

D.U.P. No. 2018-12

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

In the Matter of

COUNTY OF ESSEX,  
Respondent,

-and-

Docket No. CI-2018-020

PUBLIC EMPLOYEES SUPERVISORS  
UNION,  
Respondent,

-and-

ALEXIS T. MILLER,  
Charging Party.

**SYNOPSIS**

The Acting Director of Unfair Practices dismisses an unfair practice charge filed by an individual against her majority representative and employer. The charge alleges that the majority representative violated the duty of fair representation by failing to file a grievance on her behalf in response to the employer's disciplinary actions against her, and her eventual demotion. The charge also alleges that her employer violated the Act by conspiring with her majority representative to deny her fair representation in an effort to facilitate her demotion and subsequent ineligibility to be a member of the supervisor's unit, in an effort to relieve the majority representative of its duty to represent the charging party.

The Acting Director determined that the facts did not indicate that the majority representative violated the duty of fair representation as set forth in Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967). Consequently, the Acting Director also determined that the individual did not have standing to allege that the public employer violated 5.4a(1) and (5) of the Act when it demoted her.

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Appearances:

For the Respondent,  
County of Essex  
(Robin Magrath, Esq.)

For the Respondent  
Mets Schiro McGovern and Paris, LLP, attorneys  
(Brian Manetta, of counsel)

For the Charging Party,  
(Alexis T. Miller, pro se)

**REFUSAL TO ISSUE COMPLAINT**

On December 7, 2017, and December 18, 2017, Alexis Miller filed an unfair practice charge and an amended charge against her employer, the County of Essex (County), and her majority representative, Public Employees Supervisors Union (PESU). Miller alleges that PESU unfairly refused to file a grievance on

her behalf contesting two poor evaluations and disciplines that she received during her working test period in a supervisory title, which extended from September 11, 2017, through December 11, 2017. Miller alleges that PESU and her employer, the County, conspired together to demote her from her supervisory title so that she would no longer be included in PESU's collective negotiations unit, and PESU would no longer have to advocate on her behalf. Miller also alleges that PESU did not advocate for her, and did not send her a copy of any grievance filed on her behalf, despite her repeated requests for assistance. The PESU's actions allegedly violate 5.4b(3)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act).

Miller alleges that the County conspired with PESU to have her demoted to remove her from the supervisor's unit so that PESU would not have to represent her. The County's actions allegedly violate 5.4a(1) and (5)<sup>2/</sup> of the Act.

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1/ This provision prohibits employee organizations, their representatives or agents from: "(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." The alleged facts implicate section 5.4b(1) of the Act; "Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act." I will review Miller's charge with particular attention to this provision.

2/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the  
(continued...)"

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 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:

On July 21, 2008, the County hired Miller as a family service worker in its Division of Family Assistance and Benefits (DFAB). On September 11, 2017, Miller was provisionally promoted to the title of family service supervisor for DFAB, with a working test period beginning on September 11, 2017, and concluding on December 10, 2017. As the County is a Civil Service employer, a provisionally appointed employee is subject to a working test period which is "designed to permit an appointing authority to determine whether an employee can satisfactorily perform the duties of the title." See N.J.A.C. 4A:4-5.1(a). A working test period for any county employee, such as Miller, generally lasts three months. See N.J.A.C. 4A:4-

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2/ (...continued)  
rights guaranteed to them by this act; . . .[and] (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."

5.2(b)(1). The appointing authority prepares a progress report after two months, and a final report at the conclusion of the working test period. N.J.A.C. 4A:4-5.3(a). An employee may be separated for unsatisfactory performance at the end of the working test period. N.J.A.C. 4A:4-5.4(a).

During Miller's first month as a provisional family service supervisor, several family service workers complained about her to their majority representative, CWA, Local 1081. At or around the same time, Miller complained to her supervisors and to PESU about various family service supervisors. On September 28, 2017, DFAB's Administrative Supervisor of Family Services, Nancy Gervikas and Assistant Administrative Supervisor of Family Services, Daria Rotondo met with Miller and then-PESU President Carol Perkins to discuss Miller's concerns with pending grievances filed by CWA, Local 1081 against her (as a County representative), as well as Miller's own concerns and complaints.

On October 10, 2017, the County issued a thirty (30) day evaluation to Miller for the period of September 11, 2017 through October 10, 2017, reporting an unsatisfactory average rating of 1. (A copy of the evaluation is attached as Exhibit J to the Certification of David M. Bander, Esq., which was submitted by PESU in support of its position statement, dated February 16, 2018) (hereinafter referenced as "Bander Cert.").

On October 11, 2017, Gervikas issued (a written) "Oral Reprimand" discipline to Miller for insubordination and conduct unbecoming a public employee. (A copy of the October 11, 2017 Oral Reprimand is attached as Exhibit C to the Bander Cert.). The Oral Reprimand states that it was imposed because "Ms. Miller was insubordinate as she failed to follow several supervisory directives relating to staff assignments, case actions, case banking processes, submission of cases, and case conferences." (Bander Cert., Exh. C.) Miller also reportedly "displayed conduct unbecoming a public employee as evidenced by numerous inappropriate interactions with subordinates and colleagues," and "fail[ed] to demonstrate the ability to form effective links with staff at all levels and fails to effectively perform her job duties." The discipline directs Miller to "adhere to supervisory directives, conduct herself in a professional manner, and improve her supervisory effectiveness and job performance." Gervikas also met with Miller at that time to discuss the Oral Reprimand.

The parties' contractual grievance procedure, set forth in their 2017-2019 collective negotiations agreement, provides at Step 1, that the grievant "shall institute action in writing, signed and delivered to his (or her) Administrative Superior/Unit Manager . . . within fifteen (15) working days." The "Administrator shall render a decision in writing within fifteen (15) working days after receipt of the grievance." At Step 2,

"in the event the grievance has not been resolved at Step 1, the Union, and only the Union, may file a written grievance . . . with the Director of the Division within fifteen (15) working days of the grievant's receipt of the response," and the "Director of the Division or his/her designee shall respond in writing within fifteen (15) working days of receipt of the grievance." If the grievance is not satisfactorily resolved at Step 2, PESU may file a written Step 3 grievance "with the Department Head or his/her designee within fifteen (15) working days," and the Department Head "shall respond in writing to the grievance within fifteen (15) working days." If the grievance has not been satisfactorily resolved at Step 3, at Step 4, the PESU President "may submit the matter to arbitration . . . no later than forty-five (45) working days after receipt of the response."

On October 23, 2017, PESU President Perkins filed a Step 1 grievance on Miller's behalf contesting the Oral Reprimand and all negative evaluations. (A copy of the October 23, 2017 Step 1 grievance is attached to the Bander Cert. as Exh. D). The grievance challenges the "unwarranted disciplinary action" against Miller, and requests that "all negative evaluations and disciplinary action be removed from Ms. Miller's personnel folder." (Bander Cert., Exh. D). The grievance further requests that Miller be reassigned to another office for the remainder of

her working test period, "in order for her to have a fair and impartial evaluation of her abilities."

Also on October 23, 2017, PESU's "executive board met to discuss Miller's allegations of harassment by the County administration as well as [Miller's] request for the assistance of [PESU's] attorney." (Perkins Certification, submitted by the PESU with its position statement, at ¶7). At that meeting, the PESU's Executive Board "decided to postpone actions on these requests until Miller's parallel complaint with the Equal Employment Opportunities Commission was resolved."

On October 24, 2017, Perkins wrote a letter to Miller, advising that on October 23, 2017, PESU'S "executive board met . . . to discuss the issues surrounding [Miller's] harassment charges against the [County] Administration and [Miller's] request for the assistance of the union's attorney." (A copy of Perkins' October 24, 2017 letter to Miller is attached to the Bander Cert. as Exh. F). Perkins wrote: "Since [Miller has] filed a claim with the EEOC, the Executive Board has decided to wait until the [EEOC] makes a decision on the harassment charges against [County employees] Ms. Gervikas and Ms. Rotonda." (Bander Cert., Exh. F). Perkins also wrote that, "[d]epending upon the EEOC's decision, [Miller] may make another request at that time to the Executive Board for the assistance of the union



attorney," and requests that Miller keep Perkins informed on the status of the EEOC proceedings.

On October 27, 2017, Gervikas issued a second discipline, a "Written Reprimand," to Miller. (A copy of the Written Reprimand is attached to the Bander Cert. as Exh. G). The discipline was imposed for insubordination, ". . . as [Miller] fails to adhere to supervisory directives relating to case actions and office work processes;" ". . . continues to display conduct unbecoming a public employee;" and ". . . fails to demonstrate the ability to form effective links with staff at all levels and fails to effectively perform her job duties." (Bander Cert., Exh. G). In the reprimand, Miller was instructed to "adhere to supervisory directives, conduct herself in a professional manner, and improve her supervisory effectiveness and job performance."

On November 1, 2017, in a letter to Perkins, the County denied the Step 1 grievance. (Bander Cert., Exh. E). In the letter, the County representative asserted that during the working test period, "Miller was provided supportive assistance, mentoring, and overview . . . and other pertinent information and procedures necessary to assist her in her acclimating and transitioning to the office and new position." Despite such support, according to the County, Miller was "insubordinate as she failed to follow numerous directives;" "failed to effectively

perform her job duties;" and "displayed conduct unbecoming a public employee."

On November 6, 2017, County representatives, including Human Resources personnel and County Counsel met with Miller and PESU's Perkins to discuss Miller's complaints and her issues with various other employees. On November 8, 2017, this same group met again to discuss issues between Miller, Gervikas and Rotondo.

On November 9, 2017, the County issued another thirty (30) day evaluation to Miller (for the time period of October 11, 2017 through November 10, 2017) which, like Miller's previous evaluation, recorded an unsatisfactory average rating of 1. (A copy of this evaluation is attached to the Bander Cert. as Exh. L). In addition to the oral reprimand, the written reprimand, and the unsatisfactory evaluations, Miller received six memos from County representatives Gervikas and Rotondo, with five dated November 1, 2017, and one dated November 2, 2017, criticizing her work during her working test period. (A copy of all six memos is attached to the Bander Cert. as Exh. K).

On December 1, 2017, PESU filed a Step 2 grievance on Miller's behalf regarding the two disciplines and the negative evaluations. (A copy of this Step 2 grievance is attached to the Bander Cert. as Exhibit H). In this second grievance, PESU challenged the ". . . mistreatment of Alexis Miller by the administration and the staff;" argued that the County

administration “. . . has given [Miller] no support or direction in her three month working test period;” and asserted that the staff “. . . has been allowed to belittle her and yell at her without the administration interceding.” (Bander Cert., Exh. H). PESU also wrote that Miller’s disciplines did not follow principles of progressive discipline, and requested that “all negative evaluations and disciplinary actions be removed from Ms. Miller’s personnel folder,” and that the County reassign her to another office for the remainder of the working test period.

On Friday, December 8, 2017, the County issued another thirty (30) day evaluation to Miller for the time period of November 11, 2017 through December 10, 2017, providing an unsatisfactory average rating of 1.33. On the same date, the County issued Miller a three (3) month evaluation yielding an unsatisfactory final rating of 1.11 and a separate notice providing a grade of an “unsatisfactory” working test period. Also on the same date, the County gave Miller a letter stating that she did not successfully complete her working test period in the title of family service supervisor and was being returned to her previous title of family service worker as of December 11, 2017. (A copy of both December 8, 2017 evaluations, as well as the December 8, 2017 letter were submitted by the County with its position statement, dated February 8, 2018).

On December 14, 2017, the County denied PESU's Step 2 grievance filed on behalf of Miller. (A copy of the December 14, 2017 denial is attached to the Bander Cert. as Exhibit I).

After receiving the written denial at Step 2 and reviewing Miller's employment records and evaluations, PESU President Perkins determined that PESU "was unlikely . . . [to] prevail in further grievance proceedings or in binding arbitration" on Miller's behalf.<sup>3/</sup> (Perkins Cert., at ¶¶8-9). Perkins certified that she sought and reached an agreement with the County that in exchange for Miller returning to her previous title, the County agreed to expunge the disciplinary notices from Miller's file. (Cert. at ¶10). Perkins certified that Miller rejected this proposed deal (Cert. at ¶12), and at the end of the three-month working test period, the County determined that Miller did not meet the requirements of the supervisory position and returned her to her previous position. (Cert. at ¶13). Perkins also

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<sup>3/</sup> Perkins also certified that since Miller had received the lowest possible scores on her first two evaluations, the only path to successful completion of her working test period would have required her to receive the highest possible scores on her upcoming third and final evaluation. (Perkins Cert. at ¶9.) Inasmuch as Miller's third and final evaluations were issued on December 8, 2017, and Perkins has certified that her determination regarding Miller occurred after the County's denial of the Step 2 grievance on December 14, 2017, it is not clear why Perkins was unaware of Miller's December 8, 2017 evaluations when she made her decision. As the December 8, 2017 evaluations were also "unsatisfactory," I find this factual anomaly immaterial to the duty of fair representation analysis.

certified that PESU and any of its officials did not conspire with the County against Miller, nor did any of its officials hold a "vendetta" against her. (Cert. at ¶14).

On April 30, 2018, Miller was provided a copy of the County's and PESU's position statements, with all attachments. Miller was advised that she could file a response by May 14, 2018. On May 9, 2018, Miller requested an extension of time to respond and an extension was provided through May 29, 2018. On May 29th, Miller filed a response, reiterating allegations that the County and PESU ". . . acted illegally when they allowed [her] to be treated in a disparaging manner" by her supervisors and co-workers during her working test period. She reiterated seeking assistance from PESU and County supervisors "to no avail," as "[t]he former union president [Perkins] was retiring in three months and didn't want to challenge" the County. In her response, Miller acknowledges that in November, 2017, she attended a meeting "with all parties involved," including "the director of human resources, the division director, County Counsel, [Miller's] supervisor, [Miller's] administrator and PESU President Perkins, but "the meeting didn't go well after [Miller] was made to sit outside for 55 minutes, while [Miller's] supervisor and administrator gave their version of events." Miller also wrote that while she was speaking at the meeting, "the director of human resources abruptly uprooted himself from

his seat, . . . show[ing] the lack of interest or concern for [Miller's] issues." Miller also wrote that her administrator ". . . had a personal vendetta against her."

#### **ANALYSIS**

N.J.S.A. 34:13A-5.3 provides in part:

A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership.

In Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967), the U.S. Supreme Court articulated the standard for determining whether a labor organization violated its duty of fair representation. The Court held:

A breach of the statutory duty of fair representation occurs only when a union's conduct towards a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith. [Id. at 190, 64 LRRM 2376]

New Jersey has adopted the Vaca standard in deciding fair representation cases arising under the Act. See Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976); see also Lullo v. International Ass'n of Fire Fighters, 55 N.J. 409 (1970); Saginario v. Attorney General, 87 N.J. 480 (1981); OPEIU Local 153 (Johnstone), P.E.R.C. No 84-60, 10 NJPER 12 (¶15007 1983).

Miller alleges that PESU unfairly refused to advocate for her or file a grievance on her behalf contesting two poor evaluations and disciplines that she received during her working test period as a provisional family service supervisor, which led to her eventual demotion back to her previous title of family service worker. Uncontested facts derived from documents and Perkins's certification show that PESU filed a grievance on October 23, 2017 contesting the Oral Reprimand and all negative evaluations; and a Step 2 grievance on December 1, 2017 contesting two disciplines and all negative evaluations. (Bander Cert., Exhs. D and H). It is also uncontested that PESU represented Miller at several meetings with County representatives regarding her poor evaluations and disciplines during her working test period, and convened a meeting of its executive board to discuss possible legal action against the County. (Bander Cert., Exhs. D, F, and H). Although Miller alleges that PESU conspired with the County as a result of a "vendetta" against her, no facts tend to corroborate or illustrate the substance of that allegation. The uncontested facts show that PESU assisted Miller in opposing the County's actions against her.

Employee organizations are entitled to a wide range of reasonableness in determining how to best service their members. See Camden Cty. College, P.E.R.C. No. 88-28, 13 NJPER 755 (¶18285

1987). PESU's representatives were entitled to decide how to contest Miller's poor evaluations and disciplinary matters, so long as they did not act discriminatorily, arbitrarily or in bad faith. That PESU did not act in accordance with Miller's expectations, or achieve the results Miller desired, does not demonstrate bad faith. IBEW Local 64, D.U.P. No. 98-37, 24 NJPER 395 (¶29180 1998). No facts indicate that a different strategy by PESU in contesting Miller's poor evaluations or disciplinary issues during her working test period would have either prevented or resulted in a rescission of Miller's demotion from provisional family service supervisor to her previous title of family service worker.

"A union does not breach its duty of fair representation, and thereby open up a suit by the employee for breach of contract, merely because it settled the grievance short of arbitration." Vaca, 386 U.S. at 192. In this case, Perkins filed a grievance on October 23, 2017 contesting the Oral Reprimand and all negative evaluations; filed a Step 2 grievance on December 1, 2017 contesting two disciplines and all negative evaluations; represented Miller at several meetings with the County regarding her poor evaluations and disciplines during her working test period; and convened a meeting of the PESU's executive board to discuss possible additional legal action against the County. These uncontested facts do not indicate



that PESU acted arbitrarily, discriminatorily or in bad faith in its handling of Miller's disciplines and complaints. That PESU failed or may have failed to provide Miller a copy of grievances filed on her behalf connotes nothing more serious than negligence (that does not warrant the issuance of a complaint).

Individual employees normally do not have standing to assert an a(5) violation because the employer's duty to negotiate in good faith runs only 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 an a(5) violation only where that 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, D.U.P. No. 80-10, 5 NJPER 518 (¶10268 1979). In the absence of facts indicating that PESU acted arbitrarily, discriminatorily or in bad faith, I find that Miller does not have standing to allege that the County violated 5.4a(5) of the Act. I dismiss that allegation. N.J. Turnpike Authority; Jersey City College.

The Commission has also held that individual employees do not have standing to assert a 5.4b(3) violation. Only a public employer has standing to allege such violations. See Hamilton

Tp. Bd. of Ed., P.E.R.C. No. 79-20, 4  NJPER 476 (¶4215 1978);  Edison Tp. and Joseph Cies, D.U.P. No. 99-15, 25  NJPER 274 (¶30116 1999);  PESU Local 1034 and Renaldo A. King, D.U.P. No. 2004-2, 29  NJPER 367 (¶113 2003);  State of New Jersey (Hagedorn) and Knapp, D.U.P. No. 99-17, 25  NJPER 311 (¶30132 1999).

Accordingly, I dismiss the alleged violation of 5.4b(3), also.

Finally, I find no allegations in the charge which support a claim that the County has violated  N.J.S.A. 34:13A-5.4a(1). Miller's allegations concern an alleged conspiracy between the County and PESU to have her demoted from her supervisory position so that she would no longer be a member of PESU, and then PESU would no longer have to advocate on her behalf. No facts support these allegations. The County pursued its options and obligations under the New Jersey Civil Service rules. It also met several times with PESU and Miller throughout Miller's three month working test period as a provisional family service supervisor in efforts to address her poor evaluations, disciplines and grievance proceedings, until her eventual demotion to her previous title of family service worker.<sup>4/</sup> These actions do not indicate a possible violation of 5.4a(1) of the Act.

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<sup>4/</sup> Miller has appealed her demotion; that matter is currently pending in the Office of Administrative Law, OAL Docket No. CSV 00727-2018N.

**ORDER**

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR  
OF REPRESENTATION

/s/ Jonathan Roth  
Jonathan Roth  
Acting Director of Unfair  
Practices

DATED: June 6, 2018  
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 June 18, 2018.