

P.E.R.C. NO. 91-108

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

FRATERNAL ORDER OF POLICE,
LODGE NO. 74,

Respondent,

-and-

Docket No. CI-H-88-90

DENNIS W. CASSIDY, SR.,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, pursuant to authority delegated to him by the full Commission, dismisses a Complaint against the Fraternal Order of Police, Lodge No. 74. The Complaint was based on an unfair practice charge filed by Dennis W. Cassidy, Sr. The charge alleged that the FOP breached its duty of fair representation by failing to pursue Cassidy's discharge grievance against UMDNJ in a timely manner. The Chairman concludes that the FOP's processing of Cassidy's grievance was not arbitrary, discriminatory or in bad faith.

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Appearances:

For the Respondent, Markowitz & Richman, attorneys
(Stephen C. Richman, of counsel)

For the Charging Party, Dennis W. Cassidy, Sr., pro se

DECISION AND ORDER

On June 17, 1988, Dennis W. Cassidy, Sr. filed an unfair practice charge against the University of Medicine and Dentistry of New Jersey ("UMDNJ") and Fraternal Order of Police, Lodge No. 74 ("FOP"). The charge alleges that UMDNJ and the FOP violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(b)(1) and (3),^{1/} when UMDNJ

^{1/} These subsections 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. (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."

discharged Cassidy without just cause and the FOP breached its duty of fair representation by failing to pursue his discharge grievance in a timely manner.

On October 18, 1989, a Complaint and Notice of Hearing issued on the allegations against the FOP.^{2/}

On March 5, 1991, Hearing Examiner Stuart Reichman conducted a hearing. The parties examined witnesses, introduced exhibits and argued orally. They waived post-hearing briefs.

On April 26, 1991, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 91-37, 17 NJPER ____ (¶____ 1991). He found that the FOP did not breach its duty of fair representation in processing Cassidy's discharge grievance.

The Hearing Examiner served his decision on the parties and informed them that exceptions were due May 9, 1991. Neither party filed exceptions or requested an extension of time.

I have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 3-9) are accurate. I incorporate them here.

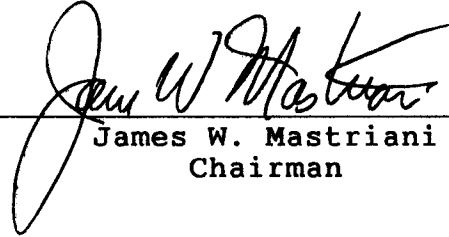
Pursuant to authority granted to me by the full Commission in the absence of exceptions, I find that the FOP's conduct in processing Cassidy's grievance was not arbitrary, discriminatory, or in bad faith. I therefore dismiss the allegation that the FOP breached its duty of fair representation.

^{2/} The Hearing Examiner's report recites the procedural history of appeals of the Director's determination not to issue a Complaint against UMDNJ.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

DATED: June 10, 1991
Trenton, New Jersey

H.E. NO. 91-37

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SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the Fraternal Order of Police, Lodge No. 74 did not breach its duty of fair representation it owed to Dennis W. Cassidy, Sr. The Hearing Examiner found that while Lodge No. 74 may have been negligent in the manner in which it processed Cassidy's grievance, negligence, standing alone, does not suffice to prove a breach of the duty of fair representation. The Hearing Examiner found that Lodge No. 74 did not act in a manner contrary to the standards set forth in Vaca v. Sipes.

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.

H.E. NO. 91-37

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Appearances:

For the Respondent, Markowitz & Richman, Attorneys
(Stephen C. Richman, of Counsel)

For the Charging Party, Dennis W. Cassidy, Sr., pro se

**HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION**

On June 17, 1988, Dennis W. Cassidy, Sr. ("Cassidy" or "Charging Party") filed an Unfair Practice Charge (C-3)^{1/} with the Public Employment Relations Commission ("Commission") against the University of Medicine and Dentistry of New Jersey ("UMDNJ") and the Fraternal Order of Police, Lodge No. 74 ("FOP"). The charge alleges that UMDNJ and the FOP violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically

^{1/} Exhibits received in evidence marked "C" refer to Commission exhibits, those marked "CP" refer to Charging Party exhibits, and those marked "R" refer to Respondent exhibits. Transcript citation "T1" refers to the transcript made on March 5, 1991, at p. 1.

subsections 5.4(b)(1) and (3)^{2/} when UMDNJ discharged Cassidy without just cause and when the FOP failed to pursue his grievance contesting the discharge.

On October 18, 1989, a Complaint and Notice of Hearing (C-1) was issued against the FOP. On November 9, 1989, the FOP filed an Answer (C-2) generally denying that its actions violated the Act. On October 23, 1989, the Director of Unfair Practices refused to issue a Complaint against UMDNJ. University of Medicine and Dentistry of New Jersey, D.U.P. No. 90-5, 15 NJPER 616 (¶20256 1989). On December 6, 1989, the Charging Party filed a Notice of Appeal with the Superior Court, Appellate Division. On April 4, 1990, the Appellate Division dismissed the appeal. On April 16, 1990, the Charging Party, invoking N.J.A.C. 19:14-7.3, filed exceptions with the Commission. On June 26, 1990, the Commission dismissed the Charging Party's exceptions. University of Medicine and Dentistry of New Jersey, P.E.R.C. No. 90-121, 16 NJPER 393 (¶21163 1990). In October, 1990, the case was returned to the Hearing Examiner and scheduled for hearing. Both parties, at different times, requested the adjournment of a scheduled hearing date. The requested adjournments were agreed to by the opposing party.

^{2/} These subsections 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. (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."

A hearing was conducted on March 5, 1991, at the Commission's offices in Newark, New Jersey. The parties were afforded an opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. At the conclusion of the hearing, the parties made oral argument and agreed to waive the filing of briefs.

Upon the entire record, I make the following:

FINDINGS OF FACT

1. The parties stipulated that the FOP is a public employee representative and, for times relevant to this unfair practice charge, Cassidy is a public employee within the meaning of the Act (T7-T8).

2. In October, 1984, UMDNJ hired Cassidy as a police officer (T12; T31). Cassidy was included in the collective negotiations unit represented by the FOP (T12; T31-T32). Cassidy was never an officer of the FOP nor did he ever run for office or become politically involved in the organization (T32).

3. On February 5, 1986, an altercation occurred between Cassidy and UMDNJ's Assistant Director of Police Dullaghan (T13; T34). Cassidy was injured (T13; T34). Both UMDNJ and Dullaghan denied responsibility for Cassidy's injury (T13; T34). Cassidy filed a worker's compensation claim (T13-T15; T34). On November 10, 1987, a determination on Cassidy's worker's compensation claim was rendered in his favor (T13).

4. After the February 5, 1986 injury, Cassidy went on a leave of absence using his accrued sick and vacation time (T15). On December 8, 1986, Cassidy obtained a doctor's note (R-7) indicating that he was able to return to work as of that date (T13; T37-T38). R-7 also stated that Cassidy had "...a degree of permanent disability" and that there existed "...a degree of risk in reinjury to his back upon heavy duty." Cassidy assumed that since UMDNJ had allowed him to work "light duty" previously, he would be able to do so again (T102). Although a reemployment physical was arranged for Cassidy, he was not allowed to complete it (T39). Dullaghan told Cassidy that he would not accept his return to work on other than a full-duty basis (T39). Since, by this time, Cassidy had used up his sick and vacation time, his leave of absence ended and his employment was terminated on December 11, 1986, for being physically unable to return to work (T15; R-2).

5. On December 11, 1986, Cassidy told FOP President Roberts that UMDNJ terminated him and requested that a grievance be filed on his behalf contesting that action (T15; T61; T73; T85). On December 17, 1986, Roberts filed a grievance at the first step (T15; T61; T87; R-3). Roberts sent Cassidy a copy of the grievance (T35; T88). UMDNJ denied the grievance (T15; T36; T61; T88; R-4). On

December 29, 1986, the FOP appealed Cassidy's grievance to the second step (T15; T61; T88; R-5).^{3/}

6. The collective agreement covering the period July 1, 1986 through June 30, 1989,^{4/} Article 5(E)(3) provides as follows:

Should a grievance not be satisfactorily resolved in a prescribed time at steps one or two, the grievance may, within five working days, be submitted to the next step. The lack of response by the University within the prescribed time, unless time limits have been extended by mutual agreement, shall be construed as a negative response. (T19)

UMDNJ never responded to the Cassidy grievance at step two (T15; T95).

7. After the second step grievance was filed, Cassidy contends that he contacted Roberts almost every week (at least six times each month) to ascertain its status (T18; T42).^{5/} Cassidy states that Roberts consistently told him that his grievance, along with all other grievances, were being held in abeyance pending the outcome of collective negotiations for a successor agreement.

^{3/} Cassidy alleges that the FOP never forwarded a copy of the second step grievance to him (T36; T47-T48). Roberts claims that he sent Cassidy a copy of the grievance when it was filed (T89; T98). On June 8, 1988, Cassidy went to UMDNJ and was given a copy of the step two grievance (T36; T55; T80). I find that a resolution of this conflict in Cassidy's and Roberts' testimonies is not necessary in reaching a decision in this matter.

^{4/} The collective agreement was not introduced in evidence, however, Cassidy quoted from it during testimony.

^{5/} These contacts included personal conversations, telephone conversations and times that Cassidy only left a message on Roberts' telephone answering machine (T42-T43).

Cassidy believed that Roberts and UMDNJ entered into a mutual agreement to hold the grievance in accordance with Article 5(E)(3) of the collective agreement (T18-T20). Cassidy stated that he believed Roberts because other unit members told him that their grievances were also frozen pending the resolution of the negotiations (T18-T19).^{6/} Cassidy testified that since he had been terminated, he did not discover when the negotiations for the successor agreement had concluded until after he had filed his unfair practice charge in June, 1988 (T48-T49; T51). Cassidy also stated that he was unaware of the status of the negotiations because Roberts told him that he could not attend union meetings (T48-T49).

8. Roberts' version of the events following the filing of the second step grievance differs. In January and February, 1987, Roberts and Cassidy discussed the grievance approximately three times after it was filed at the second step. Roberts stated that during their last discussion, Cassidy told Roberts that he wanted to pursue the matter through his worker's compensation suit rather than proceed with the grievance. Roberts told Cassidy that he would get

^{6/} Cassidy supports his contention that his grievance was frozen pending the conclusion of negotiations on the hearsay evidence of other unit members. Pursuant to the residuum rule (N.J.A.C. 1:1-15.8(b)), in order for a specific finding of fact to be made, legally competent, credible evidence must exist. See, Weston v. State, 60 N.J. 36, 51 (1972); Application of Howard Savings Bank, 143 N.J. Super. 1, 6 (App. Div. 1976). Since such evidence does not exist, I do not find the hearsay evidence as supportive of Cassidy's contention that his grievance was frozen until the completion of negotiations.

back to him when UMDNJ's Employee Relations Manager, Paul Garnett, scheduled a hearing. After their last discussion regarding the grievance in February 1987, Roberts testified that he and Cassidy did not discuss the grievance until May 25, 1988 (T62-T63; T73-T74; T89-T90; T93-T94). Roberts said he never told Cassidy that his grievance was frozen pending the conclusion of negotiations for a successor agreement (T95). The negotiations concluded with the issuance of an interest arbitration award in October, 1987. Before the successor agreement was reached, the parties operated in accordance with the terms of the predecessor agreement (T96).^{7/}

9. On May 25, 1988, Cassidy and Roberts had an in-person conversation regarding the status of the second step grievance. During that conversation, Cassidy sought to reaffirm that the grievance had, in fact, been filed with UMDNJ (T21; T45). Roberts told Cassidy that he had not yet received a response to the grievance from Garnett, but was intending to see him within the next several days and would question him regarding its status (T22; T75-T76; T91). Cassidy and Roberts spoke again in early June, 1988. Roberts told Cassidy that Garnett had not yet reached a decision on the grievance but would look into it and get back to Roberts. Roberts also indicated that Garnett would be out of the

^{7/} The dispute concerning whether Roberts told Cassidy that the grievance was frozen pending the outcome of negotiations is only relevant regarding the timeliness of the filing of this unfair practice charge. As will be seen below, I need not resolve this conflict.

office for the next several days, consequently, Cassidy would have to wait for a determination (T25; T79-T80; T91). UMDNJ never responded to the grievance prior to the filing of this unfair practice charge (T92).

10. I credit Roberts' testimony. Had Cassidy contacted Roberts nearly twice a week since it was filed to ascertain the status of the second step grievance, it would be unlikely Cassidy would call Roberts on May 25, 1988, to reaffirm that the grievance had been filed. Yet, Cassidy states that one of the reasons he spoke to Roberts on May 25, 1988, was for precisely that purpose. Additionally, I find that Cassidy was not completely forthcoming in his testimony. He claimed that he had fully recovered from his injury in order to return to work in December, 1986. However, although Cassidy was allowed to give his testimony in a narrative fashion, he did not disclose that his medical condition included a degree of permanent disability and a risk of reinjury to his back upon heavy duty until that aspect of his medical condition was raised on cross-examination. Additionally, it was not until Cassidy's rebuttal testimony that he indicated that he intended from the outset to return to work in a "light duty" capacity. This testimony changes the complexion of Cassidy's earlier statements that implied that he had completely recovered from his injury and was prepared to resume his regular duties.

I find Roberts' testimony to be direct, consistent and forthcoming.

11. During one of their conversations in May/June, 1988, Cassidy told Roberts that he was in the process of buying a house and showing current employment at UMDNJ would be "very useful" (T100-T101).

ANALYSIS

For purposes of this decision, I assume, without deciding, that the Charging Party's unfair practice charge was timely filed.

In articulating this State's standard of a union's duty to fairly represent unit employees, the Commission has looked both to the Act and to compatible private sector case law. N.J.S.A.

34:13A-5.3 provides in part that:

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 OPEIU, Local 153, P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983), the Commission discussed the appropriate standards for reviewing a union's conduct in investigating, presenting and processing grievances:

In the specific context of a challenge to a union's representation in processing a grievance, the United States Supreme Court has held: "A breach of the statutory duty of fair representation occurs only when a union's conduct towards a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Vaca v. Sipes, 386 U.S. 171, 190 (1967) (Vaca). The courts and

this Commission have consistently embraced the standards of Vaca in adjudicating 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 (¶11282 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). [footnote omitted]

We have also stated that a union should attempt to exercise reasonable care and diligence in investigating, processing 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 determination can be made concerning whether a majority representative has acted in bad faith, discriminatorily, or arbitrarily under Vaca standards. [OPEIU Local 153 at 13.]

The U.S. Supreme Court has also held that to establish a claim of a breach of the duty of fair representation, such claim "...carried with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." Amalgamated Assn. of Street, Electric, Railway and Motor Coach Employees of American v. Lockridge, 403 U.S. 274, 301, 77 LRRM 2501, 2512 (1971). Further, the National Labor Relations Board has held that where a majority representative exercises its discretion in good faith, proof of mere negligence, standing alone, does not suffice to prove a breach of the duty of fair representation. Service Employees International

Union, Local No. 579, AFL-CIO, 229 NLRB 692, 95 LRRM 1156 (1977); Printing and Graphic Communication, Local No. 4, 249 NLRB No. 23, 104 LRRM 1050 (1980), reversed on other grounds 110 LRRM 2928 (1982).

The facts establish that Cassidy went to Roberts in December, 1986, to request that a grievance be filed on his behalf appealing UMDNJ's decision to terminate him. The grievance was promptly filed by the FOP at the first step. Upon receipt of a negative response, the FOP, at Cassidy's urging, timely appealed the grievance to the second step. Since Cassidy advised the FOP that he wished to have the matter adjudicated through his worker's compensation suit, the FOP allowed the grievance to remain in "limbo" until May, 1988. At that time Cassidy contacted Roberts and urged him to press UMDNJ for a response. I find that Cassidy sought to raise the grievance at this time because employment at UMDNJ would be "very useful" in his effort to buy a house, whether such "usefulness" resided in obtaining the mortgage or for some other purpose. Since the grievance had never been formally withdrawn, Roberts contacted Garnett who then agreed to look into the matter. Shortly thereafter, the instant unfair practice charge was filed and, thereafter, UMDNJ withheld its response to the grievance.

The evidence shows that the FOP did not treat Cassidy in a manner that was arbitrary, discriminatory, or in bad faith. Since Cassidy was never involved in internal union politics, there exists no evidence demonstrating that there was personal animus between

Cassidy and Roberts resulting from conflicting internal union goals. Nor has Cassidy adduced any evidence of discrimination that was intentional, severe, and unrelated to legitimate union objectives. Amalgamated Assn. of Street, Electric, Railway and Motor Coach Employees of America. Roberts promptly filed Cassidy's grievance appealing his termination and, subsequently, promptly filed an appeal of UMDNJ's initial response to the grievance. Even after some 14 months had elapsed, Roberts was achieving some degree of success in his effort to resurrect Cassidy's dormant grievance. Since the FOP did allow Cassidy's grievance to pend over a 14-month period, such inaction must be considered negligence. However, mere negligence, standing alone, does not suffice to prove a breach of the employee representative's duty of fair representation. Service Employees Int'l Union, Local No. 579; Printing and Graphic Communication, Local No. 4.

The Charging Party alleged that the FOP refused to negotiate in good faith with UMDNJ concerning the terms and conditions of employment of employees in the collective negotiations unit it represents, in violation of Section 5.4(b)(3). No facts have been established supporting this allegation. Moreover, charges brought by individuals alleging violations of Section 5.4(b)(3) of the Act are normally dismissed under the Commission's case law for lack of standing. Furniture Workers Local 440, H.E. No. 89-20, 15 NJPER 124, 129, n. 13 (¶20057 1989) adopted P.E.R.C. No. 89-99, 15 NJPER 258 (¶20107 1989).

Based upon the entire record and the analysis set forth above, I make the following:

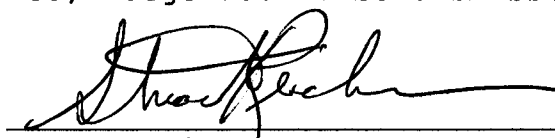
CONCLUSIONS OF LAW

The Fraternal Order of Police, Lodge No. 74, did not violate N.J.S.A. 34:13A-5.4(b)(1) by allegedly failing to process a grievance which it filed on behalf of Dennis W. Cassidy, Sr.

The Fraternal Order of Police, Lodge No. 74, did not violate N.J.S.A. 34:13A-5.4(b)(3) by allegedly refusing to negotiate in good faith with a public employer concerning terms and conditions of employment of employees in the unit it represents.

RECOMMENDED ORDER

I recommend the Commission **ORDER** that the Complaint against the Fraternal Order of Police, Lodge No. 74 be dismissed.



Stuart Reichman
Hearing Examiner

Dated: April 26, 1991
Trenton, New Jersey