

P.E.R.C. NO. 83-108

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LOCAL #3, AFL-CIO, COOKS, BAR-
TENDERS, AND CAFETERIA WORKERS,

Respondent,

-and-

Docket No. CI-82-11-99

FRANCES NELSON,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that Local #3, AFL-CIO, Cooks, Bartenders, and Cafeteria Workers breached its duty of fair representation under the New Jersey Employer-Employee Relations Act when it deliberately excluded head cooks from a \$300 bonus it had negotiated on behalf of all other unit employees. The Commission found that Local #3 excluded the head cooks from the bonus because they had filed a representation petition seeking to form a separate unit.

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Docket No. CI-82-11-99

FRANCES NELSON,

Charging Party.

Appearances:

For the Charging Party, Frances Nelson, Pro Se

DECISION AND ORDER

On September 10, 1981, Frances Nelson ("Nelson"), an individual, filed an unfair practice charge on behalf of seven Head Cooks employed by the Newark Board of Education against Local #3, AFL-CIO, Cooks, Bartenders, and Cafeteria Workers ("Union") with the Public Employment Relations Commission. Nelson alleged that the Union violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4(b)(1), (3), and (4),^{1/} when it deliberately excluded the Head Cooks from a \$300 bonus it had negotiated on behalf of all other unit employees.

^{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; and (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

On April 15, 1982, the Director of Unfair Practices issued a Complaint and Notice of Hearing. The Union did not file an Answer.

On May 17, 1982, Commission Hearing Examiner Edmund G. Gerber conducted a hearing. An hour after the scheduled start, the Union's president appeared, stated that his attorney would be unable to attend, and requested, for the first time, an adjournment.^{2/} The Hearing Examiner denied the Union's request as untimely and commenced the hearing. The president chose not to participate and left.

On December 7, 1982, the Hearing Examiner issued his report and recommendations, H.E. No. 83-19, 9 NJPER ____ (¶ ____ 1982) (copy attached). He concluded that the Union violated §5.4(b) (1) when it intentionally excluded the Head Cooks from the \$300 bonus it negotiated on behalf of all other unit employees.^{3/} He found that the Union discriminated against the Head Cooks because they had filed a representation petition for a unit of their own.^{4/} The Hearing Examiner also recommended dismissal of the §5.4(b) (3) and (4) allegations.

The Hearing Examiner served a copy of his report on

^{2/} The president also arrived 45 minutes late for the prehearing conference on May 13, 1982. At the conference he stated his intention to have his attorney present at the hearing.

^{3/} Article XVI Section 1 reads in pertinent part: "Effective July 1, 1981, all Food Service Workers, Senior Food Service Workers, Cashiers, Senior Cooks, 6 hour, 7 hour and 8 hour cooks will receive a bonus of \$300.00. The Head Cooks will not receive this bonus. This lump sum payment is in exchange for the conversion of the formula for calculating the daily rate of pay. As mutually agreed, the daily rate will be determined by dividing the annual salary by 213 instead of 184.

^{4/} The Director of Representation dismissed this petition as untimely.

the parties. The cover letter stated that Exceptions were due December 30, 1982. No Exceptions have been filed.

In the absence of Exceptions and based on our review of the record, we adopt the Hearing Examiner's report. We specifically agree that the Union discriminated against the Head Cooks in violation of its duty of fair representation. In re City of Union City, P.E.R.C. No. 82-65, 8 NJPER 98 (¶13040 1982); Vaca v. Sipes, 386 U.S. 171 (1967).^{5/}

ORDER

IT IS ORDERED that:

A. The Respondent Local #3, AFL-CIO, Cooks, Bartenders and Cafeteria Workers cease and desist from interfering with, restraining or coercing the employees in the exercise of the rights guaranteed to them by the Act, particularly by not fairly representing all unit employees in contract negotiations.

B. The Respondent Union take the following affirmative action:

1. Pay each Head Cook \$300.00, together with 12% interest from the date all other unit employees received their bonus.

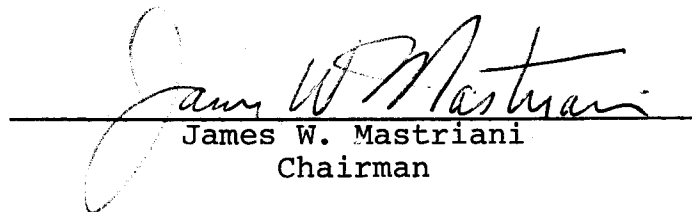
2. Post in all places where the Union customarily posts notices to unit employees, copies of the attached notice marked as Appendix "A." Copies of such notices on forms to be provided by the Commission, shall be posted immediately upon

^{5/} We caution, however, that the mere existence of negotiated salary differentials is insufficient to prove a breach of the duty of fair representation; there must be proof, as here, that the employee representative acted in bad faith, arbitrarily, or capriciously.

receipt thereof, and after being signed by the Union's authorized representative, shall be maintained by it for a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Union to ensure that such notices are not altered, defaced or covered by other materials.

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Union has taken to comply herewith.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hartnett, Butch, Suskin and Newbaker voted for this decision. Commissioner Hipp voted against this decision. Commissioner Graves abstained.

DATED: Trenton, New Jersey
February 16, 1983
ISSUED: February 17, 1983

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify all employees whom we represent that:

WE WILL NOT interfere with, restrain or coerce employees in the exercise of the rights guaranteed to them by the Act, particularly by not fairly representing all unit employees in contract negotiations.

WE WILL pay each Head Cook \$300.00, together with 12% interest from the date all other unit employees received their \$300.00 bonus.

LOCAL #3, AFL-CIO, COOKS, BARTENDERS, AND
~~CAFETERIA WORKERS~~
(Public Employer)

Dated _____

By _____ (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

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

In the Matter of

LOCAL #3, AFL-CIO, COOKS,
BARTENDERS & CAFETERIA WORKERS,

Respondent,

-and-

Docket No. CI-82-11-99

FRANCES NELSON,

Charging Party.

SYNOPSIS

A Hearing Examiner found that Local #3 of the Cooks, Bartenders & Cafeteria Workers Union committed an unfair practice when it failed to properly represent the Head Cooks employed by the Newark Board of Education. There was a proviso in the contract that the Head Cooks would not receive a \$300 pay bonus which was received by all other members of the unit. It was found this discriminatory action was taken by the union in retaliation for an attempt by the Head Cooks to create a representation unit of their own.

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
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In the Matter of

LOCAL #3, AFL-CIO, COOKS,
BARTENDERS & CAFETERIA WORKERS,

Respondent,

-and-

Docket No. CI-82-11-99

FRANCES NELSON,

Charging Party.

Appearances:

For the Charging Party
Frances Nelson, Pro Se

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On September 10, 1981, Frances Nelson, an individual, filed an Unfair Practice Charge with the Public Employment Relations Commission on behalf of the seven Head Cooks employed by the Newark Board of Education against Local #3 of Cooks, Bartenders and Cafeteria Workers, AFL-CIO.

It was alleged that all employees in the cafeteria department of the Newark Board of Education except for the Head Cooks received a \$300 bonus on July 2, 1982, and that the union willfully failed to fairly represent the Head Cooks. It was claimed that this action constituted a violation of the New Jersey Employer-Employee Relations Act (Act), specifically N.J.S.A. 34:13A-5.4(b)(1),

(3) and (4). ^{1/}

It appearing that the allegations of the charge, if true, might constitute a violation of the Act, a Complaint and Notice of Hearing was issued on April 15, 1982. The Respondent union never filed an answer or made any other response to the instant charge.

A prehearing conference in this matter was scheduled for May 13, 1982. No representative of the union appeared at the conference on behalf of the union. The undersigned called the offices of the union and in response to that call James Benjamin, the President of Local #3, came to the conference about 45 minutes late. At the conference Benjamin told the undersigned that he intended to have his attorney present at the hearing. However on May 17, the scheduled date of the hearing, the union did not make an appearance. The undersigned twice called the union offices that morning. ^{2/} Approximately one hour after the scheduled starting time of the hearing Mr. Benjamin arrived at the hearing room. Mr. Benjamin stated that his attorney was not able to be present but would be available the following day. This was the first time that Benjamin ever sought an adjournment. Further, the undersigned was never contacted by an attorney for any reason concerning this matter. Mr. Benjamin was told that his request, coming as it did one hour after the scheduled start of the hearing, was untimely and would

^{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; (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

^{2/} Both times the undersigned called Mr. Benjamin his secretary stated he was on his way.

not be considered and the hearing would commence immediately. Benjamin chose not to participate in the hearing. He excused himself and left the Commission offices. The hearing was conducted without a representative of the union present.

The cafeteria workers employed by the Newark Board of Education are represented by the Bartenders, Cooks, Cafeteria, Luncheonette and School Employees Union Local No. 3, AFL-CIO.

The Charging Party, Frances Nelson, is one of seven Head Cooks employed by the Board. The salary provision of the contract provides that essentially all employees ^{3/} will receive a bonus of \$300 except that "The Head Cooks will not receive this bonus." ^{4/}

At the hearing two Head Cooks testified although all seven were present. They testified that they had conflicts with Benjamin, the President of Local #3. The cooks considered themselves as supervisory personnel but Benjamin undermined their authority by telling the cooks the Head Cooks were not supervisors. Only one of the seven Head Cooks was a member of the Local #3. Further they testified that they filed a representation petition with the Commission seeking representation by the Newark Education Association for their own unit. There was a determination that the petition was untimely and the petition was withdrawn. It was after the filing of the petition that the Head Cooks were excluded from the \$300 payment.

^{3/} In the pertinent contract provision the individual job titles are broken down into large groups, i.e. Food Service Worker, Senior Food Service Worker, Cashier, Senior Cook.

^{4/} The contract went on: "This lump sum payment is in exchange for the conversion of the formula for calculating the daily rate of pay. As mutually agreed, the daily rate will be determined by dividing the annual salary by 213 instead of 183."

On the basis of the testimony adduced at the hearing, in the absence of any defense raised by the Respondent, and pursuant to Commission rule 19:14-3.1, all allegations in the complaint if no answer is filed...shall be deemed to be true and shall be so found by the Commission. The undersigned finds that the Respondent Bartenders, Cooks, and Cafeteria Workers Local #3 did not fairly represent the Head Cooks. In City of Union City and F.M.B.A. Local No. 12 and Wesley Spell, P.E.R.C. No. 82-65, 8 NJPER (¶13040 1982), the Commission adopted the test for the duty of fair representation as stated in Vaca v. Sipes, 386 U.S. 171, 190 (1967) 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.

The timing of the Head Cooks' exclusion from the receipt of the \$300 bonus, coming on the heels of the Head Cooks filing a representation petition, creates an unrebutted presumption that the denial of the \$300 was motivated by discriminatory intent.

It is therefore recommended that the Commission find that the Bartenders, Cooks, and Cafeteria Workers Local #3 violated §5.4(b) (1) when it failed in its duty to fairly and in good faith represent the Head Cooks employed by the Newark Board of Education.

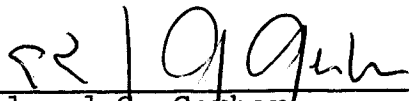
It is further recommended that since no evidence was adduced at the hearing to demonstrate violations of §5.4(b) (3) and (4) those allegations of the complaint be dismissed.

It is further recommended that the Commission ORDER

1. That the Bartenders, Cooks, and Cafeteria Workers Local #3 pay to each of the seven Head Cooks the sum of \$300.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notices on forms to be provided by the Commission, shall be posted immediately upon receipt thereof, and after being signed by the Respondent's authorized representative, shall be maintained by it for a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to ensure that such notices are not altered, defaced or covered by other materials.

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.



Edmund G. Gerber
Hearing Examiner

Dated: December 7, 1982
Trenton, New Jersey

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

we hereby notify our employees represented by
Local #3, AFL-CIO, Cooks, Bartenders & Cafeteria Workers

WE WILL NOT discriminate against the Head Cooks on the basis of their effort to be represented by another employee representative.

WE WILL pay each Head Cook the \$300 which was unlawfully denied them when we failed to fairly represent them.

LOCAL #3, AFL-CIO, COOKS,
BARTENDERS & CAFETERIA WORKERS
(Public Employer)

Dated _____

By _____
(Title)

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If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with James Mastriani, Chairman, Public Employment Relations Commission, 429 E. State State Street, Trenton, New Jersey 08608 Telephone (609) 292-9830.