

D.U.P. NO. 2024-5

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-2023-013

ISABELA PERDOMO,

Charging Party.

SYNOPSIS

The Director of Unfair Practices partially dismisses an unfair practice charge filed by Isabella Perdomo (Perdomo) against her majority representative, CWA Local 1037 (CWA). The charge alleged that the CWA violated N.J.S.A. 34:13A-b(1) when it failed to be present for a meeting between Perdomo and her employer regarding a "personal change in working conditions" despite Perdomo requesting representation and in violation of her Weingarten rights. The charge further alleges that CWA failed to submit two grievances on her behalf and declined to assist her in challenging her employer's refusal to rescind her resignation. The Director finds Perdomo's Weingarten rights were not violated and that the CWA has not breached its duty of fair representation when it declined to assist her in rescinding her resignation. The Director did issue a complaint with respect to the alleged breach of the duty of fair representation for failing to submit two grievances on Perdomo's behalf.

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Appearances:

For the Respondent,
Weissman & Mintz, attorneys
(Ira W. Mintz, of counsel)

For the Charging Party,
(Isabela Perdomo, pro se)

PARTIAL REFUSAL TO ISSUE COMPLAINT

On December 12 and 30, 2022, Isabella Perdomo (Perdomo) filed an unfair practice charge (UPC) and amended UPC against her majority representative, Communications Workers of America, Local 1037 (CWA Local 1037). The charge, as amended, alleges that CWA Local 1037 was not present for a meeting on October 28, 2022 between Perdomo and her employer regarding a "personal change in working conditions" despite Perdomo requesting representation and in violation of her Weingarten^{1/} rights. Perdomo further alleges that in November 2022, CWA Local 1037 failed to submit two

^{1/} NLBR v. Weingarten, 420 U.S. 251 (1975).

grievances on her behalf. Perdomo also alleges that CWA Local 1037 declined to assist her in challenging her employer's refusal to rescind her resignation. Perdomo alleges that CWA Local 1037's actions violated section 5.4b(1)^{2/} of the Act.

On May 5, 2023, CWA Local 1037 filed a brief letter asserting that the October 28, 2022 meeting did not trigger Weingarten rights as the meeting involved discussion regarding a "personal change to working conditions" and was not an investigatory interview that Perdomo reasonably believed would lead to discipline. Further, CWA Local 1037 argues that it determined that Perdomo's grievances were moot as she had resigned on November 20, 2022.

On May 19, 2023, Perdomo submitted a short response to CWA Local 1037's position. Perdomo asserts that CWA Local 1037 failed to represent her in accordance with the grievance procedure contained in the parties' Collective Negotiations Agreement (CNA).

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

^{2/} 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."

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:

CWA Local 1037 is the majority representative of State of New Jersey (State) employees in the statewide Professional, Administrative and Clerical Services, Primary Level Supervisors and Higher Level Supervisor Units. The State and CWA Local 1037 are parties to a CNA effective from July 1, 2019 through June 30, 2023. Perdomo was employed by State in the Division of Consumer Affairs and was represented by CWA Local 1037.

The grievance procedure (Article 4) of the parties' CNA provides a multi-step process ending in binding arbitration. Under section C-Grievance Steps and Time Frames, a grievance must be filed initially within thirty days of the event giving rise to the grievance or within thirty days of when the grievant should have reasonable known of its occurrence. Further, under Article 4, section B, a grievance is defined as a "claimed breach, misinterpretation or improper application of the terms" of the CNA or a "claimed violation, misinterpretation or misapplication of rules or regulations, existing policies, orders, letters of memoranda or agreement, administrative decisions, or laws"

On October 28, 2022, Perdomo attended a meeting with the State regarding a "personal change in work conditions." Prior to the meeting, Perdomo reached out to CWA Local 1037 and requested a shop steward be present for the meeting. Despite Perdomo's request, no one from CWA Local 1037 attended the meeting.

On November 15, 2022 and November 17, 2022, Perdomo filled out two grievance forms alleging she was docked two days pay for her approved telework days, and submitted them to her union representative. The union representative was out of the office at the time the grievances were forwarded. Perdomo never received a response from her union representative regarding the grievances she submitted.

On November 20, 2022, Perdomo sent a letter to her HR manager indicating: "I will not be returning to my position at the Division of Consumer Affairs at 124 Halsey St., Newark NJ." The letter further indicated that Perdomo would "return laptop, cell phone and id cards/parking pass on Monday 11/28/2022." On November 21, 2022, the State accepted her resignation^{3/}.

3/ It should be noted that the State has not been named as a Respondent in the charge. This fact was discussed during a telephone conference with the parties on April 19, 2023. Perdomo indicated that she did not wish to amend her charge to include the State as a Respondent.

ANALYSIS**October 28, 2022 meeting**

An employee has a right to request a union representative's assistance during an investigatory interview that the employee reasonably believes may lead to discipline. This principle was established in the private sector by NLRB v. Weingarten, 420 U.S. 251 (1975), and is known as a Weingarten right. It applies in the New Jersey public sector as well. UMDNJ and CIR, 144 N.J. 511 (1996); State of New Jersey (Dept. of Treasury), P.E.R.C. No. 2001-51, 27 NJPER 167 (¶32056 2001). If an employee requests and is entitled to a Weingarten representative, the employer must allow representation, discontinue the interview, or offer the employee the choice of continuing the interview unrepresented or having no interview. Dover Municipal Utilities Auth., P.E.R.C. No. 84-132, 10 NJPER 333 (¶15157 1984). State of New Jersey (Dept. of Public Safety), P.E.R.C. No. 2002-8, 27 NJPER 332, 335 (¶32119 2001). The charging party bears the burden of proving that an employee is entitled to a Weingarten representative.

The "meeting" in this case was not investigatory. Rather, as admitted by Perdomo in the charge, the meeting involved a "personal change in work conditions." No allegations in the charge suggest that the meeting was an investigatory interview from which one could reasonably infer a possibility of discipline. See Plainfield Bd. of Ed., D.U.P. No. 2016-4, 42

NJPER 478 (§132 2016) (Director found that Weingarten rights did not attach to a meeting whose purpose was to discuss work duties and responsibilities). A Weingarten right does not attach to run-of-the-mill shop floor conversation—for example, giving instruction, training employees or correcting techniques. General Electric Co., 240 NLRB No. 66, 100 LRRM 1248 (1979). Further, no facts have been alleged that Perdomo advised the State that she wished to have a union representative present and the State denied that request. Weingarten 420 U.S. at 257, See State of New Jersey (Dept. Of Corrections), D.U.P. No. 2022-9, 48 NJPER 373 (§84 2022) (Director found that the employees did not allege that they requested a union representative from the State at the time of the meeting, which is an essential element of a Weingarten claim). Accordingly, I find that Perdomo has failed to set forth sufficient facts to warrant the issuance of a complaint on the allegation that CWA Local 1037 violated section 5.4b(1) by failing to attend the meeting with her on October 28, 2022.

Grievance filing

A majority representative has a duty to represent all unit employees fairly and without discrimination on the basis of union membership. N.J.S.A. 34:13A-5.7. A majority representative breaches its duty of fair representation "only when [its] conduct towards a member of the collective bargaining unit is arbitrary,

discriminatory, or in bad faith.” Vaca v. Sipes, 386 U.S. 171, 190 (1967). The Commission subsequently adopted this standard, the violation of which would arise under Section 5.4b(1) of the Act. Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976); 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, 13 (¶15007 1983).

A majority representative is 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 490-91). For example, the duty of fair representation does not require a union to process non-meritorious grievances. Id. at 174 (citing Carteret Ed. Ass’n, P.E.R.C. No. 97-146, 23 NJPER 390 (¶28177 1997)). However, 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 the 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). Moreover, “mere negligence, poor judgment, or ineptitude in grievance handling,” alone do not suffice to prove

a breach of the duty of fair representation. Id. (citing Glen Ridge School Personnel Ass'n, P.E.R.C. No. 2002-72, 28 NJPER 251 (¶33095 2002) (additional citations omitted)).

Here, Perdomo alleges she was docked pay for two days which were her approved telework days^{4/} and she filled out two grievance forms and provided them to her union representative for processing. The parties' CNA allows for grievances related to both contractual violations and violations of rules, regulations, existing policies (ie. The Model Telework Pilot Program), orders, letters, etc. Therefore, accepting the facts as true, Perdomo's grievance appears to have arguable merit.

CWA Local 1037 did not file Perdomo's grievance because the representative was out of the office when she submitted the grievances and upon his return Perdomo had already resigned from her employment. CWA Local 1037 argues that Perdomo's resignation rendered her grievances moot. However, the grievances allege a failure to be paid for days Perdomo teleworked while she was still an employee of the State. CWA Local 1037 has failed to explain how her resignation would have rendered the grievances moot. Further, CWA Local 1037 does not claim to have exercised reasonable care in investigating or processing Perdomo's

^{4/} The State of New Jersey implemented the Model Telework Pilot Program in 2022 requiring all departments and authorities to offer a telework program of no more than two working days per week based on operational need.

grievance. Middlesex Cty. (Mackaronis), 6 NJPER 555. For these reasons, I find that Perdomo has alleged sufficient facts to warrant the issuance of a complaint that CWA Local 1037 breached its duty of fair representation, in violation of section 5.4b(1) of the Act, by not processing the grievances.

Resignation

Perdomo alleges that CWA Local 1037 did not assist her in having her resignation rescinded, however CWA Local 1037's duty of fair representation was not implicated.

In Carteret Ed. Ass'n, P.E.R.C. No. 97-146, 23 NJPER 390 (¶28177 1997), the Commission linked the duty of fair representation to the powers of negotiation and contract administration granted to the majority representative under Section 5.3 of the Act and "the exclusive power of the majority representative to represent employees in certain situations." See City of Clifton, D.U.P. NO. 2022-11, 48 NJPER 86 (¶379 2022) (Director found that employee disability discrimination and workers' compensation claims with other agencies did not implicate any express duty of union under the Act and was not otherwise linked to Union's exclusive representation powers.)

Here, there is no statutory requirement under the Act for a majority representative to assist in rescinding a resignation, unrelated to discipline. Therefore, there was no duty of fair representation owed to Perdomo.

However, even if CWA Local 1037 was required under the Act to assist Perdomo with rescinding her resignation, CWA Local 1037 did not breach the duty of fair representation. Under N.J.A.C. 4A:2-6.1 (c) and (d), a request to rescind a resignation may be consented to by the appointing authority if it is rescinded prior to its effective date. Here, Perdomo informed her employer on November 20, 2022 that she "would not be returning" to her position and would return the State's property on Monday, November 28, 2022. On November 21, 2022, the State accepted her resignation. Because the State has already accepted Perdomo's resignation, CWA Local 1037 determined that there was nothing that could be done to rescind the resignation. No facts allege that CWA Local 1037 acted in a manner that was arbitrary, discriminatory or in bad faith. Further, no facts suggest CWA Local 1037 has assisted other unit members in similar circumstances. For all of the reasons stated above, I find that Perdomo has failed to set forth sufficient facts to warrant the issuance of a complaint on the allegations that CWA Local 1037 violated section 5.4b(1) of the Act by failing to assist her with rescinding her resignation.

ORDER

Accordingly, I will issue a complaint under separate cover only for the section 5.4b(1) claim that CWA Local 1037 violated the duty of fair representation by not processing Perdomo's grievances. I decline to issue a complaint on all of the remaining allegations in the charge.

/s/ Ryan M. Ottavio
Ryan M. Ottavio
Director of Unfair Practices

DATED: August 18, 2023
Trenton, New Jersey

This decision may not be appealed pre-hearing except by special permission to appeal from the Chair pursuant to N.J.A.C. 19:14-4.6. See N.J.A.C. 19:14-2.3(c); N.J.A.C. 19:14-4.6(b).

Any appeal is due by August 28, 2023.