

D.U.P. NO. 2022-6

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-2022-004

CWA LOCAL 1081,

Respondent,

-and-

ALEXIS T. MILLER,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by Alexis Miller (Miller) against her employer, Essex County (County) and her majority representative, CWA Local 1081 (CWA). The charge alleged that the County violated N.J.S.A. 34:13A-5.4a(1) and (5) when it failed to interview her for a promotional position in 2019 and 2021. The charge further alleges that the CWA violated the duty of fair representation when it failed to take Miller's grievance regarding her failure to be interviewed to arbitration in violation of N.J.S.A. 34:13A-5.4b(1) and (5). The Director finds that the CWA has not breached its duty of fair representation. Further, the Director finds that allegations against the County are outside the Commission's six month statute of limitations and even if the allegations were timely, Miller lacks standing to pursue such claims.

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Appearances:

For the Respondent,
County of Essex
(Robin Magrath, Director of Labor Relations)

For the Respondent,
CWA Local 1080
(David H. Weiner, President)

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

REFUSAL TO ISSUE COMPLAINT

On August 3, 2021 and September 1, 2021, Alexis T. Miller (Miller) filed an unfair practice charge and amended charge against her employer, County of Essex (County), and her majority representative, Communications Worker's of America, Local 1081 (CWA Local 1081). The charge, as amended, alleges that in 2019, the County failed to interview Miller for a promotional position

for which she had applied. Miller also alleges that in 2021, she was again precluded from interviewing for the promotional position when it was posted and then retracted a couple of days later before she had applied. Miller alleges that the County's actions violate section 5.4a(1) and (5)^{1/} of the of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act).

Miller also alleges that CWA Local 1081 violated its duty of fair representation by failing to take her grievance regarding her failure to be interviewed in 2019 to arbitration. Miller alleges that the CWA Local 1081's conduct violates section 5.4b(1) and (5)^{2/} of the Act.

On October 6, 2021, the County filed a position statement. It asserts that Miller's charge is without merit because at the time of the promotional interview -- October, 2019 -- a disciplinary charge seeking a thirty-day suspension was pending

1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees on the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with the 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 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. (5) Violating any of the rules and regulations established by the commission."

against Miller and it (the County) has a past practice of prohibiting promotional interviews with employees against whom pending discipline could result in suspension. The County also argues that Miller's charge is untimely because it wasn't filed within six (6) months of when the alleged unfair practice occurred.

On October 7, 2021, CWA Local 1081 filed a letter asserting that it had determined that Miller's grievance should not proceed to arbitration because the County has a past practice of precluding employees with outstanding major discipline from interviewing for promotional positions. CWA Local 1081 argues that at the time of the 2019 promotional interview, an outstanding major disciplinary charge was pending against Miller, rendering her ineligible to interview.

On October 29, 2021, Miller filed a response. Miller asserts that her charge is timely because she had appealed CWA Local 1081's decision not to advance her grievance contesting the County's failure to interview her for the promotional position to arbitration through the CWA internal procedures and it wasn't until July 16, 2021 that she was advised by the CWA Executive Board that her appeal was denied. Miller also argues that the respondent(s) do not have a past practice of precluding employees against whom disciplinary charges are pending from promotional interviews.

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:

The County is a public employer within the meaning of the Act. CWA Local 1081 represents a unit of "employees in the Division of Welfare in the classification of Investigator, County Welfare Agency; Rent and Housing Coordinator, Welfare; Social Service Aide; Home Economist, Family Service Worker; Training Technician and Bi-lingual variants." The County and CWA Local 1081 signed a collective negotiations agreement (CNA) extending from January 1, 2005 through December 31, 2007, succeeded by a series of memoranda of agreement (MOA), the most recent of which extended from January 1, 2017 through December 31, 2019 and January 1, 2020 through December 31, 2023.

Miller is employed by the County as a family service worker and is represented by CWA Local 1081.

The grievance procedure (Article XXVII) of the parties' CNA provides a multi-step process ending in binding arbitration.

On an unspecified date in October, 2019, Miller was denied an interview for the promotional title of provisional training supervisor. At the time Miller's request, a disciplinary charge seeking a thirty day suspension was pending against her. On or about January 30, 2020, the County rescinded the disciplinary charge against Miller.

On October 6, 2020, CWA Local 1081 filed a Step 3 grievance on behalf of Miller contesting the County's failure to interview her in October, 2019 for the promotional title, provisional training supervisor. On an unspecified date, the County denied the grievance. CWA Local 1081 declined to advance Miller's grievance to arbitration. On January 12, 2021, Miller internally appealed CWA Local 1081's refusal to advance the grievance to the CWA New Jersey Area Director. On an unspecified date, the Area Director denied Miller's appeal due to Miller's disciplinary record. On January 26, 2021, Miller appealed the Area Director's decision to the CWA Vice President. On March 21, 2021, the Vice President denied Miller's appeal, citing her disciplinary record. On April 5, 2021, Miller appealed the Vice President's decision to the CWA President. The President denied Miller's appeal, noting her disciplinary record. On an unspecified date in May, 2021, Miller appealed CWA President's decision to the CWA Executive Board. On July 6, 2021, the CWA Executive Board

advised Miller that her appeal of CWA Local 1081's denial to advance her grievance to arbitration was denied.

Sometime in early 2021, the promotional position, provisional training supervisor, was again posted by the County but was withdrawn a few days later. On January 13, 2021, Miller was advised that the promotional position had been filled.

ANALYSIS

Charge against the CWA

A majority representative has a duty to represent all unit employees fairly and without discrimination on the basis of union membership. N.J.S.A. 34:13A-5.7. A majority representative breaches its duty of fair representation “. . . only when [its] conduct towards a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.” Vaca v. Sipes, 386 U.S. 171, 190 (1967). The Commission subsequently adopted this standard, the violation of which would arise under section 5.4b(1) of the Act. Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976); Lullo v. International Ass'n of Fire Fighters, 55 N.J. 409 (1970); OPEIU Local 153 (Johnstone), P.E.R.C. No. 84-60, 10 NJPER 12, 13 (¶15007 1983).

A union is afforded a “wide range of reasonableness in servicing its members,” and “[t]he fact that a union’s decision results in a detriment to one unit member does not establish a

breach of duty.” Essex-Union Joint Meeting and Automatic Sales, Servicemen & Allied Workers, Local 575 (McNamara), D.U.P. No. 91-26, 17 NJPER 242 (¶22108 1991) (citing Ford Motor Co. v. Huffman, 345 U.S. 330 (1953)). There is no absolute right to grievance arbitration. Id. (citing Vaca, supra). The Commission has frequently rejected duty of fair representation claims based on allegations that a union’s representation was negligent, inadequate or otherwise unsatisfactory from the grievant’s perspective. Passaic Cty. Comm. Coll. Admin. Ass’n (Wasilewski), P.E.R.C. No. 98-131, 24 NJPER 256 (¶29123 1998); Council of N.J. State College Locals, AFL-CIO (Roman), P.E.R.C. No. 2015-76, 42 NJPER 33 (¶8 2015); ATU Local 540 (Warfield), D.U.P. No. 2016-003, 42 NJPER 376 (¶107 2015), aff’d P.E.R.C. 2016-046, 42 NJPER 336 (¶96 2016). An employee organization must exercise reasonable care and evaluate an employee’s request for arbitration on the merits and decide, in good faith, whether it believes the employee’s claim has merit. See Ford Motor Company v. Huffman, 345 U.S. 330, 337-338, 73 S.Ct. 681, 97 L.Ed. 1048 (1953); Essex-Union Joint Meeting and Automatic Sales, Servicemen & Allied Workers, Local 575 and Brian McNamara, D.U.P. No. 91-26, 17 NJPER 242 (¶22108 1991); D’Arrigo v. New Jersey State Bd. of Mediation, 119 N.J. 74 (1990); Carteret Ed. Ass’n.(Radwan), P.E.R.C. No. 97-146, 23 NJPER 390, 391 (¶28177 1997); Camden Cty. College (Porreca), P.E.R.C. No. 88-28, 13 NJPER 755 (¶18285

1987); Trenton Bd. of Ed (Salter), P.E.R.C. No. 86-146, 12 NJPER 528 (¶17198 1986). A union also "must treat individuals equally by granting equal access to the grievance procedure and arbitration for similar grievances of equal merit." OPEIU Local 133, P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983).

The alleged facts do not establish that CWA Local 1081 breached its duty of fair representation. It filed Miller's grievance contesting the County's failure to interview her for the promotional title. No facts indicate that its step 3 filing, almost year after Miller was first denied an interview for the promotion, was adversely affected by the gap in time. CWA Local 1081 declined to pursue the grievance to arbitration because it determined that Miller's grievance lacked merit. Miller appealed CWA Local 1081's refusal through the CWA National chain-of-command. On July 16, 2021, the CWA Executive Board upheld Local 1081's decision to not pursue the grievance to arbitration.

Miller alleges that CWA Local 1081 did not request arbitration because it "simply did not want to." Miller also claims, without any supportive facts, that CWA Local 1081's president ". . . chose not to arbitrate because he had to barter" her grievance "with that of another employee that he [took] a better liking to." No facts indicate that CWA Local 1081's decision not to advance the grievance to arbitration was arbitrary, discriminatory or in bad faith. Nothing indicates

that CWA Local 1081's decision falls outside of the reasonable discretion parameters afforded to unions in determining how to represent members. Rutgers University, D.U.P. 2020-008, 46 NJPER 308 (¶75 2020). Accordingly, I dismiss the 5.4b(1) allegation.

Miller's charge also alleges that the CWA Local 108 violated section 5.4b(5) of the Act. No facts alleged indicate that a Commission rule or regulation has been violated. I also dismiss the section 5.4b(5) allegation.

Charge against the County

N.J.S.A. 34:13A-5.4c establishes a six-month statute of limitations period for the filing of unfair practice charges.

The statute provides in a pertinent part:

. . . that no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such a charge in which event the 6-month period shall be computed from the day he was longer so prevented.

The Commission has held that "[t]he Act does not rigidly bar relief on all causes of action arising more than six months before a charge was filed" and "[i]n determining whether a party was 'prevented' from filing an earlier charge, the Commission must conscientiously consider the circumstances of each case and assess the Legislature's objectives in prescribing the time limits as to a particular claim." State of New Jersey (Juvenile Justice) and Judy Thorpe, P.E.R.C. No. 2014-71, 40 NJPER 512

(¶164 2014), aff'd 43 NJPER 353 (¶100 App. Div. 2017), certif. den. 231 N.J. 211 (2017). "Relevant considerations include whether a charging party sought timely relief in another forum; whether the respondent fraudulently concealed and misrepresented the facts establishing an unfair practice; when a charging party knew or should have known the basis for its claim; and how long a time has passed between the contested action and the charge." Id. (citing Kaczmarek v. New Jersey Turnpike Auth., 77 N.J. 329 (1978)); accord West Orange Bd. of Ed., H.E. No. 2018-11, 44 NJPER 426 (¶120 2018), aff'd P.E.R.C. No. 2019-10, 45 NJPER 144 (¶37 2018).

Miller's claims against the County are untimely because they were not filed within the six month statute of limitations period. N.J.S.A. 34:13A-5.4c. Miller asserts that she was "prevented" from filing an unfair practice charge within the statutory period against the County (regarding its failure to interview her in 2019 and 2021) because she was waiting for a decision of her appeal to CWA contesting Local 1081's determination not to pursue her grievance to arbitration. Although the filing of a grievance does not toll a majority representative's obligation to file a timely unfair practice charge, an individual charging party's claim against a public employer may be considered timely if the delay in filing was caused by the union's alleged breach of its duty of fair

representation by not arbitrating the charging party's grievance (or causing an employee's detrimental reliance on representations to arbitrate). See Bridgewater-Raritan Bd. of Ed., P.E.R.C. No. 2010-43, 35 NJPER 455 (¶150 2009); North Caldwell Bor., P.E.R.C. No. 2008-51, 34 NJPER 69 (¶27 2008). Here, because Miller's 5.4b(1) charge against CWA Local 1081 does not meet the complaint issuance standard, the date of the CWA Local 1081's determination to decline to pursue Miller's grievance to arbitration cannot be used to toll the six month statute of limitations for Miller's charge against the County^{3/}.

Even if Miller's claims regarding the County's failure to interview her are timely, her unfair practice charge would be dismissed because Miller, as an individual employee, does not have standing to assert a section 5.4a(5) violation. A public 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

^{3/} No facts suggest Miller filed a grievance regarding the 2021 job posting that she alleges was withdrawn a few days later. Miller asserts that due to the apparent retraction, she was denied the ability to apply and interview for the promotional position. However, Miller admits she knew on January 13, 2021 that the 2021 job posting for the promotional position of provisional training supervisor was filled. Inasmuch as Miller didn't file the unfair practice charge until August 3, 2021, as amended on September 1, 2021, it falls outside of the six months statute of limitations period.

employee may file an unfair practice charge and independently pursue a claim of a section 5.4a(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 Authority, D.U.P. No. 80-10, 5 NJPER 518 (¶10268 1979). In the absence of facts indicating that CWA Local 1081 acted arbitrarily, discriminatorily or in bad faith, I find that Miller does not have standing to allege that the County violated section 5.4a(5) of the Act. N.J. Turnpike Authority; Jersey City College.

With respect to section 5.4a(1) claims alleged by an individual public employee, the Commission has explained that a public employer does not interfere with the rights afforded by the Act when a majority representative refuses to process a grievance to arbitration since there is not an absolute right to arbitration. N.J. Turnpike Authority. In the absence of facts sufficiently indicating that the CWA breached its duty of fair representation, Miller does not have standing to allege that the County violated section 5.4a(1) of the Act.

For all the reasons set forth above, I find that the Commission's complaint issuance standard has not been met and decline to issue a compliant on the allegations of this charge. N.J.A.C. 19:14-2.3.

ORDER

The unfair practice charge is dismissed.

/s/Jonathan Roth
Jonathan Roth
Director of Unfair Practices

DATED: February 7, 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 February 17, 2022.