issued a step two decision without providing her a grievance hearing and without considering the evidence presented at the first hearing. The charge alleges that these adverse employment actions took place after Morgan provided "damaging testimony" against the State in a Civil Service Commission proceeding.

The charge also alleges that the CWA violated 5.4b(1)[2/] of the Act when it waived Morgan's step two grievance hearing, depriving her of the opportunity to present her grievance. Morgan seeks a grievance hearing allegedly required under the parties' collective negotiations agreement and urges that her initial grievance be sustained, which would require the State to post the position.

1/ 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; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage 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."

2/ This subsection prohibits 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."

The State and CWA deny violating the Act. The State contends that the CWA agreed to waive the step two hearing because the grievance implicated an explicit contract provision and did not necessitate a hearing; that it provided Morgan a decision on her grievance; and that its denial of the grievance was not appealed and is now time-barred. The CWA asserts that it advanced Morgan's grievance to step two, despite its belief that the issue did not concern a position covered by the collective negotiations agreement. CWA also asserts that the grievance was not pursued because it lacked merit.

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 27, 2011, I wrote to the parties, advising that I was not inclined to issue a complaint in this matter and set forth the reasons for that conclusion. The parties were provided an opportunity to respond. On October 25, 2011, Morgan (not counsel) filed a response. Based upon the following facts, I find that the complaint issuance standard has not been met.

Morgan filed a grievance on July 26, 2009, that Article 13, Section A of the parties' collective negotiations agreement was violated because the State failed to post a job opening for a

position entitled, Associate Hospital Administrator I. A notice of vacancy for this title was posted in 2003 and Moran unsuccessfully bid to fill it. The most recent and disputed vacancy was advertised in "The Philadelphia Inquirer."

Article 13, Section A provides in pertinent part:

> To provide promotional opportunities for employees within a department or organizational unit, existing or planned job vacancies shall be prominently posted within the promotional examination scope established by the Department of Personnel for fourteen (14) days. Broader posting may be undertaken by the department at its option.

A step one grievance hearing was scheduled for April 15, 2009. On or about April 9, 2009, Morgan requested an adjournment. The grievance hearing was conducted on June 24, 2009. Jill Thaon served as the hearing officer. The evidence proffered to support the grievance included postings for the vacant Administrator I position. In October, 2009, Thaon retired without issuing a grievance decision. In November or December, 2009, Morgan advised CWA staff representative Michele Long-Vickers that Thaon had not issued a step one decision and asked that CWA advance the grievance to step two. On or about December 21, 2009, Long-Vickers appealed the grievance to step two of the contractual grievance procedure.

In January or February, 2010, Anita Pinkas, Employee Relations Administrator, informed Long-Vickers of the State's intention to respond in writing to the grievance rather than schedule and conduct a step two meeting, citing as justification

the "unambiguous nature" of the issue. Specifically, Pinkas explained that the Administrator 1 title is an unclassified, managerial title not within the scope of the negotiations unit and could not require a posting under the parties' agreement or any pertinent statutes or regulations. Long-Vickers agreed to the written response in lieu of a step two hearing.

On March 17, 2010, Pinkas provided Morgan a written step two decision, denying the grievance. The decision explained the inapplicability of the contractual posting provision and pertinent statutes and regulations because the title was outside the negotiations unit. The response provides in a pertinent part:

> As to a violation of Article 13 of the Unit Agreement, as a managerial classification the title [Administrator 1] is not recognized as a title covered by the Unit Agreement, pursuant to Article 1, Recognition of Rights and Definitions, Section A. Accordingly, the terms and conditions of the Unit Agreement are not applicable to that title.

On an unspecified date, Morgan served as a witness for a fellow employee in an action against Ancora Hospital, held before an Administrative Law Judge. Morgan's testimony was damaging to the State's case. Morgan contests the selection of the person hired to fill the disputed vacant position.

ANALYSIS

A violation of 5.4a(5) occurs when an employer fails to negotiate an alteration of a mandatory subject of negotiations with the majority representative, 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., 386 U.S. at 190, 64 LRRM 2376]

Vaca concerned the refusal of a union to process a grievance to binding arbitration. The Court wrote:

> . . . Nor do we see substantial danger to the interests of the individual employee if his statutory agent is given the contractual power honestly and in good faith to settle grievances short of arbitration . . . [386 U.S. 192, 64 LRRM 2377]

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).

The charge alleges no facts indicating that CWA acted arbitrarily, discriminatorily or in bad faith by waiving Morgan's step two hearing and electing not to pursue the grievance. Article 13 of the agreement limits the posting requirement to "promotional opportunities for employees *within a department or organizational unit*" (emphasis added). No party disputes that the title at issue is outside the CWA negotiations unit. I do not find that CWA's fiduciary duty extends to a title beyond the recognition provision in its collective agreement. See PBA Local 187, P.E.R.C. No. 2005-78, 31 NJPER 173 (¶70 2005). CWA processed Morgan's grievance through step two of the contractual grievance procedure, despite the limitations set forth in Article 13 of the agreement. Morgan

was provided a response to her grievance. Under all of these circumstances, Morgan has not alleged facts indicating that CWA may have violated its duty of fair representation under 5.4b(1) of the Act. I also find that Morgan does not have legal standing to allege that the State violated 5.4a(5) of the Act. See N.J. Turnpike Authority; Jersey City College.

A required job posting likely implicates a contract provision. The unfair practice charge does not allege a contract repudiation and Morgan does not assert that any contract provision clearly supports her grievance. An unfair practice charge filed against a public employer must set forth something more than a mere breach of contract allegation to meet the complaint issuance standard. State of New Jersey (Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). Even if CWA had breached its duty of fair representation, that fact alone would not convert an employer's mere breach of contract into an unfair practice. Hudson Cty., P.E.R.C. No. 2010-15, 35 NJPER 346 (¶116 2009).

Violations of 5.4a(3) are evaluated under the test set forth in In re Bridgewater Tp., 95 N.J. 235 (1984). Under Bridgewater, the charging party must prove, by a preponderance of the evidence, that protected activity was a motivating factor in an adverse employment action. In order to meet the complaint issuance standard, an a(3) charge must allege that an adverse employment action occurred and was related to protected activity.

I assume that Morgan's testimony at an OAL proceeding is protected activity within the Act's meaning. The charge however,

fails to allege the date or approximate date on which Morgan provided testimony and any nexus between that testimony and any adverse employment action; nothing suggests that the State violated the Act by allegedly declining to post the disputed position. Accordingly, I dismiss the 5.4a(3) allegation.

Finally, Morgan has alleged no facts to demonstrate that the State has interfered with, restrained or coerced her in the exercise of the rights guaranteed by the Act. Accordingly, I also dismiss the 5.4a(1) allegation.

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR
OF REPRESENTATION

Jonathan Roth
Deputy Director of Unfair Practices

DATED: April 3, 2012
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 April 16, 2012.