H.E. NO. 2014-16

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

In the Matter of
JERSEY CITY HOUSING AUTHORITY,
Respondent,

-and-

Docket No. CI-2012-002

INDEPENDENT SERVICE WORKERS
OF AMERICA,
Respondent,

-and-

MATTHEW P. CRAWFORD,
Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss the 5.4a(1) and a(5) as well as the 5.4b(1) allegations finding that the Authority did not collude with the union to terminate Crawford nor did the union independently violate its duty to fairly represent Crawford. Crawford was laid off after he lost his seniority due to a 4-day suspension involving an altercation with the union president's son. Crawford failed to meet his burden of proof that the Authority acted inappropriately in assessing a 4-day suspension for the altercation. The union president appropriately withdrew from representing him in light of his son's participation in the incident but the union vice-president stepped in and Crawford was represented by counsel throughout the proceeding.

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

H.E. NO. 2014-16

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

In the Matter of

JERSEY CITY HOUSING AUTHORITY,
Respondent,

-and-

Docket No. CI-2012-002

INDEPENDENT SERVICE WORKERS
OF AMERICA,
Respondent,

-and-

MATTHEW P. CRAWFORD,
Charging Party.

Appearances:

For the Respondent
Ruderman and Glickman, attorneys
(Littie E. Rau, of counsel)

For the Respondent
Cohen, Leder, Montalbano and Grossman, attorneys
(Bruce Leder, of counsel)

For the Charging Party
Feintuch, Porwich and Feintuch, attorneys
(Philip P. Feintuch, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On July 15, 2011, Matthew Crawford (Charging Party) filed an unfair practice charge, which was amended on July 25 and July 28, 2011, with the New Jersey Public Employment Relations Commission (Commission) alleging that the Jersey City Housing Authority (Authority) and Independent Services Workers of America (ISWA or Union) violated all of the 5.4a and 5.4b subsections,

respectively, of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A:1 et seq. (Act).[1/] The Charging Party alleged that the Authority colluded with the Union resulting in his loss of seniority and subsequent layoff. The Charging Party also alleged that the Union failed in its duty to represent him fairly regarding a grievance filed over certain discipline he received

---

1/ The 5.4a provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (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."

The 5.4b 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. (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. (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (5) Violating any of the rules and regulations established by the commission."

which resulted in his loss of seniority and his subsequent layoff. The Charging Party seeks reinstatement to his prior position, restoration of his seniority, back pay, the direction of "open" union elections and the removal of an alleged supervisory employee from the ISWA negotiations unit.

A Complaint and Notice of Hearing was issued on November 19, 2012 limited to the 5.4a(1) and (5) and b(1) allegations in the charge (C-1).[2/] Both Respondents filed Answers by November 29, 2012, denying having violated the Act and raising certain affirmative defenses (C-2, C-3).

Hearings were held on August 29, September 16 and December 18, 2013.[3/] All parties filed post-hearing briefs and reply briefs by March 10, 2014.

Based upon the entire record, I make the following:

FINDINGS OF FACT

1. The Authority and Union were parties to a collective negotiations agreement effective April 1, 2005 through March 31, 2008 (ER-4). The Union represents non-supervisory blue and white collar employees employed by the Authority. Article 24 of ER-4

2/ "C", "CP" and "ER" refer, respectively, to Commission, Charging Party and Employer exhibits received into evidence at the hearing.

3/ The Transcripts will be referred to as 1T (8/29/13), 2T (9/16/13), and 3T (12/18/13).

was a Seniority provision which provided in Section 24.3 Seniority applications:

> b) Seniority, for purposes of lay-offs and demotions in lieu of layoffs, shall be determined from the date of employment within title (i.e., last employed within title shall be first for lay-off or demotion in lieu of lay-off).

On December 13, 2007, the Authority and Union signed an agreement (CP-1) to resolve a previously filed grievance. In reaching CP-1, the parties agreed to language which was intended to amend the language in Article 24 of ER-4. That provision in CP-1 provides as follows:

> 3. ISWA agrees that in any future actions, the application of "merit along with seniority," as provided for in Article 24 of the ISWA collective bargaining agreement, will be defined as follows:
>
> > An employee who has had four or more days suspension (or loss of vacation in lieu of suspension) within the last three years will lose seniority rights for the purposes of layoff, demotion in lieu of layoff or recall. [CP-1]

The parties 2011-2014 collective agreement (ER-2) contains the above language from CP-1 in Article 24, Section 24.2(b) as follows:

> Seniority, for purposes of lay-offs and demotions in lieu of layoffs, shall be determined from the date of employment within title (i.e., last employed within title shall be first for lay-off or demotion in lieu of lay-off). However, in layoff actions, the application of "merit along with seniority" will be defined as follows: 'An employee who

> has had four or more days suspension (or loss of vacation in lieu of suspension) within the last three years will loss [sic] seniority rights for the purposes of layoff, demotion in lieu of layoff or recall.'

Although no new collective agreement was in place between April 2008 and March of 2011 which encompassed the time Crawford was engaged in a verbal altercation (on December 29, 2010) which led to his notice of discipline on January 14, 2011 (ER-5), the Seniority language in Article 24 of ER-4 had been amended by CP-1 on December 13, 2007, and was in effect when ER-5 issued on January 14, 2011 (1T70-1T71, 3T18-3T21).

2. Fred Parson has been employed by the Authority for many years and has been President of the Union for over ten years. His son, Omar was also employed by the Authority as a building maintenance worker. Robert Brunner has been the Union's vice-president for over ten years (1T97). He processes many of the grievances filed by employees in the unit (1T102).

3. Matthew Crawford was employed by the Authority for approximately 19 years. He held several positions and became a plasterer sometime before 2006. Prior to January 2011 the Authority had five plasterers, and Crawford was second on the seniority list (ER-10).

Crawford explained that he did not have a good relationship with Fred Parson while employed by the Authority. He claimed

Fred made derogatory remarks to and about him, denied him overtime opportunities and insulted him (1T116-1T118).

4. Crawford testified that he had never received a disciplinary suspension by the Authority (1T115). His disciplinary record, however, was not clean. He received a written warning and increment withholding in 1998; he was charged with insubordination and conduct unbecoming an employee in June 1999; he was warned about a verbal confrontation that occurred in September 1999; he received a written warning for engaging in a verbal dispute and insubordinate conduct toward his supervisor in 2001; and, he received a written warning in 2008 for failure to complete a required form (CP-2).

In the Spring of 2008, Fred Parson processed two grievances on behalf of Crawford. One grievance concerned the above written warning, the other grievance concerned the Authority's "punch out" procedure. The written warning was not changed, but the Authority scheduled a meeting with him (Crawford) to review the punch out procedure (ER-3).

5. Omar Parson was disciplined twice prior to 2011. In December 2004 he received a written warning for an unauthorized absence from his assigned work area; and, in September 2005, he received a three day suspension for failure to properly perform job duties and because of another unauthorized absence from his work site (CP-3).

6. Crawford and Omar Parson did not have a good working relationship. In December 2010 they were involved in a verbal altercation that eventually led to their discipline.

Crawford explained that a day or two before Christmas (in 2010) he was in a discussion with Fred Parson and employee Jamar Morris about Morris' vehicle allowance. Apparently, Crawford suggested Morris file a grievance. Fred was unhappy with that suggestion and told Omar. According to Crawford, on December 29, 2010, he overheard Omar making derogatory remarks about him (Crawford). Crawford claims he asked Omar if he was referring to him (Crawford), and that then Omar began running toward him. A number of other employees became involved restraining both Crawford and Omar. Fred witnessed some of the events (1T121-1T122).

After the incident, Crawford said he telephoned the Director and left a message that Omar was harassing and threatening him. He reported the incident to manager Donna Chandler, then sought medical attention because he injured his shoulder during the incident (1T123). He filed a workers compensation claim but by letter of January 4, 2011, the workers compensation claim was denied noting that: "your case is denied as it did not arise in the normal course and scope of your employment" (ER-1; 2T17-2T22). That case was subsequently settled with Crawford receiving $5,600 (2T99).

7. Grace Malley, the Authority's Director of Staff/Resident Development & Strategic Planning, explained the Authority's discipline process. An employee's direct supervisor conducts an informal investigation and sends a memorandum to the department director copying Malley. Sometimes before, sometimes after a notice of discipline is issued an informal hearing/conference is held with Union Vice President Bob Brunner, the employee(s) and the department director in an effort to resolve the matter. Particularly when the informal hearing is held after the issuance of a notice of discipline which indicates the level of discipline, the Union and/or the employee may recommend a lower penalty to resolve the matter. If the department director agrees with the Union's proposed recommendation it is presented to the Authority's Executive Director, Maria Maio for approval (1T65, 1T74, 1T77, 1T81, 1T84).

If the matter cannot be resolved the Union/employee may request a formal hearing which is conducted before Malley as hearing officer. The employee can be represented by the Union and/or an attorney. Before the formal hearing begins the Union/Grievant may request to have an informal discussion in an effort to resolve the grievance (3T89). Once the hearing is completed Malley issues a written decision (3T6-3T8).

8. The record here shows it was Crawford, not Fred Parson or anyone else, that filed a report about the December 29th

incident with his supervisor/manager Donna Chandler. Fred Parson, in fact, told Malley he had no intention of reporting the incident (3T76). I credit that testimony.

Chandler apparently questioned Crawford, then sent him to the Authority's Workers Compensation agent for attention. Chandler then questioned the other employees who had witnessed the event and notified Malley that she (Chandler) believed Crawford had been the aggressor (3T67-3T68).

9. On January 14, 2011, Malley and Maio sent a letter to Crawford (ER-5) notifying him that he had been charged with: 1) Conduct unbecoming a public employee, and 2) Failure to follow Workers Compensation directives regarding the December 29th incident. ER-5 advised Crawford that the first charge was based on his and other employee written and verbal statements to Chandler about the December 29th incident and his admission that several employees held him back from fighting. The second charge was based upon his failure to report to the Workers Compensation agent's facility (Concentra) as directed on December 31, 2010 for further examination. ER-5 further advised Crawford that his Workers Compensation claim was denied because it had been determined that he initiated the altercation; he was being suspended for five days; that he had a right to an informal meeting and or a formal hearing to review the charges. He was obligated to advise Malley of his choice by January 21, 2011.

Crawford told his shop steward, Clifford Brown, about ER-5 and Brown offered to represent Crawford but Crawford declined the offer and indicated he wanted to call Union Vice President Bob Brunner. Brown gave Crawford Brunner's number (1T124).

Crawford spoke to Brunner for over an hour and asked for a grievance form. Brunner provided the form the following day (1T183-1T189). Crawford prepared the grievance (CP-4) and faxed it to Brunner. In another hour long conversation with Brunner, Brunner allegedly told Crawford he had no defense, resulting in Crawford hiring his own attorney (1T125-1T126).

Crawford also testified that Brunner did not advise him that if he was suspended for four or more days he would lose his seniority and could be laid-off (1T126, 1T192). Brunner testified, however, that at a meeting with Malley, Crawford and himself, after the charges were read he pulled Crawford aside and advised him that if he was suspended for four or more days he would move to the top of the layoff list. Brunner said he advised Crawford either he (Brunner) would represent him or he (Crawford) could arrange for a lawyer to represent him (1T102-1T103).

Malley testified, however, that the Union did not request an informal hearing in January 2011 and that there was no informal meeting with her, Crawford and Brunner (3T63). Crawford also seemed unaware of any such meeting (1T181). I credit Malley and

find that no such meeting occurred. I also credit Crawford that Brunner did not tell him about the possibility of layoff.

Crawford did not request an informal hearing with Chandler to discuss ER-5 (2T88, 3T87-3T88).

Although Crawford's recollection of the events in January 2011 are somewhat vague, he apparently notified Malley to request a formal hearing which was initially scheduled for January 21, 2011. That hearing was cancelled, however, because Crawford took an extended leave from approximately January 21, 2011 until April 13, 2011 (2T30-2T32).

Despite being on leave, having received a grievance form, Crawford prepared and filed a grievance of his discipline with Brunner on January 25, 2011 (CP-4; 1T189-1T193). In CP-4, Crawford said he was never formally interviewed about the December 29 events, and he accused Fred Parson of meeting with all of the alleged witnesses which, Crawford alleged, caused them to "fabricate the truth." Brunner submitted CP-4 to Malley in January 2011 (1T102).

10. Sometime in January 2011 Omar Parson also received a letter from Malley and Maio notifying him that he had been charged with: 1) conduct unbecoming a public employee and 2) leaving his assigned work location without permission in relationship to the events of December 29, 2010. Omar was notified he would be suspended for four days (3T24). He

requested an informal conference at which Brunner recommended Omar receive a one-day suspension. Malley and Maio agreed to the one-day suspension because they did not believe he initiated the argument with Crawford. Fred Parson had no role in the resolution of Omar's discipline, and Omar waived any further hearing (3T23-3T24).

11. On February 8, 2011, the Authority issued its employees a general notice of layoff advising them that due to reasons of economy and efficiency a reduction in force or layoff would become effective on March 31, 2011 (ER-7).

12. On March 17, 2011, Malley and Maio sent Omar Parson a letter noting the charges against him and indicating he agreed to a one day suspension and waived any further hearing (CP-3).

13. Crawford's formal hearing regarding his disciplinary charges was held before Malley on April 12, 2011. Crawford was represented by his attorney, and Brunner was available to assist. Fred Parson testified on behalf of the Authority regarding that part of the incident he witnessed, therefore, he could not be at the hearing to represent Crawford. Nevertheless, Malley testified she relied upon the statements of other witnesses, not Parson, in reaching her determination (3T30).

14. On April 20, 2011, Malley and Maio issued Crawford a formal notice of layoff effective May 13, 2011 due to the

Authority's economic conditions but he was not actually laid off at that time pending his hearing (ER-8).

15. On April 25, 2011, Malley (and Maio) issued her (their) formal decision regarding the charges against Crawford (ER-6). Based upon Crawford's own testimony and the testimony of certain witnesses, Malley sustained the "conduct unbecoming" charge but dismissed the second charge. Since the second charge was dismissed Malley reduced the originally assessed five-day suspension to a four-day suspension. Malley concluded ER-6 with the following notice to Crawford:

> You are also advised that, in accordance with ISWA contract provisions regarding layoffs, your employment status with the four day suspension now negates your seniority status within the title of Plasterer. Since the JCHA eliminated two Plasterer positions in the recent Reduction In Force, which was effective March 31st, 2011, you are now subject to layoff and will be notified of such under separate cover.

Malley acknowledged she knew that by assessing Crawford a four-day suspension, he would lose his seniority and likely lead to layoff (1T38-1T39, 3T31). She conceded she could have recommended a suspension of less than four days but she believed that based upon the seriousness of the incident, the potential for violence, and because the evidence convinced her that Crawford initiated the argument, a four-day suspension was consistent with discipline assessed other employees in past

similar circumstances (1T39-1T40, 3T24-3T25). Malley noted Fred Parson did not influence her decision (3T50).

Malley explained that Omar received less discipline because he was actually talking to another employee, not Crawford, but that it was Crawford who initiated the verbal altercation with Omar (3T24-3T25). Malley also explained that Crawford's conduct did not warrant dismissal, but that his layoff was a consequence of the agreement with the Union on how to handle longer suspensions (3T66). Malley conceded, however, that Crawford's discipline could have been less than four days if the Union had requested an informal hearing and presumably made a recommendation for discipline less than four days that the Authority was willing to accept (3T62-3T63).

15. In accordance with the parties' Agreement, ER-2, Article 16.4(f), an employee cannot appeal (presumably grieve) discipline of less than six days once the employee has been found guilty of such charges (3T15). But an employee can grieve a layoff for a variety of reasons. In this case neither Crawford nor the Union filed a grievance over Crawford's layoff (1T76-1T77).

Crawford spoke to Brunner after the April hearing. He felt the witnesses who testified against him were afraid to say anything against Fred Person. Crawford at one point denied receiving Malley's decision in ER-6, but at another point

admitted receiving that letter (1T193-1T195, 1T198). I find he received it. Crawford asked Brunner what could be done about his layoff and if any steps could be taken. Crawford alleged Brunner said nothing could be done, he couldn't even file with PERC (1T128). I credit that part of Crawford's testimony.

Crawford also testified that no one from the Union instructed him that he could have taken a "second step" (1T129).

After talking to Brunner, Crawford went to see Malley. He allegedly played certain recordings for her which were not presented at this hearing, and complained to her that people didn't come forward to support his version of the December incident (1T129, 1T169).

Crawford believed that Fred Parson convinced and/or coerced Malley to suspend him for four days knowing he'd be laid off. He believed that if Fred had asked Malley to reduce his (Crawford's) suspension to less than three days she would have agreed (1T173-1T174). But when asked if Fred coerced Malley, Crawford explained he wasn't there, he didn't hear Fred talk to Malley and he had no facts to show Fred coerced her (1T177, 1T179). Malley denied such conduct (3T78). Given the lack of facts to support Crawford's contention, I find Malley was not coerced and I credit her testimony.

16. Malley explained that at the formal hearing in Crawford's case he had the opportunity to request an informal

discussion and the opportunity to offer to settle the charges but no such request or offer was made (3T89). She also noted that if the Union or Crawford had filed a grievance over Crawford's layoff it would have been denied (3T92-3T93).

17. The record reflects that in 2011 the Authority laid-off 37 employees and demoted 10 employees for economic reasons (3T37). There were five plasterers prior to the layoffs, and Crawford was number two based upon seniority in the position (as opposed to Authority-wide seniority) (ER-10). In February 2011, the two plasterers lowest on the list were laid off. Once Crawford's discipline case concluded in April 2011, however, the seniority list had to be redone because he lost all his seniority in position as a result of his discipline and fell to the bottom of the list. As a result, Crawford was laid off and one of the previously laid-off employees was recalled (3T32, 3T45-3T48). No plasterers have been recalled since Crawford's layoff (1T86).

Omar Parson was not a plasterer but was still affected by the layoff in 2011. Although he was subsequently recalled, he was laid off again in March 2013 and has not been recalled (1T85, 3T48-3T49).

18. Clifford Brown explained that normally as shop steward he would have represented Crawford in his grievance and would have requested an informal hearing. He normally is advised if a case goes to a formal hearing but neither side advised him of the

status of this case after his initial involvement (2T86-2T88, 2T92).

19. During his full time employment with the Authority, Crawford also worked part-time (about 10 hours per week) for New Jersey Transit. In September 2012, he was employed full-time for New Jersey Transit (1T137-1T140).

ANALYSIS

This case arose because of a singular event, Malley's suspension of Crawford for four days because of his role in the events of December 29, 2010. That suspension led to Crawford's loss of seniority which in turn, led to his layoff which led to the charge in this case. Malley, and Fred Parson, knew Crawford's four-day suspension would lead to his layoff yet Malley persisted in its assessment. Many could argue that four days was too severe a penalty for Crawford's conduct on December 29, that it was unjustified and unfair even when considered independently, and even more so when compared to the suspension assessed Omar Parson. Nevertheless, although the Charging Party might disagree, this case is really not about whether it was fair to suspend Crawford for four days based upon his December 2010 conduct or whether that conduct justified a four-day suspension at all. I am not authorized to review this case based upon a fairness standard.

Rather, this case is about whether the Authority and/or the Union violated the Act because Crawford was assessed a four day suspension. Even within that context, this case is not about whether the Authority discriminated against Crawford for any conduct he engaged in that is protected by the Act, because the Complaint did not issue on a 5.4a(3) allegation. The Complaint included a 5.4a(1) and 5.4a(5) allegation against the Authority and a 5.4b(1) allegation against the Union. But since section 5.4a(5) of the Act protects the negotiations rights of a majority representative, complaints rarely issue on a(5) allegations filed by individuals such as Crawford, except when as here, collusion is alleged. Beall and N.J. Turnpike Authority, P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980), NJPER Supp. 2d 101 (¶ App.Div. 1981); City of Jersey City and POBA and James O'Brien, P.E.R.C. No. 87-56, 12 NJPER 853 (¶17329 1986). Consequently, the primary focus of this case is the 5.4a(1) and b(1) allegations, that is, did the Authority and/or the Union interfere with Crawford's rights and/or collude to deprive him of rights protected by the Act.

Keeping separate for a moment, a unions duty of fair representation to a unit member, the "tendency to interfere" standard for violating 5.4a(1) may also be useful in considering the allegations as well. A public employer independently violates 5.4a(1) of the Act if its actions tend to interfere with

an employee's statutory rights and lacks a legitimate and substantial business justification. New Jersey College of Medicine and Dentistry, P.E.R.C. No 79-11, 4 NJPER 421, 422 (¶4189 1978); N.J. Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550, 551 (Note 1) (¶10285 1979). See also Jackson Tp., P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988); UMDNJ-Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986).

In New Jersey College of Medicine and Dentistry, the Commission also held:

> In determining...whether particular actions tend to interfere with, restrain or coerce a[n]... employee...we will consider the totality of evidence proffered during the course of a hearing and the competing interests of the public employer and the employee organization and/or affected individuals. [emphasis added]. Id. at 422-423.

In N.J. Sports and Exposition Authority, the Commission restated the a(1) standard, holding:

> It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or to coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification. [Id. at 551 n. 1] [Emphasis Added].

In determining whether an employer has violated 5.4a(1), the Commission in Fairview Free Public Library, P.E.R.C. No. 99-47, 25 NJPER 20 (¶30007 1998) held:

> [W]e must first determine whether the disputed action tends to interfere with the statutory rights of employees.... If the answer to that question is yes, we must then determine whether the employer has a legitimate operational justification. If the employer does have such a justification, we will then weigh the tendency of the employer's conduct to interfere with employee rights against the employer's need to act. [citation omitted]
> 25 NJPER at 21.

The Charging Party's primary theory of this case is that the Authority and the Union colluded to cause Crawford to receive a four (or more) day suspension which they knew would lead to his layoff for economic reasons. The collusion claim is based upon Crawford's argument or belief that Malley and Fred Parson had agreed or arranged to suspend Crawford for at least four days so that he would loose his seniority and be subject to the expected economic layoff. If they did, indeed, collude to cause Crawford to receive a four-day suspension-whether such suspension was fair or justified or not-the Respondents will have violated 5.4a(1) and b(1) respectively. Absent collusion, more specifically, absent any violation by the Authority, the Charging Party could not receive its desired remedy. The burden of proof in this case rests with the Charging Party.

In support of its collusion argument the Charging Party contends that the Authority and Union did not have a contract

clause in place at the time of the altercation between Crawford and Omar Parson on December 29, 2010 which included language that a four or more day suspension would result in a loss of seniority. Additionally, but really as a separate issue regarding the Union's duty of fair representation, the Charging Party alleged that:

> the union violated its duty of fair representation by failing to allow the unit membership to vote on and ratify (or not) agreements between the Authority and Fred Parson; Fred Parson was a supervisor and should not have been in the unit with non-supervisors; and that as President of the Union Fred Parson violated his duty of fair representation to Crawford by testifying against him at the departmental hearing before Malley.

The Charge Against the Authority

The linchpin to Crawford's loss of seniority which led to his layoff, was the clause the Respondents' claim was in their Agreement (ER-2) requiring a loss of seniority upon receipt of a four or more day suspension. The Charging Party argued in its brief and reply brief that the Respondents' 2011-2014 Agreement, ER-2, which contained in Article 24 the language affecting his seniority was not in effect on December 29, 2010. It further argued that the Union has not permitted its membership to vote on proposed contractual language, apparently questioning the viability of the agreement the Respondent's reached in CP-1 on December 13, 2007 which resulted in the language in Article 24 of ER-2.

While the Charging Party correctly argues that ER-2 was not in effect on December 29, 2010, the date of his encounter with Omar Parson, the language in Article 24 Section 2(b) was in affect at that time. The record conclusively shows that the Respondent's in

CP-1 amended the language in Article 24 of ER-4 (the 2005-2008 Agreement) on December 13, 2007 to impact seniority if an employee were suspended for four or more days and further agreed that language would apply "in any future layoff actions." Thus, the language in ER-4 was effectively amended on December 13, 2007 and became a part of the Respondent's collective agreement at that time, ER-4, and carried through to their next agreement, ER-2.

The Charging Party's apparent argument that the language in CP-1 was not official or viable on December 29, 2010 because it was never voted upon by the Union's membership lacks merit. That argument raises an internal union issue, and the Commission is generally reluctant to intercede in internal union matters. New Jersey State PBA and PBA Local 105, P.E.R.C. No. 91-92, 17 NJPER 245 (¶22111 1991); Jersey City Supv Assn., P.E.R.C. No. 83-32, 8 NJPER 563 (¶13260 1982) app. dism. App. Div. Docket No. A-768-82T1 (7/22/83); See also Calabrese v. PBA Local 76, 157 NJ Super 139, 146-147 (App. Div. 1978).

Having found that the contractual basis for Crawford's loss of seniority was in place on December 29,2010, I next examine the relationship between Malley and Fred Parson which the Charging Party relies upon as the source of its collusion argument, but which is based entirely on Crawford's own beliefs. Crawford testified, referring to his separation from employment with the Authority as his "discharge." But as the Authority correctly

argued in its brief, Crawford was not discharged, he was laid off. Crawford also testified that he believed that Fred had "something to do with" presumably his discharge; that he (Fred) convinced Malley presumably to give Crawford a four-day suspension and he (Crawford) conceded he did not witness Fred talking to Malley. Malley denied being coerced.

I don't doubt Crawford's sincerity in his believing that Malley was influenced by Fred Parson. But Crawford's own belief of an unlawful alliance between Malley and Fred lacks evidentiary support. Even in its post-hearing brief, the Charging Party concedes it is nearly impossible to prove that the Authority and Union found a vehicle by which to "terminate" Crawford. I find, particularly crediting Malley, that the Authority had a legitimate basis upon which to suspend Crawford which was not influenced by the relationship between Malley and Fred.

To the extent the Charging Party is also asserting that the Authority violated the Act because Fred Parson, allegedly is a supervisor and should not have been in the same unit with Crawford, I find insufficient evidence to prove that point. An employee who has the authority to hire, fire or effectively recommend the same is a supervisor within the meaning of the Act and should not be in a unit with non-supervisory employees. N.J.S.A. 34:13A-5.3.

But if a supervisory employee is in a unit with non-supervisory employees there is a procedure available to labor

organizations and employers through the Commission, the clarification of unit procedure, to determine supervisory status and if need be to remove a supervisor from a non-supervisory unit. N.J.A.C. 19:11-1.5. This unfair practice case was not the vehicle by which to test Fred Parson's supervisory status. Even if it was, there was no evidence presented by the Charging Party that Parson had authority to hire, fire or effectively recommend the same.

Consequently, considering all of the above, and while I recognize that one might argue that Crawford's conduct on December 29, 2010 did not require a four-day suspension, I find the Authority did not violate 5.4a(1) or a(5) of the Act or collude with the Union in assessing such a suspension in this case.

The Charge Against the Union

The Charging Party claims that the Union breached its duty of fair representation to Crawford primarily when it did not authorize Brown to represent him; Brunner told Crawford the Union could not provide a defense; the Union did not file a grievance; the Union did not request or tell Crawford to request an informal conference; Brunner didn't represent Crawford at the discipline hearing; Fred Parson testified against him at that hearing; Omar was treated differently than Crawford; and, by the Union failing to advise Crawford of any appeal rights after the disciplinary hearing was concluded.

It is well established that a breach of a unions duty of fair representation occurs only when a union's conduct toward a unit member is arbitrary, discriminatory, or in bad faith [DFR standard] Vaca v. Sipes, 386 U.S. 171 (1967). The Court in Lullo v IAFF, 55 N.J. 409, 426 (1970) embraced and adopted the Vaca duty of fair representation standard, and the Court in Belen v Woodbridge Tp. Bd. of Ed. et al., 142 N.J. Super. 486 (App. Div. 1976), certif. den 72 N.J. 458 (1976) emphasized a union's obligation to represent all employees without discrimination.

When considering the DFR standard the Commission explained that unions have a wide range of reasonableness and mere negligence does not equate to a breach of the DFR standard. Union Cty College AAUP P.E.R.C. No. 85-121, 11 NJPER 374 (¶16135 1985). NJ Tpk Ees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979). For example, in LPN Assn, P.E.R.C. No. 80-133, 6 NJPER 220 (¶11111 1980), the Commission found the union did not violate its DFR obligation where the grievant declined a union attorney and elected to have her own attorney represent her at hearing, nor was it a DFR when the union's president provided incorrect information regarding the grievant's appeal rights.

Similarly, the Commission in AFSCME Local No. 2293, P.E.R.C. No. 82-87, 8 NJPER 223 (¶13092 1982), found no DFR violation when the union unintentionally misinformed certain employees concerning their placement on a new salary guide, and in Rutgers University,

D.U.P. No. 83-4, 8 NJPER 592 (¶13275 1982), no complaint was issued and the union was not found to have violated its DFR obligation even after failing to insist upon a three-member panel to review an employee's discharge grievance.

In applying the above standard and considering the wide range of reasonableness unions have in meeting their obligation, I find that, at most, the Union, through Brunner, may have been negligent or haphazard in the way Crawford's situation was handled, but neither he nor Fred Parson acted in an arbitrary, discriminatory or in bad faith manner in this case.

It was obvious once the December 2010 incident occurred, that Fred Parson could not assist Crawford with establishing a defense for his role in the incident or his subsequent discipline. Notwithstanding the Charging Party's argument that Fred was a supervisor, since Omar was also included in the December incident, it was clear that Fred would have a conflict offering any representation to Crawford. It was no surprise, therefore, that Brunner took the lead in talking to Crawford about the incident and what could be done.

The scenario that seems to have unfolded was that Brown offered to represent Crawford previously at the upcoming disciplinary/grievance hearing. If Crawford had accepted the offer it is likely Brown - with or without Brunner - would have had an informal conference with Malley. It wasn't anything Fred or

Brunner did or didn't do that caused Brown not to represent Crawford, it was Crawford who rejected Brown's offer. Crawford contacted Brunner, and spoke to him at length about what occurred. It was not a DFR violation for Brunner, having discussed the incident, to give his opinion that Crawford did not have a good defense.

Crawford asked for and received a grievance form from Brunner and filed it with Brunner who filed it with Malley. Brunner offered to represent Crawford at the hearing or to let Crawford obtain his own attorney, and Crawford decided to hire his own attorney. While it is accurate that Brunner/the Union did not advise Crawford to request an informal conference, and that once he received a four or more day suspension he was subject to losing his seniority, that was, if anything, only a negligent act not a DFR particularly here where the Charging Party opted not to be represented by the Union.

Similarly, it could not have been a DFR violation for Brunner to tell Crawford after Malley issued her decision that he (Crawford) could not appeal the discipline she assessed in his grievance. Article 16.4(f) of ER-2 limits such appeals to discipline of six or more days.

Although the Charging Party also alleges a DFR because Fred Parson's testimony at Malley's hearing did not support his (Crawford's) explanation of what happened on December 29, 2010,

Parson was obligated to testify honestly and tell what he saw happen that day. It could not be a DFR for him to testify honestly even when the result meant discipline for Crawford.

This case presents an unfortunate result. Although Brunner may have been able to at least advise Crawford or his attorney to try to resolve his discipline informally with Malley, the evidence does not establish that his failure to do so was arbitrary, discriminatory or in bad faith.

In fact, based upon his receipt of CP-5, Crawford was aware of his opportunity to request an informal conference and/or to advise his attorney to make such a request. Even though Brunner failed to advise Crawford to make such a request, Crawford, having received CP-5, must bear some of the responsibility for not notifying his attorney of that option.

Consequently, it appears that Brunner was available to Crawford and patient with him. There is no indication either he or Fred Parson structured the situation that lead to Crawford's layoff.

Having considered the actions of the Authority and the Union both independently and in relationship to each other, I find they did not have the tendency to interfere with Crawford's protected rights, nor did the Union's handling of the matter violate its DFR obligations.

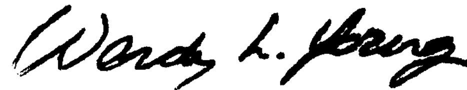
Accordingly, I make the following:

CONCLUSIONS OF LAW

The Authority did not violate 5.4a(1) or a(5) of the Act, and the Union did not violate 5.4b(1) of the Act by the events leading to Crawford's suspension or layoff.

RECOMMENDATION

I recommend that the Commission ORDER that the Complaint be dismissed.



Wendy L. Young

DATED: June 16, 2014
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 June 26, 2014.