

P.E.R.C. NO. 89-135

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT BUS
OPERATIONS, INC. & AMALGAMATED
TRANSIT UNION, LOCAL 819,

Respondents,

-and-

Docket No. CI-H-88-85

EMERSON ELDER,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission, in an interlocutory decision and order, directs Amalgamated Transit Unit, Local 819 to afford Emerson Elder the opportunity to appeal at Local 819's regularly scheduled membership meeting, the Executive Board's decision not to arbitrate his discharge.

STATE OF NEW JERSEY
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In the Matter of

NEW JERSEY TRANSIT BUS
OPERATIONS, INC. & AMALGAMATED
TRANSIT UNION, LOCAL 819,

Respondents,

-and-

Docket No. CI-H-88-85

EMERSON ELDER,

Charging Party.

Appearances:

For the Respondent, New Jersey Transit Bus Operations, Inc., Peter N. Peretti, Jr., Attorney General (Harriet H. Miller, Deputy Attorney General)

For the Respondent, Amalgamated Transit Union, Local 819, Weitzman & Rich, Esqs. (Richard P. Weitzman, of counsel)

For the Charging Party, Emerson Elder, pro se

INTERLOCUTORY DECISION AND ORDER

On May 10 and 11, 1988, Emerson Elder filed an unfair practice charge and amended charge against New Jersey Transit Bus Operations, Inc. ("NJT Bus") and the Amalgamated Transit Union, Local 819 ("ATU"). The charge alleges that NJT Bus violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (3), (4), (5), (6) and (7),^{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 (3) Discriminating in

by arbitrarily and discriminatorily discharging Elder. The charge alleges that ATU violated subsections 5.4(b)(1), (2), (3), (4) and (5)^{2/} by refusing to demand arbitration of Elder's grievance contesting the discharge.

On December 29, 1988, a Complaint and Notice of Hearing issued. On January 24, 1989, ATU filed its Answer denying that it violated the Act and claiming that its Executive Board determined in good faith that Elder's grievance did not warrant further processing. On February 2, 1989, NJT Bus filed its Answer claiming that Elder was discharged for cause and asserting several affirmative defenses.

1/ Footnote Continued From Previous Page

regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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 (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement (7) Violating any of the rules and regulations established by the commission."

2/ These subsections prohibit employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances. (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (5) Violating any of the rules and regulations established by the commission."

On February 2, 1989, NJT Bus filed a motion to dismiss with Hearing Examiner Alan R. Howe. It claimed that Elder's "vague and unfounded" allegations against it, even if true, do not constitute an unfair practice. On February 8, Elder filed a reply. On February 13, ATU indicated it took no position on the motion.

On March 6, 1989, the Hearing Examiner recommended that the allegations against NJT Bus be dismissed. H.E. No. 89-26, 15 NJPER 248 (¶20100 1989).^{3/} He found no allegation of interference with protected rights - subsection 5.4(a)(1); no allegation of discrimination for exercising protected rights - subsection 5.4(a)(3); no allegation of discrimination for using the protections of the Act - subsection 5.4(a)(4), and no allegation of collusion with ATU to refuse to process Elder's grievance - subsection 5.4(a)(5).

On March 23, 1989, Elder filed "exceptions."^{4/} He argues that personnel records and other proofs were not requested or looked into in depth, statements he made at a grievance hearing were not accurately reported by NJT Bus, and the charges leading to his discharge are without proof and were possibly altered.

3/ The Hearing Examiner treated the motion to dismiss as a motion for summary judgment even though it was filed with him. N.J.A.C. 19:14-4.8 provides that motions for summary judgment shall be filed with the Chairman who shall refer the motion to either the Commission or the Hearing Examiner.

4/ N.J.A.C. 19:14-4.6 provides that rulings by the hearing examiner on motions shall not be appealed to the Commission except by special permission. The Hearing Examiner, however, informed the parties that exceptions could be filed pursuant to N.J.A.C. 19:14-7.1.

On April 6, 1989, NJT Bus filed a reply. It argues that Elder has not alleged any facts that would trigger our jurisdiction. It further claims that his dispute, if any, is with his union, not NJT Bus. Finally, it claims that we are not the forum for a grievant to have discipline re-reviewed.

On March 27, 1989, the Hearing Examiner conducted a hearing on the charge against ATU. The parties examined witnesses, introduced exhibits, and argued orally. On April 9, the Hearing Examiner recommended dismissal of those allegations. H.E. 89-30, 15 NJPER ____ (¶ ____ 1989). He found that ATU did not breach its duty of fair representation when, after the Executive Board entertained Elder's presentation, it decided not to arbitrate his discharge grievance.

On May 4, 1989, Elder filed exceptions. He claims that he was not allowed to use records and witnesses on his behalf; he was constantly interrupted; no one is willing to research his unfair practice claims, and the supervisor sought the ATU's assistance in preventing arbitration.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. 89-26, pp. 3-4; H.E. 89-30, pp. 3-8) are accurate but incomplete. We incorporate them with this important addition. Elder testified that immediately after the Executive Board voted not to arbitrate his grievance, he asked Lombardi what the next step was and Lombardi said, "Good day, Mr. Elder." Elder was not informed that he had a right to appear at the next membership meeting to request that it overrule the Executive Board

decision. Wright and Outlaw testified for ATU about the Executive Board meeting and a member's subsequent right to appear before a membership meeting. Neither contradicted Elder's testimony about Lombardi's failure to inform Elder of that right.

Unions have power to negotiate terms and conditions of employment, but must represent the interests of all unit members without discrimination. N.J.S.A. 34:13A-5.3. A breach of the duty of fair representation occurs only when a union's conduct toward a unit member is "arbitrary, discriminatory, or in bad faith." Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976), citing Vaca v. Sipes, 386 U.S. 171 (1967). The Vaca standard has been consistently applied in evaluating fair representation cases. Saginario v. Attorney General, 87 N.J. 480 (1981); Fair Lawn Bd. of Ed., P.E.R.C. No. 84-138, 10 NJPER 351 (¶15163 1984); OPEIU Loc. 153 (Thomas Johnstone), P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983); City of Union City, P.E.R.C. No. 82-65, 8 NJPER 98 (¶13040 1982). "[All] the facts of each case must be scrutinized to determine whether a breach has been proven; there are no bright line tests." City of Union City, P.E.R.C. No. 82-65, 8 NJPER 98, 99-100 (¶13040 1982).

At this stage in the proceedings, we conclude that ATU fairly represented Elder through the decision of the Executive Board not to arbitrate his grievance. If that were the entire matter, we would be inclined to dismiss the allegations against ATU. However, Elder asked his union president what the next step would be to try to persuade the union to arbitrate his claim. Lombardi did not inform Elder that he could appeal the Board's decision to the union

membership. We cannot predict what the membership would have done and will not speculate how the membership's action might affect the outcome of this case. We believe it appropriate to put the parties back where they would have been had the union told Elder what the next step of the procedure was.


To effectuate that purpose, we make this interim determination. ATU shall afford Elder the opportunity to appeal the Executive Board decision, in accordance with union procedures, at the next regularly scheduled membership meeting. Within five days of the membership determination, ATU shall notify the Chairman of that determination. We retain jurisdiction over the remaining allegations against ATU and NJT Bus pending the membership's action.

ORDER

Amalgamated Transit Union, Local 819 is ordered to afford Emerson Elder the opportunity to appeal the Executive Board decision declining to arbitrate his discharge grievance at the next regularly scheduled membership meeting.

Within five days of the membership determination, ATU shall notify the Chairman of that determination.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Ruggiero, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
June 23, 1989
ISSUED: June 26, 1989

H.E. NO. 89-26

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

In the Matter of

NEW JERSEY TRANSIT BUS OPERATIONS, INC.
& AMALGAMATED TRANSIT UNION, LOCAL 819,

Respondents,

-and-

Docket No. CI-H-88-85

EMERSON ELDER,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss a Complaint against the Respondent New Jersey Transit by granting its Motion to Dismiss and/or for Summary Judgment. The Hearing Examiner concluded that by discharging the Charging Party on February 9, 1988, New Jersey Transit did not engage in any illegal conduct under §§5.4(a)(1), (3) through (7) of the Act.

The Charging Party had never engaged in any protected activity under the Act nor had he filed any petitions, complaints, etc within the meaning of subsection (a)(4). Since the employer had participated in good faith in the grievance procedure without collusion with ATU, the Hearing Examiner perceived no claim of a violation of subsection (a)(5) of the Act within the meaning of N.J. Turnpike Authority (Jeffrey Beall), P.E.R.C. No. 81-64, 6 NJPER 560, 561 (11284 1980). The alleged violation by New Jersey Transit of subsections (a)(6) and (7) of the Act bordered on the frivolous and were not seriously considered.

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. 89-26

STATE OF NEW JERSEY
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Appearances:

For the Respondent, New Jersey Transit
Hon. Peter N. Perretti, Jr., Attorney General
(Harriet H. Miller, D.A.G.)

For the Respondent, Local 819
Weitzman & Rich, Esqs.
(Richard P. Weitzman, of counsel)

For the Charging Party, Emerson Elder, pro se

HEARING EXAMINER'S RECOMMENDED DECISION AND
ORDER ON RESPONDENT NEW JERSEY TRANSIT'S MOTION
TO DISMISS AND/OR MOTION FOR SUMMARY JUDGMENT

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on May 10, 1988, and amended on May 11, 1988, by Emerson Elder ("Charging Party" or "Elder") alleging that New Jersey Transit Bus Operations, Inc. ("New Jersey Transit") and Amalgamated Transit Union, Local 819 ("ATU") have engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"), in that New Jersey Transit, which is the

sole subject of the instant motion, discharged Elder on February 9, 1988, because of "personal feeling" and a "double standard" without documented rules and regulations; also, that the discharge was because "of their mood" and because Elder had been "singled out because I stood up for my rights" and "was an example to others who spoke out for fair treatment"; further, that Elder was discharged while other employees like-situated received two days' suspension or were not discharged, notwithstanding dischargeable offenses committed, i.e., disparate treatment; that New Jersey Transit allowed "such practices to go on uncontested"; and in August 1987, Elder was threatened with discharge; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (3) through (7) of the Act.^{1/}

It appearing that the allegations of the Unfair Practice Charge, as amended, if true, may constitute unfair practices within

^{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. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

the meaning of the Act, a Complaint and Notice of Hearing was issued on December 29, 1988. Pursuant to the Complaint and Notice of Hearing, hearing dates were originally scheduled for February 14 and 15, 1989, in Newark, New Jersey, but these dates were adjourned without date upon the filing of a Motion to Dismiss by New Jersey Transit on February 2, 1989.^{2/} On February 8, 1989, Elder filed his opposition to the Motion to Dismiss and on February 15, 1989, the ATU filed a letter, indicating that it took no position with respect to New Jersey Transit's Motion to Dismiss and reiterating the position set forth in its Answer.

The Respondent New Jersey Transit's Motion to Dismiss is hereby decided in accordance with N.J.A.C. 19:14-4.7.

INTERIM FINDINGS OF FACT^{3/}

1. New Jersey Transit Bus Operations, Inc. is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. Emerson Elder is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

3. Elder was discharged from his position as a bus operator at the Orange Garage on February 9, 1988, after he had admitted at the first step of the grievance procedure under the

^{2/} The ATU filed its Answer on January 24, 1989, and New Jersey Transit filed its Answer on February 2, 1989.

^{3/} These findings are based upon the Unfair Practice Charge, as amended, and the Answer and moving papers of New Jersey Transit.

collective negotiations agreement with ATU that he had violated company rules on three occasions on February 3, 1988, by (1) falsifying his day card, (2) failing to make trips as per instructions and (3) pulling in ahead of time. [Answer of New Jersey Transit, Count One, ¶¶1, 2 - not denied by Elder in his opposition papers].

4. Elder's disciplinary record consists of eight infractions between April 19, 1984 and August 3, 1987, prior to his discharge on February 9, 1988. [Answer of New Jersey Transit, Count One, ¶3 - not denied by Elder in his opposition papers].

5. Under the collective negotiations agreement between New Jersey Transit and ATU, New Jersey Transit has no discretion or control over the decision of ATU to grieve a particular employee's dispute or grievance under the agreement.

6. Elder was discharged on February 9, 1988, notwithstanding that other employees like-situated were not discharged or received a two-day suspension for dischargeable offenses committed.^{4/}

^{4/} The Hearing Examiner cannot make "Interim Findings of Fact" based upon such conclusionary allegations by Elder as that his discharge occurred because of "personal feelings," a "double standard" or because "of their mood"; nor because he "stood up for his rights" or "spoke out for fair treatment." Likewise the Hearing Examiner can attach no weight to Elder's having been threatened with discharge in August 1987.

DISCUSSION AND ANALYSIS

New Jersey Transit in its moving papers seeks a Motion to Dismiss. A motion to dismiss is governed by N.J.A.C. 19:14-4.7, which provides only that if the motion is granted by the Hearing Examiner before the filing of his Recommended Report and Decision, then the Charging Party may obtain review by the Commission, provided the request for such review is filed within ten days of the order of dismissal. This rule does not, however, provide guidance as to the standard to be applied by the Hearing Examiner in determining whether to grant or deny the motion to dismiss.

However, the Hearing Examiner is unable to perceive any significant difference between the standard for disposing of a motion to dismiss and that of a motion for summary judgment, which is provided for N.J.A.C. 19:14-4.8. This rule provides in Section (a) that "...Any motion in the nature of a motion for summary judgment may only be made subsequent to the issuance of the complaint and shall be filed with the chairman of the commission, who shall refer the motion to either the commission or the hearing examiner..." Thus, it appears to the Hearing Examiner that he may treat New Jersey Transit's Motion to Dismiss as a motion for summary judgment even though it was filed directly with the Hearing Examiner and not with the Chairman.

N.J.A.C. 19:14-4.8(b) establishes the standard which the Commission utilizes in deciding whether or not to grant a motion for summary judgment, namely, that "...there exists no genuine issue of material fact and the movant or cross-movant is entitled to its

requested relief as a matter of law....," in which case summary judgment may be granted and the requested relief ordered.

The Commission has, in many cases, followed the New Jersey Civil Practice Rules (R.4:46-2) and a leading decision of the New Jersey Supreme Court in Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 73-75 (1954) in deciding motions for summary judgment under N.J.A.C. 19:14-4.8. Both the Civil Practice Rules and Judson apply the same standard.

But summary judgment is to be granted with extreme caution. The moving papers must be considered in the light most favorable to the opposing party, all doubts must be resolved against the movant, and the summary judgment procedure may not to be used as a substitute for a plenary trial: State of N.J. (Human Services), P.E.R.C. No. 89-52, 14 NJPER 695 (¶19297 1988), citing Baer v. Sorbello, 177 N.J. Super. 182, 185 (App Div. 1981); Essex Cty. Ed. Services Comm'n., 9 NJPER 19 (¶14009 1982).

The Hearing Examiner, guided by the above-stated requisites for the grant of Summary Judgment, concludes that the motion of New Jersey Transit must be granted. This decision follows from careful consideration of the above Interim Findings of Fact [¶'s 3-6] and is rendered after resolving all doubts in favor of Elder.

It will be recalled that Elder has alleged that New Jersey Transit violated all but one of the seven subsections appearing in §5.4(a) of the Act. The six subsections involved are grouped for discussion as follows:

ISections 5.4(a)(1) & (3) of the Act --

These two subsections have a common element in that the alleged discriminatee must have engaged in a recognized protected activity or activities in exercising his rights guaranteed by the Act. It is immediately apparent that there is nothing in the Elder's allegations as to New Jersey Transit, which would constitute an independent violation of §5.4(a)(1) of the Act within the meaning of N. J. Sports & Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 fn. 1 (¶10285 1979). Elder's allegations are devoid of any element of coercion or interference by New Jersey Transit with his rights under §5.4(a)(1) of the Act.

The next question to be resolved is whether or not the Elder's allegations as to New Jersey Transit are sufficient to support a violation of §5.4(a)(3) and, derivatively, §5.4(a)(1) of the Act. To constitute a sufficient allegation in this respect Elder must demonstrate that he has engaged in protected activities under the Act,^{5/} that New Jersey Transit knew that he had engaged in such protected activities and, finally, that New Jersey Transit manifested hostility or animus toward Elder in his exercise of rights protected by the Act: Bridgewater Tp. v. Bridgewater Public

^{5/} See, also, N.J. Job Corps Center, D.U.P. No. 82-4, 7 NJPER 425 (¶12189 1981) where the Director declined to issue a complaint upon an employee's unfair practice charge, notwithstanding his discharge, since the employee did not claim that he had engaged in activities on behalf of a union and was discriminated against for this reason.

Works Ass'n, 95 N.J. 235 (1984). The above Interim Findings of Fact contain no suggestion that New Jersey Transit did other than discharge Elder for cause, which might be remedied by an arbitrator under the collective negotiations agreement but does not satisfy the requirements of Bridgewater. There are no allegations in Elder's Unfair Practice Charge of May 10, 1988, as amended, which imply that he was engaged in protected activity or activities under the Act prior to his discharge. Even assuming that Elder had engaged in such activity, the Hearing Examiner cannot infer hostility from the mere fact that he was discharged on February 9, 1988. Thus, it appears clear that there is nothing in the record papers, which could constitute a violation by New Jersey Transit of §§5.4(a)(1) and (3) of the Act.

II

Section 5.4(a)(4) of the Act --

With respect to this subsection of the Act, the Hearing Examiner can perceive no theory upon which Elder might allege a violation based upon the Interim Findings of Fact. Unlike Hunterdon Cty. Bd. of Chosen Freeholders,^{6/} Elder was not discharged or otherwise discriminated against because he had signed or filed an affidavit, petition or complaint, nor had he given any information or testimony under the Act. In Hunterdon, the Commission concluded

^{6/} P.E.R.C. No. 87-150, 13 NJPER 506 (¶18188 1987), aff'd App. Div. Dkt. No. A-5558-86T8 (1988), appeal pending Sup. Ct. Dkt. No. 28,806.

that §5.4(a)(4) of the Act was violated when the County undertook discriminatory action against employees because the union there had filed an unfair practice charge, which predated the subsequent unfair practice charge upon which the Commission's decision was based. In the instant case, as noted previously, Elder had engaged in no conduct within the meaning of §5.4(a)(4), which could have triggered a violation of this subsection of the Act by New Jersey Transit.

III

Section 5.4(a)(5) of the Act --

Next there is the question of Elder's allegation that New Jersey Transit violated §5.4(a)(5) of the Act by having wrongfully discharged him. The above Interim Findings of Fact establish that Elder was discharged on February 9, 1988, after admitting certain infractions at the first step of the grievance procedure. Elder had a disciplinary history involving eight infractions since April 19, 1984. New Jersey Transit has no discretion or control over the decision of ATU to grieve a particular employee's dispute or grievance. Elder has alleged that other employees like-situated were not discharged or received a two days' suspension, notwithstanding that they had committed dischargeable offenses.

New Jersey Transit has cited N.J. Tpk. Auth. (Jeffrey Beall), P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980) and Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122 (1978) in support of its position that it has not violated §5.4(a)(5). In

N.J. Tpk. Auth., the Commission rendered a definitive decision as to when and under what circumstances an individual may charge a public employer with having violated subsection (a)(5) of the Act. In order to understand the Commission's rationale in deciding Beall, it is important to consider the factual setting, which was, briefly, as follows:

Beall was terminated for failure to report to work when scheduled and for taking an unauthorized leave of absence. Beall filed a grievance, which was processed through the contractual grievance procedure to an administrative hearing, which was the last step prior to arbitration. The hearing officer sustained the discharge and Beall requested that the union proceed to arbitration. However, the Executive Board of the union voted overwhelmingly against arbitration because it concluded there was little likelihood for success. The employer rejected Beall's request that it proceed to arbitration with Beall alone, notwithstanding his offer to arbitrate at his own expense. Finally, Beall contended that the employer and the union by their actions in combination with one another and had conspired to deprive him of his right to pursue his grievance to arbitration, i.e., the employer

exerted improper influence on the union not to take Beall's case to arbitration and the union acceded to such pressure.^{7/}

The Commission in Beall adopted the findings and conclusions of the hearing examiner, noting first that the allegation of a §5.4(a)(5) violation amounted to an attempt by Beall to have the merits of his discharge grievance adjudicated as an unfair practice, i.e., that his discharge was not for just cause under the agreement. The Commission then said that since the union had not improperly refused to take Beall's grievance to arbitration "...we must find that the Authority could not have violated N.J.S.A. 34:13A-5.4(a)(5)..." (6 NJPER at 561).

The Commission next stated that the negotiations obligation in §5.3 of the Act permits majority representatives to file unfair practice charges alleging violations of §5.4(a)(5) based upon claimed breaches of collective negotiations agreements. Since Beall's unfair practice charge amounted to exactly such a claim, the Commission stated:

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.

^{7/} The Hearing Examiner in Beall, in recommending dismissal of the Complaint, found that the union did not violate its duty of fair representation by refusing to take the case to arbitration and, additionally, that there was no collusion proven between the employer and the union in the decision not to pursue the grievance to arbitration: H.E. No 81-7, 6 NJPER 473, 476 (¶11241 1980).

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 vindicated in the unfair practice forum provided by this Act. (6 NJPER at 561).

The Commission's ultimate decision, in dismissing Beall's Complaint, was based upon the fact that the union had not breached its duty of fair representation and that there had been no proof of collusion by the employer in the decision of the union not to take Beall's termination to arbitration under the agreement.^{8/}

The Hearing Examiner is fully satisfied that Elder has alleged no facts, nor has New Jersey Transit made any admissions, which would support the conclusion that there had been any collusion between New Jersey Transit and ATU in the matter of ATU's refusal to process Elder's grievance to binding arbitration under the collective negotiations agreement. This conclusion is reached, notwithstanding that there has been no adjudication by this Hearing Examiner as to whether or not the ATU breached its duty of fair representation as to Elder when, in the course of processing his grievance, ATU refused to submit it to binding arbitration. Here

^{8/} The Commission also concluded that Beall had failed to prove an independent violation of §5.4(a)(1) of the Act since an individual public employee has no absolute statutory right to process a grievance to arbitration when the union has refused to exercise that right for the employee.

the Hearing Examiner quotes from the Commission's decision in N.J. Turnpike Authority, supra, where it was stated that:

...The employer cannot be charged with having violated its duty under N.J.S.A. 34:13A-5.4(a)(5) when that employer had in good faith participated in the grievance procedure negotiated with that representative for the resolution of disputes arising under the agreement. (6 NJPER at 561).

The above Interim Findings of Fact indicate only that New Jersey Transit fulfilled its contractual obligation with ATU by having participated in the contractual grievance procedure, following Elder's discharge on February 9, 1988. It is noted once again that under the collective agreement, New Jersey Transit had no discretion or control over the decision of ATU to grieve Elder's discharge to arbitration under the grievance procedure.

Accordingly, the Hearing Examiner perceives no reason to delay his decision on New Jersey Transit's Motion for Summary Judgment regarding the alleged violation by it of §5.4(a)(5) of the Act merely because there has as yet been no adjudication of Elder's charge against ATU that it breached its duty of fair representation as to him. It is here again noted that the Commission in N.J. Turnpike Authority stated quite clearly that "...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..." (6 NJPER at 561, supra).

IVSections 5.4(a)(6) & (7) of the Act --

These two subsections of the Act pertain respectively to the refusal of a public employer to reduce a negotiated agreement to writing and sign it; or to a public employer having violated any of the rules or regulations established by the Commission. Clearly Elder has no standing to allege a refusal by New Jersey Transit to reduce a negotiated agreement to writing and sign it since §5.4(a)(6) by its terms applies only to a public employee representative which had negotiated a collective negotiations agreement with a public employer. Finally, there is nothing in Elder's allegations which remotely involve a violation by New Jersey Transit of the rules and regulations established by the Commission.

* * * *

The Hearing Examiner has carefully considered and applied the Interim Findings of Fact to the six subsections of the Act allegedly violated by New Jersey Transit. It is clear beyond peradventure of doubt that New Jersey Transit did not engage in any conduct, which could constitute a violation of the Act as alleged.


Therefore, based upon the foregoing, and upon the record papers filed in this case by Elder and New Jersey Transit, the Hearing Examiner makes the following:

CONCLUSION OF LAW

The Respondent New Jersey Transit did not violate N.J.S.A. 34:13A-5.4(a)(1), (3) through (7) by its conduct herein.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Motion to Dismiss and/or for Summary Judgment by the Respondent New Jersey Transit be granted and that the Complaint as to it be dismissed in its entirety.



Alan R. Howe
Hearing Examiner

Dated: March 6, 1989
Trenton, New Jersey

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

In the Matter of

AMALGAMATED TRANSIT UNION,
LOCAL 819,1/

Respondent,

-and-

Docket No. CI-H-88-85

EMERSON ELDER,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent ATU did not violate §§5.4(b)(1) through (5) of the New Jersey Employer-Employee Relations Act when it refused to proceed to arbitrate the Charging Party's discharge grievance. The Charging Party was charged with an infraction of falsification of his bus operator Day Card, a most serious offense, and, after the ATU represented the Charging Party at the first three steps of the grievance procedure, it refused to take his case to arbitration. The decision of the Respondent ATU was untainted by discrimination and was based upon objective facts in considering prior requests for arbitration of discharges, it had taken five cases involving discharges to arbitration in 1988 out of eight to ten in which requests were made.

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.

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

In the Matter of

AMALGAMATED TRANSIT UNION,
LOCAL 819,^{1/}

Respondent,

-and-

Docket No. CI-H-88-85

EMERSON ELDER,

Charging Party.

Appearances:

For the Respondent, Amalgamated Transit Union, Local 819
Weitzman & Rich, Esqs. (Richard P. Weitzman, of counsel)

For the Charging Party, Emerson, Elder, pro se

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public
Employment Relations Commission ("Commission") on May 10, 1988, and
amended on May 11, 1988, by Emerson Elder ("Charging Party" or
"Elder") alleging that the Amalgamated Transit Union, Local 819
("ATU") has engaged in unfair practices within the meaning of the
New Jersey Employer-Employee Relations Act, as amended, N.J.S.A.
34:13A-1 et seq. ("Act"), in that ATU, following the third step of
the grievance procedure, unanimously refused Elder's request for

^{1/} New Jersey Transit Bus Operations, Inc. was an original
Respondent but it has been deleted from the present caption
since its Motion to Dismiss and/or Motion for Summary Judgment
was granted on March 6, 1989 [H.E. No. 89-26].

arbitration, which is his right as a member of ATU and, further, Elder was not given any "charges, or rules and regulations, or statements in writing" as to why ATU denied his request for arbitration; Elder alleges further that other employees with like offenses had their cases taken to arbitration; all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(b)(1) through (5) of the Act.^{2/}

It appearing that the allegations of the Unfair Practice Charge, as amended, if true, may constitute unfair practices within the meaning of the Act as to ATU, a Complaint and Notice of Hearing was issued on December 29, 1988. Pursuant to the Complaint and Notice of Hearing, hearing dates were originally scheduled for February 14 and 15, 1989, in Newark, New Jersey, but these dates were thereafter adjourned without date, pending the disposition of the above-noted Motion to Dismiss and/or Motion for Summary Judgment by New Jersey Transit Bus Operations, Inc., ("NJT"). Following the grant of this Motion, supra, a hearing was held on the Complaint of

^{2/} These subsections prohibit employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances. (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (5) Violating any of the rules and regulations established by the commission."

Elder against ATU on March 27, 1989. On this date the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Both parties argued orally and the instant decision is rendered upon the record, including the oral argument of the parties.

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

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

FINDINGS OF FACT

1. The Amalgamated Transit Union, Local 819 is a public employee representative within the meaning of the Act.
2. Emerson Elder, who was discharged on February 9, 1988, is, for purposes of this proceeding, a public employee within the meaning of the Act, as amended, and is subject to its provisions.
3. Elder was hired by NJT on July 26, 1982, as a bus operator. As noted previously, Elder was discharged on February 9, 1988.
4. Elder testified as to various disciplinary incidents, in which he was involved as a bus operator, between January 10, 1985 and February 3, 1988. Although Elder provided considerable detail as to the circumstances of the discipline administered by NJT for

various infractions, he did not testify as to any failure of the ATU to represent him until the last incident of February 3, 1988, following which he was discharged.^{3/}

5. Elder testified on cross-examination as to the following facts, which occurred on February 3, 1988: He reported for work at the Orange Garage at about 12:30 p.m. where he took out Bus No. 1066 on the Route No 21 line between West Orange and Penn Station in Newark; at some point in the late afternoon Elder's fare box became jammed and he was instructed to return the bus to the Orange Garage for a "change over"; this he did sometime between 6:00 p.m and 6:15 p.m. (CP-1, CP-2, CP-3, RU-1, RU-3); when Elder returned to the Orange Garage sometime between 6:00 and 6:15 p.m., he noticed that his automobile was not in its parking space on the parking lot and he made a call from a public telephone to ask if someone in his family had taken the car; then, upon being angered by the response, he "ran home" and was very upset upon finding that a friend had taken the key to his car and removed it; this upset which Elder endured over the next three to four hours resulted in Elder's having decided to falsify the entries on his "day card" (RU-1) such that entries were shown for his having operated a "phantom" Bus No. 7031 between the hours of 7:01 p.m. and 8:22 p.m. and his having

^{3/} The Hearing Examiner, although allowing Elder to testify regarding the infractions prior to February 3, 1988, by way of background, has attached no significance to this testimony since it did not implicate any failure on the part of ATU to fulfill its duty of fair representation as to Elder.

allegedly received fares of \$28.00 (RU-1); Elder returned his Day Card to the Orange Garage with the falsified entries contained therein sometime between 9:00 p.m. and 11:00 p.m.

6. When NJT learned of Elder's misconduct of February 3, 1988, he was summoned to a first-step grievance hearing^{4/} on February 9th where NJT Supervisor Frank L. Jones conducted a hearing in the presence of Elder and ATU Delegate Fred Wright (CP-1). Jones submitted his report on this first-step grievance hearing, which contained most of the factual essentials previously found.

7. Wright, the ATU Delegate who represented Elder at the first-step hearing on February 9th, impressed the Hearing Examiner by his demeanor as a truthful witness. Wright testified that he has been a Delegate for five years and has handled approximately 2500 first-step hearings. Wright testified that prior to Elder's first-step hearing, he reviewed the situation with Elder, including the charge that Elder had falsified his Day Card and Elder's defense that he had been "upset" on the night of February 3, 1988. Wright testified that Elder had had a chance to respond to the charges specified by Jones, and that he presented Elder's defense to the charge, namely, Elder's personal problems of upset and not being in a "right frame of mind." Wright stated that he "fought hard" for Elder's job and even took a "break" to discuss the matter further

^{4/} The collective negotiations agreement between NJT and ATU contains a four-step grievance procedure, terminating in binding arbitration (J-1).

since falsification of records warrants discharge. Wright's plea to Jones was that he should reduce the penalty of discharge.

8. A second-step grievance hearing was held on February 18, 1988, at which Elder was represented by Richard Outlaw, a Vice President of ATU for ten years (CP-2). The second-step hearing was conducted by Ed Cunningham of NJT; Jones, who conducted the first-step hearing, was also present. According to CP-2 and Outlaw's testimony, he stated that he was grieving the severity of the discipline and requested that Elder be reinstated. However, Cunningham sustained the discharge at the second-step. Outlaw testified at the instant hearing that he had reviewed the matter with Elder before entering the second-step hearing. Outlaw, who also impressed the Hearing Examiner as a truthful witness, testified that he requested leniency because of the circumstances and had hoped to resolve the matter in Elder's favor with lighter discipline. This, however, did not occur.

9. A third-step hearing occurred on March 1, 1988, before James J. Vergari, the Assistant Manager of Labor Relations for NJT (CP-3). Present were Vergari, Elder and ATU President, Ralph Lombardi, in addition to Supervisor Jones. According to CP-3, Lombardi, who did not testify at the instant hearing, asked that NJT

consider giving Elder one last chance and modify his discharge to a suspension.^{5/}

10. Elder requested the opportunity to appear before the Executive Board of ATU and did so on March 11, 1988. Elder complained that his opportunity to present his case to the Executive Board was "not full" although he spoke for 10 to 15 minutes! The Hearing Examiner does not credit Elder's testimony that the Executive Board members present interrupted his presentation and did not give him a full and adequate opportunity to speak. The Hearing Examiner accepts as more credible the testimony of Wright, who is an Executive Board member, that Elder made a full explanation and that he was questioned by the Executive Board members. However, after the members caucused, they voted unanimously to deny Elder's request for arbitration at the fourth step, because, in view of the severity of the falsification infraction, it was "no case" for an arbitrator. The testimony of Outlaw corroborated that of Wright as to the conduct of the Executive Board in considering Elder's request for arbitration. Outlaw confirmed Elder's testimony that at the conclusion of the Executive Board meeting Lombardi said to Elder "good day." Elder never appeared at any subsequent membership

^{5/} Elder confirmed in his testimony that Outlaw had asked for reinstatement and that Lombardi had, at the third-step hearing, asked Vergari to give Elder a last chance and a lesser penalty of suspension.

meeting to seek reversal of the Executive Board's decision^{6/} although Elder acknowledged that he had been to a few union meetings over the years and was aware that the union membership meetings take place once each month.^{7/}

DISCUSSION AND ANALYSIS

The ATU Did Not Breach Its Duty Of Fair Representation In Violation Of Section 5.4(b)(1) Of The Act When It Refused To Arbitrate Elder's Discharge Grievance.^{8/}

Elder's terminal difficulties with NJT resulted from his conduct on February 3, 1988, which, as previously found, centered on his admitted falsification of the Day Card on that date. Elder was represented at the first three steps of the grievance procedure in the collective negotiations agreement (J-1, pp. 2, 3) by ATU representatives Wright, Outlaw and Lombardi. It need not be reiterated here that each of these representatives consulted initially with Elder before the hearings at steps one through three

^{6/} Wright testified, without contradiction, that a union member can appear before a membership meeting and request that it overrule the decision of the Executive Board.

^{7/} In 1988 the ATU Executive Board voted to take five discharge cases to arbitration from among 8 to 10 cases in which a request for arbitration was made. These were from among a total of 25 applications for arbitration made to the Executive Board in 1988.

^{8/} Since Elder adduced no evidence whatever that ATU violated §§5.4(b)(2) through (5) of the Act, the Hearing Examiner will recommend dismissal of his allegations that ATU violated these four subsections of the Act. The sole question is whether or not ATU breached its duty of fair representation which, if proven, would constitute a violation of §5.4(b)(1) of the Act.

and spoke forcefully on his behalf before the representatives of management. Thus, the Hearing Examiner can perceive no dereliction in the duty of fair representation as to Elder by three ATU representatives.

After Elder's discharge was sustained, Elder, with the assistance of Lombardi, made a request to the ATU Executive Board that his case be taken to arbitration. A meeting of the Executive Board was convened on March 11, 1988, and after Elder had made his presentation, which lasted about 10-15 minutes, the Executive Board caucused and unanimously decided that Elder's case not be taken to arbitration. The Executive Board had, during 1988, considered 25 applications for arbitration, among which were eight to ten cases involving discharges. Of the latter, only five were voted upon favorably for arbitration.

The instant case must now be analyzed in the light of prior decisions of the Commission and the courts involving claims of a breach of the duty of fair representation by a labor organization. The courts of this State and the Commission have consistently embraced the standards established by the United States Supreme Court in Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967). See e.g., Saginario v. Attorney General, 87 N.J. 480 (1981); Council of State College Locals, AFT (Patrick), P.E.R.C. No. 89-26, 14 NJPER 605 (¶19256 1988); Distillery Workers Local 209 (Merricks), P.E.R.C. No. 88-13, 13 NJPER 710 (¶18263 1987); In re Board of Chosen Freeholders of Middlesex County, P.E.R.C. No. 81-62, 6 NJPER 555

(¶11281 1980), aff'd. Ap. Div. Docket No. A-1455-80 (1982), pet. for certif. den. (1982); New Jersey Turnpike Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979); and In re AFSCME Council No. 1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978). The Court in Vaca held that

...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. 386 U.S. at 190.

In fact, the U.S. Supreme Court has also held that to establish a claim of a breach of the duty of fair representation there must be adduced substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives. Amalgamated Assoc. of Street, Electric Railway and Motor Coach Employees of America v. Lockridge, 403 U.S. 274, 301, 77 LRRM 2501, 2512 (1971).

Further, the National Labor Relations Board has held that where a majority representative exercises its discretion in good faith, proof of mere negligence, standing alone, does not suffice to prove a breach of the duty of fair representation. Service Employees Int'l Union, Local No. 579 AFL-CIO, 229 NLRB 692, 95 LRRM 1156 (1977); Printing and Graphic Communication, Local 4, 249 NLRB No. 23, 104 LRRM 1050 (1980), reversed on other grounds 110 LRRM 2928 (1982).^{9/}

^{9/} See, also, Bergen Community College Adult Learning Center, H.E. No. 86-19, 12 NJPER 42, 45, 46 (¶17016 1985), aff'd P.E.R.C. No. 86-77, 12 NJPER 90 (¶17031 1985).

It is abundantly clear to the Hearing Examiner that Elder has not proven by a preponderance of the evidence that the ATU breached its duty of fair representation under the legal authorities set forth above. Vaca speaks in terms of arbitrary, discriminatory or bad faith conduct on the part of a union representative. Lockridge speaks further in terms of conduct that intentional, severe and unrelated to legitimate union objectives. The NLRB adds that proof of "mere negligence," standing alone, does not suffice to prove a breach of the duty of fair representation.

Finally, Vaca also holds that the decision to refuse to arbitrate a grievance is not in and of itself evidence of a breach of the duty of fair representation. See also, New Jersey Turnpike Employees Union Local 194 and Distillery Workers Local 209, supra and Rutgers, The State University et al. (Jennings), P.E.R.C. No. 88-130, 14 NJPER 414 (¶19166 1988).

The Hearing Examiner cannot conclude other than that the ATU, in its representation of Elder in the grievance procedure, including his request for arbitration, has not breached its duty of fair representation. First, the ATU's conduct in the representation of Elder was neither arbitrary nor discriminatory nor has the ATU manifested bad faith. Second, the United States Supreme Court's Amalgamated Ass'n. decision, supra, requires that there be substantial evidence of discrimination which is intentional, severe and unrelated to legitimate union objectives.

The Hearing Examiner, in evaluating the ATU's overall representation of Elder in this matter, concludes that the ATU did not engage in the type of discrimination which the United States Supreme Court dealt with in Amalgamated Ass'n. Further, the ATU appears at all times to have acted in furtherance of legitimate union objectives.

Finally, the Commission, following Vaca, has held in several decisions that the mere fact that a union refuses to arbitrate a grievance is not in and of itself evidence of a breach of the duty of fair representation. In N.J. Tpk. Employees Union, supra, the Commission stated that:

If in the past every discharge (here promotion) case had been processed through arbitration no matter how questionable the case, the Charging Party's allegation that the Union had breached its duty of non-discrimination would have been stronger...However, the Hearing Examiner found that in prior grievances the (Union)...had determined that some did not merit arbitration...Accordingly, the decision not to proceed to arbitration in this instance did not constitute unequal access to the grievance process...(emphasis supplied). (5 NJPER at 413, 414).

These conclusions of the Hearing Examiner, regarding the representation of Elder by the ATU's representatives, follow from the fact that Elder was fully and fairly represented at steps one through three under the contractual grievance procedure, notwithstanding that the ATU Executive Board on March 11, 1988, decided unanimously not to take his case to arbitration. Wright testified credibly that he felt that Elder was treated fairly vis-a-vis many other grievants who had sought to have their cases

taken to arbitration. Elder's falsification infraction was the main issue in the decision of the Executive Board not to take his case to arbitration. Finally, it appears to the Hearing Examiner that given the fact that the Executive Board was during 1988 presented with eight to ten requests to take discharge cases to arbitration, its decision to take only five such cases to arbitration hardly suggests a pattern of discrimination against Elder by its refusal to take his case to arbitration.

For all of the foregoing reasons, the Hearing Examiner must recommend that the Complaint be dismissed.

* * * *


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

CONCLUSION OF LAW

The Respondent ATU did not violate N.J.S.A. 34:13A-5.4(b)(1) through (5) when it refused to arbitrate the discharge grievance of Emerson Elder on March 11, 1988.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.



Alan R. Howe
Hearing Examiner

Dated: April 7, 1989
Trenton, New Jersey