

P.E.R.C. NO. 2005-61

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PBA LOCAL 187,

Respondent,

-and-

Docket No. CI-2002-64

JAMES CIPRIANO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies a Motion for Summary Judgment filed by PBA Local 187 seeking dismissal of a Complaint based on an unfair practice charge filed by James Cipriano. The charge alleges that the PBA violated the New Jersey Employer-Employee Relations Act when it failed to process and pursue Cipriano's grievance over alleged violations of departmental seniority. The Commission denies the motion because the parties have failed to support their factual assertions with certifications or affidavits. The Commission concludes that there may be no material facts in dispute in this case, but there is no factual record upon which to make that determination. The Commission denies the motion without prejudice to its refiling with proper supporting certifications and documents.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Docket No. CI-2002-64

JAMES CIPRIANO,

Charging Party.

Appearances:

For the Respondent, Loccke & Correia, attorneys
(Michael Bukosky, of counsel)

For the Charging Party, Gregory S. Schaer, attorney

DECISION

On February 24, 2005, James Cipriano filed exceptions to a Hearing Examiner's Decision on Motion for Summary Judgment. That decision recommended dismissing a Complaint based on an unfair practice charge filed against PBA Local 187. H.E. No. 2005-7, 31 NJPER 26 (¶12 2005). The Complaint alleges that the PBA breached its duty of fair representation toward Cipriano. The Hearing Examiner found that Cipriano has not asserted facts showing that the PBA acted in bad faith or in an arbitrary or discriminatory manner.

Cipriano filed his unfair practice charge against the PBA on June 14, 2002. The charge alleges that the PBA violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et

seq., specifically 5.4b(1) and (5),^{1/} when it failed to process and pursue his grievance over alleged violations of departmental seniority. A copy of a grievance attached to the charge claims that the parties' past practice allowed employees to pick vacations, jobs/shifts and overtime assignments based on their seniority from date of hire with the Sheriff's department and that selective enforcement of the contract is prejudicial and punitive.

On September 10, 2004, a Complaint and Notice of Hearing issued. On September 28, the PBA filed its Answer denying the allegations in the Complaint and incorporating the affirmative defenses in its previously filed statement of position. That statement asserts that the PBA accepted, reviewed and considered the grievance advanced by Cipriano and that after review by the PBA executive board, and following consultations with counsel and the Sheriff's department, it was determined that the grievance did not have merit and did not warrant submission to arbitration. The statement also asserts that the charge is untimely because Cipriano knew more than one year earlier how the PBA was interpreting the contractual seniority provision.

^{1/} These provisions prohibit 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. (5) Violating any of the rules and regulations established by the commission."

On October 1, 2004, the PBA filed its motion for summary judgment with the Hearing Examiner. N.J.A.C. 19:14-4.8 requires that such motions be filed with the Chairman. On October 5, the Hearing Examiner transmitted the motion to the Chairman who referred it back to the Hearing Examiner for consideration.

On November 4, 2004, the Hearing Examiner granted the charging party's request for an extension of time until November 5 to file a response. On November 4, the charging party filed his response opposing summary judgment. On November 29, the PBA filed a reply attaching copies of two letters that had not previously been submitted. On December 14, the charging party filed a response.

We begin by reviewing the procedures for filing motions before a hearing. The Director of Unfair Practices will issue a Complaint after making a determination that the allegations in a charge, if true, may constitute unfair practices on the part of the respondent, and that formal proceedings should be instituted in order to afford the parties an opportunity to litigate relevant legal and factual issues. N.J.A.C. 19:14-2.1. A decision by the Director to issue a Complaint may not be appealed pre-hearing except by special permission to appeal to the full Commission. N.J.A.C. 19:14-2.3(c). A motion for summary judgment filed by a respondent that does not rely on a factual record is in essence a motion appealing the Director's

determination that the allegations in the charge might constitute an unfair practice. Such a motion should not be considered by a Hearing Examiner. See East Brunswick Bd. of Ed., P.E.R.C. No. 97-75, 23 NJPER 41 (¶28028 1996); Englewood Bd. of Ed., P.E.R.C. No. 93-119, 19 NJPER 355 (¶24160 1993); N.J.A.C. 19:14-2.3(c).

Where a respondent believes that given the undisputed facts, there has been no unfair practice, the proper mechanism for bringing that to our attention is a motion for summary judgment. Such a motion will be granted if there are no material facts in dispute and the respondent is entitled to its requested relief as a matter of law. N.J.A.C. 19:14-4.8. However, the undisputed material facts must be in a supporting record. That record can be submitted by way of certifications or affidavits made on personal knowledge. N.J.A.C. 19:14-4.8(b); Sellers v. Schonfield, 270 N.J. Super. 424 (App. Div. 1993) (rejecting attorney's certification and attached exhibits as a proper basis for granting summary judgment).

Once a respondent places facts in the record in support of a motion for summary judgment, a charging party that disputes those facts must file its own certifications or affidavits made on personal knowledge. A charging party cannot rely on the allegations in its charge or any attachments to its charge to create a material factual dispute. See Jersey Central Power & Light Co. v. Lacey Tp., 772 F.2d 1103, 1109-1110 (3d Cir. 1985)

(pleadings and briefs are not in evidence and cannot create issues of material fact in summary judgment proceeding).^{2/}

We now consider the pending motion. There are numerous irregularities in the unfolding of this motion that require us to deny it, in particular the parties' failure to support their factual assertions with certifications or affidavits. The PBA did not file any documents or certifications with its motion. It attached two letters to a reply brief, but they are supported by a certification from respondent's attorney, and not by anyone who certified that the content of the letters is true or that he or she had first-hand knowledge of who created or sent the letters. Both parties refer to provisions of the collective negotiations agreement, but neither has introduced a copy of the agreement. The charging party argues that the Hearing Examiner failed to address many material facts, but it has not submitted any affidavit, certification or document presenting those facts.

It may be that there are no material facts in dispute in this case, but there is no factual record upon which we can make that determination. Accordingly, we must deny the respondent's motion.

The Court Rules on motions for summary judgment permit denials of such motions without prejudice for failure to file a

^{2/} A charging party may also move for summary judgment based on undisputed facts in a supporting record.

statement of material facts citing the portion of the motion record establishing the fact or demonstrating that it is uncontroverted. R. 4:46-2(a). We will take a similar course and deny this motion without prejudice to its refiling with proper supporting certifications and documents. In addition, if there are no material facts in dispute, the parties may instead stipulate the facts for a decision without a hearing. See N.J.A.C. 19:14-6.7.

ORDER

The respondent's motion for summary judgment is denied without prejudice.

BY ORDER OF THE COMMISSION

A handwritten signature in black ink, appearing to read "Lawrence Henderson", written over a horizontal line.

Lawrence Henderson
Chairman

Chairman Henderson, Commissioners Buchanan, DiNardo, Fuller, Mastriani and Watkins voted in favor of this decision. Commissioner Katz was not present. None opposed.

DATED: March 31, 2005
Trenton, New Jersey
ISSUED: March 31, 2005

H.E. NO. 2005-7

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

In the Matter of

PBA LOCAL 187,

Respondent,

-and-

DOCKET NO. CI-2002-64

JAMES CIPRIANO,

Charging Party.

SYNOPSIS

The Hearing Examiner grants the union's Motion for Summary Judgment and dismisses an unfair practice charge filed by James Cipriano against PBA Local 187. The charge alleged that Local 187 violated the New Jersey Employer-Employee Relations Act when it refused to process Cipriano's grievance. The union filed a Motion for Summary Judgment arguing that Local 187 did not breach its duty of fair representation. The Hearing Examiner found that the charging party did not assert facts that showed that the union acted in bad faith or in an arbitrary or discriminatory manner, therefore, Local 187 was entitled to summary judgment.

A Hearing Examiner's Decision on a Motion for Summary Judgment which resolves all the issues in the Complaint becomes a recommended decision, pursuant to N.J.A.C. 19:14-4.8(e). A 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. 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.

H.E. NO. 2005-7

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

In the Matter of

PBA LOCAL 187,

Respondent,

-and-

DOCKET NO. CI-2002-64

JAMES CIPRIANO,

Charging Party.

Appearances:

For the Respondent,
Loccke & Correia, attorneys
(Michael Bukosky, of counsel)

For the Charging Party,
Gregory S. Schaer, attorney

HEARING EXAMINER'S DECISION ON MOTION FOR SUMMARY JUDGMENT

On June 14, 2002, James Cipriano filed an unfair practice charge against PBA Local 187. Cipriano alleges that the PBA violated 5.4(b)(1) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it failed to process his grievance to arbitration.

^{1/} These provisions prohibit 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. (5) Violating any of the rules and regulations established by the Commission."

On September 10, 2004, a Complaint and Notice of Hearing issued. On September 28, the PBA filed an Answer denying the alleged failure to process Cipriano's grievance.

On September 27, 2004, the PBA filed a Motion for Summary Judgment accompanied by a supporting brief only. On October 5, 2004, the Motion was referred to me for decision. N.J.A.C. 19:14-4.8. On November 3, 2004, Cipriano filed a reply opposing the Motion. Cipriano's response was not supported by affidavits or other documents. On November 29, 2004, the PBA filed a reply including attachments which had not previously been submitted. The attachments included a letter to Cipriano from Mike Vasil, PBA President, dated March 20, 2002 addressing Cipriano's grievance. Cipriano was given an opportunity to respond specifically to the letter. On December 14, 2004, Cipriano filed a reply which did not address the letter included in the PBA's reply brief.

Summary judgment will be granted:

if it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and the movant . . . is entitled to its requested relief as a matter of law.

[N.J.A.C. 19:14-4.8(d)]

Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995), specifies the standard to determine whether a "genuine issue" of material fact precludes summary judgment. The

fact finder must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." If that issue can be resolved in only one way, it is not a "genuine issue" of material fact. A motion for summary judgment should be granted cautiously -- the procedure may not be used as a substitute for a plenary trial. Mandel v. UBS/Paine-Webber, 373 N.J. Super 55, 71-72 (App. Div. 2004); Baer v. Sorbello, 177 N.J. Super. 182 (App. Div. 1981); Essex Cty. Ed. Serv. Comm., P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982); N.J. Dept. of Human Services, P.E.R.C. No. 89-54, 14 NJPER 695 (¶19297 1988).

Applying these standards and relying upon the pleadings, I make the following:

FINDINGS OF FACT

1. James Cipriano has been employed by the Mercer County Sheriff's Department since September 14, 1992. Cipriano was initially employed as an investigator, an unclassified position under the auspices of the New Jersey Department of Personnel.

2. After passing a qualifying examination, Cipriano became a sheriff's officer on November 12, 2000. Sheriff's officer is a classified position under the auspices of the Department of Personnel.

3. Section 11.1 of the collective negotiations agreement between the Mercer County Sheriff's Office and the PBA provides in pertinent part:

Seniority is defined as an employee's continuous length of service with the Sheriff's Office, beginning with the date of appointment as a permanent Civil Service employee, Sheriff's Officer. Investigators shall be maintained on a separate list.

4. On January 1, 2002, a departmental seniority list was promulgated in which Cipriano's seniority was calculated from the date he received a permanent civil service appointment as a sheriff's officer (November 12, 2000) and not from his date of hire as an investigator (September 14, 1992). Cipriano's rank on the list concomitantly descended from number 61 to number 78.

5. On March 11, 2002, Cipriano filed a grievance with the PBA against the Mercer County Sheriff contesting the calculation of his seniority and requesting that the Sheriff recalculate his seniority based upon his September 14, 1992 hire date.

6. On March 20, 2002, Mike Vasil, PBA Local 187 President, sent a letter to Cipriano. Vasil wrote:

This letter is in reference to our conversation of March 15, 2002 regarding the grievance you filed with the Sheriff of Mercer County. The grievance is based on your belief of unequal treatment based on the seniority list. After learning of your concerns and consulting with the attorney for PBA Local #187, it is our belief that you have no grounds to submit this grievance. Based upon this opinion, this local cannot

support your actions based on the following reason: 1) the grievance you submitted does not violate the current contract between the Mercer County Sheriff's PBA Local #187 and the Sheriff of Mercer County/the County of Mercer.

7. Cipriano admits that he received Vasil's letter.

ANALYSIS

N.J.S.A. 34:13A-5.3 provides in part:

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 interests of all such employees without discrimination and without regard to employee organization membership.

Section 5.3 of the Act empowers an employee representative to represent employees in the negotiation and administration of a collective agreement. With that power comes the duty to represent all unit employees fairly in negotiations and contract administration.

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 (1967) ("Vaca"). Courts and this Commission have consistently embraced the standard of Vaca in adjudicating such unfair

practice 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 55 (¶11282 1980), aff'd App. Div. Docket No. A-1455-80 (April 1, 1982), pet. for certif. den. 91 N.J. 242 (1982); New Jersey Turnpike Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979); In re AFSCME Council No. 1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978). Fair Lawn Bd. of Ed., P.E.R.C. 84-138, 10 NJPER 351 (¶15163 1984); OPEIU Local 153 (Johnstone), P.E.R.C. 84-60, 10 NJPER 12 (¶15007 1983). Whether a union's conduct in deciding whether to file a proposed grievance violates its duty of fair representation will be evaluated by this standard: Did it act arbitrarily, discriminatorily or in bad faith? Vaca.^{2/}

A majority representative does not have an obligation to file every grievance which a unit member asks it to submit. Camden Cty. College (Porreca), P.E.R.C. No. 88-28, 13 NJPER 755 (¶10285 1987); Trenton Bd. of Ed., P.E.R.C. No. 86-146, 12 NJPER 528 (¶17198 1986). We have held that a union must conduct some minimal investigation of grievances brought to its attention.

2/ See also, Camden County College (LaMarra), P.E.R.C. No. 93-90, 19 NJPER 222 (¶24107 1993); City of Union City, P.E.R.C. No. 82-65, 8 NJPER 98 (¶13040 1982); Middlesex County, P.E.R.C. No. 81-62, 6 NJPER 55 (¶11282 1980), NJPER Supp.2d 113 (¶94 App. Div. 1982), certif. den. 91 N.J. 242 (1982); N.J. 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).

Jersey City Medical Center, D.U.P. No. 88-3, 13 NJPER 688 (¶18257 1981); NLRB v. American Postal Workers Union, 618 F.2d 1249, 103 LRRM 3045 (8th Cir. 1980).^{3/} The thoroughness with which unions must investigate grievances in order to satisfy the duty varies with the circumstances of each case. Although unions are afforded a reasonable range of discretion in deciding how to handle grievances, union conduct that shows an egregious disregard for the rights of union members [unit employees] constitutes a breach of the duty of fair representation. Tenorio v. NLRB, 680 F.2d 598, 110 LRRM 2939 (9th Cir. 1982). Proof of mere negligence, standing alone, does not suffice to prove a breach of the duty of fair representation. OPEIU (Wasilewski), P.E.R.C. No. 98-131, 24 NJPER 256 (¶29122 1998) aff'ng H.E. No. 98-4, 23 NJPER 573 (¶28287 1997).

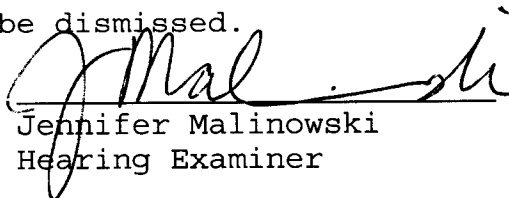
Undisputed facts show that the PBA investigated Cipriano's grievance in March 2002. Based on a consultation with its attorney, the PBA determined that there was no violation of the collective agreement between the Mercer County Sheriff's Office and the PBA with respect to Cipriano's seniority calculation. Cipriano does not contest the seniority provision nor allege that the PBA's interpretation of it is derived from bad faith. That

3/ See Lullo v. Int'l Assn. of Firefighters, 55 N.J. 409 (1970), where the New Jersey Supreme Court approved the Commission's use of federal sector precedent in unfair practice litigation.

Cipriano interprets the seniority provision differently than the PBA does not alone establish a genuine issue of material fact precluding summary judgment. Cipriano has not alleged facts indicating a violation of the PBA's collective agreement with the Mercer County Sheriff. Nothing in the record suggests that there existed any animus between Cipriano and the PBA; he argues merely that he disagrees with the PBA's interpretation of the seniority provision. Cipriano has not asserted facts showing that the PBA acted in bad faith or in an arbitrary or discriminatory manner. Accordingly, PBA Local 187 is entitled to judgment as a matter of law.^{4/}

RECOMMENDED DECISION

I grant PBA Local 187's motion for summary judgment and recommend that the complaint be dismissed.


Jennifer Malinowski
Hearing Examiner

Dated: February 15, 2005
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 February 28, 2005.

^{4/} No facts are alleged to support a violation of 5.4(b)(5) of the Act.