P.E.R.C. NO. 84-60

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

OFFICE & PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 153,
AFL-CIO,

Respondent,

-and-

Docket Nos. CI-82-45-52
CI-83-23-53

THOMAS JOHNSTONE,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge that Thomas Johnstone, formerly a custodian employed by the Ringwood Board of Education, filed against the Office & Professional Employees International Union, Local 153, AFL-CIO. The charge had alleged that Local 153 failed to represent him fairly at a Board hearing concerning his discharge. The Commission holds that Johnstone failed to establish that Local 153's representation was arbitrary, discriminatory, or in bad faith.

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THOMAS JOHNSTONE,

Charging Party.

Appearances:
For the Respondent, Schneider, Cohen & Solomon, Esqs.
(Bruce D. Leder, of Counsel)

For the Charging Party, Mr. Delaney Zanes and
Mrs. Marisa Zani

DECISION AND ORDER

On March 19, July 6, and July 20, 1982, respectively, Thomas Johnstone, formerly a custodian employed by the Ringwood Board of Education ("Board"), filed an unfair practice charge and amended charges (CI-82-45-52) with the Public Employment Relations Commission. On November 1 and 17, 1982, respectively, he filed a second unfair practice charge and amended charge (CI-83-23-53). Both charges, as amended, allege that the Office & Professional Employees International Union, Local 153, AFL-CIO ("Local 153") violated subsection 5.4(b)(3)[1/] of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"). Specifically, Johnstone claims that Local 153 failed

1/ This subsection prohibits public employee representatives, their representatives or agents from: "(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."

to represent him fairly at a December 21, 1981 Board hearing concerning his discharge.

On December 3, 1982, the Director of Unfair Practices issued an Order Consolidating Cases and a Complaint and Notice of Hearing pursuant to N.J.A.C. 19:14-2.1. On December 13, 1982, Local 153 filed an Answer denying Johnstone's allegations.

On February 1 and 2, and April 21, 1983, Hearing Examiner Alan R. Howe conducted hearings. The parties made motions,[2/] examined witnesses, and presented exhibits. They waived oral argument, but filed post-hearing briefs.

On June 24, 1983, the Hearing Examiner issued his report and recommended decision, H.E. No. 83-45, 9 NJPER 406 (¶14186 1983) (copy attached). He granted Local 153's renewed

2/ On February 1, 1983, Local 153 filed a Motion to Dismiss on three grounds: (1) that the unfair practice charges, as amended, were untimely under the six month limitation of subsection 5.4(c) of the Act; (2) that a violation of subsection 5.4(b)(3) does not properly lie against a public employee representative; and (3) that the instant proceeding should be dismissed or stayed pending a final decision in a Commissioner of Education proceeding. With respect to the first ground, the Hearing Examiner dismissed charge CI-83-23-53 as untimely, but refused to dismiss charge CI-82-45-52. With respect to the second ground, the Hearing Examiner denied the motion, although technically meritorious, because in substance Johnstone had alleged a breach of Local 153's duty of fair representation cognizable under section 5.4(b)(1) of the Act. With respect to the third ground, the Hearing Examiner denied the motion; we note that the Commission of Education has since issued a final decision upholding the Board's termination of Johnstone. Johnstone v. Board of Education of the Borough of Ringwood, Comm. of Ed. #149-83 (May 23, 1983). Local 153 sought special permission to appeal these rulings, but the Chairman denied permission.

After Johnstone finished presenting his case at the April 21, 1983 hearing, Local 153 renewed its Motion to Dismiss. The Hearing Examiner deferred ruling on this motion and directed Local 153 to proceed with its defense without prejudice.

motion to dismiss based on his determination that Johnstone, even with the benefit of all favorable inferences from the testimony of his witnesses, had failed to make a prima facie case of unfair representation.

On August 4, 1983, after receiving an extension of time, Johnstone filed exceptions. He contends, in general, that Local 153 breached its duty of fair representation. He asserts, more specifically, that Local 153 did not properly investigate the facts which resulted in his dismissal; that Local 153 did not properly represent him at the Board hearing or cite contract sections allegedly violated by the Board; and that Local 153 erroneously concluded that the grievance did not merit advisory arbitration.

We have reviewed the record. The Hearing Examiner's findings of fact are accurate. We adopt and incorporate them here. Based on these findings, we also adopt his recommended conclusions of law and order.

In the specific context of a challenge to a union's representation in processing a grievance, the United States Supreme Court has held: "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." Vaca v. Sipes, 386 U.S. 171, 190 (1967) ("Vaca"). The courts and this Commission have consistently embraced the standards of Vaca in adjudicating such unfair representation claims. See, e.g., Saginario v. Attorney General, 87 N.J. 480 (1981); In re Board of Chosen Freeholders of Middlesex

County, P.E.R.C. No. 81-62, 6 NJPER 555 (¶11282 1980), aff'd App. Div. Docket No. A-1455-80 (April 1, 1982), pet. for certif. den. 6/16/82) ("Middlesex County"); New Jersey Turnpike 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).[3/]

We have also stated that a union should attempt to exercise reasonable care and diligence in investigating, processing, and presenting grievances; it should exercise good faith in determining the merits of the grievance; and it must treat individuals equally by granting equal access to the grievance procedure and arbitration for similar grievances of equal merit. Middlesex County; Local 194. All the circumstances of a particular case, however, must be considered before a determination can be made concerning whether a majority representative has acted in bad faith, discriminatorily, or arbitrarily under the Vaca standards.[4/]

3/ For a discussion of unfair representation cases arising in the different context of a challenge to a union's representation in negotiating a collective agreement, see In re FMBA Local No. 12, P.E.R.C. No. 82-65, 8 NJPER 98 (¶13040 1982).

4/ 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). Under Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Educational Secretaries, 78 N.J. 1 (1978) and Lullo v. Int'l Ass'n of Firefighters, Local 1066, 55 N.J. 409 (1970), the Commission looks to NLRB decisions for guidance.

In the instant case, based on our review of the Charging Party's evidence, we hold that Johnstone has failed to establish a prima facie case that Local 153's representation was arbitrary, discriminatory, or in bad faith. Instead, we find that Local 153's representatives made a reasoned decision, with Johnstone's consent and given his bad evaluation and sick leave abuse, to take a conciliatory approach at the December 21, 1981 Board meeting. We will not secondguess the wisdom of this strategy merely because it did not work.[5/]

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Newbaker, Suskin, Butch, Hipp, Graves and Hartnett voted for this decision. None opposed.

DATED: Trenton, New Jersey
December 9, 1983
ISSUED: December 12, 1983

5/ Even if we found a prima facie case of unfair representation, we would still dismiss the Complaint based upon the record as a whole. The testimony of Local 153's witnesses confirms that the strategy chosen was not arbitrary, discriminatory, or motivated by bad faith.

H. E. No. 83-45

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

In the Matter of

OFFICE & PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 153,
AFL-CIO,

Respondent,

-and-

Docket Nos. CI-82-45-52
CI-83-23-53

THOMAS JOHNSTONE,

Charging Party.

SYNOPSIS

A Hearing Examiner grants a Motion to Dismiss a charge of unfair practices, which the Respondent made at the conclusion of the Charging Party's case, where the Charging Party alleged that the Respondent violated Subsection 5.4(b)(3) of the New Jersey Employer-Employee Relations Act by the conduct of the Respondent's representative at a hearing before the Ringwood Board of Education on December 21, 1981. The Charging Party had been given a 60-day notice of termination on November 2, 1981 for poor job performance and abuse of sick leave. The Respondent, as the Charging Party's collective negotiations representative at the Board hearing on December 21st, acted in good faith when it urged the Board to give the Charging Party another chance, which the Board on December 23, 1981 refused to do. The Hearing Examiner concluded that the Respondent did not violate the principles of Vaca v. Sipes, 386 U.S. 171 (1967) and decisions of the Commission such as FMBA, Local 12, P.E.R.C. No. 82-65, 8 NJPER 98 (1982).

A Hearing Examiner's decision on a Motion To Dismiss is not a final administrative determination of the Public Employment Relations Commission. The Charging Party has ten (10) days from the date of the decision to request review by the Commission or else the case is closed.

H. E. No. 83-45

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

In the Matter of

OFFICE & PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 153,
AFL-CIO,
Respondent,

-and-

Docket Nos. CI-82-45-52
CI-83-23-53

THOMAS JOHNSTONE,

Charging Party.

Appearances:

For the Respondent
Schneider, Cohen, Solomon & DiMarzio, Esqs.
(Bruce D. Leder, Esq.)

For the Charging Party
Mr. Delaney Zanes
Mrs. Marisa Zani

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION ON
RESPONDENT'S MOTION TO DISMISS

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on March 19, 1982, and amended on July 6, 1982 and July 20, 1982 in Docket No. CO-82-45-52, and a second Unfair Practice Charge was filed with the Commission on November 1, 1982, and amended on November 17, 1982 in Docket No. CI-83-23-53, both having been filed by Thomas Johnstone (hereinafter the "Charging Party" or "Johnstone") alleging that the Office & Professional Employees International Union, Local 153, AFL-CIO (hereinafter the "Respondent" or "Local 153") 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 on December 21, 1981 the Respondent failed to bargain in good faith at a hearing involving the termination of the Charging Party before the Ringwood Board of Education, all of which is alleged to be a violation

of N.J.S.A. 34:13A-5.4(b)(3) of the Act.[1/]

It appearing that the allegations of the Unfair Practice Charges, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on December 3, 1982. Pursuant to the Complaint and Notice of Hearing, hearings were held on February 1, February 2 and April 21, 1983 in Newark, New Jersey, at which time the parties were given an opportunity to make preliminary motions,[2/] examine witnesses, present relevant evidence and argue orally. The parties waived oral argument and filed post-hearing briefs by June 17, 1983

1/ This Subsection prohibits public employee representatives, their representatives or agents from:

"(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."

2/ The Respondent on February 1st, before the presentation of evidence by the Charging Party, made a Motion To Dismiss on three grounds. Ground No. 1: The Unfair Practice Charges, as amended, should be dismissed under the six-month limitation in Section 5.4(c) of the Act. The Hearing Examiner granted dismissal of the Unfair Practice Charge in Docket No. CI-83-23-53 on the ground that it was filed more than five months after the six-month limitation and was not denominated as an amendment to the Unfair Practice Charge in Docket No. CI-82-45-52. The Hearing Examiner denied the Motion to Dismiss the Unfair Practice Charge in Docket No. CI-82-45-52 on the ground that the amendment to the original Charge was a proper one and, since the original Charge was timely, so, too, was the amendment. Ground No. 2: The Hearing Examiner refused to dismiss the original Unfair Practice Charge on the ground that, notwithstanding that a Section 5.4(b)(3) allegation should not properly lie against a public employee representative by a public employee, the substance of the allegations in the original Charge indicates an alleged breach of the duty of fair representation under Section 5.4(b)(1) of the Act, which, if proven, would constitute a violation of this Subsection based on the "fully and fairly litigated" doctrine of the Commission [see Commercial Township Board of Education, P.E.R.C. No. 83-25, 8 NJPER 550 (1982), appeal pending, App. Div. Docket No. A-1642-82-T2]. Ground No. 3: Respondent urges dismissal or a stay of the instant proceeding due to the pendency of a proceeding involving the Charging Party under the Education Law at OAL before Administrative Law Judge Robert Glickman. The Hearing Examiner noted that the OAL proceeding involves the Charging Party and the Ringwood Board of Education only and, further, that the factual findings to be made in the OAL proceeding should not in any way conflict with the ultimate factual findings in the instant proceeding. Thus, the Hearing Examiner is not obliged to stay the instant proceeding in deference to the OAL proceeding under the holding of the New Jersey Supreme Court in Hackensack v. Winner, 82 N.J. 1 (1980), which directs administrative agencies to avoid overlap, duplication and conflict. The Respondent immediately appealed the threefold denial of its Motion To Dismiss directly to the Chairman of the Commission by telephone. The decision was that the Hearing Examiner should proceed to hear the Charging Party's case. Under date of February 7, 1983, Respondent filed a written request for permission to appeal the Hearing Examiner's decision of February 1st pursuant

Unfair Practice Charges, as amended, having been filed with the Commission, a question concerning an alleged violation of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing briefs of the parties, 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 [3/]

1. The Office & Professional Employees International Union, Local 153, AFL-CIO is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

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

3. Johnstone was until his termination on December 23, 1981 a custodian of the Ringwood Board of Education, and had been so employed for approximately 11 years.

4. The Respondent has been the recognized collective negotiations representative for a unit of custodian-maintenance employees of the Ringwood Board of Education (hereinafter the "Board") for several years. At the time of Johnstone's termination there was a collective negotiations agreement in effect from July 1, 1981 through June 30, 1982 (CP-9).

5. In April 1981 Johnstone received an unsatisfactory evaluation from his supervisor, George Gardner. Under Article XVII of the collective negotiations agreement (CP-9, supra), Johnstone should have received a further evaluation "after a reasonable time." However, according to Johnstone, no second evaluation was made

2/ (con't) to N.J.A.C. 19:14-4.6. Under date of March 17, 1983 the Chairman denied the Respondent's request.

At the conclusion of the Charging Party's case on April 21, 1983 the Respondent renewed its Motion To Dismiss. The Hearing Examiner deferred his ruling and directed the Respondent to proceed with its defense without prejudice. The Hearing Examiner stated that he would review the entire record and that if a Motion To Dismiss should be granted it would be done in his written Report and Decision. For the reasons hereinafter set forth the Respondent's Motion To Dismiss at the conclusion of the Charging Party's case is granted.

3/ Based solely on the evidence adduced by the Charging Party.

prior to his termination in December 1981. Charging Party witness Rudolph Sellitti, the Board's Superintendent since November 1981, testified that more than one evaluation was made. A resolution of the differences in the testimony is neither necessary nor material.

6. On September 23, 24 and 25, 1981 Johnstone reported off sick when, in fact, he was at work with his brother installing a concrete sidewalk. As a result Johnstone received from Gardner a written reprimand under date of September 29, 1981, in which he was advised that further disregard of the sick leave policy of the school district would be cause for immediate dismissal (CP-8).

7. On November 2, 1981 Joseph G. Donnelly, the Acting Superintendent of the Ringwood Board of Education, advised Johnstone in writing that his evaluations had been reviewed and that although time was given to improve no significant change has been noted (CP-10). The letter then referred to abuse of sick leave in September and concluded with a notification that his employment was being terminated upon 60 days notice, commencing November 3, 1981.

8. On November 9, 1981 the Shop Steward for Local 153, Frank Farrell, and the Alternate Shop Steward, Raymond Barrett, jointly sent a memo to the Board's Personnel Committee requesting a meeting regarding the termination of Johnstone (CP-12).

9. Under date of November 17, 1981 Sellitti responded to Farrell and Barrett, advising them that the appropriate procedure was to request a hearing before the "entire Board" and suggested the meeting scheduled for December 7, 1981 (CP-13).

10. On November 18, 1981 Thomas Havriluk, the Business Representative of Local 153, wrote to the Board Secretary, with a copy to Farrell, requesting an opportunity to meet before the Board meeting scheduled for December 21, 1981 (CP-14).

11. Although Johnstone acknowledged that he had a copy of the collective negotiations agreement and knew about the grievance procedure (Article IV in CP-9), he never filed a grievance regarding his termination or his unsatisfactory evaluation in April 1981. This was confirmed by Sellitti. Nor did Johnstone ask either the Steward, Frank Farrell, or the Alternate Steward, Raymond Barrett, to file a grievance on his behalf.

12. About a week on two before the December 21st hearing Johnstone spoke by telephone with Havriluk. Johnstone did not testify as to what was discussed with Havriluk.

13. On December 21st, shortly before the hearing, Havriluk met for about 15 minutes with Johnstone and the two stewards, Farrell and Barrett. Havriluk disclosed the manner in which he proposed to present Johnstone's case to the Ringwood Board of Education. Havriluk stated to Johnstone that he was going to appeal to the "mercy of the Board" and plead for the return of Johnstone to his job as custodian. This was based on Havriluk's perception that Johnstone had been wrong in abusing sick leave in September 1981, [4/] which Johnstone admitted to Havriluk.

14. Immediately before the start of the hearing at 7:40 p.m. Johnstone took Havriluk aside and stated that he was not satisfied with Havriluk's proposed approach. However, Johnstone testified that he ultimately "went along."

15. At the hearing before the Board, the minutes indicate (CP-1A), and the testimony confirms that Havriluk asked the Board for the reasons for termination then asked the Board to reconsider its decision to terminate, explaining that Johnstone

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4/ The findings as to what Havriluk said and did on December 21st are based solely on the evidence adduced by the Charging Party's witnesses since Respondent's evidence is not being considered due to the granting by the Hearing Examiner of Respondent's Motion To Dismiss at the conclusion of the Charging Party's case.

was wrong and so admits. Havriluk stated that Johnstone had eleven years of service and would like the Board to give him an additional 60 to 90 days in which to improve. Havriluk explained that Johnstone had received a poor evaluation in April 1981 and that even though he was promised another evaluation in June it never was made. Then Johnstone spoke personally on his own behalf, acknowledging that it was wrong to take the sick leave in September and promising that it would not happen again. He also added that he would try to do his job better. Stewards Farrell and Barrett also spoke on Johnstone's behalf, each pleading that Johnstone be given another chance. Farrell made reference to six letters of recommendation on behalf of Johnstone from teachers and a principal in the district (CP-2 through CP-7). Sellitti stated that there was documentation indicating that Johnstone's performance was not satisfactory, aside from the sick days he took in September, and that Johnstone's performance had not even improved since the termination notice of November 2, 1981. The minutes reflect that Havriluk, Johnstone, Farrell and Barrett left the hearing at 7:57 p.m.

16. Sellitti testified that on December 21st he discussed with Havriluk Gardner's memo of September 29th (CP-8, supra) and Donnelly's letter of November 2nd to Johnstone (CP-10, supra). Havriluk did not ask Sellitti to see the evaluations, which Sellitti had with him at the hearing. Sellitti also stated that Havriluk never mentioned going to arbitration.

17. Two days later Johnstone learned that the Board had decided to terminate him (CP-11). He immediately called stewards Farrell and Barrett and said that he had been "improperly misrepresentated" (sic). Farrell said, "What can we do?" and then mentioned arbitration.[5/]

18. Johnstone never told Havriluk to file a grievance on his behalf, nor did Johnstone ever tell Havriluk after leaving the hearing that he was unhappy with his

5/ The agreement delineates a five-step grievance procedure with the fifth step being advisory arbitration. The agreement indicates clearly that a grievance would have to be filed in writing at Step 2 in order to reach advisory arbitration at Step 5.

presentation to the Board.[6] In fact, Johnstone testified that when Havriluk and stewards Farrell and Barrett asked the Board on December 21st to reconsider, this was to Johnstone's satisfaction.

19. Barrett testified that Havriluk bore no ill will against Johnstone and that he, Barrett, brought up to Havriluk the question of arbitration after the Board's final decision, to which Havriluk responded that he would have to "think about it."

THE ISSUE

Did Local 153 breach its duty of fair representation to Thomas Johnstone at the December 21, 1981 Board hearing in violation of Subsections(b)(1) or (3) of the Act?[7]

DISCUSSION AND ANALYSIS

Local 153 Did Not Breach Its Duty Of Fair Representation To Thomas Johnstone At The December 21, 1981 Board Hearing And, Thus, Did Not Violate The Act

In support of his finding and conclusion that Local 153 did not breach its duty of fair representation to Thomas Johnstone and, thus, did not violate the Act, the Hearing Examiner has drawn upon Commission, court and National Labor Relations Board (NLRB) precedent.

In the leading United States Supreme Court case on the subject of fair representation, Vaca v. Sipes, 386 U.S. 171 (1967), the Court said at one point in its decision that the duty of fair representation "...includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary

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6/ Sellitti acknowledged on cross-examination that in his opinion Havriluk's presentation to the Board on behalf of Johnstone was "well done."

7/ As set forth under Ground No. 2 in footnote 2, supra, the original Unfair Practice Charge alleges a breach of the duty of fair representation under Subsection(b)(3) of the Act rather than a violation of Subsection(b)(1). The Hearing Examiner will be analyzing the Charging Party's evidence in the light of the sufficiency of proof of a violation by the Respondent of its duty of fair representation to Johnstone under Subsection(b)(1) of the Act.

conduct." (386 U.S. at 177). The Supreme Court also said that: "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith..." (386 U.S. at 190) (Emphasis supplied).

The NLRB has held in many cases, beginning with Miranda Fuel Co., 140 NLRB 181, 51 LRRM 1584, 1587 (1962), enf't. den., 326 F.2d 172 (2nd Cir. 1963), that a union violates Section 8(b)(1)(A) of the National Labor Relations Act[8/] when it breaches its duty of fair representation. See also, Local 485, I.U.E. (Automotive Plating Corp.), 170 NLRB No. 121, 67 LRRM 1609 (1968); United Steelworkers of America (Inter-Royal Corp.), 223 NLRB 177, 92 LRRM 1108 (1976); and Brown Transport Corp., 239 NLRB No. 91, 100 LRRM 1016 (1978).

The Commission in a 1979 case, New Jersey Turnpike Employees Union, Local 194, P.E.R.C. No. 80-38, 5 NJPER 412, considered the duty of fair representation in the context of the processing of a grievance, the union's conduct at a hearing on the grievance and the question of whether or not the grievance should be submitted to arbitration. The Commission enunciated the following principles for application to fair representation cases:

> "In considering a union's duty of fair representation, certain principles can be identified. The union must exercise reasonable care and diligence in investigating, processing and presenting grievances; it must make a good faith judgment in determining the merits of the grievance; and it must treat individuals equally by granting equal access to the grievance procedure and arbitration for similar grievances of equal merit." (5 NJPER at 413).

In FMBA, Local 12, P.E.R.C. No. 82-65, 8 NJPER 98 (1982), the Commission's most recent duty of fair representation decision, it was noted that the Commission has consistently embraced the standards of Vaca v. Sipes, supra, in adjudicating unfair practice claims: Middlesex Council No. 7, NJCSA, P.E.R.C. No. 81-62, 6 NJPER 555, aff'd. App. Div. Docket No. A-1455-80; N.J. Turnpike Employees Union, supra; and AFSCME Council No. 1, 79-28, 5 NJPER 21 (1978). Also, in FMBA, Local 12, supra, the Commission cited a 1980 NLRB decision in Printing & Graphic Communications, Local 4, 249 NLRB No. 23, 104 LRRM 1050 where the Board said that it was well settled that:

8/ Which is analagous to Subsection(b)(1) of the Act.

> "...so long as it exercises its discretion in good faith and with honesty of purpose, a collective bargaining representative is endowed with a wide range of reasonableness in the performance of its duties for the unit it represents. Mere negligence, poor judgment or ineptitude in grievance handling are insufficient to establish a breach of the duty of fair representation,"(104 LRRM at 1052).

See also, Dober v. Roadway Express, F.2d , 113 LRRM 2594, 2596 (7th Cir. 1983).

It is first noted that Johnstone acknowledged that he had a copy of the collective negotiations agreement and knew about the grievance procedure. Nevertheless, he not only never filed a grievance regarding his termination or his unsatisfactory evaluation in April 1981, but he never asked Farrell, Barrett or Havriluk to file a grievance on his behalf. Article IV of the agreement (CP-9) sets forth a five-step grievance procedure with the fifth step being advisory arbitration. The agreement indicates clearly that a grievance would have to be filed in writing at Step 2 in order to be submitted to advisory arbitration at Step 5.

Thus, any question of the submission of Johnstone's termination to advisory arbitration is academic, absent the request for a waiver of the grievance procedure by the Respondent and its representatives coupled with the necessary assent to the request by the Board. The inquiry herein narrows solely to the conduct of the Respondent's representatives prior to and at the Board hearing on December 21, 1981. Accordingly no question regarding Respondent's conduct vis-a-vis arbitration is before the Hearing Examiner as to a breach of the duty of fair representation.

On November 9, 1981, immediately after the 60-day notice of termination was issued by Donnelly on November 2, 1981, Farrell and Barrett requested a meeting with the Board's Personnel Committee (CP-12). Sellitti responded, advising them to request a hearing before the "entire Board" and suggested the meeting scheduled for December 7th (CP-13). At this point Havriluk became involved and on November 18, 1981 he requested of the Board Secretary an opportunity to meet before the Board meeting scheduled for December 21, 1981 (CP-14). This sequence of events indicates the role of the Respondent in bringing about a hearing before the Board on December 21st.

About a week or two before the December 21st hearing Johnstone spoke by telephone to Havriluk. On December 21st, shortly before the hearing, Havriluk met for about 15 minutes with Johnstone, Farrell and Barrett. Havriluk disclosed and explained his proposed approach to the Board, which was one of appealing to the "mercy of the Board." Notwithstanding that Johnstone took Havriluk aside shortly before the start of the hearing and stated that he was not satisfied with Havriluk's proposed approach, Johnstone testified that he ultimately "went along."

The minutes of the meeting indicate that the Board gave Havriluk, Johnstone, Farrell and Barrett about 17 minutes to make their presentation, during which Havriluk asked the Board for their reasons for termination and then asked the members to reconsider their decision to terminate, explaining that Johnstone was wrong and so admits. Havriluk asked the Board to give Johnstone an additional 60 to 90 days in which to improve. Johnstone then spoke on his own behalf, followed by Farrell and Barrett, each pleading that Johnstone be given another chance. Sellitti, who was present during the hearing, testified for the Charging Party that, in his opinion, Havriluk's presentation to the Board on behalf of Johnstone was "well done." Johnstone never told Havriluk, after leaving the hearing, that he was unhappy with Havriluk's presentation to the Board. Barrett testified that Havriluk bore no ill will against Johnstone.

On the foregoing recital of facts the Charging Party urges that the Hearing Examiner find that the Respondent breached its duty of fair representation. The legal precedent cited by the Hearing Examiner above does not allow for such a result. Vaca v. Sipes, supra, speaks of a union's obligation to refrain from hostility or discrimination toward any member, and to act with complete good faith and honesty and avoid arbitrary conduct. The Commission decisions, supra, speak in the same vein. The NLRB in Printing & Graphic Communications, Local 4, supra, states that mere negligence, poor judgment or ineptitude in grievance handling are insufficient to establish a breach of the duty of fair representation.

Havriluk's decision and strategy to appeal to the "mercy of the Board" appears to have been made in good faith, given Johnstone's admission of having been wrong in abusing sick leave and having filed no grievance over his April 1981 unsatisfactory evaluation. Havriluk's request to the Board to give Johnstone an additional 60 to 90 days in which to improve was also obviously made in good faith and followed directly from his request that the Board give Johnstone another chance. Havriluk afforded Johnstone an opportunity to speak on his own behalf, an opportunity which also was afforded to Farrell and Barrett. Also, Farrell brought to the Board's attention the six letters of recommendation from teachers and a district principal. No adverse inference can be drawn from Havriluk's failure to ask Sellitti to see Johnstone's evaluations, which Sellitti had with him at the hearing. Plainly, the Board had, in part, acted on the basis of evaluations and Havriluk was not there to challenge their accuracy but to appeal to the Board to give Johnstone another chance.

In summary, the Hearing Examiner concludes that Johnstone was fairly represented at the December 21, 1981 hearing by Havriluk, as well as by Farrell and Barrett, the latter two also being representatives of the Respondent. Commission, court and NLRB precedent, supra, dictate that the Hearing Examiner grant Respondent's Motion To Dismiss and recommend that the Complaint be dismissed. In reaching this conclusion the Hearing Examiner has given the Charging Party the benefit of all favorable inferences, as must be done on a Motion To Dismiss.[9/]

Upon the foregoing, and upon the record made by the Charging Party in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. Respondent's Motion To Dismiss case is granted, the Charging Party having failed to make a prima facie case in chief.

9/ See New Jersey Turnpike Authority, P.E.R.C. No. 79-81, 5 NJPER 197, 198-99 (1979).

2. The Respondent did not violate N.J.S.A. 34:13A-5.4(b)(1) or (3) by its representation of Thomas Johnstone prior to and at a hearing before the Ringwood Board of Education on December 21, 1981.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that Respondent's Motion To Dismiss be granted and that the Complaint be dismissed in its entirety.

Alan R. Howe
Hearing Examiner

Dated: June 24, 1983
Trenton, New Jersey