STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

FORT LEE BOARD OF EDUCATION,
Respondent,

-and-

FORT LEE EDUCATION ASSOCIATION,
Respondent,

Docket Nos. CI-2011-011
& CI-2011-012

-and-

DEONCA WILLIAMS,
Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission grants summary judgment on separate Motions for Summary Judgement filed by the Fort Lee Board of Education and the Fort Lee Education Association, respectively, on unfair practice charges filed by Deonca Williams, a nontenured teacher. Williams alleged that the Board violated N.J.S.A. 34:13-5.4a(4) and (5) when it terminated her employment and had her escorted out of the school building; and that the Association violated N.J.S.A. 34:13-5.4b(1) and (3) when an Association representative allegedly announced to a group of new teachers that the Association would not file any grievances for them, advised them not to file grievances or complaints, insisted they join the Association, and advised Williams to cooperate with the administration in changing her classroom for third period, and that it would not file a grievance for her.

Charging Party Williams did not file any certified written response to the Motions pursuant to N.J.A.C. 19:14-4.8.

The Hearing Examiner found that based upon the facts derived from the competent evidence in the certified statements of facts and exhibits provided by the Board and the Association, no facts supported a finding that the Act was violated, thus the consolidated Complaints were dismissed.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. No. 2013-17

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DEONCA WILLIAMS,
Charging Party.

Appearances:

For the Respondent - Board,
Cleary Giacobbe Alfieri Jacobs, LLC
(Yaacov Brisman, of counsel)

For the Respondent - Association,
Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys
(Aileen O'Driscoll, of counsel)

For the Charging Party,
Deonca Williams, pro se

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On September 29, 2010, Deonca Williams, a public employee (Charging Party or Williams), filed unfair practice charges against her employer, the Fort Lee Board of Education (Board) (Docket No. CI-2011-011), and her majority representative, the Fort Lee Education Association (FLEA or Association) (Docket No. CI-2011-012). Williams alleges that the Board violated sections

5.4a(4) and (5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), when, on September 8, 2012, the Board terminated her employment and had her escorted out of the school building. Williams alleges that the Association violated sections 5.4b(1) and (3)[2/] of the Act on September 1 and 8, 2012, when a FLEA representative allegedly announced to a group of new teachers that the Association would not file any grievances for them; advised them not to file grievances or complaints; insisted they join the Association; and advised Williams to cooperate with the administration in changing her classroom for third period, and that it would not file a grievance for her.

A consolidated Complaint and Notice of Hearing was issued on January 3, 2012. On January 20, 2012, the Board filed an Answer

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1/ These provisions prohibit public employers, their representatives or agents from: "(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. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ These provisions prohibit public 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 (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit."

to the Complaint, denying that it violated the Act and raising affirmative defenses. On January 30, 2012, the Association filed an Answer denying it violated the Act and raising affirmative defenses.

On September 17, 2012, the Association filed a Motion for Summary Judgment, together with a brief, certification by FLEA President Gary Novosielski and two exhibits.[3/] On October 19, 2012, the Board filed a Motion for Summary Judgment, brief, certification by High School Principal Priscilla Church and six exhibits.

On October 11, 2012, and November 8, 2012, respectively, the Commission referred the Association's and Board's Motions to me for a decision. N.J.A.C. 19:14-4.8.[4/]

3/ The Respondent Association's exhibits are referred to as RA-1 and RA-2; the Respondent Board's exhibits are referred to as RB-1 through RB-6.

4/ N.J.A.C. 19:14-4.8, Motions for Summary Judgment, provides in pertinent part:

> (a) Any motion in the nature of a motion for summary judgment . . . shall be filed with the Chairman, who shall refer the motion to either the Commission or the hearing examiner. The parties shall be notified in writing of such referral . . .
>
> (b) A motion for summary judgment shall be in writing and accompanied by a brief and may be filed with supporting affidavits . . . along with proof of service of a copy on all other parties.

(continued...)

Charging Party Williams has not filed any written response to the Motions.

Summary judgment will be granted:

> If it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and that the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross-motion for summary judgment may be granted and the requested relief may be ordered. [N.J.A.C. 19:14-4.8(e)].

Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995) (Brill) establishes the standard to be used in deciding whether a genuine issue of material fact precludes summary judgment. I must:

> consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. Brill at 540. (emphasis added).

A motion for summary judgment should be granted cautiously and not used as a substitute for a plenary hearing. Baer v. Sorbello, 177 N.J. Super. 182 (1981); Essex Cty. Ed. Serv Comm.,

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4/ (...continued)

> (c) Within 10 days of service on it of the motion for summary judgment or such longer period as the Chairman or hearing examiner may allow, the responding party shall serve and file its answering brief and affidavits, if any.

P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982); N.J. Dept. of Human Services, P.E.R.C. No. 89-54, 14 NJPER 695 (¶19297 1988).

Applying these standards and relying on the pleadings, I make the following:

FINDINGS OF FACT

Since Williams did not file any certified statement or affidavit, exhibits, or brief in response to the two Motions for Summary Judgment, the facts are derived from the competent evidence - the certified statements of facts and exhibits provided by the Board and the FLEA.

1. The Board hired Williams as a non-tenured teacher for school year 2010-2011. Williams was assigned to teach High School Spanish for 5 periods per day in room 200 of the High School (RB-1, Church cert., ¶6, 7, 8, 10; Novosielski cert. ¶9). Williams began employment on September 1, 2010 as a non-tenured teacher (RB-1, RA-B, Novosielski cert., ¶9).

2. Williams and FLEA President Gary Novosielski met on September 1, 2010, at the new teachers' orientation in the Fort Lee High School Library (Novosielski cert., ¶10). The teachers received information about the FLEA and were invited and encouraged to join (Novosielski cert., ¶10).[5/] As standard

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5/ Williams asserts in her charge against the Association that Novosielski made derogatory comments about the Governor, urged the teachers to get involved with the Association's political campaigns and remarked that another FLEA

(continued...)

procedure, they were required to complete membership forms, even if they chose not to join (Novosielski cert., 1 ¶0).[6/] Other FLEA members assisted and stood by as the teachers completed the required forms (Novosielski cert., ¶10).

3. The Board and FLEA are parties to a collective negotiations agreement containing a grievance procedure (Novosielski cert., ¶3; RA-B). Article 1. "Definitions," of the grievance procedure provides:

> b. The term "grievance" and the procedures relative thereto, shall not be deemed applicable in the following instances:
>
> > i. The failure or refusal of the Board to renew the contract of a non-tenured teacher.
> > (RA-B)

4. The High School building is an older facility and increased student enrollment has left the building overcrowded (Church cert., ¶11). Principal Church delegated to Director of

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5/ (...continued)
representative was in Mexico trying to launder the Union's funds. These allegations, even if true, are in the nature of free speech and would not be unfair practices. See, e.g., Black Horse Pike Reg. Bd. Ed., P.E.R.C. No. 82-19, 7 NJPER 502, 503 (¶12223 1981); Florham Park Bd. Ed., P.E.R.C. No. 2004-83, 30 NJPER 230 (¶86 2004)(Board violated Act by issuing disciplinary memorandum to teacher following critical remarks he made in his role as union president, which were unrelated to his employment performance).

6/ Williams asserts in her charge that Novosielski "insisted" the teachers join the FLEA; Novosielski certified that he "encouraged" them to join. The factual difference is not material to the case here.

School Counseling Jamie Ciofalo the responsibility of addressing the overcrowding by reassigning classrooms as needed, based on student enrollment (Church cert., ¶11). In the beginning of the 2010-2011 school year, Ciofalo identified an overcrowded class in the High School. History Teacher Michael LoPresti's third-period class, at twenty-nine students, had more students than his room (210) could accommodate. However, Williams' assigned room (200) could easily accommodate that number and her smaller third period class, at fifteen students, would fit in LoPresti's room. The two rooms are in the same hallway (Church cert., ¶11 - 14). Accordingly, on September 7, 2010, Ciofalo notified Williams and LoPresti that they would be switching rooms for third period only, each day (Church cert. ¶15, Novosielski cert., ¶11).

5. Ciofalo informed Church that Williams had refused to move her third period class (Church cert.. ¶15). Church then spoke to Williams to try to resolve the problem, and, afterward, Church believed that Williams would comply with the directive the next day (Church cert., ¶16).

6. At 4:22 a.m. on September 8, 2010, before school started, Williams sent an email to Assistant Principal John Coviello, Church and Ciofalo, with a copy to the NJEA, informing them that she would not change rooms during third period (Church cert., ¶ 17, Novosielski cert., ¶12; Exhibits RB2 and RA-A). Williams wrote, in relevant part:

> Thank you for your note yesterday, welcoming me to Fort Lee High School for 2010-2011.
>
> Unfortunately, it may not be such "a good year" as you described, if my students from 3rd period Spanish in room 200 have to travel to a different room (210) where it is impossible for me to be to greet them because I am already releasing a class in my assigned room 200.
>
> . . . Yesterday there was already an issue that the students were not under adult supervision and that is not the case. . . . I was in the process of traveling to room 210. . . yet the administrators believed I was not watching the class in room 210.
>
> . . . If any accident or incident happens no matter the magnitude we all know the parents will get involved and then they will bring their attorneys which will create a legal issue that would not have existed before.
>
> . . . I am willing to collaborate with everyone but in this case I cannot be tangled up in decisions that will end up being detrimental to everyone. My schedule and hours have been set and I am working with that but the room change is not good.
>
> I regret to inform you that effective today I am unable to change rooms during period 3.
> [RA-A, RB-2]

7. Novosielski realized that Williams had no intention of moving her third period students, as directed by the administration (Novosielski cert., ¶12). He decided to arrive at school early to attempt to speak to her before school and before

she spoke to any administrators. (Novosielski cert., ¶13) Early (6:45 a.m.) on September 8, 2010, before locating Williams, Novosielski approached Church about the email (Novosielski cert., ¶13, Church cert., ¶17). He asked permission to speak to Williams before classes began and before Williams spoke to any administrator, and Church agreed (Church cert., ¶17; Novosielski cert., ¶13). Novosielski waited for Williams and attempted to meet with her about the administration's directive, however, Williams did not have time before her first period class (Church cert., ¶17, Novosielski cert., ¶13 - 14). Novosielski tried to set a later meeting but Williams declined (Novosielski cert., ¶14).

8. After her second period class, as she had stated she would in her email (RA-A, RB-2), Williams disobeyed the directive to switch rooms, and remained in room 200. At the beginning of third period, several students and LoPresti congregated in the hall near room 200 causing a commotion (Church cert., ¶18). At the time, Principal Church was walking in the halls with Student Resource Officer Vincent Buda,[7/] and they saw and heard the commotion outside Williams' classroom (Church cert., ¶18). A dispute was occurring between Williams and LoPresti over the occupancy of room 200, which was at that time filled with

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7/ Buda is also a Fort Lee Patrol Officer and the district's DARE (Drug Abuse Resistance Education) officer.

students from both Williams' Spanish class and LoPresti's history class. (Church cert., ¶18). Church learned that the dispute was because Williams refused to leave room 200 (Church cert., ¶18). LoPresti and Williams told Church they had discussed moving his class to the auditorium or media center, but Church rejected the idea, because those were not appropriate learning environments (Church cert., ¶19).

9. Church asked Williams to move her class to room 210 but Williams refused, and "accused Church of yelling at her" (Church cert.,¶19). Church told Williams to come out into the hall to talk and Williams eventually left the classroom, went into a nearby office and asked for an FLEA representative (Church cert., ¶20).

10. Church summoned Novosielski from his third-period class. Superintendent Raymond Bandlow arrived at the scene (Church cert., ¶22, Novosielski cert., ¶17). Novosielski asked to speak with Williams alone first (Church cert.,¶21, Novosielski cert., ¶17). Novosielski advised Williams that scheduling and classroom assignments are managerial prerogatives and that her refusal to abide by the administration's directive amounted to insubordination, for which she could be disciplined and possibly terminated (Novosielski cert., ¶18). He advised her to cooperate with the administration (Novosielski cert., ¶18). Williams took a cell phone call during their conversation and refused to end

it, even though Novosielski asked her to (Novosielski cert., ¶19).

11. Bandlow entered the office and attempted to speak with Williams, who continued to talk on her cell phone and ignored Bandlow (Church cert., ¶22-23, Novosielski cert., ¶20). Bandlow ordered her to stop talking on the phone but she did not (Church cert., ¶22-24, Novosielski cert., ¶20). Finally, Bandlow informed Williams that she was insubordinate and he would recommend the Board terminate her employment. He ordered her to leave (Church cert., ¶25). Student Resource Officer Buda escorted her from the building (Church cert., ¶24-25, Novosielski cert., ¶21-22).

12. Bandlow recommended that the Board terminate Williams, and on September 14, 2010, the Board formally notified Williams that it had approved her termination (Church cert., ¶25-26).

13. Novosielski asserts that given the fact that Williams was a non-tenured teacher, and in view of her insubordination, it is unlikely that a grievance would have been pursued on her behalf (Novosielski cert., ¶25). The FLEA has not contacted Williams to file a grievance and she did not contact the FLEA to file a grievance (CI-2011-012, Novosielski cert., ¶24). No grievance was filed on behalf of Williams (Novosielski cert., ¶23).

14. Williams also alleges these facts that are unsupported by any corroborating evidence or by certification or affidavit:

> - Novosielski stated he would not file any grievance for her or the other teachers and advised them not to file grievances (CI 2011-011, -012).
>
> - Novosielski stated he would not file a grievance for her because, "[she] had no right to question anything the administration stated or to be concerned with student safety." (CI 2011-012)
>
> - Church, Bandlow, a security guard and Novosielski were all waiting for her outside of her assigned classroom (200). (CI 2011-012)
>
> - Bandlow harassed and threatened her and accused her of trespassing. (CI 2011-011)
>
> - Before the Board made the final decision concerning the recommendation, an advertisement for her position was posted on an internet site. (CI 2011-11, 012)
>
> - On the same day as her termination, Williams' name was removed from the list of staff and her Board e-mail account was disabled. (CI 2011-011, -012).
>
> - A "lesser qualified" candidate was hired to fill her position who "may be working off [Williams'] credentials" and using Williams' teaching materials. (CI 2011-011, -012).
>
> - The Board has not sent the FLEA any correspondence regarding the adverse decision (CI 2011-012).

ANALYSIS

As set forth infra, summary judgment will be granted if there are no material facts in dispute and the movant is entitled

to relief as a matter of law. N.J.A.C. 19:14-4.8(d); Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954). When a respondent files a motion for summary judgment and presents facts by way of certifications, the charging party cannot rely on the allegations in its charge, but must file its own certification setting forth specific facts and showing that there is a genuine issue for hearing. See, PBA Local 351-A (Pizarro) P.E.R.C. No. 2009-7, 34 NJPER 243 (¶82 2008).

CI 2011-011

In CI-2011-011, the charging party alleges that the Board terminated her after she complained about the Board's order to switch classrooms, identifying the safety of her students and the possibility that, at some future point, she would be criticized for not properly supervising them as they and she changed rooms. She implies that the order was an intentional set up to put her in an impossible situation and alleges that the Board conspired with the Association to harm her. Williams announced she would not obey the order in the email she sent on September 8, 2010, and then she disobeyed the order, which was repeated by her supervisor, Principal Church. She also refused the Superintendent's order to cease her cell phone conversation, and these insubordinate actions were the reasons the Board terminated her. These facts were not refuted.

No alleged facts or competent evidence support the alleged collusion between the Board and Association to coerce Williams and interfere with her protected rights.

Williams alleges that the Board violated sections 5.4a(4) and (5) of the Act. To maintain a successful 5.4a(4) allegation, a charging party must show that he or she "signed or filed an affidavit, petition or complaint or gave any information or testimony under this Act." None of Williams' allegations support a finding that she filed any petition, affidavit, or complaint or gave testimony or information to the Commission before she was terminated and, thus, this allegation is not supported by any facts, and is dismissed. Accord, Camden Cty. (Health Services), P.E.R.C. No. 88-11, 13 NJPER 660 (¶18248 1987) (complaint dismissed where charging party did not establish that he was suspended because he had earlier filed an unfair practice charge).

Under section 5.4a(5) of the Act, a public employer owes a duty to negotiate in good faith with a majority representative of employees over terms and conditions of employment, and to process grievances presented by the majority representative. Here, there are no alleged facts indicating that the Board refused to negotiate with the Association over Williams' terms or conditions of employment. The contention that the Board refused to process any grievances over terms and conditions of employment is not

supported by the facts, as no grievance was filed. See, e.g., County of Hudson (Konecko et al.) P.E.R.C. No. 2010-15, 35 NJPER 346 (¶116 2009) (County did not violate Act by refusing to process grievance to arbitration absent evidence that union requested arbitration). Charging Party's complaint about having to switch rooms appears to concern a non-negotiable issue. See In re Fairview Bd. of Ed., P.E.R.C. No. 80-18, 5 NJPER 378 (¶10193 1979) (non-procedural aspects of a school board's decision to make teaching assignments is an inherent managerial prerogative); see also Camden Cty. College and Camden Cty. College Faculty Assn.(Zaleski), D.U.P. No. 87-010, 13 NJPER 166 (¶18074 1987)(unfair practice charge dismissed where Director found the assignment or non-assignment of particular courses is a matter of educational policy and is not negotiable).

Individual employees normally do not have legal standing to assert section 5.4a(5) violations because the employer's duty to negotiate in good faith runs only to the majority representative. See, County of Hudson, supra; N.J. Turnpike Auth., P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980), Camden Cty. Hwy. Dept., D.U.P. 84-32, 10 NJPER 399 (¶15185 1984). An individual employee may pursue a claim of an a(5) violation only where that individual has also asserted a viable claim of the breach of the duty of fair representation (section 5.4b(1) against the majority representative. Jersey City College, D.U.P. 97-18, 23 NJPER 1

(¶28001 1996). However, as set forth below, here I find no support in the competent evidence for the alleged violation of section 5.4b(1) by the Association. Therefore, the Motion concerning the Board's 5.4a(5) allegation is granted.

CI 2011-012

In CI-2011-012, Charging Party Williams alleges that the Association violated 5.4b(1) and (3) of the Act. A union breaches its duty of fair representation and violate the section 5.4b(1), when its conduct toward a negotiations unit member is arbitrary, discriminatory or in bad faith. Vaca v. Sipes, 386 U.S. 171 (1967). Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div 1976). An Association should exercise reasonable care and diligence in "investigating, processing and presenting grievances, and exercise good faith in determining the merits of a grievance" but it is not obligated to grieve each or any issue presented by a member. See, e.g., County of Hudson (Konecko/Taylor), P.E.R.C. No. 2010-15, 35 NJPER 346 (¶116 2009).

Here, Williams has not responded to the Association's motion for summary judgment and the undisputed facts do not suggest that the FLEA acted arbitrarily, discriminatorily, or in bad faith in advising her to obey the Board's direct order and not be insubordinate and not pursuing a grievance on her behalf. Rather, it is apparent from the undisputed facts that Williams

rejected the FLEA representative's attempt to avoid a problem before it occurred, and rejected his advice in the middle of the incident, which resulted in her being considered insubordinate. Further, the grievance procedure herein may limit the potential grievances of members who are non-tenured teachers when their employment is terminated or they are not renewed.

Finally, no facts support the 5.4b(3) allegation; moreover, the duties under this section are owed to the public employer and not to individual members. See N.J.S.A. 34:13A-5.4(b); County of Hudson, supra. Therefore, summary judgment for the Association on both the 5.4b(1) and (3) allegations is appropriate and is granted.

ORDER

Summary judgment is granted. The Consolidated Complaint is dismissed.

Patricia Taylor Todd
Hearing Examiner

DATED: April 8, 2013
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by April 18, 2013.