P.E.R.C. NO. 87-60

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF SAYREVILLE,

Respondent-Public Employer,

-and- Docket No. CI-85-38-56

MARY ANN MILLER,

Charging Party.

MIDDLESEX COUNCIL NO. 7, NEW JERSEY
CIVIL SERVICE ASSOCIATION,

Respondent-Labor Organization,

-and- Docket No. CI-85-98-57

MARY ANN MILLER,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated to him by the full Commission, dismisses a Complaint based on unfair practice charges Mary Ann Miller filed against the Borough of Sayreville, her former employer, and Middlesex Council No. 7, New Jersey Civil Service Association, her former majority representative. The charges alleged that the Borough violated the New Jersey Employer-Employee Relations Act when it denied Miller's request for a personal leave of absence and constructively discharged her and that the Association violated the Act when it refused to submit Miller's grievance to binding arbitration. A Hearing Examiner concluded that these charges were meritless and exceptions to that conclusion were not filed.

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Charging Party.

Appearances:

For the Respondent-Public Employer, Robert A. Blanda, Esq.

For the Charging Party, Weinberg & Kaplow, Esqs. (Richard J. Kaplow, of counsel)

For the Respondent-Labor Organization, Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, Esqs. (James F. Clarkin, of counsel)

DECISION AND ORDER

On August 28, 1984, Mary Ann Miller filed an unfair practice charge against the Borough of Sayreville ("Borough"). The charge

alleges that the Borough violated §§5.4 (a)(1) and (3)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it denied Miller's request for a personal leave of absence and constructively discharged her.

On February 22, 1985, Miller filed an unfair practice charge against Middlesex Council No. 7, New Jersey Civil Service Association ("Association"). That charge alleges the Association violated §§ 5.4(b)(1), (3) and (5)[2/] when it refused to submit Miller's grievance to binding arbitration.

On September 26, 1985, a consolidated Complaint and Notice of Hearing issued. The Borough filed an Answer asserting that it legally denied Miller a personal leave of absence and that she voluntarily resigned. The Association filed an Answer denying it violated its duty of fair representation when it did not submit Miller's grievance to binding arbitration.

1/ These subsections 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, and (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."

2/ 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 (5) Violating any of the rules and regulations established by the commission."

On December 16, 1985 and March 5, 1986, Hearing Examiner Arnold H. Zudick conducted a hearing. The Hearing Examiner granted motions to dismiss the allegations pertaining to §§ 5.4(b)(3) and (5). The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

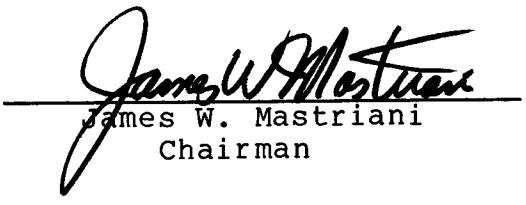
On October 16, the Hearing Examiner issued a report recommending the Complaint's dismissal. H.E. No. 87-25, ___ NJPER ___ (¶_____ 1986). He found that the denial of personal leave did not violate the Act; that Miller voluntarily resigned; and that the Association did not violate its duty of fair representation.

The Hearing Examiner served his report on the parties and informed them exceptions were due on or before October 29. Neither party filed exceptions or requested an extension.

I have reviewed the record. The Hearing Examiner's findings of fact (pp. 4-10) are thorough and accurate. I adopt and incorporate them here. Acting pursuant to authority delegated to me by the full Commission in the absence of exceptions, I also adopt his conclusions of law.

ORDER

The Complaint is dismissed.



James W. Mastriani
Chairman

DATED: Trenton, New Jersey
November 17, 1986

H.E. NO. 87-25

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

In the Matter of

BOROUGH OF SAYREVILLE

Respondent-Public Employer,

-and- Docket No. CI-85-38-56

MARY ANN MILLER,

Charging Party.

MIDDLESEX COUNCIL NO. 7, NEW JERSEY
CIVIL SERVICE ASSOCIATION,

Respondent-Labor Organization,

-and- Docket NO. CI-85-98-57

MARY ANN MILLER,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the Borough of Sayreville did not violate the New Jersey Employer-Employee Relations Act when a request for a leave of absence by Mary Ann Miller was denied, and when her vacation check was prorated. The Hearing Examiner also concluded that Miller's subsequent resignation was not a constructive discharge.

The Hearing Examiner further concluded that Middlesex Council No. 7 did not violate the Act in the manner in which it represented Miller in seeking her leave of absence or in the manner in which it processed a grievance over the denial of the leave of absence. The Hearing Examiner also concluded that Council 7's refusal to submit the grievance to arbitration did not violate its duty of fair representation.

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. 87-25

STATE OF NEW JERSEY
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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Appearances:

For the Respondent-Public Employer
Robert A. Blanda, Esq.

For the Charging Party
Weinberg & Kaplow, Esqs.
(Richard J. Kaplow, of Counsel)

For the Respondent-Labor Organization
Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, Esqs.
(James F. Clarkin, of Counsel)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

On August 28, 1984 Mary Ann Miller ("Charging Party") filed an unfair practice charge with the Public Employment Relations

Commission ("Commission") against the Borough of Sayreville ("Borough"), Docket No. CI-85-38-56, alleging that the Borough violated §§5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act").[1/]

On February 22, 1985 The Charging Party filed an unfair practice charge, Docket No. CI-85-98-57, which was amended on March 18, 1985, against Middlesex Council No. 7, New Jersey Civil Service Association ("Association"), alleging that the Association violated §§5.4(b)(1), (3) and (5) of the Act.[2/]

The Charging Party alleged that the Borough violated the Act by denying the Charging Party's request for a personal leave of absence and by constructively discharging her - causing her to resign - because she was a member of the Association's negotiations team in 1982-83. The Borough denied committing any violation of the Act. The Borough asserted that it had the right to request reasons

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1/ These subsections 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 and (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."

2/ 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 (5) Violating any of the rules and regulations established by the commission."

for the leaves of absence, that the Charging Party failed to exhaust the grievance procedure over the denial of her request for a leave of absence, and that it never requested that the Charging Party resign.

The Charging Party alleged that the Association violated the Act by refusing to represent her and by refusing to support her grievance. The Association denied committing any violation of the Act. It argued that it filed a grievance on the Charging Party's behalf over the denial of her request for a leave of absence, that it represented her through the grievance procedure, and that it made a good faith determination not to submit the grievance to arbitration. The Association also argued that the §5.4(b)(3) allegation should be dismissed because such charges may only be filed by a public employer.

A consolidated Complaint and Notice of Hearing was issued in these matters on September 26, 1985. Both parties filed Answers by October 7, 1985.

Hearings were held in this matter on December 16, 1985 and March 5, 1986 in Newark, New Jersey, at which all parties had the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. At the beginning of the hearing the Association moved to dismiss the charge filed in CI-85-98-57. I denied the motion regarding the ¶5.4(b)(1) allegation and reserved decision on the ¶(b)(3) allegation, but granted the motion regarding the ¶(b)(5) allegation. There was no allegation on the face of the

charge that the Association violated any Commission Rule or Regulation (Transcript ("T") p. 16). At the close of the Charging Party's case I granted the motion to dismiss the (b)(3) allegation. At that stage of the proceeding the Charging Party had no objection to the motion (T 2 p. 18). All parties filed post-hearing briefs the last of which was received on May 12, 1986.

Unfair practice charges having been filed with the Commission, a question concerning alleged violations of the Act exists, and after hearing this matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record I make the following:

Findings of Fact

1. The Borough of Sayreville is a public employer within the meaning of the Act and is subject to its provisions.

2. Middlesex Council No. 7 is a public employee representative within the meaning of the Act and is subject to its provisions.

3. Mary Ann Miller was a public employee within the meaning of the Act and was subject to its provisions. Miller was employed by the Borough as a clerk transcriber from August 1976 until May 25, 1984.

4. Although Miller held no union office, she was on the Association's negotiations team from late 1982 until the Fall of 1983. Those negotiations led to the Borough's and Association's January 1, 1983-December 31, 1984 collective agreement, Exhibit

J-1. (T1 p. 104, T2 p. 85). The Association's negotiations team was led by Association President, Dorothy Cieslarczyk, and the Borough's team was led by then Mayor John Czernikowski. Miller testified that she was silent during the face-to-face negotiations with Mayor Czernikowski, and that it was Cieslarczyk who spoke for the Association. (T1 pp. 105-106). Miller further testified that the only time she had input was when the Association's team met privately, and that any disagreements that developed were between Cieslarczyk and Mayor Czernikowski (T1 pp. 106-107). Finally, Miller testified that during those negotiations none of the Borough officials told her or threatened her that she would be punished for being on the Association's negotiations team (T1 p. 109). The Borough and Association reached agreement in the Fall 1983, and Mayor Czernikowski and Dorothy Cieslarczyk signed J-1 on November 2, 1983. Miller was not involved in union activity after J-1 was reached (T2 p. 86), nor did she sign J-1.

5. On January 1, 1984 a new Mayor, John McCormack, and two new Councilmen, Coyle and Zagata, took office (T2 p. 25). Neither McCormack nor the new Councilmen were involved in the negotiations leading to J-1 (T1 p. 108, T2 p. 86). In January 1984 Mayor McCormack told Dorothy Cieslarczyk that he wanted to become more strict on leaves of absence requests based on "personal reasons." (T2 pp. 87-88). Apparently, McCormack believed that in the past, leaves of absence had been used by employees to obtain or try out other jobs, and he did not favor such leaves (T2 p. 88).

6. Article 9, Sec. B of J-1 provided employees with 16 sick days per year provided they worked all twelve months, otherwise employees earned approximately 1 1/4 sick days per month.

Article 10 of J-1 provided employees with Miller's years of service with three weeks of vacation per year provided they remained an employee the full year. Employees who left before the end of the year were required to repay vacation already used but not earned on a pro rata basis.[3/]

Miller testified that by May 1984 she had used 5 3/4 sick days over the number of sick days she had earned at that point (T1 pp. 114, 116). She also testified that at that time she was unhappy and wanted a leave of absence (T1 p. 116).

On May 2, 1984, Miller sent a letter, Exhibit CP-4, to the Mayor and Council requesting a leave of absence "for personal reasons" to be effective from May 7-July 31, 1984. By letter of

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3/ Article 10, Sec. D of J-1 provides as follows:

> D. The employer and the Association agree that employees shall submit requests for vacation periods no later than April 15 of each year with first and second choices. The first choice requested shall be on the basis of seniority and the needs of the Borough. It shall be assumed that an employee will remain in the service of the Borough for the full calendar year and is entitled to use all vacation time for that year when requested, as permitted by the vacation schedule. Should any employee leave before the calendar year is completed, he must repay any vacation time already used but not earned on a pro rata basis. Any employee leaving the service of the Borough shall have any unused vacation time paid him on the basis of one (1) day for each month of service during that calendar year.

May 3, 1984, Exhibit CP-5, the Borough Clerk advised Miller that the Mayor and Council requested more specific reasons for the leave other than "personal reasons."

Prior to drafting CP-4, Miller had not asked Association President Cieslarczyk for assistance in obtaining a leave in May 1984. In 1980, Miller had a 30-day leave of absence, plus a 30-day extension, with minimal assistance from Cieslarczyk, without giving specific reasons and presumably believed she could do the same in 1984 (T1 pp. 67-70, T2 p. 80). After receiving CP-5, however, Miller asked Cieslarczyk for assistance on how to answer CP-5 (T1 pp. 79-81). Miller admitted that Cieslarczyk was "shocked" that Miller did not receive the requested leave after making the request in CP-4 (T1 p. 80).

Cieslarczyk knew that Miller's father had certain medical problems and she testified that she told Miller that she (Miller) should answer CP-5 by telling the Mayor and Council that she needed the leave because her father was ill and that she was needed at home to take care of him (T2 pp. 96-97, 130-133). Cieslarczyk had apparently spoken with Mayor McCormack after CP-5 had been sent and he wanted Miller to be more precise. Consequently, Cieslarczyk recommended that Miller write that her father was ill (T2 p. 97).

Miller, however, told Cieslarczyk that she did not want to tell the Mayor and Council the exact problem, and Miller believed that if she said "personal," that would be sufficient (T2 pp. 97, 131). I credit Cieslarczyk's testimony that she told Miller to list

her father's illness as the reason for the leave, but that Miller refused. Miller admitted that she did not want to state her reasons for the leave because they were personal (T1 p. 81). As a result, on May 10, 1984 Miller, in Exhibit CP-6, responded to CP-5 first by requesting the leave from May 21-August 10, 1984, and then by saying: "My specific reason for the request is a personal family matter." Miller provided no other explanation for the leave.

7. In early May 1984 - prior to receiving the Borough's response to CP-6 - Miller applied for a two-week vacation in May which was approved (T1 pp. 116-117). On May 16, 1984, while Miller was on vacation, she received Exhibit CP-7, the response to CP-6, denying her request for a leave of absence.

After receiving CP-7 Miller testified that Cieslarczyk suggested that she (Miller) file a grievance over the leave of absence, and that Cieslarczyk suggested the language for the grievance (T1 pp. 90, 92).[4/] The grievance, Exhibit CP-8, was filed on May 18, 1984.

Article 11, the grievance procedure in J-1, provided a four-step grievance procedure. The first-step was with the

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4/ The grievance stated:

"Unfair Labor Practice"

I feel my request for a personal leave of absence is being unjustly denied due to past precedent set by the Mayor and Council. I have submitted specific reasons as requested by the Mayor and Council and still was denied.

appropriate department head, the second step was with the appropriate Borough committee chairman, the third step was a private meeting with the Mayor and Council, and the fourth step was arbitration.[5/] Cieslarczyk testified that she and the grievance committee decided to bypass the first two steps of the grievance procedure and submit the grievance directly to the Mayor and Council because Miller did not have much time to have her request implemented (T2 pp. 100, 145). The Mayor and Council denied the grievance on or about May 22, 1984 with the following comment on CP-8.

> The grievance is denied on the basis that additional information regarding the Leave of Absence was not submitted by Miss Miller. In addition, the contract

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5/ The pertinent portions of Article 11 of J-1 provide as follows:

> B. (2) Any employee of the Borough having any such grievance shall, within three (3) workdays after the grievance arises first take up the matter with his representative or steward who will present grievance to the Department Head.
>
> (3) If within three (3) workdays a satisfactory settlement is not arrived at between these parties, the matter shall be put into writing and taken up by the employee concerned and the members of the Grievance Committee with the respective committee chairman.
>
> (4) If a settlement is not arrived at between these parties within three (3) workdays, the Grievance Committee shall, if it considers the grievance a justified one, take it up with the Mayor and Council at one of their business sessions or executive sessions, in private without having the matter made one of public record. The Mayor and Council agree to meet with the Grievance Committee as soon as practicable, but in any event within seven (7) workdays from the date of receipt of written notice from the Grievance Committee setting forth the particulars of the grievance or grievances, and requesting such meeting.

> does not state that personal leaves of absence are automatically granted.

8. Article 9 of J-1, the leave clause that applied to Miller, only provided for sick leave, bereavement leave, and jury duty leave. It did not provide for a leave of absence outside those circumstances.[6/]

N.J.A.C. 4:1-17.6(c) provides for leaves of absence as follows:

> In local service, a department head or appointing authority may grant leaves of absence without pay to permanent employees for periods not to exceed six months at any one time. Such leaves may be renewed for an additional six months by the department head or appointing authority with approval by the governing body....Standards concerning leaves of absence without pay shall be prepared and administered by the appointing authority.

Borough Administrator, Wayne Kronowski, testified that there was no set policy for granting leaves of absence, that they were not automatically granted, and that each request was considered separately on its own facts (T2 pp. 26-28). Kronowski indicated that the Borough wanted to obtain as much information as possible to show why a leave was necessary and that was why Miller was sent CP-5 (T2 p. 30). Kronowski testified, however, that when Miller did not provide any more definite information to justify the leave, the Borough denied her leave request (T2 pp. 31-33).

6/ J-1 actually contains two separate collective agreements. The first part of J-1 is the agreement covering the unit of all blue and white collar employees, and the second part of J-1 is the agreement covering the unit of dispatchers. Article 9, Sec. 3 of the dispatchers agreement provides for a leave of absence, but that clause does not apply to Miller.

I credit Kronowski's testimony as to why Miller's leave request was denied. It was denied only because Miller did not provide more specific reasons to demonstrate the need for the leave. The Charging Party did not offer any evidence to rebut Kronowski's testimony. In fact, Miller admitted that no one threatened to punish her for being on the negotiations team; that she really did not know why her leave was denied; and that she had no facts to support her assumption that the leave was denied because she had been on the negotiations team (T2 pp. 109, 139).

9. After receiving the Borough's denial of CP-8 on May 22, 1984, Cieslarczyk discussed the grievance with the Association's attorney,and Cieslarczyk concluded that she would not file for arbitration, but she informed the Charging Party that if she (Miller) wanted to file for arbitration she (Miller) would have to do so, and that the Association would assist her (T2 pp. 102, 112-114).

Miller testified, however, that she was not satisfied with Cieslarczyk's explanation as to why there was nothing more she (Cieslarczyk) could do about the grievance and why Cieslarczyk advised her (Miller) not to pursue it further (T1 pp. 136-137). Under cross-examination, however, Miller admitted that Cieslarczyk really did answer her questions and explain the situation, but that she (Miller) was confused because Cieslarczyk was optimistic when the grievance was filed, but advised her not to pursue it after it was denied (T1 p. 137). Miller further admitted that she never told

Cieslarczyk that she (Miller) thought the grievance was denied because of her union activity (T1 pp. 139-140).

I found Miller to be a very confused witness who did not have a good recollection of the facts. Cieslarczyk, however, appeared to be certain about her role in this matter. Thus, I credit Cieslarczyk's testimony that although she recommended against pursuing the grievance, she did tell Miller that the Association would assist her (Miller) in pursuing the matter further.

10. On or about learning that her grievance (the request for the leave) was denied and that the Association would not recommend further action, Miller, on May 22, sent her supervisor a handwritten note with a doctor's note attached (Exhibit RE-1) confirming a telephone call of May 21, 1984, that she would be out on sick leave through May 29, 1984. The doctor's note verified the medical need for the sick leave.

Kronowski testified that although no formal action was taken regarding RE-1, it was not denied, and that since Miller had a doctor's note the absence was satisfactory even though she would not be paid for the absence (T2 p. 36). Kronowski further testified, however, that RE-1 raised doubts whether Miller would ever return to work. Kronowski noted a series of events to support his suspicions. Miller had used all of her sick days by early May, she then requested a leave of absence and a vacation, she took her vacation, and when her leave request was denied she produced a doctor's note for another week of sick leave (T2 p. 38).

Based upon that sequence of events Kronowski suggested to the Mayor that Miller's vacation paycheck be adjusted and prorated in accordance with Art. 10, Sec. D of J-1 because he assumed that Miller would not return to work (T2 p. 38). Miller received that paycheck during the week of May 21-25 and telephoned Kronowski who informed her the check was prorated because he assumed she was quitting.

Subsequently, on May 25, 1984 Kronowski received Miller's resignation effective May 25 (T2 pp. 33-34), and that resignation was accompanied by Miller's formal withdrawal (Exhibit RE-2) from the public employee pension system (T2 p. 34).

On May 29, 1984 Kronowski wrote to Miller informing her of how much money she would receive in a final check, and on June 6, 1984 the Mayor and Borough Council formally accepted her resignation (T2 p. 34). I find that the Borough did not deny Miller's request for a leave and did not prorate her vacation check because she had been on the Association's negotiations team. There is simply no evidence to support that conclusion. Although the prorating of Miller's vacation check may have been the catalyst resulting in her resignation, the Borough's only motive in prorating the check was to protect itself from losing money if Miller abruptly resigned after having taken vacation that was not fully earned. The Borough did not force, require or request Miller to resign. She resigned on her own volition, not because she had been engaged in union activity, but because she wanted the leave and was angry at Kronowski for

prorating the vacation check (T1 pp. 118-119). Miller admitted that approximately two weeks later she realized she had made a mistake by resigning, but she did not contact the Borough in an attempt to regain her job (T1 pp. 124-125).

11. On July 10, 1984 Miller wrote to Cieslarczyk (Exhibit RU-4) asking for her assistance in taking the grievance to arbitration. Cieslarczyk replied to RU-4 by notifying the Association's attorney, and by offering Miller any assistance she (Cieslarczyk) could provide (T1 p. 127). By letter of August 21, 1984 (Exhibit RU-5), the Association's attorney responded to Miller's request for arbitration. Miller was told that the Association believed the grievance lacked merit and that it would not request arbitration because Miller was not automatically entitled to a leave of absence, and because the grant of such leave was within management's discretion. However, the Association's attorney did explain how Miller could request arbitration and the proper form for that purpose was attached to RU-5. Miller, however, did not send the form requesting a list of arbitrators.

12. The record shows that for many years prior to January 1, 1984, the Borough approved several leaves of absence for personal reasons (Exhibits CP-1, CP-3, CP-11, CP-12, CP-13). Not all leaves prior to January 1, 1984, however, were granted. Cieslarczyk testified that she knew of several employees, including Sebastian Delduca, and Sandy Dix, whose leave requests were denied (T2 pp. 89-91). In addition, one employee, Joyce Buchanan Besner,

did not provide the reasons for the leave she requested other than "personal reasons." The record shows, however, that Besner's father was a Borough councilman and he knew the reason for the leave and he discussed it with the Borough Council (T1 pp. 46-47).

The record shows that since January 1, 1984 at least three leaves of absence were approved apparently for personal reasons (Exhibits CP-2, CP-9, CP-10). Although employee John Wojcik's leave was approved ostensibly for just "personal reasons" (CP-2), the record shows that Wojcik's original request in February 1984 was denied. The record shows that both Cieslarczyk and Wojcik met with Mayor McCormack and explained the reason for the leave (T1 p. 64, T2 p. 124), and Wojcik was required to write another letter listing the reason for the leave before the leave was finally approved (T1 p. 52).

The Charging Party did now show that the approvals in CP-9 and CP-10 were done without the Borough obtaining more specific reasons for the requested leaves.

ANALYSIS

Neither the Borough nor the Union violated the Act regarding Miller's leave request, the grievance processing, or her resignation.

The Charge Against the Borough

In Bridgewater Twp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984), the New Jersey Supreme Court adopted the private sector test in analyzing (a)(3) cases. Under that test the Charging

Party must make a prima facie showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the Borough's decision to deny the leave request and that the denial was intended to result in Miller's resignation. The Charging Party failed to satisfy that test. The Charging Party did not demonstrate that Mayor McCormack and/or the Borough Council were hostile towards Miller because she was on the Association's negotiations team. The evidence clearly showed that Miller did not participate in face-to-face negotiations, and that McCormack and two Councilmen were not involved in those negotiations and were not even in office when those negotiations occurred. There was no anti-union motive for the Borough's denial of Miller's leave request, and Miller even admitted that she did not know why the leave was denied.

I found that the leave was denied for obvious reasons. In CP-5 the Borough specifically asked for reasons other than "personal reasons" (emphasis added). Despite Cieslarczyk's recommendation that Miller tell the Borough about her father's illness, Miller chose to tell the Borough in CP-6 that it was a "personal family matter." That response did not comply with the Borough's request in CP-5, thus it denied her request. There was no unlawful motive.

Similarly, the Borough was not responsible for Miller's resignation. Kronowski testified that the Borough accepted Miller's sick leave request in RE-1 and that leave would not have resulted in her discharge. In addition, based upon Miller's series of absences

in May 1984, the Borough had reasonable and ample cause to believe that Miller would not return to work and, on that basis, and pursuant to Art. 10, Sec. D of J-1, the Borough prorated Miller's vacation check. The Borough's actions were not motivated by Miller's participation in negotiations in 1983.

Finally, in its post-hearing brief the Charging Party argued, for the first time, that the Borough violated §5.4(a)(5) of the Act by allegedly unilaterally modifying an alleged past practice regarding the reasons required to obtain a leave of absence.[7/] The Charging Party alleged that in the past, leaves of absence were approved based only upon "personal reasons." But, the Charging Party's argument has no merit.

First, the Charging Party did not plead or allege a violation of §5.4(a)(5) in its Charge, and may not raise that issue at this late date. Second, even if it did plead an (a)(5) allegation, the Commission has held that, absent allegations of collusion, individuals generally do not have standing to file (a)(5) allegations alleging a breach of contract or a breach of a past practice establishing terms and conditions of employment. New Jersey Tpk. Authority, P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284

7/ This subsection prohibits public employers, their representatives or agents from: "(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."

1980), aff'd App. Div. Dkt. No. A-1263-80-T3 (10/30/81); Paterson Bd.Ed. and Paterson Ed.Assn., P.E.R.C. No. 80-107, 6 NJPER 109 (¶11056 1980), aff'd App. Div. Dkt. No. A-2783-79 (2/19/81).

Third, even if I considered the (a)(5) issue on the merits, the facts do not support the Charging Party's apparent conclusion that an established practice existed regarding the reasons given for leaves of absence. Rather, the facts show that the Borough was under no contractual obligation to grant leaves, that it considered requests for leaves on a case-by-case basis, that the Borough has often known of the specific reasons for such requests, and that the Borough has denied such requests in the past. There was no established practice that leave requests based only upon "personal reasons" were automatically granted.

Thus, the Charge in CI-85-38-56 should be dismissed.

The Charge Against the Association

The Charging Party alleged that the Association breached its duty of fair representation to Miller by failing to argue a past practice claim regarding the reasons required for leaves of absence; by not adequately investigating the evidence which could have supported Miller's grievance; by skipping the first two steps of the grievance procedure and submitting Miller's grievance directly to the Mayor and Council; by allegedly arbitrarily concluding that there was "no case" regarding Miller's grievance; and by refusing to take Miller's grievance to arbitration.

The standard for evaluating an alleged breach of the duty of fair representation was established by the U.S. Supreme Court in Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967)("Vaca"), and adopted in New Jersey by the courts and by the Commission in numerous decisions. Saginario v. Attorney General, 87 N.J. 480 (1981); Board of Chosen Freeholders of Middlesex County, P.E.R.C. No. 81-62, 6 NJPER 555 (¶11281 1980), aff'd App. Div. Dkt. No. A-1455-80 (April 1, 1982), pet. for certif. den. (6/16/82)("Middlesex County"); N.J. Tpk. Authority, P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980), aff'd App. Div. Dkt. No. A-1263-80T3 (10/30/81); Fair Lawn Bd.Ed., P.E.R.C. No.84-138, 10 NJPER 351 (¶15163 1984); OPEIU Local 153, P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983); New Jersey Tpk. Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979)("Local 194"); In re AFSCME Council No. 1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978).

The Supreme Court in Vaca established the principal that:

> The breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the...unit is arbitrary, discriminatory, or in bad faith. 386 U.S. at 190, 64 LRRM at 2376.

But the Supreme Court also explained that individual employees had no absolute right to have their grievances taken to arbitration:

> Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement.

> If an individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined... 386 U.S. at 190-191, 64 LRRM at 2377.

The Federal Courts and the National Labor Relations Board (NLRB) have interpreted "arbitrary, discriminatory, or bad faith" to mean something more than mere negligence; rather, there must be a showing of personal hostility. Bazarte v. United Transportation Union, 429 F.2d 868, 75 LRRM 2017 (3rd Cir. 1970); Encina v. Lama Boot Co. Inc. 316 F.Supp. 239, 75 LRRM 2012, aff'd 448 F.2d 1264, 78 LRRM 2382 (1971); Berry v. Pacific Intermountain Express Co., (D.C. NM), 85 LRRM 2408 (1974); Teamsters Local 692 (Great Western Unifreight), 209 NLRB 446, 85 LRRM 1385 (1975).[8/] In fact, the U.S. Supreme Court 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).

In Teamsters Local 692, supra, the NLRB held that negligent union action or inaction would not be considered arbitrary or a breach of the duty of fair representation.

8/ The National Labor Relations Board has interpreted Vaca to mean that proof of mere negligence, standing alone, does not suffice to prove a breach of the duty of fair representation. See, e.g., Printing & Graphic Communication, Local 4, 249 NLRB No. 23, 104 LRRM 1040 (1980); The Developing Labor Law, pp. 1326-28 (2nd ed. 1983).

In adopting the Vaca standards the Commission has held that a majority representative should exercise reasonable care and diligence in investigating and processing grievances, and it should exercise good faith in determining the merits of a grievance. Middlesex County; Local 194; OPEIU Local 153, supra; Fair Lawn Bd.Ed., supra. The Commission in Local 194, however, held that an exhaustive investigation is not required. 5 NJPER at 413.

In applying the above cases to the instant facts I conclude that the Association amply satisfied its duty of fair representation to Miller regarding the request for the leave of absence and in the processing of her grievance. The Association had a good faith doubt regarding Miller's chances for success in arbitration because J-1 did not provide for leaves, and because it believed that the granting of leaves was discretionary.

The facts show that Cieslarczyk recommended that Miller tell the Borough about her father's illness but Miller refused to follow the advice. After the leave was denied it was Cieslarczyk who recommended that Miller file the grievance and she also recommended the language for the grievance. Cieslarczyk then presented the grievance to the Mayor, and when the grievance was denied, she contacted the Association's attorney for guidance. Cieslarczyk acted in a professional and responsible manner which could hardly be considered as rising to the level of a violation of the Act.

Even after deciding that the grievance should not be submitted to arbitration the Association made itself available to assist Miller if she chose to file for arbitration. That satisfied the Court's intent in Saginario, supra.

In sum, the Association's actions did not rise to the level of arbitrary conduct as contemplated by the above decisions. The Charge in CI-85-98-57 should, therefore, be dismissed.

Accordingly, based upon the above findings and analysis I make the following:

Recommendation

The Commission should ORDER that the consolidated Complaint - and both Charges - be dismissed.

Arnold H. Zudick
Hearing Examiner

Dated: October 16, 1986
Trenton, New Jersey