D.U.P. NO. 95-3

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

NEW JERSEY EDUCATION ASSOCIATION,

Respondent,

-and-

Docket No. CI-93-83

NICHOLAS J. ANDRIAN,

Charging Party.

SYNOPSIS

The Director of Unfair Practices refuses to issue a complaint brought by Nicholas Andrian against the New Jersey Education Association. Andrian charged that the Association violated its obligation to fairly represent Andrian. However, the facts reveal that the Association provided an attorney for Andrian yet Andrian failed to provide information requested by the attorney in order to properly represent Andrian. Accordingly, Andrian failed to allege facts which constitutes a violation of the duty of fair representation.

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Appearances:

For the Respondent,
Wills, O'Neill & Mellk, attorneys
(G. Robert Wills, of counsel)

For the Charging Party,
Charles A. Poekel, Jr., attorney

REFUSAL TO ISSUE COMPLAINT

On May 17, 1993, Nicholas J. Andrian filed an unfair practice charge with the Public Employment Relations Commission against John V. Warms, John A. Thornton, Jr., and the New Jersey Education Association. Andrian alleges that the NJEA violated 5.4(b)(1) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act")[1/] by breaching its duty of fair representation after he was denied tenure by the Somerset County Vocational/Technical Board of Education in April 1988.

1/ This subsection 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."

The Respondent denies breaching its duty of fair representation to Andrian and asserts that their service to him was not arbitrary, capricious or in bad faith. Rather, the Association states that it went beyond what it was required to do for Andrian in view of the Board's right to deny Andrian tenure.

Pursuant to N.J.A.C. 19:14-1.6, a Commission staff agent conducted an administrative investigation into the facts of the case. The following facts appear.

Andrian began teaching at the Somerset County Vocational/Technical High School in July 1985. On April 18, 1988, his principal advised him that he would not be recommended for tenure. Andrian thought the unexpressed reason why he was denied tenure was his publicized litigation with DYFS concerning his personal life. However, he indicated that he would not fight the decision. He contacted NJEA UniServ Representative John Thornton for advice. Thornton advised Andrian that non-tenured teachers had no contractual right to grieve and/or arbitrate a tenure denial. Therefore, Andrian should address the Board in closed session, resign and seek a good recommendation for future employment. Andrian agreed to follow Thornton's advice and not file a grievance.

Andrian appeared at a Board meeting on April 25, 1988, addressing its members in closed session. On April 27, 1988, the Superintendent advised Andrian that the Board would not re-hire him.

Andrian decided to fight his discharge after he heard of negative remarks regarding his job performance allegedly made by school administrators. On May 4, 1988, Andrian wrote to Thornton asking him to take appropriate legal action and requesting an attorney.

Sometime during the next month, the NJEA informed Andrian that an NJEA attorney would contact him regarding his situation. On July 12, 1988, Andrian wrote to Thornton saying he had not yet heard from an attorney and expressed his concern that the Board used a secret file to discredit him. He wanted to know where the NJEA stood on representing him and indicated that he had scheduled a Donaldson hearing[2/] for July 25, 1988, and he wanted someone from NJEA there. He stated that he had retained a private attorney, Charles A. Poekel, Jr., to handle his case against the Superintendent for slander.

The Donaldson hearing was rescheduled and held on August 22, 1988. No one from the NJEA attended the hearing on behalf of Andrian. The Association asserts that it was not involved in the initial scheduling of the hearing nor advised by Andrian of the rescheduled hearing date. However, Andrian met several times during the summer with M.J. Cullen, an attorney provided by the NJEA. Andrian asserts that Cullen was more concerned about the outcome of his DYFS litigation than with his termination.

2/ This is a hearing before the Board at which an employee is given formal written reasons for his discharge.

On October 26, 1988, after an exchange of letters between Andrian and Thornton, NJEA attorney Cullen wrote to Andrian referencing an August 1988 meeting in which she advised him that the NJEA could not take any action until she had more information, specifically, from Court/Prosecutor's files which would support the action he had filed against DYFS. Once she received and reviewed that material, a determination could then be made about whether services to him would be covered by the NJEA/NEA legal services plan.

In November 1988, Andrian complained to the NJEA about the lack of help he received from the union office.

On February 10, 1989, four months after Cullen requested material from him, Andrian sent an article and Motion to Cullen asking her to review it. On March 3, 1989, Cullen again wrote to Andrian asking him for copies of all documents pursuant to the Court's order in his DYFS litigation.

On March 9, 1989, Andrian wrote to Cullen providing some of the information which she had requested regarding his lawsuits. However, Andrian questioned the relevance of his DYFS case and other court actions to his school law case against the Board. Andrian further stated:

> I have spoken anonymously with a number of NJEA representatives around the state and have been informed that I have a solid case against the Board for any number of violations. This opinion is shared by several private attorneys, all versed in school law, whom I have consulted.

He then went on to characterize Thornton's representation of him from April 1988 to March 1989 as "inexplicable footdragging."

On March 17, 1989, Warms wrote to Andrian stating that the law firm "is assisting you because I asked them to assist you."

In June 1989, Andrian filed a Superior Court action against the Board and the NJEA, Warms and Thornton. The case against the Board was settled in August 1991; however, the Superior Court transferred jurisdiction over the NJEA issues to the Commission in July 1991, granting a Motion to Transfer filed by the NJEA.[3/]

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Unions must represent the interests of all unit members without discrimination. N.J.S.A. 34:13A-5.3. A breach of the duty of fair representation occurs only when a union's conduct toward a unit member is "arbitrary, discriminatory, or in bad faith." Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976), citing Vaca v. Sipes, 386 U.S. 171 (1967). The Commission and New Jersey Courts have consistently applied the Vaca standard in evaluating fair representation cases. D'Arrigo v. N.J. State Bd. of Mediation, 119 N.J. 74 (1990); Saginario v. Attorney General, 87 N.J. 480 (1981); Fair Lawn Bd. of Ed., P.E.R.C. No. 84-138, 10 NJPER 351 (¶15163 1984); OPEIU Loc. 153 (Thomas Johnstone), P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983); City of Union City, P.E.R.C. No. 82-65, 8 NJPER 98 (¶13040 1982).

3/ Andrian appealed the transfer order nine months later, in March 1992, seeking a jury trial instead of Commission action. On March 30, 1993, the Appellate Division dismissed Andrian's appeal. Andrian filed his unfair practice charge on May 17, 1993.

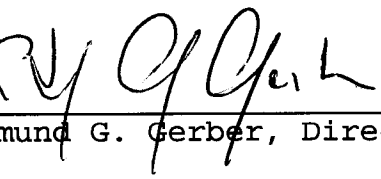
Mere negligence, standing alone, does not rise to the level of a breach of the duty of fair representation. Fair Lawn Bd. of Ed., P.E.R.C. No. 84-138, 10 NJPER 351 (¶15163 1984). Nor does a union have the obligation to provide legal counsel. Bergen Community College Faculty Association, P.E.R.C No. 84-117, 10 NJPER 262 (¶15127 1984); See also Camden County College, D.U.P. No. 89-11, 15 NJPER 171 (¶20072 1989). Accordingly, the Respondent, in providing legal counsel, has gone beyond the minimum requirement of the duty of fair representation.

Andrian has not alleged facts which, if true, would constitute a violation of the duty of fair representation. His pleadings raise no facts indicating that he was treated in an arbitrary, capricious or bad faith manner by Thornton, Warms or the NJEA. He was provided with advice from Thornton when he was denied tenure and he consulted with NJEA staff and attorney regarding his situation. Admittedly, the lawyer did not perceive any viable action to take on his behalf. But, there was little that an employee organization could do under these circumstances. The non-renewal of a non-tenured teacher is a managerial prerogative and is not arbitrable. See Englewood Bd. of Ed., P.E.R.C. No. 92-78, 18 NJPER 88 (¶23040 1992) and Long Branch Bd. of Ed., P.E.R.C. No. 92-79, 18 NJPER 91 (¶23041 1992). Significantly, the NJEA never asserted that it was discontinuing any involvement in his problem. (See Warms' letter of March 17, 1989.)

Further, I do not believe that the NJEA had an obligation to litigate the issue of the Board's alleged secret file before Cullen was given an opportunity to review the DYFS litigation materials; however, Andrian filed this charge before that investigation was complete. The lack of attendance of an NJEA attorney at Andrian's August 1988 Donaldson hearing could be viewed as questionable; however, even assuming the NJEA was negligent in failing to appear, that action, standing alone, is not sufficient to establish a claim of a breach of the duty of fair representation. Fairlawn.

Accordingly, the Commission's complaint issuance standard has not been met and I dismiss the unfair practice charge. N.J.A.C. 19:14-2.1, 2.3

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Edmund G. Gerber, Director

DATED: August 30, 1994
Trenton, New Jersey