D.U.P. NO. 93-9

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

In the Matter of

NEW JERSEY EDUCATION ASSOCIATION,

Respondent,

-and- Docket No. CI-92-88

ANDREW B. KORTON,

Charging Party.

CHERRY HILL BOARD OF EDUCATION,

Respondent,

-and- Docket No. CI-92-89

ANDREW B. KORTON,

Charging Party.

NEW JERSEY EDUCATION ASSOCIATION,

Respondent,

-and- Docket No. CI-92-90

ANDREW B. KORTON,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses certain allegations in unfair practice charges filed against the NJEA and

the Cherry Hill Board of Education. The Charging Party alleged that the NJEA failed to represent him when he was dismissed by the Board and that the Board failed to grant him a transfer when another individual had previously been given one. The Director determined that the NJEA did not breach its duty of fair representation with respect to the Charging Party's dismissal and that the Board's refusal to grant him a transfer was not based on any protected activity.

However, a Complaint and Notice of Hearing was issued with respect to the allegations of the charges that the NJEA violated the Act by refusing to file a grievance on the Charging Party's behalf when he was bumped from his position as night shift foreman and that the Board violated the Act by bumping the Charging Party from his position in favor of another unqualified employee.

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Appearances:

For the Respondent New Jersey Education Association,
Selikoff & Cohen, attorneys
(Judith A. O'Boyle, of counsel)

For the Respondent Board of Education,
Davis, Reberkenny & Abramowitz, attorneys
(William Davis, of counsel)

For the Charging Party,
Andrew B. Korton, pro se

DECISION

On April 21, 1992, Andrew B. Korton filed unfair practice charges with the Public Employment Relations Commission against the New Jersey Education Association and the Cherry Hill Board of Education. These charges were amended on June 23.[1/] Korton alleges that the NJEA violated subsections 5.4 (b)(1) and (2) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.,[2/] by refusing to file a grievance on his behalf when he was bumped from his position as night shift foreman at Cherry Hill High School East to the position of head custodian at Bret Harte Elementary School and by failing to represent him when he was dismissed by the Board. Korton alleges that the Board violated subsections 5.4(a)(1), (2) and (3) of the Act[3/] by bumping him

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1/ Korton had first filed these charges by a complaint in Superior Court, Law Division, Camden County on December 16, 1991. By Order dated April 3, 1992, the Court transferred the matter to 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/ 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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (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."

from his position at the high school in favor of another unqualified employee and by not granting him a transfer from the position at the elementary school when another individual had previously been given one.

The Association claims that it did not file a grievance over plaintiff's bumping because, upon investigation, it believed the allegation lacked merit under the contract. However, according to the Association, it told Korton numerous times he could file a grievance on his own and that he could request representation by the Association if his grievance went to arbitration. With respect to his discharge, the Association asserts that Korton never asked it to file a grievance and that, in any event, it represented him at his discharge hearing.

The Board claims that Korton was bumped strictly because he had less seniority than the individual who bumped him. Further, while admitting that the individual who bumped Korton did not have the requisite license for the job, it claims that the individual obtained the license shortly after bumping Korton. The Board also claims that it did not discriminate against Korton when it did not grant him a transfer. Although it did grant a transfer to another employee previously, that transfer was for a rules infraction and resulted in a reduced grade and salary for the trasnferred employee. Further, the Board claims that when he requested the transfer, there were then no vacant positions to transfer Korton to.

Korton had been employed as night shift foreman at Cherry Hill High School East since 1989. At that time, the job description for this position required that the night shift foreman possess and maintain a current New Jersey black seal boiler operator's license. Korton possessed that license then and continues to possess it now. On July 30, 1991, the Board changed the job description. It now provides that "those hired after September 1, 1991 must possess or be willing to obtain a New Jersey black seal boiler operator's license".

Article VI, Section F (3) covers bumping. It provides:

> Employees considered for lay-off shall first be considered for filling any existing vacancy in another job title of the same grade level provided they have the requisite qualifications and the ability to perform the work. If no vacancy exists in the same grade level, the employee may displace, in his same grade level, an employee with less seniority in the job title that the displacing employee has the requisite qualifications and ability to perform the work and likewise in successively lower grades. [sic] An employee placed in a lower grade shall be paid according to the salary guide for the grade level and job title actually worked. An employee not placed under these provisions shall be laid off. These provisions shall also apply to a displaced employee.

On May 17, 1991, Korton was informed that there would be a reduction in force by one position and that the individual in that position, Thomas Houcke, was exercising his bumping rights under the agreement and would be reassigned to Korton's position at the High School. He was also informed that he could seek reassignment pursuant

to the agreement. By letter dated May 17, Korton informed the Board that he desired reassignment to the head custodian position at Bret Harte Elementary School.

Korton believed that Houcke was not qualified for the position since he did not possess a black seal license, as required by the job description. Thus, before his reassignment was to become effective, Korton asked Camden County NJEA Representative Leahy and NJEA Regional Coordinator Geiger to file a grievance over his bumping. Both told him to ask local association president Ricco to file the grievance. Ricco initially told Korton he would file the grievance, but later told him he would not do so; Ricco informed him that it was the Association's opinion that there was no basis to file one under the agreement. According to Ricco, he informed Korton he could file a grievance on his own and that if it went to arbitration, he could request representation by the Association. Korton, however, disputes that he was ever told this. Korton then complained to Leahy and Geiger about Ricco's refusal to file a grievance. Leahy and Geiger agreed with Ricco's decision, but claim that they told Korton he could file a grievance on his own. Korton, however, disputes that he was told this.

Korton never filed a grievance on his own behalf. He was transferred to the Harte School on July 1, 1991. He did not get along with the principal at the Harte School and requested a transfer; the Board refused. In October 1991, Korton failed to report to work for 7 consecutive days and failed to call in during that time. By letter dated October 11, 1991, the Board informed him that it was recommending

his termination under Article 6, Section E (5) of the Agreement which provides:

> An employee's seniority shall cease and his/her employee status shall terminate for any of the following reasons:...
>
> 5. Failure to report to work for a period of three consecutive scheduled work days without notification to the Board of a justifiable excuse for such absence.

The Board also informed him that his dismissal hearing would be held on October 23, 1991. Korton never asked the Association to file a grievance over his dismissal; however, the Association did represent him at the dismissal hearing. The Association questioned the Assistant Superintendent about Korton's dismissal. However, after evaluating the evidence, the hearing officer upheld Korton's termination on October 28, 1991, finding that Korton had failed to report to work for 15 days. Korton was officially terminated by the Board on November 18, 1991.

ANALYSIS

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

> A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interests of all such employees without discrimination and without regard to employee organization membership.

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

> In the specific context of a challenge to a union's representation in processing a grievance, the United States Supreme Court has held: 'A breach of the statutory duty of fair representation occurs only when a union's conduct towards a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Vaca v. Sipes, 386 U.S. 171, 190 (1967) (Vaca). The courts and this Commission have consistently embraced the standards of Vaca in adjudicating such unfair representation claims. See, e.g., Saginario v. Attorney General, 87 N.J. 480 (1981); In re Board of Chosen Freeholders of Middlesex County, P.E.R.C. No. 81-62, 6 NJPER 555 (¶11282 1980), aff'd App. Div. Docket No. A-1455-80 (April 1, 1982), pet. for certif. den. (6/16/82) ("Middlesex County"); New Jersey Turnpike Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979) ("Local 194"); In re AFSCME Council No. 1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978). [footnote omitted]
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> We have also stated that a union should attempt to exercise reasonable care and diligence in investigating, processing and presenting grievances; it should exercise good faith in determining the merits of the grievance; and it must treat individuals equally by granting equal access to the grievance procedure and arbitration for similar grievances of equal merit. Middlesex County; Local 194. All the circumstances of a particular case, however, must be considered before a determination can be made concerning whether a majority representative has acted in bad faith, discriminatorily, or arbitrarily under Vaca standards. [OPEIU Local 153 at 13.]

The U.S. Supreme Court has also held that to establish a claim of a breach of the duty of fair representation, such claim "...carried with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." Amalgamated Assn. of Street, Electric, Railway and Motor Coach Employees of American v. Lockridge, 403 U.S. 274, 301, 77 LRRM 2501, 2512 (1971). 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 International Union, Local No. 579, AFL-CIO, 229 NLRB 692, 95 LRRM 1156 (1977); Printing and Graphic Communication, Local No. 4, 249 NLRB No. 23, 104 LRRM 1050 (1980), reversed on other grounds, 110 LRRM 2928 (1982).

Here, the Association did not breach its duty of fair representation with respect to Korton's dismissal. The Association represented Korton at his dismissal hearing and questioned an employer representative about the dismissal. The Association did not act arbitrarily, discriminatorily or in bad faith with respect to the hearing. Moreover, although the Association never filed a grievance over Korton's termination, Korton never requested it to do so. Based on the above, I conclude that Korton's allegations against the Association with respect to his discharge do not meet the Commission's complaint issuance standard.

With regard to the Board's refusal to transfer Korton from the Harte School, despite its having granted a transfer to another employee, the allegations do not show that the Board's actions were related to any protected activity; nor is there any proof that the Board's actions interfered with Korton's exercise of protected rights. See In re Bridgewater Tp., 95 N.J. 235 (1984). Rather, the Board had a legitimate business justification for its decision

refusing Korton a transfer from the Harte School, as there were then no available openings. See Rutgers Medical School, P.E.R.C. No. 87-7, 13 NJPER 115 (¶18050 1987). Finally, the facts alleged do not support Korton's claim of an (a)(2) violation that the Board dominated or interfered with the Association. Accordingly, I conclude that the allegations of the charge involving the Board's refusal to grant Korton a transfer do not meet the Commission's complaint issuance standard.

There is a material factual dispute concerning the allegations regarding Korton's being bumped in favor of an unqualified employee and the Association's failure to file a grievance over the bumping. Accordingly, a Complaint and Notice of Hearing will be issued as to these allegations against the Association and the Board.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

Edmund G. Gerber, Director

DATED: September 15, 1992
Trenton, New Jersey