

D.U.P. NO. 2021-3

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

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF HUMAN SERVICES),

Respondent,

-and-

Docket No. CO-2018-161

COMMUNICATIONS WORKERS OF AMERICA
LOCAL 1040,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice filed by Local 1040, Communications Workers of America, AFL/CIO (CWA). The charge alleges that the State of New Jersey, Department of Human Services (DHS) violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it unilaterally amended the Manual of Standards for Community Care Residents without responding to CWA's request to negotiate the modified terms and conditions of employment of its members, the state Community Care Residential Providers (Providers). The Director concludes that the Providers are not employees of the State or DHS, are not public employees pursuant to the Act, and accordingly finds that the Commission has no jurisdiction over this dispute.

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Appearances:

For the Respondent,
(Elizabeth A. Davies, Deputy Attorney General)

For the Charging Party,
(Carolyn Wade, President)

REFUSAL TO ISSUE COMPLAINT

On January 19, 2018, Local 1040, Communications Workers of America, AFL/CIO (CWA) filed an unfair practice charge against the State of New Jersey, Department of Human Services (DHS). The charge alleges that in August, 2017, DHS violated section 5.4a(5)^{1/} of the New Jersey Employer-Employee Relations Act,

^{1/} This provision prohibits public employers, their representatives or agents from: "(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
(continued...)

N.J.S.A. 34:13A-1 et seq., when it unilaterally amended N.J.A.C. 10:44B (Manual of Standards for Community Care Residents), and did not respond to CWA's request to negotiate the modified terms and conditions of employment of its members, specifically the state community care residential providers. The added regulatory language requires the community care residential providers to successfully complete American Red Cross Standard First Aid Training (and maintain a valid certificate on file) and Cardiopulmonary Resuscitation Training (and maintain a valid certificate on file) no later than March 20, 2018.

DHS contends that the charge must be dismissed because the community care residential providers are not employees of the State or DHS, and as such, CWA does not have standing to file the subject charge. N.J.A.C. 19:14-1.1.

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

1/ (...continued)
grievances presented by the majority representative."

2012). We have conducted an administrative investigation to determine the facts. N.J.A.C. 19:1-2.2. An investigatory conference was held on July 12, 2018.^{2/} 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.

CWA is the exclusive majority representative of all licensed community care residential providers for adults with disabilities in the State of New Jersey.^{3/} Community care residential providers, as defined by N.J.A.C. 10:44B-1.3, provide care and training to adults with developmental disabilities within their primary residence. According to Exec. Order No. 97 (March 5, 2008), 40 N.J.R. 1727(a) (April 7, 2008), "the State of New Jersey, through the Department of Human Services, is vested with the regulatory authority, including but not limited to the establishment of reimbursement rates, and the administrative oversight responsibility for the licensing of facilities and operation of [community care residential provider] homes" and "pursuant to its statutory and regulatory authority, the Department of Human Services is authorized to contract with a

^{2/} Subsequent to the conference, the parties requested that the charge be held in abeyance pending negotiation of a possible resolution. On May 11, 2020, the charging party advised that the parties did not resolve the matter and requested that the instant charge continue to be processed.

^{3/} The State Board of Mediation certified the CWA as the majority representative of this unit pursuant to N.J.S.A. 30:6D-32.1(e).

qualified third party agency or entity to provide oversight with respect to various administrative functions, including but not limited to the processing of board payments and/or cost-of-care payments to [community care residential providers]. . .”

Governor Corzine’s Executive Order instructed DHS to “meet in good faith with the CWA, as the recognized exclusive majority representative of all [community care residential providers], for the purpose of entering into a written agreement regarding reimbursement rates, payment procedures, benefits, health and safety conditions and any other matters that would improve recruitment and retention of qualified [community care residential providers] and the quality of the programs they provide. . .” Exec. Order No. 97 (March 5, 2008), 40 N.J.R.

1727(a) (April 7, 2008). The Executive Order further clarifies:

Nothing in the Order shall be construed to grant [community care residential providers] status as State employees for any purposes, including, but not limited to, the New Jersey Tort Claims Act (N.J.S.A. 59:1-1 et seq.), the New Jersey Temporary Disability Benefits Law (N.J.S.A. 43:21-25 et seq.), the New Jersey Unemployment Compensation Law (N.J.S.A. 43:21-1 et seq.), and the New Jersey Workers Compensation Law (N.J.S.A. 34:15-1 et seq.), or any other authority, law or regulations that govern or apply to State employees. Although [community care residential providers] are not State employees, the subjects to be included in an agreement shall be consistent with those areas that are considered negotiable pursuant to the New Jersey Employer-Employee Relations Act (N.J.S.A. 34:13A-1 et seq.). Ibid.

The parties entered into an Memorandum of Agreement (MOA) extending from July 1, 2011 through June 30, 2015. Article 4.(d) of the MOA mimics the language in Executive Order No. 97, providing “[n]othing in the Order shall be construed to grant community care Providers status as State employees for any purposes, including, but not limited to, the New Jersey Tort Claims Act (N.J.S.A. 59:1-1 et seq.), the New Jersey Temporary Disability Benefits Law (N.J.S.A. 43:21-25 et seq.), the New Jersey Unemployment Compensation Law (N.J.S.A. 43:21-1 et seq.), and the New Jersey Workers Compensation Law (N.J.S.A. 34:15-1 et seq.). . . .”

CWA alleges that in August 2017, DHS, through its regulatory authority, issued a notice to the community care residential providers advising that N.J.A.C. 10:44B was being amended to require them to successfully complete an American Red Cross Standard First Aid and Cardiopulmonary Resuscitation Training no later than March 20, 2018. Subsequently, CWA Local 1040 President Carolyn C. Wade sent requests to discuss the new training requirement and suspend implementation of the new requirement until such meeting to the Chief of the Office of Licensing and the Acting Commissioner of DHS. CWA did not receive a response, nor did the parties engage in any discussions prior to the implementation of the new training requirements.

DHS does not dispute CWA's assertion of the facts included in its charge. Instead, it contends that the community care residential providers are not public employees within the meaning of the Act, and as such, are not covered by the Act. The Act at N.J.S.A. 34:13A-3(c) defines a public employee as "any person holding a position, by appointment or contract, or employment in the service of a public employer, including the Delaware River Port Authority, except elected officials, members of boards and commissions, managerial executives and confidential employees." Both Executive Order No. 97 and the parties' MOA expressly provide that the community care residential providers are not State employees "for any purpose." As such, CWA does not have standing to file the subject unfair practice charge as the community care residential providers' majority representative. N.J.A.C. 19:14-1.1.

Based on the foregoing, I dismiss CWA's charge for lack of jurisdiction. CWA has standing to pursue enforcement of its MOA on behalf of the community care residential providers, but the appropriate vehicle for obtaining such relief is a contractual grievance, not an unfair practice charge. The Commission lacks jurisdiction over community care residential providers, as they are not public employees, and cannot exercise unfair practice jurisdiction over claims that DHS unilaterally changed or refused to negotiate over changes of an alleged term and condition of

their employment. Monmouth University, P.E.R.C. No. 2005-72, aff'd, 31 NJPER 142 (¶62 App. Div. 2006).

Based upon the foregoing, I find that the community care residential providers are not employees of the State or DHS, and as such are not public employees pursuant to the Act. The Commission lacks jurisdiction over the community care residential providers and, accordingly, the charge is dismissed.

ORDER

The Unfair Practice Charge is dismissed.

/s/ Jonathan Roth
Jonathan Roth
Director of Unfair Practices

DATED: December 22, 2020

This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3.

Any appeal is due by January 4, 2021.