P.E.R.C. No. 84-76

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LAWRENCE TOWNSHIP POLICEMAN'S
BENEVOLENT ASSOCIATION, LOCAL 119,

Respondent,

- and - Docket No. CI-81-74-9

DAVID E. BURNS, RAYMOND T. BRITTON,
JEROME A. GORSKI, JAMES J. HEWITT,
JOSEPH S. LECH, JOHN U. MAPLE and
RICHARD S. PELCZ,

Charging Parties.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge that certain detectives employed by Lawrence Township had filed against their majority representative, the Lawrence Township Policeman's Benevolent Association, Local 119. The charge alleged that the PBA failed to represent detectives fairly during the 1980 and 1981 contract negotiations. The Commission holds that the charging parties failed to prove their allegations by a preponderance of the evidence.

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Charging Parties.

Appearances:

For the Respondent:

Strauss, Wills, O'Neill & Voorhees, Esqs.
(G. Robert Wills, Esq.)

For the Charging Parties:

Randolph D. Norris, Esq. 1/

DECISION AND ORDER

On March 25, 1981, David E. Burns, Raymond T. Britton, Jerome A. Gorski, James J. Hewitt, Joseph S. Lech, John U. Maple and Richard S. Pelcz ("Detectives"), detectives employed by Lawrence Township, filed an unfair practice charge against the Lawrence Township Policeman's Benevolent Association, Local 119 ("PBA") with the Public Employment Relations Commission. The Detectives alleged that the PBA violated subsections 5.4(b)(1),

1/ On August 16, 1983, Norris removed himself from this case. The Charging Parties have not retained other counsel.

(3), and (5) [2/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.1, et seq. by allegedly failing to represent them fairly during 1980 and 1981 contract negotiations.

On July 23, 1981, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On August 5, 1981, the PBA filed an Answer denying the allegations.

On September 25, December 22, 1981, March 11 and 12, 1982, and September 8 and 9, 1982, Hearing Examiner Edmund G. Gerber conducted a hearing. The parties examined witnesses and presented evidence. The PBA submitted a letter brief.

On November 4, 1983, the Hearing Examiner issued his decision, In re Lawrence Township Policeman's Benevolent Association Local 119, H.E. No. 84-27, 9 NJPER ___ (¶_____ 1983). He recommended dismissal of the Complaint because he found that the PBA had not violated its duty of fair representation under Ford Motor Co. v. Huffman, 346 U.S. 330 (1953). [3/]

On November 4, 1983, the Hearing Examiner advised the parties that they could file exceptions to his report within 10 days of service of his report pursuant to N.J.A.C. 19:14-7.3. Neither party has filed exceptions or requested an extension of time.

2/ These subsections 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; (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit; and (5) Violating any of the rules and regulations established by the commission."

3/ The Hearing Examiner did not address whether the PBA's conduct violated subsection 5.4(b)(5). Nor did he address the Detectives' request to sever them from the existing unit and permit them to select their own negotiations representative.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 2-5) are accurate with the exception of finding no. 7. With that exception, we adopt and incorporate them here. With respect to finding no. 7, we make the following changes. The patrolman who made the statement in question was not an officer of the PBA and the statement was made only after the membership had already voted to reject the tentative agreement. Further, finding no. 7 is somewhat misleading to the extent it implies the membership rejected the tentative agreement solely because of the Detectives' differential. In fact, the membership had three concerns: salary percentages, compensatory time off, and the differential.

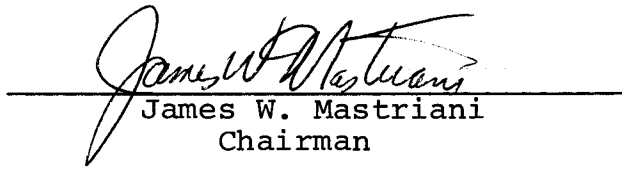
Under all the facts of this particular case, we agree with the Hearing Examiner's conclusion that the Detectives did not meet their burden of proving by a preponderance of the evidence that the PBA violated its duty of fair representation during contract negotiations. Instead, it appears to us that the PBA acted within the wide range of reasonableness permitted it and in good faith in making certain concessions in order to obtain salary increases for the entire unit. Ford Motor Co. v. Huffman, 346 U.S. 330 (1953) ("Huffman"); Belen v. Woodbridge Twp. Bd. of Ed., 142 N.J. Super. 486 (App. Div. 1976) ("Belen"); In re Union City and FMBA Local No. 12, P.E.R.C. No. 82-65, 8 NJPER 98 (¶13040 1982); In re Hamilton Twp. Ed. Ass'n, P.E.R.C. No. 79-20, 4 NJPER 476

(¶4215 1978).[4/] Accordingly, we adopt the Hearing Examiner's recommendation that we dismiss those portions of the Complaint alleging violations of subsections 5.4(b)(1) and (3). We also dismiss the subsection 5.4(b)(5) allegation since we see no evidence to support it.[5/]

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Newbaker, Suskin, Butch, Hipp, Graves and Hartnett voted for this decision. None opposed.
DATED: December 9, 1983
Trenton, New Jersey
ISSUED: December 12, 1983

4/ We agree with the Hearing Examiner's caution that each duty of fair representation case must be decided on its own facts and that the most appropriate precedents and standards for each case will ordinarily be found in cases of the same type, -- in this case, for example, cases involving alleged breaches during contract negotiations. Compare, generally, The Developing Labor Law, Vol. II, pp. 1328-1337 (2nd Ed. 1983) with pp. 1337-1343 of the same volume. Given this caveat, it is not necessary to analyze further the applicability of Vaca v. Sipes, 386 U.S. 171 (1967) to claims arising during contract negotiations or to speculate on the applicability of Huffman and Belen to claims arising during grievance processing.

5/ In light of our conclusion that the PBA did not act unlawfully, there is not basis on this record for severing the Detectives from the existing unit.

H. E. No. 84-27

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JOSEPH S. LECH, JOHN U. MAPLE and
RICHARD S. PELCZ,

Charging Parties.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss an unfair practice charge brought against the Lawrence Township PBA by certain detectives who were represented by the PBA. It was alleged that the failure of the PBA to preserve a $500 annual salary differential in negotiations violated the PBA's duty of fair representation. The Commission's Hearing Examiner recommended that, in determining whether the PBA violated its duty of fair representation, the Commission not use the test enunciated in the U.S. Supreme Court's decision Vaca v. Sipes, 386 U.S. 171 (1967), but rather use the Supreme Court's earlier decision in Ford Motor Co. v. Huffman, 346 U.S. 330 (1953). The Hearing Examiner believes that the test in the Vaca case is suitable only for those cases which arise out of the contract itself, i.e. processing of grievances and are not applicable in cases arising out of the conduct of negotiations. In the case before the Hearing Examiner, the Hearing Examiner found that the PBA's conduct did not violate the standards enunciated in Ford Motor Co. v. Huffman.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

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Appearances:

For the Respondent
Strauss, Wills, O'Neill & Voorhees
(G. Robert Wills, Esq.)

For the Charging Parties
Randolph D. Norris, Esq. 1/

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on March 25, 1981, by David E. Burns, Raymond T. Britton, Jerome A. Gorski, James J. Hewitt, Joseph S. Lech, John U. Maple and Richard S. Pelcz (hereinafter the "Charging Parties") alleging that the Lawrence Township Policeman's Benevolent Association, Local 119 of the New Jersey State Policeman's Benevolent Association, Inc. (hereinafter the "Respondent" or "PBA") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act") in that

1/ At the close of the hearing Norris had left private practice and the Charging Parties had not retained other counsel.

as a result of negotiations in both the 1980 and 1981 contracts the Respondent failed to fairly represent the Charging Parties who, up until those contracts, enjoyed a salary differential of $500 above the salary of patrolmen employed by Lawrence Township, but in both 1980 and 1981 the salary for the detectives was identical to that of patrolmen. It is claimed that this conduct violated N.J.S.A. 34:13A-5.4(b)(1), (3) and (5) of the Act. 2/

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on July 23, 1981. Pursuant to the Complaint and Notice of Hearing, hearings were held on September 25, 1981, December 22, 1981, March 11, 1982, March 12, 1982 and September 9, 1982. The parties were given an opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. The parties were given an opportunity to file briefs in this matter and the Respondent PBA filed its brief on September 2, 1983. 3/

Upon the entire record the Hearing Examiner makes the following findings of fact.

1. Lawrence Township PBA Local 11 is a public employee representative within the meaning of the act and is the majority

2/ These subsections 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; (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit; (5) Violating any of the rules and regulations established by the commission."

3/ The Charging Parties requested adjournments on numerous times in this matter in order to reach a settlement between itself, the PBA and the Township of Lawrence, which is not a party to this action. Needless to say, those settlement efforts were not successful.

representative of all patrolmen and detectives in the Lawrence Township police force.

2. For many years the detectives employed by the Township enjoyed a $500 salary differential above the salary of uniformed police officers. This differential was instituted at a time when the detectives did not receive extra compensation for overtime. However the detectives were subsequently granted overtime pay. They enjoyed both the differential pay and overtime for a number of years.

3. Within the police force a certain animosity exists between the uniformed police officers and the members of the detective bureau. The patrolmen believe that detectives are not chosen solely on merit and the police chief exhibits favoritism in selecting officers for the detective bureau. The detectives are subject to some ribbing and anonymous comments about their status as detectives.

4. In the 1980 contract, as a result of negotiations between the PBA and the Township, detectives did not receive their $500 salary differential. In this same contract a number of other officers were denied wage and financial benefits which they had enjoyed in earlier years. Those officers whose salary were not at maximum and were still on a salary guide did not receive increments for that year and a $500 salary differential for college degrees was suspended. (It is noted that the PBA's chief negotiator, Edward Conroy, was entitled to this bonus.) Unit wide, the college degree differential was worth $6000 to $8000, the increments were worth about $15,000 and the detective salary differential was worth $3500.

5. The items in paragraph 4 were given up during the course of negotiations for a higher across-the-board settlement.

The contract settlement for that year was a 9-1/2% increase for all unit members.

6. Negotiations occurred the following year for the 1981 contract. The parties reached a tentative settlement agreement which provided for a 7-1/2% wage increase for all unit members and provided for both a restoration of increments for those officers on the salary guide and a restoration of $500 differential for detectives. It did not provide for a restoration of the differential for a college degree suspended in 1980.

7. At the PBA ratification meeting the tentative contract was rejected. A number of comments were made by the membership evincing strong objection to the detectives receiving the $500 differential pay. A patrolman who was also an officer in the PBA stated that no matter what the contract proposal would be, the PBA would vote down any contract providing for a restoration of the detective pay.

8. The parties resumed negotiations and the chief negotiator for the PBA, Conroy, told the town's administrator, George Gottuso, that he could not get a contract ratified by the PBA that contained a provision for detective salaries and that such a provision had to be out of any contract that was entered into. After further extensive negotiations a new contract which provided for an 8-1/2% salary increase was signed. In gaining an additional percentage point in salary, an eye exam for all patrolmen as well as the salary differential for detectives was deleted from the new contract. In deleting these items from the contract, unit wide the PBA gave up $3500 for the detective differential pay and $1200 for the eye exam (at $25 per man). In return the extra 1%

of salary was worth about $15,000.

9. The town's position in negotiations in 1980 and 1981 concerning the detective bonus was not a clear one. The municipality's council members were divided as to whether or not the town should take a firm position in preserving the $500 salary differential. Further, in 1981 the PBA stated after the first contract was rejected that they would be unopposed to the preservation of the $500 bonus if the town would come up with a uniform testing procedure for the hiring of new detectives. The town never formally responded to this offer.

Analysis

The issue presented here is whether the PBA violated its duty of fair representation when in both 1980 and 1981 the contracts which were negotiated did not contain the $500 salary differential for detectives.

In Belen v. Woodbridge Twp. Bd/Ed, 142 N.J. Super. 486 (App. Div. 1976), certain school psychologists suffered a reduction in salary as a result of a negotiated agreement between the union and the board of education. It was held that "the mere fact that a negotiated agreement results...in a detriment to one group of employees does not establish a breach of duty by the union."

However, the Commission found in In re Union City & FMBA Local No. 12 and Wesley Spell, supra, that when a union deliberately and insidiously refused to propose a raise for a position held by the charging party, the union violated its duty of fair representation.

Both the U.S. Supreme Court cases of Vaca v. Sipes, 386

U.S. 171, 87 S.Ct. 903, 64 LRRM 2369 (1967) and Ford Motor Co. v. Huffman, 346 U.S. 330, 23 S.Ct. 681, 31 LRRM 2548 (1953) were cited in support of the respective findings. While the undersigned believes that Ford Motor Co. enunciated the proper standard for the duty of fair representation in negotiations and a proper determination was reached in both Belen and Spell, the Vaca standard should not have been applied in Belen and Spell and should not be applied here.

In Vaca v. Sipes, supra, the Court held that a union's processing of a grievance (i.e. the refusal to take a grievance to arbitration) would violate the duty of fair representation if the union's conduct towards the employee "is arbitrary, discriminatory or in bad faith."[4/] While in Ford Motor Co. Huffman, supra, the Court in reviewing a union's conduct in negotiating a provision granting seniority credit for prior military service held that "[t]he complete satisfaction of all who are represented is hardly to be expected and a wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject to complete good faith and honesty of purpose in the exercise of its discretion."

These two tests reflect very different duties of a majority representative -- i.e. administering the provisions of an existing contract where procedures and standards are laid out as opposed to negotiating a new contract where no clear signposts exist and, for an employee negotiator, it is catch as catch can in garnering the greatest benefits for the unit employees.

4/ See also Hines v. Anchor Motor Freight Inc., 424 U.S. 554, 566-69, 19 LRRM 2481 (1976); Humphrey v. Moore, 375 U.S. 335, 350, 55 LRRM 2031 (1964).

Under the Vaca test the language of the contract itself serves as a benchmark to measure whether a union's conduct is "arbitrary" or "discriminatory." No such clear yardstick exists to measure "arbitrary"or"discriminatory" conduct in negotiations. See, Schultz v. Owen-Illinois & District 9, IAM, 696 F.2d 505 (7th Cir. 1982), 112 LRRM 2181 where the court "emphasize[d] the difference between union conduct in representing diverse employees in collective bargaining and union conduct in representing employees bringing individual grievances" and held that the Supreme Court impliedly recognized the difference in creating two different standards. There is no gainsaying that the school psychologists in Belen were "discriminated" against and the union acted in an "arbitrary manner" as to them since they alone suffered a salary reduction, yet on the facts of that case, the unit as a whole profited, so no impropriety was found. If such disparity of treatment were to occur in grievance processing, it is submitted that there would have been a violation of the duty of fair representation.

Accordingly the undersigned relies on the tests enunciated in Ford Motor Co. in determining whether the conduct of the PBA constituted an unfair practice within the meaning of the Act. 5/

In analyzing the instant action, the negotiations for 1980 were unquestionably proper. The detectives were one of a number of employee groups adversely affected by trade-offs but the union was able to use such trade-offs to gain a large salary settlement, a 9-1/2% increase, for the year.

5/ As to the appropriateness of relying on Federal standards in interpreting the Act, see Lullo v. Int'l Assn. of Fire Fighters, 55 N.J. 409, 424 (1970).

The propriety of the union's conduct in the 1981 negotiations is less clear for the PBA bowed to political pressure. The first tentative contract did provide for restoration of the detective pay but after it was rejected by the membership, Conroy made it clear that if any contract was negotiated it could not contain any pay for detectives. However, the PBA was able to use this situation to good advantage; in exchange for the detectives' differential pay and the eye exam for all patrolmen, everyone in the unit got an extra 1% salary increase and the detectives shared equally in the salary increase. The 1% increase in the detectives' salary was worth $200 as opposed to the $500 salary differential.

In determining whether political decisions in negotiations constitute bad faith, it has been held that "such decisions may not be made solely for the benefit of a stronger, more politically favored group over a minority group." Barton Branch Ltd. v. NLRB, 529 F.2d 793, 91 LRRM 2241 (CA7 1976). In Barton, the minority group suffered a loss in seniority by being "end tailed" and the favored group directly benefited thereby.

Although the detectives did suffer a $300 loss of projected earnings after the tentative contract was rejected, overall the detectives here did not suffer a loss in the 1981 contract. They received the same substantial 8-1/2% raise as the rest of the unit members. The PBA was able, in dollar terms, to increase the total benefit package for all unit members. Further, a major rationale for the differential pay, that is detectives received no overtime, ceased to exist.

I find that the PBA's conduct was within its wide range

of discretion and under the total facts of this particular case. 6/ I hereby recommend that the Commission find that the PBA did not use bad faith in the 1980 or 1981 negotiations, that it used the political realities within the unit to get a better contract which benefited the majority of members and did not substantially harm the detectives.

Accordingly, it is recommended that the charge against the PBA be dismissed in its entirety.

Edmund G. Gerber
Hearing Examiner

Dated: November 4, 1983
Trenton, New Jersey

6/ In Spell, supra, the Commission stated that each duty of fair representation case must be reviewed independently on its own merits.