

P.E.R.C. NO. 91-26

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

AMALGAMATED TRANSIT
UNION, DIVISION 821,

Respondent,

-and-

Docket No. CI-H-90-53

LARRY JACKSON,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, pursuant to authority granted to him by the full Commission in the absence of exceptions, dismisses a Complaint based on an unfair practice charge filed by Larry Jackson against Amalgamated Transit Union, Division 821. The Chairman found that the charging party failed to prove that the Union's conduct in processing his discharge grievance was arbitrary, discriminatory or in bad faith.

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Docket No. CI-H-90-53

LARRY JACKSON,

Charging Party.

Appearances:

For the Respondent, Weitzman & Rich, attorneys
(Richard P. Weitzman, of counsel)

For the Charging Party, Feintuch & Porwich, attorneys
(Philip Feintuch, of counsel)

DECISION AND ORDER

On February 8 and March 30 1990, Larry Jackson filed an unfair practice charge and amended charge against the Amalgamated Transit Union, Division 821 ("ATU"). The charge alleges that the ATU violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. specifically subsections 5.4(b)(1) through (5),^{1/} by failing to arbitrate his discharge grievance.

^{1/} 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 April 6, 1990, a Complaint and Notice of Hearing issued. On April 16, 1990, the ATU filed an Answer denying that it had acted in bad faith or out of prejudice toward the charging party.

On May 16 and 21, 1990, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses, introduced exhibits and argued orally.

On August 2, 1990, the Hearing Examiner recommended dismissing the Complaint. H.E. 91-3, 16 NJPER ____ (¶____ 1990). He found that the ATU's conduct had not breached its duty of fair representation.

The Hearing Examiner served his report on the parties and informed them that exceptions were due by August 15, 1990. Neither party filed exceptions or requested an extension of time.

I have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 3-12) are accurate. I incorporate them here. I clarify finding no. 4 to state that Simko was the union arbitrator on a three member panel. The neutral arbitrator issued the award and Simko assented.

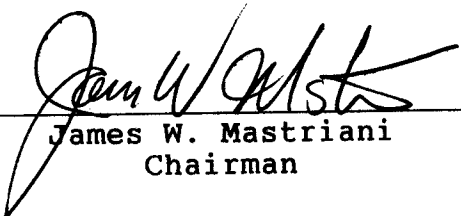
Acting pursuant to the authority granted to me by the full Commission in the absence of exceptions, I also agree with the Hearing Examiner's conclusion that the charging party failed to prove that the ATU's conduct in processing Jackson's discharge grievance was arbitrary, discriminatory or taken in bad faith. I do not judge the justness of the discharge or the wisdom of the ATU's decision. I find simply that the ATU's processing of the charging

party's grievance did not breach its duty of fair representation. I therefore dismiss the alleged violation of subsection 5.4(b)(1).^{2/}

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

DATED: Trenton, New Jersey
September 17, 1990

^{2/} The charging party presented no evidence to support a finding that the ATU violated subsections 5.4(b)(2) through (5).

H.E. NO. 91-3

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

In the Matter of

AMALGAMATED TRANSIT UNION,
DIVISION 821,

Respondent,

-and-

Docket No. CI-H-90-53

LARRY JACKSON,

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 arbitrate the Charging Party's discharge grievance. The Charging Party was charged with an infraction of engaging in a physical altercation with a fellow employee on October 11, 1989, 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 by a vote of the membership. The decision of the Respondent ATU was untainted by discrimination. The Charging Party had been discharged and reinstated by an arbitrator in 1987 with a final warning.

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. 91-3

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

In the Matter of

AMALGAMATED TRANSIT UNION,
DIVISION 821,

Respondent,

-and-

Docket No. CI-H-90-53

LARRY JACKSON,

Charging Party.

Appearances:

For the Respondent, ATU, Division 821
Weitzman & Rich, Attorneys
(Richard P. Weitzman, of counsel)

For the Charging Party, Larry Jackson
Feintuch & Porwich, Attorneys
(Philip Feintuch, of counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on February 8, 1990, and amended on March 30, 1990, by Larry Jackson ("Charging Party" or "Jackson") alleging that the Amalgamated Transit Union, Division 821 ("Respondent" or "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, following a disciplinary hearing on October 16, 1989, Jackson was dismissed from his position as a bus driver for New Jersey Bus Operations, Inc.; at this hearing, the ATU President and Shop Steward were present but

remained silent and, additionally, Jackson was not confronted by his accuser, who had been involved in an altercation with Jackson; following this hearing, a grievance hearing was held one week later where Jackson presented his version of the incident and again his accuser was not present; following this grievance hearing, Jackson's dismissal was upheld, and a second grievance hearing was held with the same result; shortly thereafter Jackson attended an ATU meeting where 15 members were present Jackson but he was denied an opportunity to state his version of the incident; additionally, the ATU President stated at this meeting, inter alia, that he did not believe anything that Jackson might say; following which there was a second ATU meeting, which Jackson did not attend, but learned later that the ATU membership refused to authorize arbitration of Jackson's case by a vote of 56 "no" votes and 54 "yes" votes with two votes voided; 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.^{1/}

^{1/} 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."

It appearing that the allegations of the Unfair Practice Charge, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on April 6, 1990. Pursuant to the Complaint and Notice of Hearing, hearings were held on May 16 and May 21, 1990 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Both parties argued orally on May 21st and waived the filing of post-hearing briefs (2 Tr 63-91)..

An Unfair Practice Charge, as amended, having been filed with the Commission, a question concerning alleged violations of the Act, as amended, 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, Division 821 is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

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

3. Jackson was originally hired as a bus driver on March 18, 1974, by the predecessor to his current employer, New Jersey Bus Operations, Inc. ("NJB") [1 Tr 15; R-1, p. 4; 2 Tr 43-45, 48].

4. Jackson's relevant disciplinary history consists of a prior discharge on August 13, 1987, which involved a physical altercation with a fellow employee (R-1; 1 Tr 114, 115, 119, 120). The ATU processed a grievance on Jackson's behalf in that case through the three steps of the grievance procedure to arbitration (1 Tr 115; 2 Tr 41, 42). In connection with the processing of his grievance in 1987, Jackson acknowledged that he was familiar with the procedures undertaken by the ATU in bringing his case to arbitration: first, he had to appeal and then appear at a regular monthly meeting of the ATU membership to present his case where the members present would question him and two weeks later a vote would be taken at the Garage (1 Tr 120-127; 2 Tr 42). In fact, Jackson appeared at a regular monthly membership meeting in 1987, following which he campaigned among his fellow employees for a favorable vote. Two weeks later, after a favorable vote, Jackson's case proceeded to arbitration. [1 Tr 124-126]. At the arbitration hearing on April 20, 1988, John R. Simko, the ATU President, was the arbitrator for the "Union" and the ATU was represented by counsel (2 Tr 42; R-1, p. 1). On May 31, 1988, the Arbitrator rendered his award, in which he reinstated Jackson but without back pay. The period from Jackson's discharge to his reinstatement was considered a "severe disciplinary suspension." Further, the Arbitrator added that Jackson's reinstatement was with "...a final warning and on a last chance basis..." [R-1, p. 7; 1 Tr 115-119].

5. The instant discharge of Jackson on October 16, 1989, supra, occurred as a result of a physical altercation with a fellow employee, Darnell Jackson ("Darnell") on October 11th (1 Tr 24-28, 79-105, 142-146). The events leading to Jackson's discharge are as follows:

a. On October 9 through October 11, 1989, Jackson operated the No. 126 bus between New York and Hoboken and had been doing so since April 1989 (1 Tr 53). On the return run from the Port Authority Terminal in New York, passengers board there and are discharged along the way until the bus terminates in Hoboken (1 Tr 54-56). From time to time fellow employees of NJB board a bus such as Jackson's and display their riding passes (1 Tr 54, 55). Typically, after Jackson discharges his passengers in Hoboken he returns the bus to the the Greenville Garage via the New Jersey Turnpike, exiting at Exit 14A (1 Tr 58-60).

b. On the two nights of October 9 and October 10, 1989, Darnell boarded Jackson's bus at the Port Authority Terminal in New York and displayed his riding pass (1 Tr 65). On October 9th, Darnell verbally abused Jackson and insisted that Jackson give him a ride to Bayview Avenue, which is Exit 14B on the New Jersey Turnpike. Jackson complied. [2 Tr 66-69, 75, 76]. The following night, October 10th, Darnell again boarded Jackson's bus in New York. Jackson first stated that he could not give him the same return ride to Exit 14B, but later Jackson agreed to do so. The ride to Bayview Avenue was without incident. [2 Tr 76-78].

c. On October 11th, Darnell again boarded Jackson's bus in New York and there was a heated verbal exchange between them before the bus left the Terminal. Jackson told Darnell that the only thing he could do that night was to drop him off at the Hudson Terminal. [2 Tr 79, 80]. Jackson explained that the problem in giving Darnell a ride, which departed from his normal return route, was one of his being asked to violate a Company rule by carrying even a fellow employee on a "deadhead" trip^{2/} (1 Tr 81-83). Having arrived at Hudson Terminal at about 8:00 p.m., Jackson gave Darnell a final ultimatum to leave the bus or he would seek outside help (1 Tr 88). Darnell stated that he would not leave and that he was to be taken to Bayview Avenue, following which Jackson left the bus and entered the Terminal Building in search of the police (1 Tr 89, 90). Finding none, Jackson reboarded the bus and drove to a point in Hoboken, again seeking assistance (1 Tr 93, 94). Returning to the bus, Jackson drove a short distance to a bus stop and ordered

^{2/} "Deadheading" occurs when a driver finishes his bus route and, after he has discharged all of his passengers, returns the bus to the garage (1 Tr 76). Jackson testified that he had been instructed many years ago by a Garage Supervisor, Matthew Feehan, that he was to carry no one on his bus while "deadheading" because there could be liability if an accident occurred en route (1 Tr 82-85). However, three ATU witnesses testified to the contrary, namely, that Feehan never gave any such instruction. The Hearing Examiner has credited the ATU witnesses on this issue based not only upon their demeanor but the improbability that such a rule ever existed as testified to by Jackson (2 Tr 5, 21, 22, 35, 36). Further, in having credited these witnesses, the Hearing Examiner has considered the fact that, at the request of the Charging Party, three of the four witnesses were sequestered. Only Simko remained in the hearing room throughout as a resource person [1 Tr 9-14].

Darnell off of the bus. Darnell then accosted him and a 20-minute altercation ensued. [1 Tr 26, 27, 98-101, 142-146]. At the conclusion of the altercation, Jackson, with Darnell still aboard, drove the bus back to the Greenville Garage via the Turnpike, following his usual route. Darnell departed at the Garage without further incident. [2 Tr 102-105, 107].

d. Jackson did not file the required "Occurrence Report" that night at the Garage because his supervisor, Len Wilkins, was not on the premises. However, a Dispatcher (Depot Master) was present and Jackson acknowledged that he could have complied with the Company rule by filing the Occurrence Report with him. [1 Tr 109-111, 128, 129]. Jackson did turn in his receipts to the Dispatcher after returning to the Garage at around 8:35 p.m. or 8:40 p.m. (1 Tr 127, 128).

6. On October 12, 1989, Jackson sought out Wilkins to discuss what had happened the night before. Wilkins stated that he had just talked to "the guy" (Darnell) and he needed to get Jackson's story when Jackson returned from a then pending trip. [1 Tr 136-138]. Upon his return, Jackson filled out an Incident Report, which Wilkins reviewed with him. Wilkins then gave Jackson a Violation Slip for a first step grievance hearing on October 16th (1 Tr 139-141, 147-149). Jackson was unsuccessful in reaching any of the ATU representatives prior to October 16th (1 Tr 150-152).

7. Steps One, Two and Three of the grievance procedure were held over the course of two weeks, beginning October 16, 1989.

At the first two steps, Jackson was represented by Simko, the President of ATU, and at the Third Step Jackson was also represented by his Shop Steward, Curtis A. Nelson, who appeared with Simko at Jackson's specific request (see 1 Tr 16-19, 21-28, 31, 32, 153-181; 2 Tr 23, 36-42, 49-54). Simko and Nelson testified credibly that it was unusual for a Shop Steward such as Nelson to be present at a Third Step hearing but that this was done because Jackson had specifically requested Nelson's presence (1 Tr 179-181; 2 Tr 23, 50, 51). Jackson acknowledged that at each step he was permitted to present a statement of his side of the case (1 Tr 171, 172, 178, 215, 216). Jackson testified that at the Third Step hearing Nelson stated on his behalf that he should not be terminated because of his 15 years of prior service. Jackson stated that Simko said nothing on his behalf (1 Tr 179, 180). However, the Hearing Examiner credits the testimony of Simko that at the Third Step hearing he argued on behalf of Jackson in support of his claim of "self-defense" and that Jackson should be given the benefit of the doubt with his 16 years of service compared to Darnell's two and one-half years of service (2 Tr 51, 52).

8. At the conclusion of the Third Step, the employer representative, James J. Vergari, upheld the discharge of Jackson and his decision was conveyed to Jackson by Nelson two days after the Third Step hearing (1 Tr 32, 181; 2 Tr 52).

9. As in the case of Jackson's 1987 discharge and his resort to the grievance procedure, Jackson in the instant case

attended a regular ATU meeting on the third Friday of November, 1989. What transpired at this meeting was the subject of contradictory testimony between Jackson on the one hand and the four ATU witnesses who were present at the meeting. The consensus was that there were 13 or 14 ATU members present but one witness estimated that there were 21 attendees (1 Tr 34, 35, 228; 2 Tr 9, 29, 30, 60). Simko presided at this meeting (1 Tr 187, 188). Domasio Gerena, a bus driver for 11 years, impressed the Hearing Examiner as a truthful witness whose testimony is credited. Gerena stated that the portion of the meeting allocated to Jackson's request for arbitration lasted over one hour and that Jackson spoke without interruption for about 30 to 40 minutes (1 Tr 225, 231; see, also: 2 Tr 7, 30). The Hearing Examiner does not credit Jackson's testimony that before he could make his presentation he was constantly interrupted by questions from the floor, adding that the questions were propounded in a boisterous atmosphere (1 Tr 35-37, 134, 190, 191, 197, 198, 200-203). Far more credible was the testimony of the ATU witnesses that, when Jackson completed his statement of his case, as many as nine members put some 11 or 12 questions to him on such matters as (1) why Jackson did not give Darnell a ride; (2) that the top priority of a bus driver is to carry fellow employees even when "deadheading"; and (3) why did Jackson provide passengers with transportation while "deadheading" on the No. 43 route (1 Tr 220-222, 233, 234; 2 Tr 7, 9, 11, 12). Gerena also testified that Jackson was not "cut off" from telling

his side of the story and that Simko several times used his gavel and told the members to listen (1 Tr 223, 224, 231, 232; see, also: 2 Tr 56). Before Jackson left the meeting of his own volition, he was told by Simko to be at the garage in two weeks where the voting would take place on whether or not his case would be taken to arbitration by ATU. Also, Simko, after stating to Jackson that since he had been "...through this before...", he should post on the bulletin board his version of what had happened (2 Tr 27, 28, 56, 57). The meeting ended when Jackson left (1 Tr 236).^{3/}

10. As previously found, Simko, at the conclusion of the meeting, advised Jackson that the vote would be taken in two weeks and that since Jackson had been "through this before" it might be helpful if he typed "...something up on the bulletin board as you did before..." and post it, to which Jackson responded "...you do it..." (2 Tr 56). Jackson acknowledged that Simko had, before Jackson left the membership meeting, stated that Jackson could, as

^{3/} Jackson insisted that near the end of the meeting Simko stated to him that he knew Darnell and had talked to him about the incident and that he, Simko, was going to tell the membership not to vote "yes" and that Jackson could "go to hell" (1 Tr 37, 38, 198, 199). Having heard the denials of Gerena and Richard Reczka, a bus driver and the current President of the ATU, that Simko made no such statements, and further having observed the demeanor of Simko as a witness, the Hearing Examiner refuses to credit Jackson on this issue of fact (1 Tr 227; 2 Tr 8). It appears most unlikely that Simko, who impressed the Hearing Examiner as a low-keyed and evenhanded individual, would have made such highly prejudicial statements to Jackson in the presence of those attending this meeting. Simko himself denied making the statements attributed to him by Jackson (2 Tr 59).

he did the last time, type up a "letter" and place it on the bulletin board. However, Jackson testified that he did not do so because of Simko's statement to him that it would not do him any good because he, Simko, had told the membership not to give Jackson a "yes vote." [1 Tr 206, 207]. Jackson offered an additional reason as to why he did not respond to Simko's suggestion to prepare and post a notice, namely, that the Simko's invitation to do so had been made "jokingly" (1 Tr 205, 206). Jackson acknowledged further that he was aware that the vote would be taken at the Greenville Garage two weeks later and that, although he had had an opportunity to appear and vote, he did not do so nor had he prepared and posted a statement on the bulletin board at the Garage (1 Tr 203-205). Jackson's stated reason for not having posted a statement on the bulletin board and for not having appeared to vote was that the membership at the meeting had "...almost sealed my coffin..." and that Simko, by his conduct, had signed Jackson's "...death warrant..." (1 Tr 203). The formal balloting took place as scheduled from 8:00 a.m. to 6:00 p.m. at the Greenville Garage two weeks after the membership meeting. Simko was not present. The result was a 56 "no" and 54 "yes" outcome with two void ballots. [1 Tr 40; 2 Tr 14, 15, 58]. Simko testified that the two "void" ballots were as a result of a member having written on the ballot instead of marking it properly but that the voided ballots did not

change the outcome, i.e. Jackson's discharge was not to be taken to arbitration (2 Tr 58, 59).^{4/}

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 Jackson's Discharge Grievance.^{5/}

The above Findings of Fact make clear beyond doubt that Simko and Nelson provided full, fair and adequate representation of Jackson in the three steps of the grievance procedure. Jackson participated in each step where he was given an opportunity to make a statement of his side of the case. Nelson, as Jackson's Shop Steward, did not participate in the first two steps of the grievance procedure but did so, at Jackson's request, at the Third Step. This was an accommodation to Jackson by Simko since a Shop Steward does not normally appear at the Third Step.

It is noted here that at the the Second Step, Frank Jones, the employer representative, advanced as one of the reasons for sustaining Jackson's discharge the fact of his prior discharge in 1987, where Jackson was reinstated with a final warning (2 Tr 41-48; R-1, p. 7). Jackson's prior discharge in 1987, and his conditional

^{4/} Jackson testified that he learned of the result several weeks later from his sister, who is also a bus driver (1 Tr 40, 41).

^{5/} Since Jackson 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.

reinstatement obviously weighed heavily against him when the employer decided in this case to terminate him for the altercation with Darnell.

Following the Third Step, Jackson appeared voluntarily at a membership meeting of the ATU where he was given an opportunity to present his side of the case. From several of the questions of the members present it is obvious that the "deadheading" issue was among their concerns, namely, that Jackson should have provided Darnell Jackson with a ride home on the "deadhead" from Hoboken. This indicates to the Hearing Examiner that if Jackson had done so then the provocation initiated by Darnell would have never surfaced and no altercation would have occurred on October 11, 1989. The Hearing Examiner is persuaded, based on his evaluation of the conflicting testimony as to what transpired at the membership meeting, that Jackson was given an opportunity to present his side of the case, notwithstanding the atmosphere that may have been created by some of the members' hostile questions.

Simko's deportment as chairman of the meeting strikes the Hearing Examiner as having been even handed, notwithstanding the statements attributed by Jackson to Simko, which have not been credited. There is no dispute but that at the conclusion of the meeting, before Jackson departed, Simko reminded Jackson that he could repeat the procedure that he had followed in 1987, by posting a statement of his position on the bulletin board at the Greenville Garage and campaigning prior to the crucial vote of the members as

to whether or not Jackson's case was to be arbitrated. Jackson disparaged Simko's suggestion as having been made "jokingly." However, the Hearing Examiner does not see it that way. Simko made an honest effort to give Jackson the same opportunity in 1989 that he had had in 1987, namely, to advance his position to the membership prior to the actual vote at the Garage two weeks after the membership meeting. Jackson's reasons for not having done so, i.e., because the membership had "almost sealed my coffin" and that Simko had signed his "death warrant," appear lame and unpersuasive. Had Jackson undertaken to campaign for a membership vote in favor of his arbitration and then voted himself he might prevailed. The vote was very close, 56 against and 54 in favor. Thus, it would appear that it was Jackson's conduct and not Simko's that proved to be his "death warrant," i.e., Jackson brought about his own "demise" by having made no effort whatsoever, following the membership meeting, to seek a favorable vote, even failing to cast a ballot.

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).^{6/}

It is abundantly clear to the Hearing Examiner that Jackson 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 Jackson in the grievance procedure, including his request for arbitration, has not breached its duty of fair representation. First, the ATU's conduct was neither arbitrary nor discriminatory nor has the ATU manifested bad faith. Second,

^{6/} 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).

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 Jackson 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 Jackson by the ATU's representatives, follow from the fact that Jackson participated in Steps One through Three of the contractual grievance procedure and was fully and fairly

represented. This is so, notwithstanding that the ATU membership voted 56 to 54 not to take his case to arbitration.

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

* * * *

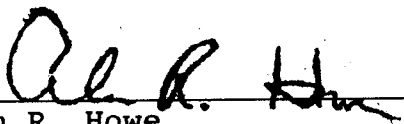
Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

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 Larry Jackson in December 1989.

RECOMMENDED ORDER

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



Alan R. Howe
Hearing Examiner

Dated: August 2, 1989
Trenton, New Jersey