P.E.R.C. NO. 90-84

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matters of

UNION COUNCIL NO. 8, NJCSA,

Respondent,

-and- Docket No. CI-H-89-86

KYLE LOONEY,

Charging Party.

ELIZABETH HOUSING AUTHORITY,

Respondent,

-and- Docket No. CI-H-89-87

KYLE LOONEY,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, pursuant to authority granted to him by the full Commission in the absence of exceptions, dismisses a Complaint based on unfair practice charges filed by Kyle Looney against the Elizabeth Housing Authority and Union Council No. 8, NJCSA. The Complaint alleged that the Authority violated the New Jersey Employer-Employee Relations Act by discharging Looney unjustly because of his race and because he filed lawsuits and discrimination complaints. The Complaint alleged that Council No. 8 violated the Act by failing to represent Looney at a departmental hearing regarding his discharge. The Chairman found that the charging party failed to prove that his discharge was in retaliation for protected activity and that he also failed to prove that Council No. 8 breached its duty of fair representation.

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KYLE LOONEY,

Charging Party.

Appearances:

For the Respondent, Union Council No. 8, Fox and Fox, Esqs. (Stacey B. Rosenberg, of counsel)

For the Respondent, Elizabeth Housing Authority, Carella, Byrne, Bain & Gilfillan, Esqs. (John F. Malone, of counsel)

For the Charging Party, Kyle Looney, pro se

DECISION AND ORDER

On May 4, 1989, Kyle Looney filed unfair practice charges against the Elizabeth Housing Authority and Union Council No. 8, NJCSA. The charging party alleged that the Authority violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et

seq., specifically subsections 5.4(a)(1), (3), (4), (5), (6) and (7),[1/] when it discharged him unjustly allegedly because of his race and because he filed lawsuits and discrimination complaints. The charging party alleged that Council No. 8 violated the Act, specifically subsections 5.4(b)(2), (3) and (5),[2/] by failing to represent him at a departmental hearing regarding his discharge.

On September 15, 1989, the unfair practice charges were consolidated and a Complaint and Notice of Hearing issued. Council No. 8 and the Authority filed Answers on October 16 and October 20, 1989, respectively. The Authority asserted that the charging party was discharged for misconduct, neglect of duty and abuse of sick

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (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. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (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. (7) Violating any of the rules and regulations established by the commission."

2/ These subsections prohibit employee organizations, their representatives or agents from: "(2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances. (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. (5) Violating any of the rules and regulations established by the commission."

leave. Council No. 8, relying on a previously filed statement of position, asserted that its president agreed to attend the departmental hearing, but forgot to appear. When reminded, he appeared only to find that the charging party had decided to proceed with his own attorney.

On October 26, 1989, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses and introduced exhibits. They filed post-hearing briefs by January 16, 1990. At the close of the charging party's case, Council No. 8 and the Authority moved for dismissal. The Hearing Examiner denied Council No. 8's motion and required it to present its case. He did not require the Authority to present any witnesses and indicated that he would rule on its motion in his written decision.

On January 23, 1990, the Hearing Examiner recommended dismissing the consolidated Complaint. H.E. No. 90-34, 16 NJPER ____ (¶____ 1990). He found that the charging party failed to prove that the Authority discharged him for any protected activity. He also found that the charging party's claims of racial discrimination should be heard in other forums, such as the New Jersey Division of Civil Rights.[3/] The Hearing Examiner also found that Council No. 8's representative acted in a fair, reasonable and good faith manner regarding the disciplinary hearing and therefore it did not violate its duty of fair representation.

3/ The charging party filed racial discrimination charges against the Authority with the Equal Employment Opportunity Commission and the Division of Civil Rights and an appeal of his discharge with the Department of Personnel.

The Hearing Examiner served his decision on the parties and informed them that exceptions were due on February 5, 1990. 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 4-10) are accurate. I incorporate them here.

Subsection 5.4(a)(3) prohibits discrimination to encourage or discourage activity protected by the Act. Retaliation cases are governed by In re Bridgewater Tp., 95 N.J. 235 (1984). The charging party failed to prove that his discharge was in retaliation for activity protected by the Act. I cannot judge whether his discharge was otherwise just or racially discriminatory.

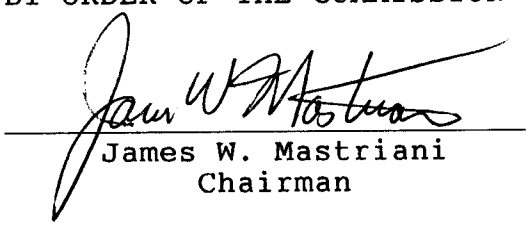
Likewise, the charging party failed to prove that Council No. 8 breached its duty of fair representation when its president arrived late for a discharge hearing or when it informed the charging party that it would not be responsible for the outcome of his discharge case since he had retained his own attorney.

Acting pursuant to the authority granted to me by the full Commission in the absence of exceptions, I dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

DATED: Trenton, New Jersey
March 12, 1990

H.E. NO. 90-34

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

In the Matter of

UNION COUNCIL NO. 8, NJCSA,

Respondent-Labor Organization,

-and- Docket No. CI-H-89-86

KYLE LOONEY,

Charging Party.

ELIZABETH HOUSING AUTHORITY,

Respondent-Public Employer,

-and- Docket No. CI-H-89-87

KYLE LOONEY,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that neither the Elizabeth Housing Authority nor Union Council No. 8, NJCSA violated the New Jersey Employer-Employee Relations Act as a result of Kyle Looney's discharge, or by the manner in which the Council represented and offered to represent Looney regarding the discharge. The Hearing Examiner granted the Authority's Motion to Dismiss because the Charging Party did not prove the elements of the charge against it, and the Hearing Examiner recommended dismissal of the charge against the Council because the Council did not violate its duty of fair representation.

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

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Appearances:

For the Respondent-Labor Organization, Fox and Fox, Esqs. (Stacey B. Rosenberg of counsel)

For the Respondent Public Employer, Carella, Byrne, Bain & Gilfillan, Esqs. (John F. Malone of counsel)

For the Charging Party, Kyle Looney, pro se

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On April 24, 1989 Kyle Looney (Charging Party) filed Unfair Practice Charges with the Public Employment Relations Commission (Commission) against the Elizabeth Housing Authority (Authority)(CO-89-87), and Union Council No. 8, NJCSA (Council)(CO-89-86). Looney alleged that the Authority violated

subsections 5.4(a)(1), (3), (4), (5), (6) and (7)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), by discharging him at least partly based upon his race. Looney alleged that the Council violated subsections 5.4(b)(2), (3) and (5)[2/] of the Act by failing to represent him at a departmental hearing regarding his discharge.

A Complaint and Notice of Hearing (C-1) was issued on September 15, 1989. All parties attended a prehearing conference on October 11, 1989. The Council and Authority filed Answers on October 16 (C-3) and October 20 (C-2) respectively. The Council,

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (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. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (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. (7) Violating any of the rules and regulations established by the commission."

2/ These subsections prohibit employee organizations, their representatives or agents from: "(2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances. (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. (5) Violating any of the rules and regulations established by the commission."

relying on a May 22, 1989 statement of position, denied any violation and argued that its president agreed to attend the departmental hearing, and although he initially forgot to appear, once notified of the hearing he did appear only to find that Looney had decided to proceed with his own attorney. The Authority also denied any violation of the Act, denied that the discharge was based on any form of discrimination, and argued that Looney was discharged for misconduct on the job, neglect of duty, and sick leave abuse.

A hearing was conducted on October 26, 1989.[3/] All parties had the opportunity to call, examine and cross-examine witnesses, present documents, argue orally, and submit post-hearing briefs.[4/] The transcript was received on November 14, 1989 and both Respondents submitted post-hearing briefs by December 27, 1989.[5/] On January 4, 1990, the Charging Party submitted a

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3/ The transcript will be referred to as "T."

4/ At the prehearing conference and hearing the Charging Party was fully advised of his rights, responsibilities and procedures regarding Commission hearings. The Charging Party was specifically advised that he had the burden to prove that he was engaged in protected activity within the meaning of the Act, that the Authority was aware of such activity, and that it discharged him because of the exercise of that activity. The Charging Party was also specifically advised that he had the burden to prove that the Council failed to represent him fairly. (T18-T21, T57, T129).

5/ By letter received on November 8, 1989 the Charging Party sought to introduce another piece of "evidence" with respect to his charge against the Authority. The alleged evidence was a copy of a check from the Authority to Looney. At the

Footnote Continued on Next Page

written reply to the Council's brief. On January 16, 1990, the Council submitted a reply to Looney's written statement.

Procedural Background

After the Charging Party presented his case both the Council and Authority moved to dismiss the respective charges. I denied the Council's motion and required it to present its case. I did not, however, require the Authority to present any witnesses and indicated that I would rule upon its motion in my written decision. (T142-T149) The Charging Party did not establish that he was discharged because of the exercise of rights protected by the Act. Thus, the Authority's Motion to Dismiss is granted.[6/]

Based upon the entire record, I make the following:

Findings of Fact

1. Looney was employed by the Authority as a foreman and was responsible for supervising certain employees. On Wednesday, March 15, 1989, he received a notice of disciplinary action indicating he was to be discharged. He was suspended that day. The notice scheduled an internal departmental hearing for Monday,

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5/ Footnote Continued From Previous Page

prehearing conference and the hearing the Charging Party was told that he had to present evidence at the hearing. Since the November 8 document was not offered at the hearing, and the Respondents did not have the opportunity to cross-examine the Charging Party or examine other witnesses about the document, it is not appropriate to consider the document as part of the record. Therefore, the record evidence was not reopened to include the document.

6/ See further discussion infra.

March 20, 1989. Looney was charged with failing to inform the Authority that an employee he supervised, William Thompson, was reporting to a second job when Thompson was scheduled to work for the Authority. Looney was also charged with sick leave abuse for taking sick time on days he too reported to a second job.

On Thursday, March 16,1989, Looney retained an attorney, Arthur Martin, to represent him at the March 20th hearing. (T45-T46, T69, CP-1) On Saturday, March 18, 1989, between 5:30 and 6:00 a.m. Looney telephoned Council President Daniel Bragg at his home and asked Bragg to attend the March 20th hearing. (T65-T66, T151). Bragg agreed to appear but did not have his appointment book with him at that time and did not record the date (T151).

On Monday, March 20, Looney, his attorney, and other witnesses appeared for the disciplinary hearing at the designated time. Bragg was not there. Ann Ferguson, the Authority's Personnel Officer, telephoned Bragg in Looney's presence and told Bragg that Looney was waiting for him to arrive. (T69-T70, T86-T87, T94, T151). Bragg had forgotten about the hearing since he did not have it recorded in his appointment book, but told Ferguson that he would be there in 40 minutes (T87, T97, T151). Ferguson conveyed Bragg's message to Looney and Martin thereby placing them on notice that Bragg would be there in 40 minutes. (T70, T87).

Just after the telephone call Looney informed Ferguson and the hearing officer that he was ready to proceed without Bragg because his attorney was present. (T70, T87-T88). Looney did not

believe that Bragg was coming to the hearing (T70). The hearing officer told Looney and Martin that they were entitled to wait for Bragg or they could postpone the hearing, but Looney insisted on proceeding without Bragg. (T88). The hearing officer's decision (RU-2) reflected Looney's request to proceed without Bragg.

When Bragg arrived at the hearing location he learned that Looney wanted to proceed without him, the hearing was over and Looney was gone. (T152). Bragg, nevertheless, discussed the hearing and Looney's suspension with Ferguson and the hearing officer (T152).

A few days after the hearing Bragg telephoned Looney and asked him why he didn't wait for him to arrive at the hearing, and why he (Looney) didn't call him (Bragg) before March 18. (T70, T152-T153). Looney told Bragg that he was suspended (T71, T153), and Bragg told Looney he should not have been suspended pursuant to Civil Service laws. (T153).[7/]

After speaking with Looney, Bragg telephoned Ferguson and told her he believed that Looney was improperly suspended. (T90, T154). Bragg telephoned Looney again and asked Looney to notify him if he (Looney) returned to work. Looney stated that he had an

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7/ Bragg testified that when Looney told him he was suspended, he (Bragg) told Looney that the suspension was improper under Civil Service Rules. (T153). Looney admitted telling Bragg he was suspended but testified that Bragg did not tell him about the Civil Service Rule. (T71). I credit Bragg's testimony. He had a better recollection of the facts and his recollection of the facts is more plausible.

attorney, and Bragg responded that the Council was not responsible for his attorney unless Looney went through the Council. (T154).[8/]

After that second conversation with Looney, Bragg again telephoned Ferguson who told Bragg that Looney had an attorney working for him (T154). As a result of those last two conversations Bragg was unsure whether he or Martin represented Looney. (T154). Bragg, therefore, telephoned Martin and explained to him that the Council was Looney's representative, but Martin told Bragg that Looney had hired him. (T157).[9/] As a result of the conversations with Ferguson and Martin, Bragg sent Looney a letter on April 5, 1989 (RU-1), notifying him that since he had an attorney to represent him at the disciplinary hearing, the Council would not be responsible for the outcome of the hearing. But the letter also indicated that Bragg would be available for further assistance. Bragg wrote RU-1 to protect the Council and inform Looney that it was not responsible for handling his discharge as long as he had his own attorney. (T155, T159). But Bragg had always been willing to

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8/ Looney did not recall whether Bragg telephoned a second time (T72), but he testified that during the first telephone conversation Bragg said "You have a lawyer." (T71). Since Bragg had a better recollection of these events generally, I find that the above remark was more likely made during the second telephone conversation. Nevertheless, since there was no evidence to contradict Bragg's recollection of the second conversation I credit it here.

9/ While cross-examining Bragg, Looney stated that Martin never spoke to Bragg. (T157). However, Looney was not testifying at that time and neither testified nor called Martin as a witness to rebut Bragg's testimony. Therefore, I credit Bragg's testimony and recollection of the conversation with Martin.

represent Looney (presumably contingent upon him not being represented by anyone else) and communicated that to him several times. (T151-T154, T159, T161-T163).

After receiving RU-1, Looney telephoned Bragg and told him that he needed Council representation because he did not have a lawyer. (T72). Having already talked to Martin, however, Bragg believed Looney did have a lawyer, and told Looney that he thought Martin was his lawyer. Looney did not subsequently respond to RU-1 in writing and notify Bragg that he no longer had a lawyer and wanted Bragg to represent him (T160-T161).10/

2. In past years Looney filed complaints against the Authority with the United States Equal Employment Opportunity Commission (EEOC). One EEOC matter involving the placement of certain documents in Looney's personnel file is still pending, and when the EEOC finishes its investigation the matter will be transferred to the New Jersey Division of Civil Rights for further processing (T38-T39).

In March 1989, Looney filed a petition with the New Jersey Department of Personnel contesting his discharge. The matter was

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10/ Although in the heat of cross-examination Bragg denied that Looney telephoned him after receiving RU-1 (T106), I credit Looney's testimony that he did telephone Bragg to discuss whether Looney had a lawyer. (T72). Nevertheless, I generally found Bragg to be a reliable and believable witness and I credit his testimony that Looney did not send him a written response to RU-1 requesting that Bragg represent him. (T160-T161). Looney did not produce a letter or evidence of having sent such a letter to Bragg in response to RU-1.

transferred to the Office of Administrative Law (OAL) and hearings were held in August and September 1989. That hearing concerned Looney's use of sick time, neglect of duty, insubordination, and disorderly conduct. The record closed in that hearing on December 8, 1989. (T37-T38, T76).[11/]

3. Looney argued that he was fired as a result of racial discrimination by the Authority because he filed EEOC complaints, and because he wrote letters to the United States Department of Justice and other Federal offices all based upon what he believed was racial discrimination. (T61-T64, T76-T78). But Looney did not present evidence that he was engaged in activity protected by the Act, that the Authority knew of such activity, or that the Authority discharged him because of the exercise of any such protected activity.

Looney presented several witnesses. One witness testified she believed that Looney was discharged because he stood up for the rights of other employees (T116-T118). But the record did not show what Looney did for those employees, whether anything was done within the statute of limitations period, whether his actions amounted to engaging in protected activity or to what extent the Authority was aware of such activity. There was also no showing that the Authority took action against Looney because he engaged in any activity on behalf of the rights of other employees.

11/ As of December 21, 1989 no OAL decision had issued. The parties have not advised me whether one has issued in the interim.

Another witness testified that Eugene Kobylarz, an Urban Initiative Co-ordinator employed by the Authority, asked him to sign a statement against Looney. (T136-T138). But there was no showing that Kobylarz took that action because Looney engaged in protected activity.12/

Analysis

The Authority's Motion to Dismiss (CO-H-89-87)

Although Looney alleged that the Authority violated subsections 5.4(a)(1) through (a)(7) of the Act, he neither plead nor presented sufficient evidence to prove those allegations. A Charging Party has the burden to prove the allegations in his charge. In Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984)(Bridgewater), the New Jersey Supreme Court created a test to be applied in analyzing whether a charging party has met his burden of proof. Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence, that conduct protected by the Act was a substantial or motivating factor in the adverse action. This may be done by direct or circumstantial evidence showing that the employee engaged in activity protected by the Act, that the employer knew of this

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12/ The witness on direct examination said Kobylarz asked him to help "frame" Looney (T136-T137). But on cross-examination he explained that Kobylarz merely asked him to sign a statement against Looney concerning how tools were arranged. (T137-T138). That testimony did not establish that Looney was engaged in protected activity or that Kobylarz was taking action because Looney was engaged in any protected activity.

activity, and that the employer was hostile toward the exercise of the protected activity. Id. at 246.

It was necessary for Looney to prove that he was engaged in activity protected by the Act such as union participation and/or the filing and processing of contractual grievances of which the Authority was aware, and that the Authority discharged him because he participated in such activity. Alleging that an employee was discharged based upon violations of laws other than the Act does not satisfy the Bridgewater test, particularly where those other laws provide a forum for review of an employer's actions. See Elizabeth Housing Authority, D.U.P. No. 90-3, 15 NJPER 591 (¶20241 1989). (Elizabeth Housing Auth.)

In Dolson v. Anastasia, 55 N.J. 2 (1959) the Supreme Court held that in motions to dismiss, all favorable inferences had to be given to the party opposing the motion, which in this case is the Charging Party. See also New Jersey Tpk. Auth., P.E.R.C. No. 79-81, 5 NJPER 197 (¶10112 1979); and Tp. of North Bergen, P.E.R.C. No. 78-28, 4 NJPER 15 (¶4008 1977). Even giving Looney every favorable inference, he did not prove that he was engaged in activity protected by the Act, and even if he had, he did not prove that he was discharged because he engaged in any such protected activity.

Although there was some evidence that Looney had been a shop steward, it was not clear whether he was a steward at the time of his discharge, or if he had engaged in protected activity, and there was no showing that the Authority discharged him for engaging

in any such protected activity. Moreover, there was no showing of any suspicious timing between when any protected actions by Looney may have occurred, and his discharge.

Although one witness testified that Looney had "stood up for her rights and the rights of others," there was no showing of what he did, when he did it or whether he was acting in his capacity as a shop steward at the time, and there was no allegation that the Authority discharged him for engaging in such activity. Looney, in fact, said that he was discharged because of his race, and because he filed complaints against the Authority before different Federal agencies. That activity is not the kind of activity protected by the Act because other forums, such as the New Jersey Division of Civil Rights which reviews allegations of racial discrimination, are available for reviewing such charges.[13/] See also, Elizabeth Housing Authority.

Looney filed charges against the Authority with the EEOC and the New Jersey Division of Civil Rights alleging racial discrimination, and before the New Jersey Department of Personnel regarding the merits of his discharge. The Commission cannot usurp

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13/ There was no proof in this hearing regarding Looney's allegations that he was discharged because of racial discrimination.

the jurisdiction of those agencies and must limit its review of the facts here to activity protected by the Act.[14/]

Based upon the evidence presented, Looney did not satisfy the Bridgewater test and the Authority is entitled to have its motion granted and the charges against it dismissed.

The Charge Against the Council (CI-H-89-86)

The standards for determining whether a labor organization violated its duty of fair representation were established by the United States Supreme Court in Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967)("Vaca"). In Vaca the Court held that:

> ...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. 386 U.S. at 190, 64 LRRM at 2376.

The Commission, and the New Jersey courts, have consistently embraced the Vaca standards in adjudicating fair representation cases. See e.g., Saginario v. Attorney General, 87 N.J. 480 (1981); Fair Lawn Bd.Ed., P.E.R.C. No. 84-138, 10 NJPER 351 (¶15163 1984); OPEIU Local 153 (Thomas Johnstone), P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983); City of Union City, P.E.R.C. No. 82-65, 8 NJPER 98

14/ Since the Department of Personnel reviewed the merits of the discharge, it was not appropriate for me to review whether Looney should have been discharged for the reasons given by the Authority. I reviewed the facts only to ascertain whether there was any showing that Looney was discharged for engaging in activity protected by the Act. Having found that the discharge was not based on protected activity, no further examination into the merits of the discharge was appropriate in this proceeding.

(¶13040 1982); 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); New Jersey Turnpike Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979); AFSCME Council No. 1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978).

The United States Supreme Court also held that to establish a claim of a breach of the duty of fair representation, a charging party must: "...adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives. Amalgamated Assoc. of Street, Electric Railway and Motor Coach Employees of America v. Lockridge, 403 U.S. 274, 301, 77 LRRM 2501, 2512 (1971)("Lockridge")." The Court also held in Lockridge that a union is not liable for mere errors in judgment if they are made honestly and in good faith.

In applying the law to this case I find that Bragg's handling of Looney's disciplinary hearing and discharge did not constitute arbitrary, discriminatory or bad faith actions by the Council. Although notified late and at an unusual time, Bragg agreed to be present at Looney's disciplinary hearing, but due to an honest mistake forgot to appear on time. Bragg's mistake was not in bad faith, and when he was notified that the hearing was ready to commence, he agreed to come, and arrived at a reasonable time thereafter. Looney, however, apparently with the agreement of his attorney, chose to proceed to hearing without Bragg. There was no corroboration for Looney's belief that Bragg would not appear.

When Bragg arrived at the hearing location he made a reasonable effort to familiarize himself with what occurred at the hearing, he subsequently telephoned Looney and offered his advice and assistance, and he telephoned Ferguson to argue that Looney's suspension was improper. When Bragg became confused over whether the Council or Martin represented Looney, he telephoned Martin who informed him (Bragg) that he (Martin) represented Looney. As a result, Bragg sent Looney RU-1 to protect the Council's interests. Although Bragg and Looney subsequently argued over whether Looney had a lawyer, Bragg's conversation with Martin, coupled with Looney's lack of a written response to RU-1, resulted in Bragg's good faith belief that Looney was being represented by Martin in any further matters regarding his employment by the Authority. Nevertheless, Bragg told Looney that he was still available for further assistance.

A review of all the facts shows that Bragg acted in a fair, reasonable and good faith manner regarding Looney's disciplinary hearing and discharge. He never arbitrarily or discriminatorily refused to represent him. Bragg merely told Looney that if he preferred to use his own attorney, the Council would not also provide assistance. A union is not required to represent a member who chooses to use his/her own attorney instead of union representation. See LPN Association, P.E.R.C. No. 80-133, 6 NJPER 220 (¶11111 1980).

Having reviewed all the facts, I find that Bragg did not act in an unlawful manner, thus the Council did not violate its duty of fair representation.

Based upon the above facts and analysis, I make the following:

Recommendation

I recommend that the consolidated complaint be dismissed.

Arnold H. Zudick
Hearing Examiner

Dated: January 23, 1990
Trenton, New Jersey