

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF ESSEX,

Respondent,

-and-

Docket No. CI-2022-004

CWA LOCAL 1081,

Respondent,

SYNOPSIS

The Public Employment Relations Commission affirms the Director of Unfair Practices' refusal to issue a complaint on the Charging Party's unfair practice charge (UPC) filed against the County and Local 1081. The Charging Party alleged that the County failed to interview for a promotional position and that Local 1081 breached its duty of fair representation by not advancing her grievance about not being interviewed for the promotion to arbitration. The Commission finds that the Director correctly dismissed the Charging Party's claims that Local 1081 breached its duty of fair representation because Local 1081's determination that the Charging Party's grievance would not be successful at arbitration was not arbitrary, discriminatory, or in bad faith. The Commission further finds that Director dismissed the Charging Party's 5.4a(1) and (5) against the County because the Charging Party lacked standing. The Commission further affirms the Director's decision that the Charging Party did not timely file the UPC.

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. 2022-53

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ALEXIS T. MILLER,

Charging Party.

Appearances:

For the Respondent, County of Essex (Sylvia Hall,
Director of Labor Relations)

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

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

DECISION

The Charging Party appeals from the refusal of the Director of Unfair Practices to issue a complaint on an unfair practice charge (UPC) she filed on August 3, 2021, and subsequently amended on September 1, 2021, against her employer, County of Essex (County), and her majority representative, Communications Worker's of America, Local 1081 (Local 1081). D.U.P. No. 2022-6, 48 NJPER 337 (¶74 2022). The charge, as amended, alleges that

the County's actions violated section 5.4a(1) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act) when the County, in 2019, failed to interview The Charging Party for a promotional position for which she had applied. The UPC further alleges that, in 2021, the Charging Party was again precluded from interviewing for the promotional position when it was posted and then retracted a couple of days later before she had applied. The UPC also alleges that Local 1081 violated sections 5.4b(1) and (5)^{2/} of the Act and its duty of fair representation by failing to take her grievance regarding her failure to be interviewed in 2019 to arbitration.

We incorporate the Director's Findings of Fact from D.U.P. No. 2022-6, 48 NJPER 337 (¶74 2022) and reproduce them, in pertinent part, as follows:

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- 1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, retraining or coercing employees on the exercise of the rights guaranteed to them by this act. . . . (5) Refusing to negotiate in good faith with the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."
- 2/ These provisions prohibit employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. . . . (5) Violating any of the rules and regulations established by the commission."

1. The Charging Party is employed by the County as a family service worker and is represented by CWA Local 1081.

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

3. On an unspecified date in October, 2019, the Charging Party was denied an interview for the promotional title of Provisional Training Supervisor. At the time of the Charging Party's application for that position, she had pending disciplinary charge seeking a thirty-day suspension. On or about January 30, 2020, the County rescinded the disciplinary charge against the Charging Party.

4. On October 6, 2020, Local 1081 filed a Step 3 grievance on behalf of the Charging Party contesting the County's failure to interview her in October, 2019 for the promotional title, Provisional Training Supervisor. On an unspecified date, the County denied the grievance. Local 1081 declined to advance the Charging Party's grievance to arbitration. On January 12, 2021, the Charging Party internally appealed CWA Local 1081's refusal to advance the grievance to the CWA New Jersey Area Director. On an unspecified date, the Area Director denied the Charging Party's appeal due to the disciplinary charge that was pending at the time the Charging Party was denied the interview. On January 26, 2021, the Charging Party appealed the Area Director's decision to the CWA Vice President. On March 21, 2021, the Vice

President denied the Charging Party's appeal, citing her disciplinary record. On April 5, 2021, the Charging Party appealed the Vice President's decision to the CWA President. The President denied the Charging Party's appeal, noting her disciplinary record. On an unspecified date in May, 2021, the Charging Party appealed the CWA President's decision to the CWA Executive Board. On July 6, 2021, the CWA Executive Board advised the Charging Party that her appeal of Local 1081's denial to advance her grievance to arbitration was denied.

5. Sometime in early 2021, the promotional position, Provisional Training Supervisor, was again posted by the County but was withdrawn a few days later. On January 13, 2021, the Charging Party was advised that the promotional position had been filled. In August 2020 and July 2021, the County permitted the Charging Party to interview for the Provisional Family Service Supervisor position despite her having two minor disciplines in 2017 that were not of suspension status.

In D.U.P. No. 2022-6, 48 NJPER 337 (¶74 2022), the Director refused to issue a complaint on the UPC against Local 1081 because the alleged facts did not establish that Local 1081 breached its duty of fair representation. The Director found that Local 1081 filed the grievance on behalf of the Charging Party, but did not pursue arbitration because it found the grievance lacked merit, a decision that fell within a union's

reasonable discretion in determining how to represent members.

Rutgers University, D.U.P. 2020-008, 46 NJPER 308 (¶75 2020).

The Director further found that no facts alleged indicate that a Commission rule or regulation had been violated, and thus, the Director dismissed the 5.4b(5) charge against Local 1081.

Regarding the charges against the County, the Director found that the charges were untimely because they were not filed within the six month statute of limitations period set forth in N.J.S.A. 34:13A-5.4c. Notwithstanding the Director's finding of untimeliness, the Director further found that the Charging Party did not have standing to assert a 5.4a(5) violation, i.e. a refusal to negotiate in good faith, which runs only to the majority representative and not an individual employee. N.J. Turnpike Authority, P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980); Camden Cty. Highway Dept., D.U.P. No. 84-32, 10 NJPER 399 (¶15185 1984). The Director found that the alleged facts did not establish that Local 1081 acted arbitrarily, discriminatorily or in bad faith, when it decided to not advance the Charging Party's grievance to arbitration, and thus, it did not breach its duty of fair representation. In the absence of a viable claim of a breach of the duty of fair representation, the Director found the Charging Party lacked standing to pursue the 5.4a(5) claim. Similarly, the Director dismissed the 5.4a(1) claims against the County due to the Charging Party's lack of standing because a

public employer does not interfere with the rights afforded by the Act when a majority representative refuses to process a grievance to arbitration. Unless the alleged facts indicate that the majority representative breached its duty of fair representation, an individual employee will be precluded from bringing a 5.4a(1) or a(5) claim against a public employer. Rutgers, supra.

On February 28, 2022, the Charging Party filed a letter appealing the Director's decision. In response to the Commission's March 1, 2022 deficiency letter, the Charging Party then amended her appeal via a March 15, 2022 letter with attached exhibits. She subsequently filed a March 30, 2022 letter responding to the County's and Local 1081's opposition to her appeal. The County filed a March 22, 2022 letter in response to the appeal. Local 1081 filed a March 22, 2022 letter in response to the appeal, with attached exhibits, and an April 6, 2022 response to the Charging Party's March 30th letter.

In the Charging Party's appeal letters, she renews many of the same arguments and factual assertions initially presented to the Director and addressed in D.U.P. No. 2022-6. The Charging Party again asserts that in 2019, the County did not interview her for a position to which she applied. She claims the County informed her that she was not interviewed due to her disciplinary record after she discovered the position had been filled. The

Charging Party requested that her union representative file a grievance, which Local 1081 pursued up until the arbitration step where she claims Local 1081 arbitrarily decided not to advance her grievance to arbitration. She claims the reason provided by Local 1081's President for not advancing her grievance to arbitration was that she would lose in arbitration due to her disciplinary record, and that financial considerations were not a factor. The Charging Party then recaps her appeal with Local 1081 regarding its decision to not advance her grievance to arbitration, which culminated in Local 1081 Board's final decision to not pursue arbitration on July 6, 2021, and thereafter, she claims that she timely filed the instant UPC on July 28, 2021.

The Charging Party raises again the argument that Local 1081 has a personal vendetta against her. She claims that her disciplinary record did not bar her from several other interviews after 2019, which she argues shows that the County acted discriminatorily when it did not interview her in 2019 and that Local 1081 acted in bad faith by not advancing her grievance to arbitration due to her disciplinary record. The Charging Party renews her allegation, absent any evidence, that Local 1081 chose to not arbitrate because the President bartered her grievance with that of another employee who she claims the President liked better.

The Charging Party again asserts that there is no past practice of disqualifying candidates from interviews due to pending disciplinary charges, and the County has failed to prove same. She argues that it is unfair that she lost the opportunity to interview in 2019 due to pending disciplinary charges that were ultimately dropped. She again questions the County's alleged actions in re-posting the position in 2021, then rescinding it, and its process in eventually filling the position.

Regarding the timeliness of her UPC filing, the Charging Party again asserts that she did not file the UPC until the conclusion of her internal appeal process with Local 1081 reviewing its decision to not advance her grievance to arbitration. She claims that if Local 1081 were to have reversed its decision and proceeded to arbitration, there would have been no reason to file her UPC.

We will not consider new arguments, factual assertions, and documentary exhibits which were not presented below. N.J.A.C. 19:14-2.3 ("An appeal must be a self-contained document enabling the Commission to rule on the basis of its contents. An 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.") The Charging Party raises for the first time on appeal that Local

1081 should have filed a grievance on its own initiative challenging the alleged past practice of disqualifying candidates from interviewing due to pending disciplinary charges, which she claims further shows Local 1081's bias against her case. The Charging Party's March 30, 2022 letter further raises new arguments that Local 1081's opposition to her UPC has defamed her. These arguments are not raised in either the Charging Party's UPC filings or her position statement. Likewise, we do not consider the new arguments and exhibits raised for the first time in Local 1081's March 22, 2022 letter, namely the allegations contained in paragraph 9 and the corresponding documents that purport to show the Charging Party's criticisms of Local 1081 and her alleged conflicts with colleagues.

The Commission has authority to issue a complaint where it appears that a charging party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4(c); N.J.A.C. 19:14-2.1. Where the complaint issuance standard has not been met, the issuance of a complaint may be declined. N.J.A.C. 19:14-2.3; CWA Local 1040, D.U.P. No. 2011-9, 38 NJPER 93 (¶20 2011), aff'd, P.E.R.C. No. 2012-55, 38 NJPER 356 (¶120 2012). After a careful review of the parties' submissions, we sustain the Director's decision not to issue a complaint and dismiss the Charging Party's UPC.

First, we find the Director correctly dismissed the Charging Party's claims that Local 1081 breached its duty of fair representation. The Charging Party argues that she was disqualified from the promotional process due to her disciplinary history, but she was subsequently allowed to interview for promotions in 2020 and 2021 despite still having minor disciplinary violations on her record within the previous 5 years. Both the County and Local 1081 acknowledged that there was an established past practice that pending major disciplinary charges were disqualifying for promotional opportunities. At the time of the Charging Party's 2019 promotional application, she had a pending disciplinary charge seeking a 30-day suspension, which disqualified her from the interview process. In her subsequent promotional interviews in August 2020 and July 2021, the Charging Party was under no pending disciplinary charges and only had two minor, non-suspension disciplines on her record from 2017. On this basis, Local 1081 determined that pursuing the Charging Party's grievance through arbitration would not be successful, a decision that is not arbitrary, discriminatory, or in bad faith. See Rutgers, supra.

Having affirmed the Director's dismissal of the Charging Party's claims that Local 1081 breached its duty of fair representation, we further find that the Director correctly dismissed the Charging Party's 5.4a(1) and a(5) claims against

the County for lack of standing. Rutgers, supra ("Since the Union did not breach its duty of fair representation, [the charging party] does not have standing to assert a violation of Section 5.4a(1) or (5) against Rutgers.")

The Charging Party argues that the Director's finding that her UPC was beyond the six-month statute of limitation was incorrect because she filed it after resolution of the internal CWA appeal process regarding the decision to not pursue her grievance through arbitration. However, the Director correctly found that the UPC was untimely filed as against the County. The alleged unfair practices by the County occurred in October 2019 when it did not interview the Charging Party for the promotional position, or later, on January 13, 2021, when the Charging Party discovered that the promotional position had been filled without being allowed to interview for it. Giving the Charging Party the benefit of the earlier dates of when she signed the UPC, the original UPC was submitted on July 28, 2021 and then amended on August 27, 2021.^{3/} Either of the dates is beyond the six month statute of limitations as it relates to the alleged unfair practices against the County. N.J.S.A. 34:13A-5.4(c). An individual employee's obligation to file a timely charge against an employer might be tolled if that employee filed a grievance

^{3/} The original UPC indicates it was filed on August 3, 2021 and the amendment was filed on September 1, 2021.

against the employer and can prove that the majority representative breached its duty of fair representation in not processing that grievance. See Bridgewater-Raritan Bd. of Ed., P.E.R.C. No. 2010-43, 35 NJPER 455 (¶ 150 2009). However, here the Charging Party did not prove that Local 1081 breached its duty of fair representation when it chose not to arbitrate the grievance.

Based on all of the above considerations, we affirm the Director's decision not to issue a complaint.

ORDER

The refusal to issue a complaint is sustained. The unfair practice charge is dismissed.

BY ORDER OF THE COMMISSION

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

ISSUED: June 30, 2022

Trenton, New Jersey