

D.U.P. NO. 2018-7

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

In the Matter of

STATE OF NEW JERSEY,  
DEPARTMENT OF COMMUNITY AFFAIRS,  
Respondent,

-and-

COMMUNICATIONS WORKERS OF AMERICA  
LOCAL 1039,  
Respondent,

Docket No. CI-2017-015

-and-

CHARLES A. CONSTANTINE,  
Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed against a majority representative and the State of New Jersey. The charge alleged that the majority representative breached its duty of fair representation when it elected not to pursue a grievance to arbitration and the State retaliated against the charging party. The Director noted that majority representatives do not have the duty to process every grievance to arbitration, and declines to issue a Complaint where a majority representative has decided not to pursue a grievance to arbitration and there are no allegations that it engaged in unlawful conduct during the appeal process. The Director also determined that the allegations made against the State concern a disciplinary dispute only and the charging party's claim of a violation under the Conscientious Employee Protect Act (CEPA), N.J.S.A. 34:19-1 et seq., is not within PERC's jurisdiction.

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Appearances:

For the State of New Jersey  
Christopher S. Porrino, Attorney General  
(Peter H. Jenkins, DAG)

For the Communications Workers of America  
Weissman & Mintz, LLC  
(Charlette Matts-Brown, on the brief)

For the Charging Party  
Charles A. Constantine, pro se

**REFUSAL TO ISSUE COMPLAINT**

On December 22, 2016, Charles Constantine (Constantine) filed an unfair practice charge against his employer, the State of New Jersey, Department of Community Affairs (State) and his majority representative, Communications Workers of America and Communications Workers of America Local 1039 (CWA). The gravamen of the charge against CWA alleges that it unlawfully refused to

provide Constantine paid representation in an arbitration of a Final Notice of Disciplinary Action (FNDA) that issued on December 7, 2015. The FNDA concerns a 10-day disciplinary suspension imposed by Constantine's employer, the State of New Jersey (Department of Community Affairs). Constantine also alleges that CWA representatives attempted to pressure him to accept a reduced penalty in exchange for dropping a grievance against a co-worker, despite his insistence that he did nothing wrong and for delaying and/or not expeditiously arbitrating his disciplinary appeal. CWA's conduct allegedly violates 5.4b(1), (3) and (5)<sup>1/</sup> of the New Jersey Public Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act).

CWA denies violating the Act, contending that it negotiated a settlement with the State that Constantine rejected and that it did not attempt to pressure him to accept a negotiated settlement in exchange for dropping a grievance against a co-worker. The CWA also contends that it is not obligated to take Constantine's case to arbitration to fulfill its duty of fair representation.

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<sup>1/</sup> 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. (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. (5) Violating any of the rules and regulations established by the commission."

Constantine alleges that the State retaliated against him "for blowing the whistle on corruption and workplace violence, and other actions..." for issuing disciplinary action against him for what he contends are false claims by others; and for attempting to force him to withdraw a grievance against a co-worker in exchange for a lighter penalty. The State's conduct allegedly violates 5.4a(1), (4), (5) and (7)<sup>2/</sup> of the Act.

The State denies violating the Act, asserting that no alleged facts constitute an unfair labor practice; that Constantine's allegation concerns a disciplinary dispute only and that his claim of a violation under the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 et seq., is not within PERC's jurisdiction.

The Commission has authority to issue a complaint where it appears that the charging party's allegations, if true, may constitute unfair practices on the part of the respondent.

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<sup>2/</sup> 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. (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.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 will decline to issue a complaint.

N.J.A.C. 19:14-2.3. We have conducted an administrative investigation to determine the facts. N.J.A.C. 19:1-2.2. An investigatory conference was held on March 15, 2017. No disputed substantial material facts require us to convene an evidentiary hearing. N.J.A.C. 19:11-2.2 and 2.6. I find the following facts:

Constantine is employed as a construction official by the State of New Jersey, Department of Consumer Affairs (DCA). The State is a public employer within the meaning of the Act. Constantine's title is included in a collective negotiations unit represented by CWA Local 1039.

On August 25, 2015, Constantine was issued a Preliminary Notice of Disciplinary Action (PNDA) alleging conduct unbecoming a public employee and impeding the effective delivery of services and creating a hostile work environment.<sup>3/</sup> On August 26, 2015,

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<sup>3/</sup> The charges stem from an investigation over a May 6, 2015 workplace violence allegation filed against Constantine by a co-worker. Subsequently, Constantine filed a grievance against that same co-worker. A first step grievance meeting was held on August 4, 2015. Brett Richter, Vice President of CWA Local 1039 appeared with Constantine. Management issued a statement that "no basis for action was presented" and denied the grievance. Thereafter, Richter requested that the grievance be held in abeyance pending resolution of Constantine's disciplinary matter.

CWA filed a grievance appealing the PNDA. In October 2015, Brett Richter, CWA Local 1039 Vice President, negotiated a settlement of the disciplinary charges which included a reduced five (5) day suspension, which would not be considered for purposes of progressive discipline if Constantine had no further disciplinary action in the following eighteen (18) months.<sup>4/</sup> Constantine rejected the proposed settlement and a disciplinary hearing was held on November 13, 2015. On December 7, 2015, a FNDA was issued, sustaining the charges and the ten (10) day suspension against Constantine.

On March 30, 2016, a mediation was held between the parties on Constantine's disciplinary matter. Between March 30, 2016 and April 4, 2016, Richter relayed to Constantine that the State first agreed to reduce the suspension to four (4) days, then later to three (3) days. Constantine rejected each offer. CWA asserts that it was during this time that, consistent with CWA policy, Constantine was notified that the union will permit him to arbitrate his ten (10) day suspension provided he pays for one half of the arbitration costs, as well as his own attorney fees, or proceed pro se.<sup>5/6/</sup> By letter dated April 12, 2016, Julia

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<sup>4/</sup> This proposal is memorialized in a letter dated October 30, 2015, to Richter, from Christopher Possessky, Administrator of Employee Relations for DCA.

<sup>5/</sup> Even if Constantine was not specifically advised of such at this time, it is not a material fact that would change the  
(continued...)

Barocas, CWA National Staff Representative, outlined the terms of the negotiated proposed settlement agreement to Constantine<sup>7/</sup> and also explained that CWA had determined that the case did not warrant arbitration. The letter further explained the process to appeal CWA's determination and the process to proceed to arbitration without CWA.

On April 15, 2016, Constantine appealed CWA's decision not to proceed to arbitration. Hetty Rosenstein, CWA Area Director, responded by letter dated April 15, 2016, again advising Constantine of his appeal rights. On May 9, 2016, presumably in response to another request from Constantine, Rosenstein again wrote a detailed eight (8) page letter to Constantine stating the reasons CWA would not arbitrate his disciplinary appeal, and outlining the proposed settlement offered to him.<sup>8/</sup> Rosenstein

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5/ (...continued)  
analysis in this case.

6/ Constantine maintains that the negotiated settlement for a lesser suspension required that he dismiss the grievance against his co-worker which was being held in abeyance. Assuming that condition were part of the negotiated settlement, I do not believe that it changes the analysis in this case.

7/ This recitation of the proposed settlement neither mentions Constantine's grievance against his co-worker, nor does it require Constantine to dismiss it.

8/ The letter does not indicate that Constantine must dismiss his grievance against his co-worker which was being held in abeyance as part of the settlement agreement.

sent a third letter on May 17, 2016, advising Constantine of his right to process his case to arbitration and/or to file an appeal of CWA's decision not to proceed to arbitration.

Thereafter, Constantine appealed Rosenstein's decision to Dennis Trainor, the Vice President of CWA District One. On June 20, 2016, Trainor issued a lengthy letter denying the appeal. Constantine then appealed Trainor's decision to Christopher Shelton, President of CWA. On July 29, 2016, Shelton advised that after reviewing the matter he was upholding Trainor's decision not to proceed to arbitration and advised Constantine of his appeal rights.

On August 4, 2016, Constantine appealed to the CWA Executive Board. By letter dated September 1, 2016, the Executive Board upheld Shelton's decision. The Executive Board also advised Constantine that he had exhausted all internal appeals. On September 6, 2016, Constantine sent a letter to CWA, via Cynthia Mapp, Recording Secretary for CWA Local 1039, requesting that the Executive Board provide him representation at arbitration. The request was again denied. Throughout each of his requests, Constantine maintains that he did nothing wrong and that his co-worker had wrongly accused him of misdoing, while it is his co-worker who was in the wrong.



ANALYSIS

Charge Against CWA

N.J.A.C. 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, the 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].

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].

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).

A union is allowed a "wide range of reasonableness in servicing its members." Essex-Union Joint Meeting and Automatic Sales, Servicemen and Allied Workers, Local 575, D.U.P. No. 91-26, 17 NJPER 242 (¶22108 1991). An employee organization must evaluate an employee's request for arbitration on the merits and decide, in good faith, whether it believes the employee's claim has merit. See Ford Motor Company v. Huffman, 345 U.S. 330, 337-338, 73 S.Ct. 681, 97 L.Ed. 1048 (1953); D'Arrigo v. New Jersey State Bd. of Mediation, 119 N.J. 74 (1990).

The charge alleges no facts indicating that CWA acted arbitrarily, discriminatorily or in bad faith when it negotiated a settlement agreement to reduce Constantine's suspension from ten (10) days to three (3) days. No facts indicate that CWA could have negotiated a better settlement than it did or that an arbitration proceeding would have resulted in a rescission or reduction of the discipline imposed. Constantine has not alleged facts indicating that CWA has violated its duty of fair representation. It is undisputed that CWA represented Constantine in his disciplinary matter before his employer; negotiated a reduction of Constantine's discipline; informed Constantine of facially legitimate reasons (i.e., the State's offers of settlement and issues of credibility) for declining to

advance his case to arbitration; and advised Constantine of the means to appeal that decision and how to advance the case to arbitration without its assistance.

CWA was not obligated to arbitrate Constantine's disciplinary charges. In D'Arrigo v. N.J. State Bd. of Mediation, our Supreme Court held that, ". . . absent clear language in the [collective negotiations] agreement conferring upon a unit employee [the right to invoke the arbitration machinery of the contract], the employee organization has the exclusive right to invoke the arbitration provisions of the contract." Id., 119 N.J. at 75-76. The current agreement between the State and CWA neither confers the right to arbitrate grievances to unit employees, individually, nor mandates that CWA proceed to arbitration in every instance. For all of these reasons, I find that Constantine has not alleged facts warranting the issuance of a Complaint on the 5.4b(1) allegation.

The charge also alleges that CWA violated provisions b(3) and (5) of the Act. A union's duty of good faith negotiations is owed to the employer, not individual unit members. Individual employees do not have standing to raise these issues. Council of New Jersey State College Locals, D.U.P. No. 84-8, 6 NJPER 531 (¶11271 1980). Accordingly, I dismiss the b(3) allegation. Additionally, because there are no facts alleged which

demonstrate that a Commission rule or regulation has been violated, I also dismiss the b(5) allegation.

Charge Against the State

Constantine's charge against the State includes a "whistleblower" claim, and allegations that the State issued false disciplinary charges against him, and attempted to force him to withdraw a grievance against his co-worker in exchange for a reduced period of suspension.

Constantine's charge does not allege a date on which the State engaged in any unfair practice; does not allege that the State's actions interfered with or restrained his exercise of rights guaranteed under the Act; does not allege that he was discriminated against because he signed or filed an affidavit, petition or complaint or gave information or testimony under the Act; and he has not identified any Commission rule that has been violated.

Constantine's claim against the State is essentially a dispute of the disciplinary charges filed and sustained against him by the State.

These alleged facts do not indicate that the State violated 5.4a(1), (4) and (7) of the Act. Nor does an individual employee normally have legal standing to assert a 5.4a(5) charge because the employer's duty under this section 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 also asserts 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 Constantine has not alleged facts warranting the issuance of a Complaint on his allegations that CWA breached its duty of fair representation, I also find that Constantine lacks standing to claim a violation of section 5.4a(5) of the Act.

The Commission lacks jurisdiction over Constantine's allegations that the State violated N.J.S.A. 34:19-3a of the Conscientious Employee Protection Act (CEPA, commonly referred to as the "Whistleblower's Act"). City of New Brunswick, D.U.P. No. 94-23, 20 NJPER 112 (¶25057 1994) app. den. P.E.R.C. No. 94-95, 20 NJPER 193 (¶5089 1994); Township of Middle and Scull, D.U.P. No. 99-16, 25 NJPER 277 (¶30117 1999). Accordingly, that claim is also dismissed.

ORDER

The unfair practice charge is dismissed.

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Jonathan L. Roth, Hearing  
Examiner, on behalf of Acting  
Director of Unfair  
Practices Daisy B. Barreto

DATED: February 16, 2018  
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 February 26, 2018.