

D.U.P. NO. 2022-10

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

In the Matter of

EDISON TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CI-2021-021

ROSEANN CARUSO WALKER,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by Roseann Caruso Walker (Walker) against her employer, Edison Board of Education (Board). The charge alleged that Walker inquired of the Board why she was not being represented by the Principals and Supervisors Association (PSA) negotiations unit and not being paid in accordance with the salary guide for the unit. As result of her inquiry, Walker alleged the Board undertook a pattern of harassment against her in violation of N.J.S.A. 34:13A-5.4a(1), (3) and (5).

The Director finds that no facts indicate that Walker's title(s) fall within the recognition provision of the collective negotiations agreement (CNA) between the Board and PSA. The Director also finds that Walker's alleged 5.3a(3) claim must be dismissed because she failed to establish that Board's alleged harassment altered any term and condition of employment in an important and material manner. Lastly, the Director finds that Walker does not have standing to assert a 5.4a(5) violation.

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Appearances:

For the Respondent,
McCusker, Anselmi, Rosen & Carvelli, attorneys
(Valentina M. Scirica, of counsel)

For the Charging Party,
Oxfeld Cohen, attorneys
(Samuel Wenocur, of counsel)

DECISION

On February 22, 2021, Roseann Caruso Walker (Walker) filed an unfair practice charge against her public employer, Edison Board of Education (Board). Walker alleges that on or about January 22, 2021, she asked the Board why she was not represented by the Principals and Supervisors Association (PSA) [in its] negotiations unit and not being paid in accordance with the salary guide for the unit. Walker alleges that as a result of her inquiry, the Board commenced harassing her, including designating Richard Benedict (Benedict) as her supervisor, though it was aware that she had previously complained about him. She

alleges that the Board disciplined her for failing to properly request time off; and by requiring her to attend an increased number of meetings that Benedict also attended. Walker alleges that Board's actions violate section 5.4a (1), (3) and (5)^{1/} of the New Jersey Public Employer-Employee Relations Act, N.J.S.A. 34:13A-5.1, et seq. (Act).

On June 22, 2021, an informal exploratory conference was held with the parties. The parties were unable to reach a voluntary settlement.

On June 3, 2021, the Board filed a letter denying that it engaged in any unfair practice and urging dismissal of the charge. More specifically, the Board asserts that Walker has been employed since November 14, 2016 and was never included in the PSA negotiations unit. The Board argues that each title held by Walker during her employment fell outside of the recognition provision of the collective negotiations agreement between the Board and PSA. The Board contends that the supervisory titles held by Walker during her course of employment, i.e., coordinator

^{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 employee in the exercise of the rights guaranteed to them by the act and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit employees in that unit, or refusing to process grievances presented by the majority representative."

of grants, assessments and special programs; supervisor of health and wellness; and supervisor of transportation, are all considered non-academic, and as such, are excluded from the PSA negotiations unit. On January 4, 2021, when Walker's title changed to transportation supervisor, Benedict became her immediate supervisor, a fact of which she was aware. The Board denies it knew of any prior complaints of harassment Walker lodged about Benedict. The Board also asserts that Walker did not follow protocol when she called out sick and the increased number of meetings (that Benedict also attended) was a consequence of its plan to return students to in-person instruction on February 1, 2021^{2/}.

On July 26, 2021, Walker filed a letter asserting that a Complaint should issue. She maintains that when she was hired in 2016 as the coordinator of grants, assessments and special programs, her title should have been included in the PSA unit, and she should have consequently received a contractual salary and benefits. The title, coordinator of grants, assessments and special projects was newly created when Walker was initially hired in 2016. She also argues that the composition of the PSA unit mandates her inclusion in it. Walker asserts she was never advised that she was a "non-academic supervisor," (compared with an "academic supervisor"). Walker concedes that the title,

^{2/} In-person instruction did not commence until March 1, 2021.

coordinator of grants, assessments and special programs, remains excluded from the PSA unit, although the person currently in the title is paid in accordance with the PSA salary guide. Walker claims that her questioning of her exclusion from the unit is related to the Board's change in treatment towards her. These alleged changes included disciplinary action; change of her supervisor; and "increased scrutiny" of her. With respect to the change in supervisor, Walker alleges that the Board installed Benedict as her supervisor knowing that she complained about Benedict "harassing" her "quite a few times."

On August 4, 2021, the Board filed a letter reiterating that the charge should be dismissed. The Board asserts that Walker knew she was ineligible for inclusion in the PSA unit because her job description(s) express that fact. Also, neither the Board nor Superintendent Bragen received any complaints from Walker about Benedict. The Board asserts that before Walker was appointed to transportation supervisor, Benedict's duties as manager of enrollment and data systems were to "oversee the District's Transportation Department," including the supervision of the transportation supervisor.

The 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 charge within the meaning of the Act. N.J.S.A. 34:13A-5(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; CWA Local 1040, D.U.P. No. 2011-9, 38 NJPER 93 (¶20 2011) aff'd P.E.R.C. No. 2021-55, 38 NJPER 356 (¶120 2012).

I find the following facts.

Walker was hired by the Board in 2016 as the coordinator of grants, assessment and special programs. Later, Walker became the supervisor of health and wellness. On January 4, 2021, Walker's title became transportation supervisor. Since Walker's initial date of hire in 2016, her various titles have not been included in the PSA unit.

The CNA signed by the Board and the PSA in effect at the time of Walker's hire in 2016 extended from July 1, 2015 through June 30, 2018. The Recognition provision (Article I, Section A) of the CNA between the Board and PSA specifies:

This Agreement shall apply to all principals, assistant principals, academic directors and academic supervisors under contract, excluding employees in all other categories.

The provision was unchanged in the successor CNA.

On or about January 22, 2021, an inquiry was made on behalf of Walker to the Board and PSA regarding her exclusion from the PSA collective negotiations unit, specifically, why she wasn't being paid in accordance with the PSA salary guide.

On or about the same date, Walker was advised that she had failed to use the correct call-out procedure for requesting a sick day. She received an email from Superintendent Bragen advising her that she should contact her direct supervisor, Benedict^{3/}, regarding any unplanned absence. At the time of her call-out, Walker believed that Bragen was her supervisor, not Benedict. She had contacted Bragen's secretary about her unplanned absence, repeating the same call-out procedure she had used in the past to request a sick day. Thereafter, Walker was required to attend an increased number of meetings that Benedict also attended.

ANAYLSIS

Exclusion from the PSA bargaining unit

No facts indicate that any of Walker's titles were ever included in the PSA unit, as defined by the recognition provision of the applicable CNAs. No facts indicate that PSA, either informally or by filing an appropriate and timely clarification of unit petition and/or representation petition, sought to represent any of Walker's job titles. Such petition(s) are the appropriate mechanism(s) to seek representation and inclusion of

3/ Benedict's title is Manager of Enrollment of Data System. The job description for Walker's title, Supervisor of Transportation, specifics that it (the holder) reports to the transportation specialist. It is unclear whether the Board currently employs a person in the title, transportation specialist.

a title in a unit. See Clearview Reg. H.S. Bd. of Ed., D.R. No. 78-2, 3 NJPER 248, 250 (1977). Walker, as an individual employee, does not have legal standing to process either petition. See N.J.A.C. 19:11-1.5(a). That an employee now holding Walker's former title may be compensated at the same rate of a title in the PSA unit does not establish that the title is included in the unit.

The Commission has also repeatedly held that titles must be identified as part of an existing unit in order to be clarified into a unit. Barneгат Tp. Bd. of Ed., D.R. No. 84-15, 10 NJPER 54 (¶15029 1983); Newark Housing Authority, D.R. No. 95-22, 21 NJPER 132, 133 (¶26082 1995) ("[T]itles to be clarified into a unit must be identified as being within the scope of the existing unit; it is insufficient that a title may share a community of interest" with unit employees); Irvington Housing Authority, D.R. No. 98-15, 24 NJPER 244, 245 (¶29116 1998) (Director noted that "newly created titles will be clarified into a unit only if they fall within the definition of the scope of the existing recognition clause of the parties' collective negotiation agreement"). Here, the recognition provision of the applicable CNAs establish that only "academic supervisors," among any other supervisors, are included in the unit. No facts indicate that Walker's title(s) fall within the unit description, nor do any

facts indicate that any possible "non-academic" supervisors are included in the unit.

Under these circumstances, I decline to issue a complaint on allegations that Walker has been unlawfully "excluded" from the PSA negotiations unit.

5.4a(3) claim

The standard for evaluating a 5.4a(3) charge is well established and set forth in Bridgewater Tp. v. Bridgewater Public Works Ass'n., 95 N.J. 235 (1984). No violation will be found unless the charging party has proved, by a preponderance of evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of that activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

New Jersey courts have held that "in order to be actionable, an allegedly retaliatory act must be 'sufficiently severe or pervasive to have altered plaintiff's conditions of employment in an important and material manner.'" El-Sioufi v. St. Peter's University Hospital, 382 N.J. Super. 145, 176 The Court in Cokus v. Bristol Myers Squibb Co., 362 N.J. Super. 366, 378-379 (Law Div. 2002), aff'd 362 N.J. Super. 245 (App. Div. 2003), certif. den. 178 N.J. 32 (2003) found that "[a]lthough actions short of

termination may constitute adverse employment action . . . , not everything that makes an employee unhappy is an actionable adverse action"; that statutes such as the NJLAD and CEPA "[were] never intended to be a general civility code for conduct in the workplace").

Walker has failed to establish that the Board's alleged retaliatory acts were sufficiently severe or pervasive to have altered her conditions of employment in an important and material manner. See El-Sioufi v. St. Peter's University Hospital, *supra*. Most of Walker's 5.4a(3) claim concerns her having been placed under Benedict's supervision, despite her allegedly conveyed protests against his previous and unspecified "harassment." She also alleges that Benedict wasn't designated as her supervisor until after she inquired about her exclusion from the PSA negotiations unit, and that since January 21, 2021, she has been required to attend numerous meetings with Benedict, and two other employees.

The Board avers that Walker knew that Benedict became her supervisor upon her January 4, 2021 designation as transportation supervisor and that Benedict had been charged with oversight of the transportation department before her designation.

Walker's general claims of Benedict's previous and purportedly contested "harassment" of her fails to meet specificity requirements of any unfair practice charge. N.J.A.C.

19:14-13(a); Edison Tp. D.U.P. No. 2012-9, 38 NJPER 269 (¶92 2012), aff'd P.E.R.C. No. 2013-84, 40 NJPER 35 (¶14 2013). That Walker may have been required to go to an increased number of meetings with Benedict in attendance after January 21, 2021, does not establish an adverse employment action. (The Board has asserted that the increase was in anticipation of a return to in-person student instruction). That she also was told to direct her "unplanned absence" request or advice to Benedict similarly fails as an "adverse action." For these reasons, I decline to issue a complaint on allegations that the Board violated section 5.4a(3) of the Act.

5.4a(5) claim

Individual employees normally do not have standing to assert a section 5.4a(5) violation because the employer's duty to negotiate in good faith only runs to the majority representative. N.J. Turnpike Authority, P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980); Camden Cty. Highway Dept., D.U.P. No. 84-32, 10 NJPER 399 (¶15185 1984). An individual employee may file an unfair practice charge and independently pursue a claim of a section 5.4a(5) violation only where the individual has also asserted a viable claim of a breach of the duty of fair representation against the majority representative. Jersey City College, D.U.P. No. 97-18, 23 NJPER 1 (¶28001 1996); N.J. Turnpike Authority, D.U.P. No. 80-10, 5 NJPER 518 (¶10268 1979). Walker has not

alleged a breach of the duty of fair representation.

Accordingly, the 5.4a(5) allegation is dismissed.

ORDER

The unfair practice charge is dismissed.

/s/Jonathan Roth
Jonathan Roth
Director of Unfair Practices

DATED: February 28, 2022
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 March 10, 2022.