P.E.R.C. NO. 2022-38

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 194,

Respondent,

-and- Docket No. CI-2015-021

KLARIDA PAPAJANI,

Charging Party.

NEW JERSEY TURNPIKE AUTHORITY,

Respondent,

-and- Docket No. CI-2015-026

KLARIDA PAPAJANI,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants both Local 194's and the Authority's motions for summary judgment on unfair practice charges filed by Papajani (Charging Party) against them. The charge against Local 194 alleges that it violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act), by refusing to process the grievances, failing to call witnesses or properly represent her at her disciplinary hearing, failing to inform her that her appeal was denied before the arbitration deadline, and for working with the Authority to terminate her. The charge against the Authority alleges that it retaliated against her for filing a Division on Civil Rights (DCR) discrimination claim and a Public Employees Occupational Safety and Health (PEOSH) safety claim. She also alleged that the Authority failed to inform her of her hearing results before the arbitration deadline. Finding that Local 194's decision not to call witnesses during her disciplinary hearing was a disagreement on strategy, the Commission does not find that Local

194's representation of the Charging Party during the Authority's internal hearing and appeals process was arbitrary, discriminatory, or in bad faith. Finding that Local 194 and the

Authority agreed to waive the Authority's timeliness objection to the arbitration and that the arbitration proceeded on its merits, the Commission finds that the Charging Party's allegations related to missing the arbitration deadline are moot. The Commission further finds that Local 194 did not breach its duty of fair representation by negotiating a settlement agreement for her that she revoked, and that there are no facts indicating that Local 194's representation of her during the arbitration was arbitrary, discriminatory, or in bad faith. The Commission finds no facts demonstrating that the Authority's actions in terminating the Charging Party interfered with her statutory rights in violation of subsection 5.4a(1) of the Act, as a neutral third-party arbitrator determined that it had just cause to terminate her. Finally, the Commission finds that the Charging Party's 5.4a(3) retaliation claim must be dismissed because she did not engage in protected activity under our Act, but she filed claims based on other laws not in the Commission's jurisdiction and that have their own forums for review.

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.

P.E.R.C. NO. 2022-38

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, LOCAL 194,

Respondent,

-and- Docket No. CI-2015-021

KLARIDA PAPAJANI,

Charging Party.

NEW JERSEY TURNPIKE AUTHORITY,

Respondent,

-and- Docket No. CI-2015-026

KLARIDA PAPAJANI,

Charging Party.

Appearances:

For the Respondent - IFPTE, Local 194, Weissman & Mintz LLC, attorneys (Steven P. Weissman, of counsel)

For the Respondent - NJ Turnpike Authority, McElroy Deutsch, Mulvaney & Carpenter, LLP, attorneys (David M. Alberts, of counsel)

For the Charging Party, Klarida Papajani, pro se

DECISION

On October 14, 2014 and January 28, 2015, the Charging Party filed an unfair practice and amended charge against her union, IFPTE Local 194 (Local 194). On December 4, 2014, December 30, 2014, and May 27, 2015, the Charging Party filed an unfair

practice charge and amended charges against her former employer, the New Jersey Turnpike Authority (Authority).

The charge against Local 194 alleges that it violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., (Act) by refusing to process the Charging Party's grievances for safety issues, bad faith communications with her, refusing to discuss strategy or assist her in planning for her defense against charges, and incompetently defending her against charges. The Charging Party's amended charge alleges: Local 194 refused to file a safety grievance on her behalf on October 31, 2013; Local 194 refused to file lunch pay and overtime pay grievances for the Charging Party in November and December 2013; Local 194 presented her with a June 9, 2014 settlement offer from the Authority that she disagreed with; Local 194 President Kevin McCarthy appeared on the Charging Party's behalf and failed to properly represent her or call witnesses during a June 30, 2014 hearing; Local 194 refused to answer the Charging Party's emails and requests for discovery in preparation for her hearing; Local 194 did not inform her that her appeal was denied and ask if she wanted to file for arbitration; the arbitration deadline passed before she found out her appeal was denied; and she "strongly believes that Local 194 in connection with NJTPA worked together to terminate the member."

The charge against the Authority alleges that it violated the Act by retaliating against the Charging Party for protected activity after she had filed a claim with the Division on Civil Rights (DCR) regarding gender and nationality discrimination and sexual harassment, as well as a safety claim with Public Employees Occupational Safety and Health (PEOSH). The Charging Party alleges that the Authority failed to send her the results of her hearing before the arbitration deadline had passed.

On June 16, 2015, the Director of Unfair Practices consolidated the charges against Local 194 and the Authority and issued a Complaint and Notice of Pre-Hearing on the portions of the charges alleging that Local 194 violated subsection 5.4b(1)[1/] of the Act and that the Authority violated subsections 5.4a(1) and (3)[2/] of the Act. Following several conferences between the parties conducted by Commission staff agents, the consolidated charge was held in abeyance pending the resolution of the Charging Party's arbitration regarding her termination (Docket

---

1/ This provisions prohibits public 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."

2/ 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) 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 the rights guaranteed to them by this Act."

No. AR-2015-711). On July 7, 2021, an arbitration award was issued upholding the Charging Party's termination. On October 29, 2021, Local 194 filed a motion for summary judgment, supported by exhibits A-I and the certification of its counsel. On November 30, 2021, the Authority also filed a motion for summary judgment, supported by exhibits A-S and the certification of its counsel. On January 10, 2022, the Charging Party filed a response brief challenging the Authority's disciplinary allegations against her, challenging her termination, and challenging the arbitrator's finding that the Authority had "just cause" to terminate her. Her response was supported by exhibits.

On January 10, 2022, motions for summary judgment were referred to the Commission for a decision pursuant to N.J.A.C. 19:14-4.8(a). 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. N.J.A.C. 19:14-4.8(d); Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954).

FACTS

Based on the exhibits and certifications submitted by the parties, we find the following facts. Local 194 is the exclusive representative of all full-time operating employees of the Authority's Maintenance and Toll Collections Departments and is the exclusive representative of the Authority's office, clerical,

and technical employees. The Authority and Local 194 are parties to a collective negotiations agreement (CNA) effective from July 1, 2007 through June 30, 2011. Article 17.B. of the CNA sets forth major discipline procedures that provide for a disciplinary hearing followed by an opportunity to appeal the Hearing Officer's determination to the Executive Director. Article 17.B. provides that Local 194 may appeal the Executive Director's decision to binding arbitration within ten working days after receipt of the appeal.

The Charging Party was hired by the Authority in 2003 as a toll collector and in 2012 was transferred to the maintenance department to work as a maintenance person until she was terminated on February 19, 2014.[3/] The Charging Party's disciplinary record with the Authority includes the following:

- February 7, 2012: Written Warning - "Failure to follow directions related to work assignment"; "jeopardizing the safety of NJ turnpike personnel and the motoring public"; and "threatening a supervisor with 'Attorney' Nonsense."
- October 29, 2013: Written Warning - "Insubordination - Disrespect and abusive behavior towards Supervision"; "Creating a Hostile Work Environment."
- November 1, 2013: Advisory Notice of Disciplinary Action - "Conduct Unbecoming a Turnpike Authority Employee 10-28-13 and 10-30-13"; "Creating a Hostile Work Environment 10-28-13 and 10-30-13"; and "Insubordination 10-28-13 and 10-30-13." (3 day suspension)

3/ On July 23, 2013, the Charging Party filed a discrimination complaint with the DCR against the Authority, which the DCR investigated and dismissed.

- December 31, 2013: Advisory Notice of Disciplinary Action - "Conduct Unbecoming a Turnpike Authority Employee 12-27-13"; "Creating a Hostile Work Environment 12-27-13"; and "Insubordination 12-27-13." (5 day suspension)

On February 19, 2014, the Authority issued the Charging Party a final "Advisory Notice of Disciplinary Action" seeking her removal for her alleged conduct that day. The charges alleged: "Conduct Unbecoming a Turnpike Authority Employee - 2-19-2014"; "Insubordination 2-19-2014"; and "Creating a hostile work environment 2-19-2014." The Charging Party was suspended immediately without pay pending resolution of the charges.

On June 30, 2014, an internal disciplinary hearing was conducted regarding the Charging Party's February 19, 2014 discipline and termination. Local 194 President McCarthy represented the Charging Party at the hearing. The Authority presented one witness, Maintenance Department employee Robert Matthews, and Local 194 did not present a witness. The parties agreed on five joint exhibits and the union submitted its own additional exhibit of the Authority's Termination Policy. McCarthy's representation of Local 194 and the Charging Party during the hearing included the following actions:

- McCarthy made an opening statement noting that the Authority had failed to invite witnesses who had signed the disciplinary notices and arguing that progressive discipline was not adhered to by the Authority in this matter.
- McCarthy cross-examined the Authority's witness about whether there were verbal warnings prior to the request for removal.

- McCarthy stated that he did not request any witnesses in the Charging Party's defense because historically the Authority would schedule all individuals who signed the disciplinary notices.

- McCarthy filed a post-hearing brief.

On August 6, 2014, the Authority's Hearing Officer issued a decision sustaining the Charging Party's termination. The Hearing Officer found that McCarthy's argument that the Authority should have all individuals who signed the disciplinary notices as witnesses at the hearing was unreasonable. The Hearing Officer also rejected McCarthy's contention that the Authority did not adhere to the progressive disciplinary procedures in the CNA or the Termination Policy, noting the evidence of the Charging Party's multiple verbal and written warnings and disciplinary suspensions since 2012 concerning the same charges: Conduct Unbecoming a Turnpike Authority Employee; Insubordination; and Creating a Hostile Work Environment.

On August 11, 2014, Local 194/McCarthy filed a written appeal of the Hearing Officer's decision to the Authority's Executive Director. McCarthy's appeal letter alleged that the Authority violated the CNA's disciplinary procedures and made technical objections concerning timing and the identity of the Hearing Officer. McCarthy also asserted that the Authority presented only "unsubstantiated accusations on documentation." On August 18, 2014, the Authority's Executive Director rejected

Local 194's procedural objections and affirmed the Hearing Officer's decision upholding the Charging Party's termination.

On August 12, 2014, the Charging Party filed a PEOSH safety discrimination complaint against the Authority alleging that her February 2014 disciplinary termination was retaliation for her refusal to perform unsafe work she was ordered to do. On November 7, 2014, PEOSH dismissed the complaint. PEOSH found:

> The facts submitted in your case have failed to clearly establish proof that the substantial reason your employer took an adverse action against you was for the exercise of protected activity of an expressed workplace safety concerns [sic] to your foreman. There is insufficient evidence to determine that your suspensions and termination would not have occurred in the absence of your protected activity related to workplace safety.

The Charging Party appealed that dismissal, which is now pending in OAL where the Authority has filed a motion to dismiss.

On May 28, 2015, Local 194 filed a request for binding arbitration over the issue of whether the Authority had just cause to terminate the Charging party. The arbitration hearing was initially scheduled for November 24, 2015. Steven P. Weissman represented Local 194 in the arbitration and negotiated a settlement agreement with the Authority regarding the Charging Party's termination. The settlement agreement provided:

- Reinstatement of the Charging Party on December 14, 2015 at the highest salary range for the position of Full-Time Toll Collector, retroactive to August 18, 2014.

- Transfer of the Charging Party, at her request, back to a Maintenance Person position as early as December 12, 2016.

- Seniority credit for the Charging Party for the period of August 18, 2014 through her reinstatement date.

- Credit, upon her reinstatement on December 14, 2015, with the prorated paid vacation and sick days to which she is entitled through December 31, 2015, immediate eligibility for health benefits enrollment, and on January 1, 2016 credit with paid leave time for vacation, sick, and personal leave banks she entitled to under the CNA.

- The Charging Party's personnel records will reflect a six month suspension without pay from February 19, 2014 through August 17, 2014; authorized unpaid leave status from August 18, 2014 through April 1, 2015; and authorized paid leave status from April 1, 2015 through December 13, 2015.

- Payment from the Authority to the Charging Party of $35,000 representing back pay for the period April 1, 2015 through December 13, 2015 (to be received in her January 12, 2016 paycheck).

- The settlement agreement is contingent upon the Charging Party's withdrawal of the arbitration, her unfair practice charge, her PEOSH/OAL claim, and her DCR/EEOC claims.

On December 10, 2015, both Local 194's President and the Charging Party signed the settlement agreement. The Authority later signed the agreement. On December 17, 2015, the Charging Party exercised her right to revoke the settlement within the seven-day window, which voided the settlement agreement.

The next arbitration hearing date was scheduled for September 15, 2016. Weissman had arranged for Kenneth Nowak, Esq. to represent Local 194 with respect to the substantive just cause issue in the arbitration. During the September 15 arbitration hearing, Weissman represented Local 194 on the

procedural issue of whether the request for arbitration was timely filed. Weissman submitted 10 exhibits and presented President McCarthy as a witness.

Following the September 15 arbitration hearing, the Charging Party indicated that she did not want Nowak to present the just cause case. Weissman arranged for Local 194 to allow the Charging Party to select an attorney to present the just cause case. The Charging Party selected Thomas McKinney, Esq. On July 26, 2017, Weissman e-mailed McKinney with the case file for the Charging Party, as well as a copy of the December 2015 settlement agreement, a copy of the September 15, 2016 hearing transcript, and advice and insight for presenting cases before the particular arbitrator. On July 28, 2017, McKinney forwarded Weissman's e-mail and attachments to the Charging Party and inquired whether there are any documents he is missing.

On June 4, 2018, a second arbitration hearing was held. McKinney represented Local 194. McKinney submitted five exhibits. McKinney called one witness and the Authority called two witnesses. McKinney conducted direct and re-direct examinations of Local 194's witness. McKinney cross-examined the Authority's witnesses and conducted re-cross of one of them.

On November 16, 2020, Local 194 and the Authority signed a Memorandum of Agreement by which the Authority agreed to "withdraw its objection to the timeliness of the submission of

the appeal of Papajani's termination to arbitration." On January 27, 2021, Local 194 and the Authority held their third and final arbitration hearing concerning the Charging Party's termination. McKinney again represented Local 194. The Charging Party was the only witness. McKinney conducted direct and re-direct examination of the Charging Party and submitted four exhibits. On March 12, 2021, McKinney filed a 19-page post-hearing brief with the arbitrator containing five major legal arguments in support of Local 194's position that there was no just cause to terminate the Charging Party and that she should be reinstated with backpay, benefits, and seniority.

On July 7, 2021, the arbitrator issued a 21-page written opinion and award denying Local 194's disciplinary appeal on behalf of the Charging Party based on his finding that: "The Authority had just cause to remove Papajani from its employ following her proven misconduct on February 19, 2014." The award noted that the Authority's initial timeliness objection had been withdrawn by the parties' November 16, 2020 stipulation. After considering the factual record and the arguments of both Local 194 and the Authority, the arbitrator found:

> Upon the foregoing, I find Papajani guilty of the February 19, 2014, offenses charged in the Advisory Notice of Disciplinary Action. Her conduct was insubordinate and unbecoming an Authority employee. Simply put, Papajani's actions in yelling at Delavega, calling him stupid and falsely accusing him of improper touching, are unacceptable in any

> workplace and provide grounds for discipline. They undermined Delavega's efforts to manage the workforce and carry out maintenance operations in an efficient manner. By any reasonable measure, Papajani's actions warrant discipline.
>
> [Award at 14-15.]

The arbitrator rejected Local 194's arguments concerning progressive discipline and just cause for termination, finding:

> In this case, I find Papajani's misconduct on February 19, 2014, was not an isolated occurrence. Instead, the record demonstrates Papajani engaged in a persistent pattern of disrespect for the authority of her supervisors from February 7, 2012, through February 19, 2014. During this time frame, I find she committed acts of insubordination and unbecoming conduct on the four (4) prior occasions described above, and continued her insubordinate conduct on February 19, 2014, as charged in this case. Significantly, Papajani continued to commit misconduct despite progressive disciplinary measures imposed by the Authority. I am convinced further efforts at correcting her disruptive behavior would be futile. In these particular circumstances, the Authority is not required to retain Papajani in its employ.
>
> [Award at 17-18.]

The arbitrator thus concluded that: "By any reasonable standard, Papajani's proven actions qualify as flagrant wrongdoing, for which discharge is appropriate." Award at 20.

ARGUMENTS

Local 194 asserts that summary judgment is appropriate because the undisputed facts establish that it did not breach its

duty of fair representation. It argues that it represented the Charging Party at the Authority's internal hearing, appealed that hearing to the Executive Director, and then appealed that decision to binding arbitration. Local 194 contends that the Charging Party's allegation that it failed to timely appeal to arbitration was rendered moot once Local 194 got the Authority to agree to waive that procedural defense in arbitration. It asserts that it also met its duty of fair representation when it secured a settlement at the start of arbitration providing for the Charging Party's reinstatement with backpay, along with seniority and pro-rated paid leave. Local 194 argues that when the Charging Party revoked that settlement agreement, the union was no longer obligated arbitrate; however, it proceeded to arbitration and allowed the Charging Party to select the attorney to represent Local 194's just cause challenge to her termination. Local 194 asserts that McCarthy did not provide incompetent representation during the internal hearing and that it was reasonable for him not to call witnesses because the burden of proof was on the Authority to prove its discipline case. It argues that regardless of McCarthy's representation, the merits of her termination were fully litigated before a neutral arbitrator. Finally, Local 194 argues that allegations about not filing grievances in 2013 should be dismissed as untimely.

The Authority asserts that summary judgment is appropriate because the Charging Party fails to state a claim against it. It argues that the allegation that it did not produce witnesses during the internal disciplinary hearing is not a claim under the Act. It notes that it did produce the person who made the decision to terminate the Charging Party's employment, and that during arbitration it also produced two of her supervisors as witnesses. Regarding the Charging Party's allegations of retaliation for her DCR and PEOSH claims, the Authority asserts that those claims do not involve the exercise of protected activity under the Act. The Authority argues that the Charging Party's collusion allegations contain no specificity. It asserts that the Charging Party had her termination litigated before a neutral third-party arbitrator who upheld her termination on the merits, which renders her charge moot.

The Charging Party asserts that her termination should be reversed because the Authority does not meet the burden for termination and did not have just cause to terminate her. She argues that there are serious doubts about the veracity of the testimony of one of the Authority's witnesses during her grievance arbitration. The Charging Party disputes the facts of multiple previous disciplinary charges raised by the Authority during arbitration, including the February 19, 2014 incident leading to her termination. She argues that other co-workers who

have done allegedly worse things have received lesser penalties. The Charging Party asserts that she had requested that Local 194 appeal not just her termination to arbitration, but also her suspensions. She contends that she withdrew from the settlement agreement because the Authority "did not follow" it and she was "not allowed to contact by herself [sic] while being represented by an attorney." The Charging Party asserts that Weissman only got the Authority to agree to waive its timeliness defense to arbitration in order to protect Local 194 and "moot my case with PERC." She incorporates into her brief large portions of Local 194's/McKinney's post-hearing brief to the arbitrator concerning just cause and the merits of her termination.[4/]

ANALYSIS

Initially, we note that, as the Charging Party's charge against Local 194 was filed on October 14, 2014, any alleged unfair practice occurring more than six months prior (i.e., preceding April 14, 2014) is barred by N.J.S.A. 34:13A-5.4(c). No facts suggest that the Charging Party was prevented from filing a timely charge within the statutory period. See, e.g., 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

4/ Authority Exhibit S is the March 12, 2021 post-hearing brief submitted by McKinney on behalf of Local 194 concerning the Charging Party's disciplinary arbitration. Comparison of that brief with the Charging Party's brief indicates significant portions are repeated verbatim.

App. Div. 2017), certif. den. 231 N.J. 211 (2017) (citing Kaczmarek v. New Jersey Turnpike Auth., 77 N.J. 329 (1978)). Therefore, we find that the Charging Party's charge and amended charge are untimely and barred by N.J.S.A. 34:13A-5.4(c) with respect to her claims against Local 194 concerning their alleged failures to file grievances on her behalf in 2013.

We next consider the Charging Party's remaining allegations in her 5.4b(1) charge against Local 194. The United States Supreme Court has held that 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. Vaca v. Sipes, 386 U.S. 171, 191 (1967). The Commission and New Jersey courts have adopted the Vaca standard in deciding fair representation cases arising under the Act. See Belen v. Woodbridge Tp. Bd. of Ed., 142 N.J. Super. 486 (App. Div. 1976); Lullo v. International Ass'n of Fire Fighters, 55 N.J. 409 (1970); D'Arrigo v. New Jersey State Bd. of Mediation, 119 N.J. 74, 76 (1990); and 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). "The 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)). A breach of the duty of fair representation violates subsection 5.4b(1) of the Act.

The Commission has held that a union should exercise reasonable care and diligence in investigating, processing, and presenting grievances; and must evaluate the merits of requests for arbitration in good faith. Middlesex Cty. and NJCSA, P.E.R.C. No. 81-62, 6 NJPER 555, 557 (¶11282 1980), aff'd, NJPER Supp.2d 113 (¶94 App. Div. 1982), certif. den., 91 N.J. 242 (1982); Carteret Ed. Ass'n, P.E.R.C. No. 97-146, 23 NJPER 390 (¶28177 1997); Camden Cty. College (LaMarra), P.E.R.C. No. 93-90, 19 NJPER 222 (¶24107 1993); Jersey City Medical Center (Shine), P.E.R.C. No. 87-19, 12 NJPER 740 (¶17277 1986).

Here, the charge includes an allegation that Local 194 President McCarthy failed to properly represent the Charging Party during her June 30, 2014 internal disciplinary hearing before an Authority Hearing Officer. The charge specifically notes McCarthy's decision not call a witness on behalf of the Charging Party. The record shows that McCarthy did not request any witnesses because historically the Authority would schedule witnesses who signed disciplinary notices because the Authority has the burden of proving its case in a disciplinary hearing. McCarthy argued before the Hearing Officer concerning the

Authority's alleged lack of witnesses who had signed the disciplinary notices, but the Hearing Officer found that it was unreasonable to require them to be at the hearing. McCarthy cross-examined the one witness presented by the Authority regarding the issue of verbal warnings prior to the Charging Party's termination notice. McCarthy also orally argued to the Hearing Officer alleging that the Authority did not adhere to the principles of progressive discipline. McCarthy then filed a post-hearing brief with the Hearing Officer. On August 11, 2014, following the Hearing Officer's August 6, 2014 decision sustaining the Charging Party's termination, McCarthy filed a written appeal to the Authority's Executive Director. The appeal letter made multiple arguments alleging violations of the CNA's disciplinary procedures and alleged that the Authority's accusations against the Charging Party were unsubstantiated. On August 18, the Executive Director upheld the termination.

We do not find any facts indicating that Local 194's representation of the Charging Party during the Authority's internal hearing and appeals process was arbitrary, discriminatory, or in bad faith. The Charging Party's disagreement with McCarthy's decision not to call his own witnesses concerns a difference of opinion regarding the hearing strategy. In the context of a disciplinary hearing, where the employer bears the burden of proving its case and the union may

cross-examine any witnesses presented, McCarthy's tactics do not appear unreasonable. See State of New Jersey (Vineland Development Center), D.U.P. No. 91-8, 16 NJPER 524 (¶21230 1990) (union's alleged failure to call or examine witnesses or raise evidence objections held not to constitute a breach of the duty of fair representation). In CNJSCL, AFL-CIO (Roman), P.E.R.C. No. 2015-76, 42 NJPER 33 (¶8 2015), the charging party asserted that she lost her arbitration case due to her union's ineffectiveness during the grievance and arbitration process, including the information it submitted and the alleged incompetence of her counsel. The Commission found no basis for an unfair practice, holding:

> Even if Roman could show that the Council could have provided better advice, developed a better case strategy, offered more evidence or witnesses, or provided a better representative, her allegations of ineffective or incompetent representation do not indicate bad faith, different treatment than others, or arbitrariness in the way her case was handled. Accordingly, there is no allegation that the union breached its duty of fair representation, and we sustain the refusal to issue a Complaint.
>
> [42 NJPER at 34.]

Even if we were to assume that McCarthy could have made a more effective presentation during the internal disciplinary hearing process, that circumstance would at most support a finding of negligence, which does not constitute a breach of the duty of fair representation. Proof of union negligence, poor

judgment, or even ineptitude, standing alone, does not suffice to prove a breach of the duty of fair representation. Middlesex Cty., P.E.R.C. No. 81-62, supra, aff'd, NJPER Supp.2d 113, supra; State of New Jersey (Dep't of Treasury), P.E.R.C. No. 2020-12, 46 NJPER 149 (¶34 2019); OPEIU (Wasilewski), P.E.R.C. No. 98-131, 24 NJPER 256 (¶29122 1998); AFSCME Local 1761 (Dros-Martinez), P.E.R.C. No. 91-33, 16 NJPER 538 (¶21242 1990); and OPEIU Local 153 (Johnstone), P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983); See also Riley v. Letter Carriers Local, 668 F. 2d 224, 228 (3d. Cir. 1981) ("Mere ineptitude or negligence in the presentation of a grievance by the union is not the type of conduct intended to be included under the arbitrary standard." (internal quotes and citations omitted)).

The charge against Local 194 also includes allegations about Local 194 failing to inform the Charging Party when her internal disciplinary appeal was denied and missing the deadline for arbitration. The record shows that Local 194 filed for binding arbitration of the Charging Party's termination on May 28, 2015. Local 194 attorney Weissman then argued during the first arbitration hearing, on September 15, 2016, in support of finding the arbitration timely. However, that procedural issue became moot once Local 194 and the Authority agreed on November 16, 2020 to waive the Authority's timeliness objection. As a result of that agreement, the arbitrator continued and completed the

arbitration on the substantive merits of Local 194's case challenging the Charging Party's termination. Accordingly, any claim that Local 194 arbitrarily missed an arbitration deadline is moot and cannot form the basis of a claim for a breach of the duty of fair representation.

Moreover, the record shows that on December 10, 2015, Local 194 had secured, and the Charging Party had signed, a settlement agreement with the Authority that would have reinstated her with more than eight months of backpay, credit for prorated paid vacation and sick days, and seniority credit from August 18, 2014 through her proposed reinstatement date of December 14, 2015. However, the Charging Party revoked her approval on December 17, 2015 and Local 194 chose to proceed with the arbitration. We note that the duty of fair representation does not obligate the union to pursue arbitration of every grievance. New Jersey Turnpike Auth. (Beall), P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980), aff'd NJPER Supp.2d 101 (¶85 App. Div. 1981) (union's decision not to arbitrate was based on good faith belief that grievance lacked merit); Sussex Cty. Sheriff's Office, P.E.R.C. No. 2021-49, 47 NJPER 527 (¶123 2021); Essex Cty. (Miller), P.E.R.C. No. 2019-16, 45 NJPER 195 (¶50 2018); Passaic Cty. Support Staff Ass'n, P.E.R.C. No. 2015-23, 41 NJPER 169 (¶60 2014).

A union's decision not to arbitrate may be supported by the fact that the union had negotiated in good faith with the employer for a settlement that the grievant rejected. "Absent some arbitrary, discriminatory or bad faith conduct, it would not be an unfair practice for the CWA to have supported a proposed settlement of a disciplinary matter and refused to submit the disciplinary dispute to binding arbitration." CWA Local 1039 (Ekemezie), P.E.R.C. No. 2009-56, 35 NJPER 132 (¶47 2009). In CWA (Nicholson), P.E.R.C. No. 2017-28, 43 NJPER 209 (¶62 2016), the charging party asserted that her union breached its duty of fair representation by not arbitrating her disciplinary charges because it had negotiated a settlement with the employer. The Commission dismissed the Complaint, holding that the charging party's "displeasure with that settlement agreement does not equate to the CWA acting arbitrarily, discriminatorily, or in bad faith." 43 NJPER at 210.

In this case, as in the above-cited Commission precedent, Local 194 had already met its duty of fair representation by negotiating a settlement agreement of her termination grievance that would have reinstated her with backpay and other benefits. Although the Charging Party may not have agreed with all of the terms of the settlement agreement, no facts indicate that Local 194 could have negotiated a better settlement than it did or that an arbitration proceeding would have resulted in a rescission or

reduction of the discipline imposed. Indeed, the case was arbitrated on the merits and the arbitrator found that the Authority had just cause for terminating her. The Charging Party has not alleged any facts indicating that Local 194 violated its duty of fair representation by representing her before the Authority and negotiating a settlement that would have provided her with reinstatement and backpay in December 2015.

As for the arbitration hearing itself, the Charging Party's allegations do not appear to allege any arbitrary, discriminatory, or bad faith representation by Local 194. The record shows that, following the first arbitration hearing concerning the procedural issue, Local 194 allowed the Charging Party to choose her own attorney to present her case after she expressed that she did not want the attorney that Local 194 had initially chosen for her substantive just cause case. The record indicates that the attorney she chose, McKinney, presented evidence and examined and/or cross-examined witnesses during the June 4, 2018 and January 27, 2021 arbitration hearings. The Charging Party also took the opportunity to testify in her own defense. McKinney then concluded his presentation of her case with a 19-page post-hearing brief containing multiple legal arguments in support of Local 194's position that the Authority lacked just cause to terminate the Charging Party. Although the arbitrator's July 7, 2021 decision found that the Authority had

just cause to terminate the Charging Party, the Charging Party had her opportunity for a full arbitration hearing conducted by a neutral third-party where she was represented by counsel. There are no facts indicating that Local 194's conduct in presenting her arbitration was arbitrary, discriminatory, or in bad faith.

Based on all of the above, we do not find arbitrary, discriminatory, or bad faith conduct in Local 194's representation of the Charging Party in connection with her February 19, 2014 termination. We therefore find that Local 194 did not breach its duty of fair representation and we grant summary judgment and dismiss the 5.4b(1) claim.

We next address the Charging Party's 5.4a(1) and (3) claims against the Authority. An employer violates section 5.4a(1) of the Act if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); NJ Sports & Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). There are no facts demonstrating that the Authority's actions in terminating the Charging Party interfered with her statutory rights. Regarding the Authority's alleged failure to inform her of the result of her hearing until the arbitration deadline passed, the Authority ultimately waived its timeliness objection to the arbitration, making that issue moot. Furthermore, the record shows that the Authority had a

legitimate and substantial business justification for her termination, as a neutral third-party arbitrator determined that the Authority had just cause for terminating her. Finally, we find that there are no facts demonstrating that the Authority colluded with Local 194 to deprive the Charging Party of her statutory rights, as we found above that Local 194 did not breach its duty of fair representation. N.J. Turnpike Authority, P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980), aff'd, NJPER Supp.2d 101 (¶85 App. Div. 1981); Essex Cty. (Miller), P.E.R.C. No. 2019-16, 45 NJPER 195 (¶50 2018); Sussex Cty. Sheriff's Office (Liobe), P.E.R.C. No. 2021-49, 47 NJPER 527 (¶123 2021).

The Charging Party's 5.4a(3) allegation of anti-union discrimination is governed by In re Bridgewater Tp., 95 N.J. 235, 240-245 (1984). Bridgewater established that the 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. 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. If the employer did not present any evidence of a motive not illegal under our Act, or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes,

however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct.

We find that the Charging Party's 5.4a(3) retaliation claim must be dismissed because no facts demonstrate that she engaged in protected activity under our Act. Protected activity is conduct in connection with collective negotiations, grievance processing, contract interpretation or administration, or other related activity on behalf of a union or individual. 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). Protected activity may include individual conduct – such as complaints, arguments, objections, letters or similar activity - related to enforcing a collective negotiations agreement or preserving or protesting working conditions of employees in a recognized or certified unit. State of New Jersey, P.E.R.C. No. 2006-11, 31 NJPER 276 (¶109 2005).

Here, the Charging Party alleged retaliation for both her PEOSH safety claims and her DCR discrimination claims, which are not within the Commission's jurisdiction. Alleging that an employee was discharged based upon violations of laws other than

the Act does not satisfy the Bridgewater test, particularly where those other laws provide a forum for review of an employer's actions. Elizabeth Housing Auth. (Looney), P.E.R.C. No. 90-84, 16 NJPER 211 (¶21084 1990), aff'ing H.E. No. 90-34, 16 NJPER 115 (¶21043 1990). The Charging Party's DCR claims do not concern protected activity under our Act and she pursued them through the DCR, where they were dismissed. The Charging Party's allegations about PEOSH violations were made solely on her own behalf about her personal working conditions and there is no evidence that they touched a matter of common concern with other employees or that she or Local 194 acted in concert with any other employees regarding her alleged safety concerns. Furthermore, her PEOSH allegations were based upon violations of laws or regulations that provide for their own forum for review. The Charging Party availed herself of that forum, specifically alleging that her termination was retaliation for making those safety violation complaints. That PEOSH forum dismissed her case on November 7, 2014, concluding that she could not establish that the Authority terminated her for exercising protected activity by expressing workplace safety concerns and that they could not determine that termination would not have occurred anyway. The Charging Party has appealed the PEOSH dismissal to the OAL, where it is still pending.

Moreover, even assuming that the Charging Party could meet the "protected activity" requirement of the Bridgewater test, as well as prove a nexus between that activity and her termination and demonstrate the employer's hostility towards her protected activity, the record demonstrates that the adverse action would have taken place absent the protected conduct. The facts found by the arbitrator support a finding that termination of the Charging Party was warranted based on her disciplinary record.

Based on the above, we grant the Authority's motion for summary judgment and dismiss the 5.4a(1) and 5.4a(3) claims.

ORDER

IFPTE Local 194's and the New Jersey Turnpike Authority's motions for summary judgment are granted. The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Jones, Papero and Voos voted in favor of this decision. None opposed. Commissioner Ford was not present.

ISSUED: March 31, 2022

Trenton, New Jersey