

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF TREASURY),

Respondent,

-and-

Docket No. CO-H-98-338

COMMUNICATIONS WORKERS OF
AMERICA, LOCAL 1033,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants, in part, a motion for dismissal and summary judgment made by the State of New Jersey (Department of Treasury). The State seeks dismissal of allegations in a Complaint based on an unfair practice charge filed by the Communications Workers of America, Local 1033. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act when it reassigned Melissa Mullin allegedly in retaliation for her pursuing a classification appeal with the Department of Personnel, filing a sex discrimination charge with the Division on Civil Rights, and filing a grievance with her employer. The Commission dismisses the 5.4a(4) and (7) allegations in the Complaint and the allegations that the State violated 5.4a(1) and (3) by harassing and discriminating against Mullin because she filed an appeal with the Department of Personnel and a complaint with the Division of Civil Rights. The Commission declines to dismiss the Complaint to the extent it alleges that Mullin was reassigned rather than promoted because she filed a grievance. The Commission also rejects the State's assertion that the unfair practice charge is moot since Mullin is no longer an employee. The case is remanded to the Hearing Examiner for further proceedings.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF TREASURY),

Respondent,

-and-

Docket No. CO-H-98-338

COMMUNICATIONS WORKERS OF
AMERICA, LOCAL 1033,

Charging Party.

Appearances:

For the Respondent, John J. Farmer, Jr., Attorney General
(Michael L. Diller, Senior Deputy Attorney General, of
counsel)

For the Charging Party, Weissman & Mintz, attorneys
(Judianne Chartier, of counsel)

DECISION

On March 16, 1998, the Communications Workers of America, Local 1033 filed an unfair practice charge on behalf of Melissa Mullin against her employer, the State of New Jersey (Department of Treasury). The charge alleges that the employer violated 5.4a(1), (3), (4), and (7)^{1/} of the New Jersey Employer-Employee

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this

Relations Act, N.J.S.A. 34:13A-1 et seq., when, on March 12, 1998, it reassigned Mullin to the Tax Services Branch. It allegedly did so in retaliation for her pursuing a classification appeal with the Department of Personnel ("DOP"), filing a sex discrimination charge with the Division on Civil Rights ("DCR"), and filing a grievance with her employer.

After a Complaint issued, the employer moved for dismissal and summary judgment. Local 1033 opposed that motion. The parties have filed affidavits, exhibits, and briefs. The Chair referred the motion to us pursuant to N.J.A.C. 19:14-4.8. We set forth the following facts and procedural history for purposes of analyzing that motion.

Mullin worked for the Department of Treasury under the civil service title of "Tax Services Specialist 3." In September, 1997, she filed a classification appeal with DOP asking that she be reclassified as a "Conferee". She also filed a complaint with the DCR alleging that she was paid less than a male employee hired to do the same work; she amended that complaint to allege that her later reassignment to the Tax Services Branch was in retaliation for filing the DCR complaint. Local 1033 did not represent Mullin

1/ Footnote Continued From Previous Page

act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (7) Violating any of the rules and regulations established by the commission."

in either the DOP appeal or her DCR complaint. And she filed a grievance asserting that her employer adopted new PAR standards in retaliation for her classification appeal.

DCR found no probable cause to credit the sex discrimination complaint so it closed that case; Mullin did not appeal that ruling. According to the State, the grievance has been abandoned. But Mullin did prevail on her classification appeal. On March 5, 1998, DOP ordered that her position "be reclassified to the title, Conferee Taxation effective October 11, 1997 or the position should be assigned duties and responsibilities commensurate with its current classification."

On March 12, 1998, Mullin was reassigned to the Tax Services Branch as a Tax Services Specialist 3. Her first day in that position would have been March 16. Mullin, however, did not report. She was granted a medical leave of absence, later extended through March 26, 1999. When she did not report to work on March 29, 1999, she was deemed to have resigned not in good standing. She has appealed that disciplinary action to the Merit System Board.

Mullin moved to consolidate the Merit System Board and PERC proceedings. We were informed that an Administrative Law Judge had orally granted that motion and would issue a written decision specifying the reasons for that ruling. However, Mullin later withdrew the consolidation motion pending our ruling on the instant motion. We were not informed of that development so this decision has been delayed.

The State asserts that CWA Local 1033 lacks standing to file this charge because it is not Mullin's certified majority representative. The charge, however, does not allege a refusal to negotiate in good faith, a duty that runs exclusively to the majority representative. See State of New Jersey, D.U.P. No. 98-38, 24 NJPER 397 (¶29181 1998). See also Lullo v. IAFF, 55 N.J. 409 (1970). Local 1033 is an employee organization within the meaning of N.J.S.A. 34:13A-3(e) and N.J.A.C. 19:14-1.1 and an affiliate of the majority representative. Under these circumstances, and absent any exclusivity concerns, Local 1033 has standing to file this charge.

We now turn to the merits of the State's motion. Initially, the parties agree that the allegations concerning N.J.S.A. 34:13A-5.4a(4) and (7) are unsupported by factual allegations. We dismiss them.

The heart of the State's motion is that we lack jurisdiction to decide claims within the primary jurisdiction of DOP and DCR. Under the circumstances presented, we agree. The claim that Mullin was retaliated against for filing a DOP classification appeal concerns her individual appeal of her individual job title rather than employment conditions generally; it must be pursued before the Merit System Board. N.J.S.A. 11A:2-24; N.J.A.C. 4A:10-1.1(c). Contrast West Deptford Tp. Bd. of Ed., P.E.R.C. No. 99-68, 25 NJPER 99, 100-101 (¶30043 1999) (reporting safety concerns to PEOSHA is protected activity);

Burlington Cty. Vocational and Technical School Dist. Bd. of Ed., P.E.R.C. No. 88-35, 13 NJPER 810 (¶18310 1987), aff'd NJPER Supp.2d 199 (¶178 App. Div. 1989) (complaining to Department of Education about employees' health and safety is protected). The claim that Mullin was retaliated against for filing a DCR Complaint also concerns her individual employment status and an individual charge; it has already been pursued to an unsuccessful and unappealed conclusion in the appropriate forum -- DCR. New Jersey Network, D.U.P. No. 98-32, 24 NJPER 245 (¶29117 1998). However, we decline to dismiss the Complaint to the extent it alleges that Mullin was reassigned rather than promoted because she filed a grievance. Our Act protects employees against retaliation for using grievance procedures. Atlantic Cty. Judiciary, P.E.R.C. No. 91-96, 17 NJPER 251 (¶22115 1991). Mullin was not required to prevail on the grievance in order to assert that she was discriminated against because she filed it. Essex Cty., P.E.R.C. No. 95-21, 20 NJPER 385 (¶25195 1994).

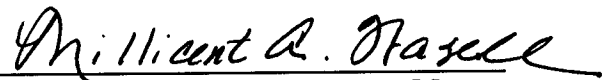
Since Mullin is no longer an employee, the State asserts that the unfair practice case is moot. Under the circumstances presented, we disagree. We assume that Mullin cannot gain reinstatement because the charge does not contest her resignation. However, other remedies -- e.g. a back pay and/or cease-and-desist order -- may be appropriate if an unfair practice is found. We remand the case to the Hearing Examiner for further proceedings consistent with this opinion. Local 1033 should

promptly inform the Hearing Examiner whether its motion to consolidate will be renewed.

ORDER

The allegations in the Complaint that the State of New Jersey (Department of Treasury) violated N.J.S.A. 34:13A-5.4a(4) and (7) are dismissed. Also dismissed are the allegations in the Complaint that the State violated N.J.S.A. 34:13A-5.4a(1) and (3) by harassing and discriminating against Mullin because she filed a classification appeal with the Department of Personnel and a sex discrimination complaint with the Division on Civil Rights. The motion for dismissal or summary judgment is otherwise denied.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Madonna, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed. Commissioner Buchanan was not present.

DATED: September 28, 2000
Trenton, New Jersey
ISSUED: September 29, 2000