

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY AFT/AFL-CIO and
GLASSBORO STATE COLLEGE LOCAL
AFT/AFL-CIO,

Respondent,

-and-

Docket No. CI-85-99-33

ROY L. JONES,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission, dismisses a Complaint based on an unfair practice charge filed by Roy L. Jones against the New Jersey AFT/AFL-CIO. The charge alleges the AFT violated the New Jersey Employer-Employee Relations Act when it failed to properly represent Jones in administrative proceedings against Glassboro State College. The Commission, in the absence of exceptions and in agreement with a Hearing Examiner, finds that the Complaint should be dismissed because there is no evidence that the union acted arbitrarily, discriminatorily or in bad faith towards Jones.

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Appearances:

For the Respondents, Dwyer & Canellis, Esqs.
(Michael E. Buckley, of counsel)

For the Charging Party, Roy L. Jones, pro se

DECISION AND ORDER

On February 26, 1985, Roy L. Jones ("Jones") filed an unfair practice charge against the New Jersey AFT/AFL-CIO and Glassboro State College AFT/AFL-CIO ("AFT"). That charge alleges the AFT violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(b)(1), (2), (3), (4) and (5),^{1/} when it failed to properly represent Jones in

^{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; (2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the

administrative proceedings against Glassboro State College ("College"). These proceedings concerned a challenge to a suspension before the Chancellor of Higher Education and related proceedings before the Division on Civil Rights.

On August 14, 1985, the Director of Unfair Practices issued a Complaint and Notice of Hearing solely concerning the charge's allegation that AFT's local president, Rose Glassberg, lied to and misled a Division on Civil Rights investigator concerning Jones' discrimination claims and defamed him. The Director declined to issue a Complaint on the charge's other allegations because they were untimely.

On August 21, 1985, AFT filed an Answer denying the Complaint's allegations.

On October 11, 1985, AFT moved for summary judgment. On November 22, 1985, after receiving an extension of time, Jones filed his response. On December 16, 1985, the Chairman referred the motion to Hearing Examiner Richard C. Gwin. On March 10, 1986, Hearing Examiner Gwin denied the motion. H.E. No. 86-43, 12 NJPER 251 (¶17105 1986).

1/ Footnote Continued From Previous Page

adjustment of grievances; (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; (5) Violating any of the rules and regulations established by the commission."

On November 18, 1986, Hearing Examiner Gwin conducted a hearing. The parties examined witnesses and introduced exhibits. They also filed post-hearing briefs.

On April 2, 1987, the Hearing Examiner issued his report recommending that the Complaint be dismissed. H.E. No. 87-58, 13 NJPER 318 (¶18131 1987). He found that Glassberg did not act arbitrarily, discriminatorily or in bad faith towards Jones when she was interviewed by a civil rights investigator and that the AFT did not have a duty to represent Jones outside of contract negotiations and administration.

The Hearing Examiner wrote a letter informing the parties that exceptions were due by April 14, 1987.^{2/} Neither party filed exceptions or requested an extension of time.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-9) are accurate. We adopt and incorporate them here. We agree that the Complaint should be dismissed because there is no evidence that Glassberg acted arbitrarily, discriminatorily, or in bad faith towards Jones. Therefore, we need not consider whether a union's duty of fair representation extends to proceedings before the Division on Civil Rights.

^{2/} This letter was sent by certified mail, return receipt requested. Jones' letter was returned by the post office, marked "moved, left no address." This constitutes sufficient service. See R 1:5-2.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
July 14, 1987
ISSUED: July 15, 1987

H.E. NO. 87-58

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

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Docket No. CI-85-99-33

ROY L. JONES,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends dismissal of Roy Jones' Complaint which alleges that the Glassboro State College NJSFT Local ("Local") violated its duty of fair representation. Jones alleged that the Local's president lied to a civil rights investigator during an interview about Jones' suspension from Glassboro State College.

The Hearing Examiner concludes that duty of fair representation standards do not apply because Jones was not relying on the Local's "representation" in his civil rights claim. The Hearing Examiner also concludes that, even if the Local president's conduct is to be evaluated by the duty of fair representation, no violation may be found because Jones failed to prove that she acted arbitrarily, discriminatorily or in bad faith.

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.

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Charging Party.

Appearances:

For the Respondent, Dwyer & Canellis, Esqs.
(Michael E. Buckley, Esq.)

For the Charging Party, Roy L. Jones, pro se

HEARING EXAMINER'S REPORT AND
RECOMMENDED DECISION

On February 26, 1985, Roy L. Jones filed an unfair practice charge with the Public Employment Relations Commission ("Commission") alleging that New Jersey AFT/AFL-CIO and Glassboro State College AFT, AFL-CIO ("NJSFT" or "union") violated sections 5.4(b)(1) through (5)^{1/} of the New Jersey Employer-Employee

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Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). In a 20-count charge, Jones alleged that NJSFT, acting arbitrarily and in bad faith, prejudiced him in various proceedings at which he was challenging his suspension from Glassboro State College ("College").^{2/}

On August 14, 1985, the Director of Unfair Practices dismissed all but one of the allegations in Jones' charge. The Director issued a Complaint and Notice of Hearing encompassing Jones' allegation that NJSFT local president Rose Glassberg gave false and defamatory testimony during an interview with an investigator from the New Jersey Division on Civil Rights. Jones

1/ Footnote Continued From Previous Page

adjustment of grievances; (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; (5) Violating any of the rules and regulations established by the commission."

2/ On March 5, 1985, the Director of Unfair Practices advised Jones that the charge could not be processed until the requirements of N.J.A.C. 19:14-1.3, N.J.A.C. 19:14-1.5 and N.J.S.A. 34:13-5.4(c) were satisfied. On March 11, 1985, NJSFT filed a general denial of the charges. On March 25, 1985, Jones amended the charge and on April 3, 1985, the Director again advised Jones that the charge appeared to be untimely under N.J.S.A. 34:13A-5.4(c). Jones filed a response on April 22, 1985, and an exploratory conference was conducted on May 14, 1985. On June 25, 1985, the Director again wrote Jones, this time advising him that the charge did not appear to be complaintable. The Director invited Jones to submit a statement of his position that the NJSFT's alleged conduct may constitute an unfair labor practice. After receiving an extension of time, Jones filed a response on July 15, 1985.

claims that Glassberg's testimony violated NJSFT'S duty to fairly represent him and prejudiced him in his suspension proceedings.

A hearing was scheduled for October 24 and 25, 1985.

On August 21, 1985, NJSFT filed an Answer denying that it breached its duty of fair representation. On October 11, 1985, NJSFT filed a motion for summary judgment, a supporting brief and a request to stay the hearing. On November 22, 1985, after receiving an extension of time, Jones filed a response.

On December 16, 1985, the Chairman referred the motion to me for a ruling. On March 10, 1986, I denied the motion. H.E. No. 86-43, 12 NJPER 251 (¶17105 1986).

On April 24, 1986, I sent the parties a notice scheduling a hearing for June 24, 1986. Jones failed to appear at the hearing. On June 25, 1986, I wrote Jones requesting that he show good cause why the case should not be dismissed based on his failure to appear. Jones replied on July 7, 1986, and NJSFT filed a response on August 25, 1986.

On September 29, 1986, after reviewing the parties' submissions, I rescheduled the hearing to November 18, 1986. On that day the parties examined witnesses and introduced exhibits. They waived oral argument but filed briefs, the last of which I received on February 11, 1987.

Based on the entire record I make the following:

FINDINGS OF FACT

1. NJSFT is an employee organization within the meaning of the Act and represents faculty employed at the College. Jones

was a member of NJSFT's collective negotiations unit.

2. In June 1982, Jones was suspended indefinitely by the College. Shortly after his suspension, Jones filed a complaint with the New Jersey Division on Civil Rights ("Division") alleging that the College's action was racially motivated. Jones also filed a charge with the Equal Employment Opportunity Commission and a Title 18A appeal. On June 7, 1982, Jones wrote a letter to Dr. Rose Glassberg requesting that NJSFT challenge his suspension and retain an attorney to pursue his EEOC complaint. NJSFT grieved his suspension and represented Jones in the Title 18A appeal but refused to represent him in the EEOC proceeding. NJSFT did not represent Jones in the Division proceeding. The union has a policy of not representing unit members in civil rights litigation. (CP-5; T54, 55).

3. Jones wrote a letter to the Division field investigator assigned to his case, outlining his contentions and listing several witnesses who could corroborate them. Glassberg was among the witnesses listed in Jones' letter.^{3/} (CP-6). Jones had

^{3/} The date on Jones' letter is January 12, 1982. This date is obviously incorrect because the contents of the letter refer to events occurring in April, May, June, November and December of 1982. I assume that the letter was written either in January 1983 or 1984. The date is not critical in my analysis of this case. The only point that need be made here is that Jones suggested that the field investigator interview Glassberg and that she subsequently did.

intended that Glassberg would corroborate his allegation that the College had retaliated against him because he was outspoken and critical of the College's affirmative action practices and treatment of minorities (CP-6; CP-7).

4. On April 30, 1984, the Division investigator interviewed Glassberg and several other witnesses listed in Jones' letter. The investigator took short-hand notes of the interview and later prepared a case progress report (CP-2). The investigator reports her interview with Glassberg as follows:

[Glassberg] is a Caucasian female and is President of the Glassboro AFT Union. She has been with Respondent for 20 years. She is in secondary education, she teaches English and is a Professor. She does not know how much was racial or how much had to do with Complainant not doing his job. She can't say that the institution is overtly racist.

As to whether the Complainant's performance as alleged would lead to dismissal, even without his outspokenness, witness said yes. Complainant's performance was a long standing problem. They upgraded him in the past even in spite of that. He was changed to Coordinator of Student Work and then they developed the Center. The problem was that there was too many managers and not enough followers.

Complainant felt that as a professional, they could not tell him to work. The bone of contention was that he was not working, not coming in, or not working when he came in. It was the feeling that the College would have moved on him earlier if it had not been concerned with its racial image. This is common knowledge.

Witness also stated that Complainant did not get to be outspoken until the last year. He never took a leadership role. She does not know why Complainant became outspoken in the last year. But the inference is that during the last year was when they were reorganizing, there were new managers. He resented it. Two Caucasian females were placed in the managing

positions over him and Complainant felt that it should have been him instead. This was the feeling of [name deleted] also. Complainant began to feel that the manager might put a book together on him to dismiss him.

Regarding others who were performing in a manner similar to Complainant, witness said that she has not heard of any. People that Complainant worked with like [name deleted] were new. [Names deleted] were coming in working at the Center because Jones was not doing his job. These are the only two individuals that she could cite that were similarly situated to Complainant at the Center.

Regarding the knowledge of supervisors and complaints about them she has none. She has never heard any complaints about Complainant's supervisor. As to whether the problems that Complainant alleged that he was having were racial she said no. As to whether Complainant could have had a racist attitude towards his Caucasian supervisors, she stated that Complainant is a opportunist. He wants to go far on little effort. He feels that things should happen for him just because he is Black.

Witness stated that they have relatively few grievances of discrimination. The Union uses equitable treatment. Discrimination is very difficult, the most difficult to prove. She cited examples of [names deleted].

Others with outspokenness, she cited [name deleted] Union Activist. He is a Caucasian male. She also cited herself. She also cited [name deleted] who is considered haughty who feels that the Administration feels that in Blacks, this is a less acceptable trait.

As to what knowledge she has of Complainant's performance, she said that he was not coming in, he was using College time for personal business. She cited two (2) Caucasians who were terminated for similar reasons. [names deleted]. This was approximately 1976, they were counselors and they were fired.

As to whether she had any complaints about [names deleted] being racists, she said no.

Regarding the issue of racism, witness stated that she believes that Complainant was setting up a smoke screen because his job was in jeopardy. When he started getting write ups, he became vocal.

Witness has been with the Union for about 11 years. She has always been very active on the campus. She knows Complainant well. She states that it was common knowledge on the campus that Complainant's allegation of racism was just a strategy.

Regarding Complainant's status with the institution, she said that the Union considers Complainant still suspended.

Regarding additional witnesses, Ms. Glassberg cited [name deleted]. She is Black and a Sociology Professor. She could provide better insight as a Black Activist. She has spoken out in public meetings and is involved in the AFT Human Rights Committee.

Others suspended for the type of things attributed to Complainant, she said that it has been a long time since any one was suspended. Regarding contact for this witness, she gave a number

Regarding others in the Center with problems, she does not know of any one. As to whether the action towards Complainant was justified based on his performance, she said yes.

Witness also stated that the one other individual that has been outspoken, that would be [name deleted].
[CP-2]

5. Glassberg denies making several of the remarks attributed to her in the investigator's report. She denies having said that Jones' performance would have led to his dismissal even without his outspokenness; his performance was a longstanding problem; he was not reporting to work; he was using College time for personal business; and he was using the issue of racism as a smoke screen because his job was in jeopardy. Glassberg admits that she told the investigator that Jones did not become outspoken until the year before he was disciplined.

Glassberg was upset with the investigator's report because it did not, in her view, sufficiently distinguish between those remarks she made from her first-hand knowledge and those based on her perception of Jones' reputation in the College community. It is difficult to determine from the report which of Glassberg's statements were based on Jones' reputation and which were based on her first-hand knowledge. On the one hand, the investigator reports that Glassberg responded, "Yes" to the question of whether Jones' performance would lead to dismissal even without his outspokenness. On the other hand, in the next paragraph of her report, the investigator uses phrases such as "the bone of contention," "it was the feeling," and "this is common knowledge." These phrases suggest that Glassberg was, in fact, testifying about Jones' reputation.

Glassberg's remarks, whether based on her first-hand knowledge or on hearsay, are generally corroborated by most of the other witnesses interviewed by the investigator (CP-2).

6. The investigator interviewed approximately eight witnesses. She asked them questions about the College's treatment of faculty, about Jones' outspokenness and about his work performance. Several of the witnesses explained that, while they had no first-hand knowledge about Jones' work performance, it was generally known that his work habits were bad. Those familiar with his work habits corroborated this. Other witnesses stated that they had no knowledge of Jones' work performance. Some witnesses felt that Jones may have been suspended because he was outspoken; others disagreed. (CP-2).

7. Based on its field investigation, the Division did not find sufficient facts to credit the allegations of Jones' complaint. Relying heavily on the findings of the Division, the EEOC dismissed Jones' Title VII action (CP-8; CP-9). Jones also lost his Title 18A appeal.

8. At the conclusion of the hearing, the parties entered the following stipulation on the record:

On or about June 1982, Mr. Jones was suspended for two weeks with pay and subsequently suspended indefinitely without pay. He requested that [NJSFT] grieve his suspension. He was dissatisfied with the representation he received.

[NJSFT] provided counsel for Mr. Jones. Mr. Jones, being dissatisfied with his counsel, dismissed him on or about December 1982. [NJSFT] declined Mr. Jones request to provide alternate counsel.

Three separate grievances all relating to Mr. Jones' suspension, were filed by [NJSFT]. Two were processed through arbitration, the third was not. The third grievance involved the claim of discrimination and harassment.

Mr. Jones did not concur with the [NJSFT] decision not to press his third grievance to arbitration.
[T71, 72]

ANALYSIS

The issue is whether Glassberg's conduct during her interview with a Division of Civil Rights investigator breached NJSFT's duty to fairly represent Jones. Jones contends that Glassberg lied to the investigator and he was consequently prejudiced in his Division, EEOC and Title 18A claims.

I conclude for two reasons that the Union has not breached its duty to fairly represent Jones. First, the Union's duty of fair representation is not at issue. The dispute does not involve the negotiation, administration or enforcement of a collective negotiations agreement and NJSFT was not "representing" Jones in the civil rights claim. Second, even if duty of fair representation standards govern Glassberg's conduct, Jones failed to prove that she acted arbitrarily, discriminatorily or in bad faith.

In the private sector, a union's duty of fair representation does not extend beyond the context of negotiating, administering and enforcing the terms of a collective bargaining agreement. Foust v. Electrical Workers (IBEW), 442 U.S. 42, 47, 101 LRRM 2365 (1979); Conley v. Gibson, 355 U.S. 41, 46, 41 LRRM 2089 (1957). See also, Boyce and Turner, Fair Representation, The NLRB, and the Courts, University of Pennsylvania Industrial Research Unit (revised ed. 1984). The first federal cases dealing with the issue of fair representation rely on statutes conferring exclusive representation status to unions. The courts reasoned that, because minority employees were deprived of the right to choose their own representative or to bargain individually with their employer, the exercise of the statutorily granted power necessarily implied a duty on the union to represent minority employees without hostile discrimination. Steele v. Louisville & Nashville Railroad, 323 U.S. 192 (1944); Ford Motor Co. v. Hoffman, 345 U.S. 330 (1952);

Conley v. Gibson. The concept of exclusivity forms the basis of the duty of fair representation. Because bargaining unit members must rely on the union to represent them in certain situations, the union must represent its members in good faith and without discrimination. See, Vaca v. Sipes, 386 U.S. 171, 207, 64 LRRM 2369 (1967).

The Commission has not yet defined the boundaries of the duty an employee organization in New Jersey owes the members of its negotiations unit. Although the Commission has adopted the standard set forth in Vaca v. Sipes, it has neither specifically limited the duty to nor expanded it beyond contract negotiation, administration and enforcement. Bergen Community College Faculty Assn., P.E.R.C. No. 84-117, 10 NJPER 262, 264, n. 8 (¶15127 1984). As in the private sector, however, the Act confers exclusive representation status to employee organizations. The New Jersey Supreme Court relied heavily on the concept of exclusivity in its endorsement of an employee organization's rights to negotiate collectively and present and process the grievances of the employees it represents. Lullo v. Intern. Ass'n of Fire Fighters, 55 N.J. 409 (1970); Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122 (1978). Employee organizations have the concurrent responsibility to exercise these rights fairly in representing their members. Id.

But NJSFT was not representing Jones in his New Jersey civil rights claim. Jones was representing himself.^{4/} There is nothing in the record to suggest that Jones asked the union to represent him in the action. While it did initially represent Jones (though not to his satisfaction) in three related grievances and in his Title 18A appeal, NJSFT refused to represent him in the EEOC claim. There is no evidence of a contractual obligation to represent him in a civil rights proceeding nor is there any evidence that NJSFT ever represented its members in such cases. The evidence is to the contrary--NJSFT has a policy of not representing its members in civil rights litigation.

This is not a case where a union was exercising its statutory grant as exclusive representative. Unlike collective negotiations or grievance processing, the litigation of a civil rights claim does not require the exclusive representation of an employee organization. Jones was not prevented access to the civil rights process by the Union's refusal to represent him. The Union was under no statutory or contractual obligation to represent Jones.

^{4/} The union's only involvement in the civil rights action was Glassberg's interview with the investigator. Section 5.4 (b)(1) prohibits employee organizations or their agents from "interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act." (emphasis added). Jones was not exercising a right guaranteed by the New Jersey Public Employer-Employee Relations Act when he filed his civil rights complaint. The right he exercised was guaranteed by the New Jersey Constitution and by the Law Against Discrimination, N.J.S.A. 10:5-1 et seq.

The duty of fair representation establishes a standard to evaluate a union's conduct in situations where employees must rely on the union's representation. That is not the case here. I conclude, therefore, that Glassberg's alleged conduct (while it may be actionable in other forums) cannot be evaluated by duty of fair representation standards.

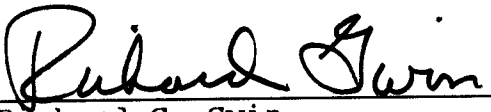
Even assuming that NJSFT's duty to fairly represent Jones was invoked by Glassberg's participation in an interview with a civil rights investigator, no violation may be found because Jones failed to prove that Glassberg acted arbitrarily, discriminatorily or in bad faith. Jones suggested to the civil rights investigator that she interview Glassberg--Glassberg did not seek out the investigator in an attempt to discredit Jones. Glassberg's remarks, as reported by the field investigator, are generally corroborated by other witnesses.^{5/} Jones failed to prove that the remarks attributed to Glassberg were false. Nothing in the record suggests that Glassberg was unlawfully motivated or predisposed to discriminate against Jones based upon his involvement with the Union. There is no evidence that Glassberg's conduct tended to interfere with Jones' exercise of protected rights.

^{5/} Glassberg's discontent with the report (CP-2) relates more to the investigator's narration than to substance. It is unnecessary for me to determine whether Glassberg told the investigator that she was speaking from her first-hand knowledge or simply relaying the prevailing opinion about Jones' work habits.

H.E. NO.

14.

Accordingly, I recommend that the Complaint be dismissed.


Richard C. Gwin
Hearing Examiner

Dated: April 2, 1987
Trenton, New Jersey