P.E.R.C. NO. 81-64

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TURNPIKE AUTHORITY,

Respondent,

-and- Docket No. CI-79-31-75

JEFFREY BEALL,

Charging Party.

SYNOPSIS

In an unfair practice proceeding brought by a discharged employee of the New Jersey Turnpike Authority, the Commission affirms and adopts the recommended report and decision of the Hearing Examiner and dismisses a complaint alleging that the Authority violated N.J.S.A. 34:13A-5.4(a)(1) and (5). The Commission, in agreement with the Hearing Examiner, finds under the facts of this case that the employee's majority representative, Local 194, IFPTE, did not breach its duty of fair representation in declining to take charging party's discharge grievance to arbitration. Given this finding, the Commission concludes that the employer, the Authority, could not be found to have violated N.J.S.A. 34:13A-5.4(a)(5) based on an unfair practice charge brought by an individual employee.

The Commission concludes that the unfair practice proceeding is not the proper forum for an individual employee to attempt to litigate his or her claim that the employer breached the collective negotiations agreement. Therefore, absent a showing that the employee's majority representative has breached the duty of fair representation owed the employee in the way it presented or processed the employee's grievance, the employer could be found to have violated N.J.S.A. 34:13A-5.4(a)(5) since that subsection is addressed to the duty owed the majority representative. Additionally, the Commission rejects the charging party's legal argument that an individual employee has an absolute right to take a grievance to binding arbitration where the majority representative declines to do so. Hence, the Commission also dismisses the charging party's complaint that the Authority's refusal to process his grievance to binding arbitration constituted an independent violation of N.J.S.A. 34:13A-5.4(a)(1).

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NEW JERSEY TURNPIKE AUTHORITY,

Respondent,

-and- Docket No. CI-79-31-75

JEFFREY BEALL,

Charging Party.

Appearances:
For the Respondent, Bernard M. Reilly, Esquire

For the Charging Party, Barbour & Costa, Esqs.
(John T. Barbour, of Counsel and On the Brief;
William R. Barbour, On the Brief)

DECISION AND ORDER

An Unfair Practice Charge was filed with the Public Employment Relations Commission on November 24, 1978 by Jeffrey Beall (the "Charging Party") alleging that the New Jersey Turnpike Authority (the "Authority") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"). Specifically, the Charging Party alleges that the Authority acted unreasonably and without just cause by harassing and excessively disciplining the Charging Party, and by allegedly refusing to permit a grievance concerning his discharge to be pursued to binding arbitration, all of which are alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act.[1/]

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act. (5) Refusing to negotiate in good faith (Continued)

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on March 17, 1980.[2/] By answer filed on March 26, 1980, the Respondent denied the allegations of unfair practice and set forth affirmative defenses with respect to the charge.

Pursuant to the Complaint and Notice of Hearing, hearings were held in this matter on May 20, 21, 22 and 28, 1980 before Hearing Examiner Arnold H. Zudick in Trenton, New Jersey at which time the parties were given an opportunity to examine witnesses, to present relevant evidence and to argue orally. Both parties filed post-hearing briefs, the last of which was received by July 24, 1980, and both parties submitted reply briefs, the last of which was received on August 4, 1980.

On September 8, 1980, the Hearing Examiner issued his Recommended Report and Decision, a copy of which is attached hereto and made a part hereof. (H.E. No. 81-7, 6 NJPER _____

1/ (Continued) with a majority representative of employees in an appropriate unit concering terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ This charge was originally filed against the Authority and Local 194, IFPTE alleging that both the Authority and Local 194 interfered with the Charging Party's contractual rights. Subsequently, in In re New Jersey Turnpike Authority, D.U.P. No. 80-10, 5 NJPER 518 (¶10268 1979), the Director of Unfair Practices refused to issue a complaint in this matter with respect to the entire Charge. The Charging Party appealed that decision to the Commission and in In re New Jersey Turnpike Authority, P.E.R.C. No. 80-106, 6 NJPER 106 (¶11055 1980), we affirmed the Director's refusal to issue complaint concerning alleged violations of N.J.S.A. 34:13A-5.4(a)(2), (3) and (4) and (b)(1) and (5), but directed that a complaint issue with respect to the alleged violations of N.J.S.A. 34:13A-5.4(a)(1) and (5) against the Authority.

(¶____ 1980) in which he concluded that the Authority did not violate subsections (a)(1) or (a)(5) in discharging the Charging Party or in refusing to proceed to arbitration on his grievance which contested the discharge. He recommended that the complaint be dismissed in its entirety. Exceptions with a brief in support thereof were filed by the Charging Party on September 17, 1980. The Respondent filed an answering brief on October 1, 1980 together with a cross-exception to the Hearing Examiner's report.

After reviewing the entire record in this matter including the exceptions and cross-exception filed by the parties, we adopt the findings of fact and conclusions of law reached by the Hearing Examiner essentially for the reasons stated in his report.

Despite a four-day hearing in which nearly all of the witnesses were called by the Charging Party, we find that the record contains little or no evidence that the Authority's discipline and ultimate discharge of Beall was taken in retaliation for Beall's reporting of an incident in which a supervisor allegedly removed soil in an Authority truck for his own personal use. Nor do we find any evidence to support Charging Party's contention that the Authority was in collusion with Local 194 or exerted pressure upon the Union to not puruse Beall's discharge grievance to binding arbitration. In fact, parts of the Charging Party's own testimony support the Authority's reasons for the discharge.

During the hearings the Charging Party's attorney questioned every union officer who had any connection with Beall's discharge grievance as to the reason he or she decided not to take the case to arbitration and also examined Union officers on

the preparation, tactics, and strategy used in presenting Beall's defense to the Authority's internal hearing officer who also testified at the hearing in this case. Despite this lengthy and detailed questioning we find that the testimony elicited does not support the contention that the Union's handling of the Charging Party's grievance was improper.[3/] It appears that the decision by the Union not to proceed to arbitration was made in good faith after an assessment of the merits of the case. Mr. Beall's case was not the first instance where the Union decided not to go to arbitration on a discharge grievance,

3/ The extensive testimony on the Union's handling of Beall's grievance in the context of the charge against the Authority is a result of the complex procedural history of this case. In P.E.R.C. NO. 80-106, supra, n.2, we upheld the Director's refusal to issue a complaint against the Union on the ground that the unfair practice charge was filed more than six months after the Union refused to take the grievance to binding arbitration. However, since Beall had filed a civil law suit against the Authority, but not the Union, within six months which was ordered transferred to this Commission, we deemed the charge against the employer to be timely filed.

In reaching this result neither we nor the Director ruled upon the merits of Mr. Beall's allegations that the Union improperly refused to take his case to arbitration. In presenting his case to the Hearing Examiner, the Charging Party attempted to prove that the Union did violate his rights by not proceeding to arbitration and that therefore the Authority could not rely on that refusal as a defense to his claim that the dismissal violated the contract; i.e., that he was not discharged for cause.

It must be emphasized that a complaint based on an individual's unfair practice charge against his employer contesting his discharge was issued in this case because the allegations raised the claim that the exclusive majority representative improperly refused to process the grievance to arbitration. Moreover, a Superior Court judge had ordered the employee's lawsuit against the employer contesting that discharge transferred to this Commission. This case should not be read to imply that an individual employee can use the vehicle of an unfair practice proceeding to contest the validity of an employer's discipline or discharge which is unrelated to union activity.

and there was no proof that the Union treated his case differently than those of other similarly situated employees.[4/] We thus conclude that the Union did not act improperly or violate the duty of fair representation in the handling of Beall's grievance.

The allegation of a violation of N.J.S.A. 34:13A-5.4(a)(5) in this case amounts, in effect, to Charging Party's attempt to have the merits of his discharge grievance adjudicated as an unfair practice against the Authority. There is no allegation that the discharge was motivated in any way to encourage or discourage conduct protected by the Employer-Employee Relations Act. The only allegation is that the discharge was not for just cause in violation of the collective negotiations agreement. As the prior discussion indicates, we find no merit to Charging Party's allegations of unfair representation against the Union. Given the finding that the Union had not improperly refused to take Mr. Beall's grievance to arbitration, we believe we must find that the Authority could not have violated N.J.S.A. 34:13A-5.4(a)(5).[5/]

The negotiations obligation set forth in N.J.S.A. 34:13A-5.3 permits majority representatives of employees to file unfair practices alleging violations of N.J.S.A. 34:13A-5.4(a)(5)

4/ Since we find no impropriety in the Union's handling of Charging Party's grievance we need not address the cross-exception of the Authority that Beall was barred from challenging the adequacy of his representation because he did not exhaust his internal union remedies (i.e., his right to appeal to the full membership the Executive Board's refusal to take his grievance to arbitration.)

5/ We would note that while our dismissal of the (a)(5) charge is based on the ensuing legal analysis, our review of the record to determine if the Union had violated any of Mr. Beall's rights also reveals that no evidence was produced by the Charging Party which indicates that the discharge of Mr. Beall by the Authority was made for other than just cause.

based upon claimed breaches of collective negotiations agreements. See In re Piscataway Township Board of Education, P.E.R.C. No. 77-65, 3 NJPER 169 (1977) affmd sub. nom. Piscataway Township Board of Educ v. Piscataway Principals Ass'n, 164 N.J. Super. 98 (App. Div. 1978).[6/] In the instant case Beall's unfair practice charge against the Board amounts to exactly such a claim. However, a real question exists, given that both N.J.S.A. 34:13A-5.3 and 5.4(a)(5) speak in terms of the majority representative, whether an individual employee can assert such a violation, or whether it must be brought by the majority representative to whom the obligation runs.[7/]

6/ N.J.S.A. 34:13A-5.3 provides in relevant part that: "Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances and terms and conditions of employment" and N.J.S.A. 34:13A-5.4(a)(5) makes it an unfair practice for a public employer to refuse "to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative." (emphasis added) As discussed in the Piscataway decision, supra, a collective negotiations agreement establishes the status quo for those terms and conditions of employment covered by the contract. A breach of a provision of the contract setting a term and condition of employment constitutes a unilateral change in that term and condition of employment without negotiation and is thus an unfair practice by the offending party.

The Commission does not encourage the use of the unfair practice forum for the resolution of what are in reality grievances. For that reason, the Commission has a policy of deferring such charges to binding arbitration pursuant to the parties' negotiated grievance procedure. However, implementation of that policy is not always possible. An obvious example when such a policy is not practical is if the parties' grievance procedure does not end in binding arbitration.

7/ In Red Bank Regional Education Ass'n. v. Red Bank Reg. High School Board of Education, 78 N.J. 122, 138-139 (1978) the Supreme Court, interpreting the same language with respect to the processing of grievances, held that N.J.S.A. 34:13A-5.4

(Continued)

As a general matter, we do not believe that an individual employee, in the absence of any allegations of collusion or unfair representation by the majority representative, can use the unfair practice forum to litigate an alleged breach of a collective negotiations agreement unrelated to union activity. The violation of the duty to negotiate terms and conditions of employment implied by such an allegation is more appropriately asserted by the majority representative. It is not an unfair practice for a public employer to refuse to negotiate with an individual employee or even a group of employees if they do not constitute the exclusive majority representative. Therefore, while the breach of a contract may violate certain rights of an individual employee, they are not normally rights vindicated in the unfair practice forum provided by this Act.

The majority representative is the representative of the employees' own choosing for the purpose of negotiations and grievance processing. Lullo v. International Association of Firefighters, 55 N.J. 409 (1970); Red Bank, supra, note 7. The

7/ (Continued)
(a)(5) does not make it an unfair practice for a public employer to refuse to process a grievance presented personally by an individual or by a non-majority representative.
Also relevant is a recent decision by the New York Public Employment Relations Board interpreting provisions of its public employment relations statute similar to those under discussion herein. In that case, PERB held that individual employees do not have standing to file a charge alleging a violation of the duty to negotiate with the majority representative. It reasoned that a charge must allege a violation of a right of the Charging Party protected by the statute. Since the right to negotiate is that of the majority representative, not an individual employee or even a group of individual employees, only the majority representative may charge the employer with a violation of the duty to negotiate. In re State of New York and Frank S. Robinson, et al, PERB Case No. U-4537, 13 PERB ____ (¶____, decided August 20, 1980).

employer cannot be charged with having violated its duty under N.J.S.A. 34:13A-5.4(a)(5) when that employer has in good faith participated in the grievance procedure negotiated with that representative for the resolution of disputes arising under the agreement. If the majority representative in good faith chooses not to pursue the grievance to arbitration, it has, taken that action as the employees' representative, and it resolves the grievance as to the employer. Moreover, the goal of labor stability which this Act is intended to foster, N.J.S.A. 34:13A-2, would not be furthered by providing a forum for individual employees to challenge the interpretation of the agreement arrived at by the employer and majority representative in the processing of the grievance, provided that the resolution was arrived at in good faith.

However, a different analysis may be called for where the employee not only alleges a breach of the contract, but also alleges that the majority representative either alone, or in collusion with the employer, processed the grievance in bad faith, or in some other way violated the duty of fair representation owed the employee. This was the situation presented by the allegations of the Charging Party in this case. However, having failed to prove that the Union did violate his rights in refusing to take the grievance to arbitration or that the employer was in collusion with the Union in that decision, Beall's allegation that the employer violated N.J.S.A. 34:13A-5.4(a)(5) must be dismissed. 8/

8/ Again, however, we note that our review of the record reveals an absence of any evidence that the discharge was for other than just cause. supra, note 5.

The only remaining issue in dispute is the allegation of an independent (as opposed to derivative) violation of N.J.S.A. 34:13A-5.4(a)(1). This presents the legal question of whether an individual has an absolute statutory right to take a grievance to binding arbitration when his union refuses to do so. The Hearing Examiner discusses this issue at pages 14-17 of his report including references to pertinent court decisions. We deem that analysis to be in accord with our own view of the issue.

The Charging Party cites the Red Bank decision of the Supreme Court[9/] for support but fails to note that the Court distinguished between the presentation of a grievance and the processing of that grievance through the steps of a contractual grievance procedure which may provide for binding arbitration. See 78 N.J. 122 at 128, footnote 2. In that case the Court pointed out the existence of an unresolved controversy concerning whether an individual employee was in fact statutorily precluded from presenting and processing his or her own grievance in a unit in which a majority representative had been selected. 78 N.J. 122 at 134-135. The Court indicated that that issue was not before it, and in the context of that discussion stated that it would "assume, without deciding, that N.J.S.A. 34:13A-5.3 permits unit employees to enjoy at least a concurrent right with their majority representative with respect to the presentation of grievances". Id. at 135 Read in context such a statement does not imply that an individual could insist on arbitra-

9/ Red Bank Reg. Ed. Ass'n. v. Red Bank Reg. H.S. Bd. of Ed. 78 N.J. 111 (1978). See our discussion of the Supreme Court's decision in our prior decision with respect to the instant charges. In re New Jersey Turnpike Authority, P.E.R.C. No. 80-106, 6 NJPER 106 (¶11055 1980).

tion where the majority representative decides that such a step is unwarranted, and the contract does not give the individual a right to proceed to arbitration on his or her own. Nor does it even suggest that the employer could be found to have committed an unfair practice under such circumstances.

In fact, later in its decision the court appears to resolve this issue against the Charging Party. 78 N.J. 122 at 138-139. The discussion, like that above, takes place in the context of whether the exclusive majority representative has a statutory right to present and process grievances but the language is certainly relevant. The Court points out that by its language N.J.S.A. 34:13A-5.4(a)(5) only prohibits public employees from "refusing to process grievances presented by the majority representative", and states:

> Significantly N.J.S.A. 34:13A-5.4 (a)(5) does not make it an unfair practice for a public employer to refuse to process grievances presented personally by an individual employee or one presented through a non-majority representative. Explicit statutory protection is given to the presentation of grievances only when done by a majority representative." 78 N.J. at 139.

It would be totally inconsistent with this language to now hold that an individual public employee has an absolute statutory right to process a grievance to binding arbitration and that a public employer has committed an independent violation of N.J.S.A. 34:13A-5.4(a)(1) because the majority representative did not exercise that right for the employee.

In the instant case, the Charging Party's grievance was presented to and heard by his employer. Since the contract gave

him no right to appeal the determination of the Authority to binding arbitration when the Union declined to do so, the Authority did not violate subsection (a)(1) in refusing to proceed to arbitration.

Based upon the above, IT IS HEREBY ORDERED that the complaint in this matter be dismissed in its entirety.

BY ORDER OF THE COMMISSION

Bernard M. Hartnett, Jr.
Acting Chairman

Commissioners Hartnett, Hipp, Graves, Newbaker and Parcells voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
October 21, 1980
ISSUED: October 22, 1980

H.E. No. 81-7

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

In the Matter of

NEW JERSEY TURNPIKE AUTHORITY,

Respondent,

- and -

Docket No. CI-79-31-75

JEFFREY BEALL,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss charges of unfair practice filed by the Charging Party against the Respondent. The Charging Party had alleged that supervisors of the Authority harassed him, and that the Authority interfered with the processing of his grievance. The Charging Party alleged collusion between his union and the Authority to deny his request to present his grievance to binding arbitration.

The Hearing Examiner found that no collusive relationship existed between the Authority and the union, and also found, consistent with basic labor law principles, that a majority representative acting in good faith is not required to process every grievance to binding arbitration. Further, the Hearing Examiner found that there was no evidence of harassment of the Charging Party, nor evidence that the Authority interfered with the processing of his grievance. Finally, the Hearing Examiner found, based upon both Federal and State law, that a public employer is not required by the Act or the State Constitution to permit an individual employee, acting alone, to pursue a grievance to binding arbitration after the majority representative has already, in good faith, declined to bring that grievance to arbitration.

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.

H.E. NO. 81-7

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

In the Matter of

NEW JERSEY TURNPIKE AUTHORITY,

Respondent,

-and-

DOCKET NO. CI-79-31-75

JEFFREY BEALL,

Charging Party.

Appearances:

For the Respondent
Bernard M. Reilly, Esq.

For the Charging Party
Barbour & Costa, Esqs.
(John T. Barbour of Counsel)

HEARING EXAMINER'S REPORT AND RECOMMEDNATIONS

An Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") on November 24, 1978 by Jeffrey Beall (the "Charging Party") alleging that the New Jersey Turnpike Authority (the ""Authority") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"). Specifically, the Charging Party alleges that on or about December 27, 1977, the Authority acted unreasonably and without just cause by harassing and excessively disciplining the Charging Party, and by allegedly refusing to permit a grievance concerning his discharge to be pursued to binding arbitration, all of which are alleged to be a violation of N.J.S.A. 34:13A-

5.4 (a)(1) and (5) of the Act. 1/

It appearing to the Commission that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on March 17, 1980. 2/ By answer filed on March 26, 1980, the Respondent denied the allegations of unfair practice and set forth affirmative defenses with respect to the charge. Essentially, the Respondent argued that the charge failed to state a cause of action, and that the Charging Party's claim was a result of actions by a third party (Local 194, IFPTE) over which the Authority had no control, and which was not joined as a party to this action.

Pursuant to the Complaint and Notice of Hearing, hearings were held in this matter on May 20, 21, 22, and 28, 1980, in Trenton, New Jersey, at which time the parties were given an opportunity to examine witnesses, to present relevant evidence and to argue orally. Both parties filed post-hearing briefs the last of which was received by July 24, 1980, and both parties submitted reply briefs, the last of which was received on August 4, 1980.

1/ These subsections prohibit employers, their representatives and agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ This charge was originally filed against the Authority and Local 194, IFPTE alleging that both the Authority and Local 194 interfered with the Charging Party's contractual rights. Subsequently, in In re New Jersey Turnpike Authority D.U.P. No. 80-10, 5 NJPER 518 (¶ 10268 1979), the Director of Unfair Practices refused to issue a complaint in this matter with respect to the entire Charge. The Charging Party appealed that decision to the Commission and in In re New Jersey Turnpike Authority, P.E.R.C. No. 80-106, 6 NJPER 106 (¶ 11055 1980), the Commission affirmed the Director's refusal to issue complaint concerning alleged violations of N.J.S.A. 34:13A-5.4(a)(2), (3) and (4) and (b) (1) and (5), but directed that a complaint issue with respect to the alleged violations of N.J.S.A. 34:13A-5.4(a)(1) and (5) against the Authority. Since a complaint was not issued against Local 194, the instant matter concerns only those (a)(1) and (5) allegations with respect to the Authority. The Commission in its decision set forth the reasons for the issuance of a complaint and established guidelines to be used in reviewing the evidence brought forth in this matter. The Commission, however, did uphold the Director's finding that the instant charge was timely filed in that it was first filed with the Superior Court in April 1978, and officially transferred by the Court to the Commission by order dated September 18, 1978.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act exists,and after hearing and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The New Jersey Turnpike Authroity is a public employer within the meaning of the Act and is subject to its provisions.

2. Jeffrey Beall was a public employee within the meaning of the Act at the time of his employment with the Authority and was terminated therefrom on December 27, 1977.

3. The New Jersey Turnpike Employees Union, Local 194, I.F.P.T.E., AFL-CIO ("Local 194") is an employee representative within the meaning of the Act, and was a party to a collective negotiations agreement effective June 27, 1977 (Exhibit J-1) with the Authority covering toll collection and maintenance employees which included the Charging Party's title.

4. After his termination from the Authority in December 1977, the Charging Party filed a grievance concerning that action which was processed through the grievance procedure as set forth in Articles XVI and XVII of the collective agreement. Article XVII(B) provides for a hearing by the Deputy Executive Director (or the Personnel Director) of the Authority in matters constituting Administrative discipline such as in the instant case. Such a hearing was held on January 18, 1978 regarding the Charging Party's termination and the same was upheld. The hearing officer found that the Charging Party had failed to report

to work on his regular work day of December 26, 1977 and that he failed to notify the Authority of the reasons for his absence. Local 194 represented the Charging Party at that hearing and Mr. Beall testified that he was operating under his old work schedule which did not have him scheduled to work on December 26, 1977. 3/

The hearing officer, however, found that based upon the December incident, as well as previous incidents, the dismissal of the Charging Party was warranted. The other incidents of primary importance that were referred to included an unauthorized leave of absence by the Charging Party on August 5, 1977. Mr. Beall admitted his mistake in that matter and voluntarily accepted a five (5) day suspension. 4/ The other incident referred to occurred on October 8, 1977 and included a charge of unauthorized leave, possession of alcoholic beverages while on duty, and abuse of sick leave. The Charging Party was originally given a 40 day suspension for that incident, but after a hearing on the matter at which he was represented by Local 194, the suspension was reduced to 15 days. Arbitration was not requested in that matter and the 15 day suspension was served. 5/

3/ Transcript (T) I, p. 74.

4/ The Charging Party testified that there was a meeting which he attended between Local 194 and the Authority concerning his August incident. The Charging Party was accompanied by Shop Steward Sinclair (T.II, p. 76), and admitted that at the meeting he signed a statement admitting his guilt over that incident (T. II, p. 36), that he signed the document on his own (T. II, p. 38), and that he accepted the five day suspension and did not want to challenge it further (T. I, p. 59).

5/ The facts of the October incident show that a hearing was conducted on October 20, 1977 before the Deputy Executive Director of the Authority concerning the incident. The Charging Party was present and was represented by officials of Local 194. On October 24, 1977 the Deputy Executive Director issued his decision reducing the suspension from 40 to 15 days. The Charging Party admitted that he accepted the 15 day suspension and did not attempt to appeal. (T. I, pp. 59-60; T. II, pp. 42-43).

However, the Charging Party testified that he was not given a chance to testify or state his side of the case (T. II, p. 43). When pressed further, the Charging Party admitted that he was given a chance to make a statement and that

(Continued next page)

5. After the hearing on his dismissal, the Charging Party requested that Local 194 pursue the matter to arbitration. Since that request came shortly before the end of the period to file for arbitration, Local 194 could only conduct a telephone vote of the Executive Board to determine whether arbitration should be granted. 6/ The Executive Board voted overwhelmingly against taking the Charging Party's grievance to arbitration, and the Charging Party did not appeal

5/ (continued)

nobody cut him off (T. II, pp. 43-44). The Charging Party felt that since nobody asked him questions he was denied the right to give his side of the story. The undersigned, however, cannot credit that testimony. It is unreasonable to believe that the Charging Party was denied a chance to give his side of what occurred after admitting that he made a statement and that nobody cut him off. In fact, the record shows that the Charging Party's statement was a decisive factor in the Deputy Executive Director's decision to reduce the 40 day suspension (T. IV, pp. 197-198). See also Exhibit R-7.

The undersigned also credits the testimony of Richard Zuccaro, a former member of Local 194's Executive Board, when he testified that the Charging Party was not placed on the witness stand at the October hearing because the union officials believed he was under the influence of alcohol (T. IV, p. 108). Mr. Zuccaro testified that he thought he could do better by not placing the Charging Party on the stand and that he gave the Charging Party the option. (T. IV, p. 109).

6/ Article XVII(B) provides:

> "All requests for binding arbitration shall be filed within ten working days after receipt of the decision of the Executive Director."

The record shows that the Executive Director's letter sustaining the hearing officer's termination of the Charging Party was dated February 8, 1978 and was sent to the Charging Party and Local 194. See Exhibit CP-5. By letter dated February 13, 1978, the Charging Party asked Local 194 to request arbitration (Exhibit CP-9). Apparently, on February 16, 1978 the Charging Party's attorney, Mr. Foy, telephoned Local 194 and learned that Mr. Beall's letter had not arrived, and he therefore advised Business Manager Jack Ford of the request for arbitration and confirmed the same by a letter dated the same date. See Exhibit CP-9. Local 194 did not have a meeting of the Union Executive Board scheduled within the remaining time to request arbitration. Therefore, a telephone poll of the Executive Board was conducted on February 17, 1978 at which time the Board voted against arbitration. Local 194 advised Mr. Foy of the results of the Board vote by letter of the same date. See Exhibit CP-10. The Charging Party argued that the February 17 letter was not postmarked until February 20, 1978. However, an examination of the envelope shows two postmarks, the first of which was February 17, 1978.

that decision, although he could have, to the union membership as a whole.[7/] The Charging Party had, through his attorney, Thomas Foy, advised Local 194 of his willingness to pay the cost of arbitration and represent himself. Members of the Executive Board, however, did not believe that money was the controlling factor in denying the Charging Party's request for arbitration, rather, they believed that his grievance did not have a reasonable chance for success.[8/] Since Local 194 did not take the Charging Party's grievance to arbitration, the Authority believed it was under no obligation to the Charging Party to agree to arbitrate the grievance at the Charging Party's expense.[9/] The Charging Party alleged that Local 194 failed to fairly represent him at his hearing of January 18, 1978 by inadequately investigating the circumstances leading up to his discharge, as well as the other incidents referred to herein. In addition, the

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7/ Francis Forst, Business Manager of Local 194, as well as other union officials, testified that decisions of the Executive Board could be appealed to the membership as a whole (T. III, pp. 92-93; T. IV, p. 53). The Charging Party was asked whether he applied to the general membership to take his case to arbitration and he responded that he didn't know (T. II, p. 67). When asked whether his attorney, Mr. Foy, had reviewed the union by-laws regarding arbitration, the Charging Party responded that he did (T. II, p. 67).

8/ Mr. Zuccaro, Ms. Lacey, Mr. Minkel and Mr. Christiano all testified that they voted against taking the Charging Party's grievance to arbitration because they believed it had little chance for success (T. IV, pp. 24, 47, 88, 128-129).

9/ The collective agreement between the Authority and Local 194 provides in Article XVI that either an employee or the union can pursue a grievance at step one or step two of the grievance procedure. Article XVII, however, places a limitation on who can request arbitration:

> In the event the decision of the Executive Director is unsatisfactory, the union may submit the matter to binding arbitration.

By letter dated March 7, 1978 (Exhibit CP-7) the Executive Director of the Authority responded to a letter by Mr. Foy on behalf of the Charging Party (Exhibit CP-6). Mr. Foy had requested arbitration of the Charging Party's grievance and advised the Executive Director that the Charging Party was willing to bear the cost of the arbitration. The Executive Director responded to Mr. Foy's request and indicated that arbitration must be submitted by the union, and he referred Mr. Foy to Article XVII. On that basis, the Executive Director denied the Charging Party's request for arbitration.

Charging Party alleged that the Executive Board's decision refusing to request arbitration resulted from a reliance upon insufficient information which demonstrated a failure of its fair representation duty.

6. The Charging Party argued that his dismissal occurred,at least in part, because of harassment directed at him by supervisors of the Authority. The facts showed that in 1974 the Charging Party witnessed Supervisor Joseph Fabrizi stealing dirt from the Authority and reported him for that action. Fabrizi was subsequently disciplined because of the incident.[10/] Several people in the Charging Party's work location knew that he had reported a supervisor,[11/] yet it was also clear that many people, although aware of the "Fabrizi incident" were unaware of who actually reported him.[12/] The Charging Party testified that after the Fabrizi incident his troubles began, he was treated differently and watched by the supervisors.[13/] Nevertheless, he admitted that he was watched by supervisors before and after the Fabrizi incident.[14/] Finally, although the Charging Party maintained that he was treated differently by supervisors after the Fabrizi incident, two supervisors, Jim Colby and Joseph Hornblower testified[15/] that they did not discrimate against the Charging Party.

7. The Charging Party also argued that the Authority and Local 194 by their actions in combination with one another had deprived him of his right

10/ T. II, p. 132; T. III, p. 29.

11/ The Charging Party testified that he discussed the Fabrizi incident with his fellow workers (T. I, p. 39).

12/ Russell Anderson, Superintendent of Maintenance for the Authority, at T. II, p. 131; Joseph Hornblower, foreman, at T. III, pp. 109-110, 114; and Joseph Robertson, Deputy Executive Director of the Authority and the hearing officer at the Charging Party's dismissal hearing, at T. IV, p. 225, testified that they did not know until recently that the Charging Party had been the one who reported Fabrizi.

13/ T. I, pp. 43, 47, 49.

14/ T. I, pp. 46-47.

15/ T. II, pp. 93, 115-116; T. III, p. 111.

to pursue his grievance to arbitration. In his opening remarks at the hearing the Charging Party's attorney maintained that the Authority and Local 194 together acted in a way to deprive the Charging Party of his rights guaranteed by the Act. 16/ In fact, the Charging Party's attorney maintained in his post-hearing brief:

> "that the Authority exerted improper influence on Local 194 not to take the Charging Party's case to arbitration and Local 194 acceded to such pressure."

Despite the above assertion, the record is devoid of any evidence that would establish a collusive relationship between the Authority and Local 194. There was no evidence of a conspiracy or of a secret agreement between the Authority and Local 194 to deprive the Charging Party of his rights, and there was no evidence to support the allegation that the Authority exerted influence over Local 194 not to take the Charging Party's grievance to arbitration. The Charging Party had the opportunity to examine officials of both the Authority and Local 194 at the hearing but could not elicit any testimony even hinting of an attempt by the Authority to influence Local 194's actions. The undersigned credits the testimony of the union officials who stated that the reason the Charging Party's grievance was not sent to arbitration was because there was little likelihood for success. 17/

8. The Commission in In re New Jersey Turnpike Authority, P.E.R.C. No. 80-106, 6 NJPER 106 (¶ 11055 1980), ordered the issuance of a complaint in

16/ T. I, p. 13.

17/ It appears to the undersigned that the Charging Party was also arguing that the actions of the Authority and Local 194 - when looked at together - combined to deny him of his rights. That argument is far different from the Charging Party's assertion that the Authority improperly influenced the Local's decision to deny his request for arbitration. A collusive relationship between the Authority and Local 194 to deprive the Charging Party of his right to file a grievance would be violative of the Act. But independent actions by the Authority and Local 194 that resulted in the same conclusion, i.e., the denial of a request for arbitration, is not necessarily violative of the Act.

this matter but did not rule upon the merits of the charge. With respect to the alleged (a)(5) violation of the Act, the Commission held that the statute of limitations period applied against Local 194,

> "...would not prevent the Charging Party from putting on proofs of a breach of Local 194's duty of fair representation as a means of establishing the Authority's violation of N.J.S.A. 34:13A-5.4(a)(5)" at slip op p. 6.

With respect to the alleged (a)(1) violation of the Act, the Commission acknowledged that an employer's refusal to hear a grievance filed by an individual arguably could amount to interference, restraint or coercion of employee rights.

9. At the close of the Charging Party's case the Respondent made a motion on the record to dismiss the complaint in its entirety arguing that the Charging Party failed to establish a violation of the Act. The undersigned reserved judgement on the motion to dismiss and permitted the Respondent to present its case. The Respondent completed its case at the same hearing and the entire hearing in this matter was concluded that day. The undersigned, therefore, will consider the merits of the motion to dismiss based upon all of the evidence in this case and reach a conclusion on the motion to dismiss merged with that of the decision on the entire record.

THE ISSUES

Did the Respondent Authority violate (1) Subsections (a)(5) and/or (a)(1) of the Act when it refused the Charging Party's request, acting alone, to pursue the grievance relative to his discharge to binding arbitration, (2) whether the Charging Party was harassed by supervisors of the Authority, and (3) whether the Charging Party's discharge was "unreasonable, capricious and in violation of his

contractual rights?" [18]

DISCUSSION AND ANALYSIS

A determination of the primary issues require an interpretation of whether the Authority was required, pursuant to contract, the Act, or the State Constitution, to permit an individual employee to pursue a grievance to arbitration after Local 194, the other party to the contract, refused to send the grievance to arbitration.

Collusion and Local 194's Alleged Failure of Fair Representation

The Charging Party alleged that the Authority violated the Act by putting pressure on Local 194 to deny the Charging Party's request for arbitration. Therefore, the Charging Party believed that by proving that Local 194 failed in its duty of fair representation he could establish a collusive relationship between the Authority and the union to deny him his rights under the Act. The undersigned has previously found, however, that there was insuffifient evidence of a collusive relationship, and no basis upon which to attack the veracity of the union officials who testified that they denied arbitration because the grievance lacked the likelihood of success. [19]

Despite a finding that no collusion existed between the Authority and Local 194, the Charging Party raised certain issues with respect to the union's duty of fair representation which needs to be considered herein. The Charging

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18/ In deciding the primary issues, there are three sub-issues that must be considered:
(1) Whether the evidence established a collusive relationship between the Authority and Local 194 to deprive the Charging Party of his rights under the Act.
(2) Whether Local 194 failed in its duty of fair representation toward the Charging Party in the conduct of the investigation and the hearing concerning his discharge.
(3) Whether the Authority failed to process a grievance presented by Local 194.

19/ Finding of Fact No. 7.

Party made a common mistake in attacking Local 194's refusal to request arbitration. It is a well settled labor law principle that a union, acting in good faith, does not violate the law by refusing to process a grievance to arbitration. The United States Supreme Court established that principle in Vaca v. Sipes, 386 U.S. 171, 190-191, 64 LRRM 2369, 2377 (1967), when it said:

> "Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement."

The Court also said:

> "The breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the...unit is arbitrary, discriminatory, or in bad faith. 64 LRRM at 2376.

The Federal Courts and the National Labor Relations Board have interpreted "arbitrary, discriminatory, or bad faith" to mean something more than mere negligence, rather, there must be a showing of personal hostility. In Teamsters Local 692 (Great Western Unifreight), 209 NLRB 446, 85 LRRM 1385 (1975), the Board held that negligent union action or inaction by itself would not be considered arbitrary, irrelevant, invidious, or a breach of the duty of fair representation. The courts have expanded on this principle and held that proof that a union acted negligently or provided poor quality representation does not support a violation of fair representation even if the grievance is later found to be meritorious. Bazarte v. United Transportation Union, 429 F.2d 868, 75 LRRM 2017, (3d Cir. 1970); Encina v. Lama Boot Co. Inc., 316 F. Supp. 239, 75 LRRM 2012, aff'd. 448 F.2d 1264, 78 LRRM 2382 (1971).

The Charging Party argued herein that Local 194's failure to thoroughly investigate the facts leading to his discharge demonstrated a failure of the duty of fair representation. Absent any showing of personal hostility, however, the

courts do not support that contention. In a case on point, Berry v. Pacific Intermountain Express Co., (DC NM) 85 LRRM 2408 (1974), a union representative neither conducted an investigation or interviewed witnesses, failed to introduce relevant material at the hearing, and, the hearing only lasted 15 minutes. Nevertheless, the court found that absent a showing of malice or personal hostility, a union's failure to investigate facts and collect evidence or interview witnesses does not constitute bad faith. Finally, the Unites States Supreme Court held that to establish a claim of a breach of the duty of fair representation,

> "...carries with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives."20/

This Commission and the New Jersey Courts have frequently relied upon Federal policy including court and N.L.R.B. decisions in formulating its own labor policy. See Lullo v. International Assoc. of Firefighters, 55 N.J. 409 (1970). In fact, in Belen v. Woodbridge Twp., 142 N.J. Super. 486, 490-491 (App. Div. 1976), the court held that the duty of fair representation as developed under the National Labor Relations Act was an appropriate guide for interpreting our Act.

In In re New Jersey Turnpike Employees Union, Local 194 IFPTE, P.E.R.C. No. 80-38, 5 NJPER 412 (¶ 10215 1979), the Commission considered a case similar to the instant matter and held that,

> "...the union was not obligated to provide unsurpassable representation, but such representation as would adequately protect those interests of the grievant which could be adversely affected." At slip. op. p. 5.

The Commission identified the principles of a union's duty of fair representation and held,

> "The union must exercise reasonable care and diligence in investigating, processing and presenting grievances;

20/ Amalgamated Assoc. of Street, Electric Railway and Motor Coach Ees. of America v. Lockridge, 403 U.S. 274, 301, 77 LRRM 2501, 2512 (1971).

> it must make a good faith judgement 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. At slip. op. pp. 3-4.

In the instant matter, Local 194 met the above criteria. Although the union did not investigate the facts of the concluded August and October incidents, it did review the facts of the December incident, it made a good faith attempt at processing the grievance and representing the Charging Party at the January hearing, and it decided not to proceed to arbitration based upon a good faith belief that the grievance lacked merit.

From the totality of the evidence presented, and based upon the cited decisions, the undersigned finds that Local 194 was not in collusion with the Authority to deny the Charging Party of his rights, and it did not violate its duty of fair representation in refusing to process his grievance to arbitration. Since the union did not violate the Act with respect to the Charging Party's rights, the Authority could not have violated Section a(5) of the Act. In order to have found that the Authority in this case "refused to process a grievance presented by the majority representative" there had to be a finding that Local 194 requested arbitration, or unlawfully failed to request arbitration. No such finding was made herein. Local 194 did present the Charging Party's grievance through the grievance procedure but decided in good faith not to request arbitration. The Authority properly processed the grievance through the lower steps of the grievance procedure, but absent collusion with or a violation by Local 194, the Authority did not violate Section a(5) by refusing the Charging Party's request for arbitration because that request was not made by the majority representative.

The Authority's Alleged Interference And Its Refusal To Proceed To Arbitration

Having found that there was no collusion between the Authority and Local 194, the Charging Party could only establish a violation of the Act under Section

(a)(1) by proving that the Authority interfered with or harassed him, discharged him in violation of his contractual rights, or denied him the right to present his grievance.

Regarding the first two allegations, the Charging Party relied upon the facts of the Fabrizi incident and argued that he was harassed by various supervisors of the Authority because of what he had done to Fabrizi. However, the facts do not establish harassment or interference by supervisors of the Authority against the Charging Party nor do they prove that the Charging Party was discharged in violation of any of his rights. The Fabrizi incident occurred in 1974, yet the three primary incidents that the Charging Party was involved with that led to his discharge occurred in 1977. The timing is not close. It is unreasonable to conclude that supervisors would wait that long to "harass" the Charging Party. Moreover, the facts of each incident demonstrate that the Charging Party had a poor work attitude and he showed very little willingness to improve the same. The Charging Party attempted to build a case of harassment at hearing, yet, there was no proof of any personal animosity directed toward the Charging Party and there was no substantial proof that the Charging Party was treated differently than other employees. Although the Charging Party testified that he believed that he was being harassed, the evidence does not support such a conclusion. The undersigned credits the testimony of the supervisors and the superintendent of maintenance concerning the Charging Party's attitude and the three 1977 incidents. Therefore, the undersigned finds that the Charging Party was not harassed by the Authortiy nor discharged in violation of any contractual right.

Regarding the allegation that the Authority denied the Charging Party the right to present his grievance, the undersigned concludes that the Authority did not violate the Act or the State Constitution by refusing the Charging Party's request for arbitration after Local 194 had declined to pursue the matter to that level.

Article I, paragraph 19 of the New Jersey Constitution of 1947 provides in pertinent part:

> "...Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing.

Our Act provides at N.J.S.A. 34:13A-5.3:

> "Public employers shall negotiate written policies setting forth grievance procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions affecting them provided that such grievance procedures shall be included in any agreement entered into between the public employer and the representative organization. Such grievance procedures may provide for binding arbitration as a means for resolving disputes."

Neither the Constitution nor the Act require that an employee have an absolute right to pursue a grievance to binding arbitration. The Act says only that a grievance procedure may provide for binding arbitration, not that the public employer is required to permit individual employees to request arbitration in the absence of the majority representative. 21/

In the instant matter the Charging Party clearly presented his grievance to the public employer through Local 194 and in fact a hearing was held concerning that grievance. The Charging Party is actually arguing that he had a right, acting without the union, to pursue his grievance to arbitration, but the law does not

21/ Our Act does provide at N.J.S.A. 34:13A-5.3 that: "When no majority representative has been selected as the bargaining agent for the unit of which an individual employee is a part, he may present his own grievance either personally or through an appropriat representative or an organization of which he is a member and have such grievance adjusted." However, in the instant matter there is a majority representative therefore this provision does not apply. Nevertheless, even if no majority representative had been present herein, the Charging Party did present his grievance to the Authority and a hearing was held concerning that matter. Therefore, that portion of the Act would have been satisfied.

support that contention. In Red Bank Reg. Ed. Assoc. v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J.122 (1978), the New Jersey Supreme Court held that a majority representative of a unit of employees is:

> "[T]heir sole representative within the meaning of Art. I, para. 19 for purposes of presentation of their grievances to their public employer." 78 N.J. at 135.

The Court further indicated that once an employee elects to have his grievance presented through his majority representative it is no longer viewed as solely his grievance.[22/] Finally, the Court held that it is not an unfair practice for a public employer to refuse to process a grievance presented by an individual once the primary responsibility for presenting the grievance has been entrusted to the majority representative.[23/]

Although Red Bank did not specifically discuss the right to pursue a grievance to arbitration, it is difficult to believe that the Court would find that the majority representative controls the presentation of grievances and then not extend that same rationale to the request for arbitration.

In Vaca v. Sipes, supra, the U.S. Supreme Court established the principle that:

> "[I]f an individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined..." 64 LRRM at 2377.

Based upon an examination of Red Bank, supra, the above principle is equally applicable in New Jersey. If each unit member were permitted to pursue grievances to arbitration despite the majority representative's good faith refusal to do the same, it would seriously undermine the collective negotiations process, and

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22/ 78 N.J. at 137.

23/ 78 N.J. at 139. The Court in Red Bank, supra, hinted that it may be a violation of Section (a)(1) of the Act if an individual employee was prevented from presenting his grievance. In the instant matter, however, the Charging Party's grievance was presented and he was in fact represented by the majority representative.

actually subject the public employer to a negotiations process with each individual employee. That certainly was not the Legislature's intent in the passage of our Act.

Having found that no collusion existed between the Authority and Local 194, and that no evidence of an independent Section (a)(1) violation existed, the undersigned finds that the Authority was under no obligation to permit the Charging Party, without the majority representative, to present his grievance to binding arbitration.

Accordingly, the undersigned finds that the Charging Party failed to prove by a preponderance of the evidence that representatives of the Authority harassed him, or that the Authority interferred with the processing of his grievance, or unlawfully prevented him from presenting his grievance, or discharged him in violation of his contractual rights.

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

CONCLUSIONS OF LAW

The Respondent Authority did not violate N.J.S.A. 34:13A-5.4(a)(1) and (5) by denying the Charging Party's request to proceed to arbitration, or by discharging him for the reasons outlined herein.

RECOMMEDNED ORDER

The Respondent Authority not having violated the Act, supra, it is HEREBY ORDERED that the Complaint be dismissed in its entirety.

Arnold H. Zudick
Hearing Examiner

DATED: September 8, 1980
Trenton, New Jersey