D.U.P. No. 2021-7

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

In the Matter of

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 1037,

Respondent,

-and- Docket No. CI-2021-006

LAVERN SANDERS-WHITE,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismissed an unfair practice charge filed by an individual, Lavern Sanders-White (Sanders-White), against her majority representative, CWA. The charge alleges that CWA violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1,et seq., by failing to adequately represent Sanders-White during an internal disciplinary process that resulted in her termination from employment with the State of New Jersey, Department of Children & Families (DCF); and by failing to adequately represent Sanders-White in the related disciplinary appeal. The charge also alleges that CWA violated the Act by disregarding and failing to respond to Sanders-White's complaints and requests for assistance.

Initially, the Director dismissed any/all allegations that occurred six months before the charge was filed given that they fall outside the statute of limitations and no facts suggest that Sanders-White was prevented from filing a charge within the statutory period. The Director dismissed Sanders-White's 5.4b(5) claim against CWA, finding that same was unsupported by the facts alleged. The Director also dismissed Sanders-White's 5.4b(1) claim against CWA, finding that the charge only establishes that Sanders-White disagrees with CWA's representation during the internal disciplinary process and CWA's view of its contractual obligations and role within the negotiated procedure for the appeal of major discipline; that no facts suggest that CWA's representation was discharged in a bad faith, discriminatory, or arbitrary manner or that CWA interpreted the parties' collective negotiations agreement in a bad faith, discriminatory, or arbitrary manner or establish a breach of the duty of fair representation; and that mere negligence is insufficient to establish a viable claim.

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Appearances:

For the Respondent, George Krevet, CWA Staff Representative

For the Charging Party, Lavern Sanders-White, pro se

REFUSAL TO ISSUE COMPLAINT

On September 24, 2020, Lavern Sanders-White (Sanders-White) filed an unfair practice charge against her majority representative, Communications Workers of America, Local 1037 (CWA or Local 1037). The charge alleges that after Sanders-White was served with a Preliminary Notice of Disciplinary Action (PNDA) dated June 13, 2018, CWA violated section 5.4b(1) and (5)[1/] of the New Jersey Public Employer-Employee Relations Act

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 . . . [and] (5) Violating any of the rules and regulations established by the commission."

(Act), N.J.S.A. 34:13A-1, et seq., by failing to adequately represent her during an internal disciplinary process that resulted in her termination from employment with the State of New Jersey (State), Department of Children & Families (DCF) by a Final Notice of Disciplinary Action (FNDA) dated January 3, 2019; and by failing to adequately represent Sanders-White in the related disciplinary appeal. In particular, Sanders-White alleges that CWA did not raise the appropriate defenses during her internal disciplinary process and did not "follow through" on her disciplinary appeal, instead "mutually agree[ing]" with the State to hold her appeal in abeyance pending the outcome of a civil action that Sanders-White had filed against DCF in New Jersey Superior Court. Sanders-White alleges that CWA did not comply with the procedural timelines established for advancing a disciplinary appeal as set forth in the collective negotiations agreement (CNA) between the State and CWA and that CWA failed to provide her with notice that mediation had been scheduled for April 25, 2019 and then cancelled. Sanders-White also claims that since January 3, 2019, CWA has generally disregarded and failed to respond to her complaints and requests for assistance.

On December 16, 2020, an informal exploratory conference was held with the parties. The parties were unable to reach a voluntary resolution.

On December 31, 2020 and February 26, 2021, CWA filed letters denying that it engaged in any unfair practices and urging our dismissal of the charge against it. It more specifically asserts that after DCF issued the 6/13/2018 PNDA, Sanders-White filed an appeal at the direction of her CWA representative; that an internal departmental hearing was held on December 12, 2018 during which Sanders-White was represented by her CWA representative; that the hearing officer issued a Report & Recommendation dated January 2, 2019; and that DCF issued the 1/3/2019 FNDA terminating Sanders-White's employment. CWA also maintains that in response to Sanders-White's termination, it filed a disciplinary appeal on January 3, 2019 in accordance with the CNA between the State and CWA; and that in correspondence dated April 3, 2019, CWA notified Sanders-White by regular mail and e-mail that mediation of her disciplinary appeal was scheduled for April 25, 2019. CWA asserts that after mediation was scheduled, it was advised on April 9, 2019 by DCF that Sanders-White's disciplinary appeal would be held in abeyance because she had an ongoing civil action against DCF in New Jersey Superior Court; that Sanders-White was advised of this development on April 10, 2019 in a telephone call and that she "corroborated" that she did in fact have a pending civil action against DCF; that Sanders-White sent a follow-up email confirming her conversation with CWA and inquiring about the interplay

between her disciplinary appeal and civil action; that CWA advised that Sanders-White's termination remained but could be "modified, dismissed or sustained by way of the appeals process"; and that Sanders-White responded that she wished to "proceed with [her] wrongful termination case" but never advised CWA when/if her civil action against DCF was resolved. CWA maintains that upon receipt of the instant unfair practice charge, CWA contacted DCF and learned that Sanders-White's civil action against DCF had been dismissed on summary judgment and an appeal was filed with the Appellate Division; and that Sanders-White had filed another civil action in New Jersey Superior Court "making similar claims of retaliation, discrimination and harassment." CWA asserts that it is DCF's policy to hold disciplinary appeals in abeyance pending the outcome of related litigation; that CWA has no authority to withdraw the 1/3/2019 FNDA terminating Sanders-White's employment or to reinstate her, provide back pay, or confer other related benefits (e.g., pension, medical, etc.); and that CWA is willing to proceed with Sanders-White's disciplinary appeal and that DCF has agreed to do so.

On March 15, 2021, Sanders-White filed a letter asserting that a complaint should issue regarding the allegations set forth in her charge. Sanders-White maintains that CWA did not comply with the procedural timelines set forth in the 2011-2015 CNA for advancing a disciplinary appeal – e.g., mediation will be held

within 90 days of the disciplinary appeal; arbitration will be held within 180 days of the disciplinary appeal. Sanders-White also maintains that CWA failed to advocate for the dismissal of her PNDA given that DCF filed the disciplinary charges on June 13, 2018, more than one year after the alleged infraction occurred on May 17, 2017. Sanders-White asserts that she never received notice from CWA via regular mail and/or e-mail that mediation of her disciplinary appeal had been scheduled for April 25, 2019. Sanders-White concedes that she filed a civil action against DCF in 2016, that it was dismissed in October 2019, and that it is presently on appeal with the Appellate Division. However, Sanders-White asserts that CWA has not presented any evidence demonstrating that DCF has a policy of holding disciplinary appeals in abeyance while civil actions are pending; that if this is the policy, her disciplinary appeal should have been held in abeyance at/before Step 1; and that CWA and DCF were aware that she had a pending civil action from the date her 6/13/2018 PNDA was issued.

On March 29, 2021, we issued a letter to the parties advising of our tentative determination to dismiss the charge in its entirety. We also advised that a decision consistent with this determination would issue in the absence of a voluntary withdrawal of the charge or submissions that warranted the issuance of a complaint. We asked Sanders-White to submit a

formal amendment to the charge or a letter brief by April 6, 2021 if she believed our determination was incorrect or wished to bring additional material facts to our attention.

On April 8, 2021, Sanders-White filed a letter dated April 7, 2021 reasserting that a complaint should issue regarding the allegations set forth in her charge. Sanders-White argues that "CWA and [DCF] have not provided any policy" demonstrating that disciplinary appeals are held in abeyance while civil actions are pending. Sanders-White maintains that "CWA did not properly represent [her]" because her disciplinary appeal "did not list all charges" and the grievance procedure was not advanced within the appropriate procedural timelines specified in Articles 4 and 5(j) of the 2015-2019 CNA – e.g., appeals to arbitration that are not scheduled for hearing within 18 months after a Step 2 decision is rendered will be considered withdrawn unless the parties mutually agree to extend the matter; mediation will be held within 90 days of the disciplinary appeal; arbitration will be held within 180 days of the disciplinary appeal. Sanders-White claims that because "there was pending litigation" before, during, and after she was disciplined, "there should not have been a grievance held if policy states [that they] should be [held] in abeyance." Sanders-White contends that an unfair practice occurred on July 4, 2020 "when the union fail[ed] to have a hearing within 180 days from [the] Step 2 decision and

fail[ed] to comply with the policy for not having charges dismissed"; and that this falls within the six-month statute of limitations given that her charge was filed on September 24, 2020.

The Public Employment Relations Commission (Commission or PERC) 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-5.4(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. I find the following facts:

Sanders-White was hired by the State in 2006 and has been employed within DCF as a Family Service Specialist 2. She worked at the Hudson local office starting in 2013. The applicable CNA extended from July 1, 2011 through June 30, 2015. The State and CWA reached a successor memorandum of agreement (MOA) that extended from July 1, 2015 through June 30, 2019 and provides in a pertinent part:

> C. Unless expressly modified by the terms of this MOA, all other provisions of the parties' 2011-2015 Agreement shall remain unchanged and shall be incorporated into the parties' July 1, 2015 through June 30, 2019 Agreement, except that the parties agree to make minor changes, such as dates, that may be necessary to conform the parties' 2011-2015 Agreement to the terms of this MOA.

The State and CWA also reached a successor CNA that extends from July 1, 2019 through June 30, 2023. CWA is the majority representative for Sanders-White's title. See 2011-2015 CNA, Art. 1, Appendix 4.

Article 4 of the parties' expired 2011-2015 CNA, entitled "Grievance Procedure," provides in a pertinent part:

> B. Definitions
>
> 1. A "Grievance" is:
> a. A claimed breach, misinterpretation or improper application of the terms of this Agreement; or
> b. A claimed violation, misinterpretation or misapplication of rules or regulations, existing policies, orders, letters of memoranda or agreement, administrative decisions, or laws, applicable to the agency or department which employs the grievant which establish terms and conditions of employment and which are not included in (a) above.
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> * * *
>
> E. General Procedures
>
> . . .14. The State and the Union agree that appeals to arbitration that are not scheduled for hearing within eighteen (18) months after a Step Two decision is rendered will be considered withdrawn unless the parties mutually agree to extend the matter.

Article 5 of the parties' expired 2011-2015 CNA, entitled "Discipline," provides in a pertinent part:

> B. Discipline of an employee shall be imposed only for just cause. Discipline under this

Article means official written reprimand, fine, suspension without pay, record suspensions, reduction in grade or dismissal from service. A suspension may not be imposed for greater than forty-five (45) work days, except as specified under paragraph C below. Dismissal from service or reduction in grade based upon a layoff, or other operational judgment of the State shall not be construed to be discipline.

* * *

F. This Article is the exclusive procedure for the processing of disciplinary actions for employees covered by this Agreement.

* * *

J. Arbitration

. . . 2. Arbitration hearings will be conducted in accordance with the procedures set forth in Article 4, except as otherwise provided in this Article.

3. The Union and the State will schedule a mediation and an arbitration date for disciplinary appeals not submitted to the JUMP panel. The mediation date will be within ninety (90) days of the appeal of disciplinary to arbitration. The arbitration will be held within one hundred and eighty (180) days of the appeal of discipline to arbitration.

. . . 7. The arbitrator shall determine whether discipline was imposed for just cause. If the arbitrator determines that discipline was imposed without just cause, the arbitrator shall have the power to (a) reinstate the employee to his or her position, (b) reduce the penalty, (c) award back pay and (d) restore all seniority the employee would have earned had the employee not been improperly disciplined. If the arbitrator determines that termination is too severe a penalty, the arbitrator may reduce the penalty and may deny back pay for any part of the period the employee was out or for all of the time that the employee was out of work without pay due to the disciplinary action regardless of the maximum period of suspension set forth in Section B of this Article. In cases where an employee was

> suspended pending the outcome of a criminal complaint, or in cases involving the resolution of collateral issues, including but not limited to allegations of abuse or neglect, or in cases involving the loss of a license or credential required as a condition of employment, the Arbitrator shall determine the appropriate length of suspension without pay without regard to the time limits set forth in Section B of this Article.

Article 5 also provides the parties' negotiated procedure for the imposition and appeal of both major and minor disciplinary action.

On April 11, 2016, Sanders-White filed a civil action against DCF and various DCF employees in New Jersey Superior Court, Hudson Vicinage, bearing docket number HUD-L-1533-16.

On June 13, 2018, DCF issued a PNDA charging Sanders-White with insubordination, chronic or excessive absenteeism, violation of department policies, procedures, rules or administrative decisions, and resignation not in good standing based upon her absence from work without authorization since May 17, 2017. On June 20, 2018, at the direction of Local 1037 staff representative Lea Chilelli (Chilelli), Sanders-White filed an appeal of her 6/13/2018 PNDA with DCF and specified that her attorney was Louis Zayas.

On December 12, 2018, DCF Hearing Officer Sybill Trotta (Trotta) held an internal disciplinary hearing. Sanders-White was represented by Local 1037 staff representative Chilelli at the hearing. On January 2, 2019, Hearing Officer Trotta issued a

Report & Recommendation finding that DCF had proven the disciplinary charges by a preponderance of the evidence and recommending that resignation not in good standing was an appropriate penalty.

On January 3, 2019, DCF issued an FNDA sustaining the charges of insubordination, chronic or excessive absenteeism, violation of department policies, procedures, rules or administrative decisions, and resignation not in good standing against Sanders-White and terminated her employment effective May 17, 2017. Also on January 3, 2019, Local 1037 staff representative Chilelli sent correspondence to the Governor's Office of Employee Relations appealing Sanders-White's resignation not in good standing and requesting mediation/arbitration.

On April 3, 2019, CWA staff representative George Krevet (Krevet) sent correspondence to Sanders-White by regular mail and e-mail specifying that her disciplinary appeal would be brought before a mediator on April 25, 2019 and that she must attend the mediation. On April 9, 2019, CWA staff representative Krevet received a telephone call from DCF's Employee Relations Director Douglas Banks (Banks) advising that DCF was holding Sanders-White's disciplinary appeal in abeyance pending the outcome of her civil action against DCF in New Jersey Superior Court (HUD-L-1533-16).

On April 10, 2019, CWA staff representative Krevet phoned Sanders-White to advise that DCF was holding her disciplinary appeal in abeyance pending the outcome of her civil action against DCF in New Jersey Superior Court (HUD-L-1533-16). That same day, Sanders-White exchanged these emails with CWA staff representative Krevet:

> -Sanders-White: This is to confirm our conversation today that DYFS had decided to put the disciplinary hearings on hold due to pending workers compensation litigation. The Workers compensation litigation has been pending since July 2011 and disciplinary charge along with Departmental Hearing have taken place during that time. Since they have decided to place the disciplinary charges on hold, does the Departmental Hearings decision still stand[] or is it null and void due to pending litigation for workers compensation? Please let me know so I could proceed with a wrongful termination case.
>
> -Krevet: The departmental charges stand but could be modified, dismissed or sustained by way of the appeals process.
>
> -Sanders-White: Ok thanks then I will proceed with a wrongful termination case.

On August 16, 2019, New Jersey Superior Court Judge Joseph Isabella granted DCF and various employees' motion for summary judgment and dismissed Sanders-White's civil action (HUD-L-1533-16).

On September 24, 2020, Sanders-White filed the instant unfair practice charge.

On January 13 and 29, 2021, DCF's Employee Relations Director Banks sent e-mails to CWA staff representative Krevet specifying that DCF had no objection to proceeding with Sanders-White's disciplinary appeal.

Statute of Limitations

N.J.S.A. 34:13A-5.4(c) establishes a six-month statute of limitations period for the filing of unfair practice charges. The statute provides in a pertinent part:

> [N]o complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such a charge in which event the 6-month period shall be computed from the day he was no longer so prevented.

In Kaczmarek v. New Jersey Turnpike Auth., 77 N.J. 329, 337-338 (1978), the New Jersey Supreme Court explained that the statute of limitations was intended to stimulate litigants to prevent the litigation of stale claims, and cautioned that it would consider the circumstances of individual cases. The Court noted that it would look to equitable considerations in deciding whether a charging party slept on its rights.

Sanders-White filed her unfair practice charge on September 24, 2020. Any alleged unlawful conduct by CWA before March 24, 2020 could not be the subject of a complaint under our Act unless she was equitably "prevented" from filing a timely charge. No facts suggest that Sanders-White was prevented from filing a

charge within the statutory period. Accordingly, I dismiss any/all allegations specified in the charge before March 24, 2020 (i.e., six months before the charge was filed). See State of New Jersey (Dep't of Treasury), D.U.P. No. 2020-1, 46 NJPER 25 (¶8 2019), adopted P.E.R.C. No. 2020-12, 46 NJPER 149 (¶34 2019); see also Somerset Cty., D.U.P. No. 2018-5, 44 NJPER 252 (¶71 2018) (final agency decision).

Claims Against CWA

Sanders-White alleges that CWA violated section 5.4b(1) and (5) of the Act. Her allegations against CWA center on being provided ineffective assistance/representation during the internal disciplinary process that resulted in her termination from employment with DCF, and ineffective assistance/representation in the related disciplinary appeal.

Section 5.3 of the Act provides that "[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 interest of all such employees without discrimination and without regard to employee organization membership."

The Supreme Court of the United States has held that "[a] breach of the statutory duty of fair representation occurs when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Vaca v. Sipes,

386 U.S. 171, 190 (1967). To establish a breach of the duty of fair representation, the claimant must "adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." Amalgamated Ass'n v. Lockridge, 403 U.S. 274, 301 (1971). New Jersey courts and the Commission have adopted the Vaca standard in deciding fair representation cases arising under the Act. See Lullo v. Int'l Ass'n of Fire Fighters, 55 N.J. 409, 427-428 (1970); Belen v. Woodbridge Twp. Bd. of Educ., 142 N.J. Super. 486, 491 (App. Div. 1976); Saginario v. Attorney General, 87 N.J. 480 (1981); Jersey City Housing Auth., P.E.R.C. No. 2015-70, 41 NJPER 477 (¶148 2015), aff'd 43 NJPER 255 (¶77 App. Div. 2017); OPEIU Local 133, P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983).

In examining a duty of fair representation claim, the majority representative must be afforded a wide range of reasonableness in serving the unit it represents. PBA Local 187, P.E.R.C. No. 2005-78, 31 NJPER 173, 175 (¶70 2005) (citing Belen, 142 N.J. Super. at 490-491). For example, the duty of fair representation does not require a union to file every grievance a unit member asks it to submit. Id. at 174 (citing Carteret Ed. Ass'n, P.E.R.C. No. 97-146, 23 NJPER 390 (¶28177 1997)). Rather, in handling grievances, unions must exercise reasonable care and diligence in investigating, processing, and presenting grievances; make a good faith determination of the merits of a

grievance; and grant unit members equal access to the grievance procedure and arbitration for similar grievances of equal merit. Middlesex Cty. (Mackaronis), P.E.R.C. No. 81-62, 6 NJPER 555 (¶11282 1980), aff'd NJPER Supp.2d 113 (¶94 App. Div. 1982), certif. den. 91 N.J. 242 (1982). "Mere negligence, poor judgment, or ineptitude in grievance handling" alone do not suffice to prove a breach of the duty of fair representation. Id. Unions are entitled to a wide range of reasonableness in determining how to best service their members. Council of N.J. State College Locals (Dusenberry), D.U.P. No. 2002-1, 27 NJPER 342 (¶32122 2001); Ford Motor Co. v. Huffman, 345 U.S. 330, 337-338 (1953). Unions are not obligated to pursue arbitration of every grievance. New Jersey Turnpike Auth. (Beall), P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980), aff'd NJPER Supp.2d 101 (¶85 App. Div. 1981) (union's decision not to arbitrate was based on good faith belief that grievance lacked merit); Carteret Ed. Ass'n (Radwan), P.E.R.C. No. 97-146, 23 NJPER 390 (¶28177 1997); Camden Cty. College (Porreca), P.E.R.C. No. 88-28, 13 NJPER 755 (¶18285 1987); Fair Lawn Ed. Ass'n. (Solomons), P.E.R.C. No. 84-138, 10 NJPER 351 (¶15163 1984) (no violation where union in good faith refused to take grievance to arbitration since it lacked merit); New Jersey Turnpike Employees Union, Local No. 194 (Kaczmarek), P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979) (no

breach of the duty of fair representation where the union decided that it could not win in arbitration).

The facts show that CWA did not breach its duty of fair representation to Sanders-White. From 2018-2019, CWA representatives directed Sanders-White to file an appeal of her 6/13/2018 PNDA; represented Sanders-White during the internal processing of her discipline including the disciplinary hearing; filed a disciplinary appeal on Sanders-White's behalf; and advanced the disciplinary appeal to the point of being scheduled for mediation in accordance with the negotiated procedure for the appeal of major disciplinary action. However, it appears that Sanders-White's employer has a policy of holding disciplinary appeals in abeyance when an employee has related litigation pending. CWA does not believe it has any contractual obligation to challenge this policy and advance a disciplinary appeal when/if a unit member confirms that he/she has related litigation pending until that litigation is resolved. See 2011-2015 CNA, Arts. 4-5. Moreover, upon receiving the instant unfair practice charge, making inquiries with DCF, and receiving notice from DCF that Sanders-White's related litigation had been dismissed on summary judgment (HUD-L-1533-16), CWA has been willing to proceed with her disciplinary appeal.

Sanders-White's charge only establishes that she disagrees with CWA's representation during the internal disciplinary

process and that she disagrees with CWA's view of its contractual obligations and role within the negotiated procedure for the appeal of major discipline. No facts suggest that CWA's representation was discharged in a bad faith, discriminatory, or arbitrary manner. No facts suggest that CWA's contractual interpretation, which appears to be identical to the State's interpretation, is in bad faith, discriminatory, or arbitrary. Even assuming that the facts Sanders-White alleges are true, I find that they do not establish a breach of the duty of fair representation. At best, Sanders-White's charge could support a finding that CWA and/or its representatives were negligent; as discussed above, mere negligence is insufficient to establish a viable claim.[2/] Accordingly, I dismiss Sanders-White's 5.4b(1) allegation.

Sanders-White's 5.4b(5) claim is unsupported. No facts were alleged that CWA violated any of the Commission's rules or regulations. Accordingly, I dismiss Sanders-White's 5.4b(5) allegations.

2/ If Sanders-White is successful with a disciplinary appeal of her 1/3/2019 FNDA, the arbitrator has the power to determine whether her employer is responsible for reinstatement, back pay and benefits, and/or any other damages. See 2011-2015 CNA, Art. 5(J)(7). If Sanders-White is unsuccessful with a disciplinary appeal of her 1/3/2019 FNDA, the lapse in time that she complains of would be moot.

ORDER

The unfair practice charge is dismissed.

/s/Jonathan Roth
Jonathan Roth
Director of Unfair Practices

DATED: April 12, 2021
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 22, 2021.