D.U.P. No. 2009-6

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

In the Matter of

CWA LOCAL 1039,

Respondent,

-and- Docket No. CI-2009-009

GEORGE EKEMEZIE,

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.

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Appearances:

For the Respondent,
George Krevet, Representative

For the Charging Party,
George Ekemezie, pro se

DECISION

On September 8, 2008, George Ekemezie filed an unfair practice charge against his majority representative, Communication Workers of America, Local 1039 (CWA). Ekemezie alleges that CWA failed to represent him when it "entered into a secret deal" with his employer without his consent, reducing a 5-day suspension that Ekemezie had already served, and refusing to appeal his discipline to arbitration. CWA's conduct allegedly

violates section 5.4b(1)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act).

The CWA denies violating the Act, contending that it negotiated a reduction in Ekemezie's discipline and then rejected it upon Ekemezie's demand. The CWA also contends that it is not obligated to take Ekemezie's case to arbitration to fulfill its duty of fair representation.

The Commission has authority to issue a complaint where it appears that the Charging Party's allegations, if true, may constitute an unfair practice within the meaning of the Act. 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 January 12, 2009, I wrote a letter to the parties, advising that I was not inclined to issue a complaint in this matter and setting forth the reasons for that conclusion. The parties were provided an opportunity to respond. Ekemezie filed documents and a reply, contending that he did not commit the acts for which he was disciplined; CWA deliberately failed to represent him; and should be required to arbitrate his discipline. I find the following facts.

1/ This provision prohibits 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."

On June 12, 2008, the CWA, Ekemezie, and the employer met to negotiate a settlement of Ekemezie's 5-day suspension for "insubordination", which he had already served. The CWA and employer agreed to downgrade the disciplinary charge to a "violation of rule, policy, procedure"; reduce the penalty to a 3-day suspension with a one-day suspension memorialized on Ekemezie's record; and agreed to reimburse Ekemezie 3 days of back-pay for the suspension served. Ekemezie refused the offer.

On June 23, 2008, the CWA wrote a letter to Ekemezie, reiterating the terms of the proposed agreement lessening the discipline imposed, and advising that it was the best result that could be achieved. CWA wrote that Ekemezie was admittedly unavailable to his employer by cell or home phone, which established, minimally, a rule violation. CWA also wrote to Ekemezie that his ". . . admission that you were motivated to ignore the [employer's] attempts to contact you . . . suggests a degree of culpability on your part." CWA wrote that the settlement would probably result in lesser discipline than an arbitration award. The CWA offered to resurrect the agreement, writing to Ekemezie that it would not arbitrate his discipline because it believed that the settlement was the best result that could be achieved. The letter also advised Ekemezie he could appeal the decision not to arbitrate to the named CWA area

director. Finally, the letter instructed Ekemezie that he could appeal his discipline to arbitration without its assistance.

Analysis

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, 64 LRRM 2369 (1967), 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, capricious or in bad faith. [Id. at 190, 64 LRRM 2376]

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, 64 LRRM 2377]

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).

The charge alleges no facts indicating that CWA acted arbitrarily, capriciously or in bad faith when it negotiated a reduction in Ekemezie's discipline. It also appears that Ekemezie was not forced to accept the negotiated settlement. No facts indicate that CWA could have negotiated a better deal than it did or that an arbitration proceeding would have resulted in a rescission or reduction of the discipline imposed. By representing Ekemezie before his employer; by negotiating a reduction of Ekemezie's discipline; by informing him of what I find were legitimate reasons for not advancing the discipline to arbitration; and by advising him of the means to appeal its decision and how to advance the case to arbitration without its assistance, the CWA did not violate its duty of fair representation.

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

Arnold H. Zudick, Director

DATED: February 17, 2009
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 March 2, 2009.