

H.E. NO. 2006-8

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PBA LOCAL 136,

Respondent,

-and-

Docket No. CI-2003-036

BARRY WIESER,

Charging Party.

SYNOPSIS

A Hearing Examiner grants the Respondent PBA's motion to dismiss at the close of the charging party's case on an allegation by an individual that the PBA breached its duty of fair representation by denying him a copy of the collective negotiations agreement solely because he was a member of the FOP. Giving the charging party all reasonable inferences and based on the record adduced at the hearing, the Hearing Examiner finds that the charging party did not produce any evidence of the alleged motive.

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Appearances:

For the Respondent, Loccke and Correia, P.A.
(Marcia J. Tapia, of counsel)

For the Charging Party, Fusco & Macaluso, P.A.
(Philip Y. Ing, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION
ON MOTION TO DISMISS

On May 5, 2003, Patrol Officer Barry Wieser filed unfair practice charges with the Public Employment Relations Commission against both his employer, the Township of Wayne (Township), and his majority representative, PBA Local 136 (PBA). The charge against the PBA alleges that it violated section 5.4b(1)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), when it collected representation fees from Wieser,

^{1/} This section 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."

despite having denied him membership in the PBA, and denied him a copy of the collective negotiations agreement because of his membership in the Fraternal Order of Police (FOP). A Complaint and Notice of Hearing was issued on October 7, 2004. Thereafter, the PBA filed an answer denying that it refused to provide Wieser with a copy of the collective agreement because of his FOP membership, or that it violated the Act.

Procedural History

On March 16, 2005, on both Respondents' motions for summary judgment, in Wayne Tp., H.E. No. 2005-12, 31 NJPER 51 (¶24 2005), I recommended dismissal of the entire charge. On May 26, 2005, in Wayne Tp., P.E.R.C. No. 2005-73, 31 NJPER 144 (¶63 2005), the Commission approved the dismissal of the charge against the Township, and remanded the remainder of the charge for a hearing on the allegations against the PBA. On December 15, 2005, in PBA Local 136, P.E.R.C. No. 2006-22, 31 NJPER 321 (¶126 2005) (PBA-No. 1), the Commission denied the PBA's second motion for summary judgment, finding that the motion was not supported by affidavits. Upon a motion for reconsideration on December 15, 2005, in PBA Local 136, P.E.R.C. No. 2006-40, 31 NJPER 393 (¶154 2005) (PBA No. 2), the Commission granted the PBA's motion for summary judgment, dismissed the allegations regarding representation fees, and remanded the charge on the sole remaining allegation that the PBA violated the Act when it

"[failed] to provide the Charging Party with a copy of the collective negotiations agreement because of his membership in the FOP." Id. at 394.

A hearing was conducted on February 2, 2006, at which the Charging Party called one witness, argued orally and placed documents into the record. At the close of the Charging Party's case, the PBA filed a Motion to Dismiss. Both parties argued orally. The decision was reserved until the transcript of the hearing was received. Granting every favorable inference to the Charging Party, I accept these facts as true for the purposes of this motion:

FINDINGS OF FACT

1. Barry Wieser was employed as a police officer and senior police officer by the Township from September 2, 1969, until his retirement on October 1, 2005 (T13-T14)^{2/}. Since at least 1969, PBA Local 136 has represented rank-and-file police officers in Wayne Township and negotiated a series of collective negotiations agreements (T16). Wieser was a member of the unit represented by the PBA, but was not a dues-paying member of the PBA (T21-T24).

2. In February 1970, approximately six months after being hired, Wieser applied for membership in the PBA (T16-T17). On

^{2/} "T" -- refers to the transcript of the hearing on February 2, 2006.

May 19, 1970, PBA Secretary Don Buwalda wrote to Wieser denying his membership application (CP-1; T19-T22). Buwalda wrote:

The reason for this denial is that the members do not feel that you have the proper attitude toward the Police Profession as a whole and especially toward fellow police officers of this department and of other departments in this State. [CP-1, para. 2.]

3. After receiving CP-1, Wieser was told by Detective Frank Mackey that the underlying reason for this denial was because the PBA members did not approve of his attitude toward issuing summonses to other police officers (T22). Specifically, Wieser, while on duty, stopped a car driven by a deputy chief from another town and gave the deputy a warning about a motor vehicle violation (T22-T23). Wieser did not re-apply for membership in the PBA and only attended one PBA meeting (T24, T28).

4. At some point in the 1980s, Wieser became aware that representation fees were being deducted from his pay but it was not until 2003 that he began to object to the deductions by writing letters to the Township treasurer and the PBA to have the deductions ceased (T29-T33).^{3/} In May 2003, Wieser joined the FOP because of its legal representation benefit (T35-T36). About 14 other Wayne Township officers also joined the FOP (T38).

^{3/} In PBA No. 2, the Commission dismissed the unfair practice allegation that the PBA illegally collected representation fees.

5. Wieser was aware that there were agreements between the PBA and Township since 1969, and once, in 1975, he paged through a copy of an agreement left on the squad room table (T34). Wieser admitted that he never personally requested a copy of the agreement:

Mr. Ing:

Q. During your employment as a Wayne Police Officer, did you ever request a copy of that agreement? (T34)

Mr. Wieser:

A. No. Except through your law office (T34).

Wieser never made a request for the contract through the Open Public Records Act (T49). He admitted that the PBA did not expressly deny him a copy of the agreement (T34, T45-T46). Sometime after May 2003, Wieser's attorney requested a copy of the agreement and the PBA provided the agreement to the attorney (T35, T36, T47-T48). Wieser testified:

Mr. Ing:

Q. Do you recall whether or not you requested a copy of the collective bargaining agreement before or after you became a member of the FOP? (T35-T36)

Mr. Wieser:

A. . . . After, because one of the reasons why I joined the FOP was their good legal representation. . . (T35-T36).^{4/}

^{4/} I infer that Wieser's answer refers to the request made by his attorney, since in other testimony he admitted that he had not personally requested the agreement (T34-T36).

6. Wieser did not request a copy of the agreement from his attorney, and only learned on February 1, 2006, the day preceding the hearing, that his attorney had a copy of the agreement (T48).

7. Wieser believed that the other FOP members obtained copies of the collective negotiations agreement because they were also PBA members until late in 2002, when they were expelled (T38-T39).

ANALYSIS

Charging Party Barry Wieser had to produce sufficient evidence to prove that the PBA denied him a copy of the collective negotiations agreement because of his FOP membership. I conclude that insufficient evidence was produced to satisfy that burden. Consequently, I grant the PBA's motion and recommend that the charge be dismissed.

The standards for determining whether to grant a motion to dismiss at the conclusion of the charging party's case were articulated in New Jersey Turnpike Authority, P.E.R.C. No. 79-81, 5 NJPER 197 (¶10112 1979). There, the Commission stated:

. . . the Commission utilizes the standards set forth by the New Jersey Supreme Court in Dolson v. Anastasia, 55 N.J. 2 (1969). Therein, the Court declared that when ruling on a motion for involuntary dismissal the trial court "is not concerned with the worth, nature or extent . . . of the evidence, but only with its existence, viewed most

favorably to the party opposing the motion".
Id. at 198.^{5/}

The Commission has never held, nor does the Act require that a union must provide a copy of the collective agreement to every unit member. However, if the PBA denied or refused to provide the collective agreement to Wieser because of his FOP membership and for no other reason, its actions would be arbitrary and discriminatory. N.J.S.A. 34:13A-5.3 authorizes majority representatives to represent and negotiate agreements for all unit employees without discrimination and without regard to employee organization membership. It is from this language that the union's duty of fair representation flows. A breach of that duty occurs only when a union's conduct towards a member is arbitrary, discriminatory, or in bad faith. Vaca v. Sipes, 386 U.S. 171, 191 (1967).^{6/} All the circumstances of a particular case must be considered.

Cases dealing with the union's duty of fair representation in grievance processing established certain relevant

5/ See also Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 535-542 (1995) and Cameco, Inc. v. Gedicke, 157 N.J. 504, 509 (1999).

6/ Those standards have been adopted in the public sector. Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976); see also Lullo v. International Ass'n of Fire Fighters, 55 N.J. 409 (1970).

principles.^{7/} In Carteret Education Association(Radwan), P.E.R.C. No. 97-146, 23 NJPER 390 (¶28177 1997), the Commission declined to find a violation where the agreement was not provided to an employee until after the charge was filed, and held that the Act does not require a union to affirmatively notify an employee that he can file a grievance individually, unless it misleads him or impedes his right to file a grievance on his own. Other cases discuss a union's duty to inform unit members. It appears that a breach of that duty will only be found where all the circumstances result in harm or prejudice to employees. In Woodbridge Tp. Federation of Teachers, P.E.R.C. No. 81-66, 6 NJPER 565 (¶11286 1980) (Woodbridge), the Commission dismissed a charge alleging that a union failed to notify a group of non-members about the status of a grievance, noting the absence of an allegation that the union had not diligently represented the grievance, and finding that the disparate treatment did not rise to an unfair practice because the statutory right to be represented in collective negotiations was not implicated. And, in CWA Local 1044 (Treu), D.U.P. No. 96-012, 22 NJPER 48 (¶27024 1995), the Director of Unfair Practices dismissed a charge

7/ See, New Jersey Turnpike Employees Union, Local 194, IFPTE, AFL-CIO, (Kaczmarek), P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979) (unions must exercise reasonable care and diligence in investigating and processing grievances, and treat individuals equally by granting equal access to the grievance procedure).

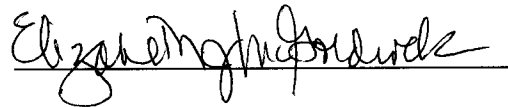
alleging that the union failed to send a non-member an informational mailing it sent to dues paying members, and failed to communicate with him about the times, places and strategies of the union's collective negotiations. There, the Director wrote:

While it may appear that CWA's alleged conduct discriminates against fee paying unit members, no alleged facts show that these employees were harmed by this conduct. The anti-discrimination requirement does not mean that a union must treat all unit members identically. None of the alleged facts show that this union failed to represent the charging party in collective negotiations. There is no individual statutory right to be apprised of the union's negotiations strategy or schedule, or to receive pre-negotiations mailings. (emphasis added) [Id. At 49.]

Applying the above standards, I find that the Charging Party has not proven that the PBA breached its duty to represent him fairly or discriminated against him because of his FOP membership. He did not produce any direct or circumstantial evidence that the PBA was aware of his FOP membership, that it was hostile towards his membership in the FOP, and/or that it did not provide him a copy of the collective agreement because he was an FOP member. Wieser admitted that he never personally requested a copy of the collective negotiations agreement and that he was never expressly refused a copy. The testimony revealed that Wieser's attorney requested it after Wieser became an FOP member in 2003, and it was eventually provided to the attorney, though no evidence in this record reveals when Wieser's

attorney requested the agreement or when it was provided.^{8/} Wieser admitted that he never requested a copy of the agreement from his attorney. There is no allegation or evidence that the PBA's actions interfered with Wieser's rights to file grievances or to be represented in collective negotiations. Thus, under these circumstances, the union's duty of fair representation was not implicated. Woodbridge, Carteret, CWA Local 1044 (Treu).

Based on the record adduced by the Charging Party through testimony and documents and granting every reasonable inference to him, I conclude that PBA Local 136 did not violate N.J.S.A. 34:13A-5.4b(1), as alleged. Therefore, the PBA's Motion to Dismiss is granted, and in accordance with N.J.A.C. 14-4.7, the Complaint is dismissed.



Elizabeth J. McGoldrick
Hearing Examiner

DATED: May 25, 2006
Trenton, New Jersey

Parties may appeal a hearing examiner's decision on a motion to dismiss pursuant to N.J.A.C. 19:14-4.7. Any appeal is due by June 7, 2006.

^{8/} Count Two of the unfair practice charge alleges that on January 24, and April 7, 2003, Wieser's attorney requested that the PBA send him a copy of the agreement, however, no evidence in this record supports these assertions.