P.E.R.C. NO. 91-101

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MORRISTOWN MUNICIPAL EMPLOYEES ASSOCIATION,

Respondent,

-and-

Docket No. CI-H-90-97

DONALD G. LIDDLE,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, pursuant to authority granted to him by the full Commmission, dismisses a Complaint against the Morristown Municipal Employees Association. The Complaint, based on an unfair practice charge filed by Donald G. Liddle, alleged that the Association violated the New Jersey Employer-Employee Relations Act when its president failed to appear at Liddle's disciplinary hearing before the Office of Administrative Law. The Chairman concludes that the Association did not breach its duty of fair representation when its president did not appear at the charging party's disciplinary appeal hearing.

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DONALD G. LIDDLE,

Charging Party.

Appearances:

For the Respondent, Jerome J. LaPenna, attorney

For the Charging Party, Donald G. Liddle, pro se

DECISION AND ORDER

On June 18, 1990, Donald G. Liddle filed an unfair practice charge against the Morristown Municipal Employees Association. The charge alleges that the Association violated the New Jersey Employer-Employee Relations Act, N.J.S.A 34:13A-1 et seq., specifically section 5.4(b)(1),[1/] when its president failed to appear at the charging party's disciplinary hearing before the Office of Administrative Law.

On September 27, 1990, a Complaint and Notice of Hearing issued. On October 18, the Association filed its Answer denying that it violated the Act. The Association contends that the

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1/ This subsection prohibits employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act."

charging party failed to provide the Association with reasonable notice of the hearing or request an adjournment until the Association could appear.

On November 9, 1990, Hearing Examiner Stuart Reichman conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs.

On March 14, 1991, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 91-29, 17 NJPER ___ (¶____ 1991). He found that the charging party failed to advise the Association within a reasonable time that a disciplinary appeal hearing was scheduled. He therefore concluded that the Association did not breach its duty of fair representation when its president did not appear at the hearing.

The Hearing Examiner served his decision on the parties and informed them that exceptions were due March 27, 1991. Neither party filed exceptions or requested an extension of time.

I have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 2-9) are accurate. I incorporate them here. Pursuant to authority granted to me by the full Commission in the absence of exceptions, I find that the Association did not breach its duty of fair representation when its president did not appear at the charging party's disciplinary appeal hearing.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

DATED: April 24, 1991
Trenton, New Jersey

H.E. NO. 91-29

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

In the Matter of

MORRISTOWN MUNICIPAL EMPLOYEES ASSOCIATION,

Respondent,

-and-

Docket No. CI-H-90-97

DONALD G. LIDDLE,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the Morristown Municipal Employees Association did not violate the New Jersey Employer-Employee Relations Act and recommends dismissal of the unfair practice charge. The Hearing Examiner found that the Association did not breach its duty of fair representation owed to the charging party when its president did not appear at a disciplinary appeal hearing. The charging party failed to advise the Association within a reasonable time frame that a disciplinary appeal hearing was scheduled.

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

H.E. NO. 91-29

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

In the Matter of

MORRISTOWN MUNICIPAL EMPLOYEES ASSOCIATION,

Respondent,

-and- Docket No. CI-H-90-97

DONALD G. LIDDLE,

Charging Party.

Appearances:

For the Respondent, Jerome J. LaPenna, attorney

For the Charging Party, Donald G. Liddle, pro se

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On June 18, 1990, Donald G. Liddle ("Charging Party") filed an Unfair Practice Charge (C-3)[1/] against the Morristown Municipal Employees Association ("MMEA"). The Charging Party alleges that the MMEA violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13-1 et seq. ("Act"), specifically subsection 5.4(b)(1)[2/] by breaching its duty of fair representation when the

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1/ Exhibits received in evidence marked as "C" refer to Commission exhibits, those marked "CP" refer to Charging Party exhibits, those marked "R" refer to respondents exhibits and those marked "J" refer to joint exhibits. Transcript citations "T1" refer to the transcript made on November 9, 1990, at page 1.

2/ This subsection prohibits employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act."

president of the MMEA failed to appear at a hearing conducted by the Office of Administrative Law appealing the Charging Party's suspension.

On September 27, 1990, the Director of Unfair Practices issued a Complaint and Notice of Hearing (C-1). On October 18, 1990, the MMEA filed an answer to the unfair practice charge denying having committed any violation of the Act (C-2). A hearing was conducted on November 9, 1990, at the Commission's offices in Newark, New Jersey. The parties were afforded the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. At the conclusion of the hearing, a briefing schedule providing for the simultaneous submission of briefs on or before February 1, 1991, was established. Both parties filed timely briefs.[3/]

Upon the entire record, I make the following:

FINDINGS OF FACT

1. The parties stipulated that the Morristown Municipal Employees Association is a public employee representative and Donald G. Liddle is a public employee within the meaning of the Act (T10).

3/ Accompanying his brief, Liddle submitted a document similar to an affidavit signed by co-worker Nick Kosmajac and Liddle. Many factual representations expressed in that document were not included in testimony or other documentary evidence. I do not consider the document as part of the record.

2. On December 1, 1988, a collision occurred between a truck driven by Donald Liddle and a backhoe, both pieces of equipment owned by the Town of Morristown ("Morristown") (T16). The truck sustained damage to the outside mirror frame; the repair cost was approximately $735 (T16; CP6). On or about January 12, 1989, Liddle was advised by John Palumbo, Director of Public Works for Morristown, that he (Liddle) would be held responsible for reimbursing Morristown for the cost of repair to the truck (T17; CP6). Palumbo took this action on the basis of a memorandum issued in March, 1988, to all public works employees advising that damage to Morristown's property, vehicles or equipment caused by an accident would be assessed against the employee (CP5).

3. Upon receipt of CP6, Liddle went to Palumbo's office and become engaged in a heated discussion. During the course of their discussion, Liddle directed profanity at Palumbo (T17). On January 23, 1989, Liddle was suspended for 30 days for using profane language while addressing the Director of Public Works (T17; CP4).

4. Liddle is included in the unit represented by the MMEA. During Liddle's suspension, he contacted the MMEA and sought representation (T17; T26). The first step of the grievance procedure between Morristown and the MMEA requires oral discussion with the immediate supervisor (T93). Hugh Geraghty, MMEA President, met with Palumbo at the first step of the grievance procedure to discuss Liddle's suspension (T17-T18; T26; T93-T94). During the conference, Palumbo offered to settle Liddle's grievance by reducing

the suspension from thirty to twenty days. Geraghty advised Liddle of the settlement offer, but Liddle rejected it (T94-T95).

5. On April 17, 1989, Terence Reidy, Morristown's Business Administrator, convened a second step grievance hearing (T27). The hearing was limited to the profanity issue and did not address the accident between the truck driven by Mr. Liddle and the backhoe (T28; T34; T95-T96). Liddle was represented at the hearing by President Geraghty and Vice President DiFalco (T18; T28; T96). Reidy's decision found that Liddle directed profane language toward his supervisor and the disciplinary action was upheld (T18; T28; T97).

6. After the second step hearing ended, Geraghty told Liddle to file with the Department of Personnel in order to appeal Reidy's decision (T18; T20; T37; T61; T97; T119-T120). Liddle sent a letter appealing Morristown's disciplinary action to the Department of Personnel, however, he never sent a copy of that letter to the MMEA or took other steps to inform the MMEA of his intention to appeal (T38; T98).

7. The Department of Personnel sent a letter to Liddle acknowledging receipt of his appeal (T41). On or about December 6, 1989, the Office of Administrative Law ("OAL") sent Liddle a notice scheduling a hearing on his appeal for January 19, 1990 (T18; T20; T55; R-3). Liddle did not send a copy of R-3 to the MMEA (T41-T42; T57; T72; T104).

8. On or about December 15, 1989, OAL sent Liddle a notice of adjournment, cancelling the hearing scheduled for January 19, 1990 (T20; T39; J-1). J-1 sets forth the OAL docket number and the title of the case (Liddle, Donald vs. Public Works Morristown). The form states no substantive information regarding the nature of the case being adjourned. Liddle sent Geraghty a copy of J-1 by way of regular mail but Geraghty never received it (T21; T41-T42; T71; T104).

9. In early January, 1990, the OAL issued a notice rescheduling Liddle's disciplinary appeal hearing for March 22, 1990 (T21; T40). Geraghty did not receive a copy of this notice.

10. Between April 17, 1989 and March 21, 1990 several issues arose which resulted in contact between Liddle and Geraghty. Liddle filed an unfair practice charge against Morristown (Docket No. CI-90-31). Although Liddle was the Charging Party in CI-90-31, he advised Geraghty of the unfair practice, and they discussed it. Geraghty accompanied Liddle to the P.E.R.C. exploratory conference in order to provide "moral support" (T63; T66; T98).[4/] Liddle and Geraghty also had conversations concerning Liddle's driving of a vehicle, the replacement of a hat and other accidents which occurred

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4/ Although Geraghty testified that he accompanied Liddle to a "hearing", I take administrative notice of the fact that CI-90-31 was dismissed prior to the conduct of a formal hearing. The Director of Unfair Practices refused to issue a complaint and dismissed the matter. Town of Morristown and Donald G. Liddle, D.U.P. No. 90-15, 17 NJPER ___ (¶_____ 1990).

while Liddle was operating a truck (T99). Liddle neither raised nor discussed his suspension appeal with Geraghty then pending with the Department of Personnel during any of the above mentioned conversations nor at any other time between April 17, 1989 and March 22, 1990 (T98-T100).

11. On or about March 20, 1990, Liddle telephoned Geraghty's home and spoke with his wife. Liddle asked her to tell Geraghty that a hearing or meeting would be conducted on March 22, 1990 and asked that Geraghty contact him (T70; T100). Geraghty tried to reach Liddle but was unsuccessful (T100). On March 21, 1990, Liddle went to Geraghty's home in the late afternoon and waited for him to return from work (T67-T68; T70). Liddle told Geraghty that a hearing would be conducted on March 22, 1990, and gave Geraghty a slip of paper showing the time, place and name of the presiding Administrative Law Judge ("ALJ") (T101). Liddle did not tell Geraghty the issue to be addressed in the hearing (T70; T101). Geraghty was under the impression that the hearing pertained to CI-90-31, Liddle's unfair practice charge against Morristown (T67-T68; T72). Geraghty told Liddle that a delivery of concrete was scheduled for the job site at which he was working, and could not be certain that he would be present at the hearing (T101-T102).

12. At 6:30 a.m. on March 22, 1990, Liddle and Geraghty had a telephone conversation (T22; T43; T69). Liddle contends that Geraghty assured him that he (Geraghty) would attend the hearing (T22; T43). Geraghty states that he told Liddle that he would "try

his best" to attend the hearing but was not certain that he would be present (T69). I credit Geraghty's testimony. During their conversation on the evening of March 21, 1990, Geraghty told Liddle that a delivery of concrete was scheduled for the next day at his job site. Geraghty's testimony concerning the March 21 conversation is uncontroverted. Accordingly, it is reasonable to find that Geraghty would tell Liddle that his attendance at a hearing for which he was given only one day's prior notice, was uncertain in light of the scheduled concrete delivery.

13. Geraghty did not attend the OAL hearing on March 22, 1990. Prior to the start of the hearing, Liddle telephoned Geraghty's office and was told that he was working in the field (T22-T23). Geraghty received a radio dispatch at the work site from his office advising that Liddle had called from the hearing in order to ascertain whether he would be attending. Since Liddle left no phone number, Geraghty was unable to return his call (T102-T103). Consequently, Liddle was forced to decide whether to apply for an adjournment or proceed with the hearing on his own.

14. As indicated above, the OAL hearing was initially set for January 19, 1990, adjourned at Morristown's request and rescheduled to March 22, 1990. Since Liddle was attending the hearing without representation, the issue of whether the matter should be adjourned arose. Although he never requested that the hearing be adjourned, Liddle testified that the ALJ indicated that since the hearing had already been adjourned once, any additional

adjournment requests would be denied (T23; T46). Morristown proposed a settlement of Liddle's disciplinary appeal (R-1b). Liddle stated that the ALJ gave him the choice of accepting Morristown's settlement offer or going forward with the hearing on its merits. The ALJ cautioned Liddle that if he decided to proceed with the hearing, he (the ALJ) could impose an additional six-month suspension on him in the event that Liddle lost his appeal (T23; T49).[5/]

15. On March 26, 1990, the attorney representing Morristown prepared the terms of the settlement agreement reached on March 22, 1990 and forwarded same to Liddle for signature (T33; R-1b). Liddle signed the settlement agreement. On May 9, 1990, the ALJ issued an initial decision approving the terms of the settlement agreement entered into by Liddle and Morristown and recommended that the settlement be adopted by the Merit System Board (R-1a). Subsequently, Liddle appealed the ALJ's decision to the Merit System Board, but the appeal was dismissed (T25; T50).

16. Although the terms of the settlement agreement addressed Morristown's demand that Liddle pay for the damages

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5/ Although Liddle's testimony pertaining to the ALJ's statements is not controverted, I do not credit it. I am aware of no authority which would allow an ALJ to increase a disciplinary penalty imposed upon an employee by the employer. No citation has been proffered by the Charging Party which grants the ALJ this authority. I further find that it is unlikely that an ALJ would force a pro se appellant to proceed without representation in a circumstance where an adjournment had already been granted to the opposing party and no request for adjournment had ever been previously made by the appellant.

incurred to the truck which he was driving, the sole issue to be resolved through the OAL hearing pertained only to Liddle's use of profanity in his meeting with Palumbo (T29-T30). Geraghty did not hear from Liddle again after the March 22, 1990 hearing date (T103).

17. While Liddle's suspension began on January 23, 1989, Morristown failed to serve him with a preliminary notice of disciplinary action until on or about April 3, 1989 (CP-4). Geraghty was not aware that the preliminary notice was not served until after the disciplinary penalty had been implemented. Geraghty believed that Morristown had followed all proper procedures regarding the implementation of the discipline (T130-T138). The MMEA does not have control over the timing which Morristown employs in delivering disciplinary notices (T139).

18. The memorandum which Palumbo issued to all employees concerning damage to Morristown's property, vehicles and equipment (CP-5) was never sent to the MMEA and, consequently, never approved by it (T144). Geraghty was not aware of any attempt by Morristown to try to recoup the cost of repairing equipment damaged by an employee (T152). Geraghty told Liddle to file a grievance contesting the Township's decision to charge him for damage which occurred to his truck on December 1, 1988 (T153).

ANALYSIS

In articulating this State's standard of a union's duty to fairly represent unit employees, the Commission has looked both to

the Act and to compatible private sector case law. N.J.S.A. 34:13A-5.3 provides in part that:

> A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership.

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

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

> individuals equally by granting equal access to the grievance procedure and arbitration for similar grievances of equal merit. Middlesex County; Local 194. All the circumstances of a particular case, however, must be considered before a determination can be made concerning whether a majority representative has acted in bad faith, discriminatorily, or arbitrarily under Vaca standards. [OPEIU Local 153 at 13.]

The U.S. Supreme Court has also held that to establish a claim of a breach of the duty of fair representation, such claim "...carried with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." Amalgamated Assn. of Street, Electric, Railway and Motor Coach Employees of American v. Lockridge, 403 U.S. 274, 301, 77 LRRM 2501, 2512 (1971). Further, the National Labor Relations Board has held that where a majority representative exercises its discretion in good faith, proof of mere negligence, standing alone, does not suffice to prove a breach of the duty of fair representation. Service Employees International Union, Local No. 579, AFL-CIO, 229 NLRB 692, 95 LRRM 1156 (1977); Printing and Graphic Communication, Local No. 4, 249 NLRB No. 23, 104 LRRM 1050 (1980), reversed on other grounds 110 LRRM 2928 (1982).

The facts in this case show that when Liddle sought the MMEA's assistance, it was provided. After Liddle was suspended on January 23, 1989, for directing profanity at Palumbo, he contacted the MMEA to represent him in his grievance appealing the disciplinary action. Geraghty promptly met with Palumbo at the

first step of the grievance procedure in order to discuss Liddle's suspension and was successful in obtaining a settlement offer which reduced the suspension from 30 to 20 days. When the settlement proposal was rejected by Liddle, appeal of the discipline continued through the grievance process. Liddle was represented by MMEA president Geraghty and Vice President DiFalco at the second step of the grievance procedure. Since Reidy upheld the disciplinary action, Geraghty advised Liddle to file with the Department of Personnel to appeal Reidy's determination.

It was at this point that Liddle proceeded with the matter independently. Liddle never specifically advised anyone in the MMEA that he decided to appeal Reidy's decision to the Department of Personnel prior to the hearing date on March 22, 1990. Although Liddle and Geraghty met on a number of occasions between April 17, 1989, the date of the second step disciplinary hearing conducted by Reidy, and March 22, 1990, the date of the OAL hearing, Liddle neither generally mentioned nor specifically discussed his disciplinary appeal with Geraghty. When Liddle finally advised Geraghty of the March 22, 1990 hearing date, Geraghty had no way of knowing that the issue pertained to the disciplinary action. Geraghty legitimately believed the hearing related to the unfair practice charge Docket No. CI-90-31, which Liddle was pursuing on his own. Even on March 21, 1990, the day before the OAL hearing, Liddle did not tell Geraghty the issue to be addressed in that hearing.

Accordingly, the evidence shows that the MMEA did not treat Liddle in a manner that was arbitrary, discriminatory or in bad faith. At best, Geraghty's actions could be considered negligent in that he assumed the March 22, 1990 OAL hearing pertained to the unfair practice charge Docket No. CI-90-31 and failed to investigate further or confirm his assumption. However, mere negligence, standing alone, does not suffice to prove a breach of the duty of fair representation. Service Employees Int'l Union, Local No. 579; Printing and Graphic Communication, supra.

Accordingly, based on all of the circumstances in this case, I conclude that the MMEA did not breach its duty of fair representation which it owed to Liddle and committed no unfair practice.

Based upon the entire record and the analysis set forth above, I make the following:

CONCLUSIONS OF LAW

The Morristown Municipal Employees Association did not violate N.J.S.A. 34:13A-5.4(b)(1) by failing to appear at an administrative law hearing to represent Donald Liddle in his appeal of a disciplinary action taken against him by the Town of Morristown.

RECOMMENDED ORDER

I recommend the Commission **ORDER** that the Complaint against the Morristown Municipal Employees Association be dismissed.

Stuart Reichman
Hearing Examiner

Dated: March 14, 1991
Trenton, New Jersey