

H.E. NO. 2024-1

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

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF LABOR AND
WORKFORCE DEVELOPMENT),

Respondent,

-and-

Docket No. CI-2023-004

SHIVON HARRIS,

Charging Party.

SYNOPSIS

A hearing examiner grants a motion for summary judgment filed by the State of New Jersey, Department of Labor and Workforce Development, and denies a cross-motion for summary judgment filed by the charging party, Shivon Harris. The hearing examiner found that the evidence presented, even when viewed in the light most favorable to the charging party, is insufficient to establish a violation of the Act. Specifically, the charging party failed to allege the occurrence of a cognizable adverse action in connection with the allegations that the Department improperly failed to interview her for a job vacancy, and that the Department improperly withheld submitting the charging party's desk audit to the Civil Service Commission. The hearing examiner further determined that, even if the charging party had shown an adverse employment action, there exists no nexus between that action and the alleged protected conduct. The hearing examiner recommends the complaint and amended complaint be dismissed.

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Appearances:

For the Respondent,
Matthew J. Platkin, Attorney General
(Kendall J. Collins, Deputy Attorney General)

For the Charging Party,
(Shivon Harris, pro se)

**HEARING EXAMINER'S DECISION ON MOTION
AND CROSS-MOTION FOR SUMMARY JUDGMENT**

On August 29, 2022 and November 22, 2022, Shivon Harris ("Harris" or "charging party") filed an unfair practice charge and amended unfair practice charge against the New Jersey Department of Labor and Workforce Development ("Department" or "respondent"). The charge, as amended, alleges that, on or about July 15, 2022, the Department violated sections 5.4a(1) and (3)^{1/}

^{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; and (3) (continued...)

of the New Jersey Employer-Employee Relations Act ("Act") by improperly denying Harris the opportunity to interview for the position of Administrative Analyst 3 ("AA3"). The charge alleges that the Department's justifications for denying Harris an interview are pretextual, and that Harris was denied an interview in retaliation for: (1) filing an Equal Employment Opportunity ("EEO") complaint against the Department; (2) serving as a Union Shop Steward and participating in the processing of grievances filed by Communications Workers of America, Local No. 1038 ("CWA" or "Union"); and (3) participating in ongoing litigation against the Department and a former Labor Relations Unit administrator. The charge further alleges that non-minority employees were allowed to interview for the promotional position, despite not having the requisite education or experience. The charge also alleges that the Department failed to provide the Civil Service Commission with desk audit documentation that Harris completed and sent to the Department in October of 2022. Harris alleges that the October 2022 occurrence was the third time the Department has wrongfully delayed submitting a desk audit on her behalf.

1/ (...continued)
Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of rights guaranteed to them by the act."

On December 15, 2022, the Director of Unfair Practices issued a Complaint and Notice of Pre-Hearing and assigned the matter to me as Hearing Examiner.

On January 20, 2023, the Department filed an answer to the original and amended complaints with affirmative defenses. The Department denies that it violated the Act by declining to interview Harris for the AA3 position. Rather, the Department asserts that Harris was deemed ineligible for the position (and thus, was not scheduled for an interview) because she failed to list all of the job titles and duties that she held in the resume submitted with her application. Further, the Department contends that the individual that reviewed Harris's resume and determined that she was ineligible had no personal knowledge of the specific applicant, and made ". . . a completely unbiased evaluation of the resume submitted by the Charging Party." The Department contends that Harris was given the standard "no interview" letter issued to all applicants who were not qualified for the position.

The Department further denies that it "held" any of Harris's desk audit documentation in October 2022, or at any time. The Department notes that Harris has been awarded two promotional titles retroactively through the desk audit/classification appeal process since 2016.

On May 24, 2023, the Department filed a motion for summary judgment accompanied by a legal brief, a certification of Juliana

Conoline ("Conoline Cert."), and exhibits. On June 2, 2023, Harris filed an opposition to the Department's motion, as well as a cross-motion for summary judgment. On June 12, 2023, the Department filed a reply brief in opposition to Harris's cross-motion. On June 15, 2023, the motions were referred to the Hearing Examiner for disposition pursuant to N.J.A.C. 19:14-4.8(a).

On July 19, 2023, respondent requested to submit an additional exhibit relevant to this matter pursuant to N.J.A.C. 19:14-4.8(d). On the same date, I accepted the additional submission.^{2/}

I have reviewed the parties' submissions in this matter. The following material facts are not contested by the parties. Based upon the record, I make the following:

FINDINGS OF FACT

1. Harris is an employee of the Department and currently holds the job title of Employment & Training Specialist 1.
(Charging Party's May 30, 2023 Opposition and Cross-Motion for Summary Judgment ("CP MSJ") at 1; Respondent's May 24, 2023 Motion for Summary Judgment ("Resp't MSJ") at 2)).
2. On or about September 7, 2021, Harris filed a lawsuit against the Department and certain Department employees in

^{2/} The supplemental document produced July 19, 2023, and dated July 7, 2023, will be identified as Respondent Ex. R12.

New Jersey Superior Court (Mercer County), alleging that she was the victim of discrimination and retaliation in violation of the New Jersey Law Against Discrimination ("NJLAD") (Mercer County Civil Action Docket No. MER-L-1884-21) (Resp't MSJ, Ex. R10). As of the date of this decision, the litigation is ongoing.

3. Harris is a member of the CWA and serves as a shop steward. The record in this case provides the following with respect to Harris's involvement with the Union:

-On or about September 4, 2019, the CWA appealed the first-step denial of a grievance concerning Shivon Harris to the second step. The underlying grievance alleged in part that Harris "was treated disrespectfully and bullied by her boss." (CP MSJ, Ex. C).

-In or about October of 2020, Harris was involved in the processing of a grievance filed by the Union alleging that Harris was mistreated by a coworker and the Department. In an email string concerning the grievance, Harris, CWA, and the Department also discuss a pending Unfair Practice Charge before PERC. The emails indicate that the underlying dispute occurred eighteen (18) months prior to the October 2020 email exchange. (Id.).

-On October 15, 2020, a PERC designee issued an interlocutory decision in a matter between the CWA and the

Department. (PERC Docket No. CO-2020-197). Harris is mentioned in that decision as one of four individuals that "filed grievances and other workplace complaints against DOL that were critical of Suzan Nickelson, DOL's Administrator of Employee Relations." State of New Jersey (Department of Labor and Workforce Development), I.R. No. 2021-8; 47 NJPER 186 (¶41 2020).

-In March of 2021, Harris was copied on emails between the CWA and the Department, wherein the CWA contended that the Department failed to process desk audit submissions on behalf of members in a timely fashion. (CP MSJ, March 31, 2021 email between CWA President Shawn Ludwig and Department Director of Human Capital Strategies, Heath Bernstein, titled "Desk Audit submission").^{3/}

-On or about April 7, 2021, Harris was copied on an email sent to Heath Bernstein from CWA President Shawn Ludwig. The subject of the email was "Re:Fw: Workplace Violence Complaint - Shivon Harris." While it appears that

^{3/} The Charging Party's Cross-Motion and Opposition to Respondent's Motion for Summary Judgment contains Exhibits A-J, an exhibit labeled "October 13," and various Microsoft Outlook files containing emails with additional attachments. For example, a Microsoft Outlook file attached to Harris's email submission is labeled "FW-Shivon Harris Desk Audit," and opening that file reveals six more attachments, including two more Microsoft Outlook files, each with additional attachments. For reference, documents contained in the various Microsoft Outlook files will be cited with specific reference to the individual document.

the email from Ludwig is in response to an earlier email sent by Heath Bernstein, the email string is not produced in its entirety. The email alleges, in part, that the Department has attacked Harris and treated her unfairly. (CP MSJ, Ex. C).

-Between July and September of 2022, following Harris's non-selection for an interview for the AA3 position, the CWA was copied on emails between Harris and the Department, wherein Harris claims the reasons given by the Department for her non-selection are pretextual. In one email, dated July 27, 2022, CWA advised the Department that it believed Harris and another applicant were ". . . illegally blocked to be interviewed for job positions." (CP MSJ, Ex. D, Ex. F-G).

4. On or about April 26, 2022, Harris applied for the position of AA3 within the Department (Posting No. 2022-139). Harris submitted a cover letter and a resume in support of her application. (CP MSJ, at 1; Resp't MSJ, Ex. R3).
5. The resume submitted by Harris with her application indicated that she had worked for the Department as an Employment & Training Specialist 1 from March of 2016 through the present. The resume does not indicate that Harris held any other titles with the Department. (Resp't MSJ, Ex. R3).

6. In the charge and amended charge in this matter, Harris asserts that she has been in the title of ETS1 from April 11, 2021 to present, and that she previously held the title of ETS2 from April 11, 2020 to April 11, 2021. Harris obtained both the ETS1 and ETS2 titles retroactively through two personnel reclassification appeals. (Statement of Charge and Amended Statement of Charge).
7. The Notice of Job Vacancy for Posting No. 2022-139 contains "Civil Service Commission Requirements" that applicants must meet in order to be eligible for the position. Specifically, Posting No. 2022-139 requires:

Education: Graduation from an accredited college or university with a Bachelor's degree.

Experience: Three years of experience involving the review, analysis, and evaluation of budget, organization, administrative practices, operational methods, management operations, or data processing applications, or any combination thereof, which shall have included responsibility for the recommendation, planning, and/or implementation of improvements in a business or government agency.

Note: Applicants who do not possess the required education may substitute additional experience as indicated on a year-for-year basis with thirty semester hour credits being equal to one year of experience.

Note: A Master's degree in Public Administration, Business Administration, Economics, Finance, or Accounting may be substituted for one (1) year of indicated experience.

(Resp't MSJ, Ex. R4)

8. The job posting further provides:

Resume Note: Eligibility determinations will be based only upon information presented on the resume along with other supporting documents

(Id.).

9. On July 15, 2022, Harris received a letter from the Department indicating that, after review of all the resumes submitted for the posting, Harris would not be interviewed for the position. Specifically, the letter states, in part:

Thank you for applying for the position of Administrative Analyst 3, Posting #2022-139 at the Department of Labor and Workforce Development. We appreciate your interests in career opportunities with this department.

After carefully reviewing all the resumes we received for this posting, you were not selected for an interview at this time.

(CP MSJ, at 1; Resp't MSJ, Ex. R5).

10. Juliana Conoline ("Conoline") is employed as a Personnel Assistant 2 in the Department's Recruitment Unit. Conoline certifies that, as part of her job duties, she routinely reviews resumes submitted for vacant positions to determine whether an applicant meets the minimum qualifications as outlined in the Notice of Job Vacancy, such that they would be selected for an interview.
11. Conoline reviewed the resume submitted by Harris in her application for the AA3 position (posting no. 2022-139) and determined that Harris did not meet the experience requirements for the position. Further, Conoline concluded

that Harris's Master's Degree could not be substituted for one year of experience because it was not a degree in Public Administration, Business Administration, Economics, Finance or Accounting. Conoline noted the resume's deficiencies and marked the application as "'NQ' (Not Qualified)." Conoline certifies that she does not know Ms. Harris personally, and has no bias against her. Conoline further certifies that she is unfamiliar with Harris's ". . . union status or activities or any Equal Employment Opportunity complaints, workplace violence complaints, lawsuits, or any other issues that may exist between her and the DOL." (Conoline Cert., at ¶¶ 1-7).

12. Following her non-selection for an interview for the AA3 position, Harris also filed an appeal with the New Jersey Civil Service Commission ("CSC") alleging that her non-selection for an interview was the result of discrimination in violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace (CSC Appeal No. 2023-253). The CSC summarized Harris's arguments presented in her appeal, in part, as follows:

On appeal, [Harris] presents that she was denied an interview for a job that she is currently performing, and the determination letter indicated that this denial was based on a lack of experience. She believes that this justification is only being presented in response to her complaint that C.C. retaliated against her because of the numerous complaints that she has made against the appointing authority alleging disparate

treatment against minority employees when it completely ignored Civil Service policies when promoting employees, reviewing qualifications, and by substantially raising the salaries of Caucasian employees compared to minority employees. S.H. states that C.C. is also privy to a lawsuit that includes a former Labor Relations Administrator as she has been copied on emails regarding that matter.

[Harris] notes that she applied for the subject vacancy posting on April 26, 2022 and she received a July 15, 2022 letter advising that because so many letters were received, she was not selected from the resume pool. [Harris] presents that this letter did not advise that she did not possess the required experience, she was not qualified or because she did not provide all her titles on her resume. Instead, the letter stated that she was not selected because too many resumes were received. Additionally, on July 26, 2022, she indicates she received another letter with additional reasons why she was not selected. However, [Harris] asserts that those reasons are not valid and believes that they were only raised because she filed an Equal Employment Opportunity (EEO) complaint in response to her non-selection to interview and she presented former complaints not addressed by the Labor Relations Unit or the ODC.

[Resp't MSJ, Ex. R8, at 2].

13. The CSC denied Harris's appeal. In its written decision, dated November 2, 2022, the CSC determined that Harris failed to present sufficient evidence to show ". . . that any actions taken by the appointing authority have been based on race or retaliation." (Id. At 7).^{4/} The decision

^{4/} The amended charge alleges that Harris "sent several examples to the [Department] regarding the blatant disregard of title 4a and how education and experience are disregarded for other employees but minority employees are not afforded the same opportunity." PERC has no jurisdiction over claims of alleged civil rights violations. New Jersey Transit

(continued...)

provides, in part:

The record indicates that [Harris] submitted a resume that indicated that she possessed a Bachelor's degree and a Master's degree in Health Administration. She also indicated that she was a EST1 (sic) from April 2021 to the closing date, an ETS2 from April 2020 to April 2021, a Program Specialist 1 from March 2017 to April 2020, and a Program Specialist Trainee from March 2016 to March 2017.

The appointing authority explains that because [Harris] did not separately list her Civil Service titles since March 2016 and listed all of her job duties under ETS1, it could only credit her for one year and one month of experience based on when she was provisionally appointed as an ETS1 in April 2021 to the May 2022 closing date and it could not evaluate her State service experience from March 2016 to April 2021. While this agency does not monitor vacancy announcements, it is noted that how the appointing authority reviewed [Harris's] application is consistent with how this agency reviews an application for a Civil Service examination when determining eligibility. Candidates are responsible for accurately indicating their Civil Service titles, the dates that they served in these titles, and describing their specific duties that they performed in these titles and those that fail to do so risk being determined ineligible even if they do potentially possess the required experience. There is no obligation under Civil Service laws or rule for an appointing authority to seek clarification from a candidate who submitted an inaccurate resume for a

4/ (...continued)
(Theodore Warfield), D.U.P. No. 2017-2, 43 NJPER 84 (¶24 2016) aff'd 43 NJPER 175 (¶53 2016). In New Jersey Transit, the charging party alleged that the Employer violated the Act by discharging Mr. Warfield because of his race, and in retaliation for his filing of an EEOC complaint against New Jersey Transit. In dismissing the charge, the Director of Unfair Practices found that the Commission "does not adjudicate disciplinary disputes" and lacks "jurisdiction over alleged violations of employees' civil rights, including race discrimination." 43 NJPER at 85, citing Mercer County, et al. D.U.P. No. 2001-1, 27 NJPER 23, 24 (¶32013 2000).

vacancy posting. As [Harris] failed to submit an accurate resume, the record indicates that the appointing authority had a legitimate business reason for only crediting her for her ETS1 experience dating back to April 2021. Further, as Health Administration is not listed in the vacancy posting as one the (sic) applicable Master's degrees, the appointing authority properly did not substitute her Master's degree for experience.

Concerning the appellant's assertion that she has performed out-of-title duties since March 2016, it is noted that in its April 4, 2018 decision, the Commission denied her appeal to have her position reclassified to EST1 or EST2. Therefore, the record does not indicate that she was performing out-of-title duties since March 2016. Instead, based on her subsequent successful classification reviews, the record indicates that that (sic) she was performing out-of-title EST1 or EST2 duties retroactive only to April 2020

(Id., at 6).

14. On or about October 12, 2022, Harris began the process of filing a classification appeal/desk audit^{5/}. Harris's

5/ The Civil Service Commission's website defines a "desk audit" as "an evaluation of the duties of a position resulting from an appeal, question, or complaint that an individual's duties do not conform to the current job description for their title." To request a desk audit, an employee is directed to discuss the matter with his or her supervisor. If the matter remains unresolved, employees may complete a Position Classification Questionnaire ("PCQ"). The PCQ is then sent to the employee's supervisor, and then the "program manager/division director" for completion. The supervisor and program manager/division director shall complete their portions of the PCQ and provide their signatures within 15 days of their receipt of the PCQ from the employee. The program manager/division director then sends the completed documentation to the appropriate agency representative. The agency representative must, within ten days of receipt of the documentation from the program manager/division director, either notify the petitioner that
(continued...)

position, as reflected in the desk audit documentation, is that she was performing the duties of an AA3, and therefore, her ETS1 position should be reclassified. (CP MSJ, October 24-25, 2022 email chain between Shivon Harris, Lesley Hirsch, and Dyneshia Smith-Monroe and attached PCQ documentation).

15. On October 24, 2022, Dyneshia Smith-Monroe, the Assistant to Assistant Commissioner Lesley Hirsch of the Department's Office of Research and Information, sent documents related to Harris's desk audit to Department Representative Pilar Tortorello ("Tortorello"), a manager in the Department's Human Capital Strategies Division. The documentation sent to Tortorello was completed by Harris and her immediate supervisor / Program Manager (Assistant Commissioner Lesley Hirsch), but still needed to be completed by the "State Appointing Authority Representative" prior to submission to the CSC. As noted in the desk audit documentation, Assistant Commissioner Hirsch agreed with Harris's position that she should be reclassified as an AA3. (Id.).

5/ (...continued)
additional information is required, or forward the petition (with an organizational chart) to the CSC representative and notifies the appellant of the submission. [New Jersey Civil Service Commission, Classification and Personnel Management FAQ, available at, <http://www.state.nj.us/csc/authorities/faq/slo/>; N.J.A.C. 4A:3-3.9(c).

16. On November 4, 2022, Tortorello wrote a letter to Kelly Glenn, Director of the CSC's Division of Agency Services, attaching "a classification appeal submitted by Shivon Harris." The letter states, in part:

The Division of Human Capital Strategies does not support this appeal. Ms. Harris submitted a classification appeal in April 2021 and was granted her current title of [ETS1]. A comparison was done of her prior April 2021 appeal against her current submission and it was found that there was only a minimum change in the duties provided as almost 70% of the duties listed are directly copied from the prior appeal. In review of the new additional duties, as well as those on her most recent performance assessment from the 2022 rating cycle, we find that they are appropriate for her current title of an [ETS1] and do not justify reclassifying her position to an [AA3].

(Resp't MSJ, Ex. R9, at 5-22).

17. On November 10, 2022, Harris contacted Tortorello to follow up on the status of her desk audit, but she received a message that Tortorello was no longer employed by the Department. On the same date, Chai Respes, Deputy Director of the Department's Human Capital Strategies Division ("Deputy Director Respes"), advised Harris that Tortorello did, in fact, submit the desk audit to Civil Service on November 4, 2022 prior to her leaving the Department. Also on November 10, 2022, Harris forwarded her desk audit documentation to Caroline Drumgoole ("Drumgoole"), a Human Resources Consultant with the CSC. (CP MSJ, November 10, 2022 email between Shivon Harris and Chai Respes; Resp't

MSJ, Ex. R9).

18. On November 21, 2022, Jaclyn Gordon from the CSC advised Harris by email that CSC had not received her desk audit documentation. Harris forwarded Ms. Gordon's email to Deputy Director Respes. On the same date, Deputy Director Respes replied disputing that the documents were not submitted to the CSC. Deputy Director Respes stated that she was ". . . copied on the email that was sent to Caroline Drumgoole on 11/4/22 at 2:44 pm. If this should have been forwarded to another person please advise" (CP MSJ, November 21, 2022 email chain between Shivon Harris and Chai Respes; November 21, 2022 email chain between Shivon Harris, Jaclyn Gordon, Melissa Figueroa, and Caroline Drumgoole).
19. Also on November 21, 2022, Drumgoole responded to Harris's November 10, 2022 email enclosing the desk audit documentation. Drumgoole's response provides, in part:

Do you know to whom the original request was sent? If it was sent to me, I was out of the office for a couple of weeks around that time so it is possible that I had not gotten around to it. Regardless, I have submitted your request to the appropriate party so rest assured that it has been received and logged into our system for processing. Thank you for following up on this.

(CP MSJ, November 21, 2022 email chain between Shivon Harris and Caroline Drumgoole).
20. On December 8, 2022, Drumgoole advised Harris that the CSC ". . . had no record of having received [Harris's] request . . ." prior to Harris sending it to her by email. Drumgoole further

confirmed that the desk audit had now been received and submitted for processing. Harris forwarded Drumgoole's December 8, 2022 email to Deputy Director Respes, copying CWA President Shawn Ludwig, and asked why the Department's Human Capital Strategies Division ". . . still has not forwarded my desk audit and is acting against policy." In response, Deputy Director Respes stated that the information from CSC was "false" and insisted that the documentation had been submitted to CSC on November 4, 2022. (CP MSJ, Ex. H).

21. On May 16, 2023, Laura DePinto, Personnel Assistant 2 with the Department's Division of Human Capital Strategies, sent an email to Jaclyn Gordon at the CSC following up ". . . on the attached classification appeal that was submitted on November 4, 2022 for Shivon Harris." Jaclyn Gordon replied to Laura DePinto the same day stating that the appeal was under review. (Resp't MSJ Reply Brief, at Ex. R11).

22. On July 7, 2023, the CSC issued a decision denying Harris's classification appeal. The decision provides, in part, ". . . our determination is that the current duties and responsibilities assigned to your position do not meet the criteria for the Title Administrative Analyst 3 (P26, 50075). Based on the duties currently assigned, your position is presently properly classified in the title Employment and Training Specialist 1 (P24, 64854)." The

decision notes that the CSC's determination was "based upon a thorough review and analysis of the [PCQ] received on November 21, 2022." (Resp't Ex. R12).

STANDARD OF REVIEW

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. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); see also, Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954).^{6/} In determining whether summary judgment is appropriate, we must ascertain "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 523. "Although summary judgment serves the valid purpose in our judicial system of protecting against groundless claims and frivolous defenses, it is not a substitute for a full plenary trial" and "should be denied unless the right thereto appears so clearly as to leave no room for controversy." Saldana v. DiMedio, 275 N.J. Super. 488, 495 (App. Div. 1995);

^{6/} N.J.A.C. 19:14-4.8(e) provides: "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."

see also, UMDNJ, P.E.R.C. No. 2006-51, 32 NJPER 12 (¶6 2006).

While a party is not required to file an affidavit or certification in support of summary judgment, where a "party opposing the motion (for summary judgment) does not submit any affidavits or documentation contradicting the moving party's affidavits or documents, then the moving party's facts may be considered as true, and there would necessarily be no material factual issue to adjudicate unless, per chance, it was raised in the movant's pleadings." State of New Jersey (Corrections), H.E. No. 2020-2, 46 NJPER 195 (¶49 2019), adopted P.E.R.C. No. 2020-49, 46 NJPER 509 (¶113 2020) (citing CWA Local 1037 (Schuster), H.E. No. 86-10, 11 NJPER 621, 622 (¶16217 1985), adopted P.E.R.C. No. 86-78, 12 NJPER 91 (¶17032 1985); City of Hoboken, H.E. No. 95-17, 21 NJPER 107 (¶26065 1995), adopted P.E.R.C. No. 95-91, 21 NJPER 184 (¶26117 1995); Nutley Tp., H.E. No. 99-18, 25 NJPER 199 (¶30092 1999) (final agency decision); N.J.A.C. 1:1-12.5(b) ("[w]hen a motion for summary decision is made and supported, an adverse party in order to prevail must be responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined by an evidentiary proceeding.")).

ANALYSIS

Allegations of anti-union discrimination under N.J.S.A. 34:13A-5.4a(3) are governed by In re Bridgewater Twp., 95 N.J. 235, 240-45 (1984) ("Bridgewater"). Under Bridgewater, "[t]he

charging party must prove, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action." Newark Housing Auth., P.E.R.C. No. 2016-29, 42 NJPER 237, 239 (¶67 2015). This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile toward the exercise of the protected rights. Id.

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' and 'a negative employment evaluation, unaccompanied by a tangible detriment, such as a salary reduction or job transfer, is insufficient to rise to the level of an adverse employment action.'" El-Sioufi v. St. Peter's University Hospital, 382 N.J. Super. 145, 176 (App. Div. 2005).

The Commission has held that "[a]n adverse employment action is an essential element of [a] 5.4a(3) . . . claim." State of New Jersey (Dep't of Community Affairs), D.U.P. No. 2015-8, 41 NJPER 315 (¶102 2014); accord State of New Jersey (Judiciary), 40 NJPER 24 (¶10 2013) (holding that the charging party had not "suffered an adverse employment action related to protected activity" because "[s]he was not transferred, demoted, fired or suspended, and suffered no reduction in compensation, rank or title" and

"[n]o facts suggest[ed] that any of her terms and conditions of employment [were] adversely affected"); Ridgefield Park Bd. of Ed., H.E. No. 84-52, 10 NJPER 437 (¶15195 1984); aff'd NJPER Supp. 2d. 150 (¶133 App. Div. 1985) (dismissing a 5.4a(3) claim because an employer's "comment[s] were within the sphere of permissible criticism and . . . did not threaten any employees, change any terms and conditions of employment, or seek to undermine the exclusive representative status of the [union]").

Further, the Commission has held that in order "[t]o prevail on [a] [5.4a(3) claim], a charging party 'must assert some nexus between activities protected by the Act and the adverse personnel action.'" Rockaway Tp. Bd. of Ed., D.U.P. No. 2016-6, 40 NJPER 293 (¶112 2013) (quoting Woodbridge Tp., D.U.P. No. 94-14, 19 NJPER 523, 524 (¶24243 1993)). "The mere fact that an employee is a union activist or officer is not, without more, sufficient to show that there is a nexus between union activity and subsequent employer action" and "[t]o suggest that nexus automatically exists is to infer that those who participate in union activity are entitled to greater protection than any other employee." Passaic Cty. Sheriff's Office, H.E. No. 2016-3, 42 NJPER 145 (¶38 2015) (final agency decision) (quoting Warren Cty. Prosecutor's Office, P.E.R.C. No. 2000-88, 26 NJPER 223 (¶31091 2000)).

An employer independently violates section 5.4a(1) if its actions tend to interfere with an employee's statutory rights and

lacks a legitimate and substantial business justification. Orange Bd. of Ed., P.E.R.C. No. 94-124, 20 NJPER 287 (¶25146 1994); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986). Proof of actual interference, intimidation, restraint, coercion or motive is unnecessary. The tendency to interfere is sufficient. Id.

(A). Harris's Non-Selection for an Interview for the AA3 Position

After viewing all competent evidential materials presented and the inferences drawn therefrom in the light most favorable to the charging party, I find that Harris has failed to set forth facts or evidence sufficient to find that the Department violated the Act in declining to interview her for the AA3 position. Rather, the record shows that Harris was not selected for an interview for the AA3 position because her resume did not accurately reflect her work history. Even assuming that Harris engaged in protected conduct, and that the failure to interview Harris is an "adverse employment action," the charging party has failed to present evidence sufficient for a rational factfinder to determine ". . . that protected conduct was a substantial or motivating factor in the adverse action." Newark Housing Auth., P.E.R.C. No. 2016-29, 42 NJPER 237, 239 (¶67 2015).

It is undisputed that the Notice of Job Vacancy for the AA3 position (posting no. 2022-139) contains "Civil Service Commission Requirements" that applicants must meet in order to be

eligible for the position, including having at least three years of experience “. . . involving the review, analysis, and evaluation of budget, organization, administrative practices, operational methods, management operations, or data processing applications, or any combination thereof” (Resp’t MSJ, Ex. R4). The Notice of Job Vacancy further provides that “[e]ligibility determinations will be based **only upon information presented on the resume** along with other supporting documents” Id. (emphasis added).

The resume submitted by Harris with her application incorrectly indicated that she had worked for the Department as an ETS1 from March of 2016 through the present. The resume does not include any other titles or positions held with the Department. (Resp’t MSJ, Ex. R3). Conoline certifies, without contradiction, that she reviewed Harris’s resume and determined that Harris did not have the required experience to be deemed “eligible” and scheduled for an interview. Conoline further determined that Harris’s Master’s Degree could not be substituted for one year of requisite experience because the degree was not in an eligible field. Conoline Cert., at ¶4. As such, Harris was sent a letter dated July 15, 2022 indicating that she was not selected for an interview. (Resp’t MSJ, Ex. R5).

In the amended charge, Harris asserts that the State’s reasons are invalid and are only being offered because Harris

". . . filed an internal EEO complaint and brought light to my former complaints that were not addressed by the Division's Labor Relations Unit and internal EEO unit." Harris also contends she was denied an interview in retaliation "for being a shop steward and being the forefront of several investigations against the Department of Labor." (Amended Statement of Charge).

However, it is effectively undisputed that Conoline (i.e., the individual that reviewed Harris's application and determined, based on her resume, that Harris lacked the experience required for the position) had no knowledge of Harris's "union status or activities or any Equal Employment Opportunity complaints, workplace violence complaints, lawsuits, or any other issues that may exist between her and the DOL." Conoline Cert., at ¶5. Based on this certification, Conoline could not have retaliated against Harris because of her union status and/or activities, since she had no knowledge of the same. Harris failed to present any competent evidence, via certification or otherwise, to contest this fact.

Harris asserts that Conoline was supervised by Chanda Curtis, a Former Department Human Capital Strategies Manager that was privy to Harris's filing of complaints against the Department. While Harris produced an email string dated July 20, 2022 (i.e., five days after Harris was rejected from the position) regarding her application in which both Ms. Curtis and

Conoline are copied, no evidence or reasonable inferences drawn therefrom suggest that Ms. Curtis instructed Conoline to deny Harris an interview, or that Ms. Curtis and Conoline discussed Harris or her application prior to the July 25, 2022 rejection. (CP MSJ, Ex. C).

Further, while Harris contends the justification offered by the Department is pretextual, the CSC noted in its decision that the Department's process of screening the resume submitted for the position is consistent with the CSC's own methodology:

While this agency does not monitor vacancy announcements, it is noted that how the appointing authority reviewed [Harris's] application is consistent with how this agency reviews an application for a Civil Service examination when determining eligibility. Candidates are responsible for accurately indicating their Civil Service titles, the dates that they served in these titles, and describing their specific duties that they performed in these titles and those that fail to do so risk being determined ineligible even if they do potentially possess the required experience. There is no obligation under Civil Service laws or rule for an appointing authority to seek clarification from a candidate who submitted an inaccurate resume for a vacancy posting. As [Harris] failed to submit an accurate resume, the record indicates that the appointing authority had a legitimate business reason for only crediting her for her ETS1 experience dating back to April 2021. Further, as Health Administration is not listed in the vacancy posting as one the (sic) applicable Master's degrees, the appointing authority properly did not substitute her Master's degree for experience.

(Resp't MSJ, Ex. R8, at 6).

In the absence of an allegation disputing the substance of Conoline's certification, the Charging Party has not asserted

facts sufficient to find that protected conduct was a substantial and motivating factor in determining that Harris was ineligible for an interview. As such, even when viewing all evidence in the light most favorable to the charging party, the allegation that the Department violated section 5.4a(3) of the Act by failing to offer Harris an interview for the AA3 position must fail as a matter of law.

Similarly, no facts support a finding that the Department's failure to offer Harris an interview under these circumstances "tend[s] to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification."

Orange Bd. of Ed., P.E.R.C. No. 94-124, 20 NJPER 287 (¶25146 1994); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986). Once again, Conoline's uncontested certification states that she had no knowledge of any of Harris's complaints against the Department or her Union activities and that she determined that Harris was ineligible for the position based on Harris's resume, consistent with the Department's (and the CSC's) screening policies. Under these facts, the Charging Party's 5.4a(1) claim related to AA3 position must fail.

Based on the above, I grant the Department's motion with respect to the allegation that Harris was not interviewed for the AA3 position in violation of section 5.4a(1) and (3) of the Act.

(B). Submission of Harris's Desk Audit

Based on all the competent evidential materials in the record and inferences drawn therefrom, when viewed in the light most favorable to the Charging Party, I find that Harris has not set forth facts sufficient to find a violation of the Act with respect to her allegation that the Department improperly withheld her desk audit from submission to the CSC. For one, the Department has presented evidence showing it submitted the desk audit documentation by November 4, 2022. However, even assuming that the Department did delay submitting the documentation, no facts suggest that Harris suffered an adverse employment action as a result, or that the Department's conduct could tend to interfere with rights protected under the Act. The charge alleges that Harris's desk audit documentation ". . . was presented to Human Capital Strategies on 10/24/2022 and was never submitted to the CSC, although DOL sent me several emails guaranteeing (sic) that the desk audit was submitted to Caroline Drumgoole at the CSC on 11/4/2022." Harris further alleges that the Department refused to provide proof that the documentation was sent to the CSC on November 4, 2022, and that on November 21, 2022, Harris was forced to submit her own desk audit to the CSC ". . . which is not the correct process and may not be processed by CSC." (Amended Statement of Charge). Harris alleges that, on November 21, 2022, she was notified by two CSC representatives (Jaclyn

Gordon and Caroline Drumgoole) that the CSC had not received a copy of her desk audit prior to November 21, 2022. The Department maintains that the documentation was submitted on November 4, 2022. In support of this contention, the Department has submitted a letter written to the CSC, dated November 4, 2022 enclosing "a classification appeal submitted by Shivon Harris" including the PCQ, Harris's performance evaluation, and an organizational chart. Unlike the incomplete PCQ sent to Tortorello by Assistant Commissioner Hirsch on October 24, 2022, the November 4, 2022 email contains a completed PCQ, signed and dated by Tortorello as the "State Appointing Authority Representative." (Resp't MSJ, Ex. R9). The Department contends that the documentation was sent by email from Tortorello to Drumgoole "on 11/4/22 at 2:44pm."^{7/} (CP MSJ, November 21, 2022 email chain between Shivon Harris and Chai Respes). However, the charging party has failed to show the occurrence of an adverse employment action. Even accepting the charge's allegation (i.e., that the desk audit was improperly withheld by the Department) as true, it is undisputed that the

^{7/} As noted above, Drumgoole (i.e., the individual at the CSC to whom the Department contends the information was sent) acknowledged that she was ". . . out of the office for a couple of weeks around [November 4, 2022] so it is possible that I had not gotten around to it." (CP MSJ, November 21, 2022 email chain between Shivon Harris and Caroline Drumgoole). It is possible, therefore, that any confusion over when the documentation was sent/received originated from the CSC rather than the Department.

classification appeal was received by the CSC by no later than November 21, 2022.^{8/} The CSC denied the classification appeal in a July 7, 2023 decision. The CSC's decision does not note any procedural issues with the appeal, such as it being submitted late or without information that was required to be produced by the Department. Rather, the classification appeal was processed by the CSC and decided on the merits. (Resp't MSJ, Ex. R12).

As noted above, "[a]n adverse employment action is an essential element of [a] 5.4a(3) . . . claim." State of New Jersey (Dep't of Community Affairs), D.U.P. No. 2015-8, 41 NJPER 315 (¶102 2014). In this case, Harris has not alleged a cognizable adverse employment action which resulted from the Department's alleged failure to submit her desk audit documentation to CSC as appropriate. The charge does not allege that Harris was transferred, demoted, fired, or otherwise had terms or conditions of employment adversely affected. While the CSC ultimately denied Harris's classification appeal, the decision makes clear that the denial was not based on any action/inaction of the Department. See Resp't MSJ, Ex. R12 ("The determination is based upon a

^{8/} The CSC decision denying Harris's classification appeal states that the PCQ was received by the CSC "on November 21, 2022." (Resp't MSJ, Ex. R12). Also on November 21, 2022, Drumgoole told Harris by email, "I have submitted your request to the appropriate party so rest assured that it has been received and logged into our system for processing." (CP MSJ, November 21, 2022 email chain between Shivon Harris and Caroline Drumgoole).

thorough review and analysis of the [PCQ] received on November 21, 2022.”).

Further, even if the alleged withholding of a desk audit submission was considered an adverse action, Harris has not asserted that she engaged in protected activity under the Act as required under Bridgewater. The Commission has held that “[p]rotected activity” [is] . . . defined as conduct in connection with collective negotiations, grievance processing, contract interpretation or administration, or other related activity on behalf of a union or individual.” Rockaway Tp. Bd. of Ed., D.U.P. No. 2014-6, 40 NJPER 293 (¶112 2103) (citing North Brunswick Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451 (¶4205 1978), aff’d NJPER Supp. 2d 63 (¶45 App. Div. 1979); Woodbridge Tp., D.U.P. No. 94-14, 19 NJPER 523 (¶24243 1993)). “In addition to pleading protected activity and an adverse employment action resulting from that activity, ‘the protected conduct must be pled with the specificity required by N.J.A.C. 19:14-1.3(a)(3)^{9/}.’”

The record in this case reveals that Harris filed a desk audit in October of 2022 on her own behalf. The CWA was not

9/ N.J.A.C. 19:14-1.3 (“Form, contents,”) provides, in relevant part, that unfair practice charges shall contain “. . . 3. A clear and concise statement of the facts constituting the alleged unfair practice. The statement must specify the date and place the alleged acts occurred, the names of the persons alleged to have committed such acts, the subsection(s) of the Act alleged to have been violated, and the relief sought.”

involved in Harris's 2022 desk audit until December 8, 2022, when CWA President Shawn Ludwig was copied on an email sent by Harris to the Department and CSC. By that time, as noted above, it is undisputed that the completed PCQ documentation had been in the CSC's possession for at least seventeen days.^{10/} Under these circumstances, I cannot find that filing a desk audit on an individual's behalf (without otherwise engaging in concerted activity) constitutes cognizable protected activity under the Act.

With respect to the other alleged instances of protected activity asserted in the charge, I find no nexus exists between any of those instances and the alleged refusal to process Harris's desk audit in October/November of 2022. Specifically, several instances of alleged protected conduct cited in the charge are unrelated to the desk audit and/or occurred years prior to the alleged refusal to process Harris's classification appeal. See CP MSJ, Ex. C (September 4, 2019 demand by CWA to advance an unrelated grievance concerning Harris to the second step; October 15, 2020 decision by PERC on an unrelated matter discussing Harris's filing of grievances/complaints against the DOL; October 2020 grievance concerning an allegation that Harris was mistreated by a coworker and the Department; April 7, 2021 correspondence concerning a workplace violence complaint filed by

^{10/} See n.8, supra.

Harris); Resp't MSJ, Ex. R10 (a lawsuit unrelated to the instant matter, filed on or about September 15, 2021, by Harris against the Department alleging violations of the New Jersey Law Against Discrimination). One email produced by the charging party purports to show that the CWA contacted the Department in March of 2021 regarding an alleged failure to submit desk audit documentation in a timely fashion. However, given that this communication occurred approximately nineteen months prior to Harris's October 2022 desk audit submission, I find it similarly lacks a nexus to the alleged adverse action.

I find that, even when viewing all evidence in the light most favorable to the charging party, the 5.4a(3) claim related to the alleged refusal to process Harris's desk audit must fail as a matter of law because Harris did not suffer an adverse employment action, and alternatively was not retaliated against for engaging in protected activity.

Similarly, I cannot conclude that the Department engaged in conduct which would tend to interfere with rights protected under the Act in violation of section 5.4a(1) in connection with Harris's desk audit documentation. As such, I find that the 5.4a(1) allegation also fails as a matter of law.

Accordingly, for the reasons set forth above, I grant the Department's motion for summary judgment, deny Harris's cross motion for summary judgment, and recommend dismissal of the

charge and amended charge.

CONCLUSION

The Department's motion for summary judgment is granted.
Harris's cross-motion for summary judgment is denied.

RECOMMENDED ORDER

I recommend that the complaint be dismissed.

/s/James R. Glowacki
James R. Glowacki
Hearing Examiner

DATED: August 9, 2023
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 August 21, 2023.