

P.E.R.C. NO. 2012-55

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LOCAL 1040, COMMUNICATIONS
WORKERS OF AMERICA,

Respondent,

-and-

Docket No. CI-2011-017

DEBRA WEISMAN,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission affirms the decision of the Deputy Director of Unfair Practices refusing to issue a complaint in an unfair practice charge filed by Debra Weisman against Local 1040, Communications Workers of America. D.U.P. No. 2011-9. The charge alleges that the CWA violated the New Jersey Employer-Employee Relations Act, specifically, N.J.S.A. 34:13A-5.4a(1) and (5) when it refused to seek arbitration of a grievance filed after Weisman resigned from employment. The Commission holds that the Deputy Director properly dismissed the charge.

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.

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Appearances:

For the Respondent, Weissman & Mintz, LLC, attorneys
(Jason L. Jones, of counsel)

For the Charging Party, Law Office of Frank Finch, III,
attorneys (Frank Finch, III, of counsel)

DECISION

On May 2, 2011 Debra Weisman ("Weisman") appealed a decision of the Deputy Director of Unfair Practices refusing to issue a complaint based on an unfair practice charge she filed on November 1, 2010 against Local 1040, Communications Workers of America ("CWA"). D.U.P. No. 2011-9, __ NJPER __ (¶ ____).

The charge alleges that CWA violated sections 5.4a(1) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A.

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. . . . (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and
(continued...)

34:13A-1 et seq. (Act) when, on October 19, 2010, CWA violated its duty of fair representation by refusing to seek arbitration of a grievance filed after Weisman resigned her employment. We affirm the refusal to issue a complaint.

On November 12, 2009, Weisman, a charge nurse included in CWA's collective negotiations unit at the State of New Jersey Ancora Psychiatric Hospital (Ancora), was served a Preliminary Notice of Disciplinary Action seeking her removal for disciplinary reasons. She requested a hearing or meeting which occurred on December 7, 2009. On January, 28, 2010, she was served with a Final Notice of Disciplinary Action ("FNDA") by regular and certified United States mail indicating that she was removed from employment effective November 12, 2009. Weisman, through CWA, filed a grievance which was subsequently scheduled for arbitration. Before the arbitration hearing, the grievance was submitted to mediation.

On April 16, 2010, a mediated settlement agreement was negotiated whereby Weisman's removal was converted to a resignation in good standing. The agreement was signed by Weisman, the mediator, CWA's national staff representative, CWA's local staff representative, the New Jersey State Office of

1/ (...continued)
conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

Employee Relations representative and her employer's representative. On May 11, 2010, Ancora filed an amended FNDA which erroneously indicated that her removal was a "resignation not in good standing." This amended FNDA was mailed to Weisman by regular and certified United States mail.

In June 2010, Weisman was offered employment with a private employer. When the prospective employer solicited confirmation of Weisman's employment at Ancora, it was erroneously advised that Weisman resigned not in good standing.

On July 23, 2010, Weisman filed a grievance contesting the employer's error. On August 5, an Ancora representative sent a letter to Weisman stating that the grievance was inappropriate and could not be processed because she resigned from her employment, effective April 16. On September 23, Weisman wrote to CWA, demanding that her grievance be processed to arbitration. On October 19, CWA advised Weisman that her resignation meant that she was no longer a State employee and not covered by the collective negotiations agreement between CWA and the State. It advised that her grievance would not be processed. On January 4, 2011, Ancora sent her via regular and certified United States mail a second amended FNDA that indicated that Weisman had resigned in good standing.

On appeal, Weisman argues that there were misstatements of fact in the Deputy Director's decision,^{2/} the charge was never "processed" within the meaning and intent of N.J.A.C. 19:14-1.6(a) or (b),^{3/4/} since CWA was a party to the settlement agreement, it had a duty to enforce the agreement after Ancora's breach, and finally, that Weisman's resignation was a result of

2/ The Deputy Director states in his decision that CWA apprised Ancora regarding the erroneous information in the May 11, 2010 FNDA and Weisman asserts that there is no evidence in the record to support that fact. Weisman asserts that this fact was a material factor in the Deputy Director's refusal to issue a Complaint.

3/ N.J.A.C. 19:14-1.6 (a) and (b), Processing of charge, provides:

(a) The Director of Unfair Practices will normally assign a charge to a staff member for processing. All parties will be notified of such assignment and will be requested to submit to the staff member:

1. An executed copy of any current or recently expired collective negotiations agreement between the parties; and

2. A written statement of position including an explanation as to why the allegations contained in the charge, if true, would or would not constitute unfair practices on the part of the respondent.

(b) The assigned staff member may request the parties to submit briefs setting forth detailed arguments concerning all relevant legal issues.

4/ Weisman's attorney was sent a letter dated November 15, 2010, from an Assistant to the Director of Unfair Practices with a Withdrawal Request notice attached. The letter indicated that it did not appear that Weisman had standing to file a charge against CWA since she was no longer a public employee. Weisman's attorney responded in writing on November 16, 2010, and elected not to withdraw the charge and an in person exploratory conference was held on January 31, 2011.

the agreement between CWA and Ancora, and as a result, Weisman's resignation cannot deprive her of standing to assert an unfair practice charge against CWA.^{5/}

CWA denies violating the Act, asserting that Weisman resigned from her employment as part of a negotiated agreement, and is no longer a public employee or a member of CWA, having no legal standing to assert a violation of our Act.

Unfair practice charges may be filed by public employers, public employees, public employee organizations, or their representatives. N.J.A.C. 19:14-1.1. It is undisputed that Weisman voluntarily resigned in good standing after the mediation on April 16, 2010, and is a signatory to the settlement agreement.

N.J.S.A. 34:13A-3(d) defines an employee as a current employee or an individual who ceased work because of a labor dispute or unfair practice.^{6/} See IAFF Local 2081 and

^{5/} Weisman has not cited any legal authority for her final two assertions.

^{6/} N.J.S.A. 34:13A-3(d) provides in pertinent part:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer unless this act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of or in connection with any current labor dispute or because of any unfair labor practice and who has not obtained any other regular and substantially equivalent employment.

Sarapuchiello, P.E.R.C. No. 2009-47, 25 NJPER 66 (¶25 2009), (a retiree is not an employee within the meaning of the Act); Borough of Belmar, P.E.R.C. No. 89-27, 14 NJPER 625 (¶19262 1988) (retired police officers not public employees under the Act).

In this case, Weisman voluntarily resigned and ceased work pursuant to a negotiated settlement agreement; any alleged breach of that agreement occurred after that point when Ancora erroneously indicated on the May 11, 2010, amended FNDA that she had resigned not in good standing and then in June 2010 when it allegedly informed the private employer that she had resigned not in good standing. There is no evidence in the record that indicates that CWA breached the settlement agreement. We neither comment nor rule on any claim which Weisman may have in this matter except to find that it is not cognizable under our Act, but may be pursued in another appropriate forum.^{7/}

ORDER

The refusal to issue a complaint is sustained.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Eskilson, Jones, Krengel, Voos and Wall voted in favor of this decision. None opposed.

ISSUED: April 26, 2012

Trenton, New Jersey

^{7/} Weisman's attorney indicated in his appeal brief that Weisman has a pending civil lawsuit against Ancora in the United States District Court for the District of New Jersey.