D.U.P. No. 2013-4

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

In the Matter of

INDEPENDENT SERVICE WORKERS OF AMERICA,

Respondent,

-and- Docket No. CI-2012-013

MARGARET COSTIGAN,

Charging Party.

SYNOPSIS

The Director of Unfair Practices refuses to issue a Complaint on an unfair practice charge alleging that a majority representative violated section 5.4b(1) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the duty of fair representation) by negotiating a provision (for ratification) in a successor agreement requiring white collar employees to work 35 hours per week without added compensation. White collar employees had previously worked 30 hours per week while blue collar employees in the unit worked 35 hours per week. The charge also alleges that the majority representative negotiations team includes no white collar employees; that no union elections have been conducted in years; that the blue collar employees are overwhelmingly male and white collar employees are overwhelmingly female; and that the majority representative failed or refused to provide information on request, including bylaws, negotiations proposals, salaries paid to union officials, etc.

The Director finds that the charge did not allege facts warranting the issuance of a complaint. Applying the standard set forth in Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967); Ford Motor Co. v. Huffman, 45 U.S. 330, 337-338 (1953); and Belen v. Woodbridge Tp. Bd. of Ed., 142 N.J. Super 486 (App. Div. 1976), certif. den. 72 N.J. 458 (1976), the Director determines that the majority representative's conduct in collective negotiations does not appear to violate the duty of fair representation. The charging party did not allege facts falling within the statute of limitations showing that eligibility restrictions on a member's ability to seek elective position within the union violated the Act. James v. Camden Cty. Council No. 10 of N.J.C.S.A., 188 N.J. Super. 251 (App. Div. 1982).

The Director also finds that no facts are alleged suggesting that the ISWA violated 5.4b(2), (3) and (5) of the Act.

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Appearances:

For the Respondent,
Cohen, Leder, Montalbano & Grossman, LLC
(Bruce Leder, of counsel)

For the Charging Party,
Margaret Costigan, pro se

REFUSAL TO ISSUE COMPLAINT

On October 3, 2011, and November 14, 2011, Margaret Costigan (Costigan), a clerical employee of the Jersey City Housing Authority (Housing Authority) included in a collective negotiations unit of non-supervisory blue collar employees and white collar employees, filed an unfair practice charge and amended charge against her majority representative, Independent Service Workers of America, (ISWA). The charge, as amended, alleges that on July 19, 2011, the ISWA violated section 5.4b(1), (2), (3), and (5)[1/] of the New Jersey Employer-Employee Relations

1/ These provisions prohibit employee organizations, their
(continued...)

Act, N.J.S.A. 34:13A-1 et seq. (Act) when it presented to the membership as part of the terms and conditions of employment in a proposed successor agreement for ratification a proposal to increase by five hours each workweek of white collar employees, without additional compensation. The charge also alleges that ISWA failed to provide Costigan information and documents she requested on July 25, 2011, including a copy of its bylaws, the salaries paid to ISWA officials, meeting minutes, and proposals that were exchanged during the most recent contract negotiations.

It specifically alleges that the ISWA negotiations team has no white collar employee members and that, ". . . [the ISWA] has not had an election in years. In the past when anyone shows interest in running they are told they can't run because they haven't attended three or five consecutive meetings. No one knows if this is true because no one can get a copy of the constitution or the bylaws."

1/ (...continued)
representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances; (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."

On or about March 6, 2012, ISWA filed a letter, together with an attachment, denying that it engaged in any unfair practice. ISWA asserts that it negotiated the parties' collective negotiations agreement in good faith. The enclosed attachment is a notice of dismissal dated February 15, 2012 issued by the U.S. Equal Employment Opportunity Commission (EEOC) to Margaret Costigan advising that it was ". . . unable to conclude that the information obtained establishes violations of the statutes."

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 3, 2013, I wrote to the parties advising that I was not inclined to issue a complaint in this matter and set forth reasons for that conclusion. The parties were provided an opportunity to respond. On January 16, Costigan filed a reply, together with attachments. On February 15, 2013, we wrote to the parties, requesting their advice on whether Ms. Costigan has been provided the ISWA constitution and bylaws and soliciting a writing advising of ". . . any circumstances pertaining to that

question." On February 19, Costigan filed a reply, writing that she and other union members ". . . have been seeking the bylaws for years and have not been able to get them from our union." Based upon the following facts, I find that the complaint issuance standard has not been met.

The ISWA is the majority representative of a non-supervisory unit of blue collar employees and white collar employees of the Housing Authority. The unit is comprised of about 96 blue collar employees and 29 white collar employees. Twenty-four of the white collar employees are women; 5 are men. The disputed workweek provision is set forth in a signed collective negotiations agreement extending from April 1, 2011 through March 31, 2014. Four ISWA representatives comprise the majority representative's negotiations team; none are white collar employees.

In her reply, Costigan wrote that the ISWA constitution provides that, ". . . the authority to bargain collectively for the union shall be vested in a negotiating committee which shall consist of no less than two officers appointed by the president and three trustees." She wrote that ISWA violated that provision because the negotiating committee was comprised of ". . . just the four union officials." Costigan also wrote in her reply that the ISWA negotiating committee ". . . never made [her or white

collar employees] aware of "when negotiations started or what was on the table."

During negotiations for the current agreement, the Housing Authority proposed increasing the workweek of white collar employees from 30 hours to 35 hours. Blue collar employees have been working 35 hours per week for years. Also, several years ago, a clothing allowance paid to all unit employees was halted for white collar employees. The Housing Authority reportedly advised that it would not sign a memorandum of agreement unless the ISWA agreed to a 35-hour workweek for white collar employees. The ISWA proposed that the white collar employees be paid for the additional hours. The Housing Authority rejected that counterproposal. The ISWA issued other unspecified counterproposals which the Housing Authority also rejected.

On July 13, 2011, a few days before the member ratification meeting, the ISWA leadership or negotiations team held a meeting for white collar employees exclusively to inform them of the increased workweek to which it had agreed in negotiations. It advised that the longer workweek was a requirement of the successor agreement, the terms of which would be placed before the membership for ratification. The proposed agreement included across-the-board wage increases of 2.5% in 2012 and 2.75% in 2013. It also provided modest increases in Housing Authority contributions to the unit employees' dental and eye care

benefits. In a negotiated provision, the "increment system" is to be eliminated on the expiration date of the agreement. In the July 13 meeting, Costigan said that the contract was [being] ratified ". . . with total disregard for what was happening to us [the white collar employees]" and that "we were not being [fairly] represented by the union." The ISWA vice-president allegedly replied, "Maybe you ladies need to get another union."

On July 19, 2011, the membership voted to ratify the successor agreement. The ISWA asserts that two of about twenty-nine white collar ISWA members attended the meeting and voted. Costigan writes in her reply that ". . . quite a few white collar workers attended [;] they had no ballots and no kind of order. The men wanted their clothing allowance and vehicle allowance [and] because they are the majority most of them raised their hands."

On or about July 21, 2011, Costigan wrote to ISWA President, Fred Parson, requesting a copy of ISWA bylaws, financial statements, salaries paid to ISWA officials, meeting minutes, and the proposals that were exchanged during the most recent contract negotiations. ISWA allegedly did not provide her with most of the requested information and documents.

ANALYSIS

Section 5.3 of the Act empowers an employee representative to represent employees in the negotiation and administration of a

collective agreement. With that power comes the duty to represent all unit employees fairly. A violation of that duty occurs ". . . only when a union's conduct towards a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967). The Commission and the New Jersey courts have adopted this standard. Saginario v. Attorney General, 87 N.J. 480 (1981). See also D'Arrigo v. New Jersey State Bd. of Mediation, 119 N.J. 74, 78-79 (1990).

In Belen v. Woodbridge Tp. Bd. of Ed., 142 N.J. Super 486 (App. Div. 1976), certif. den. 72 N.J. 458 (1976), six psychologists employed by the Woodbridge Board included in a large unit comprised chiefly of teachers charged that their majority representative failed to keep them apprised of the status of contract negotiations and negotiated provisions which reduced their salaries and increased their work hours by one half hour per day. The Court found that the union had not acted in bad faith, nor arbitrarily in its dealings with the psychologists and the Board. The Court quoted these passages from Ford Motor Co. v. Huffman, 45 U.S. 330, 337-338 (1953):

> Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. A major responsibility of negotiators is to weigh the

> relative advantages and disadvantages of differing proposals.
>
> * * * *
>
> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.
>
> Compromises on a temporary basis, with a view to long range advantages, are natural incidents of negotiation. Differences in wages, hours and conditions of employment reflect countless variables. [at 337-338, 73 S. Ct. at 686.]
> [142 N.J. Super. at 491]

In applying these principles to the allegations of Costigan's amended charge, I ask whether those allegations raise issues within our unfair practice jurisdiction and clearly specify facts which if true, may constitute an unfair practice. N.J.A.C. 19:14-1.3; 2.1.

The allegation that ISWA negotiated a provision requiring white collar employees to work five more hours per week than previously without added compensation does not indicate a breach of the duty of fair representation. The circumstances are that the Housing Authority demanded the change in workweek; it refused ISWA counterproposals, including a demand for compensation; white

collar employees had enjoyed workweeks of 30 hours for years, while blue collar employees worked 35 hours; ISWA separately apprised the white collar employees of the increase in work hours several days in advance of the ratification vote; and only a disputed fraction of them attended or voted in the meeting at which the proposed agreement was ratified. These facts do not reveal bad faith or fraud. White collar employees were adversely affected but the compromise may have enabled all unit employees to receive identical percentage wage increases over two contract years and modest contributions toward their dental and eye care benefits. See Hamilton Tp. School Social Workers Assn., P.E.R.C. No. 79-20, 4 NJPER 476 (¶4215 1978). That no white collar employees were included on the negotiations team does not, by itself, suggest a violation of the duty to represent all employees fairly. Accordingly, I find that this allegation does not meet our complaint issuance standard.

The allegation that the ISWA vice-president remarked upon Costigan's protest about unfair representation at the negotiations table, "maybe you ladies need to get another union" also does not, standing alone, indicate that ISWA violated its duty by negotiating and recommending for ratification a contract provision increasing by five hours each workweek of white collar employees, without added compensation. Costigan alleges that a large majority of white collar employees are women. I do not

infer a causal connection between the remark and the increase in work hours in the absence of other facts showing that the ISWA targeted women in the unit and diminished their wages, benefits, etc., in collective negotiations. See Newark Firemen's Union, Inc., Local 1846 and Fire Fighters Ass'n of N.J. (Bishop, et al), PERC No. 96-43, 22 NJPER 29 (¶27014 1995). I also note that Costigan filed a charge concerning these circumstances with the EEOC which declined to issue a complaint.

Finally, Costigan alleges that ISWA failed to provide her information such as salaries paid to union officials; meeting minutes; proposals exchanged in negotiations; and a copy of the by-laws. Our Act does not regulate internal union conduct. Any duty to supply information to unit members derives from an employee organization's duty to represent the interests of unit members fairly and without discrimination. Section 5.3; Old Bridge Ed. Assn. (Kosten), PERC No. 91-7, 16 NJPER 438 (¶21188 1990). Our Act imposes no requirement that a union provide a copy of a collective agreement upon request. Old Bridge Ed. Assn., f/n no. 2, 16 NJPER at 439-440.

In NJ State PBA and PBA Local 199 (Rinaldo), P.E.R.C. No. 2011-83, 38 NJPER 56 (¶8 2011), the Commission dismissed an unfair practice charge alleging that a unit employee had been unlawfully excluded from union membership. The Commission wrote

that its unfair practice jurisdiction over "membership matters" is statutorily confined to two instances:

> The first instance is where a majority representative violates its duty to represent its members fairly in contract negotiations and grievance processing. N.J.S.A. 34:13A-5.3; OPEIU Local 153 (Johnstone), P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983). The second instance is where a majority representative arbitrarily, discriminatorily or invidiously excludes or expels a negotiations unit employee seeking to participate in majority representative affairs affecting his or her employment conditions. FOP Lodge 12 (Colasanti), P.E.R.C. No. 90-65, 16 NJPER 126 (¶21049 1981); PBA Local 199 (Abdul-Haqq), P.E.R.C. No. 81-14, 6 NJPER 384 (¶11198 1980). [Id., 38 NJPER at 57]

The Commission also wrote that it has no power to enforce union constitutions and bylaws, and alleged violations of their provisions do not generally set forth an unfair practice under our Act. It also eschewed jurisdictional authority, ". . . to referee or resolve internal union disputes unconnected to allegations and proof that an unfair practice has been committed." Id., 38 NJPER at 57.

In James v. Camden Cty. Council No. 10 of N.J.C.S.A., 188 N.J. Super. 251 (App. Div. 1982), the Chancery Division applied private sector precedent under the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §481(e) to find that a public employee union's eligibility restrictions on a member's ability to have his name included on a ballot for union office were

unreasonable as a matter of law and invalid. Specifically, the unit employee's nomination for president was rejected by the union's nomination committee because the employee attended only three of five general membership meetings and the union's constitution required all those seeking union office to have ". . . attended at least all general membership meetings in the prior election year." Id., 188 N.J Super. at 254.

The Court initially acknowledged a reluctance to interfere in the internal management of a voluntary association. It then excepted situations in which ". . . an individual member is harmed by a rule which violates public policy," citing Calabrese v. Policemen's Benev. Ass'n, Local 76, 157 N.J. Super. 139, 147 (App. Div. 1978). Id., 188 N.J. Super. at 258. The Court reasoned that the disputed union rule violated that policy as expressed in Local 3489, United Steelworkers v. Usery, 429 U.S. 305 (1977), where the U.S. Supreme Court held that attendance requirements as a prerequisite for eligibility for elective office of a union are unreasonable when the anti-democratic effect of an attendance rule disqualifies a majority of the union membership and when a candidate is required to decide to run for office months in advance of an election.

Our Appellate Division in James v. Camden Council No. 10 was unconcerned that nothing in our Act addressed eligibility as a candidate for union elective office. "The fact that this was not

mentioned in [the Act] is not persuasive that the Legislature condones unreasonable requirements nor that Courts may not enlist guidance from federal decisions." Id., 188 N.J Super. at 259.

The plaintiff's allegations about eligibility requirements in James V. Camden Council No. 10 are notably similar to Costigan's, except for the position that was sought. Costigan has alleged that, "[I]n the past when anyone shows interest in running they are told they can't run because they haven't attended three of five consecutive meetings. No one knows this is true, because no one can get a copy of the constitution or bylaws." She has conceded in a subsequent letter her receipt of the ISWA constitution. I infer that the eligibility requirement to which she has referred may be included in the bylaws. I accept as true Costigan's allegation that the ISWA has always refused to provide her and white collar employees a copy of the bylaws. The problem is that ". . . in the past" does not indicate if Costigan or any white collar employee has sought and been denied the opportunity to seek membership on the negotiations committee within the six-month period preceding the filing date of her charge - a statutory requirement. N.J.S.A. 34:13A-5.4(c).

Under all of these circumstances, I do not believe that the Commission's complaint issuance standard has been met.

ORDER

The unfair practice charge is hereby dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

/s/ Gayl R. Mazuco
Gayl R. Mazuco, Director

DATED: March 4, 2013
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 14, 2013.