H. E. NO. 86-5

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

In the Matter of

NEW JERSEY SPORTS & EXPOSITION AUTHORITY and HEAVY & GENERAL CONSTRUCTION LABORER'S UNION LOCAL 472,

Respondents,

-and-

Docket No. CI-84-26-63

JOHN TUCCERI,

Charging Party.

SYNOPSIS

A Hearing Examiner grants Respondent Union's Motion for Summary Judgment on a charge of unfair practice which alleged that the Union violated its N.J.S.A. 34:13A-5.4(b)(1) duty of fair representation by refusing to process a grievance to arbitration. The Hearing Examiner granted the Motion and recommended that the Charge against the Union be dismissed in its entirety.

A Hearing Examiner's decision on a Motion for Summary Judgment which does not resolve the Complaint in its entirety shall not be appealed directly to the Commission except by special permission of the Commission pursuant to N.J.A.C. 19:14-4.6.

H. E. NO. 86-5

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

In the Matter of

NEW JERSEY SPORTS & EXPOSITION AUTHORITY and HEAVY & GENERAL CONSTRUCTION LABORER'S UNION LOCAL 472,

Respondents,

-and- Docket No. CI-84-26-63

JOHN TUCCERI,

Charging Party.

Appearances:

For the Respondent Union
Zazzali, Zazzali & Kroll, Esqs.
(James R. Zazzali and Paul L. Kleinbaum, of Counsel)

For the Charging Party
Dennis A. Maycher, Esq.
(John L. Molinelli, of Counsel)

HEARING EXAMINER'S DECISION AND RECOMMENDED ORDER ON MOTION FOR SUMMARY JUDGMENT

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on October 7, 1983, and amended on January 17, February 3, and March 26, 1984 by John Tucceri ("Charging Party") alleging that the New Jersey Sports and Exposition Authority ("Authority"), and the Heavy & General Construction Laborer's Union Local 472 ("Union") have engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act").

The Charging Party alleged that the Authority violated the Act by discharging him because of the exercise of his protected activity, and it alleged that the Union violated the Act because the Union attorney allegedly failed to adequately investigate the circumstances of the discharge prior to recommending that the Union not pursue a grievance concerning his discharge to arbitration. The Charging Party alleged that the Authority violated N.J.S.A. 34:13A-5.4(a)(1) and (3), and that the Union violated N.J.S.A. 34:13A-5.4(b)(1).1/

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, N.J.A.C. 19:14-2.1, a Complaint and Notice of Hearing was issued on November 1, 1984 scheduling a hearing for December 6 and 7, 1984. As a result of certain delays, however, the hearing

---

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; and (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."

This subsection 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."

In the original Charge and the first and second amendments the Charging Party alleged a violation of §5.4(b)(1) and (5) of the Act. However, the Charging Party struck the b(5) allegation in his third amendment.

was rescheduled on May 20, 1985 for August 13 and 14, 1985.[2/] The Union submitted an Answer on November 7, 1984, and the Authority submitted its Answer on November 19, 1984, both of which denied the allegations in the Charge. On July 3, 1985 the Union, pursuant to N.J.A.C. 19:14-4.8, filed a Motion for Summary Judgment herein with the Chairman which included a brief, sworn affidavits from Union Business Agent Stephen Kealy, and Union Attorney David Solomon, and a copy of the Charging Party's personnel file. The Charging Party filed a brief in opposition to the Motion on July 11, 1985. However, There were no affidavits or other documents accompanying the Charging Party's brief, and there was nothing in the Charging Party's brief contradicting the information or affidavits submitted by the Union. The Union on July 22, 1985 submitted a reply to the Charging Party's brief. Since the Authority has not filed a similar motion, this decision is limited to the Charge against the Union.

Pursuant to N.J.A.C. 19:14-4.8(a), the Chairman, on July 18, 1985 referred the Motion to me for determination.

2/ When the Complaint issued it was assigned to Hearing Examiner Nathaniel L. Fulk, who scheduled the December 1984 hearings. Hearing Examiner Fulk subsequently rescheduled the hearing for January 17, 1984, and then again for March 25 and 26, 1984. On March 22, 1984 I was assigned as Hearing Examiner in this matter pursuant to N.J.A.C. 19:14-6.4 because Hearing Examiner Fulk had announced his resignation from the Commission. I first scheduled the hearing for May 21 and 22, 1985, but rescheduled it pursuant to the Charging Party's request for August 13 and 14, 1985.

In order to render a decision in whole or in part in favor of a motion for summary judgment there must be no genuine issue as to any material fact, and the moving party must be entitled to prevail as a matter of law. N.J.A.C. 19:14-4.8(d) and N.J.A.C. 1:1-13.2.

Upon the record as it exists to date, I make the following:

Undisputed Findings of Fact

1. The New Jersey Sports and Exposition Authority is a public employer within the meaning of the Act and is subject to its provisions and was the Charging Party's employer.

2. John Tucceri was a public employee within the meaning of the Act and was subject to its provisions during the relevant time involved herein.

3. The Heavy & General Construction Laborer's Union, Local 472 is an employee representative within the meaning of the Act, and represented the negotiations unit to which Tucceri belonged.

4. Tucceri parked cars for the Authority in the valet parking area and held that position approximately five years. On the evening of April 8, 1983 Tucceri had an altercation with his supervisor, Bob David. Tucceri alleged that David had been calling him to park cars while other men were available, and Tucceri alleged that he informed David that he would park the car, but told him to lower his voice. David allegedly screamed again, and Tucceri alleged that he told David to "get out of my way." David prepared a warning notice regarding the incident and alleged that Tucceri had

been told to come out of the clubhouse lobby at least four times to park cars. David alleged in the warning notice the following:

> ...I was told by John Tucceri if I kept harassing him he would cause bodily damage to me by punching me.[3/]

On April 9, 1983 Tucceri received a three-day suspension over the above incident to be effective April 11, 12 and 13, 1983. However, on April 12, 1983 Tucceri was terminated as a result of a study of his work record. That study showed that Tucceri had not been in his assigned work area on April 4, 5, 7 and 8, 1983. The study also revealed that Tucceri had had three altercations with supervisors in less than one year similar to the one on April 8, 1983. On November 19, 1982 Tucceri received a written warning for intimidating and interfering with Supervisor David. On December 13, 1982 he received a three-day suspension for refusing to leave the clubhouse lobby to park cars which was similar to the April 8 incident, and on February 15, 1983 he received a written warning because he was missing from his assigned work area.

5. On April 19, 1983 Tucceri advised Union Business Agent Stephen Kealy that he had been discharged. Kealy prepared a grievance for Tucceri's signature on that date, and also discussed the events of the April 8 incident with Tucceri who then gave Kealy

---

3/ Although a dispute exists as to what Tucceri may have said to David on April 8, 1983, that dispute is not a material fact with regard to the Charge against the Union. It is a material fact regarding the Charge against the Authority.

the names of the employees who were present at the clubhouse on April 8, 1983. On April 20 Kealy spoke with Supervisor David, and the employees whose names Tucceri provided. Both the supervisor and the employees contradicted Tucceri's version of the events and they all indicated that Tucceri was at fault.

Nevertheless, on April 27, 1983 Kealy officially submitted Tucceri's grievance to the Director of Transportation, Anthony Rosamilia, and also asked Rosamilia for a copy of Tucceri's personnel file. Kealy was given Tucceri's personnel file on May 4, 1983 and then represented Tucceri in the processing of his grievance on May 4, 11, 18 and 25, 1983. Kealy attempted to convince the Authority to reinstate Tucceri, but on May 25, 1983 the Authority refused any reinstatement agreement.

Throughout the relevant time period Kealy had kept Solomon aware of the pertinent events. He spoke with Solomon prior to the April 27 meeting with Rosamilia, and on May 5, 1983 he sent Solomon a copy of Tucceri's final disciplinary notice. Kealy also met with Solomon regarding the grievance early on May 25, 1983.

On June 1, 1983 Tucceri met with Kealy and Solomon at the Union's office. Solomon questioned Tucceri concerning the events of his discharge. As a result of that meeting Solomon agreed to observe the valet parking operation.

In mid-June 1983 Solomon did observe the valet parking operation one evening for approximately one hour. He did not talk to any employees or supervisors at that time. By letter dated

June 23, 1983 Solomon informed Kealy that after observing the valet parking operation he believed it would be virtually impossible to succeed in overturning Tucceri's discharge. He therefore recommended against taking Tucceri's grievance to arbitration. Solomon specifically noted in that letter that although there was commotion and confusion in the valet parking system, he concluded that it was not as Tucceri had described. Solomon observed that valet parkers were equally involved in working, and he did not see any employees running into the clubhouse to get tickets from patrons while he was there.

After receipt of Solomon's letter Kealy decided not to pursue Tucceri's grievance to arbitration based upon his investigation, he conversations with the employees and supervisors, his review of Tucceri's personnel file, and Solomon's recommendation.

On July 5, 1983 Kealy met with Tucceri and informed him of the decision not to submit the grievance to arbitration.

ANALYSIS

The law in this State is well settled regarding the granting or denial of summary judgment. All inferences of doubt are drawn against the moving party in favor of the party opposing the motion. In addition, the hearer in considering a motion for summary judgment cannot make credibility determinations. If material factul issues exist requiring credibility determinations, the motion must be denied.

However, the New Jersey Supreme Court estabished in Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954),

that where the party opposing the motion does not submit any affidavits or documentation contradicting the moving party's affidavits and documents, then the moving party's facts may be considered as true, and there would be no material factual issue unless raised in the movant's pleadings. The Court in Judson held that:

> ...if the opposing party offers no affidavits or matter in opposition, or only facts which are immaterial or of an insubstantial nature...he will not be heard to complain if the court grants summary judgment, taking as true the statement of uncontradicted facts in the papers relied upon by the moving party, such papers themselves not otherwise showing the existence of an issue of material fact. 17 N.J. at 75.

In this case the Charging Party has not filed any affidavits or documentation in opposition to or contradicting Kealy's or Solomon's affidavits, or contradicting Tucceri's personnel record. I therefore must consider as true such pertinent facts as Kealy's statement that Tucceri did provide him (Kealy) with the names of employees who witnessed the April 8 incident; that Kealy questioned those employees and that they all indicated that Tucceri was at fault; that Kealy nevertheless filed the grievance for Tucceri and represented him at the first step of the grievance procedure and attempted to obtain his reinstatement;[4/] that

---

4/ By processing Tucceri's grievance through the first step of the grievance procedure the Union satisfied the requirements established in Saginario v. Attorney General, 87 N.J. 480 (1981) by affording Tucceri the rights guaranteed to him by the New Jersey Constitution.

Tucceri met with Kealy and Solomon and explained his case to Solomon; that having observed the valet parking operation Solomon concluded that it did not operate as Tucceri had described; and that Tucceri had been disciplined three times in less than one year prior to April 8, 1983 for incidents similar to the one which precipitated his discharge.

Those facts show, conclusively, that through the efforts of both Kealy and Solomon (emphasis added) the Union conducted a thorough investigation of Tucceri's discharge; that it processed the grievance and represented him at the first step of the grievance procedure; and, that it made the decision not to pursue Tucceri's grievance to arbitration because of the likelihood that the discharge would be upheld. Based purely upon the factual analysis, the Union is entitled to summary judgment and a dismissal of the 5.4(b)(1) allegation in the Charge.

The Charging Party's case, really seems to be grounded more in law than in fact. The Charging Party apparently does not question Kealy's investigation of Tucceri's discharge, he merely argues that Solomon's investigation was insufficient or incomplete. He apparently asserts that Solomon, as the Union's attorney, had some greater duty or responsibility than Kealy and was required to conduct his own independent investigation of the events surrounding Tucceri's discharge. The issue then is whether the Union violated its duty of fair representation because Solomon did not conduct a more thorough investigation. The answer is, that it did not.

The law in this area is very well established in the Federal courts, as well as in our State courts and by the Commission. A majority representative acting in good faith, and after reasonable care and diligence in investigating a grievance, does not violate the law by refusing to process a grievance to arbitration.

The United States Supreme Court established that principle in Vaca v. Sipes, 386 U.S. 171, 190-191, 64 LRRM 2369, 2377 (1967), when it said:

> Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement.
>
> If an individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined...

The Court also said:

> The breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the...unit is arbitrary, discriminatory, or in bad faith. 64 LRRM at 2376.

The Federal Courts and the National Labor Relations Board (NLRB) have interpreted "arbitrary, discriminatory, or bad faith" to mean something more than mere negligence, rather, there must be a showing of personal hostility. Bazarte v. United Transportation Union, 429 F.2d 868, 75 LRRM 2017 (3d Cir. 1970); Encina v. Lama Boot Co. Inc., 316 F.Supp. 239, 75 LRRM 2012, aff'd. 448 F.2d 1264,

78 LRRM 2382 (1971); Berry v. Pacific Intermountain Express Co., (D.C. NM), 85 LRRM 2408 (1974); Teamsters Local 692 (Great Western Unifreight), 209 NLRB 446, 85 LRRM 1385 (1975).[5/] In fact, the U. S. Supreme Court also held that to establish a claim of a breach of the duty of fair representation;

> ...carries with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives. Amalgamated Assoc. of Street, Electric Railway and Motor Coach Employees of America v. Lockridge, 403 U.S. 274, 301, 77 LRRM 2501, 2512 (1971).

This Commission and the New Jersey Courts have frequently relied upon Federal policy including court and NLRB decisions in formulating its own labor policy. See Lullo v. International Assoc. of Firefighters, 55 N.J. 409 (1970); Galloway Twp. Bd. of Ed. v. Galloway Twp. Ass'n of Educational Secretaries, 78 N.J. 1 (1978); Belen v. Woodbridge Twp., 142 N.J.Super. 486 (App. Div. 1976).

With that background the Commission issued several decisions adopting the Vaca standards and holding that majority representatives are not required to pursue all grievances to arbitration. In re Fair Lawn Bd. of Ed., P.E.R.C. No. 84-138, 10 NJPER 351 (¶15163 1984); In re OPEIU Local 153 (Thomas Johnstone),

---

5/ The National Labor Relations Board has interpreted Vaca to mean that proof of mere negligence, standing alone does not suffice to prove a breach of the duty of fair representation. See, e.g., Printing & Graphic Communication, Local 4, 249 NLRB No. 23, 104 LRRM 1040 (1980); The Developing Labor Law, pp. 1326-28 (2nd ed. 1983).

P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983); In re New Jersey Turnpike Authority (Jeffrey Beall), P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980), aff'd. Appellate Division Docket No. A-1263-80T3, October 30, 1981; In re New Jersey Turnpike Employees Union, Local 194 IFPTE, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979).[6/]

In New Jersey Turnpike Employees Union, supra, for example, a union business agent refused to process a grievance to arbitration after he had interviewed several witnesses that the grievant had requested, and found that they did not support the grievant's recitation of the pertinent facts. The Commission held that the

---

6/ In OPEIU Local 153 (Johnstone), supra, and Fair Lawn Bd. of Ed., supra, the Commission held that:

> The courts and this Commission have consistently embraced the standards of Vaca in adjudicatng such unfair 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 555 (¶11281 1980), aff'd. App. Div. Docket No. A-1455-80 (April 1, 1982), pet. for certif. den. (6/16/82)("Middlesex County"); New Jersey Turnpike Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979)("Local 194"); In re AFSCME Council No. 1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978).
>
> We have also stated that a union should attempt to exercise reasonable care and diligence in investigating, processng, and presenting grievances: it should exercise good faith in determining the merits of the grievance; and it must treat individuals equally by granting equal access to the grievance procedure and arbitration for similar grievances of equal merit. Middlesex County; Local 194. All the circumstances of a particular case, however, must be considered before a determintion can be made concerning whether a majority representative has acted in bad faith, discriminatorily, or arbitrarily under Vaca standards. 10 NJPER at 13, and 352.

union exercised reasonable care and diligence in investigating the grievance and found that the union did not violate its duty of fair representation. The Commission held that:

> ...as a general principle the duty of fair representation does not require an investigation so exhaustive as to satisfy the demands of the grievant. Rather, it must provide a reasonably sufficient basis for preparing a presentation of the grievance at an administrative hearing and determining whether there is sufficient merit to warrant arbitration. 5 NJPER at 413.

The Commission also identified the principles of a union's duty of fair representation and held,

> The union must exercise reasonable care and diligence in investigating, processing and presenting grievances; it must make a good faith judgment in determining the merits of the grievance; and, it must treat individuals equally by granting equal access to the grievance procedure and arbitration for similar grievances of equal merit. 5 NJPER at 413.

The instant case is similar to New Jersey Turnpike Employees Union and Fair Lawn. In the instant case, as in those cases, the union official(s) met with the grievant, then spoke with other employees who did not support the grievant's story. The Union here acted with reasonable care and diligence in investigating the discharge and had a reasonable basis for choosing not to go to arbitration.

The Charging Party has apparently intentionally attempted to bifurcate Kealy's investigation from Solomon's investigation to make his case. However, the Union's investigation here includes the combined efforts of Kealy and Solomon, and their combined efforts demonstrate that they exercised reasonable care and diligence in

investigating the grievance, they exercised good faith in determining the merits of the grievance, and they processed the grievance through the first step and attempted to win Tucceri's reinstatement. After Kealy's investigation Solomon was not required to conduct a more exhaustive investigation than he otherwise performed, or talk to employees that Kealy had already interviewed.

The Charging Party's reliance upon Zalejko v. Radio Corp. of America, 98 N.J.Super. 76 (App. Div. 1967) is misplaced. In that case there was a failure of the duty of fair representation because the Court found that the union failed to make any genuine effort to gather the evidence concerning the grievance. That is not the situation in the instant case. The undisputed evidence is that the Union, particularly through Kealy, conducted a thorough investigation which showed that Tucceri's account of the incident would not be corroborated. Under those circumstances the Union acted reasonably in refusing to allow the grievance to proceed to arbitration..

Accordingly, based upon the above analysis, I grant Respondent Union's Motion for Summary Judgment.

Recommended Order

The Complaint against Respondent Union alleging a violation of N.J.S.A. 34:13A-5.4(b)(1) should be dismissed in its entirety.[7/]

Arnold H. Zudick
Hearing Examiner

Dated: August 7, 1985
Trenton, New Jersey

7/ Since the Complaint includes two respondents, and since this Decision and Recommended Order concerns only Respondent Union, the Complaint as a whole cannot be dismissed. The hearing shall proceed regarding the Charge against the Authority.