

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNCIL NO. L, AFSCME, AFL-CIO,

Respondent,

Docket No. CI-78-20-24

-and-

JOHN BANKS, JR.,

Charging Party.

SYNOPSIS

The Commission, noting the absence of exceptions, adopts the findings of fact and conclusions of law contained in a Hearing Examiner's Recommended Report and Decision. The Commission finds that the majority representative did not breach its duty of fair representation to the charging party when it settled the charging party's grievance at the second step of the grievance procedure without notice to or the consent of the charging party. The action of the majority representative was based upon good and sufficient reason both because there was little likelihood of success beyond that level and because an adverse resolution at a higher level could adversely affect other employees represented by the majority representative. Accordingly, the Commission dismisses the Complaint in its entirety.

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNCIL NO. 1, AFSCME, AFL-CIO,

Respondent,

Docket No. CI-78-20-24

-and-

JOHN BANKS, JR.,

Charging Party.

Appearances:

For the Respondent, Mark Neimeiser, Associate Director

For the Charging Party, John Banks, Jr., Pro se

DECISION AND ORDER

On December 7, 1977, an Unfair Practice Charge was filed with the Public Employment Relations Commission by John Banks, Jr., ("Banks") alleging that Council No. 1, AFSCME, AFL-CIO ("Council No. 1) had 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., (the "Act"), in that Council No. 1 had, in September 1977, failed to fairly represent Banks when it settled a grievance filed by Banks at the second step of the grievance procedure without the knowledge or approval of Banks. It was alleged that this action violated N.J.S.A. 34:13A-5.4(b)(1) and (2) of the Act. The charge was amended by Banks on December 30, 1977 and on April 26, 1978.

It appearing that the allegations contained in the charge, as amended, if true, might constitute unfair practices

within the meaning of the Act, a Complaint and Notice of Hearing was issued on October 10, 1978. Pursuant to the Complaint and Notice of Hearing, a hearing was held before Commission Hearing Examiner Alan R. Howe on November 15, 1978 in Newark, New Jersey at which both parties had the opportunity to examine and cross-examine witnesses, to present evidence and to argue orally. The parties argued orally at the hearing and waived the filing of post-hearing briefs.

On November 20, 1978, the Hearing Examiner issued his Recommended Report and Decision, which report including findings of fact, conclusions of law and a recommended order. The original of the report was filed with the Commission and copies were served upon the parties. A copy is attached hereto and made a part hereof. H.E. No. 79-25, 4 NJPER \_\_\_\_ (Para. \_\_\_\_ 1978).

None of the parties has filed exceptions to the Hearing Examiner's Recommended Report and Decision. See N.J.A.C. 19:14-7.3.

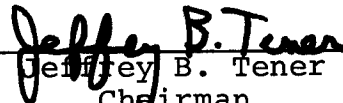
Upon careful consideration of the entire record herein, the Commission adopts the findings of fact and conclusions of law rendered by the Hearing Examiner substantially for the reasons cited by him. We agree with the Hearing Examiner that the union's conduct toward Banks did not constitute a failure to represent Banks in accordance with the requirements of the Act. The action of Council No. 1 in settling the grievance was not arbitrary, discriminatory nor in bad faith but rather was a reasonable determination that there was little likelihood that the grievance could be resolved favorably if pursued beyond the second step and that

further pursuit of the grievance could have an adverse affect upon numerous other employees represented by Council No. 1 in hospitals throughout the State.

ORDER

Therefore, for the reasons set forth above, IT IS HEREBY ORDERED that the Complaint against Council No. 1 be dismissed in its entirety.

BY ORDER OF THE COMMISSION

  
\_\_\_\_\_  
Jeffrey B. Tener  
Chairman

Chairman Tener, Commissioners Hartnett, Parcels, Hipp and Schwartz voted for this decision. None opposed. Commissioner Graves was not present.

DATED: Trenton, New Jersey  
December 14, 1978  
ISSUED: December 15, 1978

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

In the Matter of

COUNCIL NO.1, AFSCME, AFL-CIO,

Respondent,

- and -

Docket No. CI-78-20-24

JOHN BANKS, JR.,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss charges of unfair practices filed by an individual employee against Council No.1, which is the collective negotiations representative for all employees in the Health Care and Rehabilitation Service Unit of the State of New Jersey. The individual employee, John Banks, Jr., had alleged that Council No.1 breached its duty of fair representation as to Banks when it settled Banks' grievance at Step No.2 without notice to or the consent of Banks. The Hearing Examiner concluded that Council No.1 had good and sufficient reason to settle Banks' grievance at Step 2 both because there was little likelihood of success at Step 3 and the fact that an adverse resolution at Step 3 could well adversely affect many hundreds of members in the state-wide collective negotiations unit of some 9,000 employees. The Hearing Examiner further concluded that Council No.1, in settling the Banks grievance at Step 2, did not act with hostility, arbitrariness, or bad faith toward Banks.

A Hearing Examiner's Recommended Report and Decision is not a final administrative action 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, or reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

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

In the Matter of

COUNCIL NO.1, AFSCME, AFL-CIO,

Respondent,

- and -

Docket No. CI-78-20-24

JOHN BANKS, JR.,

Charging Party.

Appearances:

For Council No.1, AFSCME, AFL-CIO  
(Mark Neimeiser, Associate Director)

For John Banks, Jr.  
(John Banks, Jr., Pro se)

HEARING EXAMINER'S RECOMMENDED  
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on December 9, 1977 <sup>1/</sup>by John Banks, Jr. (hereinafter the "Charging Party" or "Banks") alleging that Council No.1, AFSCME, AFL-CIO (hereinafter "Council No.1" or the "Respondent") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act") in that Council No.1 had in September 1977 failed to fairly represent Banks by settling a grievance filed by Banks at the second step without the knowledge or approval of Banks, all of which was alleged to be a violation of N.J.S.A. 34:13A-5.4(b)(1) and (2) of

<sup>1/</sup> The Unfair Practice Charge was amended on December 30, 1977 and on April 26, 1978.

the Act. <sup>2/</sup>

It appearing that the allegations of the Unfair Practice Charge, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on October 10, 1978. Pursuant to the Complaint and Notice of Hearing, a hearing was held on November 15, 1978 in Newark, New Jersey, at which time the parties were given the opportunity to examine witnesses, present relevant evidence and argue orally. Both parties argued orally and waived the filing of post-hearing briefs.

Unfair practice charges, 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 parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

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

FINDINGS OF FACT

1. Council No.1, AFSCME, AFL-CIO is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

2. John Banks, Jr. is a public employee within the meaning of the Act, as amended, and is subject to its provision.

3. Banks is an Institutional Charge Attendant at Greystone Park Psychiatric Hospital (hereinafter the "Hospital") on the 12 midnight to 8:00 a.m. shift and has been employed by the Hospital since 1954.

4. The Hospital employees have been covered by a collective negotiations unit between the Respondent and the State of New Jersey since 1971 or 1972. The contract unit is described as the Health Care and Rehabilitation Services Unit and the most recent collective negotiations agreement is effective during the term July 1, 1977 to June 30, 1979 (J-1). There is a local union at the Hospital, "Local 2216", of which about 600 employees are members of the said Local and about 200 are non-members.

2/ These Subsections prohibit employee organizations, their representatives or agents from:

"(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act."

"(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."

5. Banks was a shop steward and a member of the executive board of Local 2216 from the inception of the Local until about four or five years ago when Banks was suspended for non-payment of dues. He has not been a member of the Local since that time. As a shop steward and executive board member, Banks was familiar with the collective negotiations agreement and, as shop steward, represented members and non-members in the handling of their grievances under the grievance procedure. Banks was also familiar with the provisions of the Local Union constitution and by-laws and the constitution and by-laws of the International Union.

6. Article VII, Section A of the Grievance Procedure defines two types of grievances, namely, contractual or non-contractual (J-1, p.8).

7. Article VII, Section C, Subsection 1 provides as follows:

"Employees are entitled to use this grievance procedure and to be represented by the Union upon request in accordance with the provisions hereof. They shall not be coerced, intimidated or suffer any reprisal as a direct or indirect result of such use." (J-1, p.8).

8. On July 9, 1977 Banks was deducted one days' pay for having failed to report his inability to get to work until 5:45 a.m., during the shift commencing the prior 12 midnight, when, under the tardiness policy of the Hospital (CP-1), he was supposed to call in at least one hour in advance of the commencement of the shift.

9. On July 15, 1977 Banks filed a non-contractual grievance, in which he indicated that he did not want union representation, protesting the application of the Hospital's tardiness policy as to him and the deduction of one days' pay (CP-2). The grievance was denied at the First Step by his immediate supervisor, and was denied at the Second Step by the Assistant Director of Nursing Service. Banks appealed to the Third Step.

10. The Local Union is advised of all grievances filed, whether they are contractual or non-contractual, and whether or not the grievant seeks the aid of the union in representation. The Local Union is notified of the outcome at each step of the grievance procedure. The Local Union apprises Council No.1 of the nature and progress of grievances at Steps 1 and 2. In the case of Step 3 grievances, Council No.1 is directly notified at its Trenton office. Thus, the Local Union and Council No.1 were aware of the nature and course of the Banks grievance from the time of its filing on or about July 15, 1977.



11. Article VII, Section C, Subsection 2 provides, in part, as follows:

"The local Union's decision to request the movement of any grievance at any step or to settle the grievance at any step shall be final as to the interests of the grievant and the Union..." (Emphasis supplied)(J-1, p.8).

12. Under date of September 28, 1977, two memos were circulated, the contents of which were that there would be no Third Step grievance hearing on the Banks grievance since Mark Neimeiser, Associate Director of Council No.1, had advised the appropriate officials of the Hospital and the State of New Jersey that the Banks grievance was considered settled at the Second Step (CP-3 and CP-4).

13. Neimeiser testified regarding his reasons for settling the Banks grievance at Step 2. Based on his knowledge of the facts of the Banks grievance, he was convinced that there was no reasonable expectation that the grievance could be won at the Third Step, and that if it was denied at the Third Step it could have an adverse impact on hundreds of other employees in the Health Care and Rehabilitation Services Unit covered by the collective negotiations agreement (J-1). Mr. Neimeiser testified that the Third Step would be a hearing in Trenton before designees of Ann Klein, the head of the Department of Human Services. He stated that an adverse resolution of the Banks grievance at the Third Step would be publicized to the administrations of hospitals throughout the State and that unit employees, who might otherwise benefit by flexible administration of hospital policy on tardiness, might be confronted with tightened administration of the said hospital policy and, therefore, would be adversely affected on a day-to-day basis. The Hearing Examiner credits the reasons given by Neimeiser as valid for purposes of the necessary administration of the state-wide contract (J-1).

14. Under the collective negotiations agreement, Step 4, Arbitration, provides that only contractual grievances may be submitted to arbitration (J-1, p.11). There is no provision for submitting a non-contractual grievance to arbitration. Thus, Step 3 is the final step for a non-contractual grievance such as the one filed by Banks in this case.

15. Council No.1 has settled other grievances previous to the Banks grievance, which involved both members and non-members of the Union. The Union does not necessarily give notice to the grievant of the settling of his or her grievance. No notice was given to Banks of the settling of his grievance other than the copies of the memos dated September 28, 1977 (CP-3 and CP-4).

16. At or about the time of the Banks grievance in July 1977, the Director of AFSCME in New Jersey, Al Wurf, had caused to be issued to all AFSCME members at the Hospital a copy of an "enemy list", which listed the names of all employees at the Hospital who were not members of the Union (C-1). The name of Banks was included on the "enemy list". Mr. Neimeiser testified credibly that the fact that Banks name was on the "enemy list" was not necessarily known to him and that, in any event, the settlement of the banks grievance at Step 2 had nothing whatever to do with Banks being on the "enemy list". The Hearing Examiner notes that the "enemy list" contains the names of in excess of 250 persons.

17. The Hearing Examiner finds, crediting Mr. Neimeiser, that there is no history of hostility between Banks, whether as a member or non-member and Council No. 1. The Hearing Examiner notes that in the instance of two prior suspensions of Banks by the Hospital, during a period when Banks was a member of the Union, Council No.1 provided Banks with counsel in a Civil Service proceeding in one instance and paid for Banks' counsel in the other. <sup>3/</sup>

#### THE ISSUE

Did the Respondent violate the Act and its duty of fair representation to Banks when it settled the Banks grievance at Step 2?

#### DISCUSSION AND ANALYSIS

A breach of the duty of fair representation arises only when the union's conduct toward a member is "arbitrary, discriminatory or in bad faith", Vaca v. Sipes, 386 U.S. 171, 190 (1967). At another point in Vaca v. Sipes, the Supreme Court said that the duty of fair representation includes a "...statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." (386 U.S. at 177).

See also:

Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971)

Humphrey v. Moore, 375 U.S. 335 (1963)

Ford Motor Company v. Huffman, 345 U.S. 330 (1953)

<sup>3/</sup> The Hearing Examiner also finds that any hostility between Banks and the Local Union at the time that Banks became a non-member has long since dissipated and, in any event, this was unknown to Mr. Neimeiser.

Belen v. Woodbridge Township Board of Education 142 N.J. Super 486 (App. Div. 1976)

Hamilton Township Education Association, P.E.R.C. No. 79-20 (1978)

Union County Board of Chosen Freeholders, E.D. No. 49 (1974)

Jefferson Township Board of Education, P.E.R.C. No. 61 (1971)

Applying the above criteria of fair representation to the facts of the instant case the Hearing Examiner finds and concludes that the Respondent did not violate the Act when in September 1977 it settled the Banks grievance at the Second Step.

As noted in the above Findings of Fact the Hearing Examiner has found that the fact of filing and the contents of the Banks grievance were known to the Local Union and Council No.1 on and after July 15, 1977. Thus, both the Local Union and Council No.1 knew the nature of the grievance and watched it proceed through Step 2. The Hearing Examiner has credited the reasons given by Mr. Neimeiser for having settled the Banks grievance at Step 2. While the preferred procedure would have been for Council No.1 through Mr. Neimeiser to have advised Banks of the intention to settle his grievance at Step 2 the Hearing Examiner cannot find that Council No.1 acted in bad faith when it failed to do so. At all events, Banks was apprised of the fact that his grievance was settled at Step 2 (CP-3 and CP-4).

The collective negotiations agreement plainly gives the Local Union and, derivatively, Council No.1, the express authority to settle a grievance "at any step" which settlement "shall be final as to the interests of the grievant and the Union." (J-1, p.8). As a non-contractual grievance, Banks was only entitled to go through Step Three and not to arbitration. Thus, there is no question of the Union having frustrated Banks in going to arbitration. This frequently is a basis for a claim of failure to represent fairly, namely, when there is the right to arbitration.

Mr. Neimeiser enumerated the reasons why he felt that the Banks grievance should be settled at Step 2. First, he thought that there was little likelihood that the Banks grievance could be settled favorably at Step 3 and, further, he was firmly convinced that the publicity attendant to an adverse settlement at Step 3 could adversely affect employees in hospitals throughout the State. The Hearing Examiner cannot, under these circumstances attribute bad faith or arbitrariness in the conduct of Mr. Neimeiser in having settled the Banks grievance at Step 2.

The Hearing Examiner has previously noted that he finds no hostility between Council No.1, and even the Local Union, toward Banks. The facts that Banks was included with over 250 other employees on the "enemy list" is clearly not indicative of any personal hostility toward Banks by Council No.1. There would have to be some more definitive showing of a relationship between the "enemy list" and the fact that Banks was on it and Council No.1's culpability.

It is also noted that Banks does not make out a case of failure to represent fairly by the fact that he indicated that he wanted no union representation on his grievance and that the union, Council No.1, later intervened in the grievance procedure and settled his grievance at Step 2. The Findings of Fact reflect that the Local Union received notices of all grievances filed and is kept abreast of the course of grievances in the grievance procedure. The Local Union also apprises Council No.1 of the filing of grievances and what happens to grievances in the grievance procedure. Council No.1 is administering a state-wide agreement (J-1) and must necessarily take into consideration the interests and well being of all members in the contract unit and cannot be blinded to the fact that a particular member or members may have filed a grievance, the adverse resolution of which may impact adversely on other members of the collective negotiations unit.

Thus, however dissatisfied Banks may be with the intervention of Council No.1 at Step 2, the Hearing Examiner can, on this record, find no evidence that Council No.1 breached its duty of fair representation as to Banks under the criteria of the court and administrative decisions cited supra.

Accordingly, the Hearing Examiner must recommend the dismissal of the Complaint in its entirety. It is noted that the evidence offered by Banks would go only to a violation of Subsection (b)(1). There was no evidence offered which would or could possibly constitute a violation of Subsection (b)(2) of the Act.

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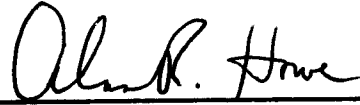
Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

The Respondent, Council No.1, did not violate N.J.S.A. 34:13A-5.4(b)(1) and (2) in its settlement at Step 2 of the Banks grievance of July 15, 1977.

RECOMMENDED ORDER

The Respondent, Council No.1, not having violated the Act, supra, it is HEREBY ORDERED that the Complaint be dismissed in its entirety.



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Alan R. Howe  
Hearing Examiner

DATED: November 20, 1978  
Trenton, New Jersey