

D.U.P. NO. 2022-11

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

CITY OF CLIFTON,
IBEW LOCAL 1158

Respondents,

-and-

Docket No. CI-2019-027

ILIA KRISTO,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by Ilia Kristo alleging that International Brotherhood of Electrical Workers Local 1158 (IBEW) breached its duty of fair representation toward him on matters involving his employer, the City of Clifton (City). Kristo had previously withdrawn the allegations against the City.

The Director found that Kristo did not allege facts that showed that IBEW acted in a discriminatory, arbitrary, or bad faith manner. The Director found that IBEW responsibly represented Kristo during his internal disciplinary proceedings before the City. The Director found no facts indicating that IBEW breached any duty with respect to Kristo's disciplinary appeal to the Civil Service Commission where Kristo had voluntarily elected to proceed with his own attorney and IBEW had not misled or impeded Kristo. The Director also found that Kristo's disability discrimination and workers' compensation claims with other agencies did not implicate any express duty of IBEW under the Act and was not otherwise linked to IBEW's exclusive representation powers because Kristo had individual statutory authority to file the claims himself.

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Appearances:

For the City of Clifton, Respondent
City of Clifton Law Department
(Matthew T. Priore, Esq.)

For IBEW Local 1158, Respondent
Jameson, Esq. LLC, attorneys
(Curtiss Jameson, of counsel)

For the Charging Party,
(Ilia Kristo, pro se)

REFUSAL TO ISSUE COMPLAINT

On January 31, 2019, February 5, 2019, and February 6, 2019, Ilia Kristo filed an unfair practice charge, first amended charge, and second amended charge against the his employer, City of Clifton (City), and his majority representative, International Brotherhood of Electrical Workers Local 1158 (IBEW). The charge alleges that IBEW violated N.J.S.A. 34:13A-5.4(b)(1) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et

seq. (Act)^{1/} by breaching its duty of fair representation against him with respect to disciplinary charges brought against him by the City for alleged fighting with another employee.^{2/}

Pursuant to my discretion under N.J.A.C. 19:14-1.6 with respect to case processing, I directed a Commission staff agent to conduct separate telephone interviews with the representatives of the parties. The staff agent received a statement from IBEW counsel Curtiss Jameson by telephone on March 1, 2019, and from City counsel Matthew Priore on March 6, 2019. Jameson also emailed the staff agent the preliminary and final notices of disciplinary action against Kristo; the major disciplinary appeal form signed by Kristo; and various emails among Jameson, Priore, Kristo, and Kristo's attorney for his disciplinary appeal to the

1/ N.J.S.A. 34:13A-5.4(b) prohibits employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act."

2/ Before filing the charge, Kristo had called our agency for information. We provided the telephone numbers to the New Jersey Division on Civil Rights (DCR) and the Division of Workers' Compensation; explained that we could not provide legal advice; and explained that he could consult his own attorney for advice on whether he should file an unfair practice charge. He explained that he had retained an attorney for the workers' compensation issue and that an interview was already scheduled with DCR. On May 20, 2020, Kristo confirmed with Commission staff by phone and email that he had reached a settlement with the City in his case before the Civil Service Commission that released the City from all other claims, and that he withdrew his unfair practice allegations against the City.

Civil Service Commission, Alan Krumholz.^{3/} The staff agent also spoke with Kristo numerous times by telephone. Accompanying his charge and amended charge filings and subsequent emails with Commission staff, Kristo also provided security camera footage; a copy of a prescription from his doctor; copies of the preliminary and final notices of disciplinary action; a copy of the statement of charges against Kristo written by the City's Acting Director of Public Works to the City Manager; a written statement signed by Kristo waiving his right to an internal hearing before a City hearing officer and indicating his intent to appeal any discipline to the Civil Service Commission; and a copy of the written decision from the City Manager imposing discipline.

The Commission has authority to issue a complaint where it appears that the factual allegations in the charge, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4(c); N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3. I find the following facts.

Kristo was employed by the City in the Department of Public Works. On September 11, 2018, Kristo was suspended without pay. A written statement of charges written by Acting Director of

^{3/} Krumholz does not represent Kristo in this unfair practice charge.

Public Works Jason Van Winkle to City Manager Dominick Villano dated September 11, 2018 alleged that Kristo, on or about August 31, 2018, acted in an offensive and inappropriate manner towards another employee by physically striking the employee in the face with a closed hand. The statement of charges provided that Kristo's actions violated the City's policy prohibiting discrimination and harassment in the workplace and the New Jersey Administrative Code in that the actions constituted incompetency, inefficiency, or failure to perform duties; conduct unbecoming a public employee; neglect of duty; discrimination that affects equal employment opportunity; and other sufficient cause for discipline.

The statement was attached to a completed Civil Service Commission Preliminary Notice of Disciplinary (PNDA) form dated September 11, 2018. The PNDA suspended Kristo effective September 1, 2018, and gave notice that removal was a disciplinary action that could be taken against Kristo. The PNDA was served on Kristo by certified mail and advised him that he desired a hearing before the City, he could notify it within 5 days of receipt of the PNDA and the hearing would be held on October 5, 2018.

On October 5, 2018, Kristo arrived for the hearing and was joined by IBEW counsel Jameson. After Jameson complained that the City had not yet given him the security camera footage, the

footage was sent to him. Jameson believed the City was overly strict on discipline in general but believed the City would have sought similar discipline for other employees. In the settlement discussions prior to a hearing, the employer offered an 180-day suspension. Kristo wanted full reinstatement with back pay, believing that he did nothing wrong. Jameson, based on interviews with witnesses, explained to Kristo that it was likely that Kristo would receive some discipline. Jameson explained that minor discipline in the form of a write-up or a 1-day suspension was possible, but that a 10-day suspension was more realistic and that Jameson could see an administrative law judge (ALJ) with the Office of Administrative Law (OAL) upholding a 30-day suspension. Jameson also explained that, without settlement, Kristo could be out of work for 6 to 9 months waiting for an ALJ, that the ALJ's recommended decisions could be rejected, and that there would be no recovery of attorney fees.

Jameson explored settlement options with Kristo, but ultimately Kristo did not agree to any settlement. Jameson explained to Kristo that since the City could reject its own hearing officer's decision, he could waive the hearing to speed up the process for a decision that could then be appealed to the Civil Service Commission.

On October 5, 2018, Kristo signed a written statement, providing in a pertinent part:

I, Ilia Kristo, hereby waive my right to an internal hearing before a hearing officer of the City of Clifton. I understand by waiving any right to an internal hearing the City will very likely proceed with my removal as stated in its September 11, 2018, Preliminary Notice of Disciplinary Action. It is my intent to appeal my discipline to the NJ Civil Service Commission.

On October 24, 2018, City Personnel Officer Doug Johnson asked Jameson by email if there was any objection to giving the New Jersey Department of Labor witness statements for the processing of Kristo's unemployment compensation claim. Jameson objected because the City had not even given the witness statements to him or Kristo yet. Johnson then sent Jameson the statements.

On October 25, 2018, the City made an offer for Kristo to resign in exchange for the City continuing his health benefits until the end of the year and not contesting his unemployment compensation claim. After consulting with Kristo, Jameson responded by email on November 1, 2018, that Kristo rejected the offer. Jameson also demanded that the City issue its Final Notice of Disciplinary Action (FNDA), as Kristo had already waived his right to a hearing so he could proceed to a de novo appeal with the Civil Service Commission and there was no procedural problem blocking the City from issuing the FNDA. Jameson warned that as it had been almost a month since the waiver, the City's continuing failure or refusal to issue the

FNDA would be seen by Kristo as further evidence of the City's misconduct and malfeasance toward him.

On November 2, 2018, Priore asked Jameson by email to confirm if Kristo waived his right to be present at his hearing, which the City planned to conduct in his absence because the City believed it could not issue an FNDA without a hearing. Jameson questioned the legal premise that the City could not issue an FNDA without a hearing (which he indicated was contrary to the practice he experienced in other counties and municipalities) and the legal authority of the City to hold a hearing after waiver. Jameson stated that the City's need for hearing appeared to be an admission that it never conducted an investigation or doubted whether its investigation showed probable cause to suspend Kristo in the first instance. Jameson also stated that it appeared the City was again treating Kristo disparately and creating artificial roadblocks to deprive him of due process and create undue hardship. Priore responded that the City disagreed with Jameson, that there was an example of a Clifton police officer who placed on the record at his hearing that he waived his right to be present after which the hearing was held in absentia, and that Jameson could make arguments at Kristo's hearing scheduled for November 9, 2020.

Jameson responded that the hearing was already scheduled for October 5, 2018, when Kristo was present to waive his right to a

hearing in writing, and that the City then cancelled the hearing. Jameson argued that the City could not schedule a new hearing without evidencing its intent to improperly and unlawfully delay Kristo's right to due process in the form of an appeal to the Civil Service Commission. Jameson asserted that the City's discrimination was apparent where either it initiated discipline without first conducting an investigation or it's investigation gave it reason to believe there was not sufficient merit for the initiation of discipline. Jameson noted that the City had not responded with the legal basis for its intended actions and distinguished the police officer example because the officer had not already waived his right in writing prior to the hearing and because a different section of the New Jersey Administrative Code applied. Jameson stated that it was obvious the City was going to proceed whichever way it wished and that he was going to document the City's actions and intentions through the email correspondence to counter a possible claim from the City of error, inadvertence, or mistake.

IBEW informed Kristo that the City was going to hold a hearing. The hearing in absentia was held on November 9, 2018. After the hearing and before any decision, the City and IBEW discussed a settlement option of 30 to 40 days suspension. IBEW asked Kristo if he wanted to settle, but Kristo declined.

A Final Notice of Disciplinary Action (FNDA) form, dated

November 15, 2018, indicated that a hearing was held on November 9, 2018. It further indicated that the disciplinary action taken against Kristo was a suspension for 50 working days beginning September 1, 2018, and ending November 15, 2018 (the day of the decision). Kristo was served the FNDA by certified mail, and the FNDA form advised him of the procedures for appealing to the Civil Service Commission within 20 days of receipt of the form.

Attached to the form was the written decision of Villano, dated November 15, 2018. The decision explains that although Kristo waived his right to an internal hearing, a hearing was nevertheless held without him on November 9, 2018. Villano acted as the hearing officer. At the hearing, Cemalentin Turk testified that, on August 31, 2018, Kristo was on line to order breakfast at a local bagel store but walked away to take a phone call. When he returned, Kristo asked whether Turk had placed Kristo's order. Turk responded that he did not order for Kristo because he was not clear as to what he wanted. Turk testified that Kristo uttered something back and struck Turk in the chin with a closed fist. Villano found that the force of the strike was not severe enough to cause physical damage but that it startled Turk, caused redness and physical pain, embarrassed Turk in front of other customers, and was inappropriate, demeaning, and emotional hurtful to Turk.

Steven Dubravsky, a mechanic with the Department of Public

Works, testified that the incident took place in his presence and that he witnessed Kristo strike Turk in the face with a closed fist. Van Winkle testified that he was made aware of the incident by Turk, and subsequently drafted the PNDA and statement of charges.

Villano concluded that the action did not seem to escalate to the level of termination, but that Kristo's conduct violated the City's policies and certain sections of the New Jersey Administrative Code. In light of two prior Employee Warning Notices dating back to 2007 regarding inappropriate behavior and unsatisfactory performance, Villano imposed the 50-day suspension, which ended the day the decision was issued, on November 15, 2018.

According to the City, a workers' compensation claim was filed by Kristo after the hearing. After returning to work, Kristo went to a doctor. On November 15, 2018, he was given a written prescription indicating that he was "disabled from work." Kristo also informed the employer, through Johnson, that he was filing for a disability pension.

On December 19, 2018, Jameson relayed to Kristo a settlement offer from the City allowing for retirement. Later that day, Kristo sent Jameson a partially completed federal Equal Employment Opportunity Commission (EEOC) charge of discrimination form alleging disability discrimination and retaliation in

violation of the Americans with Disabilities Act (ADA) and retaliation for filing a workers' compensation claim. IBEW had not been aware of the workers' compensation claim before this. Kristo also sent Jameson a New Jersey Division on Civil Rights (DCR) form explaining the work sharing agreement between EEOC and DCR and providing a choice as to processing. Jameson received Kristo's confirmation that this meant Kristo was rejecting the City's settlement offer. Jameson informed Kristo that his discrimination charge was a individual employment right claim that he could pursue on his own by completing whatever was necessary for that purpose, and indicated that IBEW did not provide that service.^{4/}

Kristo retained Krumholz as his private counsel for his disciplinary appeal to the Civil Service Commission. On January 30, 2019, Jameson spoke with Krumholz by telephone and explained that IBEW handled Kristo's representation for the disciplinary action at the internal level, that Jameson considered the City's discipline to be excessive, and that IBEW had completed the form for the appeal and was prepared to file it on Kristo's behalf. Jameson also asked Krumholz whether he would be representing Kristo for the appeal instead; stated that Kristo had previously

^{4/} The City's attorney, Priore, was unaware of any disability discrimination claim prior to the filing of Kristo's unfair practice charge. We have not been informed by any party whether such a claim was filed with EEOC or DCR.

forwarded documents for a discrimination charge; explained that IBEW did not handle charges that did not involve collective rights; and stated that he was not certain whether Kristo ever filed a discrimination charge himself. Krumholz indicated that he would consult with Kristo and respond to Jameson.

On January 31, 2019, Kristo provided Johnson with a completed and signed Civil Service Commission Major Disciplinary Appeal Form identifying Krumholz and his law firm as his representative. Johnson forwarded it to Priore who forwarded it to Jameson. Jameson sent an email to Krumholz at two different email addresses and asked whether Kristo had presented the original appeal form by mistake or whether he served a copy on the City; summarized his prior telephone conversation with Krumholz the day before; advised that he was considering the City's receipt of the appeal form to indicate that Krumholz was handling the appeal; explained that, therefore, IBEW would not also file the appeal; and attached for Krumholz's assistance copies of the statement of charges, the PNDA, Kristo's hearing waiver, the FNDA, and the City's written disciplinary decision. On February 6, 2019, Jameson sent the same documents and copies of his emails by fax to Krumholz.

Kristo did not ask IBEW to file a grievance, nor did he ask IBEW to file the disciplinary appeal with the Civil Service Commission. Jameson avers that IBEW would have sought

arbitration if there was not an alternate statutory appeal process to the Civil Service Commission, and that IBEW was still willing to represent him for his appeal to the Civil Service Commission during the processing of this unfair practice case.

On March 29, 2019, Kristo confirmed to the Commission staff agent that Krumholz was representing him for his disciplinary appeal but not his unfair practice charge. On October 31, 2019, Kristo advised Commission staff that the previous day he was at Civil Service Commission facilities with his attorney and that they had worked out a proposed settlement agreement for 70% back pay. Kristo also indicated he applied for disability benefits.

On December 9, 2019, Kristo advised Commission staff that he was reluctant to sign the proposed settlement agreement for his disciplinary appeal because it also provided for the withdrawal or waiver of his unfair practice charge. We informed Kristo of the status of his unfair practice charge and allegations against the City. We explained that he should speak with his own attorney who was handling the settlement of the disciplinary appeal as to whether he should settle

On April 3, 2020, Kristo advised Commission staff that he had settled his disciplinary dispute with the City before the Civil Service Commission for \$7,500 and was receiving disability benefits. On April 17, 2020, Kristo provided Commission staff with a copy of the executed settlement agreement, which shows

that his suspension was reduced from 50 days to 10 days and that he received \$7,500 for the days he was suspended without pay in excess of 10 days. On May 20, 2020, Kristo confirmed with the Commission staff agent by phone and email that the settlement with the City released the City from all other claims, and that he withdrew his unfair practice allegations against the City. Accordingly, this decision will address only the allegations against IBEW.

ANALYSIS

N.J.S.A. 34:13A-5.3 provides, in pertinent 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 interest of all such employees without discrimination and without regard to employee organization membership. . . . In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment. . . .

Under the Act, the duty of fair representation arises from the majority representative's responsibility for representing the interest of all public employees in an appropriate unit without discrimination. See N.J.S.A. 34:13A-5.3. The standards for measuring a union's compliance with the duty of fair representation as articulated in Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed. 2d 842 (1967) have been adopted in the New

Jersey public sector. Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976). Under Vaca, a breach of the duty of fair representation occurs only when a union's conduct toward a member of the negotiations unit is arbitrary, discriminatory, or in bad faith.

The mere allegation that a union did not act in accordance with a unit member's expectations or achieve the results the member desired does not demonstrate conduct that is arbitrary, discriminatory, or in bad faith. Bergen Community College, D.U.P. No. 2018-3, 44 NJPER 157 (¶46 2017). Mere negligence, poor judgment, or ineptitude, standing alone, do not constitute a breach of the duty of fair representation. Winslow Tp. Education Ass'n., D.U.P. No. 2011-12, 38 NJPER 97, 98 (¶22 2011). But see Camden Cty. College (LaMarra), H.E. No. 92-35, 18 NJPER 336 (¶23149 1992), adopted P.E.R.C. No. 93-90, 19 NJPER 222 (¶24107 1993) (having exercised discretion and undertaken duty to inform employer of intent to arbitrate, union's failure to perform the ministerial act of filing had no rational basis and was grossly negligent and arbitrary; union's subsequent failure to seek waiver or ruling on timeliness or to have executive board deliberate on merits of revival and pretextual reasons given to grievant suggested union wanted to be rid of responsibility and was solely guided by knowledge of its prior negligence, making its subsequent conduct arbitrary); Serv. Emple. Int'l Union,

Local No. 579, AFL-CIO, 229 N.L.R.B. 692, 95 L.R.R.M. 1156, 229 NLRB No. 104 (May 16, 1977) (perfunctory grievance handling may be arbitrary).

For the purposes of complaint issuance, given the wide range of reasonableness allowed to a statutory negotiations representative, an unfair practice charge must contain sufficient factual allegations, not conclusionary statements that the conduct of the majority representative is arbitrary, discriminatory, or in bad faith. Springfield Tp., D.U.P. No. 79-13, 5 NJPER 15 (¶10008 1978).

Kristo's charge does not allege that IBEW acted arbitrarily, discriminatorily, or in bad faith, let alone any facts that would suggest this.^{5/} Rather, the charge, as amended, alleges that IBEW "doesn't help [him] much." If Kristo's means that IBEW was not successful in achieving a more helpful result in the disciplinary proceedings, or that IBEW was negligent, inept, or exercised poor judgment, this assertion would be conclusionary without sufficient factual allegations and would not, standing

^{5/} Unlike the withdrawn allegations against the City, Kristo did not allege that IBEW discriminated against him on the basis of disability. While disability discrimination by an employer is not within the direct jurisdiction of the Commission to review, disability discrimination by a union may constitute a breach of its duty of fair representation. As Vaca explains, the duty of fair representation protects against illegal discrimination such as that based on race and was initially developed over a series of cases involving alleged racial discrimination.

alone, allege conduct that would be a breach of the duty of fair representation. Springfield Tp., Bergen Community College, Winslow Tp. Education Ass'n.

No facts suggest that IBEW acted arbitrarily in representing Kristo during the internal disciplinary proceedings. IBEW, through Jameson, represented Kristo's interests when they were before the City on the original scheduled hearing date. Jameson pushed the City for the belated production of security camera footage and negotiated with the City with regard to the level of discipline. The offers from the City that Jameson received and were not accepted by Kristo, does not indicate a breach of IBEW's duty of fair representation. Jameson explained to Kristo the likelihood that he would receive at least some discipline from a City decision based on the evidence; that a 10-day suspension (constituting major discipline under N.J.S.A. 34:13A-5.3 subject to an alternate appeal procedure under civil service laws) was realistic; that an ALJ on appeal might uphold a 30-day suspension; that Kristo might have to wait 9 months for an ALJ; that the ALJ decision could itself be rejected; and that Kristo would not be able to recover attorney fees.

Despite Jameson explaining the benefits of the various settlement offers, Kristo did not accept any offer. Nevertheless, Jameson provided further representation by advising Kristo on a strategy for speeding up the process to obtain a

final decision from the Civil Service Commission. Based on the likelihood of the City's hearing officer issuing major discipline and the possibility that the City could reject a lenient hearing officer's decision, Jameson explained to Kristo that he could waive the hearing so that the City could issue an appealable decision sooner. Kristo ultimately opted for this strategy and signed a written waiver of his right to a hearing which stated his understanding that the City would likely proceed with discipline and expressed his intent to appeal to the Civil Service Commission.

That this strategy did not work as intended did not show arbitrariness on the part of IBEW, even if it could be considered misguided. IBEW did not foresee that the City would cause delays from its further gathering of documents, belated production to Jameson, and its scheduling and conducting of a hearing in absentia. Still, Jameson continued to keep Kristo informed and to represent his interests by negotiating over further settlement offers and strenuously objecting to the delays in production and the City's intent to still have a hearing despite Kristo's waiver and stated intent to appeal. Through several emails, Jameson questioned the City's legal bases; explained his own experience in other jurisdictions; distinguished an example proffered by the City; and accused the City of disparate treatment, undue hardship, deprivation of due process, inadequate investigation,

and lack of probable cause. Jameson also documented the City's actions and intentions to counter future claims by the City.

IBEW and Kristo agreed not to appear for the hearing. Before a written decision was issued, the City and IBEW continued to discuss settlement options, but Kristo declined them. Even after the written decision was issued, IBEW relayed settlement offers to Kristo.

These facts show that IBEW did not act in an arbitrary, discriminatory, or bad faith manner and did not breach its duty of fair representation to Kristo with regard to his internal disciplinary proceedings.

To the extent that Kristo's unfair practice charge allegation that IBEW did not help much is intended to allege that IBEW should have helped him with his disability discrimination charge to the EEOC or DCR or his workers' compensation claim, IBEW's duty of fair representation was not implicated.

In Carteret Ed. Ass'n, P.E.R.C. No. 97-146, 23 NJPER 390 (¶28177 1997), the Commission linked the duty of fair representation to the powers of negotiation and contract administration granted to the majority representative under Section 5.3 of the Act and "the exclusive power of the majority representative to represent employees in certain situations." The Commission found that while the duty applied to a majority representative's decision-making as to whether to press a

grievance, the Act did not expressly require a majority representative to notify an employee of his individual right under the Act to file a grievance on his own,^{6/} and such a requirement was not otherwise linked to the majority representative's exclusive power of representation.

However, the Commission explained that our case law does prevent unions from misleading employees about or impeding employees in exercising any rights they may have in presenting grievances personally or appealing a union's decision to the general membership. Carteret Ed. Ass'n. See Camden Cty. College (Porreca), P.E.R.C. No. 88-28, 13 NJPER 755 (¶18285 1987); Trenton Bd. of Ed., P.E.R.C. No. 86-146, 12 NJPER 528 (¶17198 1986); New Jersey Transit Bus Operations, Inc., P.E.R.C. No. 90-46, 16 NJPER 3 (¶21002 1989).

Kristo's unfair practice charge does not specifically allege that IBEW refused to assist him with his disability discrimination charge to the EEOC or DCR or with his workers'

^{6/} Public employees in New Jersey have a constitutional right to present grievances through their chosen representative and a statutory right under the Act which effectuates this guarantee and cannot be inhibited. N.J. Const. (1947), Art. I, par. 19; N.J.S.A. 34:13A-5.3; Camden Cty. College (Porreca); Trenton Bd. of Ed. See also Saginario v. Attorney General, 87 N.J. 480, 493-95 (1981) (noting policy reasons for the position that initiating and processing grievances should be exclusive to the union, but interpreting the language of the Act to lead to the opposite conclusion: that an individual employee is entitled access to the grievance procedure for an opportunity to be heard and notice when a union-filed grievance conflicts with his own interest).

compensation claim. IBEW was unaware that Kristo already used private counsel to file his workers' compensation claim, and so cannot be found to have refused to help him with its initial filing.

Regardless, I find that, because Kristo had individual statutory authority to file claims for discrimination on the basis of disability or a workers' compensation claim with the EEOC, the DCR, or the Office of Special Compensation Funds and because there is no statutory requirement under the Act for a majority representative to file such claims, there was no duty of fair representation owed to Kristo for such claims that could have been breached by IBEW refusing to file them.^{7/}

Although the right to file a disciplinary appeal with the Civil Service Commission is not exclusive to the majority representative, the Act does reference a duty of the majority

^{7/} I note that Kristo has not alleged that IBEW impeded his rights to file such charges, which, regardless and unlike grievances, are not statutorily protected under the Act absent a connection to concerted activity or an interest of common concern. Kristo has also not alleged that he asked IBEW to file a grievance related to the same issues or anti-discrimination clauses under the collective negotiations agreement. To the extent IBEW breached contractual duties it may have owed over and above the statutory duty of fair representation, such as in a union constitution or bylaws, such a breach of contract claim would need to be filed in a court of law or as otherwise provided by the union constitution or bylaws, as the Commission does not have jurisdiction over such internal union matters. See Bergen Community College Faculty Ass'n, P.E.R.C. No. 84-117, 10 NJPER 262 (¶15127 1984) at n.4.

representative to negotiate with respect to disciplinary disputes. N.J.S.A. 34:13A-5.3. We have also found the duty of fair representation applicable to internal disciplinary proceedings despite individual employees having a statutory right under the Act to initiate their own grievances over the application of administrative decisions, including disciplinary determinations. N.J.S.A. 34:13A-5.3; Camden Cty. College (Porreca); Trenton Bd. of Ed.; Carteret Ed. Ass'n; Saginario.

In Hotel, Restaurant, & Cafeteria Employees Union Local 3 (Local 3), D.U.P. No. 2003-10, 29 NJPER 200 (¶59 2003), remanded P.E.R.C. No. 2004-60, 30 NJPER 103 (¶40 2004), the charging party alleged a breach of the duty of fair representation when the union failed to appeal her termination to the Merit Systems Board (MSB)^{8/} or advise her of her rights to appeal on her own (the union instead filed an ineffectual grievance alleging discrimination). The Director wrote that for the purposes of the decision, he assumed that the MSB was the appropriate forum and that the duty of fair representation extends to appealing discipline before the MSB. He nevertheless found that at most the union was negligent, that there was no bad faith in its failure to inform the employee of her appeal rights, and that the charge was untimely. The Commission however remanded for

^{8/} The Civil Service Commission succeeded the Merit Systems Board in 2008. See N.J.S.A. 11A:11-1.

complaint issuance, finding that the allegations, if true, sufficiently alleged an unfair practice (the matter was later settled). The Commission held that impeding an employee from filing an MSB appeal may be an unfair practice. It stated that whether the charging party was impeded, whether the MSB was the only appropriate forum, and when the charging party learned of the union's alleged breach were relevant factual questions to be developed at hearing.

Other cases have assumed a majority representative duty with respect to the disciplinary appeal process under non-Act statutes before nevertheless finding that such duty was not breached in those cases. See Bergen Cty. Util. Auth., H.E. No. 89-25, 15 NJPER 175 (¶20075 1989) (noting that N.J.S.A. 34:13A-5.3 precludes binding arbitration for major discipline of employees with statutory protection under civil service laws; finding that union accordingly did not breach duty of fair representation by not filing for arbitration for a termination; stating that charging party could have sought union representation in processing a timely filed appeal to the Civil Service Commission), adopted absent exceptions P.E.R.C. No. 89-105, 15 NJPER 218 (¶20091 1989); John E. Runnells Hospital, H.E. No. 85-22, 11 NJPER 8 (¶16005 1984) (finding union did not breach its duty of fair representation to employee when it was not asked nor entitled to be at non-investigatory termination announcement; nor

when it did not represent him in appeal to Civil Service Commission after it informed him of those rights and he filed on his own without asking for further representation), adopted absent exceptions P.E.R.C. No. 85-91, 11 NJPER 147 (¶16064 1985); LPN Association, H.E. No. 80-37, 6 NJPER 171 (¶11081 1980) (finding that union did not breach duty of fair representation when employee voluntarily chose own attorney rather than union attorney to represent her before Civil Service hearing examiner; nor when lay union president made non-arbitrary honest mistake in telling her union would take appeal despite not having standing under Civil Service Rules, president could not get in touch with her again, and employee did not follow up before individual filing deadline despite employee knowing of deadline), adopted absent exceptions P.E.R.C. No. 80-133, 6 NJPER 220 (¶11111 1980). Compare Local 3 (union cannot impede right to personally file MSB appeal; whether right is impeded is question of law and fact).

To the extent the duty of fair representation extends to disciplinary appeals to the Civil Service Commission and that a majority representative may not arbitrarily, discriminatorily, or in bad faith fail to file and represent a unit member in such disciplinary appeals if such member requests, a breach of the duty is unlikely to be found where a unit member does not ask the union for representation or where the member voluntarily chooses to proceed with the member's own attorney instead. John E.

Runnells Hospital; LPN Association; cf. Elizabeth Housing Authority, H.E. No. 90-34, 16 NJPER 115 (¶21043 1990) (no breach found where employee chose to proceed with own attorney at internal disciplinary hearing and where union did not refuse to represent and believed in good faith that his attorney would continue to represent him) adopted absent exceptions P.E.R.C. No. 90-84, 16 NJPER 211 (¶21084 1990). However, the majority representative cannot mislead or impede unit members in the exercise of their rights to proceed personally. Local 3. Moreover, a majority representative may be required to represent the unit member during the appeal if necessary to correct earlier breaches of its duties. Cf. Camden Cty. College (LaMarra).

In this case, the unfair practice charge does not explicitly allege that Kristo asked IBEW to file an appeal of his discipline with the Civil Service Commission or represent him in that process and that IBEW refused or failed to do so. The facts show that IBEW completed the forms to file with the Civil Service Commission under the assumption that it would represent Kristo in the appeal, but Kristo had already retained Krumholz as private counsel and chose to proceed without IBEW. Kristo himself filed and served the forms, that confirmed that Krumholz was his representative. Jameson also confirmed with Krumholz that Kristo's filing that Krumholz was handling the appeal and that IBEW would not also file the appeal. Jameson had provided the

background documents to Krumholz. During the processing of this unfair practice charge, Kristo confirmed with Commission staff that he was being represented by Krumholz for the disciplinary appeal. Jameson also averred that IBEW would have sought arbitration if there was not an alternate statutory appeal process to the Civil Service Commission, and that IBEW was still willing to represent him for his appeal to the Civil Service Commission.

These facts don't indicate that IBEW acted arbitrarily, discriminatorily, or in bad faith with respect to the appeal to the Civil Service Commission or that IBEW impeded Kristo's right to proceed on his own. As explained earlier, no facts suggest that IBEW breached its duty of fair representation in the earlier internal disciplinary proceedings, either. Jameson explained to Kristo in those proceedings that some form of discipline was likely and that a 10-day suspension was realistic. Kristo velected to have his own attorney rather than IBEW represent him in the disciplinary appeal to the Civil Service Commission. Ultimately, that appeal was settled with an agreement for a 10-day suspension, further demonstrating the reasonableness of and lack of harm from IBEW's prior representation.

I find that Kristo has not alleged facts that would, if true, constitute an unfair practice under the Act by IBEW. Accordingly, and in light of Kristo's withdrawal of the

allegations against the City, I dismiss the unfair practice charge in its entirety.

ORDER

The unfair practice charge is dismissed.

/s/Jonathan Roth
Jonathan Roth
Director of Unfair Practices

DATED: March 2, 2022
Trenton, New Jersey

This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3.

Any appeal is due by March 14, 2022.