

D.U.P. NO. 2015-1

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

In the Matter of

STATE OF NEW JERSEY
(JUVENILE JUSTICE COMMISSION),

Respondent,

-and-

Docket No. CO-2014-129

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 1040,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge alleging that the State of New Jersey, Juvenile Justice Commission (JJC) unlawfully reassigned a shop steward in violation of 5.4(a)(1), (2) and (3). The shop steward was also a member of the Communications Workers of America, Local 1040 (CWA) and a teacher at a juvenile detention facility. The JJC received allegations from a juvenile resident that the shop steward sexually harassed the resident in violation of the Prison Rape Elimination Act (PREA), 42 U.S.C. 15602 et seq.. In accordance with the PREA, the shop steward was reassigned to a different work location in the facility to ensure the shop steward did not have contact with the alleged victim while the JJC's investigation was pending. The JJC later determined the allegations were unsubstantiated and promptly returned the shop steward to his previous work location. The CWA alleged the JJC reassigned the shop steward because of his status and position as a CWA shop steward. The Director disagreed and noted that the shop steward's status as a union representative did not insulate him from an investigation the JJC was required to undertake under the PREA. The Director also noted there were no facts alleging the PREA investigation was initiated as a pretext that concealed an illegal motive.

D.U.P. NO. 2015-1

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

In the Matter of

STATE OF NEW JERSEY
(JUVENILE JUSTICE COMMISSION),

Respondent,

-and-

Docket No. CO-2014-129

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 1040,

Charging Party.

Appearances:

For the Respondent
John Jay Hoffman, Acting Attorney General
(Peter H. Jenkins, Deputy Attorney General)

For the Charging Party
Robert O. Yaeger, Principal Staff Representative

REFUSAL TO ISSUE COMPLAINT

On December 16, 2013, the Communications Workers of America, Local 1040 (Local 1040 or Charging Party) filed an unfair practice charge against the State of New Jersey, Juvenile Justice Commission (JJC or Respondent). The charge alleges that on December 5, 2013, the JJC violated sections 5.4a(1), (2) and (3)^{1/} of the New Jersey Employer-Employee Relations Act (Act),

^{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 (continued...)"

N.J.S.A. 34:13A-1 et seq., when the JJC reassigned a CWA shop steward to a different unit of a juvenile detention facility. The charge also alleges that the JJC's Assistant Superintendent "harassed and intimidated" the shop steward.

The Commission has authority to issue a complaint where it appears that a charging party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4(c); 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; CWA Local 1040, D.U.P. No. 2011-9, 38 NJPER 93 (¶20 2011), aff'd P.E.R.C. No. 2012-55, 38 NJPER 356 (¶120 2012).

On July 22, 2014, I issued a letter to the parties tentatively dismissing the charge and inviting responses. No responses were filed.

I find the following facts.

The CWA is the exclusive majority representative for the State Professionals Unit. CWA Local 1040 represents professional

1/ (...continued)
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."

unit employees working in the Juvenile Justice Commission's Medium Security Facility (JMSF) in Bordentown, New Jersey.

Peter Scutti is a member of CWA Local 1040's professionals' unit and is a teacher at the JMSF. Scutti is also a shop steward at the JMSF. Christian Nnajifor is the Assistant Superintendent of the JMSF.

On December 4, 2013, the JJC received allegations from a JMSF resident that Scutti made inappropriate comments of a sexual nature towards the resident. The allegations were immediately reported to designated JJC officials. Investigator Robert J. Tursi, Jr. conducted an investigation into the allegations pursuant to JJC policy.

When Scutti reported for work on December 5, 2013, he was advised that he was to report to the Hayes Building, a facility for female residents. Later that day, JJC officials informed Scutti that a charge had been filed against him under the Federal Prison Rape Elimination Act (PREA) and that he would be separated from the alleged victim and reassigned to the JMSF's North Unit while the PREA investigation was pending. Scutti's terms and conditions of employment, other than his work location, were not altered.

On February 24, 2014, the JJC concluded the PREA investigation and determined the charge to be unfounded. Upon

the issuance of this determination, Scutti was returned to his previous work location where he remains to the present day.

The JJC has adopted and implemented a policy to ensure compliance with the PREA. The PREA is a comprehensive statutory and regulatory scheme designed to impose national standards on all adult prisons and juvenile facilities for the "detection, prevention, reduction and punishment of prison rape." 42 U.S.C. §15602(3).^{2/}

The standards for determining whether an employer has violated N.J.S.A. 34:13A-5.4(a)(3) are set forth in In re Bridgewater Tp., 95 N.J. 235 (1984). No violation will be found unless the charging party has proved, by a preponderance of evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be demonstrated by direct evidence or circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile toward the exercise of protected rights. Id. at 246.

We have previously held that a public employee's status as a union officer or representative does not, by itself, insulate the union representative from an employer's investigation into

^{2/} The PREA is codified at 42 U.S.C. §15602 et seq. and 28 C.F.R. Part 115, Subpart D.

workplace harassment or discrimination. Rockaway Tp. Bd. of Ed., D.U.P. No. 2014-6, 40 NJPER 293 (¶112 2013); State of New Jersey (Trenton State Coll.), H.E. No. 90-48, 16 NJPER 337 (¶21139 1990), adopted P.E.R.C. No. 91-1, 16 NJPER 419 (¶21175 1990).

This holding is premised on the fact that state and federal anti-discrimination and anti-harassment laws require employers to investigate all allegations of discrimination or harassment and take prompt remedial action. An employer has a legitimate and substantial business justification for complying with these statutory requirements even where the allegations in question turn out to be without merit. Rockaway Tp. Bd. of Ed.; State of New Jersey (Trenton State Coll.)

In Rockaway Tp. Bd. of Ed., the Director of Unfair Practices dismissed an unfair practice charge alleging that the board of education violated section 5.4a(3) by investigating the vice president of an education association for workplace harassment of a co-worker. The association claimed the investigation was conducted because of the association vice president's status as vice president and as a member of the association's negotiations committee. The board asserted it had a statutory obligation under state and federal anti-discrimination laws, as well as its affirmative action policy, to investigate all allegations of workplace harassment, even those involving association officers. Rockaway Tp. Bd. of Ed., 40 NJPER 293. The Director agreed with

the board and found that the employer had a prerogative and legal obligation to investigate the allegations under state and federal law and that conducting the investigation against a union official, by itself, did not violate the Act. Id. The Director also noted that the fact that the allegations might appear to be without merit does not relieve the employer of its obligation to investigate the allegations. Id.

Similar to the anti-discrimination laws discussed in Rockaway Tp. Bd. of Ed., the PREA requires all employers operating juvenile correction facilities to investigate all allegations of sexual abuse or harassment. 28 C.F.R. §115.322(a).^{3/} Employers subject to PREA must also ensure all investigations undertaken pursuant to it's requirements are completed. Id. Employers must adopt a written policy "mandating zero tolerance toward all forms of sexual abuse and sexual harassment" and describing the employer's approach to preventing, detecting and responding to such conduct. 28 C.F.R. §115.311(a). All JJC staff must immediately report "any knowledge, suspicion, or information they receive regarding an incident of sexual abuse

^{3/} Sexual harassment is defined broadly under the PREA to include comments or gestures by a staff member towards a juvenile resident that are of a "sexual nature", as well as any "demeaning references to gender, sexually suggestive or derogatory comments about body or clothing, or obscene language or gestures." 28 C.F.R. §115.6. The JJC's PREA policy mirrors this definition, as well as other PREA requirements.

or sexual harassment." 28 C.F.R. §115.361(a). Once reported, the employer has the ability under the PREA to remove staff members from locations where they have contact with the alleged victim pending the outcome of the investigation. 28 C.F.R. 115.366(a). Indeed, the employer *must* separate the alleged victim from his or her abuser and cannot be restricted from doing so by agreement or through collective bargaining with the alleged abuser's majority representative.^{4/} Id., 28 C.F.R. §115.364(a).

Here, I dismiss the CWA's 5.4a(3) allegation since the JJC was obligated under the PREA to investigate the charge against Scutti, as well as to separate Scutti from the alleged victim while the investigation was pending. Although CWA alleges Scutti's reassignment was implemented because Scutti is a shop steward, his status as a shop steward does not insulate him from an investigation by the JJC of a PREA charge. No facts suggest that the harassment charge was lodged as a pretext for the purpose of discriminating against Scutti for engaging in protected conduct. Aside from reassignment, the JJC did not alter Scutti's terms and conditions of employment and it promptly returned him to his previous work location once the investigation

^{4/} The employer and majority representative may only collectively bargain over the manner in which discipline is imposed and whether or not a "no-contact" assignment during an investigation should be expunged from a staff member's personnel file if the allegations are unsubstantiated. 28 C.F.R. §115.366(b).

was completed. The JJC, by reassigning Scutti to a unit where he would not have contact with the alleged victim and investigating the PREA charge to completion, acted within its prerogative to satisfy its obligations under the PREA.

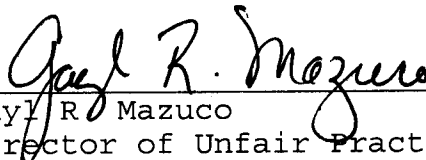
The CWA also alleges that Scutti has been "harassed and intimidated" by Assistant Superintendent Christian Nnajifor. CWA has not alleged facts that might substantiate allegations of harassment and intimidation in response to protected conduct, nor has it plead with specificity the time, place or manner in which Nnajifor's harassment occurred. This bare allegation does not satisfy the complaint issuance standard. N.J.A.C. 19:14-1.3(a)(3); Op. of Edison, P.E.R.C. No. 2013-84, 40 NJPER 35 (¶14 2013).

Accordingly, I find that the CWA's allegations do not satisfy the complaint issuance standard.^{5/}

^{5/} The CWA has alleged no facts indicating that the JJC violated sections 5.4(a)(1) or (a)(2). I dismiss those allegations, also.

ORDER

The unfair practice charge is dismissed.



Gayl R. Mazuco
Director of Unfair Practices

DATED: August 21, 2014
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 September 2, 2014.