

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

DISTILLERY, WINE & ALLIED
WORKERS INTERNATIONAL UNION,
LOCAL 209, AFL-CIO,

Respondent,

-and-

Docket No. CI-H-87-62

JAMES MERRICKS,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, pursuant to authority delegated to him by the full Commission, dismisses a Complaint based on an unfair practice charge James Merricks, a former employee of the Linden-Roselle Sewerage Authority, filed against his majority representative. The charge had alleged that Merricks was not fairly represented at a grievance hearing on his discharge, but a Hearing Examiner found that this charge was not substantiated and no exceptions were filed.

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JAMES MERRICKS,

Charging Party.

Appearances:

For the Respondent, George J. Orlando

For the Charging Party, James Merricks, Pro se

DECISION AND ORDER

On March 27, 1987, James Merrick ("Merricks") filed an unfair practice charge against Distillery, Wine and Allied Workers International Union, Local 209, AFL-CIO (Local "209"). The charge alleges Local 209 violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsection 5.4(b)(1),^{1/} when it did not properly represent Merricks at a grievance hearing contesting his discharge from employment with the Linden-Roselle Sewerage Authority.

On May 6, 1987, a Complaint and Notice of Hearing issued.

^{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."

On May 14, 1987, Local 209 submitted its previously filed Statement of Position as its Answer. It denies violating the Act and contends that it properly represented Merricks.

On July 7, 1987, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and introduced exhibits. Local 209 moved to dismiss the Complaint at the conclusion of the charging party's case. The Hearing Examiner denied this motion.

On July 29, 1987, the Hearing Examiner recommended that the Complaint be dismissed. H.E. No. 88-8, 13 NJPER ____ (¶ 1987). He concluded that Local 209 fairly represented James Merrick in the contractual grievance procedure.

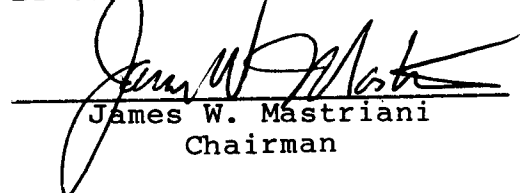
The Hearing Examiner served his report on the parties and informed them that exceptions were due August 11, 1987. Neither party filed exceptions.

I have reviewed the record. The Hearing Examiner's findings of fact (3-8) are accurate. I adopt and incorporate them here. Acting pursuant to authority delegated to me by the full Commission, I agree the Complaint should be dismissed.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

DATED: Trenton, New Jersey
August 20, 1987

H.E. NO. 88-8

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

In the Matter of

DISTILLERY, WINE & ALLIED
WORKERS INTERNATIONAL UNION,
LOCAL 209, AFL-CIO,

Respondent,

-and-

Docket No. CI-H-87-62

JAMES MERRICKS,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss the Complaint of Merricks, alleging that the Respondent violated §5.4(b)(1) of the New Jersey Employer-Employee Relations Act by the representation it provided to Merricks upon his discharge on November 28, 1986. The Hearing Examiner found that the Respondent had on its own initiated all steps of the grievance procedure and fairly represented Merricks at a plenary Third Step hearing on March 3, 1987. The fact that the Respondent refused to take Merricks' case to arbitration was made in good faith and did not constitute a breach of the duty of fair representation: Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967).

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. 88-8

STATE OF NEW JERSEY
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

DISTILLERY, WINE & ALLIED
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LOCAL 209, AFL-CIO,

Respondent,

-and-

Docket No. CI-H-87-62

JAMES MERRICKS,

Charging Party.

Appearances:

For the Respondent
George J. Orlando, Pro se

For the Charging Party
James Merricks, Pro se

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on March 27, 1987, by James Merricks (hereinafter the "Charging Party" or "Merricks") alleging that the Distillery, Wine & Allied Workers International Union, Local 209, AFL-CIO (hereinafter the "Respondent" or "Local 209") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that at a Step No. 3 grievance hearing on March 3, 1987, with

representatives of Local 209 and the Linden-Roselle Sewerage Authority (hereinafter the "Authority") present, a hearing was conducted wherein the International President of the Respondent union, George J. Orlando, conducted the hearing on behalf of Merricks, who had been discharged, and, according to Merricks, the attorney for the Authority "took over the whole meeting" and Orlando did not represent Merricks in the various items he had documented for the hearing, Orlando having had no knowledge of "what to talk about in my behalf" such that Merricks alleged that only a one-sided story was presented and, thus, Merricks concluded that an unfair practice was committed by the Respondent Local 209; all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(b)(1) of the Act.^{1/}

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on May 6, 1987. Pursuant to the Complaint and Notice of Hearing, a hearing was held on July 7, 1987, in Newark, New Jersey.^{2/} At the hearing

^{1/} This subsection prohibits 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."

^{2/} A hearing was originally scheduled for June 18, 1987, but Merricks failed to appear. The hearing was then rescheduled to July 7, 1987, at which time the Respondent moved to dismiss for the failure of Merricks to have appeared on June 18th. This motion was denied by the Hearing Examiner on the ground that Merricks had indicated some confusion as to what date he

on July 7th, the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. At the conclusion of the Charging Party's case, the Respondent moved to dismiss and the Hearing Examiner reserved decision pending the completion of a full record. Formal oral argument was waived and neither party expressed a desire to file a post-hearing brief.

The Hearing Examiner here denies the motion of the Respondent to dismiss at the conclusion of Charging Party's case. A decision will be rendered hereinafter on the complete record.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and the parties having waived oral argument and post-hearing briefs, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Distillery, Wine & Allied Workers International Union, Local 209, AFL-CIO is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

2/ Footnote Continued From Previous Page

was to appear. Since a severe hardship would inure to Merricks if the motion to dismiss was granted, the hearing commenced as scheduled with Merricks present on July 7, 1987.

2. James Merricks is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

3. Merricks was hired by the Authority in 1981 as a Maintenance Supervisor. After working in that position for approximately four and one-half years, Merricks was asked to assume the position of Lubrication Technician and Steel Fabricator.

4. Merricks testified that on October 16, 1985, he was removed from the Lubrication Technician and Steel Fabricator position and placed in Maintenance as a Second Class Mechanic. At the same time he stated that he was suspended for three days for an infraction.

5. Merricks testified further that at a meeting in October 1985, with the Executive Director of the Authority, Jerome A. Frederick and John Romanoski, the President of Local 209, the burden was placed on Merricks to exonerate himself from certain derelictions in his duties as Lubrication Technician and Steel Fabricator. Merricks testified that he did not file a grievance regarding his three-day suspension because he was told by Romanoski and Frederick that if the Authority received proof of non-dereliction on the part of Merricks then there was no need to grieve. Later, when the requisite proof had not been obtained, Merricks testified that he did not file a grievance because the Authority had stated that it was "too late."

6. The documentation introduced by the Respondent indicates that under date of October 16, 1985, Frederick sent a

letter to Merricks, in which he referred to disciplinary action imposed against Merricks on October 1, 1985, namely, a two-week suspension without pay and a pay scale demotion of one step and the reassignment of Merricks from Lubrication Technician to Plant Maintenance Man (R-1). Merricks was also given a warning that any further serious breaches of conduct or duty might result in immediate dismissal.

7. The Respondent also introduced into evidence a memorandum of February 19, 1986, from Joseph Switek, the Maintenance Supervisor of the Authority, to Raymond Nierstedt, the Authority's Plant Manager, which complained that Merricks: (1) had been taking too long on the jobs assigned to him; (2) that he insists on working alone; (3) that he frequently does not know the proper nomenclature of parts with which he works; and (4) that he demonstrates a negative attitude (R-2). The memorandum concluded with a reference to R-1, supra, regarding any further serious breaches of conduct or duty and dismissal.

8. On March 31, 1986, Frederick wrote to Merricks, advising him that as a result of a disciplinary hearing on March 12th he was being placed on a 30-day performance schedule and that if no improvement resulted, then disciplinary action, most likely termination, would result (R-3).

9. On November 5, 1986, Switek sent a memo to Frederick, in which he related a series of incidents concerning Merricks (R-4). Switek then set forth a recapitulation of work infractions

by Merricks from September 23, 1985, to date and concluded with the recommendation that because of Merricks' failure to improve his job performance, following progressive discipline, Merricks be terminated.

10. On November 21, 1986, Frederick recited the events of a meeting with Merricks where two representatives from Local 209 were present (R-5). Switek's memorandum of November 5, 1986 (R-4), supra, was reviewed. When Merricks refused to resign, Frederick stated that termination would follow. Thus, on the same date, November 21st, Frederick sent a letter to Merricks, advising him that he was being suspended for three days and terminated as of November 28, 1986 (R-6).

11. The testimony of Merricks was that nothing happened after the November 21st letter to him from Frederick (R-6, supra). However, the fact of the matter is that the President of Local 209 sent a memorandum to Frederick on November 26, 1986, invoking Step 1 of the grievance procedure in the collective negotiations agreement between the parties (R-7; R-10). Further, the President of Local 209 on December 4, 1986, sent another memorandum to Frederick, advising him that the Respondent was invoking Step 2 of the grievance procedure (R-8). Finally, the President of Local 209 invoked Step 3 of the grievance procedure on December 17, 1986 (R-9).

12. After some excusable delay the Third-Step hearing was held on March 3, 1987. Merricks' testimony as to what transpired at this hearing was totally vague and unsatisfactory. Thus, the

Hearing Examiner relies upon the "Meeting Notes," which were taken by the Recording Secretary of Local 209, Robin M. Germek (R-11). Germek, in preparing these Meeting Notes from the notes taken by her, also relied upon two tapes, which were made on Merricks' own equipment that he brought to the Third-Step hearing. The Meeting Notes indicate clearly that a thorough and fair hearing was conducted by the Respondent on behalf of Merricks. The meeting lasted approximately two and one-half hours.

13. On March 5, 1987, Frederick sent a letter to International President Orlando, in which Frederick stated that the Authority affirmed its previous position at the Third-Step hearing and that Merricks' grievance was held to be without merit (R-12).

14. On April 14, 1987, Local 209 held a regular membership meeting, at which the matter of Merricks' grievance and discharge was brought before the membership (R-13). Germek had prepared the agenda, outlining Merricks' case, based on the documentation theretofore received. Merricks did not appear at the membership meeting. After discussion, the membership of Local 209 voted by secret ballot not to take Merricks' case to arbitration.

15. On April 23, 1987, Germek sent a letter to Merricks advising him of the decision of Local 209 not to arbitrate his case and that this was a final decision of Local 209 (R-14). The foregoing letter from Germek stated that Merricks was receiving a copy of the minutes from the March 3, 1987 Third-Step hearing. Additionally, Germek testified credibly at the instant hearing that

she also enclosed the two tapes of the March 3rd Step-Three hearing and the agenda and minutes of the Local 209 membership meeting of April 14, 1987, supra.^{3/}

16. The President of Local 209, James V. Schilling, testified as to how the grievance procedure under R-10, supra, operates, namely, that if an employee has a grievance and he wishes to process it he notifies the President of Local 209 and thereafter Step 1 of the grievance procedure is initiated. Of course, the employee may proceed to process his own grievance without the assistance of Local 209. Schilling testified credibly that Local 209 had never refused to file and process a grievance on behalf of Merricks.

DISCUSSION AND ANALYSIS

The Respondent Local 209 Did Not Violate §5.4(b)(1) Of The Act Since It Fully And Fairly Represented Merricks In The Contractual Grievance Procedure, Following His Termination On November 28, 1986, Notwithstanding That The Membership Of The Respondent Voted Not To Take The Termination To Arbitration.

The evidence adduced by the parties indicates overwhelmingly that Merricks has been fully and fairly represented by Local 209 even if one is to delve as far back as October 1985

^{3/} Merricks testified that he acknowledged receiving the two tapes sent to him by Germek; he denied receiving the March 3, 1986 Step-Three "Meeting Notes" (R-11) or the Local 209 minutes of the April 14th meeting (R-13) as well as Germek's letter of April 23, 1987 (R-14).

(see Findings of Fact Nos. 5 & 6, supra). It is clear that the work record of Merricks since October 1985 has been far from laudatory. He was given a two-week suspension without pay on October 1, 1985. On February 1986, the Maintenance Supervisor of the Authority cited a series of derelictions and concluded that dismissal would be next recommended. Thus, on March 31, 1986, Merricks was placed on a 30-day performance schedule with a warning that any further lack of improvement would result in termination. (See Findings of Fact Nos. 6-8, supra).

Finally, on November 5, 1986, Switek, the Maintenance Supervisor, sent a memo to Frederick, the Executive Director, recapitulating work infractions on the part of Merricks and recommending termination. This followed the November 21, 1986 meeting and the decision of the Authority to terminate Merricks as of November 28, 1986 (see Findings of Facts Nos. 9 & 10, supra).

Notwithstanding that Merricks testified that nothing happened after the November 21st memo to him from Frederick (R-6), the President of Local 209 invoked Step 1 of the grievance procedure under the contract, and thereafter invoked Steps 2 and 3. The Third-Step hearing on March 3, 1987, is conclusive on the good faith effort of Local 209 to represent Merricks during the first three steps of the grievance procedure. What transpired at this hearing was well documented by the Recording Secretary as well as the two tapes which Merricks made at the hearing on his own equipment (see Finding of Fact No. 12, supra). On the matter of the decision of

Local 209 not to take the case of Merricks to arbitration, it is noted that Merricks did not even appear at the membership meeting (see Finding of Fact No. 14, supra). It is evident that Merricks was kept thoroughly apprised of the situation involving his termination grievance at all points beginning with Step 1 (see Findings of Fact Nos. 11-15, supra).

With the foregoing factual background having been set forth, the Hearing Examiner notes that in adjudicating unfair representation claims, the courts of this State and the Commission have consistently embraced the standards established by the United States Supreme Court in Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967). See e.g., Saginario v. Attorney General, 87 N.J. 480 (1981); In re Board of Chosen Freeholders of Middlesex County, P.E..C. No. 81-62, 6 NJPER 555 (¶11281 1980), aff'd. Ap. Div. Docket No. A-1455-80 (April 1, 1982), pet. for certif. den. (June 16, 1982); New Jersey Turnpike Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979); In re AFSCME Council No. 1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978). The Court in Vaca held that

...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. 386 U.S. at 190.

In fact, the U.S. Supreme Court has also held that to establish a claim of a breach of the duty of fair representation: ...carries with it the need to adduce substantial evidence of

discrimination that is intentional, severe, and unrelated to legitimate union objectives. Amalgamated Assoc. of Street, Electric Railway and Motor Coach Employees of America v. Lockridge, 403 U.S. 274, 301, 77 LRRM 2501, 2512 (1971).

It is also noted that 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 Int'l Union, Local No. 579 AFL-CIO, 229 NLRB 692, 95 LRRM 1156 (1977); Printing and Graphic Communication, Local 4, 249 NLRB No. 23, 104 LRRM 1050 (1980), reversed on other grounds 110 LRRM 2928 (1982).^{4/}

It is abundantly clear to the Hearing Examiner that Merricks has not proven by a preponderance of the evidence that Local 209 breached its duty of fair representation under the legal authorities set forth above. Vaca speaks in terms of arbitrary, discriminatory or bad faith conduct on the part of a union representative. Lockridge speaks further in terms of conduct that intentional, severe and unrelated to legitimate union objectives. The NLRB adds that proof of "mere negligence," standing alone, does not suffice to prove a breach of the duty of fair representation.

^{4/} See, also, Bergen Community College Adult Learning Center, H.E. No. 86-19, 12 NJPER 42 (¶17016 1985), aff'd P.E.R.C. No. 86-77, 12 NJPER 90 (¶17031 1985).

Vaca also holds that the decision to refuse to arbitrate a grievance is not in and of itself evidence of a breach of the duty of fair representation. See also, New Jersey Turnpike Employees Union Local 194, supra.

When one utilizes the criteria contained in the above cases to evaluate whether or not a public employee representative has breached its duty of fair representation, it seems abundantly clear that the actions and conduct of Local 209 in the representation of Merricks were exemplary under any standard. How else can one account for the fact that Local 209 initiated the Step 1 grievance on behalf of Merricks and then pursued it diligently through a plenary Step 3 meeting on March 3, 1987. Admittedly, the membership of Local 209 decided by secret ballot not to take the case of Merricks to arbitration but this, without more, does not constitute evidence of bad faith conduct such as would constitute a breach of the duty of fair representation.

Thus, the Hearing Examiner must recommend dismissal of the allegations in the Unfair Practice Charge that Local 209 violated §5.4(b)(1) of the Act.

* * * *

Upon the entire record, the Hearing Examiner makes the following:

CONCLUSION OF LAW

The Respondent Local 209 did not violate N.J.S.A. 34:13A-5.4(b)(1) by its conduct herein inasmuch as it fully and

fairly represented James Merricks in the contractual grievance procedure, following his termination on November 28, 1986.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.



Alan R. Howe
Hearing Examiner

Dated: July 29, 1987
Trenton, New Jersey