H.E. NO. 2016-1

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

In the Matter of

NEW JERSEY SPORTS & EXPOSITION AUTHORITY,
Respondent,

-and- Docket No. CI-2013-049

LOCAL 632, INTERNATIONAL ALLIANCE OF THEATRICAL STAGE EMPLOYEES, MOTION PICTURE TECHNICIANS, ARTISTS AND ALLIED CRAFTS OF THE U.S. AND CANADA, AFL-CIO, CLC,
Respondent,

-and-

PETER CURTIS,
Charging Party.

SYNOPSIS

A Hearing Examiner recommends that a majority representative did not violate N.J.S.A. 34:13A-5.4b(1) of the Act when it declined to appeal a unit employee's termination to binding arbitration, pursuant to the contractual grievance procedure. The charge upon which the Complaint issued also alleged that the majority representative, the public employer and the individual employee had reached an agreement on a disciplinary suspension that the representative failed to (seek to) enforce.

The Hearing Examiner recommended that the parties had not reached an agreement on a disciplinary suspension and that the majority representative complied with the duty of fair representation, when the membership voted by secret ballot to oppose arbitration by a vote of 23-19, with 1 abstention. Counsel for the majority representative had written a letter recommending against arbitration that was read to the membership before it voted. Under all the circumstances, the Hearing Examiner recommended that the majority representative's conduct was not arbitrary, discriminatory or in bad faith. Vaca v. Sipes, 386 U.S. 171 (1967); Saginario v. Attorney General, 87 N.J. 480 (1981).

The Charging Party had also alleged that the public employer had violated N.J.S.A. 34:13A-5.4a(2), (3), (5) and (6) of the Act. The Hearing Examiner recommended in particular that the Charging Party did not have standing to litigate the section 5.4a(5) allegation because it did not demonstrate that the majority representative violated 5.4b(1). The Hearing Examiner recommended dismissal of the other sections because no facts supported those allegations.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Respondent,

-and-

PETER CURTIS,
Charging Party.

Appearances:

For the Respondent
Connell Foley, attorneys
(Michael A. Shadiack, of counsel)

For the Respondent
Kroll, Heineman, Carton, attorneys
(Raymond G. Heineman, of counsel)

For the Charging Party
Ralph Wood, Esq.

**HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION**

On April 22, 2013 and July 19, 2013, Peter Curtis (Curtis) filed an unfair practice charge and amended charge against his public employer, New Jersey Sports & Exposition Authority (Authority) and his majority representative, Local 632,

International Alliance of Theatrical Stage Employees, Motion Picture Technicians, Artists and Allied Crafts of the U.S. and Canada, AFL-CIO, CLC (Local 632). The charge, as amended, alleges that on November 5, 2012, the Authority unlawfully terminated Curtis's employment after it had ". . . rendered a decision [on October 22, 2012] that Curtis would receive a one-day suspension" for a "non-physical verbal altercation" with another unit employee on October 10, 2012. The charge alleges that the Authority breached its agreement to the suspension and the collective negotiations agreement, violating section 5.4a(1), (2), (3), (5) and (6)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq., (Act).

The charge, as amended, also alleges that Local 632 violated section 5.4b(1) and (4)[2/] of the Act by not seeking to enforce

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1/ 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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (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. (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. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

2/ These provisions prohibit employee organizations, their (continued...)

". . . the step one resolution of a one-day suspension for Curtis and let the discharge stand without seeking arbitration."

On January 10, 2014, a Complaint and Notice of Hearing issued against both Respondents. On January 17, 2014, the Director issued a letter clarifying that the Complaint was properly issued on the allegations that the Authority violated section 5.4a(5) and that Local 632 violated section 5.4b(1) of the Act.

On January 29, 2014, the Authority filed an Answer denying that it violated the Act, particularly section 5.4a(5). It denies entering any agreement agreement with Local 632 and/or Curtis, ". . . regarding the severity of disciplinary action" arising from an incident on or about October 10, 2012.

On February 4, 2014, Local 632 filed an Answer admitting that the Authority terminated Curtis on November 5, 2012, ". . . as a result of [him] twice calling a co-worker a 'n _ _ _ _ _' during a workplace altercation on October 10, 2012." It denies that at a step one grievance meeting on October 22, 2012, the Authority rendered a decision that Curtis would receive a one-day

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2/ (...continued) representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

suspension. It also denies that it violated its duty of fair representation.

On March 20, 2014, Local 632 filed a motion for partial summary judgment, together with a supporting brief and exhibits seeking dismissal of a portion of the Complaint. It contended that the material facts show that it acted within the lawful discretion allotted to a majority representative to decide how far to pursue a grievance.

On March 24, 2014, the Authority filed a motion for summary judgment seeking dismissal of the Complaint filed against it, contending that only a majority representative and not an individual has standing to allege that a public employer has violated section 5.4a(5). It also submitted a supporting brief and exhibits.

On March 26, 2014, Curtis filed a brief opposing the motions, together with exhibits and supporting affidavits. He argued that issues of material fact precluded granting summary judgment.

On August 14, 2014, the Commission issued a decision, P.E.R.C. No. 2015-3, 41 NJPER 90 (¶30 2014), denying both motions for summary judgment and remanding the case for hearing. In denying the Authority's motion, the Commission found that an individual has standing to allege a violation of 5.4a(5) when he or she also asserts that the majority representative has breached

its duty of fair representation, citing Beall and N.J. Turnpike Auth., P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980), aff'd NJPER Supp.2d 101 (¶85 App. Div. 1981). The Commission denied Local 632's motion because an employee facing discharge is not denied the benefit of an arbitration hearing solely because his or her alleged conduct is offensive or outrageous. See New Jersey Turnpike Authority v. Local 196. I.F.P.T.E., 190 N.J. 28 (2007). The Commission noted that Curtis alleged that Local 632 violated its duty of fair representation by not seeking enforcement of the grievance settlement and by refusing to challenge his termination through binding arbitration.

On November 3 and 5, 2014, I conducted a hearing at which the parties examined witnesses and presented exhibits. Post-hearing briefs were filed by February 2, 2015. Replies were filed by February 13, 2015.

Upon the record, I make the following:

## FINDINGS OF FACT

1. The Authority and Local 632 signed a collective negotiations agreement on behalf of stagehands, wardrobe persons and projectionists extending from June 15, 2007 through June 14, 2010 (C-5).[3/]

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3/ "C" represents Commission exhibits; "CP" represents Charging Party exhibits; "UR" represents Union Respondent exhibits; and "ER" represents Employer Respondent exhibits.

The agreement includes a grievance procedure (Article 9) and a management rights provision (Article 12).

Step one of the grievance procedure directs a grievant to file a written grievance promptly with the employee's immediate supervisor. Step two permits an unresolved step one grievance to proceed to the grievant's department head within ten calendar days. Step three provides that an unresolved step two determination shall be submitted to the Director of Labor Relations or to the person in charge of the office, in the Director's absence. Step four provides for binding arbitration (C-5, pages 15-17).

The "management rights" article in part provides the Authority with power: "to suspend, demote, discharge or take other disciplinary actions against any employee for just cause as set forth herein and providing same is not contrary to the provisions of this agreement." Another provision allows the Authority, ". . . to adopt and enforce reasonable rules and regulations governing the conduct and activities of employees in accordance with the terms of this agreement." (C-5, p. 20).

2. Peter Curtis was employed as a "ground rigger" by the Authority for more than 25 years at the IZOD Center (formerly Brendan Byrne Arena) and Giants Stadium (now MetLife Stadium)

(1T25, 1T26).[4/] He also works in the same capacity at other venues for other employers (1T25). Curtis has been a member of Local 632 since 1987 and has not experienced any problems with its leadership (1T44). He is Caucasian.

3. Bernard James is employed as a stagehand (electrician) by the Authority for more than 20 years at the IZOD Center and Giants Stadium. He also works in the same capacity at other venues for other employers (2T180-2T181). He is Black. Curtis and James worked together for about 15 years (1T36).

4. In the morning of October 10, 2012, about 60 unit employees represented by Local 632 (including Curtis and James), employees represented by other union(s) and Canadian employees commenced working the equipment "load-out" following Jonas Brothers rehearsal performances at the IZOD Center (1T35-1T73, 1T93-1T94, 2T98, 2T187-2T188). On that day, as in each of the previous several days, the employees worked 12 or more hours, owing to changes in lighting, set pieces, etc. (1T34, 2T188).

Very late in the workday, following several rehearsals, James was working with his crew in the center of the arena floor, separating an unusually large quantity of electrical cables that had amassed atop other equipment (2T188-2T189). As the "stage

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4/ "T" represents the transcript, preceded by a "1" or "2" signifying the first or second day of hearing, followed by the page number(s).

electrician," James was responsible for operating the "house [electrical] power" (2T98).

The production manager for the Jonas Brothers, known by the nickname, "Hydro" may have called or spoken with James on his (faulty) radio one or more times during that day's late work hours (2T204). The production manager can instruct the stage electrician to "kill" (turn off) power (1T33).

Curtis was working away from James in another area of the arena (2T100). Unable to reach James on his "radio" (as James did not answer), "Hydro" asked Curtis if he could ". . . get the power shut off" (1T33). Curtis in turn asked Ann Marie Forker, another electrician, to shut off the power (1T33).

Forker is included in another negotiations unit represented by International Brotherhood of Electrical Workers, Local 164 (2T98). She was waiting on the northwest side of the arena for James's instruction to shut off the power. James had told her that, ". . . it would be awhile before the power could be shut off" (2T190). If power is turned off prematurely, employees working on the highly elevated arena "catwalk" would be stranded in darkness (2T99, 2T100).

Curtis testified on cross-examination that he asked Forker, ". . . to cut the power for the motors" -- not the house power -- and she complied (1T94). He denied that she told him that she would take instruction only from James (1T94).

Forker testified that Curtis first asked her what she was doing and she replied, “I’m just waiting for BJ [Bernard James], then I’m out of here” (2T100). She testified that Curtis said: “Fuck the nigger; shut it down” (2T100). Forker had not observed any discussion between James and Curtis preceding his remark (2T101).

Forker testified that her reaction to the remark was that, “. . . there were a lot of people there and it put me in a bad position. I just didn’t know what to do. I just stood there” (2T100). She also testified that she, “. . . wanted to walk away, but I had, you know, it was very hard because everybody was just quiet. You can hear a pin drop” (2T101). She testified that she replied: “I’m waiting to shut down. I don’t do it without BJ; BJ is the one that tells me” (2T101). On cross-examination, Curtis denied that he said anything about James to Forker (1T94-1T95, 1T101).

I credit Forker’s testimony that Curtis cursed James loudly with the racial epithet because she was forthright, embarrassed and without any apparent interested motive to testify falsely. Her detailed recollection of James’s and Curtis’s relative work locations at that time was unchallenged, and her memory of conversations, her discomfort and the apparent discomfort of others nearby was specific. She was not cross-examined. I don’t credit Curtis’s denial. I do not credit Forker’s testimony to

mean that she ultimately refused Curtis's demand to turn off some electrical power that night.

5. Curtis shouted to James across the arena floor that he instructed Forker to turn off [certain electrical] power (ER-2).[5/] James walked from the center of the arena to backstage, where he encountered Curtis (2T101).

On or before October 21, 2012, Curtis wrote this account of his ensuing verbal altercation with James:

> When I finally saw BJ, I told him that I had the building electrician [Forker] cut the power and he said, 'YOU DON'T TELL ANYBODY TO DO MY JOB' (emphasis supplied).
>
> I said: 'Well, if you're not there, I had to have somebody do it' (that's why I went to the building electrician in the first place).
>
> BJ said, irately: 'Shut the FUCK UP you cocksucker, motherfucker.' I was insulted.
>
> I said: 'Make me, nigger.'
>
> BJ said: 'Shut the fuck up.'
>
> I said: 'Make me, nigger.'

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5/ This fact is taken from James's October 17, 2012 written version of the episode. James testified that Forker had not turned off the power when he walked to the backstage area, immediately preceding his argument with Curtis (2T190-2T191). I credit the document because it was written within one week of the incident and jibes with Curtis's written account. I do not credit James's testimony because his recollection of Forker's action(s) -- peripheral to the altercation with Curtis -- likely diminished in the passage of time.

> BJ kept going on and on, so I said: 'Let's go to Jimmy's [James Villani, foreman] office and settle this right now.'
>
> BJ would not go, so I went back to work. . . [CP-2; 1T32]

Curtis did not believe that James's utterance of the word, "cocksucker" suggested that he (Curtis) was a homosexual (1T97). On cross-examination, Curtis denied that his twice-spoken rejoinder, "Make me, nigger," provoked physical violence (1T98). Pressed to explain his denial, Curtis testified: "I have the right to talk anytime I want. It's a free country. Just make me. Tell me to shut up. You can say anything you want" (1T98). Analogizing the verbal altercation to a schoolyard confrontation, Local 632 Counsel asked Curtis if his phrase, ". . . make me" had a particular meaning. Curtis denied that it did (1T100).

I do not credit Curtis's testimony. I find that his loud racial epithet rejoinder was intended to provoke a physical altercation, and that his repetition of it increased that provocation. I credit Curtis's written recounting of his verbal altercation with James, generally.

Asked to explain why he chose an occasion with many witnesses present to call James a "nigger" for the first time, Curtis testified: "I explained to you before, it came out as it came out. I was in the heat of the moment" (1T103). Curtis conceded that he had been "in the heat of the moment" previously

but had not called James by the epithet (1T103). I do not credit Curtis's denial (See finding no. 10).

James testified that Curtis also said to him in a "boisterous, aggressive . . . loud" tone, "I don't have to listen to you; you're just a nigger" (2T191). He testified that a witness, unit employee Tommy Zileski, said to Curtis: "Petey, stop it," to which Curtis replied, "No, he's just a nigger. I don't have to listen to him" (2T191). No evidence rebuts James's testimony about Curtis's remark to him and verbal exchange with Zileski. I find that Curtis expressed the racial epithet twice again before returning to work and omitted to include it in his written version of the altercation [CP-2]. I credit Forker's and James' testimonies, together with Curtis's written statement that Curtis called and referred to James as a "nigger," five times on that shift.[6/]

6. Curtis testified that the vernacular among unit employees during a shift (i.e., on the arena floor), ". . . is like [that at] a construction job" (1T28). His testimony was corroborated by other witnesses (1T126, 2T217, 2T242). Slurs regularly spoken during work hours include "cocksucker" and

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6/ Curtis first admitted on cross-examination that he called James by the racial epithet, ". . . at least two [times]" on October 10, 2012 and asked if he might have called him by that epithet more than twice, he answered: "I don't recall" (1T105).

"motherfucker" (1T95, 1T128, 2T217, 2T242). I credit Curtis's testimony.

Curtis also testified that the specified racial epithet is "regularly" spoken during work hours at the arena by unit employees, including Black employees (1T28, 1T29-1T30). He testified that he has heard it at ". . . almost every show I worked there" (1T30). On cross-examination, he testified that, ". . . everybody uses it on the floor" (1T117). Also on cross-examination, Curtis elaborated that, "[Black men] call themselves that all the time. That's their slang. I hang out with a lot of black people. I have black people in my family" (1T106). He acknowledged that speaking the epithet is ". . . not proper" and that his conduct was "wrong" (1T104, 1T107).

Judy Feltus has been employed by the Authority since 1988 and is included in the negotiations unit represented by Local 632 (1T123, 1T124). She manages the "ground crew" that Local 632 "supplies" to traveling productions (1T126). She has also been a Local 632 shop steward for 10 or more years and recording secretary for about 9 years (1T125). As shop steward, Feltus seeks to enforce the applicable collective negotiations agreement and to resolve workplace issues informally (1T125). As recording secretary, she takes notes at Local 632 executive board meetings and at general membership meetings. She also records all correspondence that Local 632 receives (1T126). Feltus and

Curtis have a personal relationship and have lived together for about 20 years (1T45, 1T166).

Feltus testified that unit employees, ". . . call each other racial epithets all the time. I mean it happens" (1T128). She testified that she has heard Black unit employees say "nigger" sometimes, ". . . when things were going wrong and they would say, 'what the - hey what are you doing?'" (1T129, 1T242).

On cross-examination, Curtis denied that he ever said the racial epithet in the workplace before October 10, 2012, and denied that he called James by the epithet on a previous occasion (1T101-1T103, 1T108). I do not credit his testimony (See finding no. 10).

Joseph Villani is a stagehand employed by the Authority and a member and business manager of Local 632 for many years (2T216). He testified that the racial epithet, "nigger" is neither spoken nor "shouted out" by unit employees on the arena floor. He conceded that slurs, "cocksucker" and "motherfucker" are "shouted out" on the arena floor (2T217). Local 632 President Kevin O'Brien has been employed as a stagehand by the Authority for many years (2T237). He also testified that he has never heard the specified racial epithet spoken at the arena. He admitted to both hearing and speaking the slurs, "cocksucker" and "motherfucker" during work hours (2T242). James was not asked

about his understanding of how often the racial epithet is spoken among unit employees.

Authority Executive Vice President and Chief Operating Officer James R. Minish, Assistant Vice President of Theatrical Events Gregory Miller and Senior Vice President of Human Resources and Labor Relations Robert Weakley are non-unit supervisors (2T23, 2T49, 2T137-138). All work in the IZOD arena but do not have immediate supervisory authority over Local 632 unit employees (2T25, 2T50, 2T139). They separately testified that an employee calling another employee the racial epithet, "nigger" is unprecedented and "egregious" (2T29, 2T38, 2T59, 2T144).

Neither Curtis nor Feltus testified about any other specific instance in which a named or unnamed unit employee called or referred to another unit employee as a "nigger." Neither one specifically identified any other occurrence of or frequency with which a Caucasian unit employee overtly called or referred to a Black unit employee as a "nigger," despite their testimonies that the racial epithet is spoken often in the workplace. Two other unit employees - Villani and O'Brien - denied that the particular racial epithet is spoken, and conceded that the specified sexual slurs are spoken often. I infer that the Authority's non-unit supervisors were likely not to have been as continuously present on the arena floor as unit employees, and find that their

testimonies on the frequency of uttered slurs and epithets do not carry equivalent weight.

7. Immediately after the verbal altercation, James walked to the foreman's office, where he told Local 632 business agent Joseph Villani and foreman (and unit employee) James Villani that, "Peter [Curtis] is calling me a 'nigger,' straight out" (2T193-2T194). He added: "I'm done with this, I'm done with this" (2T220). Never before had James heard, ". . . that verbiage, in that language, in that sound level" (2T192). James promptly left the office, returned to his work crew and said to them: "This is what racism looks and sounds like, folks; this is true ignorance and I'm not part of it" (2T194). Foreman Villani instructed representative Villani to speak with Curtis and find out, ". . . what's going on" (2T220).

Curtis told Joseph Villani that Bernard James needed to be "removed" because he wasn't, ". . . where he was supposed to be." He told Villani that he directed another electrician [Forker] to "disconnect" the power; that James approached him and ". . . they had words" (2T221). Villani asked Curtis if he had called James a "nigger," to which Curtis replied: "I did. He called me a cocksucker." Villani suggested: "If I [were] you, I would apologize" (2T221).

Sometime later, after the electrical power was turned off, Curtis said to James: "Come on outside, I'll kick your ass. You

wait until I get you outside." James replied: "Anytime you're ready; let's go outside. It does not matter to me" (2T194).

Curtis later that night approached James and said to him: "B.J., look I'm sorry, but we were both in the heat of the moment and things happen" (1T135-1T136, 2T212).[7/] James credibly testified that, "I wasn't there, in my mind, to be friends or to have another conversation with him, period. I was finished" (2T212). Curtis reported to Joseph Villani that James did not accept his apology and would not talk to him (2T221).

Joseph Villani testified that on October 10, Curtis and James ". . . admitted that they did what they did, said what they said" (2T222). I infer that James told Villani that night that he had called Curtis a "cocksucker" and "motherfucker."

8. Gregory Miller is the Authority's liaison to "clients" and has a non-supervisory working relationship with foreman James Villani (2T50). Specifically, Villani is Miller's ". . . contact when it comes down to that certain group of individuals we have working with the concerts; he reports to me" (2T51). In keeping with Authority protocol for possible disciplinary incidents concerning Local 632 unit employees, Villani phoned Miller and

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7/ Feltus saw Curtis "following" James. Joseph Villani told her that Curtis should apologize to James. She testified that, "Peter had already been trying to apologize to B.J." (1T131). I find that some time elapsed between Villani's suggestion to Curtis that he apologize to James and his repeating the same sentiment to Feltus. I find that Curtis offered his apology to James in that interim.

reported the verbal altercation between Curtis and James (2T30, 2T54).[8/] Miller testified that he told him to collect "written documentation" from each of them and from witnesses (2T108). Miller's intent was to pass the writings, ". . . up the chain," to James Minish (2T54). Miller told Minish about the altercation on October 17, 2012 (2T122). The writings were to be prepared in anticipation of a meeting among Curtis, James, Local 632 representatives and Authority representatives on October 22, 2012 (2T56). (October 22 was to have been the next date when all were likely to report to Authority premises, inasmuch as stagehand work coincides with the dates of scheduled IZOD arena events or performances. A World Wrestling Entertainment event was held at the arena on October 22, 2012 (2T56, 2T125)). Joseph Villani testified that Miller told him to collect written statements from Curtis and James and that he in turn instructed them ". . . [to] be prepared, think about what you're putting on paper" (2T222). Whether Miller instructed either Villani or both of them on the need for the writings is of little or no significance.

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8/ Forker testified that soon after she heard Curtis speak the racial epithet on October 10, Miller personally appeared at the "work site" and asked Forker ". . . what happened" and she replied truthfully (2T103). Miller testified that at the time Villani phoned him, he had left the arena (2T108). He also testified that he did not remember if Forker had told him in person about the spoken epithet and slurs on October 10, 2012 (2T120). I credit Forker's and Miller's testimonies.

9. On or about October 17, 2012, James wrote his version of the altercation in a letter to Minish without assistance from any Local 632 representative (ER-2; 2T195-2T196). James wrote that on October 10, 2012, Curtis instructed Forker to turn off certain electrical power and she complied, denoting it an "unsafe" decision. James wrote that he reprimanded Curtis, who swore at him, saying "nigger" several times. He also wrote that Curtis threatened him, challenging to "meet [him] outside."

On an unspecified date between October 10 and 22, 2012, James consulted his brother -- an attorney -- about likely discipline that would be imposed for "bad verbiage" [i.e., sexual slurs] and for saying a "racist or sexist term" (2T201). James first testified that before the October 22, 2012 meeting, Joseph Villani phoned him and asked him if he would agree to a six-day suspension as a result of the altercation and he declined (2T196). A short time later in the same examination (i.e., several transcript pages), James testified that after the October 22 meeting, Villani phoned and asked him about his willingness to accept a six-day suspension and he declined (2T201). Villani testified that he called James on the morning of October 23, 2012 and asked him if he would accept a suspension and he declined. Villani warned him that his refusal could, "make everything worse for [him]" and James replied that he understood (2T227). No facts indicate that before October 22, 2012, any Authority

representative had communicated to Villani or another Local 632 representative a possible or likely discipline of Curtis or James. Nor does it appear logical to me that discipline would be proposed before an investigation was performed. I credit James's later testimony and Villani's testimony.

Feltus assisted Curtis in writing his version of the altercation and they discussed the incident at length (1T45, 1T46). His report was completed on or about October 20, 2012 and he gave it to Joseph Villani on October 22 (CP-2; 1T32, 2T223). Curtis did not speak with Villani about possible discipline between October 10 and 22, 2012 (1T46).

10. In the early evening of Monday, October 22, 2012, Authority representative Minish convened a meeting with Curtis, James, Local 632 representatives O'Brien and Joseph Villani and Authority representative Miller (1T36, 2T197, 2T224, 2T243). Minish admitted in testimony that Miller "normally" investigates incidents among unit employees that could lead to discipline (2T30). He credibly testified that if a grievance was filed, the investigation would have been "handled" by Miller and Weakley (2T30). He testified without contradiction that the "egregious language" spoken in the October 10 altercation prompted his decision to personally, ". . . find out what happened" (2T29). Minish had read Curtis's and James's written statements beforehand (2T125).

Minish testified that the purpose of the meeting was to investigate the October 10 altercation (2T126). His testimony was corroborated by all other attendees (1T111, 2T109, 2T197, 2T224, 2T243). Minish stated to all gathered that he needed to understand what happened on October 10, 2012 (2T129). Curtis and James each spoke about the incident (1T50-1T51, 2T11, 2T129, 2T197, 2T199).

Curtis testified that he didn't remember if he recounted his version of the October 10 altercation in the meeting, though he admitted, "We [James and he] both said our peace" (1T50). Curtis admitted in the meeting that he called James by the racial epithet twice in the altercation (2T129). He testified that Minish said that James and he had been friends for fifteen years and that, "after the long hours we were working . . . it should be taken care of amongst ourselves" (1T50). On direct examination, Curtis testified:

> What [Minish] said to me was, 'I propose a one-day suspension to both of you.' And Mr. Miller said I would be informed the day I was going to be suspended. And I shook hands and I hugged Mr. James in front of Mr. O'Brien, Mr. Villani, Mr. Minish, Mr. Miller. Just like we were old friends again, And I went back to my job at ringside . . .
>
> And so, as far as I knew I was on a one-day suspension and Mr. Miller was going to let me know when the suspension was going to be. [1T37]

On cross-examination, Curtis denied that Minish said that the one-day suspension was "proposed" (1T112). He denied that Minish said that he needed to think about discipline before deciding on it. Asked if Minish said that a one-day suspension (for each of them) decision was "final," Curtis testified: "As far as I knew it was a final decision. I'm not sure if he said it or not" (1T113). Asked what he said to the assembled membership in January, 2013 in his effort to persuade it to approve proceeding to arbitration, Curtis testified in part: "When we had the meeting on [October] 22, I was under the impression I had a one-day suspension . . ." (1T74; see finding no. 19). Curtis considered the matter settled when he left the meeting (1T39). Curtis testified that he did not remember if he spoke with Miller (1T114).

James testified that he repeated facts set forth in his written statement (2T197; ER-2). He testified that he also mentioned "previous incidents" with Curtis that, ". . . led me to use the language [i.e., sexual slurs] that I used, which was not appropriate for a supervisor, but I was frustrated and I was tired" (2T197).

All meeting attendees corroborated that James recounted at least one previous occasion when Curtis called or referred to him as a "nigger" (1T109, 2T114, 2T131, 2T225, 2T245). In the October 22, 2012 meeting, James said that on Mother's Day, 2012

(May 13), a group of Local 632 unit employees (including he) was informally gathered outside and near MetLife Stadium. They were commiserating over the nearby and accidental vehicular death earlier that day of another named Local 632 unit member when Curtis, upon arriving, drove his car to a sudden stop within a very short distance of James. James reacted: "Petey, you almost hit me," to which Curtis replied: "Fuck you, nigger" and walked away (2T184-2T185). James did not report the incident to the Authority or Local 632 (2T114, 2T131, 2T185).

Curtis testified that he denied calling James by the epithet both in the October 22 meeting and on Mother's Day, 2012 (1T102, 1T109). Curtis specifically recalled the incident, testifying that an erected steel barrier situated between his car and James would have stopped his car's forward motion, preventing any bodily injury to James. Curtis admitted replying to James's spontaneous protest at the time, saying "I wasn't even close" (i.e., to hitting him) and that he was very upset by the death of his friend (1T102).

I credit James's testimony that Curtis called him a "nigger" on Mother's Day, 2012. I find that James would recall the incident because a fellow unit employee died suddenly and nearby in a car accident on that holiday Sunday; because Curtis coincidentally drove his car to a sudden stop within a short distance of James (that a parking lot barrier prevented Curtis's

car from hitting James would scarcely lessen his immediate fright); and because of the epithet. I also find that James's excited utterance on October 10 (immediately after reporting Curtis's admitted epithet to James Villani), "I'm done with this; I'm done with this" credibly alludes to and corroborates his frustration with previous occasions when Curtis had called him "nigger" and his conduct was neither reported nor censored.

I do not credit Curtis's denials because I have previously not credited his denial that he referred to James by the epithet to electrician Forker on October 10; that he was equivocal about the number of times he spoke it on October 10; and find that, similar to his emotional state on October 10, 2012, Curtis was ". . . in the heat of the moment" on Mother's Day, 2012. Accordingly, I do not credit Curtis's testimony that he never called or referred to James as a "nigger" before October 10, 2012 (see finding no. 6).[9/] I also do not credit his denial that he called James that epithet on Mother's Day, 2012.

James also testified that Minish said that suspensions were "possible" and "repercussions" likely for both he and Curtis

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9/ James testified about another instance on an unspecified date when Curtis said to him while they were outside smoking cigarettes that ". . . somebody [an unspecified person] is a nigger but you're not a nigger" (2T186). The record is not clear if James mentioned that asserted instance in the October 22, 2012 meeting.

(2T200). He denied that an agreement was achieved on any discipline (2T200). I credit his testimony.

Near the end of the meeting, Minish spoke about possible [disciplinary] suspensions for both employees (2T33-2T34, 2T132). He testified:

> I said this is a serious incident. There will be some form of punishment that will have to be doled out and that the best case scenario, in my mind, may be what I said earlier [i.e., 1T34], that we're looking at probably - at least, one-day suspension for Mr. James and three days for Mr. Curtis. And at the end of that discussion, I then told them that it's something I needed to think about. You know, this was the first I was hearing this information. I had read the information, now we're hearing it from Mr. Curtis and Mr. James in their own words. Really put a whole different light on it to me.
>
> And I said to them that, you know, I needed to think this through the weekend, and we would get back to them. [2T132-2T133]

Minish specifically denied that any agreement was reached regarding discipline that would be imposed on Curtis (2T133). Minish shook hands with Curtis and James and Curtis and James shook hands with each other.

At the time of the meeting, Minish and Miller knew that in the previous month - September, 2012 - foreman and unit employee James Villani was suspended for eight days, or "events" (2T34, 2T57, 2T61; CP-5). Villani was suspended for calling and/or referring to a Jewish Local 632 unit employee as "rabbi,"

"Hebenstein" and "moehl" in February, 2012 at the IZOD Center (2T172-2T174). The suspension, including a "last chance agreement," was imposed by Authority Senior Vice President of Human Resources and Labor Relations Robert Weakley (2T153-2T154; CP-5). Weakley testified without contradiction that allegations of James Villani's conduct were brought to his attention about five months after the occurrence by a unit employee who, ". . . had disciplinary issues himself." He credibly testified that his investigation revealed that only a portion of the allegations was sustainable, rendering a discipline of termination a "weak" case if Local 632 grieved the matter to arbitration (2T154). Feltus's recorded notes from and testimony about the September 10, 2012 Local 632 executive board and general membership meetings provide that Local 632 approved Villani's 8-day or "event" suspension imposed by Weakley (CP-5; UR-11; 1T213-1T214).

The executive board meeting minutes of September 10, 2012 includes a one-page "full and final settlement" of Villani's ". . . violati[on of] Authority policy and work rules by using racial/ethnic epithets directed toward co-workers." The document, signed by the principals, sets forth the period and terms of the suspension, including a "last chance" provision (CP-5). I infer that the reference to "work rules" alludes to the 2009 and 2010 Authority versions issued by Weakley (ER-1; CP-7; finding no. 14).

Feltus's notes also provide that Local 632 Counsel appeared before and , ". . . addressed the body in regards to discrimination and racial slurs at the workplace. The [Authority] and Local 632 received a Title IX, EEOC complaint" (UR-11). Counsel said to the membership: "Ethnic humor cannot be part of the workplace." The notes also provide in part that Local 632 had expelled unit employee Michael Katz from membership. O'Brien testified without contradiction that Katz had claimed that foreman James Villani directed anti-Semetic remarks to him (2T260). Feltus's notes provide that Local 632 ". . . conducted its own investigation" of allegations against Villani (UR-11). I infer that that investigation included the participation of Local 632 Counsel.

The record is not clear whether Minish and Miller were aware of all or most of the circumstances of Villani's suspension. I infer that they knew of the specific slurs that Villani was found to have said.

Joseph Villani testified that Minish said in the meeting:

> 'We can resolve this here. I will give you guys time to think about this. I'm going to put something on the table.' And I believe it was a one-day suspension for Mr. James; it was a three-day suspension for Peter.
>
> He told them both to think about it. 'We're not going to make a decision today, and understand one thing - if it goes past my office, it's going to be a lot worse for both of you guys, so think about it.' [2T225-2T226]

Asked on direct examination if he believed that the matter was resolved at the end of the October 22, 2012 meeting, Villani answered: "I wish it was, but it wasn't" (2T226). On cross-examination, he concurred that Minish said that Curtis's discipline had not been determined, finally (2T235).

Local 632 President Kevin O'Brien testified that after James and Curtis spoke in the meeting, Minish said: "We have to come up with some sort of resolution here, to figure out where we have to go" (2T246). He testified that Minish said at the end of the meeting:

> 'I would like to recommend - go upstairs with a recommendation of one day and two days but I'm going to give you guys a chance to think about this. Don't take too long because if we can't settle this amongst ourselves as gentlemen, then it's going to have to go upstairs and it's going to be worse than this but that's what I would like to recommend.' But I don't think there was a resolution. [2T246]

I infer that "upstairs" refers to a higher Authority representative, specifically, Weakley.

Authority representative Miller testified that Minish mentioned the prospect of suspensions but their duration was not "set in stone" (2T56-2T57). Asked if "potential discipline" was discussed in the meeting, Miller testified: "There were scenarios thrown around there but nothing was affirmed. It was just - there was this and that" (2T115).

I find that in the October 22, 2012 meeting, Minish suggested or proposed three-day and one-day disciplinary suspensions for Curtis and James, respectively. All witnesses to the meeting except Curtis credibly testified that Minish expressly reserved any final decision on penalties, implicitly conveying that the decision would be his to render, provided that James and Curtis agreed to the proposed penalties. Minish admitted on direct examination however, that Weakley has sole authority to issue discipline exceeding a reprimand (2T134). Witness testimonies differing on the specific duration of the suspensions are important only insofar as Minish (and by extension, the Authority) assessed Curtis's conduct as deserving greater punishment than James's. (Minish was not examined about comparing or reconciling his proposal with the eight-day suspension imposed on James Villani - of which he was aware - about one month earlier). Only Curtis testified that the penalty to be imposed on him (a one-day suspension) was to be no greater than the penalty to be imposed on James.

I do not credit Curtis's testimony that the parties reached an agreement on discipline for the October 10 altercation in the October 22 meeting. Curtis's testimony that an agreement was achieved is equivocal. On direct examination, he testified that Minish "proposed" one-day suspensions, only to retract that characterization on cross-examination. Asked on cross-

examination if Minish said in the meeting that the one-day suspension(s) was a "final" decision, Curtis replied: "As far as I knew it was a final decision; I'm not sure if he said it or not" (1T113). He also admitted telling the membership in January, 2013 that he was ". . . under the impression" that the parties had agreed to one-day suspensions for both he and James. Asked if Minish said that he needed to "think about it further before rendering a decision," Curtis testified:

> No, I wouldn't have let him - as far as shaking the man's hand and hugging the guy [James] again and just saying, 'Ok, this is it? It's over?' I thought we were done. I thought it was a done deal. And I basically said the same thing, 'Thank you very much' and I walked out the room. [1T113]

These answers are also evasive, non-responsive and predominantly self-serving. The circumstance described in Curtis's last response (and generally corroborated by others) demonstrates only a gesture towards reconciliation. I find indicative of proposed suspensions that neither Local 632 President O'Brien nor business agent Villani said, wrote or caused to have written anything in or after the meeting confirming an extant "agreement," an otherwise unlikely omission for a majority representative ostensibly achieving a (desirable) disposition of a disciplinary investigation of two unit employees. (Contrast the "full and final settlement" of James Villani's violation of work rules in finding no. 10). I have not credited Curtis's testimony

regarding two or more material facts (i.e., whether he called James by the racial epithet on occasion(s) other than that to which he admits) and I decline to credit his testimony regarding the formation of an "agreement," the "finality" of any determination and equal duration of the suspensions.

11. Soon after the meeting ended on October 22, 2012, Feltus spoke with Joseph Villani (1T158, 2T226). Feltus testified that Villani told her that the matter appeared to be resolved and that Curtis received a one day suspension on an undetermined date (1T159, 1T243). Villani testified that he told Feltus that he believed the matter, ". . . would go away." He testified that he did not tell her that it had been settled (2T226-2T227). I have found that Minish proposed a three-day suspension for Curtis and that Villani, among others, corroborated that fact in his testimony about the October 22 meeting. I credit Villani's testimony about his brief discussion with Feltus after that meeting.

Miller credibly testified that immediately or soon after the October 22 meeting, Feltus entered the office and "thanked me," to which he replied: "Hopefully, things will work out" (2T66). I do not infer that Miller's response confirms that a final disposition had been achieved.

12. On October 23, 2012, Villani phoned James and asked him if he would accept the proposed suspension and he declined

(2T196, 2T206, 2T227). Villani credibly testified about James's reply:

> He said he could not accept - he says - what he thought the severity of it was, they would almost have the same sort of punishment for this. He felt that it was still a very unjust cause to him and he was willing to go forward with it. [2T227]

James admitted that he told Villani of his refusal to accept the proposed "suspension" (2T196, 2T206).

Minish testified that, ". . . probably a few days" after the October 22 meeting, he asked James ". . . how he was doing" to which he replied that he was "very uncomfortable with the whole situation" (2T44). I infer that Minish understood that James was not agreeable to the suspension proposed in the October 22 meeting. James testified that he did not speak with any Authority representative after his conversation with Villani (2T207). I credit Minish's testimony as an admission. I do not credit James's denial.

In or around this same period, Villani phoned Curtis and advised him that James ". . . was not happy. He's going to pursue this [matter] further" (1T51). Curtis testified that he replied: "I thought we had a settlement in the office; that Mr. Minish was going to give us a one-day suspension and Mr. Miller was going to determine the day I was going to be suspended." Curtis testified that Villani replied: "I'll let you know what's going on" (1T51). In the absence of any conflicting facts, I

credit Curtis's testimony. Villani also informed Feltus that James was "not happy" with the proposed agreement (1T159).

13. On two unspecified date(s) between October 23 and November 5, 2012, Minish spoke with Authority Senior Vice-President of Human Resources and Labor Relations Weakley about Curtis and James (2T44, 2T45, 2T141-2T143). In their first meeting or discussion, Minish told Weakley that in the October 22 meeting, the two employees spoke about the October 10 altercation; that the meeting was "upsetting" and "emotional" and that he "loosely" discussed "possible remedies" (2T143). Asked by Charging Party Counsel if he told Weakley that James had told him of being "very uncomfortable with the whole [discipline] situation," Minish testified: "I don't recall" (2T45). Weakley testified that he did not receive any direct or indirect communication from James between October 22 through November 5, 2012 (2T165). James testified that after October 22, he called Weakley's office, and believed that they spoke but ". . . didn't think it was in reference to Mr. Curtis. I think it was more in terms of me" (2T211). I infer that James meant that he spoke with Weakley about his possible discipline. I do not credit Minish's and Weakley's testimonies.

In the October 22 meeting, Minish advised Curtis and James to seriously consider his proposed disciplines over some forthcoming period. James's decision on the proposal mattered to

Minish because he called James a few days later and inquired about it. Later, Minish admittedly told Weakley about Curtis's and James's versions of the altercation and their respective sentiments about it in the October 22 meeting. Considering that reportage and the evident significance of James's opinion to Minish, I must also believe that Minish both told and remembered that he told Weakley that James was not agreeable to his proposed suspension. I consider James's testimony about his phone calls to and conversation with Weakley an admission consistent with this finding.

Weakley also read the two employees' written versions of the altercation (2T151-2T142; ER-2; CP-2). Weakley has overall responsibility for human resources, contract administration and discipline at the Authority (2T139).

14. On February 3, 2009, Weakley wrote an Authority, "Disciplinary Policy - Unionized Employees," including "work rules," a two-page table of infractions with various penalties and (frequently) ascending penalties for each occurrence and recurrence (2T139; ER-1, ER-3). The document's purpose was to "centralize" the labor relations function and to ensure fair, equitable treatment of unit employees in compliance with collective negotiations agreements (2T147-2T148). Local 632 President O'Brien received the policy on or about February 7, 2009, together with a cover letter advising that the

implementation date would be March 2, 2009 (ER-3; UR-8; 2T239). O'Brien admitted conferring with Local 632 Counsel and that the rules set forth did not require negotiations (2T239).

O'Brien testified that Joseph Villani "read" and "discussed" the work rules at the general membership meeting on February 7, 2009 (2T241).[10/] He testified that Villani informed the membership that ". . . these rules were being instituted" (2T241). Local 632 recording secretary Feltus's handwritten notes of the February 7, 2009 general membership meeting provide in part: "Joe Villani discusses the possible drug testing/alcohol testing at the [Authority] and the work rules" (UR-9; 1T201). An entry to the substantially same effect appears in her typed, conformed notes of that meeting and of that day's earlier Local 632 executive board meeting (UR-10; UR-7).

Feltus testified that on February 7, 2009, the work rules were not discussed in Local 632's executive board meeting and were ". . . kind of thrown aside" in the general membership meeting (1T200, 1T202). Characterizing her written meeting notes, Feltus testified: "And what [Joseph Villani] said was, 'Since we're not considering the drug testing, we're not considering the rules; it's done by our collective bargaining agreement.' That's as far as it got" (1T201).

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10/ The transcript provides that counsel for Local 632 said that the meeting occurred on December 7, 2009 (2T241). I find that he intended to say February 7, 2009.

Feltus had the same substantive response to the question of Local 632's receipt of the Authority's 2005 "Workplace Violence Policy" that provides "zero tolerance" for acts of violence and ". . . any conduct that the individual should have reasonably perceived would provoke violence by another individual." Such conduct ". . . warrants either an immediate suspension without pay or discharge from [Authority] employment, depending on the degree of the violation and the particular circumstances involved" (CP-63; 1T146).

Feltus's testimony about Villani's remarks about the work rules in the February 7, 2009 general membership meeting provides at best, a cropped meaning of his "discussing" them, as she memorialized that fact contemporaneously with the meetings. (Considering her testimony, I believe that Feltus would have more accurately noted in the minutes that Villani did not discuss the work rules). Her testimony is also inconsistent with O'Brien's testimony about Villani's conduct in the general membership meeting and his belief that reasonable work rules (as opposed to drug and alcohol testing procedures) did not have to be negotiated. No facts suggest that Local 632 communicated to the Authority its opposition to any or all of the work rules set forth in the February, 2009 document.

The policy provides that, "Labor Relations" must be notified of all disciplinary actions. (In the absence of any evidence to

the contrary, I infer that in the context of this case, "Labor Relations" means Weakley). It specifies:

> Any disciplinary action beyond a written reprimand should be approved by Labor Relations. In the event Labor Relations is unavailable, they must be notified as soon as possible. [ER-1, ER-3]

The table of infractions under the category, "personal conduct" prescribes "removal" [i.e., termination] in the first instance of "racial epithet" and a sliding scale from "reprimand" to "suspension 1-15 days" to "removal" in the first instance of "conduct unbecoming" (ER-1, ER-3). The policy also provides that, ". . . disciplinary action shall normally be progressive" [i.e., verbal warning, written reprimand, suspension and removal]. It cautions: "Any breach of discipline can result in removal regardless of whether there were previous disciplinary actions concerning the same type of breach, when the totality of circumstances indicate a very serious breach has occurred" (ER-1, ER-3).

The Authority did not distribute copies of the February 2009 "work rules" to Local 632 unit employees (2T163). A copy was posted in the Authority human resources department on the mezzanine level at the IZOD Center (2T42). Curtis was not provided the 2009 work rules until 2013 and did not see them posted at the Authority's human resources office (1T115). He was unaware that the 2009 work rules specifically provided that the

first instance of an employee calling another by a racial epithet could result in termination (1T117-1T118). On and before October 10, 2012, typed Authority "work rules" approved in 2003 were posted adjacent to a time clock in the IZOD arena and were reviewable daily by Local 632 unit employees (2T41). Curtis saw those work rules while employed (1T116). The 2003 work rules did not include "racial epithet" as an infraction (CP-1). An April, 2010 version of "Employee Discipline Policy - Union Employees" also sets forth "work rules," prescribing the same penalties for "racial epithets" and "conduct unbecoming" appearing in the February, 2009 version (CP-7). Local 632 was provided a copy at the time of its issuance (1T149).

15. On or about November 5, 2012, Weakley terminated Curtis's employment, bypassing interim steps of the grievance procedure, ". . . because the matter was clear. The matter was already up at my desk, so there was no sense to go back through a step 1 grievance. You don't do that in matters of this gravity" (2T143-2T144). Asked on direct examination to explain his reason(s) for terminating Curtis's employment, Weakley testified:

> [T]his was conduct that was just so egregious; it was hate speech . . . And it was directed at a co-worker in front of a large group of people in a hateful and spiteful manner; and not only that -- there was an outside group there, a production group, who heard it . . . That word harkens back to a very dark chapter in our country's history. It conjures up notions of segregation, of violence, of slavery, of

> dehumanization and we were not going to put up with that. [2T144]

Weakley testified that the Authority had "just cause" to terminate Curtis's employment by both an "implicit rule" -- anyone would know that that language is unacceptable; and an "explicit rule" -- an admission of the violation and a penalty that was applied across the Authority (2T145). Weakley reviewed the 2009 work rules in considering discipline for Curtis (2T149). He also considered an earlier instance, ". . . in which an employee was terminated for such language" (2T145).[11/] On November 5, Weakley issued a letter and "staff disciplinary notice" to Curtis by certified mail advising that he, ". . . ha[s] been terminated from [his] position as a stagehand with the [Authority] as a result of [his] use of racial epithets directed toward a co-worker on October 10, 2012." The notice specifies that Curtis said, "Make me, nigger" twice toward co-worker Bernard James, after a "verbal altercation" (CP-3; 2T152).

Feltus testified that in her opinion, the October 10, 2012 altercation resulted in everyone (i.e., the Authority and Local

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11/ The reference is to unit employee, "S.H.," whom Weakley terminated from employment in 2009, and the grievance arbitration award, issued in 2011, denying the grievance contesting that termination (UR-15). In assessing the credibility of witnesses, including the grievant's, the Arbitrator determined that the grievant had directed anti-Semitic and homophobic slurs at a fellow unit employee. The Arbitrator did not credit the grievant's denials of the allegations.

632) ". . . walking on eggshells." She meant that race played a factor in how Curtis was disciplined, specifically that, ". . . everybody was like, oh, he's Black, oh my God, we have to handle this because it could blow up in our faces" (1T170, 2T19). By the latter phrase, Feltus meant that the respondents were ". . . nervous that they would be sued" (2T19). No specific evidence corroborates Feltus's opinion, though the glaring discrepancy in the duration of punishments in Minish's October 22, 2012 proposal and Weakley's determinations on November 5, 2012 could engender such speculation (but not confirm it as a fact). Considering the weight of evidence and reasonable inferences, I find that Weakley's testimony about his reasons for firing Curtis was unrebutted; I credit it.

On the same date, Weakley issued a letter and "staff disciplinary notice" to James by certified mail, advising of his suspension for "eight events" for "conduct unbecoming" in his "verbal confrontation with Peter Curtis." Weakley's letter directs James to contact Authority representative Miller for the "specific [suspension] dates" (Minish and Weakley discussed how the suspension would be implemented (2T45-2T46); I infer that that was the topic of their second conversation).

The letter advises James that his conduct was "highly inappropriate and totally unacceptable" and warned that he will be "subject to termination" if he again engages in similar

behavior (CP-8; 2T151). The notice specifies that he is being suspended for saying, “shut the fuck up” and “shut the fuck up, cocksucker” to Curtis on October 10, 2012 (CP-8).

16. On November 7, 2012, Curtis wrote a letter to Weakley, with a copy to Miller, advising of his notification (from Local 632 business manager Villani) that he was terminated from employment at the Authority. Curtis wrote that he intends to grieve the firing, though he had not yet received “formal notice” of it. The letter requests a thirty day extension of time in which to respond to his termination, together with all relevant, “. . . statements, documents and correspondence” (CP-4).

Curtis received Weakley’s November 5 letter and notice on or about November 12, 2013 (1T39; CP-3). He promptly spoke with Villani, who told him, “. . . there was no grievance. This is a done deal” (1T52). Villani also told Curtis that he intends to write a letter to Weakley, seeking to lessen the penalty to a suspension (1T53).

On November 17, 2012, Villani wrote to Weakley, complaining that, “. . . the action of termination is much too harsh.” Noting that Curtis has been employed by the Authority since 1984 and, “. . . has done more than an adequate job for all [of his] assignments,” Villani wrote that Curtis’s behavior “should not be tolerated.” He acknowledged that, “. . . sometimes tempers flare amongst brother and sister stagehands” and that Curtis’s behavior

(to his knowledge) has not been "pervasive." Villani requested "leniency" in punishment. Finally, he wrote of his appreciation for Weakley's ". . . consideration of this [step 2] grievance" (UR-1).

Villani consulted Curtis and Feltus before sending the letter, about which Feltus conceded in testimony, "[Villani] was trying to help" (1T226). Neither Curtis nor Feltus asked Villani to write that a "settlement" was achieved in the October 22, 2012 meeting. Nor did they ask him to write about "work rules" or unfair treatment, compared with the 8-event suspension meted out to James Villani in September, 2012 (2T228, 2T229). They approved Villani's letter to Weakley (1T56, 2T229). Villani testified that he "assumed" that his letter expressed a step 2 grievance because he had also assumed that the October 22, 2012 meeting was a step 1 grievance (2T229-2T230). I credit his testimony.

On November 28, 2012, Weakley wrote a letter to Joseph Villani, acknowledging his written appeal and denying it. Weakley wrote:

> [T]he intentional use of racial epithets on two occasions, as admitted by Mr. Curtis, was a blatant violation of our work rules and generally accepted standards of decent behavior and this type of conduct cannot be condoned under any circumstance. The grievance is therefore denied. [UR-2]

Villani forwarded the letter to Curtis (1T59).

17. On December 3, 2012, Counsel for Local 632 spoke to Local 632 leadership, including Feltus, at a regularly scheduled executive board meeting about the Curtis termination and compared it with James Villani's eight-event suspension in the previous September (1T228-1T230, 2T248-2T250; UR-12). O'Brien had requested Counsel's attendance (2T248). Counsel had previously addressed the executive board in person on other select matters, including Villani's suspension (2T248) (see finding no. 10).

Feltus recorded the minutes of the December 3 meeting. Under the heading, "Unfinished Business," Feltus wrote:

> Ray [Counsel for Local 632] has come to explain about discharge for just cause, what constitutes a hostile work environment.
>
> The response from the [Authority] regarding their work rules violation;
>
> There is a question about what "step" in the grievance process we are in
>
> Have we lost a "step?"
>
> There is reference made that the only posted work rules that have been accepted by the body are 2003 work rules that are posted in the IZOD arena.
>
> [Counsel for Local 632]'s advice is to raise the 'work rule violation issue' and ask what work rule was violated. [UR-12]

Another notation provides: "Judy Feltus wishes to thank the executive board for allowing the time spent with [Local 632 Counsel] with regards to Peter Curtis's grievance" (UR-12). Feltus testified that Counsel discussed that "grievance" and

specifically, ". . . use of the word [i.e., "nigger"]" (1T228, 1T229).

On December 4, 2012, Villani sent a memorandum email to Weakley on the matter of "Peter Curtis step 3 grievance." Villani wrote that the "4/14/2003" work rules are posted, ". . . in the glass case in front of the operations office for the stagehands to follow." Villani wrote that those rules omit one ". . . call[ing] for termination for Mr. Curtis's actions." I infer that Villani was referring to an omission of a rule against "racial epithet." Villani wrote that Local 632 requests that his "termination be removed and Mr. Curtis again be able to work at the Authority" (UR-3).

On December 5, 2012, Weakley wrote a reply to Villani, advising that on February 4, 2009, he sent a letter to President O'Brien, together with copies of "revised" Authority work rules. He noted that those rules provide that ". . . the use of racial epithets results in termination." He enclosed a copy of the letter sent to O'Brien (UR-4; ER-3; 2T158).

On December 17, 2012, O'Brien sent a letter to Weakley, acknowledging receipt of his December 5 letter and requesting an extension of time (until January 14, 2013) for ". . . processing this [Curtis] grievance." O'Brien wrote that on January 14, 2013, Local 632's executive board and general membership will meet to "deliberate" whether Curtis's grievance will be forwarded

to arbitration [i.e., step four of Article 9 of the collective negotiations agreement, C-5] (ER-4).

On December 18, 2012, Local 632 Counsel wrote a letter to President O'Brien, opining that, ". . . an arbitrator would uphold the discharge of the grievant Peter Curtis" and recommending that the matter not proceed to arbitration (UR-5). The letter is incorporated in these facts as "Appendix A."

On December 19, 2012, Weakley sent a letter to O'Brien, agreeing to an extension of time until January 15, 2013 for Local 632's determination on the continued processing of the Curtis grievance (ER-5).

18. On or around September 19, 2007, Authority representative Miller issued a "verbal warning" to Curtis for "unsatisfactory" job performance two days earlier during a "Jennifer Lopez rehearsal" (UR-6; 1T83-1T86). Curtis testified that he denied the substantive allegation of fact in that matter and admitted that Local 632 representative Joseph Villani assisted him in that dispute (1T86).

In or around September, 2008, a Local 632 representative assisted Curtis in another matter that was subject to discipline. A disposition resulted in (eventual) expungement of a record of the incident from Curtis's personnel file (1T87).

At the time of Hearing in this case, Local 632 represented Curtis in a grievance (proceeding to arbitration) contesting his

discharge from employment at MetLife Stadium. The disputed incident concerns sexual harassment that allegedly occurred in Spring, 2014 (2T259).

19. On January 14, 2013, Feltus attended and recorded the minutes of a Local 632 executive board meeting, except for the period she, ". . . recused herself and exited the room" while the board, under O'Brien's auspices, considered pursuing a grievance to arbitration contesting Curtis's termination (UR-13; 1T231, 2T252). Listed among "correspondences" received are those, ". . . to/from attorney Ray Heineman regarding Peter Curtis termination from the [Authority];" from Peter Curtis regarding [Authority] termination; "to/from" Robert Weakley, Human Resources Director regarding Peter Curtis termination; and [Authority] work rules of 1/14/13 for "distribution" (UR-13).

O'Brien credibly testified that in Feltus's absence, the board discussed Local 632 Counsel's December 18 letter [UR-5]. The board dismissed the "work rules" contention (i.e., that "racial epithet" was not among the work rules posted) because Weakley's December 5 letter ". . . spelled out specifically what work rule was violated" (2T253, 2T254). The executive board voted unanimously (about 9 voters, as O'Brien abstained) not to proceed to arbitration to contest Curtis's termination and to recommend that action to the general membership (2T254). After the board completed all of its "business" over almost two hours,

it adjourned and its members walked "across the street" to convene the general membership meeting (UR-13; 1T233).

O'Brien presided over the general membership meeting and Feltus recorded the minutes (1T233, 2T203, 2T233). About 45 to 50 members attended the meeting, including Curtis and James (1T173, 2T203, 2T233; CP-9). Many members pay their annual dues at the first meeting of the calendar year (1T173). Among the written "communications" recorded were Local 632 Counsel's December 18 letter [UR-5]; correspondence to and from Weakley regarding Curtis's termination; and unspecified "correspondence" from Curtis (CP-9). Feltus credibly testified that copies of three documents were available for members to read at the meeting; (1) March, 2005 Authority "Workplace Violence Policy" (prohibiting threats or acts of violence by Authority employees, including, "any conduct that the individual should have reasonably perceived would provoke violence by another individual:" punishment for any proscribed conduct included "immediate suspension without pay or discharge)" (CP-6); (2) the February 2009 Authority Disciplinary Policy (ER-1); and (3) the updated policy from April, 2010 (CP-7).

O'Brien told the membership that the executive board voted against proceeding to arbitration contesting Curtis's termination (1T69, 2T233). He read Local 632 Counsel's December 18 letter to the membership and did not comment about it (1T70, 1T174, 2T203,

2T255; UR-5). O'Brien credibly testified that members openly discussed whether they should or should not rely on advice of Counsel (2T255).

On direct examination, Feltus was asked if O'Brien said anything, ". . . besides reading the [December 18 Local 632 Counsel] letter" and she answered, "Not that I recall." She was immediately asked if he ". . . expressed an opinion as to whether this was a winnable situation," to which she testified that O'Brien said to the membership that Local 632 Counsel told him, ". . . that this was an unwinnable situation" (1T174). O'Brien testified that he did not tell the membership that the case was "unwinnable" and did not state any opinion (2T255). I credit O'Brien's denial. O'Brien abstained from voting on the matter in the executive board session, in apparent recognition that his approval or disapproval might unduly sway the votes of other board members. I fail to see a consistent logic (or a demonstrated inconsistency) in his opining later to the general membership, before whom his views might carry even greater authoritativeness. I am also not inclined to credit Feltus's testimony, the source of which was embedded in Charging Party Counsel's leading question. Even if I credit Feltus's testimony about O'Brien's remark, I find that his characterization is consistent with the overall text and recommendation set forth in Local 632 Counsel's December 18 letter (UR-5).

Curtis addressed the membership, apologizing to James, telling all that he spoke the racial epithet, ". . . in the heat of the moment." Curtis conceded in his testimony that he didn't explain to the membership what happened on October 10, 2012: "They already knew what happened. They didn't have to be told what happened" (1T73). He also immediately conceded that the reason the membership knew what happened was that about 60 of them were present at the Jonas Brothers' load out on October 10, 2012 (1T73). He asked the attendees for their support in recognition of his upstanding membership of more than 20 years (1T72). He said that termination was unfair because:

> [W]hen we had the meeting on [October] 22, I was under the impression that I had a one-day suspension and Mr. Miller was going to determine the day of my suspension. The same thing he had said to Mr. Bernard James. After we shook hands, I hugged the gentleman. And then we went on. [1T74]

Curtis admitted in testimony that by January 14, 2013, "most of the membership" was already aware of an "agreement" for his "one-day" suspension (1T78). Curtis did not tell the membership that termination was unfair because the 2009 work rules were not properly posted. He did not say that termination was unfair because James Villani received an 8-day or event suspension (1T74, 1T79). No facts suggest that any limitation of time or content was imposed on any speaker in this general membership meeting.

Feltus also spoke to the general membership, reiterating that things are (unfortunately) said, “in the heat of the moment” and soliciting an opportunity to proceed to arbitration (2T257). Feltus did not speak to the membership about work rules, James Villani’s discipline compared with Curtis’s, and a resolution achieved in the October 22 meeting (1T241, 2T257).

James testified that he did not address the membership. He also testified that he didn’t “recall” that Curtis spoke to the membership (2T203). Joseph Villani testified that James spoke to the membership, mostly repeating his remarks in the October 22 meeting and saying that, “. . . he was not looking for anyone to lose their job” (2T234). Considering that James did not recall that Curtis spoke to the membership (a fact corroborated by all other witnesses attending that meeting), I have reason to doubt his recollection of whether he spoke. I credit Villani’s testimony.

O’Brien presided over a secret ballot vote among the attending membership on whether to proceed to arbitration contesting Curtis’s termination from the Authority. O’Brien did not vote (2T257). The tally of results was that 23 opposed, 19 voted in favor of proceeding and 1 abstained (CP-9). Asked on direct examination why Local 632 did not take Curtis’s termination to arbitration, O’Brien credibly answered: “Because the membership voted, ‘no.’ The membership accepted what Counsel

said in the letter and they formed - they basically formed their opinion on that letter" (2T263).

ANALYSIS

Section 5.3 of the Act empowers an employee representative to represent employees in the negotiation and administration of a collective negotiations agreement. With that power comes the duty to represent all unit employees fairly in both contexts. The standards in the private sector for determining a union's compliance with the duty of fair representation were set forth in Vaca v. Sipes, 386 U.S. 171 (1967). Under Vaca, a breach of the statutory duty of fair representation occurs only when a union's conduct towards a member of the negotiations unit is arbitrary, discriminatory or in bad faith. Id., at 191. That standard has been adopted in our public sector. Saginario v. Attorney General, 87 N.J. 480 (1981); see also, Lullo v. International Ass'n of Fire Fighters, 55 N.J. 409 (1970); D'Arrigo v. New Jersey State Bd. of Mediation, 119 N.J. 74 (1990); Edison Tp. Ed. Assn. (Ziznewski), P.E.R.C. No. 2014-86, 41 NJPER 49 (¶13 2014).

A union is allowed a wide range of reasonableness in servicing its members. A majority representative must evaluate an employee's request to arbitrate or otherwise appeal discipline on the merits and decide, in good faith, whether it believes that the employee's claim has merit. PBA Local 187, P.E.R.C. No. 2005-78, 31 NJPER 173 (¶70 2005), citing Ford Motor Co. v.

Huffman, 345 U.S. 330, 337-338 (1953). The majority representative must exercise reasonable care and diligence in investigating, processing and presenting grievances, but proof of negligence, standing alone, does not establish a breach of the duty. OPEIU Local 153 (Johnstone), P.E.R.C. No.84-60, 10 NJPER 12 (¶15007 1983). The duty of fair representation does not require a union to arbitrate every grievance. Passaic Cty. Support Staff Assn. (Ernst), P.E.R.C. No. 2015-23 43 NJPER 203 (¶69 2014); Carteret Ed. Assn. (Radwan), P.E.R.C. No. 97-146, 23 NJPER 390 (¶28177 1997); Camden Cty. College, P.E.R.C. No. 88-28, 13 NJPER 755 (¶18285 1987).

Curtis contends that "considerable evidence" demonstrates that Local 632, ". . . discriminated against [him] in its handling of his grievance and exercised bad faith in its presentation of the decision to arbitrate to its membership" (post-hearing brief at 30). He argues that James Villani had greater access to the grievance process; that Local 632 did not ". . . vigorously pursue a settlement [and] allowed [James] to interfere in the settlement that the Authority had either proposed or had already agreed to" (brief at 30). Curtis argues that Local 632 Counsel recommended against arbitration without speaking to him or Feltus about "mitigating facts" that would reduce the discharge to a lesser discipline in arbitration.

Local 632 has assertedly demonstrated bad faith by ". . . wanting to placate or curry favor with James, its only African-American with any kind of senior status and James made clear he wanted Curtis fired;" and by ". . . downplaying the abysmal behavior of James Villani, by making the Curtis case about race instead of preventing unlawful harassment of persons in any protected class in the workplace" (brief at 31).

Curtis asserts that Local 632 Counsel "misrepresented cases" and failed to describe, ". . . numerous mitigating factors in Curtis's case that were known to him." He contends that Local 632 and the Authority ". . . colluded to short circuit the grievance process" at his expense.

I disagree that the record demonstrates that Local 632 violated its duty of fair representation to Curtis. Contrary to a substantive allegation in the Complaint, I find that on October 22, 2012, the Authority did not ". . . render a decision" and the parties did not reach an "agreement" on a discipline of Curtis for his October 10 verbal altercation with James (finding no. 10). See, e.g., Borough of Fairlawn, H.E. No. 91-33, 17 NJPER 201 (¶22085 1991), adopted P.E.R.C. No. 91-102, 17 NJPER 262 (¶22122 1991) (circumstantial evidence not establishing a "meeting of the minds"). The adduced and credited testimony shows that Authority representative Minish proposed relatively minor disciplinary suspensions of Curtis and James, expressly

deferring a final determination to an impending but unspecified date. The only circumstantial evidence consistent with an agreement -- handshaking among the principals at the meeting's end -- exhibited merely a gesture of personal reconciliation.

The modest suspensions proposed were irreconcilable with the 2009 termination of unit employee "S.H." for directing anti-Semitic and homophobic slurs to a Jewish unit employee (and whose grievance contesting that termination was denied in a 2011 grievance arbitration award) and with an eight-day or "event" suspension Senior Vice President Weakley imposed on James Villani in September, 2012. The proposal was also irreconcilable with Curtis's termination and James's eight-day or "event" suspension, both imposed on November 5, 2012.

On October 22, 2012, Minish responded indeterminately at an unspecified early step in the contractual grievance procedure.[12/] Weakley's subsequent determinations on the "unresolved" matters comport with the authority reserved to him (specifically, to the person holding his title) in both the contracual grievance procedure and his February, 2009 "Disciplinary Policy - Unionized

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12/ An employer's refusal to respond to a grievance or its improper treatment of one at an intermediate step of a contractual grievance procedure is not an unfair practice, provided that the procedure is "self-executing" and culminates in binding arbitration. NJ Transit Bus Operations, Inc., P.E.R.C. No. 86-129, 12 NJPER 442 (¶17164 1986); Hudson Cty. (Primo), D.U.P. No. 92-10, 18 NJPER 152 (¶23071 1992).

Employees" (finding no. 14). Local 632 representative Villani advised James of a risk of greater punishment by opposing Minish's suggested suspension. Villani promptly notified Curtis of James's resistance. James nevertheless informed Weakley of his dissatisfaction before November 5, 2012 (James had consulted his brother - an attorney - during the pendency of discipline). These facts contradict Curtis's allegation that Local 632 ". . . allowed James to interfere in the proposed settlement." Also, no facts indicate that Weakley would have approved and implemented Minish's proposed suspensions if James either agreed to his suspension or expressed no opinion.

About ten days after Weakley issued a letter to Curtis notifying him of his termination, Local 632 representative Villani spoke with Curtis and Feltus about a response. On November 17, 2012, Villani sent a letter to Weakley, criticizing the termination as a "too harsh" penalty for Curtis's vitriol, while conceding that the behavior "should not be tolerated." Villani also wrote of Curtis's lengthy and upstanding employment at the Authority and the apparent infrequency of similar offending conduct as mitigating factors in seeking "leniency" in punishment. On November 28, Weakley wrote to Villani, denying the grievance because ". . . the intentional use of racial epithets" violated the Authority's work rules and "accepted standards of decent behavior."

On December 3, 2012, Local 632 Counsel discussed with Local 632's executive board (including Feltus) the circumstances of Curtis's termination and compared it with James Villani's eight day or event suspension in September, 2012. Feltus's notes reveal that Counsel for Local 632 discussed ". . . use of the word" [i.e., "nigger"]. I infer that his remarks included a comparison of the racial epithet (its repetition and context in which it was spoken) with slurs spoken and directed to or found to have been spoken and directed to Jewish unit employee(s) by James Villani and "S.H." Feltus did not testify that Local 632 Counsel, nor any member of the executive board (in any ensuing discussion) identified any matter of disparate treatment (i.e., similar facts treated dissimilarly) in the Villani and Curtis cases. If Feltus believed that Local 632 Counsel's presentation was deficient in any way, she withheld that opinion, apparently asked no questions and expressed gratitude for Counsel's appearance that day. Counsel suggested that Local 632 inquire about the specific "work rule" that Curtis ostensibly violated.

Local 632 representative Villani promptly emailed Weakley, objecting that the 2003 work rules posted, ". . . for stagehands to follow" omit any reference to "racial epithet." His email requested that Curtis's termination be "removed." Weakley replied, specifying that the 2009 revised work rules sets forth "racial epithet" as prohibited conduct, punishable by termination

in the first instance, and that he had sent those revisions to Local 632 President O'Brien in February, 2009. O'Brien conferred with Local 632 Counsel and then requested and was provided about one month to consider arbitrating Curtis's termination. I infer that Local 632 weighed (among Authority policies) whether the more recent work rules applied to Curtis's utterances and if they did not, whether a reasonable unit employee would know that a serious adverse employment consequence would likely result from them.

Local 632 Counsel opined in his December 18, 2012 letter to O'Brien that an arbitrator would, ". . . uphold [Curtis's] discharge." Counsel first noted the Authority's various sources for its employment action, including the collective negotiations agreement and specific provisions of its 2003, 2005 and 2009 policies and work rules. Counsel briefly recounted the essential facts of the October 10, 2012 verbal altercation, conceding that James, ". . . used provocative language towards [Curtis]" and that Curtis, ". . . threatened to resolve the altercation, physically." Citing specific arbitration awards, Counsel wrote that the racial epithet, "nigger" is one ". . . of racial contempt which normally justifies the sanction of discharge in the first instance" and that a "lesser sanction" is imposed, ". . . only where the word is not addressed or directed toward anyone else," or when it is used among black co-workers and not

understood as a term of racial contempt. He noted that terminations of employees for fighting were downgraded if the spoken epithet instigated the altercation. Counsel wrote that in his experience, an arbitrator from the likely pool of arbitrators under the auspices of the New Jersey State Board of Mediation would regard "nigger" to be, ". . . racially provocative and inciting and as justifying discharge," noting that "S.H.'s" termination was ". . . for less serious speech." Finally, Counsel opined that arbitrators ". . . treat [James's] profanity very differently than [Curtis's] racially charged speech, the former, "not mitigating the sanction of discharge, based on the alleged provocation."

Curtis contends that Local 632 Counsel's December 18, 2012 letter recommending against proceeding to arbitration "grossly misled" the membership on the chance of having the discharge reduced to a lesser punishment (brief at 26). To that end, Counsel to Curtis reportedly reviewed 65 arbitration awards issued from 2003-2013 in Westlaw American Arbitration Association Award database involving the specified racial epithet; eliminated 21 that did not concern discipline; and analyzed 15 awards that sustained terminations and 13 that did not. 10 of the 15 awards sustaining termination concerned "use" of the epithet, together with, ". . . either insubordination or violence or threat of violence" (brief at 22). The remaining 5 awards concerned

speaking the epithet as either part of a "pattern of harassment" or repeated articulation of the epithet after an employer's warning to cease such conduct. Many of the awards not sustaining termination set forth a "laundry list" of reasons, also assertedly applicable to Curtis, including supervisor conduct, inadequate training, grievant's ignorance that the remark was a dischargeable offense, disproportionality of discipline, etc.

Charging Party's accounting and delineation of numerous grievance arbitration awards inadequately acknowledges that the statutory duty of fair representation extends beyond an attorney recommendation, obligating the majority representative to assess the merits of a grievance fairly and in good faith. The Commission has recognized that performance of the duty may properly include a membership's consideration of and vote on whether a grievance should be taken to arbitration. ATU, Div. No. 821, P.E.R.C. No. 91-26, 16 NJPER 517 (¶21226 1990), aff'g H.E. No. 91-3, 16 NJPER 467, 470 (¶21201 1990) (union complied with duty of fair representation in part by providing grievant opportunity to "campaign" in favor of membership approval to arbitrate, notwithstanding its 56-54 vote against arbitration; grievant brought about his own "demise" by having made no effort to seek favorable vote); Distillery Workers Local No. 209, P.E.R.C. No. 88-13, 13, NJPER 710 (¶18263 1987) aff'g H.E. No. 88-8, 13 NJPER 683 (¶18254 1987); New Jersey Transit, D.U.P. No.

90-12, 16 NJPER 256 (¶21106 1990). Stated another way, the duty of fair representation encompasses obligations that cannot be avoided by a union delegating the authority to make decisions and when those decisions are delegated to the membership, the union is not immune from the consequences, since, by having selected the method for determination, it is underwriting its inherent fairness. Teamsters Local 315 (Rhodes & Jamieson), 217 NLRB No. 95, 89 LRRM 1049, 1053 (1975), enfd. 545 F.2d 1173 (9th Cir. 1976).

In ATU Division 822 (Trujillo), 305 NLRB 946, 140 LRRM 1016 (1991), the Board adopted an Administrative Law Judge's (ALJ) determination that a membership's secret ballot vote not to arbitrate four grievances separately contesting the terminations of four unit employees (for theft of revenue) complied with the duty of fair representation, despite the union's executive board recommendation to proceed to arbitration because the grievances had a "50-50" chance of success and questions from members seeking disclosure of their financial costs for arbitrating the four grievances and the impact on their seniority in the event that the grievances were sustained. The membership was told that they would be assessed the costs of any grievance sent to arbitration and if the grievants were successful, they would be reinstated to their former positions and those who now held those jobs would be returned to their prior jobs. The ALJ dismissed

arguments from the General Counsel that the two concerns raised by the membership led to an arbitrary decision not to arbitrate, violating Vaca standards.

The ALJ acknowledged that ". . . a pecuniary interest coupled with a job interest in the outcome of a vote regarding whether to process a grievance to arbitration might exert more influence on the membership voting than if only one such interest were involved." He found however, that the membership had given consideration to the merits of the grievances and decided that they lacked sufficient merit to justify the expense of arbitration. Specifically, the ALJ found that the ATU representative explained the grievances to the membership and answered their questions about costs and impact on seniority truthfully; the grievants were given the opportunity to present their cases to the membership; that the membership knew about the reasons for discharge; and considered the merits of the grievances in the decision-making process.

Curtis has admitted that on January 14, 2013, the membership arriving for its regular Local 632 meeting already knew the circumstances of his altercation with James and of the (alleged) agreement for his one-day suspension. Numerous documents were made available to the membership in the meeting, including Weakley's and Villani's correspondence and three Authority policies from 2005, 2009 and 2010 bearing upon the seriousness of

the infraction and the "just cause" for the discipline (see finding no. 14). Local 632 President O'Brien told the membership of the executive board decision opposing arbitration of Curtis's firing, read aloud Local 632 Counsel's December 18, 2012 letter (see Appendix "A") and heard the membership's discussion of whether Counsel's advice should or should not be followed. The members also listened to Curtis, Feltus and James personally express their respective views on the matter, without limitation (see finding no. 19). Finally, the members voted by secret ballot to oppose arbitration by a vote of 23 to 19, with 1 abstention.

I find, like the ALJ found of the union in ATU Division 822 (Trujillo), that the membership considered rational and objective criteria -- as described above -- in deciding in good faith that the grievance lacked merit to justify proceeding to arbitration, complying with Vaca standards. I note parenthetically that nearly one-half of the voting membership disagreed with Local 632 Counsel's recommendation against arbitrating Curtis's termination for reasons that are unknown on this record, except for their participation in the process that Local 632 followed, as described above, together with their own experiences and observations at the Authority.

Curtis contends that Local 632 Counsel should have disclosed known mitigating circumstances favoring a reduction in punishment

as a remedy in a grievance arbitration award. Such asserted circumstances include a disparately favorable punishment of James Villani; Curtis's long employment history without prior offenses; the termination was premised upon a single incident Curtis did not initiate; the "epithet" rule had not been given to Curtis; and Curtis quickly apologized. He also argues that Local 632 Counsel "misrepresented" two arbitration awards cited in his December 18, 2012 letter.

Local 632 Counsel explicitly dismissed the likelihood of a mitigation of punishment in his letter, owing to the "provocation" inherent in the repeated (and loudly spoken) epithet. Counsel also wrote of a fatal employment prognosis for employee speakers of the epithet in the view of arbitrators likely to preside over the grievance hearing, while delineating specified exceptions. Though I concede that that opinion may be disputed, I find that Curtis has not proved that it falls outside of Vaca parameters. If I consider other awards (as Curtis suggests), I believe that Curtis's case, based on admitted facts, would be slotted among those sustaining termination when the epithet is coupled with a threat of violence.

I am not persuaded that unit employee/foreman James Villani was treated disparately (and favorably) because he received only an 8-day or "event" suspension, together with a "last chance" admonition. No facts rebut Weakley's testimony that the

Authority's case against Villani was flawed by "stale" facts, unsustainable allegations and a compromised unit employee complainant. Local 632's "investigation" was prompted by that complainant's allegations against Local 632 and not a contractual grievance. Curtis has not proved that the "agreement" on Villani's discipline was something more or less than the product of the parties' separate and good faith assessments of the merits.

Considering Local 632's representation of Curtis from October, 2012 through January 14, 2013, I find that Local 632 complied with the statutory duty of fair representation.

## RECOMMENDATION

Local 632, International Alliance of Theatrical Stage Employees, Motion Picture Technicians, Artists and Allied Crafts of the U.S. and Canada, AFL-CIO, CLC, did not violate N.J.S.A. 34:13A-5.4b(1) when it declined to pursue Curtis's termination

from employment to grievance arbitration. I recommend that the Complaint be dismissed.[13/]

/s/Jonathan Roth
Jonathan Roth
Hearing Examiner

DATED: July 8, 2015
Trenton, New Jersey

**Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).**

**Any exceptions are due by July 20, 2015.**

13/ In dismissing the Complaint against Local 632, I find that Curtis does not have standing to maintain his allegation that the Authority violated 5.4a(5) of the Act. Beall and N.J. Turnpike Auth., Passaic Cty. Support Staff Assn. (Ernst).

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APPENDIX A

EXHIBIT
UR-Scott 11/8/14

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December 18, 2012

**FACSIMILE AND FIRST CLASS**
Kevin M. O'Brien, President
Local 632 I.A.T.S.E.
205 Robin Road, Suite 202
Paramus, NJ 07652

Re: New Jersey Sports and Exposition Authority
(Peter Curtis- Termination)

Dear Mr. O'Brien:

Pursuant to your request, I reviewed the materials in the above-captioned matter. Based on my review, it is my opinion that an arbitrator would uphold the discharge of the grievant, Peter Curtis. Accordingly, I would not recommend proceeding to arbitration.

The collective bargaining agreement between the NJSEA and Local 632 provides for the NJSEA's right to discipline employees for "just cause." The Authority's 2003 work rules provide for a suspension, prior to discharge, for the offense of "intimidation or interference with the duties and rights of ...other employees." In 2005, the Authority modified its work rules further by adopting a Violence in the Workplace Policy, which provided for the discharge of employees for "conduct that the individual should have reasonably perceived would provoke violence by another individual." In 2009, the Authority adopted work rules providing for the discharge of employees in the first instance for the use of racial epitaphs.

On October 10, 2012, the grievant had a verbal altercation with Head Electrician Bernard James. While the two employees proffered different versions of the altercation, the grievant admitted that he called his co-worker a "N____" twice, after the James called him a "motherfucker." The versions of the two employees differ over whether James used provocative language toward the grievant and whether the grievant threatened to resolve the altercation physically. For purposes of this opinion, I am treating the facts in the light most favorable to the grievant.

Arbitrators generally regard the use of the word "N_____" as a serious expression of racial contempt which normally justifies the sanction of discharge in the first instance. See e.g.