D.U.P. NO. 92-23

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

In the Matter of

BRICK TOWNSHIP MUNICIPAL
UTILITIES AUTHORITY,

Respondent,

-and-

Docket No. CI-92-40

INTERNATIONAL BROTHERHOOD OF FIREMEN,
OILERS, POWER HOUSE OPERATORS AND
MAINTENANCE MEN, LOCAL 473, AFL-CIO,

Respondent,

-and-

THOMAS ROGERS,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by Thomas Rogers against Local 473, International Brotherhood of Firemen, Oilers, Power House Operators and Maintenance Men and the Brick Township Municipal Utilities Authority. Rogers alleged that Local 473 processed his case in a perfunctory and capricious manner and alleged that the Authority violated the parties' agreement in discharging him and discharged him because he was a "nuisance, a wiseacre, big mouth and a non-compliant employee". The Director finds that Local 473 did not breach its duty of fair representation towards Rogers in taking his case to arbitration. The Director also finds that Rogers has not shown any facts that support a finding that the Authority has committed an unfair practice under the Act.

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Appearances:

For the Respondent, Brick Tp. MUA
Apruzzese, McDermott, Mastro & Murphy, attorneys
(Robert T. Clarke, of counsel)

For the Respondent, IBFO, Local 473
Freedman & Lorry, attorneys
(Mark P. Muller, of counsel)

For the Charging Party,
Kenneth E. Joel, attorney

REFUSAL TO ISSUE COMPLAINT

On December 10, 1991, Thomas Rogers ("Rogers") filed an unfair practice charge with the Public Employment Relations Commission ("Commission") against the Brick Township Municipal Utilities Authority ("Authority") and Local 473, International Brotherhood of Firemen, Oilers, Power House Operators and

Maintenance Men, AFL-CIO ("Local 473"). The charge alleges that the Authority violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically, subsections 5.4(a)(1) and (4)[1/] and that Local 473 also violated the Act, specifically, subsection 5.4(b)(1).[2/]

N.J.S.A. 34:13A-5.4(c) sets forth in pertinent part that the Commission shall have the power to prevent anyone from engaging in any unfair practice, and that it has the authority to issue a complaint stating the unfair practice charged.[3/] The Commission has delegated its authority to issue complaints to me and has established a standard upon which an unfair practice complaint may be issued. The standard provides that a complaint shall issue if it

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1/ These subsections 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. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act."

2/ This subsection 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/ N.J.S.A. 34:13A-5.4(c) provides: "The commission shall have exclusive power as hereinafter provided to prevent anyone from engaging in any unfair practice.... Whenever it is charged that anyone has engaged or is engaging in any such unfair practice, the commission, or any designated agent thereof, shall have authority to issue and cause to be served upon such party a complaint stating the specific unfair practice charged and including a notice of hearing containing the date and place of hearing before the commission or any designated agent thereof...."

appears that the allegations of the charging party, if true, may constitute an unfair practice within the meaning of the Act.[4/] The Commission's rules provide that I may decline to issue a complaint.[5/]

On November 2, 1990, the Authority suspended water plant operator Rogers, an eighteen-year employee, based on the suspicion that he had falsified hourly water test records on October 23, 1990. On November 19, 1990, the Authority verbally discharged him for said offense. Local 473 pursued the matter to arbitration. Local 473's attorney represented Rogers at the arbitration which took place before Arbitrator Robert S. Weaver on April 15, 1991 and June 10, 1991. At the conclusion of the hearing, the arbitrator gave Rogers the opportunity to add anything he wanted to the record. Rogers declined to add anything. When the arbitrator further asked Rogers if he felt he had been fairly represented by Local 473 and its attorney, he replied that he had.

On June 28, 1991, the arbitrator rendered his award. He found that the grievance was arbitrable, that Rogers was discharged in accordance with the terms of the collective negotiations agreement and for just cause. On August 9, 1991, Rogers' attorney requested that Local 473 move to vacate the arbitrator's award, claiming that the arbitrator based his decision on a suspension that had never occurred. Local 473, however, did not respond.

4/ N.J.A.C. 19:14-2.1.

5/ N.J.A.C. 19:14-2.3.

Rogers alleges that the Authority violated the Act by violating the collective negotiations agreement when it discharged him for falsifying water test records. He claims that under the agreement, falsification of records subjects an employee to a four-to-six day suspension, not termination and, in any event, the arbitrator found that he had not falsified any records. Rogers further claims that the Authority violated (a)(4) because his "attitude" in being a "nuisance, a wiseacre, big mouth and a non-compliant employee" was probably a substantially contributing factor to his discharge. The charge notes that Rogers wrote letters to the Authority in January 1989 and November 1990 challenging disciplinary actions taken against him.

In addition, Rogers asserts that Local 473 breached its duty to fairly represent him by acting arbitrarily and processing his case in a perfunctory and capricious manner. Specifically, he claims that Local 473 refused to honor his request to come to their attorney's office to prepare for his arbitration hearing. Instead, the preparation for his first day of hearing consisted of a twenty minute meeting with the attorney right before the hearing. Further, Rogers claims that the preparation for his second day of hearing consisted only of a 10-minute meeting with the attorney prior to that hearing. In addition, the Charging Party alleges that Local 473 failed to point out to the arbitrator that he had never received a one-day suspension, as the authority had claimed; that Rogers had successfully challenged the suspension and Local 473 failed to

explain this; and that he had challenged other disciplinary actions. Rogers points this out since the arbitrator held that his disciplinary record did not warrant mitigation of his termination, despite his 18-year employment record.

Local 473 claims that it was "sandbagged" by Rogers because he did not tell Local 473 the reason for his termination prior to its representatives learning of it at the hearing. Moreover, Local 473 disagrees that there was a violation of the agreement, noting that the agreement grants the Authority the discretion to terminate an employee for a first offense of falsification of water test records. Local 473 also points out that an arbitrator's award will only be overturned if the arbitrator exceeds his authority or is guilty of misconduct. Hence, Local 473 argues that the arbitrator's alleged impropriety in miscontruing Rogers' disciplinary record is not a basis for overturning the award.

Local 473 also asserts that the Charging Party has failed to cite any case law supporting his claim that the union breached its duty of fair representation by not devoting substantial time to the preparation of his case. In any event, Local 473's attorney claims that he met with Rogers and the Local 473 business agent 1 hour and 20 minutes prior to the hearing. Moreover, Local 473 notes that Rogers has not presented any evidence that Local 473 acted arbitrarily, discriminatorily or in bad faith or any evidence as to why it would have acted in that way.

Finally, Local 473 points out that Rogers was given an opportunity to speak at the hearing and did not raise the alleged errors in his disciplinary record or inform the arbitrator of his dissatisfaction with Local 473's representation. Rather, Rogers told the arbitrator he was satisfied with the representation he had received.

The Authority asserts that Rogers failed to allege facts sufficient to support an (a)(1) violation, as he did not refer to one protected activity in which he participated or attempted to engage in. Similarly, the Authority claims that Rogers failed to make out a prima facie case under subsection (a)(4) of the Act, as Rogers never indicated that he had signed or filed an affidavit, petition or complaint or given any testimony under the Act. Rogers suggests that he was terminated because of a grievance filed in 1989 regarding a one-day suspension and because of the November 5, 1990 letter he wrote to the Authority after he was suspended in the matter that ultimately led to his discharge. However, according to the Authority, these facts cannot form the basis of his charge, since they occurred more than six months prior to the filing of the charge. Moreover, the Authority points out that Rogers simply continues to allege that the Authority violated the collective bargaining agreement, a claim which does not constitute a violation of the Act.

Further, the Authority asserts that Local 473 did not violate its duty of fair representation to Rogers. Rogers has not

alleged any facts indicating that Local 473's conduct was arbitrary, discriminatory or in bad faith. The Authority points out that not only did Local 473 file a grievance, but it pursued his case to arbitration, which it was not required to do. Further, the Authority asserts that there is no basis for Rogers' claim that the arbitrator's decision would have been different if Local 473 had proven that Rogers had not been suspended in 1988. Indeed, according to the Authority, Rogers' own submissions established that the Authority never dropped his prior grievance regarding the suspension and that he in fact was suspended. Finally, the Authority notes that Rogers did not clarify the issue of the suspension or add anything further when given the opportunity by the arbitrator; further, Rogers told the arbitrator that he felt he had been properly represented by Local 473.

ANALYSIS

N.J.S.A. 34:13A-5.3 provides in part that:

> 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 interests of all such employees without discrimination and without regard to employee organization membership.

In OPEIU, Local 153, P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983), the Commission discussed the appropriate standards for reviewing a union's conduct in investigating, presenting and processing grievances:

> In the specific context of a challenge to a union's representation in processing a grievance,

> the United States Supreme Court has held: 'A breach of the statutory duty of fair representation occurs only when a union's conduct towards a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Vaca v. Sipes, 386 U.S. 171, 190 (1967) (Vaca). The courts and this Commission have consistently embraced the standards of Vaca in adjudicating such unfair representation claims. See, e.g., Saginario v. Attorney General, 87 N.J. 480 (1981); In re Board of Chosen Freeholders of Middlesex County, P.E.R.C. No. 81-62, 6 NJPER 555 (¶11282 1980), aff'd App. Div. Docket No. A-1455-80 (April 1, 1982), pet. for certif. den. (6/16/82) ("Middlesex County"); New Jersey Turnpike Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979) ("Local 194"); In re AFSCME Council No. 1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978). [footnote omitted]
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> We have also stated that a union should attempt to exercise reasonable care and diligence in investigating, processing and presenting grievances; it should exercise good faith in determining the merits of the grievance; and it must treat individuals equally by granting equal access to the grievance procedure and arbitration for similar grievances of equal merit. Middlesex County; Local 194. All the circumstances of a particular case, however, must be considered before a determination can be made concerning whether a majority representative has acted in bad faith, discriminatorily, or arbitrarily under Vaca standards. [OPEIU Local 153 at 13.]

The U.S. Supreme Court has also held that to establish a claim of a breach of the duty of fair representation, such claim "...carried with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." Amalgamated Assn. of Street, Electric, Railway and Motor Coach Employees of American v. Lockridge, 403 U.S. 274, 301, 77 LRRM 2501, 2512 (1971). Further, the National Labor Relations Board has held that where a majority

representative exercises its discretion in good faith, proof of mere negligence, standing alone, does not suffice to prove a breach of the duty of fair representation. Service Employees International Union, Local No. 579, AFL-CIO, 229 NLRB 692, 95 LRRM 1156 (1977); Printing and Graphic Communication, Local No. 4, 249 NLRB No. 23, 104 LRRM 1050 (1980), reversed on other grounds 110 LRRM 2928 (1982).

The facts show that Local 473 did not breach its duty of fair representation. There is no evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives. Amalgamated Assn. of Electric, Railway and Motor Coach Employees of America. Local 473 took Rogers' grievance to arbitration, which it was not necessarily required to do, and provided an attorney to represent him at both days of his hearing. See Essex-Union Joint Meeting and Automatic Sales, Servicemen and Allied Workers, Local 575 and Brian McNamara, D.U.P. No. 91-26, 17 NJPER 242 (¶22108 1991). The attorney, the Local 473 business agent and Rogers met prior to each day of hearing to prepare for it. Even if, as Rogers claims, Local 473's attorney met with Rogers for only 20 minutes before the first day of hearing and for only 10 minutes before the second day of hearing, this is not sufficient to support the contention that Local 473 did not exercise reasonable care and diligence in processing and presenting his case. Moreover, the fact that Local 473 did not specifically inform the arbitrator that, in fact, Rogers was never suspended or that he had challenged some

disciplinary actions does not show that Local 473 acted arbitrarily, discriminatorily or in bad faith. At most, it suggests mere negligence, which, standing alone, will not establish a breach of the duty of fair representation. Service Employees. Moreover, Rogers was given an opportunity at the hearing to explain that he was never suspended and that he had challenged some disciplinary actions, but failed to do so. Instead, he made a statement to the arbitrator that he was satisfied with the representation provided to him by Local 473.

Based on the foregoing, we find that Local 473's actions do not constitute a violation of its duty of fair representation. Hence, we do not believe that the allegations in the charge warrant the issuance of a complaint against Local 473.

Similarly, no allegations in the charge warrant the issuance of a complaint against the Authority. The allegations in the charge are insufficient to support violations of subsections (a)(1) and/or (a)(4) of the Act. An employer violates subsection 5.4(a)(1) if its actions tend to interfere with an employee's statutory rights and lack a legitimate and substantial business justification. Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987); New Jersey Sports and Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). Here, an arbitrator found that the Authority had just cause for Rogers' discharge. Under the circumstances of this case, the Commission follows a

policy of complete deference to the arbitrator's award.[6/] Accordingly, we find the Authority had a legitimate and substantial business justification for its action and, therefore, did not violate subsection (a)(1) of the Act. Moreover, with respect to the (a)(4) charge, there is no timely allegation or evidence that Rogers was discharged because he signed or filed an affidavit, petition or complaint or gave any information or testimony under the Act. Finally, Rogers' claim that the Authority violated the agreement in discharging him is not, in itself, an unfair practice under the Act. N.J. Department of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

Based upon the foregoing, I conclude that the Commission's complaint issuance standard has not been met. Accordingly, I decline to issue a complaint and dismiss the charge.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

Edmund G. Gerber, Director

DATED: June 3, 1992
Trenton, New Jersey

6/ See Jersey City Bd. of Ed., D.U.P. No. 82-27, 8 NJPER 236 (¶13099 1982)