

P.E.R.C. NO. 80-133

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LICENSED PRACTICAL NURSE ASSOCIA-
TION OF NEW JERSEY, INC.,

Respondent,

Docket No. CI-79-55-22

-and-

CECILIA A. BOYD, L.P.N.,

Charging Party.

SYNOPSIS

In an unfair practice proceeding, the Chairman of the Commission, noting the absence of exceptions, adopts the Hearing Examiner's findings of fact, conclusions of law and recommended order for the reasons cited by the Hearing Examiner. The Chairman agreed that the Charging Party failed to prove that the LPNA failed to meet its duty to fairly represent the Charging Party at a Civil Service hearing. The Complaint was ordered dismissed in its entirety.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LICENSED PRACTICAL NURSE ASSOCIA-
TION OF NEW JERSEY, INC.,

Respondent,

-and-

Docket No. CI-79-55-22

CECILIA A. BOYD, L.P.N.,

Charging Party.

Appearances:

For the Respondent, Craner and Nelson, Esqs.
(Stephen A. Satkin, of Counsel)

For the Charging Party, Mark S. Jacobs, Esquire

DECISION AND ORDER

On April 27, 1978, an Unfair Practice Charge was filed by Cecilia A. Boyd ("Charging Party") with the Public Employment Relations Commission alleging that the Licensed Practical Nurse Association ("LPNA") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act (the "Act"), as amended, N.J.S.A. 34:13A-1 et seq. Specifically, it is urged by the Charging Party that the LPNA violated its duty to represent her at a Civil Service hearing in violation of N.J.S.A. 34:13A-5.4(b)(1). It appearing that the allegations of the charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on October 22, 1979. A hearing was held before Commission Hearing Examiner Edmund G. Gerber on January 21, 1980, at which time the parties were given an opportunity to examine and cross-examine witnesses, to present

evidence and to argue orally. Both parties filed post-hearing briefs which were received by February 28, 1980. Thereafter, on March 28, 1980, the Hearing Examiner issued his Recommended Report and Decision, H.E. No. 80-37, 6 NJPER ____ (¶ ____ 1980), a copy of which is attached to this Decision and Order and made a part hereof. The report was served upon the parties and the case was transferred to the Commission. N.J.A.C. 19:14-7.1. Neither party has filed exceptions to the Hearing Examiner's Recommended Report and Decision. N.J.A.C. 19:14-7.3 provides, in part, that any exception which is not specifically urged shall be deemed to have been waived.

In accordance with N.J.S.A. 34:13A-6(f), the Commission has delegated to the undersigned the authority to render decisions on behalf of the Commission in cases where exceptions to Hearing Examiners' Recommended Reports and Decisions have not been filed.

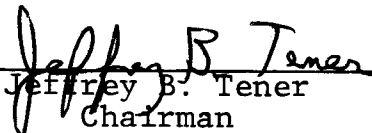
The Hearing Examiner, citing cases decided by the Commission as well as the U. S. Supreme Court, concluded that the Charging Party failed to prove that the LPNA failed to meet its duty of fairly representing the Charging Party at the Civil Service hearing. He found that the Charging Party elected to have her own attorney represent her voluntarily and that inaccurate information given to the Charging Party by the LPNA's representative regarding the appeals process under Civil Service rules was an honest mistake made by a lay person, could not be considered arbitrary, and could have been corrected by the Charging Party if she had pursued this matter in a timely manner. Based upon an independent review of the entire

record and noting particularly the absence of exceptions, the undersigned adopts the findings of fact, conclusions of law and recommended order of the Hearing Examiner substantially for the reasons cited by the Hearing Examiner. These findings are amply supported by the evidence in the record.

ORDER

Based upon the above, IT IS HEREBY ORDERED that the complaint be dismissed in its entirety.

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

DATED: Trenton, New Jersey
April 18, 1980

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

In the Matter of

LICENSED PRACTICAL NURSE
ASSOCIATION OF NEW JERSEY, INC.,

Respondent,

-and-

Docket No. CI-79-55-22

CECILIA A. BOYD, L.P.N.,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends to the Public Employment Relations Commission (Commission) that they find the Licensed Practical Nurse Association of New Jersey, Inc. did not commit an unfair practice in their representation of Cecilia Boyd, an individual. Cecilia Boyd was promised that she would be represented by an Association attorney at a Civil Service hearing. Before the hearing began Cecilia Boyd chose to have her own attorney represent her. The fact that she was unsuccessful was not due to any fault of the Association.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

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

In the Matter of

LICENSED PRACTICAL NURSE
ASSOCIATION OF NEW JERSEY, INC.,

Respondent,

-and-

Docket No. CI-79-55-22

CECILIA A. BOYD, L.P.N.,

Charging Party.

Appearances:

For the Respondent
Craner and Nelson, Esqs.
(Stephen A. Satkin, Esq.)

For the Charging Party
Mark S. Jacobs, Esq.

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On April 27, 1979, Cecilia Boyd filed an Unfair Practice Charge with the Public Employment Relations Commission (Commission) alleging that the Licensed Practical Nurse Association (LPNA) violated their duty to fairly represent Boyd at a Civil Service hearing. It was further alleged that the LPNA violated their duty of fair representation when it failed to make a timely appeal from the adverse decision in that hearing.

Boyd specifically alleges that the LPNA committed an unfair practice within the meaning of N.J.S.A. 34:13A-5.4(b)(1) ^{1/} (hereinafter the Act).

It appearing that the allegations of the Unfair Practice Charge if true may constitute unfair practices within the meaning of the Act, a Complaint

^{1/} This subsection provides that employee organizations, their representatives or agents are prohibited from (1) interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.

and Notice of Hearing was issued on October 22, 1979. A hearing was held on January 21, 1980, at which time the parties were given an opportunity to examine and cross-examine witnesses and present evidence. Both parties filed post-hearing briefs which were received by February 28, 1980.

Upon the record, the Hearing Examiner makes the following:

Finding of Fact

1. Cecilia Boyd was employed by the County of Camden (County) as a Licensed Practical Nurse from April 1976 to January 28, 1978. Accordingly, she was a public employee within the meaning of the Act. During her employ she worked in a unit wherein the LPNA was the exclusive majority representative. The LPNA is an employee organization within the meaning of the Act.
2. On January 28, 1978, Boyd was told by her supervisor that she was fired and thereupon she received a notice of termination.
3. Upon receipt of said notice, Boyd signed a grievance form in the presence of Edwina DeVan, the President of Division 27 of the LPNA. Boyd's grievance was processed and in July 1978 Boyd was told by Deborah Moore, a shop steward, that the matter had been brought before the Civil Service Commission and a hearing was scheduled before a hearing examiner of that agency.
4. Thomas Dargon, the bargaining agent for the New Jersey LPNA, told Boyd he had discussed her case with the Association attorney who would represent her at the hearing. Boyd testified that Dargon told her that the attorney would be in touch with her. The attorney however did not contact Boyd. Boyd wanted to reach the attorney but she did not know his name nor was she able to contact Dargon to ascertain the attorney's name. As a result, Boyd never spoke to the Association attorney prior to the hearing date. It is noted however that the name and address of the Association attorney is printed on the Association contract, which is posted on the employee's bulletin board at the hospital where Boyd worked.
5. Boyd retained private counsel, Lawrence Vecchio, to accompany her to the Civil Service hearing.
6. The hearing was scheduled on October 30, 1978. When Boyd and Vecchio arrived at the Civil Service hearing, DeVan, Dargon, Moore and Susan Carbone, a district Vice-President in the Association, were all there on behalf of the Associ-

ation and all were there without pay. Dargon stated that he had spoken with the Association attorney and that he would be late but he was on his way.

7. The Civil Service hearing examiner inquired if the parties were ready to proceed. DeVan told Boyd that the union counsel had not yet arrived but would be there and that Boyd could dismiss her private attorney. DeVan knew the Association attorney had all the information about the case and she felt their attorney could better represent Boyd.

8. Dargon spoke with the Civil Service hearing examiner and told him that they were expecting the Association attorney. The hearing examiner said that Boyd's private attorney Vecchio had filed a notice of appearance prior to the hearing; Boyd could not have dual representation at the hearing and must choose who she wanted to represent her. At that point Boyd and Vecchio conferred and Boyd decided that Vecchio would represent her. Accordingly, Vecchio represented Boyd at the hearing.

9. During the hearing the contents of Boyd's personnel file were disclosed. Boyd testified that DeVan had told her that, other than her absenteeism, there was nothing in Boyd's personnel file that was detrimental to the case. In fact, there were adverse comments in Boyd's file. DeVan, however, testified she told Boyd there was a disciplinary notice in her file that was to be removed after six months and Boyd should check her file to make sure it was removed. DeVan also testified the file used at the hearing was not the same file as the one kept at the hospital; it was a different file which was kept in the County's administrative offices. In comparing the conflicting testimony of the two witnesses I find that DeVan's had a better recollection of events and seemed more forthright and credible. ^{2/} Accordingly, I find that the Charging Party failed to prove by a preponderance of the evidence that DeVan told Boyd there was nothing in Boyd's file that was detrimental to her case.

10. Boyd claimed that only DeVan offered to testify out of all the Association officers at the hearing. Vecchio testified that one of the Association officers volunteered to testify but he could not recall who. DeVan testified that she suggested to Vecchio on two occasions that she testify since she was the only person familiar with the procedural defects of the County's case against Boyd. She was never called as a witness although she stayed through the

^{2/} It must be remembered that Boyd had access to her own files and could have independently reviewed them.

entire hearing. Carbone testified that once during the taking of testimony she spoke out of turn at the hearing and then approached Vecchio along with DeVan and volunteered to testify. Vecchio never approached any of the Association people to talk to them about the case nor did he ask the hearing examiner for time to talk with the Association people before the hearing began. There is no evidence that the Association failed to cooperate with Boyd's private counsel.

11. There was no evidence adduced to demonstrate that the Association failed to provide Boyd with counsel. Boyd simply decided not to wait for the Association's attorney.

12. Vecchio gave Dargon his business card at the conclusion of the case and asked if he would have the Association attorney get in touch with him but the attorney never did contact Vecchio.

13. At the conclusion of the hearing DeVan told Boyd that if she were unsuccessful at the hearing the Association would file an appeal to the decision. Prior to receiving any decision in the matter Vecchio wrote Boyd and suggested that any further proceedings be handled by the Association. On January 29, Vecchio again wrote to Boyd and sent her a copy of the Civil Service hearing examiner's Recommended Report and Decision. It was unfavorable to Boyd and upheld the discharge. Vecchio also informed Boyd that his present caseload would not permit him time to prosecute an appeal. Boyd then contacted DeVan. DeVan said the Association would take an appeal. However, when DeVan contacted Dargon, he told DeVan that they could not take an appeal since they were not a party to the proceedings; Boyd was represented at the hearing by private counsel. DeVan then called the Civil Service offices in Trenton. Again she was told that the Association could not file an appeal for they had no standing in the matter. Only Boyd or her attorney could take an appeal under Civil Service Rules. DeVan could not get in touch with Boyd.^{3/} Boyd knew that the appeal had to be filed within ten days but several days elapsed between when she was notified of the unfavorable decision and when she contacted DeVan. Yet Boyd waited seven days after her first call to contact DeVan to find out the status of her appeal. By this time the 10 day time period in which to file an appeal had already elapsed. DeVan explained to Boyd that the Association had been unable to file an appeal on her behalf.

^{3/} This testimony is consistent with DeVan's testimony about an earlier incident wherein DeVan could not reach Boyd.

Conclusion of Law

The Commission adopted the standards for the duty of fair representation first enunciated by the U. S. Supreme Court in Voca v. Sipes, 386 U.S. 171, 190, 64 LRRM 2369 (1976); in Council No. 1, AFSCME and John Banks, Jr., P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013, 197) and N.J. Turnpike Employees Union Local 194, IFPTE, AFL-CIO and Walter Kaczmarek, Jr., P.E.R.C. No. 80-38, 6 NJPER (¶ 1979). The Commission will find that actions which are "arbitrary, discriminatory or in bad faith" violate the duty of fair representation. The Charging Party cites Zalejko v. Radio Corp. of America, 98 N.J. Super. 76, 84 (App. Div. 1967), cert. den. 51 N.J. 397 (1968) in which a New Jersey court applied Voca v. Sipes, supra, and held that "the use of the disjunctive 'or' (in the standard) indicates that the union duty of fair representation is breached if there is a showing of bad faith, but it may also be breached in the absence of bad faith, if the union's conduct is shown to have been 'arbitrary or discriminatory'." In the instant case the Charging Party has not demonstrated that the Association acted in an arbitrary manner. Boyd chose to have her own attorney represent her voluntarily. There was no evidence adduced to indicate that the Association attorney would not be present and there is testimony that he was familiar with the case and was prepared to proceed. The failure of the Association's attorney to get back to Vecchio after Vecchio gave his business card to Dargon is de minimus and not violative of Boyd's rights. Similarly DeVan did give Boyd the wrong information about the union's ability to appeal the Civil Service hearing examiner's Recommended Report and Decision. But under no circumstances could such action be considered arbitrary. It was an honest mistake made by a layperson and if Boyd followed up on her conversation with DeVan in a timely manner she would have been able to file an appeal on her own behalf.


Upon the foregoing and upon the entire record in this case, the Hearing Examiner makes the following

Conclusion of Law

The Respondent Licensed Practical Nurse Association of New Jersey, Inc. did not violate N.J.S.A. 34:13A-5.4(b)(1) in its representation of Cecilia Boyd.

Recommended Order

The Respondent Association not having violated the Act, supra, it is hereby Ordered that the Complaint be dismissed in its entirety.



Edmund G. Gerber
Hearing Examiner

DATED: March 28, 1980
Trenton, New Jersey