

D.U.P. No. 2009-2

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

In the Matter of

CWA LOCAL 1033,

Respondent,

-and-

Docket No. CI-2008-011

MALIKA Y. HALE,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed against a majority representative alleging that the majority representative breached its duty of fair representation when it elected not to pursue a grievance to arbitration. 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 finds that the majority representative did not breach its duty of fair representation when it did not attend an exploratory conference concerning an unfair practice charge filed individually by a bargaining unit member against her Employer. The Director finds that the majority representative did not have and did not undertake a duty to attend the conference.

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Appearances:

For the Respondent,
Rae C. Roeder, President

For the Charging Party,
Malika Y. Hale, pro se

REFUSAL TO ISSUE COMPLAINT

On September 27 and December 31, 2007, and on April 16, 2008, Malika Y. Hale (Hale) filed an unfair practice charge and amended charge against her majority representative, CWA Local 1033 (Local 1033). The charge, as amended, alleges that on April 2, 2007, Local 1033 did not represent Hale at an informal (exploratory) conference in our offices concerning an unfair practice charge (Dkt. No. CI-2007-031) she had filed against her former employer, the New Jersey Motor Vehicle Commission (MVC). In her amended charge, Hale alleges that Local 1033's president did not keep her informed about the status of a June 29, 2007 appeal of her termination it filed on her behalf. Local 1033's

conduct allegedly violates section 5.4b(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq.^{1/}

On December 17, 2007, and June 6, 2008, Local 1033 submitted letters replying to the charge and amendment, asserting that it was not required to attend the April 2, 2007 exploratory conference because it did not file the charge. Local 1033 also wrote that it did not fail to keep Hale informed about her appeal.

The Commission has authority to issue a complaint where it appears that the charging party's allegations, if true, may constitute an unfair practice and that formal proceedings should be instituted in order to afford the parties an opportunity to litigate relevant legal and factual issues. 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. N.J.A.C. 19:14-2.3. On July 22, 2008, I wrote to the parties, advising that I was not inclined to issue a complaint and set forth the reasons upon which I reached that conclusion.

^{1/} 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. (5) Violating any of the rules and regulations established by the commission."

On August 4, 2008 Hale filed a reply, asserting that on March 7, 2007, Roeder advised her that attorney Walter R. Bliss, Jr., would be designated ". . . to handle all of her legal matters."

Hale did not allege in her charge, as amended, that Roeder told her that Local 1033 hired an attorney to handle all of her legal matters. More specifically, Hale did not allege that Roeder told her that Local 1033 or its designated representative would represent her at the April 2, 2007 informal (exploratory) conference in our offices concerning an unfair practice charge she had filed against the MVC on January 18, 2007 (Dkt. No. CI-2007-031).

Hale submitted a copy of a March 13, 2007 letter from Roeder to Office of Employee Relations (OER) Administrator Patrick DiMattia regarding Hale's refusal to consent to a psychological examination and treatment. Roeder wrote that Hale had not abandoned her job and was eager to return to work. She wrote that DiMattia "abused procedures for conduct of fitness examinations." Roeder wrote that she had designated attorney Walter Bliss to represent Hale on behalf of Local 1033. Hale received a copy of that letter.

Hale wrote that Bliss called her on March 31, 2007 and informed her that he had been directed by Roeder not to represent her at the informal conference. On April 2, 2007, Bliss wrote to Hale, advising her about the merits of complying with the

mandated psychiatric examination. He also reiterated that she would not be represented by Local 1033 at the informal conference because it did not file or approve the charge. Bliss also wrote that he was hired to represent her ". . . only with respect to your refusal to submit to the State psychiatric examination and the related efforts to get you back to work."

Hale filed the unfair practice charge against the MVC on January 18, 2007. Local 1033 did not attend the April 2, 2007 conference.

On June 29, 2007, Local 1033 appealed a June 28, 2007 decision of a hearing officer at the OER to arbitration. The decision sustained the MVC's termination of Hale from her position as support services representative 2, compliance and safety, retroactive to March 16, 2007. This hearing was conducted on June 20, 2007, pursuant to Article V of the State/CWA collective negotiations agreement.

Local 1033 asserts that "only the National CWA can approve arbitration." A National CWA staff representative, Lynn Buckley, elaborated; if National CWA approves advancing a grievance to arbitration, it will be assigned to a National CWA staff representative, who will assume representation of the grievant.

On or about July 24, 2007, Hale and Local 1033 each received written notification from National CWA that it would not represent Hale at arbitration because it did not believe she could prevail. Under the CWA Constitution, Hale could elect to

appeal the denial of representation or pursue the case to arbitration without union assistance at her own expense.

Hale appealed the denial of representation to District One Vice President, Chris Shelton, who denied her appeal in a letter dated August 20, 2007. She appealed Shelton's decision to National CWA President Larry Cohen. On September 6, 2007, Cohen issued a letter, denying the appeal. Hale next appealed Cohen's decision to National CWA's Executive Board. On November 19, 2007, Hale was advised that the Executive Board had denied her appeal.

Article 5, Section J of the State/CWA successor contract, effective July 1, 2007, provides: "The union and the State will schedule a mediation and an arbitration date for (major) disciplinary appeals . . ." Buckley explained that in early 2008, National CWA directed its staff representatives to schedule mediation of all open grievance cases involving major discipline. Buckley attempted to mediate Hale's appeal pursuant to that directive. The matter was not resolved at mediation, and National CWA chose not to pursue it to arbitration.

Analysis

Hale has alleged that Local 1033 has violated the duty of fair representation, conduct prohibited by section 5.4b(1) of the Act.^{2/}

^{2/} No facts suggest that 5.4b(5) of the Act was violated.
(continued...)

Section 5.3 of the Act empowers an employee representative to represent all unit employees fairly in negotiations and contract administration. The standards in the private sector for measuring a union's compliance with the duty of fair representation were set forth in Vaca v. Sipes, 386 U.S. 171 (1967). Under Vaca, a breach of the statutory duty of fair representation occurs only when a union's conduct towards a member of the negotiations unit is arbitrary, discriminatory, or in bad faith. Id. at 191. That standard has been adopted in the public sector. 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); OPEIU Local 153 (Johnstone), P.E.R.C. No 84-60, 10 NJPER 12 (¶15007 1983).

Local 1033 did not have and did not undertake a duty to attend the April 2, 2007 exploratory conference concerning an unfair practice charge which Hale filed individually against the MVC. Hale was specifically advised of the scope of CWA counsel's representation of her on March 31, 2007, which was memorialized in an April 2, 2007 letter to her.

Local 1033 later acted upon Hale's behalf by appealing the OER hearing officer's adverse decision to arbitration. On July 24, 2007, Hale and Local 1033 learned that National CWA elected

2/ (...continued)
Accordingly, that allegation is dismissed.

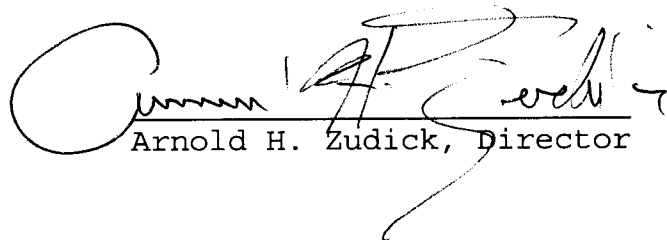
not to represent her at binding arbitration. Hale subsequently exhausted all her internal CWA appeals of the denial of representation for arbitration. Hale has not alleged that CWA engaged in any unlawful conduct during the appeal process. Majority representatives do not have the duty to process every grievance to arbitration; it may sift out wholly frivolous grievances. Vaca at 386 U.S. 192.

Based upon the above facts and law, I find that the Commission's complaint issuance standard has not been met and I refuse to issue a complaint on the allegations of this charge.^{3/}

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Arnold H. Zudick, Director

DATED: September 12, 2008
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 22, 2008.

3/ N.J.A.C. 19:14-2.3.