

L.D. No. 89-3

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION  
LITIGATION ALTERNATIVE PROGRAM

In the Matter of

MUNICIPAL EMPLOYEES ASSOCIATION  
OF THE BOROUGH OF FREEHOLD,

Public Employer,

-AND-

Docket No. CIH-88-75  
LD-89-3

DOROTHY NIMICK, MARY STILES  
AND GERTRUDE PARSON,

Petitioner.

Appearances:

For the Public Employer,  
John West, President

For the Petitioner,  
Dorothy Nimick

LAP DECISION

The Municipal Employees Association of the Borough of Freehold ("MEA") and Dorothy Nimick, Mary Stiles and Gertrude Parson ("charging parties") have agreed to submit this dispute to the Public Employment Relations Commission's ("Commission") Litigation Alternative Program ("L.A.P."). In this procedure, the parties describe and document the nature of their dispute to a Commission designee. Failing a direct resolution of the issue by the parties, the Commission designee issues a recommendation designed to resolve the dispute without prejudice to the parties' legal positions.

On August 25, 1988, I conducted a hearing with the parties concerning this dispute. Dorothy Nimick, Mary Stiles and Gertrude Parson appeared pro se and John West and Gladys Ivery represented the MEA. The parties agreed that my determination would be final and binding.

The issues to be determined in this matter are: were charging parties authorized to take February 12, 1987 off; should the MEA have provided charging parties with representation; and what remedy, if any, is appropriate?

#### Findings of Fact

Dorothy Nimick, Mary Stiles and Gertrude Parson are employees of the Borough of Freehold ("Borough") and MEA members. The MEA is a public employee representative within the meaning of the New Jersey Employer-Employee Relations Act ("Act"). The Borough and the MEA are parties to a collective negotiations agreement effective from January 1, 1987 until December 31, 1989. That agreement provides in part:

Section 3: Representation. In using the grievance procedure established herein, an employee is entitled at each step to be represented by his Association representative or an attorney chosen by the Association, but not by both. However, both may be present (Ex.1).<sup>1/</sup>

Article X of the same agreement identifies 14 paid holidays (Ex. D). Lincoln's Birthday is not listed as a paid holiday for Borough employees.

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<sup>1/</sup> Charging parties' exhibits are numbered. The MEA's exhibits are labeled by letter. Joint exhibits are cited as J.Ex.\_\_\_\_.

The MEA bylaws provide as follows:

All members of this Association in addition to regulations herein set forth shall also be governed by reasonable rules and regulations of the Mayor and Council of the Borough of Freehold set forth by the contract and the employees handbook.

Municipal court Judge Leslie Tinkler closed the municipal court on Lincoln's Birthday in 1985 and 1986.<sup>2/</sup> Charging parties did not work on those days but were paid by the Borough. The Borough was aware that the court was closed and approved their payment for Lincoln's Birthday in 1985 and 1986.

In February 1987, Judge Tinkler advised the court employees that the court, including the clerical offices would be closed on February 12, 1987. Charging parties did not work that day and were paid.

An MEA member informed it that charging parties did not work on February 12, 1987, but were paid for the day. Gladys Ivery, MEA secretary, questioned the Borough clerk about the holiday.

On February 18, 1987 Borough Administrator Hank DiPasquale informed charging parties they were not permitted to take Lincoln's Birthday as a holiday and they could make up the day by working a Saturday at straight time or they would be docked a day's pay (Ex. 3). The next day, Judge Tinkler advised DiPasquale that he had closed the court and its clerical offices on February 12, 1987 (Ex.

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<sup>2/</sup> Rule 1:30-4 authorizes the municipal judge to set the court's hours (Ex. 22).

4). On February 20, DiPasquale responded explaining that court's clerical employees were Borough employees who were not entitled to the day off (Ex. 5). DiPasquale stated his intention to follow his February 18 memo unless the Borough council came to another conclusion. On February 26 and 27, charging parties wrote to the Mayor and council asking them to review DiPasquale's decision since they were instructed to take the day off by their supervisor (Ex. 6a-6d). On March 2, DiPasquale reiterated his request that charging parties make up the day (Ex. 7). On March 3, DiPasquale informed charging parties that the Borough would pay them for February 12, 1987 as a holiday (Ex. 8). I find that by closing the clerical offices Judge Tinkler authorized charging parties to take Lincoln's Birthday as a holiday.

On March 5, John West MEA president and Ivery complained to the Mayor and council complaining because charging parties were paid for February 12, 1987. They asserted that paying charging parties for the day violated the contract. They requested that charging parties be required to make up the day; have a personnel day deducted; or the Borough should give other unit members extra pay for working that day (J.Ex. 9). On the same day, the PBA filed a grievance requesting similar treatment for its members (Ex. 10).

On March 11, DiPasquale informed charging parties that the Council had reviewed the issue at the Association's request and decided that charging parties would not receive pay for February 12,

unless they made up the day (Ex. 12).<sup>3/</sup> On March 16 17, and 18, charging parties filed formal grievances (Ex. 13a-13d). On March 18 and 23, Judge Tinkler responded by suggesting they resolve the matter with the Mayor and council (Ex. 14, (Ex. 16). On March 27 and 30, charging parties moved the grievances to the third step, the Mayor and council (Ex. 17a-17c).

On March 20, 23, and 27, charging parties requested the MEA provide them with an attorney of their choice to represent them in their grievance against the Borough (Ex. A, Ex. B, and Ex. C). In each letter charging parties stated they did not wish to be represented by the MEA because it objected to their receiving February 12, 1987 as a holiday. On April 9, the MEA sent copies of two petitions to charging parties. The first opposed providing charging parties with an attorney. It had 30 signatures of unit employees. The second was in favor of providing charging parties with an attorney to represent them against the Borough. The second petition was not signed (Ex. 2). Charging parties were not given an opportunity to sign either petition.

Charging parties subsequently hired their own attorney to represent them before the Mayor and council and at arbitration. On April 9, 1987 the Mayor and council heard the matter and denied the grievance. The arbitrator denied the grievance for lack of standing because under the agreement between the Borough and the MEA, only the MEA may file for arbitration.

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<sup>3/</sup> The PBA subsequently withdrew its grievance and supported charging parties (Ex. 11).

Positions of the Parties

Charging parties assert that the MEA violated the Act and the contract when it refused to process their grievances to arbitration; opposed the grievance; refused to provide charging parties with an independent attorney to represent them in the grievance process and colluded with the Borough against them.

Charging parties seek a finding that they were improperly denied representation by the MEA. Additionally they seek reimbursement for their expenses including pay for February 12, 1987, attorneys fees, and the arbitrator's fee. Finally, charging parties seek an order providing them with a credit against future MEA dues for their proportional share of the fee paid to the MEA's attorney to defend the MEA in this proceeding.

The MEA asserts that charging parties should have known that they were not entitled to a paid holiday on February 12, 1987 and should have questioned the Judge's order to close the court. It also asserts that charging parties informed the MEA in their March 20, 23 and 27, 1987 letters that they did not wish to be represented by the MEA (Ex. A, Ex. B, Ex. C). The MEA contends that the dispute was between the Mayor and council and charging parties until a charge was filed against the MEA. Since the contract did not provide February 12, 1987 as a holiday, charging parties violated the contract and the MEA bylaws by not working that day; the MEA contends that it had no obligation to represent charging parties because they violated the contract.

The MEA asserts that charging parties' charges and allegations are without merit and therefore it should not be required to compensate charging parties for the February 12, 1987 or for their expenses. Further the MEA believes that it has no obligation to deduct the cost its defense of the unfair practice charge from future dues.

#### Analysis

Section 5.3 of the Act requires a majority representative to represent the interests of all unit members without discrimination and without regard to employee organization membership. Subsection 5.4(b)(1) makes it illegal for a majority representative to violate that obligation. A majority representative does so when it acts arbitrarily, discriminatorily or in bad faith. Vacca v. Sipes, 366 U.S. 171 (1967). See, Belen v. Woodbridge Twp. Bd. of Ed., 142 N.J. Super. 486 (App. Div. 1976); Lawrence Twp. P.B.A., P.E.R.C. No. 84-76, 10 NJPER 41 (Paral5023 1983); Local #3, AFL-CIO, Cooks, Bartenders & Cafeteria Workers, P.E.R.C. No. 82-198, 9 NJPER 146 (¶14069 1983); Union City, P.E.R.C. No. 82-65, 8 NJPER 98 (¶13040 1982). The Commission has found a breach exists when the majority representative "makes a deliberate decision in bad faith to cause a unit member economic harm." Union City at 100. The facts of each case must be examined to determine whether the obligation has been breached. Union City. The majority representative, however, is entitled to a wide range of reasonableness. Lawrence Twp. PBA, supra, Humphrey v. Moore, 375 U.S. 335 (1964).

Under this case's circumstances, I find the MEA acted in bad faith. Charging parties were authorized to take a holiday on February 12, 1987 by Judge Tinker, their supervisor. After the MEA inquired about their payment, DiPasquale told charging parties they had to make up the day. When the Mayor and Council reviewed the decision at charging parties' request, DiPasquale was instructed to pay them. The MEA complained to the Mayor and Council and the Borough reversed itself. The MEA's actions constitute a deliberate decision to cause charging parties to lose the holiday. While the remainder of the unit did not receive the holiday as a benefit, it was not within the wide range of reasonableness to urge an employer to dock employees for receiving an extra holiday which they were instructed to take by their supervisor. I therefore find the MEA's actions in seeking to require charging parties to make up the day or be docked were in bad faith and breached the duty of fair representation.

Charging parties also assert that the MEA should have taken their grievances to arbitration and provided them with an attorney of their choice.

There is no requirement that a majority representative present every grievance urged upon it, despite its best judgment, with regard to the relative merits of the grievance in question. Trenton Bd. of Ed., P.E.R.C. No. 86-146, 12 NJPER 528 (¶17198 1986). Furthermore, an employee has no right to compel a majority representative to proceed to arbitration where the employee had the



right to present his or her grievance at an earlier stage in the grievance procedure. N.J. Tpke. Auth., P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980).

Here, charging parties filed grievances on their own and processed them through the grievance procedure. The parties agreement apparently limited the right to file for binding arbitration to the MEA.<sup>4/</sup> Such a provision is within the rights of a majority representative. Red Bank. The arbitrator dismissed charging parties' grievances finding they did not have standing to file for arbitration under the agreement. Though it is likely that the charging parties would have prevailed on the merits at arbitration, the MEA did not have an absolute obligation to take that case to the arbitrator. The MEA evaluated the case in terms of the contract. The contract did not provide a holiday on Lincoln's Birthday. Therefore, the MEA may have legitimately assumed that charging parties would not prevail on the merits at arbitration despite the fact that Judge Tinkler authorized them to take the holiday.

The MEA did not breach its duty of fair representation by failing to arbitrate charging parties' grievances. Therefore, I do not order the MEA to reimburse the charging parties for the cost of the arbitrator, nor do I order them to file for arbitration of the grievances.

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<sup>4/</sup> While certain contract clauses are part of the record, the grievance procedure is not.

Charging parties claim that Section 3 of the parties' agreement obligated the MEA to provide them with an attorney to process their grievances against the Borough. Section 3, however, merely obligates the MEA to provide representation by "an association representative or by an attorney chosen by the Association." (emphasis added). Charging parties specifically asked the MEA to pay for an attorney of their choice. Charging parties legitimately rejected representation by the MEA which urged the Borough to deny them the holiday. That does not mean they had a contractual right to independent counsel. The contract provides that the MEA provide its members with representation by an MEA representative or its attorney. Charging parties rejected those alternatives in their letters to the MEA. The contract does not provide charging parties a right to an attorney of their choice. Therefore the contract does not require the MEA to pay charging parties' legal fees. Absent an express statutory or contractual obligation, there is normally no recovery for litigation expenses or counsel fees. Union City. I therefore reject charging parties' claim for attorneys fees.

Finally, charging parties claim that they should not be required to pay a share of the MEA's cost of an attorney to defend the it in the unfair practice proceeding.<sup>5/</sup> There is no statutory or contractual reason that charging parties should not have to pay a


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<sup>5/</sup> The MEA retained an attorney who appeared on its behalf in the pre-hearing, but did not appear at this hearing for the MEA.

proportion of dues simply because the money is used to pay for an attorney defending the MEA in an action against their interests See Lehnert v. Ferris Faculty, 123 LRRM 2361, 2376 (W.D. Mich. 1986) Union litigation expenses, including those expended by a union to defend itself against an objecting representation fee payor, are chargeable to objecting representation fee payors, where such expenditures are related to the union's duties as exclusive representative.)

Recommendation

Based upon the entire record presented in this case and the above analysis, I recommend that the MEA reimburse charging parties the amount they were docked for taking February 12, 1987 as a holiday.

  
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Joyce M. Klein  
Commission Designee

DATED: September 20, 1988  
Trenton, New Jersey