

D.U.P. NO. 2018-3

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

In the Matter of

BERGEN COMMUNITY COLLEGE,

Respondent,

-and-

Docket No. CI-2016-049

BERGEN COMMUNITY COLLEGE FACULTY
ASSOCIATION,

Respondent,

-and-

PATRICIA MARY KELLY,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by Patricia M. Kelly (Kelly) against Bergen Community College (College) and the Bergen Community College Faculty Association (Association). The charge alleged that the Association failed to pursue Kelly's grievance beyond Step 3 of the negotiated grievance procedure after she was non-renewed as an untenured faculty member of the College.

The Director found that Kelly has not alleged any facts, other than the mere refusal by the Association to advance her claims beyond the final step of the grievance procedure, showing that the Association violated its duty of fair representation. Additionally, the Director found that Kelly alleged neither facts nor circumstances indicating that the Association's handling of her case was arbitrary, discriminatory or in bad faith. Further, the Director found there is no violation of the New Jersey Employer-Employee Relations Act (Act) simply because the Association did not act in accordance with Kelly's expectations or otherwise achieve the results she desired. Moreover, the Director found there are no specific facts alleged that would support a violation of the Act by the College, and even if there were they would not fall within the six month statute of limitations.

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Appearances:

For the Respondent, Bergen Community College,
DeCotiis Fitzpatrick and Cole, LLP, attorneys
(Arlene Q. Perez, of counsel)

For the Respondent, Bergen Community College Faculty
Association,
Zazzali Fagella Nowak Kleinbaum and Friedman, attorneys
(Robert A. Fagella, of counsel)

For the Charging Party, Patricia Mary Kelly,
Leonard S. Miller, PA, attorneys
(Leonard S. Miller, of counsel)

REFUSAL TO ISSUE COMPLAINT OR DECISION

On June 22, 2016, Patricia Mary Kelly (Kelly) filed an
unfair practice charge against Bergen Community College Faculty
Association (Association) and Bergen Community College

(College).^{1/} The charge alleges that the Association failed to pursue Kelly's grievance beyond step 3 of the negotiated grievance procedure after she was non-renewed as an untenured faculty member of the College. As a remedy, Kelly specifically seeks reinstatement of her position at the College.

The Commission has authority to issue a complaint where it appears that the charging party's allegations, if true, may constitute unfair practices on the part of the Respondent. 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. On September 21, 2017, I wrote to the parties advising that I was not inclined to issue a complaint in this matter and set forth the reasons for that conclusion. The parties were afforded an opportunity to respond. No response was filed. Under all the circumstances, I find that the complaint issuance standard has not been met. I find the following facts.

^{1/} Kelly failed to identify which specific subsections of the New Jersey Public Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act) were allegedly violated. Based on the facts outlined in the charge, I will infer a violation of 5.4b(1) of the Act which prohibits employee organizations, their representatives or agents from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. There are no specific facts alleged that would support a violation of the Act by the College, and even if there were they would not fall within the six month statute of limitations pursuant to N.J.S.A. 34:13A-5.4(c).

The Association is the majority representative of faculty members at the College. The parties are operating under a collective negotiations agreement (Agreement) extending from July 1, 2013 to June 30, 2017.

Kelly was a non-tenured, at-will employee whose contract of employment required annual renewal upon its expiration by the College's Board of Trustees.^{2/} On March 12, 2014, the College formally notified Kelly that she would not be renewed for continued employment after June 30, 2014. Non-tenured faculty members who have been denied re-appointment may challenge such decision through the grievance procedure (Article XVII) outlined in the parties' Agreement. Accordingly, the Association filed a grievance on Kelly's behalf in June, 2014.^{3/} The Association further arranged for Kelly to meet with Sheldon Pincus, Esq.

2/ N.J.S.A. 18A:64A-13 provides, inter alia, that teaching staff employees possess all of the rights and privileges of teachers employed by local boards of education. N.J.S.A. 18A:27-10 provides that on or before May 15 in each year, non-tenured teaching staff members continuously employed by the board of education since the preceding September 30 shall receive either: (a) A written offer of a contract for employment from the board of education for the next succeeding year providing for at least the same terms and conditions of employment but with such increases in salary as may be required by the law or policies of the board of education, or (b) A written notice from the chief school administrator that such employment will not be offered.

3/ The grievance alleged a violation of Article XIII, § 5, ¶ a.3 and Article XIII, §5, ¶ c, regarding the College's notification requirements for members not being reappointed and termination of non-tenured appointments, respectively.

(Pincus) on August 26, 2014, to review the facts and circumstances surrounding her non-renewal. On August 28, 2014, Pincus sent a letter to Ronald Topham (Topham) of the New Jersey Education Association explaining that he did not believe Kelly had any viable legal claims outside of the grievance process.

The Agreement provides that the grievance process ends in a third step review of the grievance by the College's Board of Trustees. (Article XVII, ¶ 4, Step 3). Additionally, the Agreement has neither a mandatory nor an advisory arbitration provision. Consequently, the Board of Trustees' final decision regarding the grievance is dispositive.

On October 8, 2015, the Association and Kelly filed the grievance at Step Three of the grievance procedure. On December 22, 2015, the Board of Trustees issued a Step 3 response affirming the decision of the College President not to reappoint Kelly.

The gravamen of Kelly's charge against the Association is that it failed to pursue Kelly's claim beyond the negotiated grievance procedure, notwithstanding that Step 3 is the final step of the procedure.

ANALYSIS

Section 5.3 of the Act empowers a union to negotiate on behalf of all unit employees and to represent all unit employees in administering the collective negotiations agreement. With

that power comes the duty to represent all unit employees fairly in negotiations and contract administration. Section 5.3 specifically links the power to negotiate and administer with the duty to represent all unit employees "without discrimination and without regard to employee organization membership." The standards in the private sector for measuring a union's compliance with the duty of fair representation were articulated in Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed. 2d 842 (1967). Under Vaca, a breach of the statutory duty of fair representation occurs only when a union's conduct towards a member of the negotiations unit is arbitrary, discriminatory or in bad faith. Id. at 191. Those standards have been adopted in the New Jersey public sector. 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) and Carteret Ed. Assoc. (Radwan), P.E.R.C. No. 97-146, 23 NJPER 390, 391 (¶28177 1997).

Kelly has not alleged any facts, other than the mere refusal by the Association to advance her claims beyond the final step of the grievance procedure, showing that the Association acted in violation of Vaca standards. See also, OPEIU Local 153(Johnstone), P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983). A union is allowed a "wide range of reasonableness in servicing its members." Ford Motor Company v. Huffman, 345 U.S. 330, 337-

338, 73 S.Ct. 681, 97 L.Ed. 1048 (1953). The Commission has repeatedly held that an employee organization is not obligated to pursue every grievance. Rather, it must evaluate possible grievances and decide in good faith whether a unit employee's claim has merit. D'Arriago v. New Jersey State Bd. of Mediation, 119 N.J. 74 (1990); 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).

The Association pursued Kelly's grievance through the final step in the negotiated grievance procedure. Pincus's August 28, 2014 letter to Topham sets forth several reasons why Kelly did not have any viable claims outside of the grievance procedure. Kelly has not alleged any facts contesting the ascribed reasons nor any circumstances indicating that the Association's handling of her case is arbitrary, discriminatory, or in bad faith. Kelly also acknowledged that Brant Chapman, Association Representative, provided her with assistance during the grievance process, including efforts to resolve the issue of her non-renewal with the College. The Association advocated for Kelly, apparently exhausting every step of the grievance procedure. That the Association did not act in accordance with Kelly's expectations, or achieve the results she desired, does not demonstrate conduct that is arbitrary, discriminatory, or in bad faith.

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

/s/Daisy B. Barreto
Daisy B. Barreto
Acting Director of Unfair Practices

DATED: October 2, 2017
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 October 13, 2017.