P.E.R.C. NO. 94-53

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PASSAIC COUNTY COMMUNITY COLLEGE
ADMINISTRATORS' ASSOCIATION, OPEIU,
LOCAL NO. 153,

Respondent,

-and- Docket No. CI-H-92-28

RUTH B. WASILEWSKI,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission denies a motion to dismiss filed by the Passaic County Community College Administrators' Association, OPEIU, Local No. 153 in an unfair practice proceeding brought by Ruth B. Wasilewski. The Association argued that even if its failure to appear at a hearing on behalf of Wasilewski was arbitrary, capricious and in bad faith, Wasilewski's failure to show that there was a contractual violation by the College that could have been remedied if the Association had appeared exonerates the Association from a charge that it breached its duty of fair representation. The Commission finds since the Association has conceded, for purposes of this motion, that its conduct in failing to represent Wasilewski was arbitrary and capricious; and since a union may breach its duty in fair representation if its representation falls to that level, there is no basis for dismissing the Complaint.

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RUTH B. WASILEWSKI,

Charging Party.

Appearances:

For the Respondent, Schneider, Goldberger, Cohen, Finn, Solomon, Leder and Montalbano, attorneys (Bruce D. Leder, of counsel)

For the Charging Party, Neil H. Deutsch, attorny, before the Hearing Examiner); Ruth B. Wasilewski, pro se, before the Commission

DECISION AND ORDER

On October 14, 1993, after an extension of time, Ruth Wasilewski requested review of H.E. No. 94-3, 19 NJPER 526 (¶24245 1993). In that decision, Hearing Examiner Alan R. Howe dismissed a Complaint against the Passaic County Community College Administrators' Association, OPEIU, Local No. 153. The Complaint was based on an unfair practice charge and amended charges filed by Wasilewski on November 7, 1991 and January 6, May 27 and July 14, 1992. The charge, as amended, alleges that the Association violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(b)(1), (2), (3), (4) and

(5),[1/] when it failed to represent her properly after her termination from Passaic County College.[2/]

Before opening the record on a second day of hearing, the Hearing Examiner permitted the Association to move for dismissal on these grounds:

> Even if the Association's failure to appear at a hearing on behalf of Wasilewski was arbitrary, capricious and in bad faith, Wasilewski's failure to show that there was a contractual violation by the College that could have been remedied if the Association had appeared exonerates the Association from a charge that it breached its duty of fair representation.

The Hearing Examiner granted the motion and dismissed the Complaint concluding, under Camden Cty. College, D.U.P. No. 87-10, 13 NJPER 166 (¶18074 1977), that a union cannot breach its duty of fair representation where the employer's conduct implicates a managerial

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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."

2/ The Director of Unfair Practices originally declined to issue a Complaint on this charge and a related charge against the College. D.R. No. 93-6, 18 NJPER 453 (¶23205 1992). On appeal from that decision, we held that a Complaint should have issued against the Association, but not the College. P.E.R.C. No. 93-51, 19 NJPER 53 (¶24024 1992). A Complaint issued and the case against the Association went to hearing where this motion to dismiss was made.

prerogative. He found that the College had an unfettered right to terminate Wasilewski without recourse to the grievance procedure and therefore that the motion to dismiss had to be granted.

We disagree. First, Camden Cty. College, a decision of the Director of Unfair Practices, is irrelevant to this dispute. A public employer does not have a managerial prerogative to discharge a public employee. The discipline amendment to N.J.S.A. 34:13A-5.3 specifies that public employers shall negotiate with respect to disciplinary disputes, including disciplinary review procedures. Second, there can be a breach of the duty of fair representation without a finding that the employer breached the contract. While we may not have said that before, the National Labor Relations Board has. In Kesner v. NLRB, 532 F.2d 1169, 92 LRRM 2137 (7th Cir. 1976), cert. denied 429 U.S. 983 (1976), a union breached its duty of fair representation when its representative undermined a unit member's grievance before an arbitral committee. The NLRB found an unfair labor practice and ordered the union to cease and desist despite its finding that the grievance was without merit. The NLRB simply ordered no additional remedy.

For purposes of a motion to dismiss, all facts alleged in the Complaint and all reasonable inferences that can be drawn from those facts are deemed admitted. Reider v. State of New Jersey, Dept. of Transportation, 221 N.J. Super. 547 (App. Div. 1987). A Complaint should not be dismissed where a cause of action is suggested by the facts and a theory of actionability may be

articulated by way of amendment. Muniz v. United Hosps. Med. Ctr. Pres. Hosp., 153 N.J. Super. 79, 82-83 (App. Div. 1977). However, a dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted. Reider. The inquiry at this stage is to the legal sufficiency of the facts alleged by the charging party.

Since the Association has conceded, for purposes of this motion, that its conduct in failing to represent Wasilewski was arbitrary and capricious; and since a union may breach its duty of fair representation if its representation falls to that level, we find no basis for dismissing the Complaint. We will not speculate on what Wasilewski may prove at hearing; what legally cognizable harm, if any, she may have suffered; or what remedy might be appropriate should a violation be found.

ORDER

The Association's motion to dismiss is denied. This matter is remanded to the Hearing Examiner to continue the hearing.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Grandrimo, Regan and Smith voted in favor of this decision. None opposed. Commissioner Wenzler was not present.

DATED: November 15, 1993
Trenton, New Jersey
ISSUED: November 16, 1993

H.E. NO. 94-3

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Respondent,

-and- Docket No. CI-H-92-28

RUTH B. WASILEWSKI,

Charging Party.

SYNOPSIS

A Hearing Examiner, in granting a Motion to Dismiss, which was made during the course of a plenary hearing, was persuaded that the Charging Party's claim was destined to fail as a matter of law. Even the decision in Reider v. State of New Jersey, Department of Transportation, 221 N.J. Super. 547 (App. Div. 1987) offered no support to the Charging Party's case.

Wasilewski was an "administrator" in a unit represented by the Respondent where the collective negotiations agreement provided that terminations of administrators were not subject to the grievance and arbitration provisions of the contract. The Charging Party's claim was that while representatives of the Respondent attended a first hearing on her termination before the Board of Trustees, their conduct was perfunctory and when a second hearing was scheduled, the Respondent's representatives failed to appear. The question was did the Respondent breach its DFR.

The Hearing Examiner concluded that under Camden County College, D.U.P. No. 87-10, 13 NJPER 166 (¶18074 1977), there could be no DFR where an employer's conduct in the employment context implicated a managerial prerogative. That case involved a faculty member who complained about his non-assignment to a certain course within the curriculum of the College. Since the College possessed a non-negotiable prerogative to assign its work force, non-teaching duties, "...any unfair practice charge attempting to restrict such right must be dismissed..." Since the instant case was directly analogous, i.e., the College's unfettered right to terminate without recourse to the grievance procedure, the Motion to Dismiss must be granted.

A Hearing Examiner's Decision to dismiss upon the motion of the Respondent, 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.

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Appearances:

For the Respondent,
Schneider, Goldberger, Cohen, Finn
Solomon, Leder and Montalbano, attorneys
(Bruce D. Leder, of counsel)

For the Charging Party,
Neil H. Deutsch, Esq.

HEARING EXAMINER'S DECISION ON
RESPONDENT'S MOTION TO DISMISS

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on November 7, 1991, and amended thereafter on January 6, May 27 and July 14, 1992, by Ruth B. Wasilewski ("Charging Party" or "Wasilewski") alleging that the Passaic County Community College Administrators' Association, OPEIU, Local No. 153 ("Respondent" or "153") 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 the **Original charge** of November 7, 1991, it is alleged that the

Respondent failed to represent her in connection with an order by management to vacate her office in June 1991, and again the Respondent failed to represent her in September 1991, when it stated its intention to appeal from a disciplinary hearing instead of requesting a postponement, the Respondent having concluded that Wasilewski had been terminated due to "unsatisfactory job performance," all of which became enmeshed in the status of the Charging Party's health and her health benefits entitlement; the **first amendment** of January 6, 1992, is concerned with the history of the Charging Party's meetings with representatives of 153 between the dates of July 3, 1990 and October 12, 1991, all of which deal with various grievance meetings between 153 and the Charging Party as to the disciplining of the Charging Party by management coupled with her complaints about how the Respondent handled her claimed violations under the contract; the **second amendment** of May 27, 1992, sets forth a series of instances wherein the Respondent failed to follow the contractual grievance procedure but these do not appear to involve alleged breaches of the Respondent's duty of fair representation; and the **third amendment** of July 14, 1992, pertains solely to the Charging Party's allegation that 153 did not represent her properly at Step 3 of the Grievance Procedure; specifically, there was no separate hearing for her on September 23, 1991; the Respondent failed to process a timely appeal from the action of management; and the appeal date of October 14th was not made known

to the Charging Party; all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(b)(1), (2), (3), (4) and (5) of the Act.[1/]

A Complaint and Notice of Hearing was issued on January 8, 1993. Hearings were scheduled for April 2, April 15 and April 20, 1993 in Newark, New Jersey. The Respondent's Answer was a general denial. The hearing opened on April 2nd. The Charging Party and a witness on her behalf testified and certain documentary exhibits were received in evidence.

Prior to the opening of the record at the second hearing on April 15th, and at the invitation of counsel for the parties, I held a one and one-half hour off-the-record conference. The purpose was to explore mechanisms by which the basic legal issues presented might be brought forward and adjudicated expeditiously. Thereafter,counsel for the Respondent moved to dismiss on the record. The theory advanced by 153 appears at 2Tr7-10, 17. Counsel for Wasilewski joined issue, opposing the Motion to Dismiss, and his position is set forth at 2Tr12-15.

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."

I then raised sua sponte the rule that on a motion to dismiss prior to hearing, all facts properly pleaded and, in this case, the evidence adduced at the first day of hearing, April 2nd, are deemed admitted (2Tr15, 16).[2/] While counsel for the parties expressed their understanding of the Reider rule, each stated that in this case the only facts to be considered by me were, first, those appearing in the collective negotiations agreement effective July 1, 1991 through June 30, 1994 (J-1) [2Tr18-20] and second, the matter of the proper representation of Wasilewski by the Respondent at the Step 3 hearing on September 23, 1991 (2Tr17, 19, 20).[3/]

At the conclusion of the hearing, the Respondent sought to restate the issue as follows:

> Charging Party is claiming that there was hearing number one, (and) there was...scheduled hearing number two. That the Union failed to attend hearing number two. By failing to attend hearing number two, the Grievant or the Charging Party, Miss Wasilewski, suffered some detriment.
>
> What the Union says is unless Miss Wasilewski can prove that she would have won (at) that second hearing, the Union has not violated its duty of fair representation... [2Tr25].

2/ A motion to dismiss prior to hearing, like a motion for judgment on the pleadings, raises only issues of law and admits all facts properly pleaded by the opposing party: Reider v. State of New Jersey Dept. of Transp., 221 N.J. Super. 547 (App. Div. 1987).

3/ I found this constraint unworkable vis-a-vis my task of adjudicating the Respondent's Motion to Dismiss. This will be evident hereinafter.

The Respondent also conceded at the instant hearing that its conduct in not attending Wasilewski's second hearing "...was arbitrary and capricious...," adding that no consequences flowed therefrom (2Tr26).[4/] I do not feel bound by the Respondent's restatement of the issue as will be apparent hereinafter.

* * * *

Based upon the stipulations of counsel at the hearing, the collective negotiations agreement (J-1) and the necessary references to the record made on April 2, 1993, I make the following:

FINDINGS OF FACT

1. Wasilewski was employed by the Passaic County Community College ("College") from December 1987 through September 1991 in the position of Supervisor of Accounts Receivable. Her supervisor initially was Robert Westfield and later Michael Yosifon. [1Tr16-18]

2. At all times material hereto, Wasilewski was subject to the provisions of Article I, Recognition, Section 1.1 of the collective negotiations agreement between the Respondent and the College (J-1, p. 1). Article XXI, Grievance Procedure, provides in Section 21.3 that a grievance is defined as either "A breach, misinterpretation or improper application of terms of this Agreement; or An arbitrary or discriminatory application of the policies of the Board of Trustees, related to terms and conditions

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4/ Essentially, the Charging Party does not dispute the Respondent's restatement of the issue above (2Tr27, 28).

of employment..." (J-1, p. 52). Finally, Article VIII, which is the key provision relevant to the case at bar, provides in Section 8.9, in part, as follows:

> Matters of administrator separation shall be within the sole discretion of the Board and shall not be subject to the grievance arbitration provisions of this Agreement. However, upon request, the Board shall provide the administrator with a statement of reason(s) for its action to non-reappoint, terminate for cause, lay-off, and shall afford an opportunity to the administrator to appeal before the Board or a committee of the Board concerning the separation...
> [Emphasis applied] (J-1 at p.20)5/

3. A 1985 policy of the Board (B105) provides under a heading, "Employee Discipline," as follows:

> Consistent with the appropriate provisions of current collective bargaining agreements, the College shall maintain a practice of employee discipline that affords adequate due process...(CP-3)

William J. DeMarco, the attorney for the Board, testified conclusively that terminations such as Wasilewski's are not grievable under the provisions of Article XXI, the Grievence Procedure, pursuant to Article VIII, Section 8.9. However, the above statement of Board policy (CP-3) encourages "...adequate due process..." [1Tr44, 45, 69-71, 99].

5/ It is undisputed that Wasilewski's position at the time of her termination in September 1991 was that of an "administrator" within the meaning of Section 8.9 of Article VIII (1Tr69, 70, 135).

4. On September 11, 1991, Wasilewski was notified by letter from the Director of Personnel of the College that its President would recommend her immediate termination to the Board of Trustees at their September 23, 1991 meeting, where she may be present with counsel (CP-8; 1Tr127-129).

5. On September 18, 1991, Wasilewski wrote to Thomas Conn, the President of the Respondent, in which she requested assistance in connection with her pending dismissal, i.e., representation at the Board meeting on September 23rd, (CP-9; 1Tr130, 131). In this letter, Wasilewski requested that an attorney and John Heffernan of the Respondent be present. Walter Mack was copied on the letter. [1Tr130].

6. Also, on September 18th, Wasilewski wrote to the President of the College, stating that she would appear at the September 23rd Board meeting and that she had requested that a representative of the Respondent be present (CP-10; 1Tr131, 132). Wasilewski then met with the Respondent's Grievance Committee on September 20th. The Committee concluded that it did not have sufficient time to review all of the materials submitted to it by Wasilewski prior to the September 23rd meeting (CP-11; 1Tr132-134, 136, 137).

7. During the day of September 23rd, Wasilewski met with Heffernan and Mack and asked them to postpone the evening meeting so that she could prepare herself. The response of Heffernan and Mack was that she shouldn't worry and "...just go ahead..." In response

to Wasilewski's request for union counsel, Heffernan and Mack stated that if she was terminated, an attorney would help her later during the "appeal meeting." [1Tr137, 138].

8. At the 7:30 p.m. Board meeting on September 23rd, Heffernan and Mack were present with Wasilewski and a Catholic sister. According to Wasilewski, Heffernan spoke "a few minutes...," in which he made an emotional appeal, to the effect of not throwing Wasilewski "...out on the street at her age...". She asked Mack to speak but he said it was "...not necessary." DeMarco, who was present, said that Wasilewski did most of the speaking and that Mack said little or nothing. [1Tr71-73, 75-77, 138-140].

9. The action of the Board on September 23rd was to uphold Wasilewski's termination. According to Wasilewski, Heffernan and Mack came out of the Board meeting and stated to her, "You're fired"; but that she should not worry; "...we will appeal..." [1Tr96, 140].

10. Shortly thereafter, Wasilewski learned that her request to the College for a second hearing had been granted (1Tr78, 79, 81, 92, 96, 97).

11. When Wasilewski learned that the College was giving her an opportunity to appeal, she called Mack and asked about representation, to which he replied that there would be "no help" from the Respondent (1Tr140, 141).

12. Thereafter, Wasilewski appeared <u>without representation</u> at the second hearing on October 14, 1991. (See Third Amendment of July 14, 1992 to Unfair Practice Charge).

ANALYSIS

Positions of the Parties

I.

The factual premise of the Respondent, as indicated previously, begins with September 23, 1991, when its representatives appeared with Wasilewski at an initial hearing before the Board. Subsequent to this meeting, the College advised Wasilewski that she was terminated, following which Wasilewski requested a second hearing before the Board. The Respondent has stipulated that its failure to have appeared at the second hearing on behalf of Wasilewski was "arbitrary, capricious and in bad faith..."

The Respondent then contends that Wasilewski must show that there was a contractual violation by the College that could have been remedied if the Respondent had appeared at the second hearing on October 14th. Her failure to do so exonerates the Respondent from a charge that it has breached its duty of fair representation "DFR".

The Respondent next refers to Section 8.9 of Article VIII of the collective agreement (J-1), emphasizing that in "Matters of administrator separation," such as here, the Board has "sole discretion" and its action "...shall not be subject to the grievance arbitration provisions... of the Agreement." (J-1, pp. 19, 20). Given this provision of the Agreement, the Respondent's participation in the procedure is not even required.

Finally, after citing the standard DFR cases, the Respondent points to a case of uncommon interest: Miller v. U.S. Postal Service, 792 F.Supp. 4, 142 LRRM 2409 (D. N.Hamp. 1992), aff'd. 985 F.2d. 9, 142 LRRM 2413 (1st Cir. 1993). In that case it was held that whether an employee sues his employer, his union, or both, he must prove that the action of the employer violated the terms of the collective agreement and that the union breached its DFR. The failure of the employee's claim against one party is tantamount to a failure of the action as a whole. The Circuit Court agreed fully in affirming the District Court.

II.

An examination of the Charging Party's brief indicates at pages one and two that there is no dispute between the parties as to the premise upon which my decision is to be based. However, the Charging Party, beginning at page three, construes Section 8.9 of Article VIII of J-1 very differntly from the Respondent: the Charging Party need not prove that her appeal to the Board would have been successful, i.e. that the College breached the agreement.

The Charging Party perceives Section 8.9 as equivalent to the grievance/arbitration procedure. Therefore, it was intended that the Respondent should have the obligation to represent before the Board any "administrator" employee whose termination had been recommended. Any suggestion to the contrary would result in administrator/union members having to appear alone. The Charging Party contends that Section 8.9 was never intended to produce such a result.

The Respondent's Motion To Dismiss Is Granted

I am persuaded that the contention of the Respondent that there can be no DFR in the absence of a breach by the College of the collective negotiations agreement is correct. The above-cited decision of Miller vs. U.S. Postal Service supports this conclusion. However, in granting the Respondent's Motion to Dismiss I rely principally upon the rationale in Camden County College, D.U.P. No. 87-10, 13 NJPER 166 (¶18074 1987).

Before discussing Camden County College, I point again to the Miller decision and its cogent analysis that when an employee sues his or her employer, his or her union, or both, the employee burden of proof is the same: the employer's actions must have violated the contract and the union must have breached its DFR. A failure of proof against one party is tantamount to a failure of the action as a whole. This holding in Miller leads ineluctably to the result that I must reach herein. The claim of an aggrieved employee against his or her employer and/or union are "inextricably linked" and the "...failure to prove either one of them results in the failure of the entire hybrid action..." [Circuit Court in Miller: 142 LRRM at 2413].

Now, turning to Camden County College. In that case a series of unfair practice charges were filed with the Commission by a Professor Zaleski against the College and the Faculty Association. One charged the Faculty Association with failing to seek arbitration over Zaleski's non-assignment to a certain Co-Op

course within the College's curriculum and that it thereby breached its DFR. The College had taken the position that its decision concerning the assignment or non-assignment of courses was a "managerial prerogative".

The Commission's holding was that an employer, having the managerial prerogative to transfer employees to other positions within its work force, possessed a similar prerogative to assign non-teaching duties to its work force, which are neither mandatorily negotiable or arbitrable: So. Brunswick Bd. of Ed., P.E.R.C. No. 85-60, 11 NJPER 22 (¶16011 1984) and Roselle Park Bd. of Ed., D.U.P. No. 86-6, 12 NJPER 219 (¶17088 1986) where it was stated that the "...Board has a managerial right to decide how to assign its work force and any unfair practice charge attempting to restrict such right must be dismissed..."

Further, in Camden County College it was also noted that the non-assignment of teaching staff is a matter of educational policy. A non-assignment is neither negotiable nor subject to review in arbitration. Therefore, Zaleski had no right to seek arbitration and the Faculty Association could not have by its refusal breached its DFR. It was stated further that:

> ...The Association's alleged refusal to either seek arbitration for Zaleski or assign him the right to seek arbitration does not constitute a violation of the Act, since the subject matter of the grievances was not arbitrable to begin with... (13 NJPER at 168).

The cases of Camden County College and Miller require, on this record, that the Respondent's Motion to Dismiss be granted.

This is so since the Respondent cannot, as a matter of law, be found to have violated its DFR as to Wasilewski since, as an "administrator," the College had the unfettered right to terminate her without having committed a breach of contract under Section 8.9 of the Agreement. There being no recourse to the grievance procedure under Article XXI, the Respondent was at no time legally obligated to provide Wasilewski with representation.

* * * *

While I felt constrained to make a number of Findings of Fact, based upon the record made at the first day of hearing on April 2nd, this was done primarily to comport with the rule of Reider, supra, and like cases. While recognizing that Reider dictates that all facts properly pleaded and, in this case those facts proven at the hearing on April 2nd must be deemed admitted, I have no doubt but that the instant Motion to Dismiss must be granted as a matter of law.

Therefore, based upon the foregoing, the record and the briefs in this case, I make the following:

CONCLUSION OF LAW

The Respondent 153 did not violate N.J.S.A. 34:13A-5.4(b)(1) through (5) by its conduct herein with respect to the separation of Ruth B. Wasilewski, an administrator, within the collective negotiations unit.

RECOMMENDED ORDER

I recommend that the Commission Order that the Charging Party's Complaint be dismissed.

Alan R. Howe
Hearing Examiner

Dated: September 3, 1993
Trenton, New Jersey