

D.U.P. NO. 2015-13

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

In the Matter of

STATE OF NEW JERSEY
GREYSTONE PSYCHIATRIC HOSPITAL,
Respondent,

-and-

Docket No. CI-2013-054

COMMUNICATION WORKERS OF AMERICA,
Respondent,

-and-

ANNE WYVILLE,
Charging Party.

SYNOPSIS

The Director dismisses an unfair practice charge filed by state employee Anne Wyville against her majority representative, CWA Local 1040, and the State. On or around March 18, 2013, Wyville received an unsatisfactory performance review from her supervisor who is a CWA shop steward, and two days later filed a grievance claiming that her supervisor violated the respect and dignity clause of the parties' contract. Wyville alleged that the supervisor's conduct violated subsection 5.4a(3) and 5.4a(5) of the Act. Wyville alleged CWA violated its duty of fair representation by failing to contact her regarding a hearing for the grievance she filed against the supervisor. The Director found that Wyville did not allege facts indicating that CWA may have breached its duty of fair representation because at most her charge suggests that CWA negligently processed her grievance because a hearing was not scheduled within the roughly two-month period between Wyville's grievance filing and her unfair practice charge filing. The Director found that Wyville did not set forth any facts indicating that the State was hostile to the exercise of protected activity since her negative performance review came two days before the filing of the grievance, and she suffered no adverse employment action following the filing of her grievance. The Director further found that Wyville lacked standing to assert a subsection 5.4a(5) allegation because she is an individual and CWA did not breach its duty of fair representation.

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Appearances:

For the Respondent,
John Jay Hoffman, Acting Attorney General
(Lawrence Fox, of counsel)

For the Respondent,
Weissman and Mintz, attorneys
(Annmarie Pinarski, of counsel)

For the Charging Party,
(Anne Wyville, pro se)

REFUSAL TO ISSUE COMPLAINT

On May 17, 2013, Anne Wyville (Charging Party) filed an unfair practice charge against Greystone Park Psychiatric Hospital (Greystone) and Christopher Young, a staff representative for Communication Workers of America Local 1040

(CWA).^{1/} The charge alleges that on February 26 and 28, 2013, and on March 6, 2013, Wyville's immediate supervisor, Mary Yellin, emailed various staff members in an effort to undermine Wyville's professional recommendations. Wyville, who is a speech/hearing specialist, alleges that on March 18, 2013, Yellin wrote a performance evaluation of Wyville, admonishing her for not following the "chain of command," specifically that she should not contact the Acting Chief of Medicine at Greystone. The charge alleges that Yellin's admonitions violated 5.4a(3) and (5)^{2/} of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq. and requests relief in the form of reassignment to a new supervisor and maintenance of a respectful work environment.

1/ The New Jersey Employer-Employee Relations Act provides the Commission with jurisdiction over the conduct of public employers, public employee representatives, and their agents. N.J.S.A. 34:13A-1 et seq. The named individual will be considered as an agent of the organization that the individual represents, rather than as a separate respondent.

2/ These provisions prohibit public employers, their representatives or agents from "(3) [d]iscriminating in regard to hire or tenure of employment or any term and condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act" and "(5) [r]efusing 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."

Wyville has also alleged that Yellin is a CWA representative. She further claims that CWA violated the Act by failing to hold a hearing after she filed a contractual grievance against Yellin on March 20, 2013. Wyville's grievance asserted that Yellin's treatment of her violates the respect and dignity clause of the contract. Wyville did not identify in her charge any provisions of the Act that she contends CWA violated.

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; 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 April 21, 2015, I issued a letter to the parties setting forth my tentative findings and conclusions. I invited the parties to respond by the close of business on April 30, 2015. No party filed a response. Based upon the following facts, I find that the complaint issuance standard has not been met.

CWA is the majority representative for a state-wide unit of professional employees, which includes the title Wyville occupies, speech hearing specialist. Greystone is a State psychiatric facility, and it is part of the Department of Human Services (DHS). The State is a public employer within the

meaning of the Act. The applicable collective negotiations agreement extends from July 1, 2011 through June 30, 2015.

On or around March 18, 2013, Wyville received a performance evaluation from her supervisor, Director Yellin, which identified some areas of her work as unsatisfactory. Two days later, on March 20, 2013, Wyville filed a grievance. Her grievance alleges that Yellin does not treat her "with dignity and respect regarding [her] job functions and knowledge of [her] job." Wyville's grievance alleges that Yellin violated Article 2C:b of the contract, which provides that "[t]he State and the Union agree that the working environment shall be characterized by mutual respect for the common dignity to which all individuals are entitled. It is agreed that verbal and/or physical harassment of an employee is inappropriate." As a remedy for her grievance, she requested to be transferred to a different supervisor, and also requested that "Ms. Yellin should cease and desist" her treatment of Wyville.

On May 17, 2013 Wyville filed this unfair practice charge alleging in part that she had not been contacted by her CWA representative concerning the grievance and that no hearing had been scheduled.

In November 2013, DHS transferred Wyville from Greystone to another facility. Wyville's request for a new supervisor was also granted.

Claims Against CWA

Although Wyville did not identify any provision of subsection 5.4b that she believes CWA violated, the substance of her charge asserts a duty of fair representation claim for failing to contact her regarding a hearing for the grievance that she filed. Accordingly, this claim will be analyzed under the duty of fair representation framework.

CWA denies violating its duty of fair representation, and contends that Wyville did not set forth any facts that establish discriminatory, arbitrary or unreasonable conduct. It claims that it processed Wyville's grievance, admitting it had not scheduled the first step grievance hearing by time Wyville filed the unfair practice charge due to a backlog of grievances at the time. CWA asserts that before Wyville filed the unfair practice charge, her shop steward had contacted Greystone's human resource department to arrange her reassignment to another supervisor. CWA further argues that Wyville's charge is moot because Wyville has already received the requested relief of a new supervisor. By May 2013, Wyville was reporting to Dr. Melk, the Acting Chief of Medicine at Greystone, rather than Director Yellin. In November 2013, Wyville was transferred from Greystone to Hunterdon Developmental Center.

In Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 64 LRRM 2369 (1967), the United States Supreme Court ruled that unions owe a

duty of fair representation, which is breached “. . . only when a union’s conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith.” New Jersey courts have consistently adopted and applied the Vaca standard. See e.g., Lullo v. International Ass’n of Fire Fighters, 55 N.J. 409 (1970); Belen v. Woodbridge Tp. Bd. of Ed., 142 N.J. Super. 486 (App. Div. 1976), certif. denied, 72 N.J. 458 (1976).

A majority representative is afforded a wide range of reasonableness in serving the unit it represents. PBA Local 187, P.E.R.C. No. 2005-78, 31 NJPER 173, 175 (¶70 2005)(citing Belen, 142 N.J. Super. at 490-91). For example, the duty of fair representation does not require a union to process non-meritorious grievances. Id. at 174 (citing Carteret Ed. Ass’n, P.E.R.C. No. 97-146, 23 NJPER 390 (¶28177 1997)). Moreover, “mere negligence, poor judgment, or ineptitude in grievance handling,” alone do not suffice to prove a breach of the duty of fair representation. Id. (citing Glen Ridge School Personnel Ass’n, P.E.R.C. No. 2002-72, 28 NJPER 251 (¶33095 2002)(additional citations omitted)).

I find that Wyville has not alleged facts indicating that CWA may have breached its duty of fair representation. No facts suggest that CWA handled her grievance in an arbitrary, discriminatory or bad faith manner. While Wyville notes that her then-immediate supervisor, Director Yellin, is a CWA shop

steward, no other facts suggest a possible conflict of interest or breach of the duty of fair representation. At most, Wyville's charge suggests that CWA negligently processed her grievance because a hearing was not scheduled within the roughly two-month period between Wyville's grievance filing and her unfair practice charge filing. That conduct, standing alone, does not implicate the duty of fair representation. Accordingly, I decline to issue a complaint on the allegations regarding this aspect of the charge.^{3/}

Claims Against DHS (Greystone)

I find that Wyville has not alleged facts indicating that DHS violated subsection 5.4a(3) of the Act. In Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), the New Jersey Supreme Court upheld the Commission's standard for determining whether an employer's action violates subsection 5.4a(3). The charging party must prove by a preponderance of the evidence on the entire record that protected activity was a substantial or motivating factor in the employer's adverse action. Id. at 244. This may be done by direct or circumstantial evidence which demonstrates all of the following: (1) the employee engaged in protected activity under the Act; (2) the

^{3/} I decline to address the mootness argument raised by CWA in its defense because I conclude that the charge should be dismissed on other grounds.

employer knew of this activity; and (3) the employer was hostile toward the exercise of the protected activity. Id. at 246.

Protected activity in this context refers to conduct by public employees that implicates their right under the Act "to form, join and assist any employee organization or to refrain from any such activity . . ." N.J.S.A. 34:13A-5.3. The filing of a grievance is a "fundamental example of protected activity" under our Act. Pine Hill Bd. of Ed., P.E.R.C. No. 86-126, 12 NJPER 434, 437 (¶17161 1986).

Wyville's charge does not set forth facts establishing that DHS was in any way hostile to the exercise of protected activity. Wyville's charge states that she received her negative performance review two days before (emphasis added) she filed a grievance complaining about her supervisor. Specifically, Wyville's charge alleges that she received the negative performance review from her supervisor on March 18, 2013, and subsequently filed a grievance on March 20, 2013. Wyville alleges no facts that demonstrate she suffered any adverse employment action following the filing of her grievance. Therefore, I find that no facts in Wyville's charge support a violation of 5.4a(3) of the Act.

I also find that Wyville has no legal standing to allege a violation of subsection 5.4a(5) of the Act. Individual employees generally lack 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 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). Because I find that CWA did not breach its duty of fair representation, I also find that Wyville therefore lacks standing to claim violation of section 5.4a(5) of the Act.

For all these reasons, I conclude that the charge does not meet the complaint issuance standard.

ORDER

The unfair practice charge is dismissed.

/s/Gayl R. Mazuco
Director of Unfair Practices

DATED: May 5, 2015
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 May 19, 2015.