

P.E.R.C. NO. 2019-16

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

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 Public Employment Relations Commission affirms the decision of the Director of Unfair Practices refusing to issue a complaint on an unfair practice charge filed by Miller against the County and the PESU. The charge alleges that PESU violated N.J.S.A. 34:13A-5.4b(3) by failing to file grievances and/or unfair practice charges against the County on Miller's behalf to contest disciplines and evaluations she received during her working test period, and conspiring with the County to have her demoted out of the PESU unit. The charge also alleges that the County violated subsections 5.4a(1) and (5) by conspiring with the PESU to have her demoted outside of the unit. The Commission finds that Miller as an individual employee does not have standing to prosecute a 5.4b(3) claim, but agrees with the Director's conclusion that even under a 5.4b(1) claim, her allegations fail to demonstrate that PESU's conduct toward her was arbitrary, discriminatory, or in bad faith. The Commission further finds that Miller lacks standing to assert a 5.4a(5) violation against the County and that her allegations fail to demonstrate that the County was engaged in a conspiracy with the PESU or that its conduct toward her implicates a 5.4a(1) violation.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

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

For the Respondent, Public Employees Supervisors Union,  
Mets, Schiro & McGovern, LLP, attorneys (Brian J.  
Manetta, of counsel)

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

DECISION

On July 24, 2018, Alexis T. Miller (Miller) appealed a decision issued by the Director of Unfair Practices (Director) refusing to issue a complaint based upon an unfair practice charge and amended charge that Miller filed against her employer, the County of Essex (County), and her majority representative, the Public Employees Supervisors Union (PESU). D.U.P. No. 2018-12, \_\_\_\_\_ NJPER (¶ 2018). Miller alleges that PESU

violated subsection 5.4b(3)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act), by:

- failing/refusing to file grievances and/or unfair practice charges on Miller's behalf contesting two poor evaluations and disciplines that she received during her working test period (September 11, 2017 through December 11, 2017) in a supervisory title;

- conspiring with the County to have Miller demoted from the supervisory title so that she would no longer be included in PESU's negotiations unit and PESU would no longer have to advocate on her behalf; and

- Carol Perkins (Perkins), the then-PESU President, failing/refusing to perform her due diligence with respect to Miller, specifically neglecting to advocate for Miller and send her copies of any grievance filed on her behalf despite repeated requests for assistance.<sup>2/</sup>

Miller also alleged that the County violated subsections 5.4a(1) and (5)<sup>3/</sup> of the Act by:

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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."

2/ The Director noted that Miller's allegations implicate subsection 5.4b(1) of the Act. This provision prohibits 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."

3/ 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 "(5) Refusing to  
(continued...)"

-conspiring with PESU to have her demoted from the supervisory title so that she would no longer be included in PESU's negotiations unit and PESU would no longer have to represent her.

On July 31 and August 1, 2018, respectively, PESU and the County filed opposition to Miller's appeal asserting that the Director properly refused to issue a complaint.

#### PROCEDURAL HISTORY

On December 7 and 18, 2017, respectively, Miller filed the underlying unfair practice charge and amended charge. PESU and the County filed position statements thereafter. On February 23, 2018, an exploratory conference was held.

On April 30, 2018, Miller was provided a copy of the position statements and attachments filed by PESU and the County and was advised that she could file a response by May 14. On May 9, Miller requested an extension of time to respond and was granted until May 29. On May 29, Miller filed a response reiterating the allegations set forth in her charge and amended charge.

On June 6, 2018, the Director issued a decision in which he refused to issue a complaint. He dismissed Miller's 5.4b(3) claim given that only public employers have standing to assert

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3/ (...continued)  
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."

such violations. The Director also found that the uncontested facts demonstrated that PESU assisted Miller in opposing the County's actions against her by filing a grievance on October 23, 2017; filing a Step 2 grievance on December 1, 2017; representing Miller at several meetings with County representatives; and convening a meeting of PESU's Executive Board to discuss possible legal action against the County. He found that although PESU may not have acted in accordance with Miller's expectations and/or achieved the results that she desired, no facts indicated that PESU acted arbitrarily, discriminatorily, or in bad faith or that a different strategy by PESU would have either prevented or resulted in a rescission of Miller's demotion from her provisional supervisory title. He also found no facts supporting Miller's allegation that there was a conspiracy between the County and PESU to have her demoted. Accordingly, the Director determined that Miller did not have standing to allege that the County violated subsection 5.4a(5) and dismissed Miller's 5.4a(1) claim.

The instant appeal ensued.

## LEGAL ARGUMENTS

On appeal, Miller argues that she "was demoted unfairly" and that "the union didn't fight for [her] and [her] employer didn't investigate [her] claims of harassment and retaliation." In addition to a recitation of events that transpired during her working test period, Miller maintains the following:

-that she "received (2) levels of discipline and (3) poor evaluations, but the union only filed a grievance for one discipline" and did not pursue arbitration, Perkins "didn't follow through" and negotiated "an agreement with the [C]ounty without conferring with [her]," and "[t]he union gave up on [her]";

-that she "never filed a claim with EEOC" but did file "harassment charges . . . internally with the County" which were determined to be "unfounded without even investigating the claims"; and

-that the agency is "solely focused on the poor evaluations and disciplines that were issued instead of the underlying issues that led to those poor evaluations and disciplines" - specifically, Miller requested to be moved to another floor after she was promoted because "[n]o one wanted [her] on that floor" and "[i]n retaliation, [she] received the poor evaluations and discipline shortly thereafter."

Miller requests that the Commission reverse the Director's determination and issue a complaint against PESU and the County.

In response, PESU argues that the Director properly dismissed the underlying unfair practice charge because even assuming the facts alleged by Miller are true, same do not support a claim for breach of the duty of fair representation. PESU maintains the following:

- that it challenged all of the disciplines and negative evaluations issued to Miller during her working test period;

- that Miller submitted evidence demonstrating that she advised Perkins that she had filed a harassment complaint; and

- that Miller has admitted that Perkins represented her at two meetings with County representatives, that Perkins was with her when Miller was being disciplined and questioned the County's actions, and that Perkins attempted to reach an agreement with the County concerning Miller's grievances.

PESU contends that an individual employee does not have standing to allege a subsection 5.4b(3) violation and that even under a broader 5.4b(1) analysis, Miller has failed to allege facts sufficient to support a complaint. PESU also argues that it is inappropriate for the Commission to consider any newly-alleged facts that Miller failed to present to the Director.

Also in response, the County argues that although an individual employee may have standing to pursue a subsection 5.4a(5) violation where he/she has also asserted a viable claim for breach of the duty of fair representation against his/her majority representative, Miller does not have standing in this case because she has not alleged any facts demonstrating that PESU acted arbitrarily, discriminatorily, or in bad faith or breached its duty of fair representation. The County maintains that Miller's 5.4b(3) claim is inappropriate because only public employers have standing to assert that an employee organization has refused to negotiate in good faith. The County contends that

Miller has not alleged any facts demonstrating that the County interfered, restrained, or coerced her in the exercise of any rights guaranteed under the Act in violation of subsection 5.4a(1). Rather, the County asserts that Miller appropriately filed an appeal related to her working test period with the Civil Service Commission. The County also argues that it is inappropriate for the Commission to consider any newly-alleged facts that Miller failed to present to the Director.

#### STANDARD OF REVIEW

N.J.A.C. 19:14-2.1(a) provides that the Director shall issue a complaint "if it appears . . . that the allegations of the charge, if true, may constitute unfair practices on the part of the respondent, and that formal proceedings should be instituted in order to afford the parties an opportunity to litigate relevant legal and factual issues."

N.J.A.C. 19:14-2.3(b) provides that "[w]here no complaint is issued, the charging party may appeal that action by filing . . . an appeal with the Commission . . . [and] [t]he Commission may sustain the refusal to issue a complaint . . . or may direct that further action be taken." However, "[a]n appeal may not allege any facts not previously presented, unless the facts alleged are newly discovered and could not with reasonable diligence have been discovered in time to be presented." Id.

N.J.S.A. 34:13A-5.3 provides in pertinent 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 interest of all such employees without discrimination and without regard to employee organization membership.

The Supreme Court of the United States has held that "[a] breach of the statutory duty of fair representation occurs when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Vaca v. Sipes, 386 U.S. 171, 190 (1967). New Jersey courts and the Commission have adopted the Vaca standard in deciding fair representation cases arising under the Act. See Lullo v. Int'l Ass'n of Fire Fighters, 55 N.J. 409, 427-428 (1970); Belen v. Woodbridge Twp. Bd. of Educ., 142 N.J. Super. 486, 491 (App. Div. 1976); Saginario v. Attorney General, 87 N.J. 480 (1981); Jersey City Housing Auth., P.E.R.C. No. 2015-70, 41 NJPER 477 (¶148 2015), aff'd 43 NJPER 255 (¶77 App. Div. 2017); OPEIU Local 133, P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983).

#### ANALYSIS

We agree with the Director's analysis and determination. We add the following.

As noted by the Director, Miller's allegations center on her provisional appointment to the title of family service supervisor and related working test period.<sup>4/</sup> See D.U.P. at 3-4. Upon

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<sup>4/</sup> N.J.A.C. 4A:4-5.1 thru -5.5 define the parameters of a working test period. In particular, a working test period is "designed to permit an appointing authority to determine (continued...)"

receiving notice from the County that she did not successfully complete her working test period, Miller filed an appeal with the Civil Service Commission (CSC) (CSC Dkt. No. 2018-1872) which was transmitted to the Office of Administrative Law for further proceedings (OAL Dkt. No. CSV 00727-2018N).<sup>5/</sup> See County's Br. at Ex. A. N.J.S.A. 34:13A-5.3 specifies that collectively-negotiated "grievance and disciplinary review procedures may provide for binding arbitration as a means for resolving disputes" but "may not replace or be inconsistent with any alternate statutory appeal procedure . . . ." Accordingly, Miller has appropriately raised her concerns regarding the "underlying issues that led to . . . poor evaluations and

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4/ (...continued)  
 whether an employee can satisfactorily perform the duties of the title" (N.J.A.C. 4A:4-5.1(a)); may not extend beyond "a period of three months of active service" for employees in local service (N.J.A.C. 4A:4-5.2(b)1); obligates an appointing authority to "prepare a progress report on the employee at the end of two months and a final report at the conclusion of the . . . period" (N.J.A.C. 4A:4-5.3(a)); may result in "[a]n employee . . . be[ing] separated for unsatisfactory performance at the end of the . . . period" or "be[ing] disciplined during the . . . period" (N.J.A.C. 4A:4-5.4); and may result in an employee "be[ing] restored to an eligible list" or his/her "former title" (N.J.A.C. 4A:4-5.5; N.J.A.C. 4A:4-1.9).

5/ N.J.A.C. 4A:4-5.4 provides employees who are disciplined during a working test period or separated for unsatisfactory performance at the end of a working test period with the right to appeal to the CSC. See also N.J.A.C. 4A:2-1.1 thru -1.8 ("Appeals"); N.J.A.C. 4A:2-2.1 thru -2.13 ("Major discipline"); N.J.A.C. 4A:2-3.1 thru -3.7 ("Minor discipline"); N.J.A.C. 4A:2-4.1 thru -4.3 ("Termination at end of working test period"); N.J.A.C. 4A:2-5.1 thru -5.2 ("Employee protection against reprisals or political coercion").

disciplines" during her working test period as well as her dissatisfaction with being returned to her former title at the end of her working test period through the CSC's appeal procedure.

Moreover, even assuming Miller's allegations are true, they are insufficient to support the claims she has asserted under the Act.

With respect to Miller's claims against PESU, the Commission has held that individual employees lack standing to prosecute an alleged violation of subsection 5.4b(3). See Amalgamated Transit Union, Local 540, D.U.P. No. 2016-3, 42 NJPER 376 (¶107 2015), adopted P.E.R.C. No. 2016-46, 42 NJPER 336 (¶96 2016); Hamilton Tp. Ed. Ass'n, H.E. No. 79-10, 4 NJPER 381 (¶4171 1978), adopted P.E.R.C. No. 79-20, 4 NJPER 476 (¶4215 1978). Further, despite the fact that she did not articulate a 5.4b(1) claim, Miller's allegations fail to demonstrate that PESU's conduct toward her was arbitrary, discriminatory, or in bad faith. See Vaca, 386 U.S. at 190. The uncontested facts establish that PESU filed a grievance on Miller's behalf on October 23, 2017 contesting "all negative evaluations and disciplinary actions"; filed a Step 2 grievance on Miller's behalf on December 1, 2017 contesting "all negative evaluations and disciplinary actions"; represented Miller at several meetings with County representatives and attempted to negotiate an agreement whereby Miller would return to her former title in exchange for the County removing

disciplinary notices from her file; received indications from Miller that she had filed a harassment claim with varying references to the EEOC, the NLRB, and the County's Human Resources Department; convened a meeting of PESU's Executive Board to discuss possible legal action against the County; and reviewed Miller's employment records and evaluations and determined that it was unlikely that PESU would prevail in further grievance proceedings or in binding arbitration. See N.J.A.C. 4A:4-5.4. The Commission has held that "[t]he complete satisfaction of all who are represented is hardly to be expected" and "[a] wide range of reasonableness must be allowed a statutory bargaining representative in servicing the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." PBA Local 187, P.E.R.C. No. 2005-78, 31 NJPER 173 (¶70 2005) (citing Ford Motor Co. v. Huffman, 345 U.S. 330, 337-338 (1953)). The Commission has also held that "[t]he duty of fair representation does not require a union to arbitrate every grievance." Passaic Cty. Support Staff Ass'n/NJEA, D.U.P. No. 2014-16, 41 NJPER 37 (¶9 2014), adopted P.E.R.C. No. 2015-23, 41 NJPER 169 (¶60 2014); accord Vaca, 386 U.S. at 191-192 ("[t]hough we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable

collective bargaining agreement"; "[i]f the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation"; "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"). Accordingly, we agree with the Director's determination that there are insufficient facts to support Miller's 5.4b(3) and (1) claims. See D.U.P. at 14-18.

With respect to Miller's claims against the County, given that she has failed to demonstrate that PESU's conduct toward her was arbitrary, discriminatory, or in bad faith, she lacks standing to assert a subsection 5.4a(5) violation against the County. The Commission has held that "where [an] employee not only alleges a breach of the contract, but also alleges that the majority representative either alone, or in collusion with the employer, processed [a] grievance in bad faith, or in some other way violated the duty of representation owed the employee[,] an employee may only proceed with a 5.4a(5) claim against his/her employer if he/she has also asserted a viable breach of the duty of fair representation claim against his/her majority representative. New Jersey Turnpike Auth., H.E. No. 81-7, 6

NJPER 473 (¶11241 1980), adopted P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980), aff'd NJPER Supp.2d 101 (¶85 App. Div. 1981); see also Hudson Cty., D.U.P. No. 2009-11, 35 NJPER 234 (¶83 2009), adopted P.E.R.C. No. 2010-15, 35 NJPER 346 (¶116 2009)

("[i]ndividual employees do not have standing to assert a violation of 5.4a(5) because the employer's duty to negotiate in good faith runs to the majority representative, not individual employees[,] and "[e]ven if a majority representative has breached its duty of fair representation in refusing to arbitrate a grievance, that fact alone would not convert an employer's mere breach of contract into an unfair practice"). Further, Miller's allegations fail to demonstrate that the County was engaged in a conspiracy with PESU or that its conduct toward Miller in any way implicates a subsection 5.4a(1) violation of rights guaranteed by the Act. The County had the authority to issue evaluations and disciplinary actions during Miller's working test period, as well as the authority to restore Miller to her former title at the end of her working test period, pursuant to the Civil Service regulations set forth above. Accordingly, we agree with the Director's determination that there are insufficient facts to support Miller's 5.4a(1) and (5) claims. See D.U.P. at 14-18.

#### ORDER

The Director's refusal to issue a complaint is affirmed.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Boudreau, Papero and Voos voted in favor of this decision. Commissioner Jones voted against this decision. Commissioner Bonanni was not present.

ISSUED: November 29, 2018

Trenton, New Jersey