P.E.R.C. NO. 2015-3

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY SPORTS & EXPOSITION AUTHORITY,

and

LOCAL 632, INTERNATIONAL ALLIANCE
OF THEATRICAL STAGE EMPLOYEES,
MOTION PICTURE TECHS,

Respondents-Movants,

-and- Docket No. CI-2013-049

PETER CURTIS,

Charging Party-Respondent.

SYNOPSIS

The Public Employment Relations Commission denies the New Jersey Sports & Exposition Authority's motion for summary judgment and denies Local 632, International Alliance of Theatrical Stage Employees, Motion Picture Techs' motion for summary judgment in an unfair practice case filed by Peter Curtis. Curtis alleges that the Authority violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by discharging him after he accepted a one day suspension for a verbal altercation with a coworker, and that Local 632 violated the Act when it refused to process a grievance contesting his termination. Finding that the Authority's lack of standing argument regarding Curtis' 5.4a(5) claim lacks merit because he is also asserting a viable breach of duty of fair representation claim against the majority representative, the Commission denies the Authority's motion. Rejecting Local 632's argument that a union is not unreasonable as a matter of law if it refuses to take a discharge grievance to arbitration where the alleged conduct is offensive or vile, the Commission denies Local 632's motion. The case is remanded for hearing.

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.

P.E.R.C. NO. 2015-3

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY SPORTS & EXPOSITION AUTHORITY

and

LOCAL 632, INTERNATIONAL ALLIANCE
OF THEATRICAL STAGE EMPLOYEES,
MOTION PICTURE TECHS,

Respondents-Movants,

-and- Docket No. CI-2013-049

PETER CURTIS,

Charging Party-Respondent.

Appearances:

For Respondent N.J. Sports & Exposition Authority, Connell Foley, Attorneys (Michael A. Shadiack, of counsel)

For Respondent Local 632, International Alliance of Theatrical Stage Employees, Motion Picture Techs, Kroll Heineman Carton, attorneys (Raymond G. Heineman, of counsel)

For the Charging Party, Ralph Wood, attorney

DECISION

On April 22, 2013, Peter Curtis filed an unfair practice charge against his employer, the New Jersey Sports & Exposition Authority (Authority) and his Union, Local 632, International Alliance of Theatrical Stage Employees, Motion Picture Techs (Local 632). As amended on April 23 and July 19 the charge alleges that the Authority violated N.J.S.A. 34:13A-5.4a(1), (2)

(3) (5), (6) and (7)[1/] when, after Curtis had accepted a management-proposed one day suspension for his participation in an epithet-laced verbal confrontation with a co-worker, Bernard James, he was discharged by Robert Weakley, the Authority's Senior Vice-President for Human Resources and Labor Relations.

Curtis' charge against Local 632 alleges that it violated N.J.S.A. 34:13A-5.4b(1), (4) and (5),[2/] when, after Curtis was discharged, it refused to continue to process a grievance contesting his termination, or allow Curtis to pursue the

---

1/ These provisions 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. . . (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. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

2/ 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. . . (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (5) Violating any of the rules and regulations established by the commission."

grievance to arbitration. In doing so, Curtis alleges that Local 632 violated its statutory duty of fair representation.[3/]

A Complaint and Notice of Hearing was issued on the portion of the charge alleging that the Authority violated subsection 5.4a(5) and that Local 632 violated 5.4b(1).

The Authority has filed a motion for summary judgment seeking dismissal of the Complaint against it on the grounds that only a majority representative, and not an individual, has standing to allege that a public employer has violated subsection 5.4a(5). It has filed a supporting brief and exhibits.

Local 632 has filed a motion for summary judgment, supported by a brief and exhibits, asserting that the material facts establish that it acted within the discretion that case law allows a majority representative to exercise when deciding how far to pursue a grievance.

Curtis has filed a brief in opposition to the motions together with exhibits and supporting affidavits. He argues that issues of material fact preclude granting summary judgment.

These facts are from the charge, exhibits and affidavits.

3/ N.J.S.A. 34:13A-5.3 reads 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.

On October 10, 2012, Curtis, an Authority employee for 28 years, was working as a stagehand during an event at the IZOD Center in East Rutherford. After it ended, Curtis was working on "rigging." The act's stage/production manager asked to have the power cut so they could leave. Curtis called out to James, the Head Electrician. He got no response. After a 7-10 minute wait, Curtis went to another electrician to have power cut.

Later, Curtis saw James and told him that he had another electrician cut power. James shouted, "YOU DON'T TELL ANYBODY TO DO MY JOB!" Curtis responded that he had to have somebody do it. James yelled, "Shut the ____ UP, you ____ ____, ____-____."[4/] Curtis then reacted by saying to James, an African-American, "Make me ____."[5/] James again told Curtis to "Shut the ____ UP." Curtis again directed the racial epithet at James.

A Step One grievance meeting was held on October 22, 2012, at which a one day suspension each for Curtis and James was proposed by the Executive Vice-President of the Authority's facilities and the Director of Theatrical Productions, as punishment for the incident.[6/] Curtis accepted the proposal, but

---

4/ The epithets were a crude term for intercourse, a homophobic sexual insult, and an obscene term connoting incest.

5/ Curtis uttered a vile, racial epithet.

6/ Local 632's Answer to the Complaint denies that at the Step One meeting the Authority, "rendered a decision" that the Charging Party would receive a one-day suspension.

apparently James did not and later protested that Curtis should receive a more severe punishment.

On November 5, 2012, the Authority discharged Curtis. On the same day it issued an eight day suspension to James. On November 17, Local 632's business manager filed a grievance asserting that the discharge of Curtis was "too harsh," and should be rescinded. By letter dated November 28, Weakley denied the grievance, asserting, *inter alia*, that Curtis' actions violated posted work rules. On December 3, the business manager replied that the work rules did not list Curtis' conduct as a ground for immediate discharge and reiterated that Curtis should not be terminated.

An affidavit, with exhibits, filed on behalf of the Charging Party by Local 632's recording and correspondence secretary states:

- One month prior to the Curtis-James incident, a foreman and Local 632 member who had made repeated and unprovoked anti-Semitic slurs to a Jewish subordinate received an eight day suspension.

- Work rules posted at the IZOD Center (where Curtis worked) were out of date (circa 2003) and were not the current work rules revised in 2009 stating that the use of racial epithets could warrant termination. The 2009 rules do not require that sanction in all cases.

- That, as a result of the incident involving the anti-Semitic slurs, the Authority planned to tone down the

construction site-like language commonly used by workers and was, at the time of the Curtis-James exchange, developing, but had not implemented, a diversity training program.

- Just after the October 22, 2012 Step One meeting, the Local 632 Business Manager told her the issue was settled by having Curtis and James each suspended for one day.

- On October 26, 2012, she received a phone call from the Local 632 Business Manager relaying that James was expected to write a letter asserting that Curtis should receive a more severe punishment than James and that the Business Manager said that it didn't look good for Curtis.

- That Local 632 thereafter acted as if no step one settlement of the grievance had been reached.

- That, at the "unprecedented" request of Local 632's President, a letter was written by Local 632's counsel advising that Local 632 should not pursue a grievance challenging Curtis' discharge to arbitration.[7/]

- The letter was read at the January 13, 2013 general membership meeting of Local 632.

- Union members attending the January 13, 2013 meeting were not informed of the following:

7/ In support of its motion, Local 632 attorney Raymond G. Heineman certifies "[F]ollowing the recommendation and review of its counsel, Local 632 declined to proceed to arbitration based on its assessment of the merits of its grievance."

1. The settlement agreement providing that Curtis and James would each receive a one day suspension;

2. That James provoked the incident by directing vile slurs to Curtis;

3. That, unlike Curtis, James was not discharged, but instead received a suspension;

4. That Curtis had a clean employment history and made immediate efforts to de-escalate the incident and apologize.

- That despite these and other omissions of pertinent information, the vote on going to arbitration to contest Curtis' discharge was close; 23 voted against arbitration; 19 voted in favor of arbitration.

Local 632 and the Authority are parties to a collective negotiations agreement (CNA) covering the period from June 15, 2007 through June 14, 2010. The CNA provides that the Authority has the right to discipline or discharge employees for just cause. It also contains a non-discrimination clause obligating the Authority and Local 632 not to discriminate and provides that Local 632 as exclusive representative has the responsibility of representing all employees in the unit without discrimination. The grievance procedure in the CNA ends in binding arbitration and provides in pertinent part:

- A grievance may be raised by an employee, group of employees or by Local 632 on behalf of an employee(s).

- The CNA does not compel Local 632 to submit a grievance to arbitration and its decision to move the grievance to any step or to terminate the grievance at any step shall be final.

- At Step One, the employee's immediate supervisor shall make every reasonable effort to reach a satisfactory settlement with the grievant.

- If the grievance is not resolved at Step One, it may, within 10 days, proceed to Step Two (Department Head).

It is well settled law that in considering a motion for summary judgment, all inferences are drawn against the moving parties and in favor of the party opposing the motion. N.J.A.C. 19:14-4.8(d) provides that summary judgment may be granted only if there are no material facts in dispute and if, as a matter of law, the movant or cross-movant is entitled to its requested relief. The Courts have further cautioned that summary judgment should be granted with extreme caution; the process is not to be used as a substitute for a plenary trial. Baer v. Sorbello, 117 N.J. Super. 182 (App. Div. 1981); Essex County Educational Services Commission, P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982); New Jersey Dept. of Human Services, P.E.R.C. No. 89-52, 14 NJPER 695 (¶19297 1988).

The Authority's Motion

The Authority asserts that Curtis' charge alleging that the authority violated N.J.S.A. 34:13A-5.4a(5) must be dismissed as

only a majority representative has standing to assert a violation of this subsection of the Act. It cites Borough of Glassboro, D.U.P. No. 93-14, 18 NJPER 511 (¶23237 1992); Town of Morristown, D.U.P. No. 90-15, 17 NJPER 68 (¶22032 1990); and Hoboken Board of Education, D.U.P. No. 90-7, 17 NJPER 92 (¶22044 1991).

Curtis responds that an individual may pursue a charge alleging a violation of 5.4a(5) where he/she also asserts that the majority representative has breached its duty of fair representation. It cites N.J. Turnpike Auth., P.E.R.C. No. 80-106, 6 NJPER 106 (¶11055 1980).[8/] Curtis notes that none of the cases cited by the Authority alleged union malfeasance.

Here, the charging party is alleging that Local 632 has breached its duty of fair representation by: (1) not seeking enforcement of the grievance settlement reached with management representatives at Step 1 on the negotiated procedure; and (2) after Curtis was discharged, refusing to challenge that personnel action through binding arbitration. Thus, Curtis argues that he has standing to assert a violation of 5.4a(5) as he is also asserting a viable claim of a breach of a duty of fair

---

8/ In N.J. Turnpike Auth., an individual filed a timely charge against his employer. However, his charge alleging that his majority representative had breached its duty of fair representation was not timely. A complaint was issued and an evidentiary hearing was conducted. The case was dismissed on the merits and that action was affirmed by the Appellate Division of the Superior Court. Beall and N.J. Turnpike Auth., P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980), aff'd NJPER Supp.2d 101 (¶85 App. Div. 1981).

representation against the majority representative. Cf. Jersey City State College, D.U.P. No. 97-18, 23 NJPER 1, 2 (¶28001 1996).

As the Authority's sole argument in support of its motion is based on lack of standing, we deny summary judgment. The case will be remanded for hearing.

Local 632's Motion

The focus of Local 632's motion is that its refusal to arbitrate the discharge of an employee who has admitted using the vile racial epithet uttered by Curtis, can not be unreasonable "as a matter of law." It cites cases that allegedly stand for the proposition that a union is justified in not pursuing arbitration on behalf of a member who used the racially offensive term in the workplace.

Curtis responds that, save for one case, the decisions cited by Local 632 involve the use of racial epithets by supervisors toward subordinates and do not involve allegations that a union failed to represent the accused employee. In the one case that did involve a union's alleged failure to represent an accused employee, the union had, unlike in Curtis' case, taken the employee's case to arbitration. The judge made these (and other more detailed) findings:

> Here, the record is replete with actions taken by . . . the CWA to put forth a viable case for the Plaintiff's [two-day] arbitration hearing and thus, amply

> demonstrate that the CWA did not dispense with Plaintiff's case in a perfunctory fashion.
>
> Morgan v. CWA & Verizon, Inc., 2009 U.S. Dist. LEXIS 21088 at 26 (D.N.J. Mar. 17, 2009).[9/]

Curtis cites cases holding that the use of a racial epithet does not automatically require an employee's discharge without first considering the circumstances.

We deny Local 632's motion and will allow the parties to present their cases to the hearing examiner. An employee facing discharge is not denied the benefit of an arbitration hearing solely because his or her alleged actions are offensive or outrageous. See N.J. Tpk. Auth. and N.J. Tpk. Supervisors Ass'n, 143 N.J. 185 (1996) (supervisor accused of sexual harassment was entitled to contest disciplinary sanction through binding arbitration); New Jersey Turnpike Authority v. Local 196, I.F.P.T.E., 190 N.J. 283 (2007) (arbitrator's decision to impose 11 month suspension, rather than discharge, as sanction to toll collector, who while driving home in uniform on Garden State Parkway fired paint ball gun at another car, did not violate public policy).

9/ The Court noted, at p. 29, n.4, that, in contrast to the facts before her, "in many instances, a breach of the duty of fair representation claim arises when a union fails to file a grievance or bring a grievance to arbitration."

These cases implicitly reject Local 632's argument that, as a matter of law, a union is not unreasonable if it refuses to take a discharge grievance to arbitration where the alleged conduct is offensive, vile and/or outrageous. Whether Local 632's actions violated its duty of fair representation will be contested before the Hearing Examiner.

ORDER

A. The separate motions for summary judgment filed by the New Jersey Sports and Exposition Authority and Local 632, International Alliance of Theatrical Stage Employees, Motion Picture Techs, respectively, are denied.

B. The case is remanded for hearing.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Jones and Voos voted in favor of this decision. None opposed. Commissioner Eskilson recused himself. Commissioner Wall was not present.

ISSUED: August 14, 2014

Trenton, New Jersey