P.E.R.C. NO. 93-22

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL NO. 102,

Respondent,

-and-

Docket No. CI-H-92-7

ERIC L. GABRIELSON, IRA L. PHILLIPS, and JOHNNY H. WALCOTT,

Charging Parties.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed against International Brother of Teamsters, Local No. 102 by Eric L. Gabrielson, Ira L. Phillips, and Johnny H. Walcott. The charging parties alleged that their majority representative had violated its duty of fair representation by refusing to represent Phillips at a disciplinary hearing; by inadequately representing Gabrielson and Phillips at a grievance meeting over a new overtime policy; and by inadequately representing Wolcott at a Department of Personnel hearing before the Office of Administrative Law. The Commission finds that the charging parties did not prove that the duty of fair representation was violated.

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Respondent,

-and- Docket No. CI-H-92-7

ERIC L. GABRIELSON, IRA L. PHILLIPS, and JOHNNY H. WALCOTT,

Charging Parties.

Appearances:

For the Respondent, Richard A. Weinmann, attorney

For the Charging Parties, Eric L. Gabrielson, Ira L. Phillips, and Johnny H. Walcott, pro se

DECISION AND ORDER

On July 30, 1991, Eric L. Gabrielson and Ira L. Phillips filed an unfair practice charge against the International Brotherhood of Teamsters, Local No. 102. The charge alleges that Local No. 102 violated subsections 5.4(b)(1) through (5)[1/] of the

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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 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."

New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. Local No. 102 allegedly breached its duty of fair representation by refusing to represent Phillips at a disciplinary hearing and by inadequately representing Gabrielson and Phillips at a grievance meeting concerning a new overtime policy.

On December 9 and December 12, 1991, the charge was amended to add Johnny H. Walcott as a party. Walcott alleges that he was inadequately represented by Local No. 102 during a Department of Personnel hearing before the Office of Administrative Law ("OAL").

On October 16, 1991, a Complaint and Notice of Hearing issued. Local No. 102 filed its Answer denying the charging parties' substantive allegations and claiming that the charging parties refused representation.

On December 18, 1991, and February 7 and 19, 1992, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and introduced exhibits. Local No. 102 argued orally but did not file a post-hearing brief. Phillips and Walcott did not argue orally but filed separate post-hearing briefs on February 28, 1992. Gabrielson neither argued orally nor filed a post-hearing brief.

On April 29, 1992, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 92-28, 18 NJPER 274 (¶23118 1992). He found no breach of the duty of fair representation.

On May 5, 1992, Walcott filed exceptions. He claims that Local No. 102 breached its duty of fair representation and that there was no justification for the union's actions. Neither Phillips nor Gabrielson filed exceptions.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 4-15) are accurate. We incorporate them here.

In considering a majority representative's duty of fair representation with respect to handling grievances, we have identified certain principles:

> 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. [N.J. Turnpike Employees Union, Local No. 194, IFPTE, P.E.R.C. No. 80-38, 5 NJPER 412, 413 (¶10215 1979)]

See also Vaca v. Sipes, 386 U.S. 171 (1967). On this record, the charging parties did not prove that Local No. 102 breached any of these obligations. Specifically, they did not prove that Local No. 102 refused to represent Phillips and Gabrielson at the overtime meeting. They did not prove that Local No. 102 unlawfully refused to represent Phillips at his disciplinary hearing. And they did not prove that Local No. 102 unlawfully refused to represent Walcott at the OAL proceeding.

Local No. 102 promptly investigated and processed the overtime grievance. It represented Phillips and Gabrielson at a grievance meeting with the director of public works. Local 102's representative asked Phillips and Gabrielson whether they wanted to pursue the case and they did not respond.

Phillips' lack of representation at his disciplinary hearing was not Local No. 102's fault. He refused representation by Local No. 102's shop steward and failed to file a written grievance.

Walcott failed to contact a union representative before the disciplinary hearing at which he was suspended. It was not until six months later that Local No. 102's representative learned of Walcott's suspension. Walcott eventually filed an appeal with the Department of Personnel seeking reinstatement and the case was transmitted to the OAL for a hearing. The union representative did not know of this proceeding until it reached the hearing stage. He then unsuccessfully attempted to testify on Walcott's behalf three times. Walcott prevailed in his Department of Personnel appeal and advised the union representative of his success. The representative requested Walcott's reinstatement with backpay, but was informed that the employer's attorney would communicate directly with Walcott.

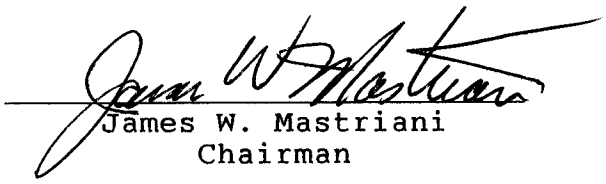
Under these circumstances, we cannot find that Local No. 102 acted arbitrarily, discriminatorily or in bad faith in investigating, processing or presenting the charging parties'

claims. We therefore hold that Local No. 102 did not breach its duty of fair representation.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Grandrimo, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: September 24, 1992
Trenton, New Jersey
ISSUED: September 25, 1992

H.E. NO. 92-28

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

In the Matter of

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL NO. 102,

Respondent,

-and- Docket No. CI-H-92-7

ERIC L. GABRIELSON, IRA L. PHILLIPS
and JOHN H. WALCOTT,

Charging Parties.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss charges of unfair practices contained in an amended Complaint. The Charging Parties alleged variously that the Respondent had breached its duty of fair representation as to them either in the manner of representing the three Charging Parties in disciplinary hearings within the Department of Public Works of the City of Plainfield for off-the-premises infractions or, in the case of Gabrielson and Phillips, the alleged failure of the Respondent to have represented them properly in the grievance procedure with respect to a unilateral change in the City's overtime policy wherein employees who have been disciplined cannot gain access to overtime opportunities.

Citing Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967) and a host of subsequent Commission decisions applying Vaca, the Hearing Examiner concluded that the Respondent did not breach its DFR.

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. 92-28

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

In the Matter of

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL NO. 102,

Respondent,

-and- Docket No. CI-H-92-7

ERIC L. GABRIELSON, IRA L. PHILLIPS
and JOHN H. WALCOTT,

Charging Parties.

Appearances:

For the Respondent, Richard A. Weinmann, Esq.

For the Charging Parties, Eric L. Gabrielson, Ira L. Phillips and John H. Walcott, pro se

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on July 30, 1991, by Eric L. Gabrielson ("Gabrielson") and Ira L. Phillips ("Phillips") alleging that the International Brotherhood of Teamsters, Local No. 102 ("Respondent" or "Local 102") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"), in that Gabrielson and Phillips have been unrepresented by their Shop Steward, Robert E. Johnson; Johnson approached the Director of Public Works, the City Administrator, the Personnel Department and the Mayor and used his "influence" to institute a policy which kept

employees on "probation" from obtaining overtime pay; Phillips was informed of this conduct of Johnson by Lou Jones, the Superintendent of Public Works, on July 12, 1991; Gabrielson and Phillips had been brought up on disciplinary charges in May 1991 and Johnson failed to represent them during their hearings; Phillips thereafter contacted Ben Merker (of Local 102) regarding Johnson's conduct and his lack of representation but to no avail; and, finally, Gabrielson had filed an Unfair Practice Charge with the Commission in 1988 (Docket No. CI-89-10) because of the lack of representation by the Respondent; all of which which is alleged to be in violation of N.J.S.A. 34:13A-5.4(b)(1) through (5) of the Act of the Act.[1/]

Under dates of December 9 and December 12, 1991, Gabrielson amended the original Unfair Practice Charge to bring John H. Walcott ("Walcott") into this proceeding as a Charging Party, who

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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 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."

adopted the same allegations as those contained in the original Unfair Practice Charge, supra.[2/]

It appearing that the allegations in the original Unfair Practice Charge , if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on October 16, 1991, supra. Further, pursuant to the original Complaint and Notice of Hearing, and the subsequent amendment making Walcott a Charging Party, hearings were held on December 18, 1991, and February 7 and February 19, 1992, in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Only the Respondent argued orally, Phillips and Walcott having waived oral argument in favor of filing separate post-hearing briefs, which were received simultaneously on February 28, 1992. [3 Tr 67-72].

An Unfair Practice Charge, as amended, having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the oral argument of the Respondent and the post-hearing briefs

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2/ This amendment was allowed by the Hearing Examiner on the above dates, notwithstanding that the motion to amend was made after the issuance of the Complaint and Notice of Hearing on October 16, 1991, and after the filing of the Respondent's Answer on November 12, 1991 (See C-2 and C-3). To have disallowed this amendment would have been prejudicial to Walcott who had earlier been led to believe that he had been made a part of these proceedings. The Hearing Examiner summarized the pertinent history of Walcott's status as an additional Charging Party on the first day of hearing, December 18, 1991 (1 Tr 6-9).

of Phillips and Walcott, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

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

FINDINGS OF FACT

1. The International Brotherhood of Teamsters, Local No. 102 is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

2. Eric L. Gabrielson, Ira L. Phillips and John H. Walcott are public employees within the meaning of the Act, as amended, and are subject to its provisions.

3. All three of the Charging Parties have been employed in the Department of Public Works ("DPW") of the City of Plainfield ("City"). Gabrielson was hired on September 7, 1986, as a Senior Road Repairer and, at the time of his voluntary resignation on November 26, 1991, he was a Road Repairer (1 Tr 77, 78). Phillips was hired in June 1978 as a Public Works Repairer and continues to be an employee of the City, notwithstanding that in May 1991 he was demoted from his then position of a Supervisor of Public Works to a Senior Public Works Repairer (1 Tr 123, 125). Walcott was hired in 1974 as a Road Repairer and had thereafter attained the position of Assistant Supervisor of Public Works in or around 1985, and he continued in this position until he was suspended on April 18, 1988, which suspension was still in effect as of the dates of hearing in the instant proceeding (1 Tr 18, 19, 22).

4. Although the record is not specific, the Hearing Examiner takes administrative notice that Local 102 has for many years been the collective negotiations representative for a unit of employees in the City's Public Works Department. The most recent collective negotiations agreement between Local 102 and the City was effective during the term January 1, 1990 through December 31, 1991 (R-7; 3 Tr 4-8). The agreement contains in Article IV a "Grievance Procedure," which provides for a five-step process, terminating with a final and binding decision by the Mayor (R-7, p. 7-10). Contrary to the testimony of several of the witnesses at the hearing, the current Agreement between the City and Local 102 does not impose any obligation upon the City to negotiate with Local 102 regarding changes in work rules such as the allocation of overtime between probationary and non-probationary employees. [Compare R-7 with 3 Tr 39-43, 45]. Thus, Article VI contains a strongly worded "Management Responsibility" clause, the language of which is totally inconsistent with any alleged obligation of the City to negotiate work rules with Local 102 (see R-7, pp. 12, 13). The City has, however, agreed to provide DPW employees with "specific Rules and Regulations..." (R-7, p. 11).

5. Local 102 has been represented by its Secretary-Treasurer, Benno Merker, since April 1950 (2 Tr 26). Robert E. Johnson has been the Shop Steward for the City's DPW employees, represented by Local 102, since 1987 or 1988 and has been re-elected twice since (1 Tr 146, 147; 3 Tr 18).

Findings As To Gabrielson

6. As a result of Unfair Practice Charges filed with the Commission by Gabrielson in 1988 (Docket Nos. CI-89-9 & CI-89-10), a settlement agreement was entered into between the City, Local 102 and Gabrielson on August 10, 1988 (R-2; 1 Tr 107). It stated that Gabrielson would be permitted to file a grievance regarding his February 2, 1988, disciplinary hearing with final review by the Mayor. The grievance was to be filed no later than September 16, 1988, and Local 102 would represent Gabrielson. [1 Tr 102-107]. Although not documented in the record, it appears that Gabrielson exhausted the procedure provided in R-2, supra. Under date of September 29, 1988, counsel for Local 102 sent Gabrielson a letter, which referred to a decision having been made by the Mayor and stating further that the matter could be pursued by the filing of an unfair practice charge on the basis that Gabrielson had not received an impartial determination from the Mayor (R-3; 1 Tr 120, 121).

7. On May 23, 1991, Gabrielson was arrested off the DPW premises at about 7:30 p.m. for possession of "CDS." The following day he reported to work and told Louis Jones, the Assistant Superintendent of Public Works, what had happened. Thereafter, Gabrielson was permitted to work several days until the following Wednesday, when he was suspended pending a hearing. At the hearing on July 10, 1991, at City Hall, Gabrielson was formally suspended for 31 days and was demoted from his position of Assistant Supervisor to Road Repairer. At the July 10th hearing, Gabrielson

was asked if he wanted a "Union representative" and, when he noted that the representative would be Johnson, he refused representation for the reason that "Having Mr. Johnson is like having nobody..." [1 Tr 79-84; 111].

8. The formal charges filed by the City against Gabrielson for the May 23rd incident referred in part to Gabrielson's "...incapacity due to mental or physical disability, disorderly or moral conduct and conduct unbecoming a public employee..." (1 Tr 110). Thereafter, Gabrielson appealed his 31-day suspension to the Office of Administrative Law (1 Tr 85, 109). On cross-examination, Gabrielson agreed that his complaint of non-representation in this proceeding relates solely to the matter of his having been discriminated against in his access to overtime after his return to work from the 31-day suspension, infra (1 Tr 109).

9. Prior to Gabrielson's suspension, the policy on overtime allocation within the DPW had been to allow all employees to "sign up" for overtime. However, after Gabrielson's return to work at the conclusion of his 31-day suspension, he learned that he was not eligible for overtime because he had been disciplined and was considered "on probation" (1 Tr 78, 90, 91). According to Gabrielson, Johnson successfully sought to change the former policy by eliminating employees who were on "probation" from access to overtime, which resulted in Gabrielson losing overtime opportunities (1 Tr 89-92).

10. Gabrielson appealed the change in overtime policy to David W. Ervin, the Director of Public Works,[3/] who informed Gabrielson that the policy had not yet been written but management had decided that employees on probation should not be allowed to accrue overtime (1 Tr 89, 91-94).

11. On July 16, 1991, Merker sent a letter grievance regarding the change in overtime policy to the City Administrator, Jewel Thompson Chin. Merker stated that the City had discriminated against Gabrielson (and Phillips), specifically referring to an overtime incident on July 12th. [R-1; 1 Tr 101, 102]. This grievance resulted in a meeting on August 8, 1991, with Ervin. Merker and Johnson were present on behalf of Local 102. Gabrielson (and Phillips) were also present. [1 Tr 93, 94, 107, 108].

12. At the conclusion of the August 8th meeting, Merker stated: "Well, is that it?..." in response to Ervin's statement that the Department intended to implement the new policy on overtime. Merker then stated to Phillips: "Well, I guess the City Administrator would be the next step. What do you guys want to do?..." Gabrielson (and Phillips) told Merker that he could do whatever he wanted because they were getting nothing from him. [1 Tr 94-96, 107, 108]. The testimony of Merker as to what happened at the conclusion of the August 8th meeting with Ervin was

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3/ Phillips, whose case regarding overtime opportunities is identical to that of Gabrielson will be considered hereinafter.

essentially the same as that of Gabrielson, i.e., he stated that an appeal to the Mayor was the next step and that when he stopped Gabrielson (and Phillips) in the hallway after the meeting he asked whether they wanted to "go further..." When Merker asked them a second time if they wanted to go further, he received the "...same no response...." Instead, they walked past him. [2 Tr 38, 39].

13. On August 16, 1991, Ervin sent a letter to Merker, in which he acknowledged receipt of his grievance letter of July 16th and restated his position on behalf of the DPW as set forth at the August 8th meeting, supra (R-9; 3 Tr 8, 9). Independent of Local 102, Gabrielson (and Phillips) filed a joint appeal to the City Administrator from the DPW's (Ervin's) new policy regarding overtime. This appeal was denied by Chin on September 4, 1991, with a copy to Merker. [R-6; 2 Tr 21, 22]. Gabrielson testified that no appeal was taken thereafter to the Mayor, the final step in the grievance procedure under the collective negotiations agreement, supra (1 Tr 116).

14. As previously found, Gabrielson resigned his employment with the City on November 26, 1991, due to a second arrest. His present interest in this proceeding is to obtain proper representation for others from "the Teamsters" or any other Union. [1 Tr 77, 116].

Findings As To Phillips

15. Phillips was hired in June 1978, supra. On May 17, 1991, he was arrested because he had part of a marijuana cigarette

in his possession and he was suspended on the same day for 20 days (1 Tr 123, 124). A disciplinary hearing was scheduled by the City for May 31st, and although Phillips wanted union representation, he did not want Johnson, his Shop Steward, to represent him due to a longstanding estrangement (1 Tr 124, 125, 138, 147-151). However, Phillips did want Merker to be present at his disciplinary hearing on May 31st. According to Phillips, Merker had been made aware of the hearing date, having been told by Jones. Also, Merker had received a copy of Phillips' Final Notice of Disciplinary Action from Jones (1 Tr 124, 125, 144-146 & CP-5). Additionally, Phillips testified without contradiction that between May 17th and May 31, 1991, he attempted to reach Merker by telephone on more than five occasions without success (1 Tr 143, 147).

16. Neither Merker nor any other representative from Local 102 appeared to represent Phillips, who received a 20-day suspension, a demotion to Senior Public Works Repairer, one year of probation and one year of counseling (1 Tr 125). Merker acknowledged that he knew of Phillips' May 31st disciplinary hearing, having learned about it from Ervin. However, Ervin stated to Merker that Phillips did not want a Union representative present. [2 Tr 40]. Merker stressed that he never had direct knowledge of Phillips' desire for Union representation since he had never received a grievance on the matter, implying that he was, therefor, under no obligation to appear. The Hearing Examiner finds that Merker acted in good faith under Local 102's procedures when he

failed to appear on behalf of Phillips on May 31, 1991. This is based upon Merker's demeanor and the fact that Phillips flatly rejected representation by Johnson, the on-the-premises Shop Steward.

17. Upon Phillips' return to work from his 20-day suspension in early or mid-June he requested and received overtime work on the first Saturday. However, when he sought overtime on the following Saturday, his request was denied. He was told by Jones that Johnson went to the Personnel Department and the Director (Ervin) and stated to them that since Phillips and Gabrielson were on "probation," they should be denied overtime. [1 Tr 126-128].

18. The facts as previously found in Findings of Fact Nos. 11 & 12 are incorporated herein by reference. After Merker filed an overtime grievance on behalf of Phillips and Gabrielson on July 16, 1991, the overtime grievance meeting was held in Ervin's office on August 8th. Ervin testified without contradiction that Merker and Johnson took the position that as a "new policy" it should have been submitted to the Union beforehand and "...it was unfair to the two employees..." (2 Tr 25). [See also, 1 Tr 129, 131-134, 139].

19. The facts as previously found in Finding of Fact No. 13 are incorporated herein by reference. Merker did not receive a response to his July 16, 1991 overtime grievance until August 16th, when Ervin replied, denying the grievance. Independently, Phillips and Gabrielson had appealed Ervin's action of August 8th, in a letter dated August 13, 1991, and addressed to Chin, the City Administrator, with a copy, inter alia, to Merker (CP-4; 1 Tr

129-131, 141, 142). Merker testified credibly that he had sought a meeting with Chin, who first directed Merker to contact Ervin and then authorized a meeting to process the grievance (2 Tr 41). The next action taken by the City was Chin's memorandum to Phillips and Gabrielson, dated September 4, 1991, in which their grievance was rejected (2 Tr 21; R-6).[4/] Merker was prepared to appeal to the Mayor, the final step of the contractual grievance procedure, but this never occurred (2 Tr 42).

Findings As To Walcott

20. As previously found, Walcott was hired in 1974 and at the time of his suspension on April 18, 1988, he was an Assistant Supervisor in the DPW (1 Tr 18, 22). Walcott testified that he filed a grievance with Local 102. However, Merker failed to learn of this until he was told so by Johnson about six months after Walcott's suspension in April of 1988. [1 Tr 19; 2 Tr 43, 48-50].[5/]

4/ Unlike Gabrielson, Phillips failed to testify that his basic complaint regarding the absence of representation pertained to discrimination, resulting from the change in the DPW's overtime policy for employees on disciplinary "probation." (see 1 Tr 109, supra). Instead, Phillips' sole complaint, regarding representation, focused on the discipline, which he received on May 31, 1991, when Merker failed to appear (see Findings of Fact Nos. 15 & 16).

5/ Whether or not Walcott filed a grievance in April 1988, or whether it was processed by Johnson or Merker, is purely academic since the event is untimely under the six-month limitation in Section 5.4(c) of the Act. The instant Unfair Practice Charge was docketed on July 30, 1991.

21. Several days after his April 18th suspension, Walcott instituted a legal proceeding on his own behalf in Trenton. This matter was ultimately converted into a proceeding seeking reinstatement before the Office of Administrative Law where he had proceeded variously with or without an attorney (1 Tr 24-26, 44, 45, 49, 50).[6/]

22. Walcott's OAL proceeding apparently reached the hearing stage in June or July 1991, and Walcott's expectation was that Merker would appear and testify that his suspension should not have occurred (1 Tr 32-34, 39, 40). At Walcott's request, he and Merker met sometime in July 1991, at which meeting Merker learned for the first time of Walcott's OAL proceeding. Merker agreed to attend a future OAL hearing. [2 Tr 28-30, 46-48]. According to Walcott, Merker's willingness to meet with him in July 1991, originated in fact from his many letters to Merker and, more importantly, his letters to the International Union (1 Tr 52-54). Merker did not dispute that Walcott had communicated with the International Union as well as the local Joint Council. Thereafter, Merker appeared at OAL on three occasions in July, August and September of 1991 on Walcott's behalf. [1 Tr 41; 2 Tr 27-29]. However, Merker's attempt to testify on Walcott's behalf at OAL was

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6/ Walcott also filed a criminal complaint against Local 102 with the Attorney General's office in 1991 (1 Tr 26-32, 76; CP-3).

rebuffed. Thus, his position that Walcott should be reinstated and made whole was never heard. [2 Tr 29, 30].7/

23. On January 16, 1992, Walcott telephoned Merker and advised him that he had prevailed in the OAL proceeding and requested that Merker send a letter to the City, requesting his reinstatement and backpay (2 Tr 52, 53). Merker responded immediately by sending a letter to Chin, the City Administrator, under date of January 17, 1992 (2 Tr 53; R-13). Merker followed up his January 17th letter with a second letter (illegibly dated) to Chin, inquiring whether his earlier request for reinstatement of Walcott had been discussed (R-14). On January 24th, Chin wrote to Merker, advising him that the City's attorney had been requested to communicate directly with Walcott (R-8). The instant record discloses that nothing further transpired.

Additional Findings

24. Johnson, the Local 102 Shop Steward, was first elected in 1987 or 1988 and was last reelected on April 19, 1989 (1 Tr 146, 147; 3 Tr 18). He denied that he had ever sought a change in the overtime policy nor had he ever sought to deny overtime to

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7/ It is noted that beginning with a letter dated July 16, 1991, to Chin, the City Administrator, Merker undertook, independently, to obtain Walcott's reinstatement. However, the effort ended with the City's final rejection of his effort in Chin's letter to him of August 20, 1991. [See R-4, R-5, R-10 & R-11].

Gabrielson and Phillips as probationary employees after their discipline (3 Tr 18, 19).[8/]

25. Johnson was present at the August 8, 1991 meeting with Ervin regarding the overtime matter. He supported Merker's stated position that Gabrielson and Phillips should receive overtime. [3 Tr 19]. At the conclusion of this meeting, Merker asked Gabrielson and Phillips if they wished to take the matter further, which would have been to the Mayor, but they failed to respond. Shortly thereafter, when exiting the building, Merker again asked them and they replied that he could do what he wanted to do. [3 Tr 19, 20].

ANALYSIS

Introductory Remarks

The Charging Parties have alleged that the Respondent has violated Sections 5.4(b)(1) through (5) of the Act. It is immediately apparent that no evidence whatsoever was adduced in support of any allegation that Local 102 or its agents and representatives violated Sections 5.4(b)(2) through (5) since the first three of these subsections of the Act pertain to the conduct of a public employee organization vis-a-vis a public employer. Thus, Section 5.4(b)(2) prohibits a public employee organization from interfering with the right of a public employer to select its

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8/ In view of the ultimate decision in this proceeding it is not necessary to resolve the conflict in the testimony on this issue.

representatives for negotiations or adjusting grievances while Section 5.4(b)(3) bars a public employee organization from refusing to negotiate in good faith with a public employer. Finally, Sections 5.4(b)(4) and (5) obligate a public employee organization to reduce a negotiated agreement to writing and sign it and, additionally, any such organization may not violate any of the rules and regulations established by the Commission.

Because no evidence was adduced by the Charging Parties in support of these allegations, the Hearing Examiner must recommend dismissal of the Complaint as to Sections 5.4(b)(2) through (5) of the Act.

The Respondent Local 102 Did Not Breach Its Duty Of Fair Representation As To Gabrielson, Phillips Or Walcott Either At Their Respective Disciplinary Hearings Or In Seeking To Remedy The Matter Of Overtime For Employees On Disciplinary "Probation."

In concluding that Local 102 did not breach its duty of fair representation to the three Charging Parties above, the Hearing Examiner has drawn upon various decisions of the Commission, which in turn have relied upon precedent from the federal courts and the National Labor Relations Board ("NLRB").

Historically, duty of fair representation (DFR) cases have originated from two distinct factual settings, namely, (1) the conduct of the majority representative in negotiating terms and conditions of employment; or (2) its conduct in representing employees in matters relating to their rights under the agreement and the contractual grievance procedure. Since this case involves

complaints that Local 102 failed to represent the three Charging Parties at disciplinary hearings and, also, that it failed to provide proper representation as to the change in overtime policy, which affected Gabrielson and Phillips, only those cases in category (2) above are relevant to the disposition of this case, beginning with Vaca v. Sipes.[9/]

Vaca has become the most significant of the United States Supreme Court's DFR decisions. Although it involved the refusal of a union to process a grievance to binding arbitration, the basic tenets are applicable herein. The Supreme Court in Vaca developed these rules in analyzing DFR cases:

> 1. ...Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit 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 conduct... (386 U.S. at 177, 64 LRRM at 2371). (Emphasis supplied).
>
> 2. 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, 64 LRRM at 2376). (Emphasis supplied).
>
> 3. 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... (386 U.S. at 191, 64 LRRM at 2377). (Emphasis supplied).

9/ See 386 U.S. 171, 64 LRRM 2369 (1967).

Two years after the enactment of Chapter 303 in 1968, our Supreme Court sustained it in Lullo v. IAFF, 55 N.J. 409 (1970) where it relied broadly upon federal precedent, particularly the 35-year history of decisions interpreting the NLRA. The Court focused upon Section 5.3 of our Act, especially, the responsibility of the majority representative to represent the interests of all employees without discrimination or regard to organization membership (55 N.J. at 419).

The Court in Lullo specifically embraced the "DFR" doctrine, citing Vaca and other sources. The Court held that although the exclusive representative:

> ...has the sole right to...[process]...grievances for all employees in the unit, the right to do so must always be exercised with complete good faith, with honesty of purpose and without unfair discrimination against a dissident employee or group of employees...Vaca v. Sipes, supra...
>
> (55 N.J. at 427, 428). (Emphasis supplied). [See also, 55 N.J. at 429].10/

In 1981, the New Jersey Supreme Court in Saginario v. Attorney General, 87 N.J. 480 again reviewed federal DFR precedent, noting that nowhere did Vaca suggest that an employee should be allowed to intervene in an arbitration since "...it would undercut the legitimacy of the arbitration..." (87 N.J. at 488).

10/ The New Jersey Supreme Court most recently returned to Lullo when it discussed the Vaca standards in analyzing DFR cases: D'Arrigo v. N.J. State Board of Mediation, 119 N.J. 74, 77-79 (1990).

* * * *

The Commission's first "grievance procedure" decision was that of AFSCME Council No. 1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978),[11/] which was followed by N.J. Turnpike Employees Union, Local No. 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979), where the Commission found no breach of the DFR but "identified" certain principles in considering the DFR:

> ...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 OPEIU Local No. 153, P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983), the Commission noted that Vaca has been interpreted by the NLRB to mean that mere proof of negligence, standing alone, does not establish a breach of the duty of fair representation: Service Employees Int'l Union, Local No. 579 AFL-CIO, 229 NLRB 692, 95 LRRM 1156 (1977)[violation - negligence found]; Printing and Graphic Communication, Local 4, 249 NLRB No. 23, 104 LRRM 1050, 1052 (1980)[no violation], rev'd on other grounds, 680 F.2d 598, 110 LRRM 2928 (9th Cir. 1982) and Local 8-398, OCAW, 282 NLRB No. 61, 124 LRRM 1048 (1986)[no violation]. See, also, Bergen Community College

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11/ Relying essentially on Vaca, no breach of DFR was found where a non-member's grievance was settled at Step 2.

Adult Learning Center, H.E. No. 86-19, 12 NJPER 42, 45 (¶17016 1985), adopted P.E.R.C. No. 86-77, 12 NJPER 90 (¶17031 1985).

Also, in Union Council No. 8, P.E.R.C. No. 85-91, 11 NJPER 147 (¶16064 1985) the Commission found that there was no breach of the DFR where the employee failed to request representation and then filed his own appeal without informing the union. In TWU Local No. 225, P.E.R.C. No. 85-99, 11 NJPER 231 (¶16089 1985) no breach of the Union's DFR was found since representation of a suspended employee in the grievance procedure was untainted.

Additionally, in Utility Workers Union, Local No. 534 (D'Arrigo), P.E.R.C. No. 89-105, 15 NJPER 218 (¶20091 1989) no violation of the Union's DFR was found where the refusal to arbitrate a termination grievance was based upon mandatory civil service review. Also, in Newark Teachers Union, P.E.R.C. No. 90-87, 16 NJPER 252 (¶21101 1990) there was no breach of the DFR where an employee failed to allow the union a reasonable time to decide whether to file a termination grievance. Instead, the employee filed a Unfair Practice Charge on his own. In AFSCME Council No. 52, P.E.R.C. No. 91-34, 16 NJPER 540 (¶21243 1990) it was held that a bare claim that the union refused to arbitrate an employee's overtime grievance was not a violation of its DFR.

Finally, in Middlesex Council No. 7, P.E.R.C. No. 81-62, 6 NJPER 555 (¶11282 1980), aff'd App. Div. Dkt. No. A-1455-80 (1982), certif. den. (1982), the Commission cited Local No. 194 in finding that there was no DFR violation where the union made every effort to assist an employee whose grievance was filed out of time.

* * * *

Having set forth the state of the law of DFR with respect to the conduct of the majority representative in representing employees in matters relating to their rights under the agreement and the contractual grievance procedure, it remains to analyze the factual record as to whether or not the Charging Parties have proven by preponderance of the evidence that Local 102 breached its duty of fair representation with respect to: (1) Gabrielson's and Phillips' claim of overtime discrimination; (2) Phillips' claim of non-representation at his disciplinary hearing on May 31, 1991; and (3) Walcott's claim of non-representation in his OAL proceeding.[12/]

Gabrielson

Gabrielson's evidence with respect to his Unfair Practice Charge, filed with the Commission in 1988, appears to have no probative value in the instant proceeding. It is true that a "settlement agreement" was reached between him, the City and Local 102. It is also true that pursuant to this agreement Gabrielson filed a grievance which was processed through the final step of the grievance procedure, after which the attorney for Local 102 advised Gabrielson that he might pursue the matter further by the filing of a new Unfair Practice Charge. [Finding of Fact No 6].

12/ Any claim by Walcott that Local 102 failed to represent him regarding his suspension on April 18, 1988, is time-barred under Section 5(c) of the Act (see Finding of Fact No. 20).

Since Gabrielson's position on the record was that his claim of non-representation pertained solely to the matter of his having been discriminated against in access to overtime, the Hearing Examiner need not be concerned with the circumstances under which he was arrested on May 23, 1991, and thereafter disciplined by the City at a hearing on July 10th. [Findings of Fact Nos. 7 & 8].

The Hearing Examiner finds as a fact that prior to the suspension of Gabrielson (and Phillips), the overtime policy within the DPW was to allocate overtime without regard to whether or not employees were on disciplinary "probation." The Hearing Examiner also finds as a fact that a change in this policy occurred after the disciplining of Gabrielson (and Phillips) upon their return to work in July 1991. Whether or not this is attributable to Johnson is irrelevant, since on and after July 1991, it was the policy of the DPW, administered by Ervin, its Director. [Findings of Fact Nos. 9 & 10].

What is important at this point is that Merker promptly pursued the matter of the unilateral change in the overtime policy in the form of a letter grievance on July 16, 1991. Merker specifically stated that the City had discriminated against Gabrielson (and Phillips) in the implementation of the new policy. This grievance resulted in a meeting on August 8th with Ervin where Merker, Johnson, Gabrielson and Phillips were present. Significantly, at the conclusion of the meeting, when Ervin said that there would be no change in the new policy, Merker stated to

Gabrielson (and Phillips) that the City Administrator or the Mayor would be the next step and he asked what they wanted to do. The response of Gabrielson (and Phillips) was to stand mute and later to state to Merker that he could do whatever he wanted to do. [Findings of Fact Nos. 11 & 12].

Thereafter, on August 16, 1991, Gabrielson (and Phillips) filed a joint appeal to the City Administrator from Ervin's new policy on overtime. This appeal was denied on September 4th. No appeal was taken thereafter by Gabrielson to the Mayor. [Finding of Fact No. 13].

* * * *

The above recital of the Hearing Examiner's Findings of Fact as to Gabrielson make clear beyond doubt that Local 102 in no way violated its duty of fair representation as to him. As noted previously, his original disciplinary hearing of July 10th was not placed in issue by Gabrielson. Further, the Union did everything conceivably required of it as to the overtime issue when Merker filed a timely grievance on July 16, 1991, and thereafter pursued the matter to a grievance hearing on August 8th. The response of Gabrielson to Merker's offer to pursue the matter further (the City Administrator or the Mayor) indicates at best an indifference and at worse a rejection of the efforts of the majority representative to seek redress for the change in the overtime policy. Thereafter, the independent decision of Gabrielson (and Phillips) to proceed on their own after the August 8th meeting resulted in the City's

eventual rejection of their joint appeal on September 4, 1991, by which they were bound. [Finding of Fact No. 13].

Phillips

Phillips complains that his request that Local 102 represent him at his May 31, 1991 disciplinary hearing was rebuffed. However, he created a problem for himself when he rejected out of hand representation by Johnson, the Shop Steward for Local 102. It is irrelevant that his rejection of Johnson's representation was based upon a longstanding history of animosity between the two men.

It is true, in connection with the May 31st disciplinary hearing above, that Phillips did wish to be represented by Merker. Phillips' problem, in part, is that Merker was told by Ervin that Phillips did not want a union representative present, which Merker was reasonably entitled to rely upon. Merker's obligation to have appeared was also lessened by the fact that Merker had no direct knowledge of Phillips' desire for representation since he had never received a grievance. There was certainly adequate time for Phillips to have filed a grievance and brought the matter to Merker's attention since the arrest incident occurred on May 17, 1991, and the disciplinary hearing was May 31st.

The Hearing Examiner cannot accept as a fact that Phillips was told by Jones that he had alerted Merker as to the May 31st hearing date or that Jones told Phillips that Merker had received a copy of Phillips' Final Notice of Disciplinary Action.

[Findings of Fact Nos. 15 & 16]

Recall that the Commission in OPEIU Local No. 153, supra, made reference to the NLRB decisions in which mere proof of negligence, standing alone, does not establish a breach of the duty of fair representation. Merker, in this instance, was guilty of no more than mere negligence in having failed to follow up on the information received by him from Jones, assuming that Jones did alert Merker as testified to by Phillips, supra.

The bottom line on Phillips' claim of non-representation on May 31, 1991, is that he flatly rejected any representation by Johnson for whatever reason. Thus, Phillips prejudiced himself by his own conduct. Any expectation of Phillips that Merker should have appeared on May 31st has been dealt with above.

The facts as found with respect Gabrielson on the discriminatory change in the overtime policy by Ervin has been adequately dealt with in a review of the findings as to Gabrielson, supra. There is, therefore, no need to repeat them here. Suffice it to state that Phillips was subjected to the same alleged discriminatory change in the overtime policy as Gabrielson. This was protested, first by Merker, and then by Gabrielson and Phillips when they filed a joint appeal to the City Administrator on August 16, 1991.

The testimony of Phillips as to what transpired at the August 8th meeting with Ervin was no different than that of Gabrielson or Merker. The offer of Merker to pursue the matter

further was rejected by Phillips as well as Gabrielson. It is noted, also, that Ervin testified that the Union took the position that the change in policy should have been submitted to it before hand and that it was "unfair to the two employees." [Finding of Fact No. 18].

The only difference in the respect positions of Gabrielson and Phillips in this proceeding is that Gabrielson stated that his claim as to non-representation was with respect to the discriminatory overtime matter while Phillips stated that his claim of non-representation pertained to his disciplinary hearing of May 31st, avoiding any reference to non-representation in the matter of the discriminatory overtime policy. [Finding of Fact No. 19].

* * * *

A majority representative does not have to provide a specified individual to appear for an employee in any given situation. In the May 31, 1991, instance, Phillips had access to Johnson, the local Shop Steward for Local 102. Johnson could have appeared and represented Phillips at his disciplinary hearing, but Phillips, of his own volition, elected to reject Johnson out of hand and unsuccessfully sought the presence of Merker. This course of events does <u>not</u> enmesh Local 102 in a breach of its DFR for having failed to represent Phillips on May 31st.

Since Phillips made no claim about the failure to Local 102 to represent him in the disciplinary overtime policy change, Local 102 is necessarily not implicated. Note is made of the fact that

Phillips, together with Gabrielson, pursued the matter of a joint appeal to the City Administrator from the Ervin meeting of August 8, 1991, without any request of Local 102 to intervene. In fact, Phillips (and Gabrielson) rejected Merker's offer to pursue the matter further within the steps provided in the grievance procedure of the collective agreement.

Walcott

Walcott does not present an issue of non-representation as to his suspension on April 18, 1988, since the subject matter is plainly time-barred under Section 5(c) of the Act. [Finding of Fact No. 20].

Several days after his April 18th suspension, Walcott instituted his own legal proceedings and these continued through January 1992. [Findings of Fact Nos. 21-23].

Walcott's essential complaint of non-representation by Local 102 is the difficulty that he had in communicating with Merker in order that Merker might appear on his behalf in the OAL proceeding. Walcott was successful in his endeavor since Merker appeared and attempted to testify on three occasions before the Administrative Law Judge on dates in July, August and September of 1991. However, Merker was denied standing by the ALJ and was, thus, unable to testify on Walcott's behalf that Walcott should be reinstated and made whole. [Finding of Fact No. 22]. The Hearing Examiner notes that Merker made independent efforts to obtain

Walcott's reinstatement through communications with the City Administrator between the dates of July 16, 1991 and August 20, 1991. [Finding of Fact No. 22].

When Walcott telephoned Merker on January 16, 1992, and advised him that he had gained an order of reinstatement, Merker immediately wrote to the City Administrator, seeking his reinstatement with backpay. However, he was rebuffed by the City in a letter dated January 24th. Nothing further transpired on the instant record. [Finding of Fact No. 23].

* * * *

The Hearing Examiner is aware of no case or theory under which Local 102 could be found to have breached its DFR as to Walcott. Merker did all that he was asked to do by Walcott, namely, to appear at the OAL, and he did so. Local 102 by its overall conduct did not breach its DFR as to Walcott.

* * * *

Based upon the entire record in this case, the Hearing Examiner now makes the following:

CONCLUSIONS OF LAW

1. The Respondent Local 102 did not violate N.J.S.A. 34:13A-5.4(b)(1), namely, its duty of fair representation as to the several Charging Parties, by the manner in which it represented or sought to represent Gabrielson, Phillips and Walcott with respect to either their disciplinary hearings or the matter of the alleged discriminatory change in the access to overtime by Gabrielson and

Phillips, who were on disciplinary "probation" in mid-1991.

2. The Respondent Local 102 did not violate N.J.S.A. 34:13-5.4(b)(2) through (5) by its conduct herein since the Charging Parties failed to adduce any evidence in support of these allegations.

RECOMMENDED ORDER

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

Alan R. Howe
Hearing Examiner

DATED: April 29, 1992
Trenton, New Jersey