

D.U.P. NO. 2018-8

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-2017-218

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 1040,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge alleging violations of section 5.4a(2), (3) and (5) of the New Jersey Employer-Employee Relations Act (Act). The Communications Workers of America (CWA) alleged the employer violated the Act by assigning "direct care work" with residents at Hunterdon Developmental Center to unit employees without negotiations. According to CWA, the "direct care work" was performed by other employees in another negotiations unit represented by the American Federation of State, County and Municipal Employees (AFSCME). The employer contended the charge should be dismissed because the parties had negotiated a procedure for resolving this dispute in their collective negotiations agreement. The Director agreed with the employer and dismissed the charge for lack of jurisdiction under State of New Jersey, (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). The Director also found that CWA did not allege the "direct care work" was not incidental to unit employees' normal duties and therefore the charge did not satisfy the complaint issuance standard. CWA's (a)(2) and (3) claims were dismissed because they were not supported by any factual allegations.

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Appearances:

For the Respondent
Gurbir Grewal, Attorney General of New Jersey
(Andy Jong, Deputy Attorney General)

For the Charging Party
Robert O. Yaeger, Principal Staff Representative

REFUSAL TO ISSUE COMPLAINT

On April 7, 2017, the Communications Workers of America, AFL-CIO, Local 1040 (CWA) filed an unfair practice charge against the State of New Jersey, Department of Human Services, Hunterdon Developmental Center (HDC). The charge alleges that on or about March 3, 2017, HDC violated section 5.4a(2),(3) and (5)^{1/} of the

^{1/} These provisions prohibit public employers, their representatives or agents from: "(2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of (continued...)

New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., by assigning "direct care work" with residents at HDC cottages to Cottage Training Supervisors (CTS), who are represented by CWA. According to CWA, this work is performed by "direct care bargaining unit" employees represented by the American Federation of State, County and Municipal Employees (AFSCME) and the assignment was a unilateral change to CTS employees' terms and conditions of employment.

On September 19 and October 12, 2017, HDC served position statements on CWA. HDC denies violating the Act and contends CWA Local 1040 lacks standing to pursue a 5.4a(5) claim. HDC also argues that the parties have negotiated in their collective negotiations agreement an exclusive procedure for resolving disputes over out-of-title assignments and that several CTS employees have filed appeals with the Civil Service Commission challenging the assignments in accordance with that procedure. The Commission should therefore defer to those procedures and dismiss CWA's charge.

1/ (...continued)
employment to encourage or discourage employees in the exercise of the rights guaranteed to them by 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.

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-5.4c; 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; 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 2012).

I find the following facts.

CWA and the State of New Jersey are parties to a collective negotiations agreement extending from July 1, 2011 through June 30, 2015 (Agreement). HDC and CWA Local 1040 are bound by that Agreement. CWA and the State are currently negotiating a successor agreement.

Article 4(E)(6) of the Agreement's grievance procedure provides:

Unless specifically provided for elsewhere in this Agreement, where the grievance involves an alleged violation of individual rights specified in the Civil Service law and rules for which a specific appeal to the Civil Service Commission is available, the **individual must present his complaint to the Civil Service Commission directly**, provided however, where allegations of violations of other employee rights which derive from this Agreement occur, it is intended that the provisions of this grievance procedure are to be utilized. [emphasis added].

Article 11 of the Agreement sets forth a procedure for resolving disputes over out-of-title work assignments. It provides, in pertinent part:

A. The State and the Union agree that employees should be assigned work appropriate to and within their job classification.

B. The practice of regularly assigning out-of-title work to employees shall be discontinued. Instances of out-of-title work identified by the Union and formally brought to the attention of the State shall be corrected immediately or by phasing out such assignments at the earliest time which shall in any case be no later than three (3) months from the time of notification by the Union. Subsequent to notifying the appropriate management official **any dispute as to whether the work is within the job classification of the employee(s) involved shall be resolved by Union or employee appeal to the Civil Service Commission** where the matter will be heard within twenty-one (21) days and a decision rendered within ten (10) days of that hearing. Any dispute concerning the phasing out period will be resolved through the grievance procedure. [emphasis added]

On March 3, 2017, Husan Abdallah, HDC's Chief Executive Officer, promulgated and implemented a policy whereby CTS employees would be assigned "direct care" work at HDC residential cottages. According to CWA, this work is performed by employees in a different, "direct care" negotiations unit represented by AFSCME and the assignment is a unilateral change to CTS employees' terms and conditions of employment. CWA contends this policy was created and implemented by HDC without negotiations with CWA.

CWA also asserts that the union has not appealed or challenged the "direct care" work assignment in accordance with Article 11 and maintains there is no pending appeal challenging the assignments before the Civil Service Commission. HDC contends that Article 11 governs this dispute and asserts that several CTS employees have challenged their assignments in accordance with Article 11.

On September 14, 2017, CWA notified the staff agent investigating this charge that CWA Local 1040 was authorized to pursue the charge.

ANALYSIS

CWA alleges that HDC violated the Act by assigning "direct care" work to CTS employees without negotiations. HDC counters that CWA Local 1040 lacks standing to pursue a section 5.4a(5) claim and CWA's charge alleges a breach of contract and job classification claim that must be resolved in accordance with Article 11 of the parties' Agreement. I agree with HDC that Article 11 governs this dispute and dismiss the charge because we lack jurisdiction to decide it. I also dismiss the charge because CWA does not allege direct care work is not comprehended within CTS employees' job description or was not incidental to CTS employees' normal duties.

Standing

I reject HDC's argument that CWA Local 1040 lacks standing to pursue this charge. HDC is correct in asserting that CWA is the exclusive majority representative of CTS employees and has standing to pursue CWA Local 1040's charge. State of New Jersey (Human Services), D.U.P. No. 97-11, 22 NJPER 332 (¶27172 1996). However, CWA may authorize CWA Local 1040 to pursue the 5.4a(5) claim on behalf of CTS employees, which it did by email dated September 14, 2017. Id., 22 NJPER at 333 (Director noted the absence of correspondence by CWA in joining or supporting CWA Local 1040's charge as basis for dismissing 5.4a(5) claim). Therefore, CWA Local 1040 has standing to pursue its 5.4a(5) allegation.

Direct Care Assignment

CWA contests the assignment of direct care work to CTS employees. CWA does not allege that direct care work falls outside the CTS's job title or is not comprehended within the CTS's job description or normal duties. Instead, CWA alleges CTS employees were ". . . mandated to do work assigned to the Direct Care Bargaining Unit represented by [AFSCME]." CWA has not alleged that the direct care assignment is unrelated to CTS job duties or resulted in a severable impact on CTS employees. Accepting CWA's allegations as true, I cannot conclude HDC's assignment violated the Act.

A majority representative may negotiate on behalf of unit employees for contractual protections against being required to assume duties outside their job title and beyond their normal duties. New Jersey Highway Authority, P.E.R.C. No. 2002-76, 28 NJPER 261, 263 (¶33100 2002), aff'd 29 NJPER 276 (¶82 App. Div. 2003). Such provisions “. . . protect the integrity of the equation between negotiated salaries and the required work.” 28 NJPER at 263. Employers may unilaterally assign new duties if they are incidental to or comprehended within an employee's job description and normal duties. Id.; City of Newark, P.E.R.C. No. 85-107, 11 NJPER 300 (¶16106 1985), (fire officers required to perform crossing guard or patrol duties connected to fires); Monroe Tp. Bd. of Ed., P.E.R.C. No. 85-6, 10 NJPER 494 (¶15224 1984) (bus drivers required to pump gas).

CWA does not allege direct care work is not comprehended within CTS employees' job description or is not incidental to CTS employees' normal job duties. Instead, CWA alleges CTS employees perform direct care work that is also performed by employees in another negotiations unit. That fact alone, however, does not mean that the new duties assigned to CTS employees are beyond what CTS employees normally do or are required to do, pursuant to their job description. Employees in different negotiations units may perform similar work without running afoul of the Act. Since HDC has a managerial prerogative to assign new duties to CTS

employees if they are comprehended within their job title, and CWA has not alleged direct care work falls outside their job title, I cannot conclude CWA's allegations, if true, justify the issuance of a complaint.

Unfair Practice Jurisdiction

Even if I assume that the direct care assignment is not incidental to a CTS's normal duties, CWA's charge must be dismissed anyway because we do not have jurisdiction over a dispute covered by the terms of the parties' collective negotiations agreement.

Section 5.3 of the Act commands that any dispute covered by the terms of the parties' collective negotiations agreement must be resolved in accordance with the parties' negotiated grievance procedures. N.J.S.A. 34:13A-5.3. In State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984), the Commission held that ". . . deferral to a negotiated grievance procedure culminating in binding arbitration is generally appropriate when a charge essentially alleges a violation of subsection 5.4a(5) interrelated with a breach of contract claim." Human Services, 10 NJPER at 420. The Commission and Appellate Division concluded that this deferral policy ". . . ensures that the parties' grievance procedures will be used, as section 5.3 commands, for any dispute covered by the terms of such agreement." 10 NJPER at 421; State v. Council of

State College Locals, 153 N.J.Super. 91, 93 (App. Div. 1977).

(The appellate court held that Section 5.3's language, along with other provisions of the Act, were evidence of a "clear legislative intent that disputes over contractual terms and conditions of employment should be resolved, if possible, through grievance procedures.")

But Human Services was not primarily a deferral case. The parties in Human Services negotiated a procedure for resolving the issues raised by their charges^{2/} that did not culminate in arbitration. 10 NJPER at 421. Instead, the agreed-upon procedure provided that the respective decisions of the employer's department head or designee were final. 10 NJPER at 423-424. The Commission was thus faced with the question of whether, in the absence of arbitration, the Commission should adjudicate a dispute the parties agreed would be resolved by a different procedure. The Commission answered this question in the negative and affirmed the Director's dismissal of the unfair practice charges. 10 NJPER at 424.

In deciding not to exercise unfair practice jurisdiction, the Commission explained:

^{2/} The Charging Party in Human Services filed two charges: one asserting an unclassified employee's right to a departmental hearing on a discharge and the second concerned the failure to make longevity payments to part-time employees. In both cases, the Commission found that the parties had agreed not to submit these disputes to arbitration.

[T]hese cases require us to consider whether and under what circumstances a charging party, having agreed that a contract dispute may not be submitted to binding arbitration, may still litigate a breach of contract claim in unfair practice proceedings. We conclude that a mere breach of contract claim does not state a cause of action under subsection 5.4a(5) which may be litigated through unfair practice proceedings and instead parties must attempt to resolve such contract disputes through their negotiated grievance procedures. We base this conclusion primarily on our interpretation of the Act and the legislative policy expressed therein favoring the use of negotiated grievance procedures for handling contractual disputes. [10 NJPER at 421]

The Commission added that where an “. . . employer which negotiates terms and conditions of employment as set forth in a collective negotiations agreement, which agrees to specific grievance procedures for the resolution of contractual disputes, and which is willing to abide by those negotiated procedures, does not ‘refuse to negotiate in good faith’ simply because its interpretation of an unclear contract clause may ultimately prove mistaken.” 10 NJPER at 422. Absent allegations that predominantly relate to an employer’s duty to negotiate in good faith (such as the claim an employer repudiated a clear contractual provision, among other examples),^{3/} we will not

^{3/} The Commission in Human Services listed several (though not an exhaustive list) of breach of contract allegations that “predominantly relate” to an employer’s duty to negotiate in good faith, such as an employer’s unilateral change to the parties’ past and consistent practice in administering a

(continued...)

exercise unfair practice jurisdiction over disputes that are governed by a collectively negotiated procedure. 10 NJPER at 422-423.

The rationale for dismissing the unfair practice charges in Human Services applies with equal force here. CWA and the State have collectively negotiated procedures for resolution of the issue raised by CWA's charge. Article 4(E)(6) of the Agreement requires individual unit employees who are asserting rights under the Civil Service rules and who enjoy a right to appeal to the Civil Service Commission to present their complaints to the Civil Service Commission. The right to not perform work outside one's job title is protected under the Civil Service laws and has been recognized by our Commission. N.J.A.C. 4A:3-3.4; Maplewood Tp., P.E.R.C. No. 97-80, 23 NJPER 106, 111 (¶28054 1997) (Citing N.J.S.A. 11A:3-1 and N.J.A.C. 4A:3-3.4, Commission recognizes the ". . . protection granted Civil Service employees against having to perform out-of-title work.") The Civil Service Commission

3/ (...continued)
 disputed clause; an employer's decision to abrogate a contractual provision based on its belief the provision is non-negotiable; the repudiation of a contract clause so clear that an inference of bad faith arises from the employer's refusal to honor the provision; and charges which allege the policies of our Act, rather than a mere breach of contract claim, are at stake. 10 NJPER at 422-423. The analysis requires we ". . . look closely at the nature of the charge and all the attendant circumstances." 10 NJPER at 422.

rules also prescribe a procedure for appealing the assignment of out-of-title work. N.J.A.C. 4A:3-3.9.

Under Article 4(E)(6) of the parties' negotiated grievance procedure, CTS employees who wish to challenge their assignment of direct care work were required to appeal that assignment to the Civil Service Commission. Moreover, Article 11 of the parties' agreement requires disputes over whether an assignment is "out-of-title" to be submitted to the Civil Service Commission for a hearing and determination. HDC acknowledges these contractual and regulatory procedures govern this dispute and insists these procedures be followed for resolving CWA's charge. CWA does not allege a repudiation of this procedure nor does it claim that HDC will not honor this contractually negotiated procedure. In accordance with the principles articulated by the Commission in Human Services, we defer to the parties contractual procedure and dismiss CWA's charge for lack of jurisdiction. See State of New Jersey (Dept. of Human Services), P.E.R.C. No. 95-112, 21 NJPER 248 (¶26158 1995) (Commission affirms Director's dismissal of an unfair practice charge alleging the employer assigned a unit member out-of-title work in violation of the parties' collective negotiations agreement).

Based on the foregoing, I conclude CWA's unfair practice charge does not satisfy the complaint issuance standard.

N.J.A.C. 19:14-2.1.^{4/}

ORDER

The unfair practice charge is dismissed.

/s/Jonathan Roth
Jonathan Roth
Acting Director
of Unfair Practices

DATED: April 20, 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 April 30, 2018.

^{4/} CWA does not allege facts in support of its (a)(2) and (3) claims. I dismiss these allegations. N.J.A.C. 19:14-2.1.