

P.E.R.C. NO. 2005-78

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PBA LOCAL 187,

Respondent,

-and-

Docket No. CI-2002-64

JAMES CIPRIANO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against PBA Local 187. The Complaint was based on an unfair practice charge filed by James Cipriano alleging that the PBA violated the New Jersey Employer-Employee Relations Act when it failed to process and pursue his grievance over alleged violations of departmental seniority. The Commission grants the PBA's motion for summary judgment finding that the PBA's interpretation of the contract was not so clearly incorrect as to fall outside the range of reasonableness, the Charging Party did not make his statutory arguments to the PBA or the employer in his grievance, and the Charging Party does not suggest that the PBA acted for discriminatory or bad faith motives.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PBA LOCAL 187,

Respondent,

-and-

Docket No. CI-2002-064

JAMES CIPRIANO,

Charging Party.

Appearances:

For the Respondent, Loccke & Correia, attorneys
(Michael A. Bukosky, of counsel)

For the Charging Party, Gregory S. Schaer, attorney

DECISION

On June 14, 2002, James Cipriano filed an unfair practice charge against PBA Local 187. The charge alleges that the PBA violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4b(1) and (5),^{1/} when it failed to process and pursue Cipriano's grievance over alleged violations of departmental seniority.

On September 10, 2004, a Complaint and Notice of Hearing issued. On September 28, the PBA filed its Answer denying the

^{1/} These provisions prohibit employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Violating any of the rules and regulations established by the commission."

allegations in the Complaint and incorporating the affirmative defenses in its previously filed statement of position. That statement asserts that the PBA determined, after review by its executive board and following consultations with counsel and the Sheriff's department, that the grievance did not have merit and did not warrant submission to arbitration. The statement also asserts that the charge is untimely because the charging party knew more than one year earlier how the PBA was interpreting the contractual seniority provision.

On May 25, 2005, PBA Local 187 filed a motion for summary judgment.^{2/} On June 1, the charging party filed a cross-motion for summary judgment and an answering brief. On June 3, the PBA filed a reply brief. On June 10, the Chairman referred the motion and cross-motion to the full Commission for consideration. N.J.A.C. 19:14-4.8.

Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. N.J.A.C. 19:14-4.8(d); Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954). The following are the undisputed facts.

^{2/} An earlier motion for summary judgment filed by the PBA was denied without prejudice. P.E.R.C. No. 2005-61, 31 NJPER 60 (¶29 2005).

James Cipriano is employed by the Mercer County Sheriff's Office and is a member of a negotiations unit represented by PBA Local 187. The Sheriff's Office and the PBA are parties to a collective negotiations agreement that expired on December 31, 2004.

Cipriano has been employed by the Sheriff's department since September 14, 1992. He was hired as an unclassified Investigator and became a permanent Sheriff's Officer on November 12, 2000.

Both before and after Cipriano became a Sheriff's Officer, his original date of hire was used for seniority purposes. The year after he became a Sheriff's Officer, his vacation eligibility was based upon his original hire date. The departmental seniority list issued as of August 24, 2001 recognized his original date of hire.

The parties' 1999-2001 collective negotiations agreement included this provision entitled "Seniority."

11.1 Seniority is defined as an employee's continuous length of service with the Sheriff's Office, beginning with the date of appointment as a permanent Civil Service employee, Sheriff's Officer. Investigators will be on a separate list by date of hire.

On January 1, 2002, the Department issued a seniority list that changed Cipriano's seniority date from his original date of hire to the date he became a Sheriff's Officer. As a result, he went from number 61 to number 78 on the seniority list. That change affected his work assignments and vacation eligibility.

On March 9, 2002, Cipriano filed a grievance. It stated:

Unequal treatment by the Sheriff's Dept. and P.B.A. 187 for implementing a new seniority list. I was receiving seniority for over eight years and retaining my seniority for one and 1/2 years as an officer. This unfair labor practice is in fact discriminatory to certain members of P.B.A. 187. This selective enforcement of the contract is in fact prejudicial and punitive treatment towards me. *See attached copy

The attached copy stated:

The recent change of seniority has resulted in a different date for me to select my vacation. The past practice of the Mercer County Sheriff's Department for departmental seniority has always been from the date of hire. I have been employed since September 14, 1992 as an investigator until November 12, 2000 when I became a Sheriff's Officer. Since I have been assigned to the Courts for over 4 years I have selected my vacations in the order from the date I started with the Mercer County Sheriff's Department. Now I am selecting my vacations in a different sequence from the new seniority list. Officers that I have been given seniority over in the past practice are now selecting vacations before me. I have 9 1/2 years of service with the Mercer County Sheriff's Department including a year and a half as a Sheriff's Officer. Both the Sheriff's Administration and P.B.A. 187 have had ample time to implement the seniority list. P.B.A. 187 never enforced the contract rules and regulations when I was given my vacation schedule last year (2001) based on eight years of service with the Sheriff's Department. The provision in the contract is over three years old. This selective enforcement of the contract is in fact prejudicial and punitive towards me.

In a letter to Cipriano dated March 20, 2002, PBA President Mike Vasil wrote:

Dear Brother Cip,

This letter is in reference to our conversation of March 15, 2002; regarding the grievance you filed with the Sheriff of Mercer County. The grievance is based on your belief of unequal treatment based on the seniority list.

After learning of your concerns, and consulting with the attorney for PBA Local #187; it is our belief that you have no grounds to submit this grievance. Based upon this opinion, this local can not support your actions based on the following reasons:

1) The grievance you submitted does not violate the current contract between the Mercer County Sheriff's PBA Local #187 and the Sheriff of Mercer County/the County of Mercer.

If you have any problem with PBA Local #187 regarding this matter, you should contact Andy Sivo, State Delegate for PBA Local #187; who will forward any complaint you have with PBA Local #187 to the State PBA Office in Woodbridge, NJ.

Also on March 20, 2002, Vasil wrote a letter to Undersheriff James Taylor. It stated:

This letter is to advise you that we are aware of the grievance that Brother Cipriano has filed. We have taken steps internally to deal with this situation.

It is this locals belief, based on conversations with our attorney, that we can not support the filing of this grievance. Based on our attorney's advice it does not violate our contract with the County of Mercer/Sheriff of Mercer County.

If we can be of any further assistance to the County of Mercer/Brother Cipriano; please feel free to contact us at the above mentioned number.

Cipriano forwarded a complaint to the State PBA delegate's office in Woodbridge and did not receive a response.

Section 5.3 of the Act empowers a union to negotiate on behalf of all unit employees and to represent them in administering the contract. With that power comes the duty to represent all unit employees fairly in negotiations and contract administration. The standards in the private sector for measuring a union's compliance with the duty of fair representation were articulated in Vaca v. Sipes, 386 U.S. 171 (1967). Under Vaca, a breach of the statutory duty of fair representation occurs only when a union's conduct towards a member of the negotiations unit is arbitrary, discriminatory, or in bad faith. Id. at 191. That standard has been adopted in the public sector. Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976); see also Lullo v. International Ass'n of Fire Fighters, 55 N.J. 409 (1970); OPEIU Local 153, P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983). The duty of fair representation does not require a union to process non-meritorious grievances. Carteret Ed. Ass'n (Radwan), P.E.R.C. No. 97-146, 23 NJPER 390 (¶28177 1997); Camden Cty. College (Porreca), P.E.R.C. No. 88-28, 13 NJPER 755 (¶18285 1987). However, the representative may not mislead or misinform

employees concerning their rights. Carteret. Proof of mere negligence, standing alone, does not suffice to prove a breach of the duty of fair representation. Glen Ridge School Personnel Ass'n (Tucker), P.E.R.C. No. 2002-72, 28 NJPER 251 (¶33095 2002); OPEIU (Wasilewski), P.E.R.C. No. 98-131, 24 NJPER 256 (¶29122 1998).

In moving for summary judgment, the PBA argues that it did not breach its duty of fair representation because it reviewed the charging party's grievance, found it to lack merit, and decided not to submit it to arbitration. It contends that the contract plainly indicates that seniority must be calculated from the date of appointment as a Sheriff's Officer. The PBA further argues that the unfair practice charge is untimely because the charging party was aware of how the PBA was enforcing the contract for more than a year.

In cross-moving for summary judgment, the charging party argues that there are at least three reasons why the PBA's interpretation of the contract does not apply to him. First, he contends that the contractual seniority provision does not address how to determine seniority for an individual who was an Investigator but became a Sheriff's Officer. Second, he contends that a majority representative has a duty to pursue grievances if the evidence suggests that the contract is being applied in a manner that is inconsistent with State law. Third, the charging

party contends that the Sheriff's department and the PBA are without authority to interpret the contract in a manner that takes away rights set by statute or regulation. In particular, he asserts that N.J.S.A. 40A:9-117a prohibits the contract interpretation suggested by the PBA. That statute provides, in part:

The sheriff of each county may appoint a number of persons . . . to the position of sheriff's investigator. . . . A sheriff's investigator appointed pursuant to this section shall have the same compensation, benefits, powers and police officer status as is granted to sheriff's officers.

The charging party argues that, under this provision, there is no basis for treating Investigators and Sheriff's Officers differently with respect to seniority. In addition, the charging party notes that N.J.S.A. 40A:9-117.9 provides that seniority for employees appointed as Sheriff's Officers shall be calculated "so as to include permanent time in grade in their former titles for civil service purposes." He argues that, under this provision, an individual who was employed as an Investigator before becoming a Sheriff's Officer is statutorily entitled to retain his seniority.

The charging party also argues that the PBA's sudden change in its interpretation of the seniority provision is inequitable and inconsistent with its own past practice.^{3/}

In response to the PBA's timeliness argument, the charging party asserts that his charge was timely filed within six months of the date the PBA refused to further process his grievance.

On June 3, 2005, the PBA filed a reply. It argues that the duty of fair representation does not extend to enforcement of statutory claims that are neither referenced nor incorporated into a contract. It suggests that the charging party's sole recourse is to file an action in the Superior Court. In response to the charging party's statutory interpretations, it asserts that N.J.S.A. 40A:9-117.9 applies to seniority for civil service purposes, not contractual purposes in deciding vacation picks or a myriad of other situations. It further states that "compensation, benefits, powers and police officer status" under N.J.S.A. 40A:9-117a does not equate to the terms and conditions of employment related to calculation of seniority for vacation picks. The PBA argues that a difference of opinion as to the meaning and construction of these statutes does not rise to the level of arbitrary, discriminatory or bad faith conduct. It

^{3/} Although the charging party's certification states that the PBA's State delegate did not respond to his complaint, the charging party does not argue that his inaction breached the PBA's duty of fair representation.

contends that even if it was negligent in failing to subscribe to the charging party's interpretation, it still did not violate the duty of fair representation.

Our role is not to determine which party correctly interpreted the contract or the statutes alleged to afford the charging party certain rights. Our role is to review the PBA's conduct to determine if its decision not to arbitrate the charging party's grievance was arbitrary, discriminatory or taken in bad faith.

We begin with the first prong of the standard. A majority representative has wide latitude in negotiating on behalf of its unit members. In Belen v. Woodbridge Tp. Bd. of Ed., the Court explained that:

the mere fact that a negotiated agreement results, as it did here, in a detriment to one group of employees does not establish a breach of duty by the union. The realities of labor-management relations which underlie this rule of law were expressed in Ford Motor Co. v. Huffman, 345 U.S. 330, 73 S.Ct. 681, 97 L.Ed. 1048 (1953), where the court wrote:

. . .The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in servicing the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. . . . [at 337-338, 73 S.Ct. at 686]

[142 N.J. Super. at 490-491]

The latitude allowed an employee organization in servicing its unit exists during the term of a collective agreement as well as at its conclusion. City of Jersey City, P.E.R.C. No. 87-56, 12 NJPER 853 (¶17329 1986).

The PBA's interpretation of the contract is not so clearly incorrect as to fall outside the range of reasonableness or to be deemed "irrational" or "arbitrary." See Airline Pilots v. O'Neill, 499 U.S. 65, 78 (1991). The PBA reviewed the grievance and consulted with its attorney before deciding that the grievance had no merit. Contrast Gregg v. Teamsters Local 150, 699 F.2d 1015 (9th Cir. 1983) (where union's conduct was arbitrary, reliance on attorney's advice did not insulate it from liability). The contract provides that seniority begins with the date of appointment as a permanent Sheriff's Officer. It was not arbitrary for the PBA to interpret that language literally. Nor was it arbitrary for the PBA to permit a change in the method of creating the seniority list consistent with that interpretation. As for the two cited statutes, the charging party did not make those arguments to the PBA or the employer in his grievance, and the PBA was at most negligent in not knowing about and considering the relationship between the statutes and the contract.

As for the bad faith and discrimination prongs of the standard, the charging party does not suggest that the PBA acted

for discriminatory or bad faith motives or offer evidence that the PBA's decision, based on its interpretation of the contract, was in any way suspect. Accordingly, we grant the PBA's motion for summary judgment and deny the charging party's cross-motion.^{4/} The charging party may elect to pursue his statutory claims in the Superior Court.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



Lawrence Henderson
Chairman

Chairman Henderson, Commissioners Buchanan, DiNardo, Fuller, and Katz voted in favor of this decision. None opposed. Commissioners Mastriani and Watkins were not present.

DATED: June 30, 2005
Trenton, New Jersey
ISSUED: June 30, 2005

^{4/} We reject the PBA's argument that the charge is untimely. It was filed within six months of the PBA's decision not to pursue the charging party's grievance.