D.U.P. No. 2013-7

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

In the Matter of

BOROUGH OF EATONTOWN,

Respondent,

-and- Docket No. CI-2013-028

DWAYNE C. CONNELLY,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses in part an unfair practice charge brought by Dwayne C. Connelly, an individual. Connelly alleged that the Borough of Eatontown violated subsections N.J.S.A. 34:13A-5.4a(1), (2), (3), (4), (5) and (7), when they refused to provide him with information regarding his contractual grievance contesting promotional opportunities for unit employees and when the Director of Public Works allegedly told two shop stewards that he would not approve any vacation time off in 2013 unless Connelly's right to file grievances was "taken away." The Director found that the Borough's obligation to supply information is to the majority representative, and not to individuals. The Director also found that Connelly had no standing to bring an a(5) claim and found no facts supporting an allegation of a(2), a(3), a(4), and a(7). However, the Director issued a complaint on the a(1) claim because the alleged statements could have a tendency to interfere with Connelly's protected right to file grievances.

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Appearances:

For the Respondent,
Apruzzese, McDermott, Mastro & Murphy, attorneys
(Arthur R. Thibault, Jr., of counsel)

For the Charging Party,
(Dwayne C. Connelly, pro se)

DECISION

On January 30, 2013, Dwayne C. Connelly ("Connelly"), an employee in the Department of Public Works of the Borough of Eatontown ("Borough"), filed an unfair practice charge against the Borough. Connelly alleges that on January 15, 2013, the Borough refused to provide him with information regarding his contractual grievance contesting promotional opportunities for negotiations unit employees. The charge also alleges that on unspecified date(s) in "two separate meetings," the Director of Public Works told two named shop stewards that he would not approve any vacation time off in 2013 unless Connelly's right to file grievances "is . . . somehow taken away from him." The

Borough's conduct allegedly violates 5.4a(1), (2), (3), (4),(5), and (7)[1/] of the New Jersey Public Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act). As a remedy, Connelly seeks: the rescission of a May 3, 2011 settlement agreement disposing of unfair practice charge Docket No. CI-2011-034; the restoration of his eligibility for per diem employment as it existed before his 2011 demotion; and payment for all promotional opportunities he was denied since May 3, 2011.

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.

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. (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 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. (7) Violating any of the rules and regulations established by the commission."

N.J.A.C. 19:14-2.3. In correspondence dated April 19, 2013, I advised the parties that I was not inclined to issue a complaint on all but one of the alleged violations of the Act in this matter and set forth the reasons for that conclusion. The parties were provided an opportunity to file responses. On April 26, 2013, the charging party filed a response. Based upon the following facts I find that the complaint issuance standard has not been met regarding allegations that section 5.4a(2), (3), (4), (5), and (7) were violated and has been met with respect to section 5.4a(1).

Dwayne C. Connelly is a Borough employee included in a collective negotiations unit of all blue collar employees represented by Communications Workers of America Local 1038 ("CWA"). The Borough and the CWA signed a collective negotiations agreement extending from January 1, 2010 through December 31, 2013. The agreement includes a multi-step grievance procedure.

Sometime in April, 2011, Connelly was suspended from work for ten (10) days and demoted from sign shop operator to laborer. CWA filed two contractual grievances and an unfair practice charge (Docket No. CO-2011-034) challenging Connelly's discipline. On or about May 12, 2011, the parties executed a settlement agreement in which the Borough agreed to reduce Connelly's discipline from ten (10) days to five (5) days and the

CWA and Connelly agreed to withdraw both grievances and the unfair practice charge. The agreement did not disturb Connelly's demotion to laborer.

In June, 2011, Connelly, a union representative at the time, filed a grievance alleging that he was not awarded a special skills assignment in the sign shop, where he had worked before his demotion. The grievance was denied at the first two steps of the contractual grievance procedure (Article 27) and was not appealed to step 3 by the CWA. On September 22, 2011, Connelly sent a letter to the Borough Administrator, writing that he disagreed with the decision and requesting certain information needed to process the grievance to the next step. The requested information was not provided to Connelly.

In November, 2011, the CWA discontinued Connelly's status as union representative. More than one year later, on December 20, 2012, Connelly, in his capacities as a unit employee and CWA member, again requested the Borough Administrator to provide the information sought about fifteen (15) months earlier. On December 24, 2012, the Borough Administrator issued a letter to Connelly, writing that the information would not be provided.

Connelly alleges that on unspecified dates, Director of Public Works Frank Cannella ("Cannella") said in two separate meetings attended by CWA representatives that he would not approve any vacation time in 2013 unless Connelly's right to file

grievances was revoked. The charge also alleges that Cannella required all three of his division managers to disseminate that statement to the CWA membership.

ANALYSIS

A public employer must supply information to a majority representative if there is a probability that the information is potentially relevant and that it will be of use to the union in carrying out its representational duties and contract administration, which includes grievance processing (emphases added). State of N.J. (OER) and CWA, P.E.R.C. No. 88-27, 13 NJPER 752 (¶18284 1987) recon den. P.E.R.C. No. 88-145, 13 NJPER 841 (¶18323 1997), aff'd NJPER Supp. 2d 198 (¶177 App. Div. 1988). Connelly appears to have last acted on behalf of CWA on or about September 22, 2011, when he requested information from the Borough on a pending grievance. His status as a CWA representative appears to have ended in November, 2011.

An individual employee normally does not have legal standing to assert an 5.4a(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 5.4a(5) violation only where that person has also asserted a viable claim

of a breach of the duty of fair representation against a majority representative. See, e.g. Vaca v. Sipes, 361 U.S. 171, LRRM 2369 (1967). Connelly has not alleged a violation of the duty of fair representation against CWA; as an individual filing an unfair practice charge, he does not appear to have standing to allege that the Borough has refused to negotiate in good faith or refused to process his grievance under section 5.4a(5) of the Act. I dismiss this allegation.

In re Bridgewater Tp., 95 N.J. 235 (1984) sets forth the legal standard by which allegations of discrimination under section 5.4a(3) and normally, 5.4a(4) are evaluated. See Randolph Tp. Bd. of Ed. and Randolph Tp. Ed. Assn., P.E.R.C. No. 82-119, 8 NJPER 365 (¶13167 1982), aff'd NJPER Supp. 2d 136 (117 App. Div. 1983). Bridgewater instructs that no violation will be found unless the charging party proves, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in an adverse employment action. Connelly has not alleged that he suffered an adverse employment action as a consequence of engaging in conduct protected by the Act. I dismiss his 5.4a(3) and (4) allegations.

In New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421, 422-423 (¶4189 1978), the Commission articulated this standard for finding a violation of section 5.4a(1) of the Act:

> It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification.

In Commercial Tp. Bd. of Ed. and Commercial Tp. Support Staff Ass'n and Collingwood, P.E.R.C. No. 83-25, 8 NJPER 550, 552 (¶13253 1982), aff'd 10 NJPER 78 (¶15043 App. Div. 1983),the Commission explained that the tendency of an employer's conduct to interfere with employee rights is the critical element of an 5.4a(1) charge, holding that " . . . proof of actual interference, restraint, or coercion is not necessary." Commercial Tp. Bd. of Ed., 8 NJPER at 552; citing In re City of Hackensack, P.E.R.C. No. 77-49, 3 NJPER 143, 144 (1977), rev'd on other grounds, 162 N.J. Super. 1 (App. Div. 1978), aff'd as mod., P.E.R.C. No. 83-25, 82 N.J. 1 (1980).

In deciding whether an employer statement violates section 5.4a(1), the Commission has applied a balancing test acknowledging two important interests: the employer's right of free speech and the employees' right to be free from coercion, restraint or interference in the exercise of protected rights. State of N.J. (Trenton State College), P.E.R.C. No. 88-19, 13 NJPER 720, 721 (¶18269 1987).

Connelly has alleged that Director Cannalla told CWA representatives in two meetings that he would not approve

vacation requests from employees in 2013 unless Connelly's right to file grievances was revoked and that he advised three employer representatives to "distribute that information" among the CWA membership. I infer that Canella allegedly issued these statements sometime between December 20, 2012 and January 30, 2013, the filing date of this unfair practice charge. I also find that the alleged statements could have a tendency to interfere with Connelly's protected right to process grievances and the unit members' rights to be free from coercion in the exercise of contractual and statutory rights. That no employee has been denied vacation time-off in 2013 does not negate the possibility that the threats were issued. Accordingly, I find that the allegations in the charge warrant the issuance of a complaint on the 5.4a(1) claim.

No facts support the allegation that the Borough sought to dominate or interfere with the formation, existence or administration of an employee organization; I therefore dismiss the 5.4a(2) allegation.

In High Point Reg. Bd. of Ed., D.U.P. No. 80-23, 6 NJPER 214, 215 (¶11105 1980), the Director determined that under 5.4a(7), the Commission will not issue a complaint where the charging party does not cite to a specific Commission rule or regulation alleged to have been violated. Connelly has failed to

cite to any rule or regulation. His a(7) claim is dismissed, in view of that omission.

ORDER

Accordingly, I will issue a Complaint under separate cover regarding only the 5.4a(1) allegation. The remaining allegations are dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

Gayl R. Mazuco

DATED: May 22, 2013
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 3, 2013.