P.E.R.C. NO. 2023-15

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CHERRY HILL TOWNSHIP BOARD OF EDUCATION,

-and-

CHERRY HILL EDUCATION ASSOCIATION,

Respondents,

-and- Docket No. CI-2019-012

ANTHONY W. BROCCO II,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies a motion for summary judgment filed by the Charging Party, a teaching staff member, grants cross-motions for summary judgment filed by the respondents, Cherry Hill Township Board of Education and the Cherry Hill Education Association, and dismisses an unfair practice complaint alleging respondents violated the New Jersey Employer-Employee Relations Act in connection with the Board's selection of an out-of-district candidate for a head football coach position at a high school. The Commission finds the Charging Party's complaint describes a contractual dispute, not an unfair practice, with respect to his claim the Board violated a collectively negotiated hiring procedure, as mandated by N.J.S.A. 34:13A-23, for extracurricular activities that produces in-district candidates first. The Commission finds the Charging Party pursued his contractual remedy of filing a grievance challenging the appointment, and no evidence in the record suggests either that the Board interfered with that process, or that the Association breached its duty of fair representation when it determined not to pursue grievance arbitration. The Commission further finds the Charging Party presented no certified facts or documents supportive of his allegations to the effect that the Board engaged in "continued retaliation and discrimination" against him, or that the Association "knowingly and actively failed to represent" him and engaged in "retaliatory and discriminatory actions" against him.

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, Cherry Hill Township Board of Education, Schenck Price Smith & King, LLP (Paul H. Green, of counsel and on the briefs)

For the Respondent, Cherry Hill Education Association, Selikoff & Cohen, PA (Steven R. Cohen, of counsel; Hop T. Weschler, on the briefs)

For the Charging Party, Anthony W. Brocco II (pro se)

DECISION

On September 27, October 3, November 30, December 3 and 5, 2018, and June 4, 2019, Anthony W. Brocco II (Charging Party) filed an unfair practice charge (UPC or Charge), as amended, against Respondents Cherry Hill Township Board of Education (Board) and the Cherry Hill Education Association (Association or CHEA), alleging that the Respondents violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., in connection with the Board's selection of the head football coach at Cherry Hill High School East for the 2019-2020 season.

The Charging Party makes various claims relating to the Board's decision not to appoint him to the coaching position, initially identified as Charges 1 and 2 against the Board, and Charge 3 against the Association. The UPC also cites various PERC cases that, the Charging Party contends, support the charges.[1/]

Charge 1 initially alleged the Board's selection process for the head football coach position at issue violated N.J.S.A. 34:13A-23 and Article 13© of the collective negotiations agreement (CNA) between the Board and the Association when the Board "posted the position to everyone immediately and held all interviews in the same week."

Charge 2 initially alleged the Board failed to give "due consideration" to the Charging Party when it appointed someone else to the head football coach position in 2018, "in that the position was 'filled' prior to the formal posting."

Charge 3 initially alleged that the Association failed to represent the Charging Party in connection with his grievance challenging the Board's decision not to appoint him to the coaching position, and with the Association's decision not to pursue grievance arbitration.

Subsequent amendments added: allegations and exhibits disputing that the Board and Association agreed through mutual practice to depart from the contractual procedure governing

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1/ The Charging Party did not cite or rely on those cases in support of his motion for summary judgment.

extra-curricular appointments; allegations of "continued retaliation and discrimination" against the Charging Party by the superintendent and the Board, citing the superintendent's involvement in prior tenure charges against the Charging Party; and asserting that "to have differing views on" his qualifications "can only be due to discrimination, retaliation and personal dislike."

Subsequent amendments also variously alleged that the Association: "knowingly and actively failed to represent" the Charging Party; "never planned to represent" him and "fabricated" its investigation of his claims; "personal[ly] attack[ed]" him "due to [his] questioning of [CHEA's] lack of leadership, actions[,] and results [sic] throughout the years"; had "personal issues against" him; engaged in "retaliatory and discriminatory actions" against him; and referred to the grievance as a "conspiracy theory".

The final amendment to the UPC further alleges that, despite the Association's assurances, no Association panel was present at the Charging Party's interview for the head football coach position at issue, during which he was told that his chosen union representative could not attend. The amended UPC also alleges that the Association engaged in a "continued personal vendetta" against the Charging Party through its allegedly delayed and/or inadequate responses to the Charging Party's requests (to the Board's payroll and human resources departments and to the

Association) to fix alleged errors in payroll deductions for his Ch. 78 health benefit contributions.

On February 18, 2022, the Director of Unfair Practices issued a Complaint and Notice of Hearing, finding that the allegations in the Charge, if true, may constitute unfair practices in violation of subsections 5.4a(1), (3), (5)[2/] and 5.4b(1)[3/] of the Act. The Director declined to issue a complaint on violations of subsections 5.4a(4) and 5.4b(5), finding insufficient facts were presented to support those allegations.

The Board and the Association each filed answers and affirmative defenses on March 7, 2022, incorporating their respective previously-filed position statements.

On May 23 and 24, 2022, the Charging Party filed a motion for summary judgment, supported by a brief and certification.

On June 2, 2022, the Respondents respectively filed opposition and cross-motions for summary judgment, supported by a

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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"; "(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"; and "(5) Refusing to 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".

3/ 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".

letter brief on behalf of the Board, and by a brief, exhibits and certification of counsel on behalf of the Association. The Charging Party filed no answering brief(s), certification(s) or affidavit(s) in response thereto.

We have reviewed the record, which reflects, by way of background, that the Board is a public employer, and the Association is a majority representative, within the meaning of the Act; and that, at all times relevant to this dispute, the Charging Party has been employed by the Board as a teaching staff member and is an Association member. The record also indicates that, at all times relevant to this dispute, the Board and the Association were parties to a CNA in effect from 2014-2018, including a grievance procedure that culminated in binding arbitration. We summarize the undisputed material facts as follows.

SUMMARY OF FACTS

The Charging Party's certification in support of summary judgment is limited to four substantive factual statements, none of which are in dispute, as follows:

1. "In March 2018 the first round of interviews were conducted for the head football coach at Cherry Hill High School East."

2. "During the first round of interviews in March 2018, [A.D.] and other out of district candidates were interviewed along with in-building and in-district candidates."

3. "In March 2018, [A.D.] was not employed by the Cherry Hill School District."

4. "[A.D.] was ultimately hired as head football coach at Cherry Hill High School East."

As the Charging Party filed no opposition rebutting the facts asserted by the Association in its cross-motion for summary judgment, we further find the following facts[4/] to be undisputed:

5. On April 14, 2018, the Charging Party contacted the Association's Grievance Chair Lisa Badger upon the referral of CHEA President Steve Redfern to discuss a potential grievance contesting the Board's hiring of an external candidate, A.D., as head football coach at Cherry Hill High School East.

6. On April 24, 2018, the Charging Party presented the potential grievance directly to CHEA's Grievance Committee. Following deliberation, the Committee voted unanimously not to file a grievance.

7. Notwithstanding the Committee's vote, in or about early May 2018, Redfern and Badger decided to file a grievance on behalf of the Charging Party.

8. On May 24, 2018, the Association consented to the Charging Party's insistence that his grievance be presented by CHEA building representative Joseph Dilks.

9. On May 29, 2018, Redfern, with input from the Charging Party and Dilks, filed the grievance with the Board's Superintendent of Schools, Dr. Joseph Meloche, in accordance with Level Three of the parties' contractual grievance procedure.

10. On June 5, 2018, the Charging Party and Dilks met with Meloche to present the grievance.

11. On June 20, 2018, Meloche denied the grievance in a letter stating that the Charging Party "was given an interview and

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4/ These facts are derived from exhibits attached to the Association's certification in support of its cross-motion, which included among other things the Association's previously-filed position statement, and a time line of events set forth therein. We do not rely upon the facts asserted in the Board's brief in support of its cross-motion for summary judgment, as it was unsupported by certification or affidavit based on personal knowledge.

his application for Football Coach at [Cherry Hill] East was given full consideration."

12. On July 10, 2018, Board President J. Barry Dickinson notified CHEA that the Charging Party would have the opportunity to present the grievance directly to the Board during its July 24, 2018 executive session.

13. On August 14, 2018, Dilks presented the grievance to the Board, with Badger in attendance.

14. On August 15, 2018, Lynn Shugars, the Board's Assistant Superintendent/Business Administrator, notified CHEA by letter that the Board voted to deny the grievance.

15. On August 23, 2018, CHEA's Grievance Committee notified the Charging Party by email that it was withdrawing the grievance and would not proceed to arbitration.

16. In or about September 2018, the Charging Party requested a meeting with the Grievance Committee, which Badger denied in a September 21, 2018 email, stating that "after careful review," the Committee was of the opinion that the Charging Party had "received all of the due process" to which he was entitled, including: being "given access to an NJEA lawyer"; being "permitted to address the Grievance Committee personally"; having his case reopened and being "permitted to address the Superintendent with the representative of [his] choice," after the grievance was voted down by the Committee; and being "ultimately permitted to present [his] grievance directly to the Board" with his chosen representative.

17. The motion record also contains a copy of the Charging Party's response to an email dated June 15, 2011, from a past CHEA president, Martin Sharofsky, with the subject "RE: Your request for a grievance." Sharofsky's email states, among other things:

> As for the posting of the positions, twice or three times a week at this time of the year an email comes out of the HR office listing job openings. This email is sent to all principals, all vice principals, all secretaries, and to interested parties (my office). There is no situation where some receive information and others do not. It is a standard distribution list.
>
> Why they are not printed out and posted in the middle schools is something that I can not answer nor will I choose to lay any blame on anybody. We print many of

> them out here and post them for our reference. We usually do not print stipend positions as they are limited in interest.

The Charging Party's email in response states, "Am I able to be put on the email list notifying me of all open positions in Cherry Hill?"[5/]

STANDARD OF REVIEW

Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954). N.J.A.C. 19:14-4.8(e) provides:

> If it appears from the pleadings, together with the briefs, affidavits and other documents filed that there exists no genuine issue of material fact and that the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross-motion for summary judgment may be granted and the requested relief may be ordered.

In determining whether there exists a "genuine issue" of material fact that precludes summary judgment, we must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the

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5/ The Association contends that this 2011 email exchange is evidence that the Charging Party was previously informed of a "change from paper to electronic job postings," and that he endorsed the change in his response to the CHEA's email. The Association further contends that, as he did not file his UPC with PERC until September 27, 2018, the claim is untimely. Additionally, the Association asserts that the Respondents' mutual deviation from the CNA in this case did not breach CHEA's duty of fair representation to the Charging Party, nor did it violate the CNA.

alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 540. We "must grant all the favorable inferences to the non-movant." Id. at 536. No credibility determinations may be made and the motion must be denied if material factual issues exist. N.J.A.C. 19:14-4.8(e); Brill, Judson, supra. The summary judgment procedure is not to be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 183 (App. Div. 1981), certif. denied, 87 N.J. 388 (1981); UMDNJ, P.E.R.C. No. 2006-51, 32 NJPER 12 (¶6 2006).

A charging party opposing summary judgment cannot simply rely on the allegations of its charge or attachments thereto to create a material factual dispute. Mercer Cty Sheriff's Office, P.E.R.C. No. 2017-2, 43 NJPER 65, 67-68 (¶16 2016), recon. den. P.E.R.C. No. 2017-15, 43 NJPER 114 (¶33 2016). Moreover, bare conclusions in the pleadings without factual support in tendered affidavits or certifications will not defeat a meritorious application for summary judgment; nor will conclusory assertions in an answering affidavit or certification defeat a meritorious application for summary judgment. Id., see also, PBA Local 351-A (SOA), 34 NJPER 243 (¶82 2008)("When a respondent files a motion for summary judgment and presents facts by way of certification, the charging party cannot rely on the allegations in its charge, but must file its own certification setting forth specific facts and showing that there is a genuine issue for hearing"); PBA Local 187, P.E.R.C. No. 2005-61, 31 NJPER 60, 61 (¶29 2005)("A

charging party cannot rely on the allegations in its charge or any attachments to its charge to create a material factual dispute").

ARGUMENTS OF THE PARTIES

In support of his motion for summary judgment, the Charging Party argues that N.J.S.A. 34:13A-23 mandates that there must be a collectively negotiated hiring procedure for extracurricular activities that produces in-district candidates first. It is factual, the Charging Party argues, that: Article 13 of the 2014-2018 CNA has this mandatory procedure; and that A.D., an out-of-district candidate, was interviewed during the same scope of time as in-building/district candidates. Under these facts, he argues, the Board violated the CNA and N.J.S.A. 34:13A-23, and the Association should have proceeded to arbitration on behalf of the Charging Party. The fact that it did not do so is, the Charging Party contends, sufficient "in and of itself" to find that the Association failed to represent the Charging Party.

In opposition to the Charging Party's summary judgment motion, and in support of their respective cross-motions for summary judgment, the Respondents argue as follows.

The Board argues that PERC should dismiss the UPC because the Commission lacks jurisdiction to decide the Charging Party's purely contractual claim that the Board violated the CNA, and in turn N.J.S.A. 34:13A-23, in connection with the hiring decision at issue. The Board also argues that the Charging Party

effectively concedes the Board did not refuse to negotiate as required by N.J.S.A. 34:13A-23. The Board also admits the issue was fully grieveable and arbitrable, and that the Charging Party properly challenged the Board's hiring protocol through the parties' grievance process. But, the Board argues, the Association's determination not to pursue grievance arbitration does not bring the matter within the Commission's unfair practice jurisdiction. The Board further argues that the Charging Party has neither alleged nor offered evidence that the Board manifested any hostility or anti-union animus towards him, and the Charging Party lacks standing to assert a 5.4a(5) charge because he cannot demonstrate that the Association violated its duty of fair representation.

The Association argues that its decision not to seek grievance arbitration was reasonable and was not arbitrary, discriminatory or made in bad faith. The Association contends it reasonably concluded that the change from paper-based to electronic job postings did not violate the contract, as the change was not recent nor did it deny in-district candidates any opportunities; and that a challenge to the Board's stated qualifications for the position or its hiring of a particular candidate based on those qualifications was unlikely to succeed at arbitration. The Association further argues that the Charging Party's claims under N.J.S.A. 34:13A-23 must be dismissed for lack of jurisdiction, and that Charging Party's other broad,

conclusory, unsupported claims against it cannot create a "genuine issue of material fact" that would defeat the Association's cross-motion for summary judgment. Finally, the Association asserts that it has no involvement with the processing of the Charging Party's paychecks; an issue that, to the Association's knowledge, was promptly resolved.

ANALYSIS

Viewing the undisputed material facts in a light most favorable to the non-moving parties, we deny the Charging Party's motion for summary judgment as against both Respondents, we grant the Respondents' cross-motions for summary judgment, and we dismiss all charges.

5.4a(1), (3) and (5) claims against the Board

The few facts asserted by the Charging Party in support of summary judgment are not disputed (i.e., that in March of 2018, the Board, during the first round of interviews, interviewed and subsequently hired an out-of-district candidate for the head football coaching position at issue). But the Charging Party, on motion, alleges only that these facts prove the Board violated the CNA and N.J.S.A. 34:13A-23. Even if true, this describes a contractual dispute, not an unfair practice.

N.J.S.A. 34:13A-23 provides, in pertinent part:

> All aspects of assignment to, retention in, dismissal from, and any terms and conditions of employment concerning extracurricular activities shall be deemed mandatory subjects for collective negotiations between an employer and the majority representative of

> the employees in a collective bargaining unit, except that the establishment of qualifications for such positions shall not constitute a mandatory subject for negotiations. If the negotiated selection procedures fail to produce a qualified candidate from within the district the employer may employ from outside the district...

Here, there is no dispute that the negotiations required by N.J.S.A. 34:13A-23 in fact occurred, and there is nothing in the record to support that this statute has been violated. The negotiated procedure concerning extracurricular appointments is set forth in Article 13© of the relevant CNA. In pertinent part, that article requires that notice of a vacancy in an athletic, co-curricular or extracurricular position: (1) "shall be advertised in the building in which said vacancy exists"; and (2) "if not filled as a result of [such] advertising," "shall be advertised in all schools in the district." The Charging Party contends the Board breached this negotiated procedure when it made the coaching appointment at issue.

Thus, his charge that the Board "violated" N.J.S.A. 34:13A-23 does not involve a cognizable claim within our unfair practice jurisdiction that the Board refused to negotiate over extracurricular terms and conditions of employment. Rather, it involves a breach of contract claim. See, City of Newark, P.E.R.C. No. 2000-57, 26 NJPER 91, 92 (¶31036 2000) ("denial of contractual benefits to an individual employee is generally a breach of contract that does not rise to the level of an unfair

practice"); Bernardsville Bor. Bd. of Ed., P.E.R.C. No. 96-54, 22 NJPER 68 (¶27031 1996)(right under N.J.S.A. 34:13A-23 to continue in extracurricular position depends on terms of parties' CNA, a contractual issue for arbitration). The Charging Party's remedy for such an alleged breach of contract was the parties' negotiated grievance procedure, which culminates in binding arbitration.[6/] The record reflects that the Charging Party pursued that remedy. No evidence in the record suggests either that the Board interfered with that process or, as further discussed infra, that the Association breached its duty of fair representation when it determined not to pursue arbitration of the Charging Party's grievance.

In support of his summary judgment motion, the Charging Party presented no certified facts or documents to support his UPC allegations in connection with claims that the Board engaged in "continued retaliation and discrimination" against him. We may not derive material disputes of fact from the allegations of

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6/ The only exception to arbitrability is a challenge to the Board's establishment of qualifications for an extracurricular position, which N.J.S.A. 34:13A-23 excludes from negotiations. Kenilworth Bd. of Ed., P.E.R.C. No. 93-86, 19 NJPER 214 (¶24103 1993) ("the statute specifies that the qualifications for such positions are not negotiable"). We note the Charging Party's conclusory UPC claim that "to have differing views on" his qualifications "can only be due to discrimination, retaliation and personal dislike" does not transform a non-arbitrable dispute over qualifications into an unfair practice, as the Charging Party presented no certified facts or documents to support these allegations.

the charge or attachments thereto. Mercer Cty Sheriff's Office, supra.

We therefore find that the Charging Party has not established, as a matter of law, that the Board interfered with, coerced or intimidated him based on his exercise of protected activity, in violation of section 5.4a(1), or discriminated against him for the exercise of rights guaranteed by the Act, in violation of section 5.4a(3). Nor does the fact that the Association did not process the grievance to binding arbitration give rise to an independent violation of 5.4a(1) as against the Board. 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).

Further, an individual employee may file an unfair practice charge and independently pursue a claim of a section 5.4a(5) violation (alleging the employer refused to negotiate in good faith) only where that individual has also asserted a viable claim of a breach of the duty of fair representation against the majority representative. N.J. Turnpike Authority, supra. See also, Rutgers, the State University of N.J., D.U.P. No. 2020-8, 46 NJPER 75 (¶308 2020), aff'd, P.E.R.C. No. 2020-44, 46 NJPER 442 (¶98 2020), aff'd, 2022 N.J. Super. Unpub. LEXIS 1821 (App. Div. 2022). Here, not only is the record devoid of any evidence that the Board refused to negotiate in good faith, but the Charging Party's 5.4a(5) claim against the Board fails for lack of standing because, as further discussed infra, we find that the

undisputed material facts do not support a conclusion that the Association breached its duty of fair representation to the Charging Party.

5.4b(1) claim against the Association

Turning to the Charging Party's section 5.4b(1) claim against the Association, we first note that in support of his summary judgment motion, the Charging Party presented no certified facts or documents supportive of his UPC allegations to the effect that the Association "knowingly and actively failed to represent" him, engaged in "retaliatory and discriminatory actions" against him, or failed to adequately respond to a payroll error affecting his Chapter 78 contributions. As with his similarly unsupported UPC allegations against the Board, we may not derive material disputes of fact from the allegations of the charge or attachments thereto. Mercer Cty Sheriff's Office, supra.

We further stress that as the Charging Party filed no response disputing them, we find the facts certified by the Association in its cross-motion for summary judgment to be undisputed. PBA Local 351-A (SOA), P.E.R.C. No. 2009-7, 34 NJPER 243 (¶82 2008)(UPC allegations denied by union in summary judgment certification were factually unsupported where charging party did not respond to union's motion). Those facts reveal that, notwithstanding initial resistance from its grievance panel, the Association processed and presented the Charging

Party's grievance all the way to the Board level, during the course of which the Charging Party was represented by his chosen union representative. The Association then declined to further pursue the grievance to binding arbitration. The undisputed record does not suggest the Association made that decision in violation of its duty of fair representation, or that it exceeded the "wide range of reasonableness" afforded to majority representatives in making such decisions. Rutgers, the State University of N.J., supra. There is no absolute right to grievance arbitration, and we have frequently rejected duty of fair representation claims based on allegations that a union's representation was negligent, inadequate or otherwise unsatisfactory from the grievant's perspective. Vaca v. Sipes, 386 U.S. 171, 190 (1967); Rutgers, supra.

Thus, we find the Association could have reasonably concluded that the contractual aspect of the grievance was unlikely to succeed at arbitration on the merits, and that a grievance alleging a violation of N.J.S.A. 34:13A:-23 was a challenge to the Board's stated qualifications for the position, and was also unlikely to succeed at arbitration. The Charging Party's disagreement with that decision does not transform it into an unfair practice.

ORDER

The Charging Party's motion for summary judgment is denied. The respective cross-motions for summary judgment of the Cherry Hill Township Board of Education and the Cherry Hill Education Association are granted. The Charge is dismissed.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, Papero and Voos voted in favor of this decision. None opposed.

ISSUED: October 27, 2022

Trenton, New Jersey