

H.E. NO. 2020-3

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

In the Matter of

WASHINGTON TOWNSHIP EDUCATION ASSOCIATION,

Respondent,

-and-

Docket No. CI-2018-015

NEW JERSEY EDUCATION ASSOCIATION,

Respondent,

-and-

JOSEPH PETRONE,

Charging Party.

SYNOPSIS

A Hearing Examiner denies respondents' motions for summary judgement because the motive behind why a grievance was not advanced to arbitration by the respondents is disputed, and material in determining whether respondents committed an unfair practice.

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Appearances:

For the Respondent, Washington Township Education
Association
Zazzali, Fagella, Nowak, Kleinbaum & Freidman, P.C.
(Colin M. Lynch, of counsel)

For the Respondent, New Jersey Education Association
Oxford Cohen, PC
(William P. Hannan, of counsel)

For the Charging Party
(Joseph F. Petrone, pro se)

HEARING EXAMINER'S DECISION ON MOTIONS
FOR SUMMARY JUDGEMENT

On October 2, 2017, Joseph F. Petrone (Petrone) filed an
unfair practice charge against the Washington Township Education
Association (WTEA) and the New Jersey Education Association

(NJEA), alleging that the respondents violated N.J.S.A. 34:13A-5.4b(1)^{1/} when they breached their duty of fair representation.^{2/} More specifically, Petrone alleges that officers of the WTEA "dropped" a grievance against the Washington Township Board of Education (Board)^{3/} regarding a middle school schedule change and increased workload, despite representing to members that the grievance was still active and awaiting arbitration. Petrone alleges that the WTEA's motive to misrepresent the status of the grievance was to coerce members into ratifying a contract and reelect certain officers of the WTEA. Petrone further alleges that the NJEA failed to respond to his reports that WTEA officers were not replying to his concerns and colluded with the WTEA to prevent Petrone and other members from accessing WTEA records that would help to explain the disappearance of the grievance, as well as an unrelated grievance that was dropped in 2016.

1/ This provision prohibits employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. . . ."

2/ N.J.S.A. 34:13A-5.3 states in pertinent part:

A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership.

3/ The Board is not named as a respondent in the charge.

On July 9, 2018, the Director of Unfair Practices issued a Complaint and Notice of Pre-Hearing and assigned the matter to me for hearing. On July 23 and July 27, 2018, the WTEA and NJEA, respectively, filed Answers to the Complaint.

Respondent WTEA admits that it filed a grievance on behalf of middle school teachers in June 2016 and presented the grievance to the Board at level 3 of the grievance process. Respondent WTEA also admits that in November 2016 it represented that the grievance was at level 4 and awaiting arbitration. The WTEA further admits that its Executive President, Shaun Giberson (Giberson), emailed Petrone on March 30, 2017 stating that they were "still waiting for an arbitration date," despite the grievance not appearing on the WTEA Council Minutes in January, February, or March. Respondent WTEA maintains that while it did send a memo on April 4, 2017 that the middle school grievance was no longer active, it denies that it intentionally failed to direct Respondent NJEA to move the grievance to arbitration. Respondent WTEA denies that it released a memo on May 5, 2017 indicating that it filed a new grievance on behalf of the middle school teachers and that they had in fact notified Respondent NJEA to move the grievance to arbitration. Finally, Respondent WTEA denies that it colluded with Respondent NJEA to obtain a legal opinion that prevented Petrone and other WTEA members from accessing WTEA records in order to investigate the grievance.

Respondent NJEA admits that it sent an email stating that it did not "drop the ball" with respect to the grievance, and denies that Respondent WTEA directed it to move the middle school schedule grievance to arbitration. Respondent NJEA also denies that it colluded with Respondent WTEA to get a legal opinion that prevented WTEA members from accessing WTEA records in order to investigate what happened to the grievance. Respondent NJEA also raises as affirmative defenses that the unfair practice charge fails to state a claim upon which relief can be granted, and that the charge must be dismissed because it was filed beyond the six-month statute of limitations.

On August 28, 2018, the NJEA filed a motion for summary judgment together with a brief, certifications of Louis P. Bucceri, Esq.(Bucceri), current NJEA Field Representative Michael Kaminski (Kaminski), and former NJEA Field Representative Thomas Patterson (Patterson), as well as exhibits. On September 7, 2018, Petrone filed a brief opposing NJEA's motion for summary judgment.^{4/} On September 10, 2018, the WTEA advised that it was not opposing NJEA's motion nor filing a cross-motion, but that it intended to file its own motion for summary judgment. On

^{4/} Petrone inaccurately refers to his filing as a cross-motion. Furthermore, although the facts submitted by Petrone are not in affidavit or certification form, he appears pro se and affixed the date and his signature at end of the document. Therefore, I consider his submission to be compliant with N.J.A.C.19:14-4.8c.

September 17, 2018, the WTEA filed its own motion for summary judgment together with a brief, a certification of former WTEA Vice President Giberson, and exhibits. Also on September 17, 2018, the NJEA filed a reply to Petrone's brief in opposition to NJEA's motion. On September 25, 2018, Petrone filed a brief opposing WTEA's motion for summary judgment.

On September 25, 2018, the parties were notified that the motions were referred to the Hearing Examiner pursuant to N.J.A.C. 19:14-4.8(a). On September 28, 2018, I granted permission for the WTEA and NJEA to file reply briefs in response to Petrone's opposition to WTEA's motion. On or about October 31 and November 1, 2018, NJEA and WTEA, respectively, filed reply briefs.

I have conducted an independent review of the parties' briefs and supporting documents submitted in this matter. The following material facts are not disputed by the parties. Based upon the record, I make the following:

FINDINGS OF FACT

1. Petrone is an NJEA and WTEA member employed by the Board.
2. The WTEA is the collective negotiations representative for all teachers employed by the Board. NJEA is the parent organization to the WTEA.

3. Shaun Giberson is the former Vice President of the WTEA and held that position until at least June 2017.

4. Gerard Taraschi (Taraschi) is the current President of the WTEA, and has held the position throughout all relevant times at issue in this case.

5. Kaminski has served as a Field Representative for the NJEA since December 2015. He was assigned to WTEA's region from December 1, 2015 until October 3, 2016, when he was transferred to a different region. He continued to serve as a Field Representative for WTEA's region until January 2017.

6. After Kaminski was transferred, Patterson was assigned to WTEA's region as a Field Representative for the NJEA from January 2017 until August 2017.

7. On March 11, 2016, Petrone sent an email to Taraschi and Giberson, copying Kaminski, expressing the middle school teachers' concerns about the Board's proposed schedule changes for the following year. He stated that he understood that the Board could increase student contact minutes within the contracted dates but that when workload is increased it must be negotiated. He also asked if the WTEA had already agreed to the Board's proposal. Kaminski replied on March 14, 2016 stating that he would research the issues raised; that any change to a contractual provision would need to be negotiated; that if the contract did not define the length of a period, student contact

time, preparation time, lunch time, or duty time, the WTEA would not have the same leverage over a schedule change that another school might have; that since the WTEA was already at the table for negotiations, it was a great time to "hammer out all of these issues"; and that if the changes were occurring by way of a sidebar agreement, the executive committee should approve them and the agreement should be subject to ratification by the whole membership.

8. On April 20, 2016, Taraschi and Giberson sent a memo to members stating that they formally requested the Board to negotiate the change in workload.

9. In June 2016, the Board announced a new schedule for the middle school, where Petrone is assigned, to be effective at the commencement of the 2016-2017 school year. The WTEA considered the change to constitute a block schedule within the meaning of the collective negotiations agreement.

10. Prior to the institution of the new schedule, the middle school had 9 instructional periods of 42 minutes each and one and one half preparation periods. The new schedule called for 8 teaching periods of 50 minutes each and only a single preparation period. The length of the school day and teacher work day was unchanged, but the new schedule increased student contact time.

11. Article VII of the collective negotiations agreement (CNA) between the WTEA and the Board covering the period July 1, 2013 to June 30, 2016, is entitled "Teaching Hours and Teaching Load" and provides in pertinent part:

A. . . .

1. Teacher workday for kindergarten through grade five shall be seven (7) hours and fifteen (15) minutes. The teacher workday for grades six through twelve shall be seven (7) hours twenty-five (25) minutes. . . . Grades one through five student day shall be six (6) hours and twenty (20) minutes. Grade 6 through 12 student day shall be six (6) hours and forty-five (45) minutes. Teachers are to be available for student supervision no more than five minutes before the start of the present student day.

. . . .

B.

1. Every secondary teacher shall be granted five (5) duty-free periods per week during the student day for the purpose of instructional preparation.

2. Every elementary teacher Grades one (1) through five (5) shall be granted five (5) duty-free periods per week during the student day for the purpose of instructional preparation. . . .

4. Half-time special education teachers (those teaching a minimum of three periods per day) shall be granted one duty-free period during the student day for the purpose of instructional preparation. At the elementary level, if the schedule permits a forty- (40) minute period, if not this period may be divided into two (2) twenty- (20) minute periods. If the schedule does not permit this, the teacher will be paid for the duty period not scheduled.

- C. In the event the Board elects to implement block scheduling, the Board agrees to negotiate with the Association, the terms and conditions of employment for those employees who participate in the program.
- D. If the Board implements a nine (9) period day at the secondary level (Grades 6-12), twelve (12) minutes of non-instructional time shall be added to the teacher work day at all levels (elementary, middle school, and high school).

12. The Board and the WTEA were in negotiations for a successor agreement at the time the Board announced the new schedule. The WTEA requested that Kaminski allow the WTEA to handle the negotiations without assistance from the NJEA.

13. The Board and the WTEA negotiated over the issue of the new middle school schedule during the course of negotiations for a successor agreement. Proposals and counter proposals were made.

14. Many middle school teachers, including Petrone, objected to the schedule change and the increased workload without additional compensation, and requested that the WTEA file a grievance.

15. Giberson prepared and filed the grievance over the new middle school schedule on or about June 22, 2016.

16. As part of the grievance procedure, a hearing was held on September 27, 2016, at which Petrone testified as to the impact, increased instructional time, decreased preparation time, and increased workload caused by the schedule change.

17. Prior to the grievance hearing, on September 22, 2016, Giberson emailed WTEA members, including Petrone, stating that he would like them to give testimony at the hearing and eventually testify in the arbitration.

18. On September 28, 2016, Petrone sent Giberson an email with a link to the Commission's decision in Elizabeth Bd. of Ed., P.E.R.C. No. 2004-9, 29 NJPER 389 (¶123 2003) (denying restraint of arbitration to the extent it challenged an uncompensated increase in teacher workload).

19. Pursuant to internal WTEA procedures, the WTEA is required to request and provide authorization to the NJEA in order to pursue grievance arbitration.

20. An October 10, 2016 email from Giberson to Kaminski requested that Steven Cohen, Esquire, an NJEA affiliated attorney, be at the arbitration "whenever that may be scheduled" and requested a legal opinion as to whether the WTEA should also file an unfair labor practice charge.

21. The Board denied the grievance on October 11, 2016, arguing that the length of the student day is a managerial prerogative, that the schedule change was not "block scheduling" within the intent and language of the collective negotiations agreement, and that, regardless, the Board fulfilled any impact negotiations obligations.

22. The October 10, 2016 email from Giberson to Kaminski was forwarded from Giberson to Taraschi on November 13, 2016.

23. On December 13, 2016, Petrone emailed WTEA officials and stated concerns about the status of the grievance.

24. On December 14, 2016, Petrone emailed Kaminski and advised him that WTEA officials did not respond to Petrone's email.

25. On March 29, 2017, Petrone emailed a WTEA official and asked about the status of the grievance.

26. On March 30, 2017, a WTEA official told Petrone that the WTEA was awaiting assignment of an arbitration date for the grievance.

27. On April 3, 2017, Petrone and Ronald Lucarini (Lucarini), another WTEA member, emailed Patterson and Kaminski explaining that Giberson and Taraschi were up for reelection and members needed to know whether the grievance was actually filed for arbitration or why it was not; that the Commission and the NJEA Region 2 office was contacted and had no record of the grievance; that three members of the Board who signed off on the contract were contacted and they did not know that there was a pending grievance that could have cost the Board thousands of dollars; and that the WTEA appeared not to have ever notified the Board about arbitration.

28. On April 4, 2017, Patterson responded that he had been in touch with Kaminski and would try to reach out to Giberson and Taraschi; that the grievance was not advanced to arbitration and that no demand was filed; and that NJEA Region 2 staff did not "drop the ball". Lucarini replied that he would talk with the NJEA about halting the election until every WTEA member was aware of the issue.

29. Also on April 4, 2017, Taraschi sent an email to WTEA members thanking Petrone for alerting him to the possibility that the grievance had not been moved to arbitration; that Giberson assured Taraschi that Giberson had specifically asked Kaminski to file for arbitration; that Giberson had searched for the corresponding email sent on October 10, 2016, where he specifically asked Kaminski to file for arbitration and specifically requested Cohen to act as counsel for the arbitration; that Taraschi reached out to Kaminski who told him that arbitration had not been filed because NJEA assumed the issue would be dealt with during negotiations; and that Taraschi checked into the possibility of refiling for arbitration or filing another grievance.

30. Internal WTEA officer elections occurred on April 5, 2017, the day after Taraschi sent his email to WTEA members.

31. On May 5, 2017, a WTEA memo informed members, including Petrone, that the initial grievance had been dropped; that Cohen advised that a new grievance could be filed based on the impact of the new schedule; and that a new grievance was indeed filed on May

2, 2017, requesting teacher compensation for the added instructional time and lost preparation time caused by the Board's unilateral schedule change.

31. On May 5, 2017, Petrone emailed Giberson, Taraschi, and Patterson, asking for a copy of Cohen's legal opinion on the validity of the new grievance and noting that WTEA Council Reports in January, February, and March of 2017 did not report any active grievances after the tentative contract was signed. Petrone also asked how the grievance was dropped. Giberson responded that since he thought that he had asked the NJEA for legal counsel at arbitration, that arbitration was filed. On May 7, 2017, Petrone again asked Patterson for Cohen's legal opinion since Giberson and Taraschi would not provide it. Patterson replied that the WTEA Executive Committee is charged with correspondence related to the processing of grievances and that it is up to that committee to relay the nature of Patterson's discussion with the committee to the WTEA general membership.

32. On May 8, 9, and 10, 2017, Petrone asked Giberson and Taraschi by email again for Cohen's legal opinion and explanation for why there were no grievance reports in January, February, and March after the tentative agreement was signed. Petrone also asked Patterson in the email on May 10 whether Petrone could file an unfair practice charge with the Commission against the Board for unilaterally changing terms and condition of employment, as well as

the timelines for doing so given his recent discovery that the grievance had been dropped.

33. On May 10, 2017, Giberson responded that the grievance report was awaiting an arbitration date and that, ever since he was on the executive committee, grievance reports were not a part of the minutes because the Board had been obtaining copies of the minutes. Petrone responded that Giberson had reported the grievance report in the minutes for September 2016 and April 2017, and Petrone questioned why Giberson waited 4 to 5 months without corresponding with the NJEA if he really thought he was waiting for an arbitration date.

34. In May 2017, Petrone requested access to WTEA Executive Committee meeting minutes to investigate the WTEA's handling of the grievance. The WTEA requested that the NJEA provide a legal opinion from an NJEA affiliated attorney in connection with Petrone's request to access such records. Patterson requested that Cohen provide a legal opinion regarding whether a member has any right to access or copy such records. Cohen's legal opinion was that the WTEA general membership, including Petrone, did not have any right of access to such records. Patterson provided WTEA with the legal opinion.

35. During a WTEA Executive Committee meeting in June 2017, Giberson stated that the committee heard Patterson say that Cohen did not feel that the grievance was sustainable.

36. On May 29, 2018, Taraschi announced to WTEA members that a different WTEA attorney, Matt Wieliczko, gave a legal opinion recommending that the newer grievance should be dropped due to his anticipation that the arbitration would be restrained by a court or arbitrator on procedural grounds. Taraschi stated that the Grievance Committee voted to drop the grievance.

ANALYSIS

Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954).

N.J.A.C. 19:14-4.8(d) provides:

If it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and that the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross motion for summary judgment may be granted and the requested relief may be ordered.

In considering a motion for summary judgment, all inferences are drawn against the moving party and in favor of the party opposing the motion. No credibility determinations may be made, and the motion must be denied if material factual issues exist. N.J.A.C. 19:14-4.8(e); Brill; Judson. The summary judgment motion is not to be used as a substitute for a plenary trial. Baer v. Sorbello, 177

N.J. Super. 182 (App. Div. 1981); UMDNJ, P.E.R.C. No. 2006, 32 NJPER 12 (¶6 2006).

The issue in this case is whether the WTEA and the NJEA breached their duty of fair representation to Petrone and other WTEA members through its actions surrounding a grievance challenging a new middle school schedule that was never advanced to arbitration.

Section 5.3 of the Act empowers a union to negotiate on behalf of all unit employees and to represent all unit employees in administering the collective negotiations agreement. With that power comes the duty to represent all unit employees fairly in negotiations and contract administration. The standards in the private sector for measuring a union's compliance with the duty of fair representation were articulated in Vaca v. Sipes, 386 U.S. 171 (1967). Under Vaca, a breach of the statutory duty of fair representation occurs only when a union's conduct towards a member of the negotiations unit is arbitrary, discriminatory or in bad faith. Id. at 191. Those standards have been adopted in the New Jersey public sector. Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976); See also, Lullo v. International Ass'n of Fire Fighters, 55 N.J. 409 (1970) and Carteret Ed. Assn. (Radwan), P.E.R.C. No. 97-146, 23 NJPER 390, 391 (¶28177 1997).

Furthermore, a union is allowed a "wide range of reasonableness in servicing its members." Ford Motor Company v. Huffman, 345 U.S.

330, 337-338, 73 S.Ct. 681, 97 L.Ed. 1048 (1953). The Commission has repeatedly held that an employee organization is not obligated to pursue every grievance to arbitration. Rather, it must evaluate requests for arbitration on the merits and decide in good faith whether it believes the employee's claim has merit. See D'Arrigo v. New Jersey State Bd. of Mediation, 119 N.J. 74 (1990); Carteret Ed. Ass'n.(Radwan); Camden Cty. College (Porreca), P.E.R.C. No. 88-28, 13 NJPER 755 (¶18285 1987); Trenton Bd. of Ed (Salter), P.E.R.C. No. 86-146, 12 NJPER 528 (¶17198 1986).

The WTEA now concedes that it never made a formal request with the NJEA to file for arbitration, despite its intentions to do so. The WTEA maintains that it was an unfortunate mistake, it had no ulterior motive, and at worst it was mere negligence on its part which does not constitute a breach of the duty of fair representation. Brooks v. New Jersey Mfrs. Ins. Co., 170 N.J. Super. 20, 35 (1979) (holding that union negligence does not constitute a breach of the duty of fair representation). The NJEA argues that it did not breach its duty of fair representation by providing a legal opinion to the WTEA regarding Petrone's request for access to certain WTEA records, and that there is no evidence that Steven Cohen's legal opinion was biased or dishonest. The NJEA also argues that Petrone's allegations against it are time barred.

Here, Petrone does not challenge the WTEA's right to decide whether to process a grievance. Rather, Petrone is contesting the

WTEA and NJEA's motive, and whether they acted in good faith with respect to the handling of the middle school grievance filed in June 2016. More specifically, Petrone alleges that the WTEA knowingly dropped the middle school grievance while at the same time representing to members that it was still active during the contract ratification and internal union election process.

Petrone alleges that the NJEA "colluded" with the WTEA in securing a legal opinion regarding whether the WTEA needed to provide Executive Committee meeting minutes to Petrone pursuant to his request. Petrone is not actually contesting the veracity of Attorney Cohen's legal opinion, but rather, he is questioning NJEA's motive for obtaining the legal opinion in the first place; namely, to protect the WTEA and prevent Petrone from finding out the truth behind why the grievance was dropped. The charge was filed on October 2, 2017 and the NJEA sought Mr. Cohen's legal opinion in May of 2017, well within the six month statute of limitations. N.J.S.A. 34:13A-5.4c.

The motive behind the WTEA and NJEA's actions surrounding the grievance being dropped is material in determining whether an unfair practice occurred, is disputed by the parties, and requires a plenary hearing.

Based on the foregoing, I deny the respondents' motions for summary judgment.

/s/ Jordan Ablon
Jordan Ablon
Hearing Examiner

DATED: December 3, 2019
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-4.8(e) this ruling may only be appealed to the Commission by special permission in accordance with N.J.A.C. 19:14-4.6.

Any request for special permission to appeal is due by December 10, 2019.