P.E.R.C. NO. 2002-72

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

GLEN RIDGE SCHOOL PERSONNEL ASSOCIATION AND
NEW JERSEY EDUCATION ASSOCIATION,

Respondents,

-and- Docket No. CI-H-96-32

KENNETH T. TUCKER, JR.,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission orders the Glen Ridge School Personnel Association and the New Jersey Education Association to comply with their duty of fair representation under N.J.S.A. 34:13A-5.3 by reimbursing Kenneth T. Tucker, Jr. at reasonable and customary rates for the attorney of his choice to represent him in his grievance arbitration proceeding. Tucker had filed an unfair practice charge against the respondents alleging that they violated the New Jersey Employer-Employee Relations Act by misleading him into trusting the NJEA to provide him with representation in his arbitration and discrimination cases related to his termination.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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On February 2, 1996, a Complaint and Notice of Hearing issued. On February 13, the respondents filed an Answer denying that they had violated the Act. They also assert that they are willing to pay their share of the costs for Tucker to proceed to arbitration, including the costs of an attorney of Tucker's choice, to be paid at the usual NJEA rate. In addition, they claim that it does not matter which agency provides an arbitrator; we lack jurisdiction to resolve any claim other than an alleged breach of the duty of fair representation; and Tucker's failure to name the employer as a party entitles him to no relief.

Hearing Examiner Stuart Reichman conducted three days of hearing beginning June 6, 1996. After the third day, Tucker wrote

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an NJEA attorney's conduct in representing Tucker may have constituted some degree of negligence, it did not constitute discrimination that is intentional, severe or unrelated to legitimate union objectives; although Tucker did not agree with the attorney's strategy or accept her preparation, her actions did not breach the duty of fair representation; the attorney's decision to ask Tucker to sign a certification waiving any claims against the respondents was made reasonably and in good faith; Tucker caused many of the delays in the case himself; the NJEA attorney believed, in good faith, that she had no alternative under the RPC but to refrain from continuing to represent Tucker; the respondents' failure to provide Tucker with a copy of an amendment to the collective negotiations agreement and their decision to switch from the American Arbitration Association to the Commission is not evidence that they failed to exercise due diligence and reasonable care in representing Tucker; there is no evidence that a statement signed by two local Association leaders helped lead to Tucker's termination; and Tucker's race-based claims have been raised before the Division on Civil Rights.

On February 24, 2000, after an extension of time, Tucker filed exceptions and supporting exhibits. He requested oral argument.2/ He also requested a directed verdict in his favor or a new hearing.

2/ We deny that request. The matter has been fully briefed.

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hearing on Tucker's charge that the NJEA and Association did not fairly represent him in the grievance proceeding.

On January 24, 2002, Tucker objected to the letter because it was not submitted by the attorney of record and because the attorney who did submit it should not be permitted to carve out a part of the Special Master's report to submit to Tucker's disadvantage. Tucker added that he objects to consideration of the report, but if we do consider it, we must also consider other aspects.

At our request, complete copies of the admonitions and Special Master's report have been submitted. We note that the final Disciplinary Review Board actions do not reference the Special Master's report. We therefore decline to consider that report.

The representation of the respondents at our hearing has been found to have violated the conflict of interest standard set by R.P.C. 1.9(a)(1). The Appellate Division has held that, in the absence of a waiver not present here, prejudice will be presumed to flow from such a conflict of interest. State v. Sanders, 260 N.J. Super. 491 (App. Div. 1992), states:

> The mischief that can arise in a conflict of interest prohibited by R.P.C. 1.9 may not be provable. To require a defendant to show with specificity exactly what confidences were used against him by his former attorney would require an extensive inquiry into a privileged area. The hearing itself would constitute an unhealthy erosion of the trust required by the attorney-client relationship. [Id. at 500]

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have given serious consideration to remanding, but recognize that the respondents' representation at our hearing, coupled with the publication of possible attorney-client confidences in the Hearing Examiner's report, precludes an untainted new hearing. Contrast Reardon v. Marlayne, Inc., 83 N.J. 460 (1980) (new attorney shielded from strategy, plans and work product of disqualified law firm). We note that the charging party has sought throughout these proceedings to have the respondents provide an attorney to represent him at his arbitration proceeding; and the respondents have offered to provide that representation, although apparently not in the exact form the charging party demands. Under all the circumstances of this case, we conclude that the duty of fair representation requires that the respondents reimburse Tucker at reasonable and customary rates for the attorney of his choice to represent him in his grievance arbitration.3/

ORDER

The Glen Ridge School Personnel Association and the New Jersey Education Association are ordered to take this action:

A. Comply with their duty of fair representation under N.J.S.A. 34:13A-5.3 by reimbursing Kenneth T. Tucker, Jr. at reasonable and customary rates for the attorney of his choice to represent him in his grievance arbitration proceeding.

3/ In the absence of any supporting evidence, we dismiss the 5.4a(4) and (5) allegations.

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A. Comply with their duty of fair representation under N.J.S.A. 34:13A-5.3 by reimbursing Kenneth T. Tucker, Jr. at reasonable and customary rates for the attorney of his choice to represent him in his grievance arbitration proceeding.

3/ In the absence of any supporting evidence, we dismiss the 5.4a(4) and (5) allegations.

H.E. NO. 2000-4

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

In the Matter of

GLEN RIDGE SCHOOL PERSONNEL ASSOCIATION AND
NEW JERSEY EDUCATION ASSOCIATION,

Respondents,

-and- Docket No. CI-H-96-32

KENNETH T. TUCKER, JR.,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the Respondents did not breach their duty of fair representation owed to Kenneth T. Tucker, Jr. by the manner in which they processed his grievance.

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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. NO. 2000-4

STATE OF NEW JERSEY
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

GLEN RIDGE SCHOOL PERSONNEL ASSOCIATION AND
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Respondents,

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KENNETH T. TUCKER, JR.,

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Appearances:

For the Respondents, Balk, Oxfeld, Mandell & Cohen, attorneys (Sanford R. Oxfeld, of counsel)

For the Charging Party,
Kenneth T. Tucker, Jr., pro se

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On November 29, 1995, Kenneth T. Tucker, Jr. (Tucker) filed an unfair practice charge (C-3)[1/] with the Public Employment Relations Commission (Commission), alleging that the

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1/ "C" refers to Commission exhibits received into evidence at the hearing in the instant matter. "CP" and "R" refer to Charging Party's exhibits and Respondent's exhibits, respectively. Transcripts of the successive days of hearing are referred to as "1T", "2T", "3T", "4T", "5T", "6T", "7T", "8T", "9T", "10T", and "11T".

Glen Ridge School Personnel Association (GRSPA or Association)[2/] and the New Jersey Education Association (NJEA) violated provisions 5.4b(1), (4) and (5)[3/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by deceitfully misleading Tucker into trusting the NJEA to provide him with representation in his arbitration and discrimination cases related to his termination. Tucker claims that although he was terminated in November 1993, his arbitration still has not taken place because of the undue delay caused by the Respondents.

Tucker also alleges that the Respondents failed to provide him with an amended Association collective agreement which reflects that the parties are to use the procedure administered by the Commission instead of the American Arbitration Association (AAA) for the selection of an arbitrator. He further asserts that the Respondents violated the Act when they conditioned his continued representation upon him signing a certification waiving his right to make any claims against the Respondents. According to Tucker, the Respondents never intended to represent him.

2/ In his charge, Tucker names the "Glen Ridge Personnel Association" as a Respondent. However, the correct name of this Respondent, as reflected in the parties' collective agreement, J-1, is the "Glen Ridge School Personnel Association (GRSPA), thus this is how this Respondent will be designated herein.

3/ These provisions 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. (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."

On February 2, 1996, the Director of Unfair Practices issued a Complaint and Notice of Hearing (C-1). On February 13, 1996, the Respondents filed an Answer, denying they violated the Act (C-2). Specifically, they deny that they: 1) deceitfully mislead Tucker into trusting them to provide representation; 2) caused undue delays in his arbitration proceeding; 3) refused to provide an alleged amended Association agreement; 4) never planned to represent Tucker; and 5) violated the Commission rules.

The Respondents also set forth several separate defenses. First, they assert that they are willing to pay their share of the costs for Tucker to proceed to arbitration, including the costs of an attorney of Tucker's choice, to be paid at the usual NJEA rate. Additionally, the Respondents claim that they only have an obligation to represent Tucker fairly in the grievance procedure/arbitration forum and explain that since the arbitrator selected for Tucker's arbitration is on both the AAA and Commission lists, it makes no difference which agency was used to select him. The Respondents further asserts that the Commission lacks jurisdiction to resolve any claim other than an alleged breach of the duty of fair representation. Moreover, the Respondents assert that since Tucker failed to join the employer in this matter, he is entitled to no relief.

Hearings were held on June 6, 11, and November 21, 1996, April 16, May 6, 15 and 22, August 5, September 17, October 23, 1997 and April 9, 1998. The parties were given the opportunity to

examine and cross-examine witnesses and Tucker was given the opportunity to testify.

After granting several requests for extensions of time, briefs were filed by April 7, 1999. On April 19, 1999, the Respondents asked me to take administrative notice of Ruth A. Cahn, et al. v. Officials of New Jersey Education Association, Docket No. A-4034-97T1 (4/5/99). On April 21, 1999, Tucker filed an objection to the submission of the decision by Respondents. In an April 29, 1999 letter, I explained to Tucker that I have authority to take administrative notice of court cases and as such the decision to take notice of the Ruth A. Cahn case and rely or not rely upon it rests with me.

Based upon the record in this case, I make the following:

FINDINGS OF FACT

1. Kenneth Tucker began his employment with the Glen Ridge Board of Education as a custodian on July 13, 1992 (9T17). During his employment, Tucker was a member of the GRSPA and the NJEA and was covered by the collective negotiations agreement between the GRSPA and the Board (6T82; J-1).

2. During his employment, Tucker received several memoranda regarding his job performance (2T75-2T78; R-1, R-2, R-3, R-4, R-22, CP-54, CP-55, CP-57, CP-59, CP-60, CP-62). Specifically, on October 26, 1992 school principal, Dr. Nell Sanders, sent Tucker a memorandum referencing a meeting that day concerning his job performance. In part, it states:

> Ken, it is absolutely necessary for you to follow a specified schedule and set of tasks. You must function as a team member, not an individual who sets his own schedule and priorities, if you are to remain on the custodial staff of the Glen Ridge School district. [2T76-2T78; R-3]

Tucker claims that Sanders lied about his job performance in R-3 because he reported a dangerous asbestos problem which the Board was allegedly hiding, however, he admits he did not perform all the tasks he was assigned (9T16-9T19). Tucker wrote a rebuttal to R-3 (11T13-11T14; CP-99).

On January 13, 1993, NJEA Representative Kenneth Wiggins sent a memo to Board Secretary/Business Administrator Patricia Haberthur indicating that Tucker's job performance was satisfactory at the time (CP-28). On February 4, 1993, however, Tucker received another memo from Sanders regarding his failure to properly perform his job. It concludes by stating:

> You may consider this a second formal warning that you are still failing to follow instructions given to you by the lead custodian. [2T78; R-4]

According to Tucker, R-4 is false. He claims Sanders wrote it after Tucker objected to being singled out for a drug screening. Tucker also claims the Board was racially discriminating against him by issuing R-4 (10T81). Tucker further believes Sanders lied in R-4 because she was upset that Tucker had asked for a meeting with her and Wiggins to discuss his job performance, and that at this meeting, Sanders had told him his job performance was fine (9T23-9T24). Thereafter, Wiggins included a claim about Tucker being singled out for a drug screening test with regard to grievances he had filed for Tucker (10T80-10T81).

3. On February 16, 1993, Tucker wrote to Sanders regarding hazardous conditions at the middle school and requested a meeting with Board representatives. A February 17, 1993 meeting was held between Sanders, Haberthur, School Superintendent Dr. Marcia Bossart and Tucker at which Tucker claims Board representatives made racial slurs to him (9T42-9T43, 11T10-11T11; CP-98). As a result of the meeting, Tucker filed a complaint with the New Jersey Department of Health. He claims he was harassed and transferred (9T43).

On February 19, 1993, a meeting between GRSPA President Jerry Williams, Wiggins and Tucker was held. Williams informed Tucker and Wiggins that the Board was going to terminate Tucker if he did not "straighten up his act" (2T131, 11T29-11T30). Tucker believed these comments were made because he had raised the issue concerning hazardous conditions at the middle school (4T59-4T61, 5T119-5T120).

4. On April 5, 1993, Tucker received a less than satisfactory evaluation from Sanders (CP-70). According to Tucker, the evaluation was false. He claims CP-70 was not the original evaluation he received, but a revised one that was issued after he wrote a rebuttal to the first evaluation (8T51, 9T27-9T29, 10T63-10T64; CP-70, CP-87). Tucker claims the Board gave him the less than satisfactory evaluation in retaliation for his "blowing the whistle" regarding the asbestos problem. Tucker gave the NJEA both the original evaluation and the revised one, but they did nothing about them. Tucker believes this is evidence that the NJEA never intended to represent him (11T24-11T27; R-24; CP-70, CP-87).

5. Although he was covered by the collective negotiations agreement between the GRSPA and the Board, Tucker received an individual employment contract on April 19, 1993 (6T83-6T84; CP-29).

6. On July 9, 1993, Tucker received a letter of reprimand from Superintendent Bossart. The document read:

> Make no mistake this is a final warning to you to improve your attendance, your performance, and your attitude as an employee of this District. Failure to do so will result in my recommendation to the Board of Education that we terminate your employment" [8T49, 9T38-9T40; R-22].

Tucker did not think R-22 constituted a final warning because he felt he had not received a legitimate first or second warning, and because the Board had found his job performance satisfactory by approving his individual employment contract a few months earlier (9T39, 9T55, 10T105, 11T21). He also believes it was not justified. R-22 states that Tucker's area was cleaned inadequately; however, according to Tucker, the area was not designated for only him to clean, but was assigned to all custodians (10T76-10T77; R-22).

Tucker believes R-22 was part of a conspiracy to get rid of him. Tucker claims the Board gave him false disciplinary documents and singled him out because he "blew the whistle" on the Board (9T40-9T41, 11T32-11T33; CP-56). He believes all Board representatives lied in their documents regarding Tucker's job performance being unsatisfactory (9T69-9T70). Tucker believes he never received a job description or the proper training needed to enable him to perform his job successfully (10T51-10T53, 10T70, 10T81-10T82; CP-89, CP-99).

I decline to make a finding as to whether Tucker received the memoranda regarding his job performance being unsatisfactory or otherwise received discriminatory treatment by the Board, based on his race or because he "blew the whistle" on the Board. Such claims are not before me, as they are outside of the Commission's jurisdiction.

The Alleged False Statements

7. In October 1993, GRSPA Vice-President and fellow employee and NJEA member John Dubuque signed a statement regarding Tucker (1T35-1T41, 1T63; CP-1). Haberthur had asked Dubuque to sign the statement. The statement was on Board letterhead and was attached to a cover letter by Haberthur to the Acting Program Manager of the Public Employees Occupational Safety and Health Administration. In the letter, Haberthur indicated that Dubuque and fellow employee and Association member Robert Blanchard witnessed Tucker refusing to wear a respirator, in violation of district policy (1T37-1T40, 3T17; CP-1). The letter, however, is incorrect when it refers to Dubuque witnessing Tucker's refusal to wear a respirator. Dubuque did not witness Tucker wearing or not wearing a respirator. Dubuque's statement does not refer to him witnessing anything (1T38-1T42, 1T72, 2T82; CP-1).

While Dubuque testified on direct examination that his statement was false, he clarified on cross examination that he simply had no firsthand knowledge of some of the information to

which he swore. He explained that paragraph 1 is true, and he has no reason to believe that the remainder of his statement is false (1T38-1T41, 1T66-1T68, 1T88-1T89).

Paragraph 2 of CP-1 states "Mr. Kenneth Tucker was informed that upon issue of the respirator, he was to return the respirator to the custodial/maintenance office at the end of each working day for safekeeping." Dubuque does not know, for a fact, if this is true; rather, other Association members simply relayed this information to him (1T67, 1T88-1T89; CP-1).

Paragraph 3 of the statement reads: "Mr. Kenneth Tucker refused to accept and wear the respirator under these conditions, therefore, Mr. Tucker never wore the respirator and Mr. Tucker was never fitted for the respirator or informed of the respirator program in place at the Glen Ridge Public School System." Dubuque does not know if this is true or false (1T67-1T68, 1T89; CP-1). According to Tucker, he refused to wear the respirator because he was denied the right to first have a full pulmonary examination, as Tucker claims is required by law (9T68).

8. Dubuque had previously reprimanded Head Custodian Ahmed Mohammed for signing a statement against another Association member (1T38, 10T84-10T86). Tucker claims that Wiggins told Association members at a December 13, 1992 meeting that they cannot sign statements for the Board against fellow Association members, because this would be a conflict of interest (10T85-10T86). Dubuque, the GRSPA vice-president, nevertheless

signed the statement against Association member Tucker (1T41-1T42, 1T108-1T109; CP-1).

9. Dubuque remarked to his fellow custodians that he "messed up" in signing the statement about Tucker (1T55). Dubuque believed that he erred in signing the statement because his understanding about Tucker was arrived at through hearsay, not because he knew any of it was false (1T69, 1T85-1T88).

10. Dubuque did not receive any special favors or benefits such as money, more favorable assignments or decreased duties for signing the statement (1T68-1T69, 1T80-1T84, 1T86). Dubuque did use school facilities for his personal benefit after his regular shift. He never received this privilege from anyone - he simply did it on his own volition (1T81). Tucker, however, believes that Haberthur specifically allowed Dubuque to do this (9T124). Tucker, however, presented no evidence to support this claim and, thus, I do not find this as a fact.

Tucker also believes Dubuque and Blanchard received numerous favors and benefits for signing their statements regarding him. Specifically, Tucker believes Dubuque was allowed to arrive late and not required to do his work, without being reprimanded. Tucker also claims that Dubuque and Blanchard received preferential treatment over Tucker with respect to a required physical examination, and that Tucker was the only one required to take a drug test (9T125-9T130, 10T83).

According to Tucker, Dubuque was also permitted to use the company vehicle and smoke in the building, and that Dubuque and Blanchard changed the time clock and took school supplies home without being disciplined (10T117-10T119). Tucker also claims Blanchard received the lead custodian job over Jerry Williams, even though Williams had more experience, and Tucker was required to perform Blanchard's assignments (10T119-10T120). Tucker further asserts that Blanchard received an outstanding evaluation, while Tucker received a less than satisfactory one, even though Tucker was performing both his and Blanchard's jobs (11T6-11T10; CP-96, CP-97). Finally, Tucker claims Dubuque and Blanchard received overtime pay even though Tucker had more seniority and that they received it for simply "showing up to the job" (9T127-9T128, 11T10).

Tucker, however, offered no proof or corroboration in support of his examples of preferential treatment given to Dubuque and Blanchard for signing their statements involving Tucker. Thus, I do not credit his testimony about the alleged preferential treatment.

11. Dubuque never handled Tucker's complaints against the Board. As vice-president, Dubuque was not involved in members' grievances; rather, then Association President Jerry Williams, as well as NJEA representatives Ken Wiggins and Pamela Klesch were responsible for grievance processing. Dubuque would inform Williams of any problems that members experienced (1T60, 1T105-1T106, 1T63-1T64, 1T99).

12. Dubuque commented to his fellow custodians that Tucker ruined the Board policy whereby custodians would be permitted to cash their paychecks during work hours. Dubuque assumed, based on rumor, that Tucker somehow was involved with this policy change; however, he did not know this for sure (1T56, 1T64-1T66, 1T96). Ultimately, Dubuque admitted he made a mistake in blaming Tucker for the change in the check cashing policy (1T93-1T94).

13. Dubuque was never asked to testify on the Board's behalf that just cause existed to terminate Tucker; nor did he make comments to the NJEA or GRSPA representatives not to take Tucker's case to arbitration (1T70-1T71).

The Representation of Tucker by NJEA UniServ Staff

14. Pamela Klesch has been employed by the NJEA since 1993, as a UniServ Representative in Essex County (1T109-1T110; 2T70-2T71, 2T74). She is supervised by Richard Gray, Assistant Director for the NJEA Central Region Uniserv Division (3T4-3T5, 3T16). The prime objective of the NJEA is to protect its members employment and civil rights (1T120-1T121; CP-4). Prior to becoming an NJEA representative, Klesch was vice-president and grievance-chair in the Morris School District (2T70-2T71).

Klesch's duties as UniServ Representative include servicing the members in Glen Ridge. Ken Wiggins had previously serviced this area (1T109-1T111, 2T75). When Klesch took over the

area, she reviewed the files Wiggins turned over to her, including Tucker's (1T110-1T111, 1T115, 2T74-2T75, 2T124).

Klesch and Wiggins reviewed Tucker's files together and Klesch was told by Wiggins that Tucker had a pending civil rights matter (1T114-1T115, 2T75-2T76, 2T146). Wiggins said that Tucker was alleging discrimination by the Board and Klesch saw claims by Tucker that he was singled out (2T126, 2T146). Wiggins never told Klesch that Tucker had a track record of outstanding performance or that he was classified as the District's "wonder boy" (2T124-2T125). Further, Wiggins never told Klesch that after "Tucker blew the whistle" on the Board in February 1993, the Board built up numerous reprimands and started to compile a paper trail (2T125). Klesch noticed that Tucker had written to the GRSPA asking them to stand up for his rights and fight for him (1T116). Klesch also reviewed several memoranda and disciplines regarding Tucker's job performance (2T77-2T78; R-1, R-2, R-3, R-4).

15. Tucker was terminated on November 3, 1993. He received a letter that day from Haberthur informing him that on November 2, 1993, the Board had voted to terminate his employment for cause, effective immediately. It stated that his termination was based upon the following reasons: 1) falsification of employment records; 2) unsatisfactory work performance; 3) insubordination; 4) unbecoming and subversive conduct and 5) failure to correct conduct and attitude after prior warnings (2T78-2T79, 7T28; R-5). Tucker's alleged refusal to wear a

respirator was not listed as a reason for his termination (2T82; R-5).

16. After his termination, Tucker immediately called Klesch and told her he wanted to file a grievance. Klesch told him she was going to contact then Association President Henry Haas to file the grievance (728-7T29).

Tucker told her he had great trepidation about Klesch contacting Haas, since Tucker had previously had problems with the Association while Haas was president. Tucker told Klesch that the GRSPA would not file a grievance for him. Klesch told Tucker that she was going to schedule Tucker to meet with an attorney (7T29-7T30).

17. Since Tucker did not trust the GRSPA, he scheduled an appointment with his own attorney to review his options (7T29-7T30). The attorney told Tucker to file a grievance on his own because if the Association waited too long to do so, he would lose his rights. Tucker did file his own grievances on November 19, 20 and 23, 1993 (7T31-7T33, 9T76).

The Initial Consultation with attorney Randi Doner

18. As promised, Klesch scheduled a consultation for Tucker with NJEA attorney Randi Doner, of the law firm Balk, Oxfeld, Mandell & Cohen on November 23, 1993. The purpose of the consultation was not to have Doner represent Tucker at his arbitration; Klesch was going to be his representative, as was

regular NJEA practice for both Association and other NJEA members. Rather, the consultation was for Doner to assess Tucker's situation (1T122-1T123, 1T132, 2T84, 2T151, 7T30, 9T73; CP-5). Tucker, however, believed Doner would now be handling his arbitration and civil rights matters (10T46).

19. Klesch wanted Tucker to see Doner because Klesch was concerned about his case, as she knew there was a paper trail to support his termination. She wanted an attorney to review Tucker's case and wanted Tucker to know that although the NJEA intended to take his case to arbitration, this did not mean they could guarantee his job back (2T84, 2T91, 2T143). Klesch was also concerned about Tucker because she knew the GRSPA declined to take a prior grievance of his to arbitration. As a result, Tucker had filed an unfair practice charge against the GRSPA which he subsequently withdrew (1T112-1T114, 1T118, 2T86, 2T107, 2T122, 5T139-5T140, 9T31-9T32; CP-25).

20. At the consultation, Klesch, Doner and Tucker discussed the termination and its basis (2T86, 9T73). Doner reviewed Tucker's file, including the memos on his performance and absenteeism, specifically, R-1 through R-4. Doner was interested in the fact that one of the reasons for Tucker's termination was falsification of employment records. According to Tucker, this was false and Doner later confirmed this. The Board, in attempting to contact Tucker's prior employer, contacted the wrong company (1T123-1T124, 2T43, 2T45, 2T84, 7T33-7T37, 9T73, 11T15-11T17; CP-26, CP-51, CP-52).

Klesch and Donor wanted to show Tucker that he had problems with his case. Tucker was shown the April 1993 "final warning" to him by Bossart (2T42-2T44, 2T103-2T104). According to Klesch, Tucker was told at his meeting with Doner that there was just cause for his termination (2T42-2T43, 2T48).

21. At the meeting, Klesch told Tucker they would be meeting more often to prepare for his arbitration, as the arbitration date grew closer (1T123). Klesch and Doner were concerned with the civil rights matter, specifically whether Tucker had heard from the Division on Civil Rights as to whether his claim had merit (7T33-7T35). Tucker knew that NJEA policy with respect to providing an attorney for a member with a claim before the Division on Civil Rights was that if the Division determines there is merit to the case, the NJEA will then provide that member with an attorney (1T133, 1T163-1T164, 2T85, 2T146, 3T26-3T27, 3T31-3T32). Tucker brought several documents to the meeting but Doner did not view them. She just wanted to make sure Klesch had filed a grievance for Tucker (7T33-7T34).

22. Klesch next sent Tucker an unsigned grievance; she told him she had to send it back to the Association president for signature. She never followed up with Tucker (7T36).

The Association, specifically Klesch, then filed a grievance over Tucker's termination sometime before November 29, 1993 (1T129-1T130, 2T88-2T90,; R-6). According to Klesch, the grievance was timely and properly filed; Tucker, however, believed

it was not (1T126, 1T129, 2T46, 10T109-10T110). I find no evidence that the Board considered the grievance to be untimely.

The grievance listed several violations: 1) termination without cause; 2) violation of the Open Public Meeting Act; 3) lack of 24 hour notice before effecting the termination; and 4) not allowing Tucker to have an Association representative (1T125-1T129, 1T131, 1T144-1T145, 2T50-2T52, 2T158, 5T188; J-1).

The NJEA did not file a claim alleging a violation of the Open Public Meetings Act before the Department of Education or in Superior Court because such a claim was part of the grievance (1T161-1T162, 2T50-2T51, 2T158-2T159, 5T188, 10T50-10T51). In any event, NJEA believes such cases are futile because the law simply requires the employer to send a notice; it can then lawfully retake the action. Thus, a termination still stands once the employer gives the terminated employee the required notice (4T166-4T167, 5T96-5T97).

23. Tucker's grievances and the NJEA grievance were consolidated. Tucker asked the NJEA for an attorney because he did not believe the NJEA's grievance raised all of the claims included in his grievances. Klesch told Tucker that the Association would provide an attorney in the future, but not now (2T103, 7T51, 9T110). Klesch asked Tucker to advise her of anything he felt pertinent to his grievance(7T60).

24. In a November 24, 1993 letter, Klesch informed Tucker that she would contact him as soon as she arranged a

meeting with Haberthur on Tucker's grievance and asked him to notify her of anything he received from the Division on Civil Rights (2T92-2T93; R-8). Haberthur, however, returned the grievance to Klesch because it had not been filed with Tucker's supervisor first, as required under the parties' collective agreement (1T126, 2T46, 2T89-2T90, 7T45-7T47, 7T51; J-1, R-6).

25. Klesch then refiled the grievance with Dr. Nell Sanders, Tucker's supervisor (2T94; R-7). Sanders subsequently sent Klesch a December 23, 1993 letter expressing an interest in having a meeting (2T95; R-9). Sanders asked Klesch if she wished to waive the level one grievance conference; if so, she would issue a written reply (R-9). Klesch agreed to waive the conference because Sanders lacked authority to remedy the grievance (2T96, 2T145-2T146, 7T47-7T49; R-10).

26. Klesch then pursued Tucker's grievance to level two (2T97-2T98; R-12). A level two grievance meeting was scheduled in January 1994 and then rescheduled for February 8, 1994 (2T97-2T98; R-13). Klesch asked Tucker to schedule a meeting with her prior to the level two meeting (R-13). Tucker again asked Klesch for an attorney to represent him. Klesch refused, explaining that one was not needed yet, but Tucker would get one later (7T48).

The level two meeting was actually held in March 1994 with Board attorney Mark Blunda, Haberthur, Tucker and Wiggins, who stood in for the hospitalized Klesch (2T99-2T100; R-14). The grievances were denied by the Board, but not on the basis that they were untimely (2T100, 9T83; CP-6, R-14).

27. Klesch then pursued the grievance to level three (2T100; R-15). A level three grievance meeting was scheduled in March 1994 between Bossart, Blunda, Tucker and Klesch (2T100-2T101).

Tucker had been notified of the tentative date of the meeting, but he was never told the date was definite. On the date that had been tentatively set, Tucker called Klesch's office to confirm the meeting. Since the meeting was confirmed at the last minute, Klesch had failed to document it on her office calendar (1T173-1T175, 2T147-2T148, 7T51-7T52). Therefore, although Klesch was already at the meeting, the personnel in Klesch's office did not know it. Tucker then called the Superintendent's office and was informed that the meeting was on and that everyone was waiting for him (7T52).

When Tucker arrived at the meeting, he saw Klesch and Board representatives talking and drinking coffee. Tucker derived from this that Klesch was "in cahoots" with the Board (1T175, 2T101, 7T53-7T55). Tucker was upset and did not trust Klesch after this incident (2T13-2T14, 9T91-9T92).

28. Klesch had not discussed Tucker's case with the Board prior to his arrival (1T175, 2T101, 2T148). Upon his arrival, Klesch took Tucker into the hallway and told him it was inappropriate to ask for a multi-million dollar remedy in settlement of the grievances. Tucker perceived this as a reprimand. The pair went back into the meeting. Blunda asked

Tucker if he was representing himself or if the NJEA was representing him; Tucker responded the NJEA (2T9, 2T14, 2T148-2T149, 7T55-7T56, 9T88-9T89).

Blunda then asked Klesch to present the grievance. Klesch responded that she did not bring her file on Tucker; she asked Blunda if she could use his. Tucker objected to this; he asked to tape the meeting (7T56-7T57, 9T88-9T90).

Ultimately, Klesch and Tucker presented the case (2T101, 2T108). Klesch did not discuss all the reasons the Board cited for Tucker's termination; however, some were already contained in Klesch's grievance (2T134-2T135). Neither Tucker nor anyone else raised the respirator incident cited in the Dubuque and Blanchard statements (2T83, 2T108-2T109, 2T101-2T102). Tucker did not express his belief that Dubuque and Blanchard had committed fraud (2T109).

29. After the meeting, the Board denied the grievance by issuing a decision adopting the findings and resolutions submitted by the Superintendent. The Board did not meet with Tucker and NJEA representatives; however, this is not required under the agreement (2T14, 2T101-2T103, 2T161-2T162, 9T86-9T87; R-16).

The Board's decision reads:

> C. The Board of Education had more than sufficient cause for the termination of Mr. Tucker. He received a series of warnings throughout 1993 regarding his unsatisfactory job performance and conduct. Following a less than satisfactory performance evaluation in April 1993, Mr. Tucker received a final warning from the Superintendent of Schools regarding his poor attendance, poor performance and poor attitude.

The final warning concluded that:

> Make no mistake, this is a final warning to you to improve your attendance, your performance, and your attitude as an employee of this District. Failure to do so will result in my recommendation to the Board of Education that we terminate your employment.
>
> Despite this final warning, Mr. Tucker's performance and attitude continued to be unsatisfactory in the Fall of 1993. When Mr. Tucker was put on notice regarding these deficiencies, he responded with insubordinate and subversive memos and challenges to the assignments in question. Mr. Tucker's unbecoming conduct included efforts to use students as pawns in his battle with the school administration. The termination of his employment does not violate the Agreement.

The decision did not reference Tucker's failure to wear a respirator cited in the Dubuque and Blanchard statements (2T108; CP-1, R-16).

30. Tucker then, by letter, complained to Klesch about her drinking coffee and discussing him and his case before his arrival at the meeting (7T59). Tucker believed Klesch had failed to represent him properly up to this point. She had not attended his unemployment hearing; rather, he had to prove that he did not falsify his employment application without NJEA assistance. Also, Klesch had not yet provided him with an attorney and, in his estimation, did not file his grievance timely. Further, Klesch had not notified him of the level three meeting and when he arrived at the meeting, she reprimanded him. She also did not bring her own file to the meeting, but had to use Blunda's (1T124, 7T37, 9T87-9T90, 9T110-9T111, 10T87; CP-3; CP-45).

31. Klesch next filed for arbitration (2T101-2T102). NJEA field representatives such as Klesch generally take members' cases to arbitration (1T126, 1T164, 4T54). The NJEA discourages the use of attorneys in arbitration; they want field representatives to handle them because they are trained to do so (2T72, 2T121, 2T157-2T158, 3T117-3T118, 3T124, 4T54, 5T123-5T124). Only in very rare circumstances do attorneys handle arbitrations (1T126, 1T164, 3T118, 4T54). In terms of the NJEA policy on the use of attorneys in arbitrations, it makes no difference if the Board uses an attorney, and almost always does (3T118). Klesch has attended arbitration workshops since she became a Uniserv Representative (2T72). As a Uniserv Representative in Essex County, she has processed six cases through arbitration, all without an attorney (2T71-2T72, 2T121).

Tucker kept insisting verbally, and in writing, that the Association provide him with an attorney for his arbitration (1T126, 1T163-1T164, 9T79, 9T150). Klesch explained to Tucker many times that it is not NJEA practice to use attorneys in arbitrations (1T164).

32. In April 1994, Tucker wrote to the Executive Director of the NJEA, Robert Bonazzi (3T122). Tucker's letter was then forwarded to UniServ Director Vince Giordano who then forwarded it to Richard Gray, Klesch's supervisor (3T7, 9T108). In his letter, Tucker expressed concern that his Association was not representing him and that he wanted an attorney (2T6, 3T7-3T8, 3T19, 3T22,

7T61). Also, in April 1994, Tucker wrote to GRSPA President Henry Haas, informing him that he would be suing certain union members in order to clear his name (9T6-9T9, 9T12; CP-66).

33. At Giordano's request, Gray scheduled a meeting with Tucker. Tucker, Gray and Klesch then met on April 25, 1994 in the NJEA's South Orange office (1T164, 3T8, 3T21, 7T62). At the meeting, Tucker reiterated the concerns expressed in his letter. He told Gray several times that the Association was not fighting for him or standing up for his rights and that he wanted an attorney (3T9). Tucker also told Gray that he did not trust the Association, and that he was concerned over the false statements of Association members Dubuque and Blanchard (3T9, 2T16-2T18, 7T62-7T64).

Gray discussed how the NJEA was going to continue to represent Tucker and, specifically, Tucker's request for an attorney (3T22, 7T64, 7T67). Gray also asked Klesch to speak to Blanchard and Dubuque (2T16-2T18, 3T10-3T11, 3T18, 7T67). There was also a discussion as to (1) whether the Association could fully represent Tucker in light of the statements, and (2) the possibility of Tucker using his own attorney (2T26, 2T28, 7T67-7T68). Klesch did not view Blanchard's and Dubuque's statements as posing a problem with regard to the Association's ability to represent Tucker, even though she acknowledged the Board could use the statements against him (2T30, 2T55). Gray informed Tucker that nothing could be done about the statements (3T11).

Klesch also explained to Tucker that they were waiting for a list of arbitrators from the American Arbitration Association and explained the procedure for choosing an arbitrator (7T65-7T66). Gray also recalls discussing tapes with Tucker, but he does not recall listening to or receiving them (3T30-3T31).

34. Gray was concerned with how to provide Tucker with proper representation, not the merits of the case (3T25-3T26, 3T40-3T41). Gray believed Tucker had been given proper representation by the NJEA thus far, since Tucker had already been assigned a field representative, pursuant to standard practice (3T26). Gray was considering Tucker's request for an attorney, although it was not NJEA practice to provide one (3T26).

From Tucker's letter to Bonazzi and the discussions in which they engaged, Gray gathered that Tucker believed the statements of Dubuque and Blanchard would constitute a major part of the Board's case against him (3T11-3T13, 3T105, 3T107). Thus, Gray concluded that a principal part of Tucker's case involved allegations by and against NJEA members, and, specifically, GRSPA leaders (3T40, 3T105). Gray felt that Tucker was more interested in going after the Association then the Board (3T106-3T107). Gray knew that this aspect would present a major conflict that he would have to deal with throughout his involvement in the Tucker case. It was clear to Gray that there was a significant problem as to how Tucker viewed his case and what the NJEA could legally to do to represent him (3T40, 3T105-3T106).

35. Thereafter, Tucker called and wrote Gray several times about the status of his case. Gray eventually called him back and told Tucker he wanted him to see an attorney (3T22, 7T68, 9T92).

The Consultation with attorney Louis Bucceri

36. The NJEA then had Tucker meet with attorney Louis Bucceri for a consultation and evaluation on May 6, 1994 (1T162-1T166, 3T22-3T24, 7T68-7T69). The consultation was for the purpose of determining the best way to provide Tucker with representation. The NJEA claims this was explained to Tucker; Tucker, however, believed that Bucceri would now be representing him, because Bucceri requested a postponement for Tucker with regard to a conference before the Division on Civil Rights (9T109, 10T29-10T31, 11T30-11T31).

At the meeting, Tucker told Bucceri that the leadership of the Association was colluding with the Board and that individuals in the Association were a primary source of the discriminatory treatment he received (9T9).

37. After the meeting, Klesch and Tucker received a letter from Bucceri (1T166-1T167, 7T70; CP-7). Bucceri confirmed that he had met with Tucker on May 6, 1994 to evaluate Tucker's legal position and render an opinion as to whether or not the NJEA should fund his representation. Bucceri further explained that he could not ethically render an opinion as to the merits of Tucker's claims, because Tucker's allegations establish a conflict of interest

between himself and the officers and members of his local Association. Bucceri continued:

> This conflict of interest became apparent very early in my meeting with Mr. Tucker. He readily acknowledged his contention that the leadership of his local during 1992-93 was in collusion with management and that he believed that individuals in the Association were a primary source of the allegedly discriminatory treatment he received. He believes, whether accurately or not, that the source of his problem was his co-workers.
>
> In my opinion, the only way a representative could even attempt to prove Mr. Tucker's case would be to try to prove discrimination by some of his local Association officers and fellow members. This is the case regardless of whether Mr. Tucker's allegations are true or not.
>
> It would be a conflict of interest for any attorney paid by N.J.E.A. to attempt to prove wrongful conduct against a local N.J.E.A. affiliate, its officers or even its members. This is true even though each local is a separate corporate and financial entity.
>
> Accordingly, without rendering any opinion as to the merit, or lack of merit, of Mr. Tucker's allegations, I am compelled to advise that it is impossible for N.J.E.A. to fund Mr. Tucker's civil rights litigation or any other form of litigation. In each case, the Board will assert performance and other deficiencies in support of its actions. In each case Mr. Tucker's representative will be forced to accuse the officers and members of the local of wrongful actions in order to resist the Board's claims.
>
> For his part, Mr. Tucker could never be satisfied that his representative's actions were not affected by the source of their compensation. He believes that he has already been the victim of corruption and/or collusion on the part of state investigators employed by the Division on Civil Rights and various health and safety agencies. His concern would extend equally to people with Association affiliations. [1T166-1T167, 2T31, 2T160; CP-7].

Bucceri, accordingly, concluded that he could not recommend NJEA funding Tucker's litigation (1T169, 3T33; CP-7).

38. Tucker did not agree with Bucceri's finding that it was a conflict of interest for an NJEA attorney to attempt to prove wrongdoing by NJEA officers or members (9T101). Tucker felt the NJEA could represent him 100 percent, if they would stop their illegal conduct with the Board (10T41, 11T31).

Tucker believed he had been set-up and that the NJEA never intended to represent him (7T71). Tucker had to now represent himself in his civil rights matters, and in July 1994, he went before Administrative Law Judge Samuels. The Judge asked Tucker why the NJEA was not representing him; Tucker explained that the NJEA thought there was a conflict of interest (7T75-7T76).

39. Despite Bucceri's letter, Klesch still fully intended to take Tucker's case to arbitration (1T169, 2T29). Gray did not speak to Tucker until August 1994, because he first had to clear significant hurdles to continue to provide representation to Tucker. The main hurdle was Bucceri's opinion that the crux of Tucker's case involved Tucker's charges against other NJEA members; Bucceri believed it would be a conflict of interest for the NJEA to represent Tucker in those matters (3T35-3T36, 3T130). Gray reiterated this to Tucker. He explained that the NJEA would not be able to represent Tucker to the extent he was requiring the NJEA to pursue charges against fellow NJEA members (3T50).

40. In a July 21, 1994 letter, Tucker complained to Bonazzi of the NJEA that he was being "sold out" and discriminated against by the NJEA (9T109-9T110; CP-35).

41. In August or September 1994, a second meeting between Klesch, Gray and Tucker took place. Tucker was then told that the NJEA decided to provide him with an attorney (2T38, 3T45, 7T82).

Klesch had recommended that Tucker be provided with an attorney because Tucker had been insisting on one all along, and because Tucker did not trust Klesch (1T171-1T173, 2T107; CP-3). Tucker claims he received an attorney only after he threatened to come before a panel of lawyers in Trenton and present the NJEA's involvement in wrongdoing (9T152-9T153). He also claims he was told three times by Gray and Klesch that he would get an attorney before one was finally assigned (9T111). Although the NJEA did not think Tucker's case warranted an attorney, he received one, nevertheless, because he constantly complained about the representation he was receiving and because the NJEA thought it was in everyone's best interest to provide one (2T151, 3T123, 4T54, 5T141).

Tucker was told that Attorney Nancy Oxfeld would be representing him in his civil rights matters and the arbitration. He was also told that Oxfeld would represent him in his whistleblower case, unless she found that the case lacked merit (7T84).

Tucker, however, still did not trust the NJEA and he told this to Gray. Gray then explained to Tucker that Tucker could not

file charges against the GRSPA or the NJEA; otherwise, the NJEA would not provide him with an attorney. Tucker agreed, as long as the attorney represented him "100 percent" (3T52-3T53, 7T85). Tucker's main concern was that he wanted full, proper representation. Gray's main concern was to do the NJEA's best to uphold Tucker's rights and to provide him with representation (3T43, 3T47, 3T67, 3T78, 3T93-3T94).

42. At this meeting, Tucker also learned that the Board and the NJEA had agreed upon Joel Weisblatt as the arbitrator for his case (2T32, 2T81, 2T109-2T110, 7T82). Tucker raised the issue of how the arbitrator was selected. He had learned that the Commission, rather than AAA, was used for Weisblatt's selection. He had seen this referenced in a letter from Blunda to Klesch and he was greatly concerned about this change (2T35, 2T80-2T81, 2T136, 7T83).

The change was explained to Tucker. The NJEA and the Board were in negotiations at the time Tucker's grievance was filed, and early in the negotiations, the parties decided to immediately switch from AAA to the Commission's procedure for the selection of an arbitrator. The NJEA made this switch because the GRSPA lacked funds; the Commission does not charge a fee for its services, while AAA does; and many of the same arbitrators belong to both panels. Further, the Association and the Board adopted the same procedure as used by the teachers (1T147-1T148, 2T33-2T34, 2T80-2T81, 2T136-2T137).

Neither Tucker nor any other Association member was informed of this agreed upon change. Tucker never received a copy of the amendment to the agreement reflecting this change (4T113, 7T81, 7T126-7T127). This change would ultimately be voted on by Association members as part of the overall contract ratification (1T157, 2T34-2T35).

Tucker constantly complained about the collective agreement being amended to use the Commission's arbitrator selection procedure and continuously ask to see a copy. The NJEA did not look into Tucker's complaints or get him a copy of the amended agreement because they thought it was irrelevant whether the arbitrator was chosen through the Commission rather than AAA. They did not believe there was any substantive difference between the procedures used by the Commission and AAA, except for the fee (2T81, 4T112, 4T117-4T118, 5T191-5T193).

Klesch and Gray discussed Weisblatt's qualifications and told Tucker that if Weisblatt was not acceptable, someone else would be selected (2T35, 2T110). Tucker, however, agreed to use Weisblatt (2T37, 2T110, 2T112).

Tucker was also told that Klesch would try to contact Dubuque and Blanchard but that they may not change their testimony. Gray memorialized all of this in an October 12, 1994 letter to Tucker. In the letter, Gray also assured Tucker that the NJEA would do their best to ensure that Tucker's rights were upheld (3T46-3T47, 7T89-7T90; CP-8).

Klesch testified that she did finally speak to Dubuque and Blanchard in person about the statements. She stated that they both told her they did not witness the event sworn to in their statements, but that they did not believe the statements were false (2T21-2T22). However, at other times in her testimony, she stated that she made two attempts to contact them, but they did not want to speak to her (1T151-1T152, 2T19, 2T29-2T30). Dubuque testified that no one from the NJEA spoke to him about his statement (1T54-1T55, 1T69-1T70, 1T79). Based on the Klesch and Dubuque testimony, I cannot find that Klesch, nor anyone else from the NJEA, ever spoke to Dubuque or Blanchard about the statements.

Attorney Nancy Oxfeld is Assigned to Represent Tucker

43. Nancy Oxfeld has been with the law firm of Balk, Oxfeld, Mandell and Cohen since 1990 and is one of its shareholders (4T18). Her firm has been retained by the NJEA for several years, including all times relevant here (4T18-4T19; CP-8).

Gray chose Oxfeld to represent Tucker out of the large NJEA attorney network because he believed Oxfeld was one of the NJEA's better attorneys and Gray wanted to provide Tucker the highest quality representation. Once Gray concluded that a distinction had to be made as to what Tucker wanted and what was ethically possible, Gray wanted an attorney he knew could analytically handle the situation. Gray viewed Oxfeld in that light; she had the experience and analytical skills that would enable her to maintain the fine

line needed in the Tucker matter (3T120-3T121, 3T127-3T128, 5T137; CP-8).

44. Oxfeld learned in September 1994 that she would be representing Tucker. Oxfeld was advised by the NJEA that Tucker had an arbitration, a civil rights case and a "whistleblower" claim. She was to represent him in the arbitration and civil rights cases and was to evaluate the "whistleblower" claim and determine whether it had merit so as to qualify for NJEA representation (1T170-1T171, 2T41, 4T19, 5T56-5T57, 5T80, 5T187-5T188). She was not told then that the Tucker case involved a conflict of interest between the GRSPA/NJEA and the Board (4T25). She was told there was a problem in terms of deadlines; that was her biggest concern at the outset (4T23, 4T25). Oxfeld requested that the NJEA provide her all the materials related to Tucker's cases (3T38-3T39).

45. Tucker did not have the right to take his discharge to arbitration on his own; he needed the involvement of the GRSPA. He had the right to pursue his civil rights case himself; however, Oxfeld was assigned to represent him in that matter (5T57). She notified Judge Samuels that she would be representing Tucker (4T20).

46. She met with Tucker in September 1994. Tucker brought numerous documents to the meeting, but Oxfeld did not review the merits of his cases then, because she was about to embark on a four week vacation (4T20, 7T87-7T88, 9T135). The initial meeting was for the sole purpose of reassuring Tucker that she was there for him;

that although she did not have time to do anything for him immediately, she intended to meet again with him upon her return, after she had reviewed his cases (4T21, 5T31-5T32).

Oxfeld advised Tucker to prepare responses to the Board's discovery requests in his civil rights matter, specifically, their interrogatories and their request for admissions (5T60-5T61). Since Tucker was approaching a deadline on the interrogatory answers, Oxfeld asked him to prepare draft answers that they could review when she returned. Once the answers were accurate, she would then revise them into the appropriate form and send them to the Board. This was her usual practice (4T21-4T22, 4T25, 4T34, 5T61-5T63).

47. Oxfeld acknowledged that there are certain interrogatories a client may not have to answer. However, she did not expect Tucker to prepare answers that would go directly to the Board. She intended to review Tucker's draft answers; if there was a question that she thought should not have been asked, or that Tucker did not have to answer, she would not send the answers to those questions to the Board. She thought it was appropriate to have Tucker prepare draft answers, especially in light of the time pressure. Oxfeld did not assign another attorney or paralegal to help Tucker with the interrogatories because that is not her usual practice (4T22-4T25, 10T33).

Oxfeld also told Tucker if he wanted to pursue the "whistleblower" claim, he should file it because the statute of limitations had almost run and she did not have time to make the

filing. Gray also told Tucker this (3T48-3T49, 4T154-4T155, 7T88; CP-8). Oxfeld also asked Tucker to lay out the facts of his arbitration case so she could learn them (7T88). She memorialized their discussions in a September 22, 1994 letter to Tucker and also scheduled a second meeting with Tucker for November 7, 1994 (R-23; 9T135).

48. Oxfeld also wrote to Board attorney Mark Blunda and Judge Samuels to request that the deadline for answering the interrogatories be extended, because she had just gotten involved with the case and was unfamiliar with it (4T22; CP-13). Oxfeld referenced in the letter that she would be helping Tucker prepare his answers (6T90-6T92; CP-13). However, she did not do so. Tucker believed this to be evidence of a lack of representation on Oxfeld's part (9T13).

49. Tucker hand delivered an October 3, 1994 chronology of his case to Oxfeld. Tucker claims he included audio tapes in the chronology. However, Oxfeld does not recall receiving the tapes referenced or any other tapes. She did not contact Tucker to ask where the referenced tapes were (5T21-5T22, 5T141-5T142, 5T167, 7T91-7T93, 10T53-10T55; CP-22).

50. Oxfeld spent numerous hours on Tucker's case reviewing all his documents (4T43, 4T80, 5T24, 6T55). Upon reviewing Tucker's files, Oxfeld learned that Doner from her law firm had previously met with him. She also learned that Tucker was not happy with Jerry Williams, who was the GRSPA president at the time of Tucker's

termination, because of comments he made at a February 19, 1993 meeting (4T58-4T61, 5T119-5T120).

From Tucker's letters and the Bucceri letter, Oxfeld also concluded that a conflict of interest existed which precluded her from representing Tucker. She learned that Tucker believed his termination was due to a conspiracy between the GRSPA, including its officials, and the Board, including Board members, the Superintendent and the Board Secretary/Business Administrator. She realized that Tucker partially blamed the GRSPA for his termination (2T84, 4T37, 4T44-4T45, 4T80, 5T31, 5T58, 5T120-5T123, 5T134, 5T210-5T211). She also learned Tucker wanted the GRSPA to force Dubuque and Blanchard to change their statements and that Tucker had written letters to various people complaining about GRSPA and NJEA representatives (4T37).

Oxfeld realized that under the Rules of Professional Conduct, she could not represent someone who claimed that her clients, the GRSPA and the NJEA, had conspired with the Board to "do him in" (5T17-5T18, 5T58-5T59). Oxfeld discovered the conflict of interest the night before her meeting with Tucker scheduled for November 7, 1994, but she did not advise anyone from the NJEA about it then (4T46, 5T58).

51. Oxfeld met with Tucker on November 7, 1994 (4T29, 7T94, 9T136). Initially, the purpose of the meeting was to review the draft interrogatory answers and admissions Tucker had been asked to prepare, and to review the merits of Tucker's claims (4T34-4T35,

4T69, 9T136-9T137). However, Oxfeld could not adhere to this agenda because she felt that the conflict of interest that precluded her from representing Tucker had to first be addressed (4T36, 9T137-9T140, 10T33).

Thus, Oxfeld sought to review two things with Tucker: 1) that if Tucker still believed in a conspiracy between the Board and the GRSPA/NJEA, there was a conflict that precluded Oxfeld from representing him because the GRSPA/NJEA is her client and; 2) she thought Tucker's concerns could be addressed without the conflict issue surfacing, as she could impeach witnesses, specifically, Dubuque and Blanchard, through cross-examination rather than affirmatively prove wrong doing (4T37-4T38, 4T43-4T44, 5T79, 7T94). She did not find it improper to attack the credibility of union members. Oxfeld has had much experience over the past 20 years with union members testifying against grievants who are fellow union members (4T82, 5T30, 5T79-5T80).

52. Oxfeld called Wiggins into the meeting because he had worked with Tucker previously. She told Wiggins about the conflict of interest (4T46, 7T94). Tucker, Wiggins and Oxfeld spent several hours going over the conflict issue (4T38, 7T94-7T95). According to Tucker, Wiggins lied at this meeting about a February 19, 1993 meeting between Tucker, Wiggins and Jerry Williams because Wiggins was being paid by the NJEA (9T113-9T114, 9T119-9T122).

Tucker was upset. He made up his mind at this point that the NJEA was not representing him, but was simply tricking him into

prolonging his cases (7T94-7T95). Tucker wanted the GRSPA/NJEA to force Dubuque and Blanchard to retract their statements. Tucker believed that GRSPA was obligated to obtain such a retraction. Tucker contended the statements were lies, deliberately made as part of a conspiracy to get rid of him (4T39, 5T78, 5T118, 5T134-5T135).

53. Oxfeld never spoke to Dubuque and Blanchard. She did not find it necessary; she could cross-examine them at hearing (4T41, 5T27-5T28, 5T149-5T150). Further, Gray told her that Klesch would speak to them (4T42). Oxfeld believed each of them made the statement in the capacity of co-worker, not GRSPA officer or member; the statements were on Board letterhead, with no mention of the GRSPA (5T157-5T158, 6T32-6T35). According to Oxfeld, it would not be a conflict of interest for the GRSPA vice-president to sign a statement, even a false one, against a fellow member (4T42, 5T30-5T31, 6T37-6T38).

54. Because of the conflict perceived by Oxfeld, no work was accomplished on the substance of Tucker's case at the November 7, 1994 meeting. Oxfeld told Tucker that in order for her to represent him, he would have to sign a certification waiving any claims he might have against the GRSPA and the NJEA. She wanted Tucker to choose between the GRSPA/NJEA providing him with representation and naming the GRSPA/NJEA as the cause of his troubles (4T47, 7T96, 9T140-9T141).

55. Gray later called Tucker and asked about the meeting. Tucker told Gray that Oxfeld had brought up the conflict of interest

issue. Tucker reminded Gray that in his October 1994 letter (CP-8), Tucker had already promised that he did not intend to file any claims against the GRSPA or the NJEA; thus, the issue as far as Tucker was concerned, was dead. Tucker asked Gray why Oxfeld brought up this dead issue. Tucker told Gray he was upset and warned Gray that he had spoken to an attorney who told Tucker he had a great case against the GRSPA/NJEA. Gray told Tucker he would speak to Oxfeld (3T53, 7T97-7T100).

56. Subsequently, Tucker received the waiver certification which Oxfeld prepared (4T48, 7T100; CP-11). Oxfeld did not show it to Gray before asking Tucker to sign it; nor did she get the consent or input of Tucker or Gray before she drafted it (3T56-3T57, 3T61-3T62, 4T49, 4T51, 10T32). She did send Gray a copy and later learned that he agreed with it (3T40, 3T54-3T55, 3T61-3T63, 4T53, 4T71).

Attached to the certification was a November 11, 1994 letter explaining the reasons Oxfeld needed Tucker to sign it if she was to continue representing him. The certification was based on her conversations with Tucker and her review of his file (6T54, 7T101-7T102). Oxfeld also recommended that Tucker consult with an attorney unrelated to the NJEA, to get advise concerning whether to sign the waiver (5T69, 5T143, 9T144-9T145; CP-11, CP-14).

57. Gray does not recall any other cases where he was concerned about a member filing charges against another member or Association leadership. He also does not recall any case in which

Association members signed false statements against a fellow member. However, under these circumstances, he did not believe it was discriminatory for Tucker to be asked to sign the certification even though no other member had been asked to sign one before (3T58).

Tucker was not obligated to sign the certification; Oxfeld gave him a choice (4T50, 6T50-6T51, 6T57-6T58). In order to adhere to the Rules of Professional Conduct, Oxfeld, as an attorney, could not represent Tucker unless he understood he could not bring claims against the GRSPA/NJEA, her client (3T40, 4T50, 4T56, 4T124, 5T7-5T8, 5T67-5T68, 5T81).

Oxfeld explained that Tucker did not need the NJEA to represent him in his civil rights or "whistleblower" cases. Further, if he had not insisted on an attorney, a non-attorney NJEA UniServ Representative would have represented him in his arbitration; the conflict of interest would then not have been an issue and, accordingly, the certification would not have been necessary (4T124, 5T68-5T69).

Oxfeld felt Tucker strongly believed in his claims against the GRSPA and the NJEA, and that if he wanted to pursue them, she would not interfere with his right to do so. She included additional details in the certification because she was concerned about Tucker misperceiving things (4T50, 4T124, 5T67).

58. In a November 14, 1994 letter to Oxfeld, Tucker indicated his disagreement with the certification (4T64, 7T101-7T102; CP-15). He stated his belief that Oxfeld never

intended to represent him (7T101-7T103). Oxfeld knew then that Tucker would not sign the certification (4T67).

According to Oxfeld, there is not necessarily a set procedure whereby an attorney must apply to an administrative law court before withdrawing from a case. Oxfeld did not write to Judge Samuels and withdraw from Tucker's case immediately after the November 7, 1994 meeting because she did not want Tucker to rush his decision about whether or not to sign the certification (4T66, 7T104).

59. In a November 27, 1994 letter to Judge Samuels, Tucker explained that Oxfeld no longer represented him because he would not sign the waiver certification. He asked for a postponement because of this. In December 1994, Oxfeld wrote to Judge Samuels officially informing him that she could no longer represent Tucker because of the conflict (4T68, 7T105; CP-16, R-18).

In December 1994, a conference call between Judge Samuels, Blunda and Tucker took place. At Tucker's request, Judge Samuels extended Tucker's time to answer the Board's discovery requests until February 1995 (7T105-7T107; R-18).

60. Tucker became very depressed. He wanted an attorney to represent him but he could not afford to retain one on his own. Some Glen Ridge residents put him in touch with an attorney, George Diamond. Mr. Diamond and a second attorney visited Tucker and collected his files for review. Upon review, Diamond advised Tucker that he had good cases but that they would require much time and

money. Diamond explained that he could not represent Tucker because his caseload was already large, but told Tucker the Association was obligated to pursue the cases. Diamond knew that Tucker did not want to sign the certification, but he advised Tucker that if he did and the Association still did not represent him, Tucker could then file charges against the NJEA. Tucker consulted with Diamond two or three times (7T107-7T110, 9T145-9T148).

Tucker did not want to sign the certification but he wanted to do whatever it took to pursue his cases. Thus, reluctantly, and under what he characterizes as "duress", he signed the certification on January 7, 1995. Tucker signed it because of the pressures on him. He was afraid that he would not have representation, and he wanted an attorney. Also, he felt he was losing his cases and his friends (9T143, 9T149, 10T41).

61. Tucker sent the signed certification back to Oxfeld, but did not immediately hear from her or anyone from the NJEA (7T110, 10T43). Tucker still felt depressed. He ran into his friend, Robert Lawrie, and told him how he had signed the certification at Diamond's advice, but he still had not heard from the NJEA. Lawrie then arranged a meeting with Oxfeld (7T110-7T111, 10T35-10T36).

62. Oxfeld began representing Tucker again and so advised Judge Samuels (3T76, 4T72, 5T66-5T67, 5T70, 6T65; R-21). At the end of January 1995, Oxfeld met with Tucker and Lawrie in the NJEA South Orange office (4T72, 10T5, 10T35-10T36). They went over the request

for admissions in the civil rights case. Tucker also told Oxfeld about another "whistleblower" who had gotten fired, Neil Schulman. After the meeting, Oxfeld received a letter from Lawrie indicating that he was going to help Tucker prepare the interrogatory answers that Tucker still had not prepared (4T72-4T74, 5T202-5T203; R-19). Lawrie also gave Oxfeld the telephone number of Schulman and his attorney. Oxfeld did not contact Schulman or his attorney (6T48-6T49; R-19).

63. Oxfeld scheduled another meeting for February 1995 to finish the interrogatory answers (4T73-4T74, 4T109, 5T70-5T73). The meeting took place February 7, 1995; Tucker still had not prepared the draft answers. He explained that he had been too depressed to do so. Oxfeld observed that Tucker was depressed; he was not "the sparky Mr. Tucker he usually was" (4T77-4T78, 5T82-5T84, 7T114-7T115).

Tucker broke down in front of Oxfeld, indicating that he wanted to drop all of his cases. Oxfeld would not allow him to do that. In her opinion, Tucker needed psychiatric help. She called a psychiatrist friend and scheduled an appointment for Tucker. Tucker was in no shape to answer the interrogatories. Thus, she told Tucker she would contact Judge Samuels and Blunda and secure an extension of time to prepare the answers (4T77-4T78, 5T82-5T84, 7T114-7T116, 10T12, 10T37-10T38). Although Oxfeld observed that Tucker was not able to answer the interrogatories, the February 10, 1995 discovery deadline was not postponed (4T88, 6T40, 7T120; R-21).

64. On February 16, 1995, Oxfeld notified Tucker that his arbitration was scheduled for May 9 and 16, 1995 (5T76-5T77 7T121; R-20). Up to that time, Tucker had not called to schedule an appointment to review his draft interrogatory answers (5T77).

Oxfeld then received a February 28, 1995 letter from Tucker (CP-17), indicating that he was now well enough to work on the interrogatory answers and prepare for the arbitration. He also listed several witnesses he wanted Oxfeld to subpoena for his arbitration. Tucker further asked Oxfeld for written confirmation that she had contacted Blunda and Judge Samuels and gotten the discovery deadline extended (4T85, 7T120-7T123, 10T39; CP-17).

65. Oxfeld did not then contact Tucker or any of his witnesses. From the time she received CP-17, Oxfeld did not prepare for Tucker's arbitration until she received another letter from him in May. She did not work on any interrogatory answers. Nor did she contact Tucker. Oxfeld figured Tucker was good at contacting her, and was on top of things, and that he would do so when he was ready (4T85-4T86, 4T89-4T90, 4T135, 4T153, 5T40, 5T44-5T45, 7T123, 7T131-7132; CP-12). Tucker never gave Oxfeld written draft answers to the interrogatories (5T63, 5T77, 6T46, 7T123; CP-81).

Gray usually prepares anywhere from several weeks to several months before a grievance hearing. However, he has seen people effectively prepare right on the spot (3T101-3T102).

66. In early May 1995, Oxfeld received a copy of a letter Tucker had faxed to Gray stating that it was the "eleventh hour" of

Tucker's arbitration and that no one had contacted him to work on strategy or prepare for it (4T90, 7T131; CP-12). Tucker was concerned because he had learned that the Board had contacted his witnesses, yet Oxfeld had not; nor had Oxfeld contacted him to prepare. Tucker indicated that he believed his arbitration was "staged" because no one from NJEA was preparing for it (7T129-7T133, 10T48-10T49; CP-12). Also, he again complained about the Commission, rather than AAA, being used to select the arbitrator (CP-12). Oxfeld did not respond to the letter, or inform Tucker of what she had done to prepare (4T163).

67. Oxfeld postponed Tucker's first arbitration date, May 9, 1995, because she was not prepared and had not heard from Tucker. She told this to Blunda when she asked for his consent to postpone it (4T90-4T91, 4T100, 4T135). Oxfeld telephoned the Tucker residence the night of May 8, 1995, to inform Tucker that the arbitration had been cancelled. Oxfeld did not talk to Tucker, but talked to someone she assumed was his wife (4T157-4T158, 7T135).

68. Oxfeld then met with Tucker in the NJEA South Orange office sometime after May 8, 1995 to prepare for the May 16, 1995 arbitration (4T109-4T110, 4T152, 7T136). Oxfeld tried to explain why she had not yet subpoenaed Tucker's witnesses, but Tucker was not interested in her rationale (4T114, 7T136-7T137). Tucker believed his witnesses, the Board members, should be subpoenaed because they had met secretly without notifying him and then fired him (7T137). Oxfeld did not bring any of the prospective witnesses

to the meeting. She interviewed Tucker, but did not interview any of the witnesses he suggested (4T91-4T92).

69. Oxfeld felt Tucker's case was uncomplicated and did not require much preparation. Further, it was pre-scheduled to be a two day hearing. On the first day, the Board would present its entire case and Oxfeld would then cross-examine their witnesses. She was not going to decide which witnesses to call until after she heard the Board's case. Tucker's side of the case would be presented on the second day. Oxfeld saw no point in subpoenaing or preparing witnesses that might not be needed or that might be harmful to the successful outcome of Tucker's case (4T164-4T165, 4T168, 5T83-5T87, 5T212-5T217, 7T137-7T138). Oxfeld believed even the most essential witnesses for Tucker would not have to be subpoenaed the first day because the second day was also scheduled (5T216).

Oxfeld, however, felt some preparation was necessary and believed that she had been preparing all along by learning his case. She felt it necessary to review the relevant facts and documents, but disagreed with Tucker that she needed to interview witnesses beforehand because the burden of proof was on the Board (4T164, 4T168, 5T84-5T88, 5T198, 5T214-5T217, 7T137). She explained this to Tucker when they met (5T84-5T85, 7T138). However, Tucker did not like Oxfeld's strategy. He was more interested in developing and instituting his own strategy rather than reviewing the facts with Oxfeld (5T33-5T35, 5T87-5T88, 5T212-5T214).

70. Tucker then wrote a May 15, 1995 letter to Oxfeld requesting a record of the arbitration because he did not trust the GRSPA/NJEA or the Board. He wanted his own record so he could later use it for charges he intended to file against the GRSPA/NJEA. It was at this time that he made up his mind to file the charges against the GRSPA/NJEA (7T134, 10T49; CP-21).

71. On May 15, 1995, Oxfeld responded to Tucker's May 7, 1995 fax to Gray concerning her lack of preparation for his arbitration. Oxfeld stated that she expected Tucker to be "mature enough" to contact her. She also told him that it did not matter that the Commission, rather than AAA, was used to select the arbitrator (4T147, 4T151, 5T40, 7T153; CP-19). She stressed to Tucker that his arbitration was not "staged." She wrote the letter after a phone call she had with Tucker during which he complained about the arbitration being held in the Board attorney's office. Oxfeld explained that she agreed to hold it there because Blunda had the nicest conference room, not because she was "giving in" to the Board (4T147-4T148, 7T139; CP-19). Oxfeld found it incredible that while Tucker could generate so many lengthy letters, he could not call her and schedule an appointment for what he considered such an important case - the arbitration over losing his job (5T40, 5T197).

72. Even after receiving Tucker's May 7, 1995 fax, Gray did not feel the need to check whether Oxfeld had been providing Tucker proper representation (3T77-3T79, 3T100). Oxfeld had been an NJEA network attorney for several years and there had never been a

problem with her before. Gray holds Oxfeld in high regard and never doubted she was providing Tucker the best possible representation (3T101, 3T128). Further, Gray had never checked if Klesch and Wiggins had handled Tucker's case properly (3T124-3T125). Tucker's letter did concern him about whether the NJEA could continue to represent Tucker because, in his view, the bars to representation were continually being raised (3T128).

73. Before Tucker's arbitration began on the morning of May 16, 1995, Oxfeld met with Tucker and his wife in the Board attorney's office (4T92-4T93, 7T140). Oxfeld told Tucker that she could no longer represent him because he kept bringing up claims against the union. Tucker knew then that she would no longer represent him (4T94, 7T141, 10T13-10T14).

Oxfeld then went to the room designated for the arbitration. In the room were Oxfeld, Tucker and his wife, Board Secretary/Business Administrator Haberthur, Arbitrator Weisblatt, Board Attorney Blunda and the court reporter. Without Tucker's consent, Oxfeld read into the record parts of two letters Tucker had written to the NJEA.[4/] Oxfeld wanted to place on the record the reasons she felt there was a conflict of interest (4T95-4T97, 4T99-4T101, 4T115, 7T141-7T144; J-2). The conflict was that as an attorney for the NJEA, Oxfeld was precluded from representing anyone with claims against the NJEA (4T106).

4/ These letters are further discussed in Finding No. 66 and Finding No. 70.

Tucker thought it was inappropriate for her to read those letters into the record. Tucker did not understand why Oxfeld believed that, based on these letters, he intended to file charges against the NJEA. Tucker felt humiliated (7T144-7T145).

Blunda then addressed the record. He mentioned the conflict of interest, which surprised Tucker because he had never mentioned this to Blunda. Blunda also blamed Tucker for the delays in the case because Tucker had "fired" Oxfeld and because Oxfeld had delayed the first arbitration date because she was not prepared. Oxfeld did not correct Blunda or explain that Tucker did not fire her or that he was not the cause of the delays (4T129-4T130, 7T146-7T148, 8T90). Oxfeld admits that she caused some delays (4T134).

Tucker then received permission from Weisblatt to record the meeting. Tucker wanted to tape it even though a stenographer was there, because he did not trust the stenographer since she was paid by the Board (5T91-5T92, 7T149). Tucker addressed the record explaining he was upset and humiliated. He indicated Oxfeld acted inappropriately by now declaring that she would not represent him. Tucker also thought Oxfeld acted inappropriately in making her statements in front of the Board (7T149-7T150). Tucker also raised the issue of the change from AAA to the Commission for selection of the arbitrator (4T112, 5T92-5T93; J-2). Weisblatt wanted Tucker to have representation, thus he stated he would hold open June 22, 1995 for the arbitration to be rescheduled (7T150).

74. Oxfeld's doubts about representing Tucker had surfaced the night before the arbitration, based on a fax Tucker had sent Oxfeld. She realized that based on that fax and the May 7, 1995 fax Tucker had sent to Gray, Tucker felt too strongly that there was collusion between the Board and the NJEA (4T121-4T122, 4T149-4T150, 5T89-5T90; CP-12). She realized then that she could no longer represent Tucker. However, she did not tell Tucker until the day of the arbitration because the arbitration was paid for and she wanted to place her thoughts on the record (4T123). She had not fully realized the problem when she first received the May 7, 1995 fax because she was too busy preparing for the arbitration (5T90, 5T199).

75. In a May 18, 1995 letter to Oxfeld, Tucker expressed that he thought Oxfeld's May 15, 1995 letter was sarcastic. He also complained that Oxfeld had never made a second call to make sure Tucker knew the first arbitration date had been adjourned, and never told him why it had been adjourned (4T161-4T162, 7T136, 7T139; CP-20). He also reiterated his concerns about switching the arbitrator selection procedure from AAA to the Commission and complained about Oxfeld, at the arbitration, disclosing to the Board communications between himself and the NJEA (CP-20).

The Aftermath of Oxfeld's Withdrawal

76. Tucker then wrote NJEA President Dennis Testa, explaining what happened at the arbitration. He copied Oxfeld on the letter. He asked Testa to send him a copy of the amended

contract reflecting the change from AAA to the Commission for selection of an arbitrator. He also indicated that the union was discriminating against him. He never received a response from Testa. Letters in the nature of Tucker's are not passed on to Testa after being opened by his secretary, and Testa does not recall receiving the document from Tucker or a previous letter concerning the representation provided to Tucker by the NJEA (7T5-7T10, 7T152-7T153; CP-30).

77. After Oxfeld withdrew from representing him, Tucker requested all the documents he had given her. He offered to come to her office and retrieve them if she did not want to mail them back (8T16).

Oxfeld, by certified mail, did return several documents, and offered to copy anything she had not returned (5T20-5T21, 8T14-8T15, 8T26; CP-38, CP-39, CP-40, CP-41, CP-43, CP-72, CP-73, CP-74, CP-75, CP-76, CP-77). She did not mail everything back at once (5T21, 8T15-8T21). Oxfeld referenced in her letters documents which she claimed to have returned, however, Tucker claims they were not. Oxfeld did not return all of his documents or any audio tapes (5T20-5T21, 8T20-8T23, 8T30, 8T84, 8T104-8T106, 9T105, 10T15; CP-76, CP-84).

78. In a May 18, 1995 letter, Oxfeld indicated to Judge Samuels that she was withdrawing as Tucker's representative (CP-37). Tucker believed Oxfeld would have to file a motion or necessary papers to legally withdraw from his case. Since Oxfeld

had not done this, he believed she still represented him before the Office of Administrative Law and Tucker filed papers to have Oxfeld represent him there on June 19, 1995 (10T16, 11T33-11T34).

In a June 19, 1995 letter, Oxfeld informed Tucker that the NJEA would contact him shortly concerning the further processing of his case and that Blunda had postponed the June 27, 1995 arbitration date (8T84-8T85; CP-78). Oxfeld did not check if the NJEA provided Tucker with another attorney once she withdrew (4T145). Tucker believed at this point Oxfeld no longer represented him, but believed that the NJEA was going to provide another attorney (10T19-10T20).

79. Upon Oxfeld's withdrawal, Klesch represented Tucker again (2T115, 2T117, 2T119). Klesch did not have any conversations or send any letters to Tucker once she began representing Tucker again (2T120-2T121). Klesch believes Tucker still knew she was his representative because he copied her on letters (2T120-2T121). Gray and Klesch had several conversations as to what to do next. Gray was frustrated. He did not know who was going to represent Tucker, because no NJEA attorney could represent him in light of the conflict (3T97, 3T103-3T104, 3T132, 6T59). It was decided that Tucker would be given the opportunity to hire his own attorney. Klesch did not immediately tell this to Tucker (2T115-2T118).

Around June 27, 1995, Gray had a conversation with Tucker. Gray told him the NJEA could not represent him in the arbitration, civil rights case or any other matters; however, the NJEA would

reimburse Tucker for the cost of his own attorney in any of the matters, but according to Tucker, only if he prevailed (3T104-3T105, 9T2-9T3). Gray claims he told Tucker that he did not necessarily have to prevail in his arbitration in order for the NJEA to reimburse him for attorneys fees; rather there were simply some financial conditions that had to be followed in order for Tucker to be reimbursed (3T134). I credit Gray's version of the offer for reimbursement for the arbitration, as the NJEA later placed this version in writing to Tucker (See R-17 and Finding No. 81). Tucker thereafter did not speak to anyone from the NJEA until he filed his unfair practice charge with the Commission in November 1995 (2T118, 3T132-3T133, 3T135, 9T3).

80. Tucker thereafter spoke to Mike Caruso, a teacher employed by the Board. Caruso told Tucker that Oxfeld had remarked that Tucker did not have a good case (8T10-8T13). I do not find that Oxfeld made this statement. Tucker's testimony on this issue constitutes mere hearsay which was not corroborated. Under the Residuum Rule, this testimony is not legally competent evidence.

81. Gray, Oxfeld and Klesch do not believe Tucker was discriminated against by the NJEA. Oxfeld spent more time on Tucker's case than she has done on other similar cases (2T107, 2T150-2T151, 3T89, 5T127). Tucker, an African-American, however, believes he was discriminated against by the NJEA on the basis of race by virtue of the fact that the grievance of fellow custodian Gary Formisano, a Caucasian, went to arbitration before Tucker's,

although Tucker was terminated first (9T82, 9T114). Klesch, however, claims she did not move Formisano's grievance to arbitration before Tucker's based on race (1T147). Klesch explained that the Formisano grievance moved to arbitration first because: 1) he followed Klesch's instructions; 2) he did not ask for an attorney, rather he allowed Klesch to represent him; 3) he accepted the arbitrator chosen by the Board and the NJEA; and 4) he did not write numerous letters as Tucker did (1T146, 1T164, 2T73-2T74, 2T123-2T124). Further, Formisano did not challenge the credibility of other NJEA members.

I decline to make a finding as to whether Formisano went to arbitration before Tucker because he was Caucasian and Tucker was African-American. A claim of racial discrimination is not before me.

ANALYSIS

N.J.S.A. 34:13A-5.3 provides in 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.

In OPEIU, Local 153, P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983), the Commission discussed the appropriate standards for reviewing a union's conduct in investigating, presenting and processing grievances:

> In the specific context of a challenge to a union's representation in processing a grievance, the United

> States Supreme Court has held: "A breach of the statutory duty of fair representation occurs only when a union's conduct towards a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Vaca v. Sipes, 386 U.S. 171, 190 (1967) (Vaca). The courts and this Commission have consistently embraced the standards of Vaca in adjudicating such unfair representation claims. See, e.g., Saginario v. Attorney General, 87 N.J. 480 (1981); In re Board of Chosen Freeholders of Middlesex County, P.E.R.C. No. 81-62, 6 NJPER 555 (¶11282 1980), aff'd App. Div. Docket No. A-1455-80 (April 1, 1982), pet. for certif. den. (6/16/82) ; New Jersey Turnpike Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979); In re AFSCME Council No. 1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978).
>
> We have also stated that a union should attempt to exercise reasonable care and diligence in investigating, processing, and presenting grievances; it should exercise good faith 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. Middlesex Cty.; Local 194. All the circumstances of a particular case, however, must be considered before a determination can be made concerning whether a majority representative has acted in bad faith, discriminatorily, or arbitrarily under the Vaca standards. [10 NJPER at 13.]

The U.S. Supreme Court has also held that to establish a claim of a breach of the duty of fair representation, such claim "...carried with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." Amalgamated Assn. of Street, Electric, Railway and Motor Coach Employees of American v. Lockridge, 403 U.S. 274, 301, 77 LRRM 2501, 2512 (1971). Proof of mere negligence, standing alone, does not suffice to prove a breach of the duty of fair representation. OPEIU (Wasilewski),

P.E.R.C. No. 98-131, 24 NJPER 256 (¶29122 1998) aff'ng H.E. No. 98-4, 23 NJPER 573 (¶28287 1997).

Here, Tucker does not show that the Respondents breached their duty of fair representation towards him. Specifically, he has not proven that they deceitfully mislead him into trusting them to provide him with representation in his arbitration and discrimination cases. Rather, the record shows that the Respondents diligently and in good faith attempted to represent Tucker.

First, Tucker was assigned an experienced UniServ Representative, Pamela Klesch, to represent him for the grievance and arbitration process. Before Klesch ever met with Tucker or in any way began to represent him, Tucker contacted his own attorney to review his options, because he did not trust the GRSPA. Tucker, thereafter, filed three grievances on his own.

Klesch promptly had Tucker meet with an NJEA network attorney for a consultation. Klesch was concerned about Tucker from the outset because she knew the Board had a paper trail to support his termination and because Tucker previously had problems with the GRSPA. After the consultation, Klesch filed a grievance on Tucker's behalf. Although Tucker believed it was not timely filed, there is no evidence in the record that the Board considered this to be the case.

The grievance was initially filed with the wrong Board representative. However, it was refiled with the correct

individual and processed. The initial procedural error does not constitute a breach of the duty of fair representation. ATU (McDede), D.U.P. No. 91-13, 17 NJPER 10 (¶22007 1990). After the grievance was denied at Level I of the procedure, Klesch moved it to Level 2; once it was denied there, Klesch moved it to Level 3.

Tucker claims that Klesch breached the duty of fair representation with respect to the Level 3 grievance proceeding because: 1) she failed to call him and confirm the date of it; 2) when he finally arrived at the proceeding, he observed her drinking coffee and talking with Board representatives; and 3) she asked to use the Board attorney's file on Tucker at the proceeding because she forgot hers.

At most, this conduct amounts to mere negligence by Klesch, which does not, standing alone, constitute a breach of the duty of fair representation. Wasilewski; Rutgers University, D.U.P. No. 94-1, 19 NJPER 426 (¶24192 1993). These facts do not demonstrate discrimination that is intentional, severe and unrelated to legitimate union objectives. Amalgamated Assn. There is no evidence that Tucker was injured in any way as the result of Klesch's actions.

After the Board denied the Tucker grievance at Level 3, Klesch immediately filed for arbitration. Despite the fact that Tucker knew that NJEA UniServ representatives such as Klesch customarily take members' cases to arbitration, Tucker continually insisted that an attorney represent him. Because of Tucker's

insistence, Tucker's arbitration was delayed, and a meeting between Tucker, Klesch and Gray took place. At the meeting, Tucker continued to insist on an attorney for his arbitration. Further, Gray then realized that Tucker believed a principal part of his case involved allegations by NJEA members and GRSPA leaders, Dubuque and Blanchard, against Tucker. Gray knew this aspect would present a major conflict that the NJEA would have to address throughout the Tucker case.

As a result of the meeting, Gray had Tucker meet with attorney Louis Bucceri for a consultation. At the consultation, Tucker told Bucceri that the leadership of the GRSPA was colluding with the Board and that individuals in the GRSPA were a primary source of the discriminatory treatment he received. Thus, Bucceri concluded that the NJEA should not fund Tucker's claims because Tucker's allegations establish a conflict of interest between himself and the officers and members of the GRSPA. (See Finding No. 36 and Finding No. 37).

If the case ended with Bucceri's recommendation, the outcome of this case might be different. However, despite Bucceri's conclusion, the NJEA persisted in its representation of Tucker and provided him with an attorney in September 1994. Nancy Oxfeld, an experienced and highly regarded NJEA network attorney, was assigned to represent him in his arbitration and civil rights cases, and to evaluate his "whistleblower" claim to determine whether it qualified for NJEA representation. At their first

meeting, Oxfeld asked Tucker to prepare draft interrogatory answers in response to the Board's discovery requests in his civil rights case. Tucker believed this to be a lack of representation on Oxfeld's part. However, this was Oxfeld's usual practice (See Finding No. 47) and clearly a reasonable request. Oxfeld did not possess the information needed to answer the interrogatories, Tucker did. Oxfeld then intended to review the answers for their legal propriety. This is not evidence of bad faith or discriminatory conduct on her behalf. OPEIU, Local 153. Further, Tucker's claim that Oxfeld also breached the duty of fair representation by failing to contact the judge in his civil rights case to have his discovery deadline extended does not amount to a violation of the Act. While such conduct may constitute some degree of negligence, in the scheme of this case, it does not constitute discrimination that is intentional, severe or unrelated to legitimate union objectives. Amalgamated Assn.

Tucker further asserts that Oxfeld's lack of preparation for his arbitration constitutes a breach of the duty of fair representation. Oxfeld met with Tucker in September and November 1994 and February 1995. Tucker claims that from their last meeting in February 1995 whereby Oxfeld observed that Tucker was not well enough to work on his case, until May 1995 when Tucker complained to Gray about Oxfeld's lack of preparation, Oxfeld did not contact Tucker to prepare for the arbitration. Further, she did not listen to any audiotapes that Tucker claims to have given

to her or interview any of the witnesses he suggested. Moreover, Oxfeld cancelled the first scheduled arbitration date because she was not prepared. She thereafter met with Tucker a week or so before the May 16, 1995 arbitration to prepare.

Oxfeld, however, in her professional opinion, did not believe Tucker's case needed a lot of preparation, because it was pre-scheduled to be a two day hearing and the Board was required to present its case first. Oxfeld would thus learn the Board's case first and then be able to decide how to proceed. Oxfeld did not find it necessary to interview Tucker's witnesses beforehand or subpoena Board members as Tucker wanted. (See Finding No. 69) While Tucker did not agree with Oxfeld's strategy nor was he satisfied with her degree of preparation, Oxfeld's actions simply do not constitute a breach of the duty of fair representation. Wasilewski.

The Respondents were not required to provide Tucker with an attorney to represent him with respect to his claims. See Ruth A. Cahn; Wasilewski; NJEA (Andrian), D.U.P. No. 95-3, 20 NJPER 360 (¶25184 1994); Essex-Union Joint Meeting, D.U.P. No. 91-26, 17 NJPER 242 (¶22108 1991). Accordingly, the Respondents, in providing legal counsel, went well beyond the minimum required for Respondents to meet their duty of fair representation. Andrian. In any event, there is no evidence that Oxfeld acted arbitrarily, discriminatorily or in bad faith, and, all factors considered, did not exercise reasonable care and diligence in processing Tucker's

case. OPEIU, Local 153. While Tucker believed Oxfeld should have spent more time on his case, Oxfeld testified she spent more time on Tucker's case than she has on other cases. Her conduct in handling Tucker's cases and preparing for his arbitration did not constitute a breach of the duty of fair representation. See e.g., Brick Tp. MUA, D.U.P. No. 92-23, 18 NJPER 322 (¶23138 1992) (No breach of the duty of fair representation found where union's attorney and business agent met with grievant for only 20 minutes prior to first day of arbitration hearing and for only 10 minutes before the second day of arbitration hearing to prepare); State of New Jersey (Vineland Development Center), D.U.P. No. 91-8, 16 NJPER 524 (¶21230 1990) (union's alleged failure to call or examine witnesses or raise evidence objections held not to constitute a breach of the duty of fair representation).

Tucker also claims that the Respondents violated the Act when, in order for him to receive continued representation, they had him sign a certification waiving any claims against the Respondents. Oxfeld, in exercising her professional judgment to properly represent her clients, the Respondents, felt the certification was necessary because Tucker believed a conspiracy between the Board and the Respondents existed. As an attorney, Oxfeld realized that under the Rules of Professional Conduct, she could not represent someone who claimed her client had conspired with the Board to "do him in." Accordingly, she asked Tucker to sign the certification in order for her to be able to continue to

represent him. Her decision to ask Tucker to sign the certification was made reasonably and in good faith, not arbitrarily. Further, it was related to legitimate union objectives. NJEA (Lindsay), D.U.P. No. 91-9, 16 NJPER 525 (¶21231 1990). Unions are permitted a wide range of reasonableness in representing their membership. Dennis Tp. Bd. of Ed., D.U.P. No. 98-36, 24 NJPER 302 (¶29145 1998) aff'd P.E.R.C. No. 99-8, 24 NJPER 416 (¶29192 1998); Wasilewski; Essex-Union Joint Meeting.

Moreover, while Tucker claims he signed the certification "under duress", this is not the case. Rather, Oxfeld gave him a choice - sign the certification or she could not continue to represent him because of his claims against her client. She specifically advised him to seek advise from an attorney unaffiliated with the instant proceeding and provided him ample time to do so. Tucker's independent attorney advised him to sign the certification. Indeed, it is not an unfair practice for a union to refuse to provide counsel to a member who wishes to prosecute a claim against his union. Bergen Community College Fac. Assn., P.E.R.C. No. 84-117, 10 NJPER 262 (¶15127 1984). Further, if Tucker had not signed the certification, an NJEA Uniserv Representative would have still represented him, just not an NJEA attorney because of the conflict issue. Moreover, he could have pursued his "whistleblower" and civil rights cases pro se or with another non-NJEA attorney. Finally, there is no evidence that Tucker ever received a decision from the Division on

Civil Rights as to whether his claim had merit. Only upon receiving this, would Tucker be entitled to legal representation from the NJEA on his civil rights case (See Finding No. 21).

Tucker independently and voluntarily decided to sign the certification. Despite this fact, Oxfeld withdrew from representing him on the morning of the arbitration because of the conflict of interest issue. She felt that two documents by Tucker received shortly before the arbitration date caused her to believe that Tucker still intended to pursue claims against the Respondents. Under these circumstances, she felt ethically bound to refuse to represent him.

Tucker claims that because of the undue delays caused by the Respondents, including Oxfeld's withdrawal, his case still has not proceeded to arbitration. However, Tucker caused many of the delays in his case himself. If Tucker had not insisted on having an attorney represent him, NJEA UniServ Representative Klesch would have moved his case to arbitration in normal course and the conflict of interest issue which caused so much of the delay in getting his case to arbitration would not have arisen. But Tucker insisted on representation by an attorney and the Respondents conceded to his demand. While Oxfeld's last minute withdrawal further delayed his case, she believed, in good faith, that in light of Tucker's positions, she had no alternative under the Rules of Professional Conduct but to refrain from continuing to represent Tucker. Oxfeld did not act arbitrarily,

discriminatorily or in bad faith in withdrawing and causing some additional delay. OPEIU, Local 153.

Tucker further claims that the Respondents violated the Act by failing to provide him with an amended Association agreement which reflects that the parties are to use the Commission instead of AAA for the selection of an arbitrator. However, the record does not show that the Respondents provided any Association member with a copy of the Agreement. Thus, the Respondents did not act arbitrarily or discriminate against Tucker. In any event, the Respondents' failure to provide Tucker with a copy of the amended Agreement or their decision to switch from AAA to the Commission for selection of an arbitrator is not evidence that they failed to exercise due diligence and reasonable care in representing him. OPEIU, Local 153. Parties to a collective agreement can jointly agree to immediately implement changes to terms and conditions of employment at anytime.

In his brief, Tucker claims that the Board and GRSPA leaders and members Dubuque and Blanchard conspired to write a fraudulent letter (CP-1) about Tucker which helped lead to his termination, and that the Respondents did nothing to address it. However, there is no evidence that CP-1, with its attached statements, was ever relied on by the Board or played any role in Tucker's termination or that the statements were made by Dubuque and Blanchard in their capacity as GRSPA leaders or union members. Further, Oxfeld did not believe the statements

constituted an insurmountable problem to Tucker's case. (See Finding No. 15 and Finding No. 53).

Finally, Tucker also argues that the Board discriminated against him because of race; that the GRSPA did nothing to address it; and that the GRSPA even conspired with the Board to racially discriminate against him. Tucker also claims that the Board violated N.J.S.A. 18A:27-4.1, and that the GRSPA did not challenge the Board's actions under the statute. Tucker has sought a determination on his racial discrimination claims with the Division on Civil Rights. Claims that the Board violated provisions of N.J.S.A. 18A:1 et seq., should be raised before the Commissioner of Education.

Based on the entire record, I find that the Respondents did not breach their duty of fair representation towards Tucker.[5/] Specifically, I find no proof in support of Tucker's 5.4b(1), (4) and (5) contentions that the Respondents: 1)

5/ Citing Wasilewski, the Respondents argue that even if Tucker proved they breached their duty of fair representation, Tucker would also have to demonstrate that his termination violated the just cause provision of the agreement in order to establish a violation of the Act. According to the Respondents, this would be impossible since there is ample evidence establishing just cause for Tucker's discharge (See e.g., CP-54; CP-55, CP-56, CP-57; CP-59; CP-63; CP-70; CP-99; R-2; R-5; R-16 and R-22). Tucker, however, disputes there was just cause for his discharge. While I do not concede that the Respondent's analysis is accurate on this point, I nonetheless decline to address the issue of whether there was just cause for Tucker's discharge. Since I have found that the Respondents did not breach their duty of fair representation toward Tucker, the issue of whether there was just cause for his discharge is irrelevant.

interfered with, restrained, or coerced him in the exercise of protected rights; 2) refused to reduce a negotiated agreement to writing and to sign such an agreement and; 3) violated any of the rules and regulations established by the Commission.

Accordingly, I make the following:

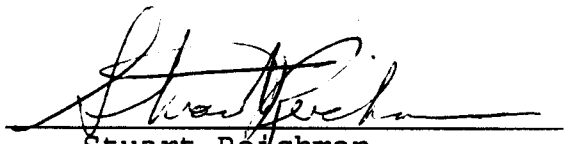
CONCLUSIONS OF LAW

1. The GRSPA and the NJEA did not breach their duty of fair representation owed to Kenneth T. Tucker, Jr. and consequently, did not violate provision 5.4b(1) of the Act.

2. The GRSPA and the NJEA did not violate provisions 5.4b(4) and (5) of the Act.

RECOMMENDATION

I recommend that the Commission **ORDER** that the complaint be dismissed.



Stuart Reichman
Hearing Examiner

Dated: November 19, 1999
Trenton, New Jersey