

H.E. NO. 97-14

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

In the Matter of

NEWARK TEACHERS UNION,

Respondent,

-and-

Docket No. CI-H-96-29

HENRY A. AKIN-MARTINS,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission found that the Newark Teachers Union did not violate the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by the manner in which it represented him after his suspension and termination by the Newark Board of Education. The NTU's conduct was reasonable under the circumstances, and was not arbitrary, discriminatory, or in bad faith.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent,
Eugene G. Liss, Esq.

For the Charging Party,
David A. Krenkel, Esq.

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On November 14, 1995, Henry Akin-Martins ("Akin-Martins" or "Charging Party") filed an unfair practice charge (C-1A; T6-T7), ^{1/} amended on February 7 and April 4, 1996 (C-1B; C-1C; T7), against the Newark Teachers Union ("NTU"), alleging that the NTU violated subsections 5.4(a)(1), (4) and (7), and (b)(1), (3) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et

^{1/} Exhibits received in evidence marked as "C" refer to Commission exhibits; those marked as "J" refer to joint exhibits. Transcript citations "T1" refer to the transcript developed on June 27, 1996 at page 1.

seq. ("Act").^{2/} The Charging Party alleged that the NTU failed to fairly represent him regarding his suspension and subsequent termination as an employee of the Newark Board of Education ("Board"). In the amended charges, Akin-Martins alleged the NTU would not represent him because of a letter he sent to the Board's Human Resources Department regarding the Board's inept administration.

Akin-Martins also alleged that the NTU violated N.J.S.A. 34:13A-8.2 because he had a one year employment contract.^{3/}

2/ These subsections prohibit public employers, their representatives or agents from: (a) "(1) Interfering with, restraining or coercing 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. (7) Violating any of the rules and regulations established by the commission."

These subsections prohibit employee organizations, their representatives or agents from: (b) "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (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. (5) Violating any of the rules and regulations established by the commission."

3/ This statute provides:

The commission shall collect and maintain a current file of filed contracts in public employment. Public employers shall file with the commission a copy of any contracts it has negotiated with public employee representatives following the consummation of negotiations.

Finally, Akin-Martins alleged that the NTU violated N.J.S.A. 34:19-1 et seq., the Conscientious Employee Protection Act, which protects employees from retaliatory actions.

In the original handwritten charge, Akin-Martins alleged the NTU breached its duty of fair representation by refusing to represent him before the Newark Board of Education after he was suspended on September 21, 1995, and terminated on October 21, 1995. He further alleged that the NTU acted in collusion with the Board to "disenfranchise" him from his job, and that his wrongful termination by the Board was in retaliation for a June 1995 letter he wrote in which he complained about the Board's Supervisor of Human Resources, Lynn Antonacci.

In the first amended charge, Akin-Martins alleged he was told he would not be represented because of the letter he sent noting the Board's poor administration, and in the second amended charge he added that he never received a copy of the collective agreement between the Board and the NTU.

In the original charge, Akin-Martins claimed that his rights were violated pursuant to the 5.4(a) subsections of the Act which address employer unfair practices. However, Akin-Martins did not name the Board as a Respondent in the charge; never served it with the charge; did not present a case against the Board during the hearing; and confirmed at hearing that the NTU was the Respondent in this case (T10-T11).

A Complaint and Notice of Hearing was issued on May 15, 1996 (C-1; T6-T7). The Respondent filed an Answer (C-2) and Amended Answer (C-3) on April 24 and May 24, 1996, respectively, denying the allegations raised in the charge. The NTU argued that it did not violate its duty of fair representation and that it had provided a copy of the collective negotiations agreement to Akin-Martins.

A hearing was conducted on June 27, 1996. A briefing schedule was established for September 20, 1996, but neither party submitted briefs.

Based upon the entire record, I make the following:

FINDINGS OF FACT

1. Akin-Martins was employed by the Board in September 1992 as a per diem substitute teacher available to teach kindergarten through grade 12 (T15; T29; T30; T32-T34; T50). He was retained by the Board as a per diem substitute teacher from 1992-1995 (T15; T32). The regularity of employment as a per diem substitute teacher differs from that of a long term substitute teacher (T33). Per diem substitute teachers report to work only when they are called (T32-T33).

Akin-Martins became a full time teacher for the Board effective September 5, 1995 (T15-T16). But on or about September 21, 1995, he was notified he was being terminated effective October 21, 1995 (C-1A(8)).

2. The NTU administers two collective agreements for Board employees (T59). One contract applies to per diem substitute teachers/aides and it covered Akin-Martins during the years he served as a per diem substitute teacher^{4/} The second agreement administered by the NTU covers teachers and clerks (J-1; T9-T10). J-1 applied to Akin-Martins when he became a full-time employee in September 1995 (T59-T60). Per diem substitute teachers are specifically excluded from that contract.

3. Akin-Martins became an NTU member once he was employed as a per diem substitute teacher in 1992. His membership dues were automatically deducted from his paycheck (T16; T34).

While the Charging Party was employed as a per diem substitute teacher, charges were filed against him with the States' Department of Youth and Family Services ("DYFS"). Ultimately, all but one of the charges were categorized by DYFS as "unsubstantiated." Akin-Martins was never interviewed or called to a hearing with respect to any of the unsubstantiated charges (T29-T30).

The charge that was "substantiated" involved an incident in 1992 in which slapping occurred.^{5/} Akin-Martins represented himself at DYFS (T29; T31). He thought he was entitled to union

^{4/} The agreement covering per diem substitute teachers/aides was not offered for evidence (T59).

^{5/} The record does not clearly indicate what the Charging Party did (T29; T31).

assistance, but he never requested it (T32; T67), and he never filed a complaint against the NTU for allegedly failing to represent him in an investigation before DYFS.

Akin-Martins testified that in 1992 he asked NTU Executive Director, Pietro Petino, to represent him in the slapping incident case before DYFS, but that Petino refused (T30-T32). Petino denied refusing to provide assistance. He testified he didn't meet Akin-Martins until 1995 (T67). Petino also testified that Akin-Martins never sought assistance regarding any DYFS complaint, but if he had, he would have represented him, even as a per diem, because participation in DYFS hearings is a routine part of his job (T67). I credit Petino's testimony. Akin-Martins had difficulty recalling when he allegedly asked Petino for help (T30-T31). His testimony was unreliable.

4. In May 1995, Akin-Martins was involved in another DYFS incident (C-1A(5); T6-T7). Charges were filed against him on May 22, 1995 alleging physical abuse while he was teaching at the Miller School on May 19, 1995. DYFS conducted an investigation. Akin-Martins was advised of the investigation and the outcome by letter of August 11, 1995 (C-1A(5)), from Margaret Burgess, Assistant Regional Supervisor, Institutional Abuse Investigation Unit. The physical abuse charge was found "unsubstantiated with concerns".

5. During his employment as a per diem substitute teacher, Akin-Martins applied for several vacant permanent teacher positions

and participated in five interviews (T38; C-1A(4)). He was not hired in a permanent position, however, until September 1995.

At some point during his interview experience, the Charging Party interacted with Lynn Antonacci from the Board's Human Resources Department (C-1A(4); C-1A(10)). Akin-Martins believed that Antonacci was handling his interviews unfairly and that she did not want him to work for the Board (T25-T26). Antonacci apparently told him that he would never work for the Board again.^{6/} He concluded that the Board condoned nepotism in its teacher hiring practices and he thought he was being treated unfairly (T19; T25; T35; C-1A(4)). He felt that "if you don't know nobody in the...Board, you can't get into the school" (T38). He felt grieved and harmed by Antonacci and thought that she was vindictive toward him (T26).

During that time period, the State was preparing to take over the Newark Board of Education (T38). On June 30, 1995, Akin-Martins wrote a letter (C-1A(4)) to the Executive Director of Human Resources, Ms. Caponegro, strongly detailing his frustrating interview experiences involving Antonacci and the Personnel Department, and directly accusing the Board of nepotism (T35; T19). He wrote that letter to bring these problems to the attention of the State authorities (T18-T19; T38). He was very concerned that after teaching for years in Newark, he was not getting called to

^{6/} The record does not show what caused Antonacci's remark (T25).

interviews while others were being called (T34). He thought many people were complaining to the State Department of Education about the "rampant nepotism" (T19; T35; T38).

Akin-Martins pursued the issues involving Antonacci and the Board nepotism problem by himself (T27). He never contacted the NTU at the time Antonacci made the objectionable remarks to him (T27; T28). He also never contacted or advised the NTU about the letter he sent to Caponegro because "I had no cause to contact the Union" (T37).

6. After Akin-Martins wrote C-1A(4) to Caponegro, he met with Lou Conte, Director of Human Resources. Conte advised him that another interview was coming up and they would call him for the next interview (T37).

7. After Akin-Martins sent his letter to Caponegro, a meeting was arranged between them to discuss his problems (T37-T39). Akin-Martins did not ask the NTU to attend the meeting with him, remarking that,

...[A]s an employee of the Newark Board of Education-- Newark School, I don't think I had to go all the way out each time I want to meet anybody in the administration to notify the union. I don't think it's actually necessary. (T39).

At the meeting, Caponegro apologized to Akin-Martins for not being called for any interviews. He explained to her that he had been called for five interviews, and that he wrote his letter to her because he wanted to get his nepotism complaints to the right authorities (T38).

8. Later in the Summer of 1995, Akin-Martins scheduled a meeting with Acting State District Assistant Superintendent, Patricia Lucas, to discuss Antonacci's remarks (T27-T28). They met on August 25, 1995 (T28). Akin-Martins pursued that matter and scheduled the meeting on his own. He did not ask for the NTU's assistance (T28-T29).

Lucas reviewed Akin-Martins' files during their meeting (T27). She confirmed the results of the meeting by letter of the same date (C-1A(6)). She advised him that he would immediately be reinstated as a substitute teacher for the 1995-96 school year, and that his candidacy would be considered for vacancies in the Bilingual Department; however, this was not to be construed as a guarantee of permanent employment.

9. On August 31, 1995, Akin-Martins received a letter from Lucas (C-1A(7)) notifying him of his appointment as a full time Elementary/Bilingual Teacher at Vailsburg Middle School effective September 5, 1995. He began his appointment on September 5 (T15-T16). The NTU began deducting dues from his salary as a full time teacher (T16).

By letter of September 21, 1995 (C-1A(8)), however, Dr. Beverly Itall, Acting State District Superintendent, notified Akin-Martins of his suspension and termination effective that day. The letter stated:

Based upon recommendations of the Acting State District Asst. Superintendent for Human Resource Services, you are hereby terminated effective October 21, 1995. This action is taken pursuant

to the 30 day notice provision of your employment contract, paragraph 4, dated August 31, 1995. Effective at the close of business today, you are suspended with pay from your duties as Elementary Bilingual Teacher until the date of your termination. You are not to report to Vailsburg School Bilingual Program or enter upon school premises.

The decision to terminate your services is based upon a recommendation of the Department of Human Services, Division of Youth and Family Services, Institutional Abuse Investigation Unit ("IAIU") by letter dated August 17, 1995.

According to IAIU, on May 19, 1995 you were employed as a substitute teacher assigned to Miller Street School. On this date, you slapped pupil [X]^{7/} in the face which was an inappropriate form of discipline. Previously, you were reported to IAIU for physical abuse of pupils on January 23, 1992, March 12, 1992 and March 16, 1992. According to IAIU, you have exhibited a pattern of "unjustified and inappropriate methods of physical intervention".

If you have any questions concerning this action, you may contact Dr. John Nolan, Acting State District Assistant Superintendent, Office of Human Resource Services.

C-1A(8) was copied to five parties including Dr. Nolan, the Newark Teachers Union, and Antonacci.

Akin-Martins scheduled an appointment to meet with Dr. Nolan upon receipt of C-1A(8) (T44-T46; T48).^{8/} His meeting was scheduled for September 26, 1995 (T48; T56; T57).

^{7/} I deleted the pupil's name from this text.

^{8/} Akin-Martins's recollection is unclear about how he arranged the Nolan meeting, he either telephoned in advance, or showed up at Nolan's office (T45; T47-T48).

10. Sometime after Akin-Martins had been notified of his termination and had arranged to meet with Nolan, he decided to seek help from the NTU (T17; T20). On September 25, 1995, he went to the NTU office and spoke with Petino (T51). Petino's duties include grievance handling from their inception through arbitration. During his 27 years of employment with the NTU, he has filed innumerable, even "thousands" of grievances (T52). The NTU regularly represents non-tenured teachers regarding grievances and terminations (T58). Petino routinely appears on behalf of employees, whether they are per diem employees, aides, tenured or non-tenured teachers, at DYFS hearings, sometimes two or three times per week (T67).

Akin-Martins testified that after he arranged his meeting with Nolan, he thinks he called Petino at the NTU office, told him about the Nolan meeting, asked Petino to attend with him, and said Petino responded on the phone:

[W]e don't want to represent your case....We don't want to represent you. We don't want to have nothing to do with you.... (T46-T48).

I do not credit Akin-Martins' testimony that he called the NTU before going to its office on September 25. His recollection about the telephone conversation is unclear. He testified, "I--I think I remember, you know, having--telling--calling Mr. Petino".... Then when asked did he call rather than see him, he responded he called him (T46), which is inconsistent with Petino's testimony that he met with Akin-Martins on September 25, 1995 (T52). Petino denied telling the Charging Party he would not represent him (T58), and he

gave a detailed explanation of their meeting (T56-T59). I credit Petino's testimony. It was more logical and more consistent than Akin-Martins.

When Akin-Martins went to the NTU office on September 25, 1995, Petino met with him in his office for one half hour to forty five minutes (T52; T65). Akin-Martins asked Petino for help in clearing up this case because he was suspended and facing termination in a month (T17-T18). Petino understood that Akin-Martins needed representation (T64).

Akin-Martins showed Petino the termination letter (C-1A(8)) he had received from the Board on the previous Friday (T18). Petino copied it. Akin-Martins did not show Petino any other documentation (T53).

Petino and Akin-Martins had a lengthy conversation about Akin-Martins' employment status (T53-T54). Petino asked Akin-Martins when he was employed. Akin-Martins told Petino that he was recently hired; he signed a contract; and then said he was "unjustly terminated" (T53-T55). From their conversation, and from C-1A(8), Petino knew that Akin-Martins was a non-tenured teacher, and that his termination was a central office personnel action (T53-T55). Petino and Akin-Martins also talked about the DYFS allegations. Petino explained that use of the phrase "unsubstantiated with concerns" was not a positive remark (T65).

During the meeting, Petino gave Akin-Martins a copy of the NTU's collective agreement based upon his request (T58; T66).

Contracts are on the counter at the Union office for all of the titles represented by the NTU; teachers, clerks, per diems and aides (T58). When Petino gave the teachers contract to Akin-Martins, he did not memorialize it in writing. He never does (T64). The Union distributes over 9,000 contracts in a three year period; they routinely give them away without question (T64; T66). Petino discussed the contract with Akin-Martins, explained what he was going to do for him, but he never opened up a contract to point to any specific provisions (T67).^{9/}

Akin-Martins testified that at the September 25, 1996 meeting Petino refused to represent him because he was a non-tenured teacher. He said that Petino told him to do the case himself, and to get his own lawyer (T21; T43; T44; T47;). The Charging Party also testified that Petino told him he wouldn't represent him because of the letter Akin-Martins wrote about Antonacci (T18; T21).

Petino testified that he told Akin-Martins that he would look into his matter to ascertain why he was terminated and he would get back to him (T54). Petino felt that they had a good meeting.

I don't credit Akin-Martins testimony about the events of the meeting. The record is void of any evidence that Petino ever saw the letter about Antonacci because the Union wasn't copied on C-1A(4); Akin-Martins didn't bring any documentation other than his

^{9/} Akin-Martins had testified that he was never given a copy of the contract (T17). I do not credit his testimony. I found Petino's explanation as to how contracts are routinely distributed to be both reasonable and believable.

termination letter to the meeting with Petino, nor did they discuss this matter (T55). Since it doesn't appear that Petino knew about the situation involving Antonacci, it doesn't make sense that he would say he refused to represent Akin-Martins because of it. Consequently, I credit Petino's testimony.

Certain topics were not discussed during the September 25, 1995 meeting between Akin-Martins and Petino. Akin-Martins never discussed Antonacci, Lucas, or other people with Petino (T55). He did not tell Petino about the letter he sent to Caponegro (C-1A(4); T65), and he never raised a freedom of speech issue with Petino (T66). Finally, Akin-Martins did not advise Petino that he had scheduled a meeting for himself with Nolan for the next day, September 26, 1995, nor did he ask Petino to attend the meeting with him (T55-T56; T62-T63).

11. After meeting with Akin-Martins, Petino reviewed the contract to determine which sections he should follow regarding the Charging Party's complaints (T54; J-1). He immediately considered Article III, Sec. 3(C), which provides in pertinent part:

ARTICLE III - SECTION 3.

C. A grievance arising from the action of a Supervisor, Director, Coordinator attached to the Central Office, Associate to Assistant Executive Superintendent or Assistant Executive Superintendents, will first be discussed with that official and if not resolved informally it may be processed in accordance with Steps "3", or "4" above.

D. Nothing in this contract shall be construed as compelling the Union to submit a grievance to arbitration.

This clause applies when an individual alleges a grievance arising out of his/her employment attached to the Central Office. Petino knew that he had to contact Nolan regarding the Charging Party's termination (T54-T55).

Petino looked for procedural defects in the contract as the basis for filing a grievance (T56). He knew that Article 5, Section 1B provided rights to a non-tenured teacher to have a hearing before termination, and thought he might have a basis to move on that issue when discussing Akin-Martins with Nolan (T56; T60).^{10/}

Petino also knew that teachers could file their own grievances under the contract, but he wasn't focusing on that since Akin-Martins had asked him for representation (T60; J-1). Once or twice during the 27 years Petino has worked for the NTU, people have handled their own cases, but it's rare (T60).

10/ ARTICLE V - GENERAL CONDITIONS OF EMPLOYMENT

SECTION 1. FAIR EMPLOYMENT PRACTICE, provides:

B. No non-tenured employee shall be suspended or discharged or separated from employment unless an informal conference has been held with the employee and his/her representative with the appropriate administrator. At the conference, the employee shall be apprised of the reasons of the conference and given an opportunity to respond. Before any notification of non-renewal, the teacher shall receive notice of any unsatisfactory evaluation and offered assistance to improve his/her performance.

12. After Akin-Martins left Petino's office on September 25, Petino reviewed the contract, and called Dr. Nolan. However, Petino and Nolan did not discuss the Akin-Martins termination that day because Nolan did not return Petino's call until September 27, 1995 (T55).

Akin-Martins met with Nolan on September 26, 1995.^{11/} Prior to this meeting with Nolan, Akin-Martins had not discussed his termination with any other Board employee.

In their meeting, Nolan told Akin-Martins "I've been expecting you. It's a pity that we have to dismiss you" (T43). Nolan discussed the DYFS charges and complaints with Akin-Martins and explained to him that was why he was not rehired (T43; T56). Akin-Martins protested to Nolan that none of the complaints were true; they were not substantiated except for one event (T43). He emphasized to Nolan that other teachers had 10 or 12 substantiated charges in their records, and wondered why he was being "pointed out" (T44). Further, he reminded Nolan that he was still called to substitute while the charges were pending (T43). At the end of their meeting, Nolan told Akin-Martins: "that's the end of the case" and he dismissed Akin-Martins from the office.

^{11/} I do not credit Akin-Martins testimony that his meeting with Nolan was a "week after or some days after or about a week after" he met with Petino (T44, T46). I already discredited the Charging Party's testimony in describing the events related to his meeting with Petino, nor did I credit his testimony that he told Petino, in advance, about his meeting with Nolan. I infer that the Charging Party was intentionally avoiding telling Petino about the meeting he had scheduled on his own with Nolan.

13. On September 27, 1995, Nolan returned Petino's telephone call made two days earlier (T55). They discussed Akin-Martins termination (T55-T56). Petino's first approach with Nolan was that Akin-Martins was a non-tenured teacher. Petino believed there was a violation of his rights under the contract, Article 5 Section 1B, by terminating him without giving him a hearing (J-1; T56; T60).

Nolan's response to Petino was "you're way off base, Mr. Petino" (T56). Nolan explained that he had had a meeting and hearing with Akin-Martins the previous day at 2:00 p.m. (T56). Nolan further told Petino that he and Akin-Martins went through a discussion of the situation and Nolan explained that Akin-Martins would not be rehired due to the four DYFS charges (T56-T57). After their conversation, Petino verified the September 26, 1995 meeting between Nolan and Akin-Martins (T57).

Having learned, "after the fact," about the Nolan/Akin-Martins meeting, Petino realized that he "did not have a formal grievance to process" (T57; T62-T63). He decided not to pursue the grievance procedure because even a step three grievance would have returned the matter to Nolan with a low likelihood of success to rescind the termination due to the DYFS charges (T62). Petino would have attended and represented Akin-Martins in the meeting with Nolan if Akin-Martins had asked him to do so (T62-T63).

14. After his discussion with Nolan, Petino telephoned Akin-Martins (T57).^{12/} Petino told Akin-Martins what Nolan had said and explained to him that there was really no violation to his rights. Petino explained to Akin-Martins that he had had a hearing, that his employment contract included a 30 day termination clause by either party; and that the Board had honored that clause by giving him 30 days notice (T58).

Akin-Martins disagreed with Petino's explanation (T57). He asserted that he was a contract teacher and a Union member and he didn't need to be a tenured teacher to be represented by his Union (T21-T22). Petino tried to explain the matter to him so that he could understand it. Akin-Martins called him two more times and Petino spoke to him both times (T57). In both conversations, Petino explained that there was no formal grievance to process (T57), but Petino never told Akin-Martins to get a lawyer during any of those telephone conversations (T64).

After Petino advised him that he had no grounds to file a grievance, Akin-Martins went to the library seeking information on how he could pursue his case (T20; T50). He learned that he could contact Newark Legal Aid Services (T20-T21), and that he could file an unfair labor practice charge with PERC (T22).

^{12/} Akin-Martins testified that he gave Petino his telephone number but said that Petino never called him at home or work (T49). I don't credit Akin-Martins testimony. He admitted he gave his telephone number to Petino, and Petino said he telephoned the Charging Party. I consistently found Petino to be a more reliable witness than Akin-Martins and credit him here.

Despite his research, Akin-Martins was confused about filing grievances and the Commission's jurisdiction. He testified that he knew he could file a grievance on his own behalf (T20), but thought the Commission was responsible for peoples grievances (T22). He did not file a grievance, but after doing research, Akin-Martins wrote his own complaint letter and sent the form to the Commission (T22-T23). The document he sent was the unfair practice charge which he filed against the NTU on November 14, 1995 (C-1A; T22).

15. In October, 1995, Petino spoke to a Legal Aid Services attorney regarding Akin-Martins. Petino explained to the attorney what he had done on Akin-Martins behalf. She asked him questions. He explained to her the differences between tenured and non-tenured teachers, different courses of action, and the DYFS situation (T61). At the conclusion of their discussion, the attorney thanked Petino and said that she was satisfied that, as far as she could ascertain, Petino had done everything possible for Akin-Martins (T62).

ANALYSIS

Akin-Martins argued that the NTU breached its duty of fair representation by refusing to represent him over his suspension on September 21, and termination on October 21, 1995. He alleged that the NTU acted in collusion with the Board to "disenfranchise" him from his job. He further alleged that he never received a copy of the collective agreement between the Board and NTU.

N.J.S.A. 34:13A-5.3 provides in pertinent 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 interest of all such employees without discrimination and without regard to employee organization membership.

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

In the specific context of a challenge to a union's representation in processing a grievance, the United States Supreme Court has held: 'A breach of the statutory duty of fair representation occurs only when a union's conduct towards a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.' Vaca v. Sipes, 386 U.S. 171, 190 (1967). Id. at 13.

In that case, the Commission also said:

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. Id.

In earlier cases we also held:

...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. Mackaronis and Middlesex Cty. and NJCSA, P.E.R.C. No. 81-62, 6 NJPER 555, 557

(¶11282 1980), aff'd. NJPER Supp. 2d 113 (¶94 App. Div. 1982), certif. den. 91 N.J. 242 (1982).
Id.

See also, New Jersey Turnpike Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412, 413 (¶10215 1979); and In re AFSCME Council No. 1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978).

During an investigation into the merits of a potential grievance, a union may determine that the employer correctly interpreted the contract. Absent any facts indicating arbitrary or discriminatory conduct, a union can decline to process a grievance even if the grievant's interpretation of the contract is contrary to the union's understanding. Montclair Tp., D.U.P. No. 91-18, 17 NJPER 103 (¶22046 1991). Additionally, without facts indicating arbitrary or discriminatory conduct, a union doesn't violate its duty of fair representation if the employee has independently taken steps to address a problem with the employer and fails to notify the union of meetings or other representation opportunities. IBT Local 102, P.E.R.C. No. 93-22, 18 NJPER 473 (¶23214 1992); AFSCME Local 888, Council 52, D.U.P. No. 92-28, 18 NJPER 370 (¶23163 1992); John E. Runnells Hospital, P.E.R.C. No. 85-91, 11 NJPER 147 (¶16064 1985).

Based upon this record, the NTU did not breach its duty of fair representation to Akin-Martins. The NTU, through Petino, took reasonable and prudent steps to represent the Charging Party. Petino spoke to Akin-Martins about his employment problems, reviewed the contract to preserve the Charging Party's rights, and spoke to Nolan about the matter. Once he learned that Akin-Martins had

already had a meeting/hearing with Nolan, and had been afforded his contractual rights, however, Petino was entitled to conclude that a grievance would be ineffectual. Petino's conclusion was based upon his investigation of the matter, and his experience in handling similar matters in the past. It was not arbitrary, discriminatory or in bad faith.

Although Akin-Martins had requested Petino's assistance, he neither told him about his scheduled meeting with Nolan, nor asked him to attend. Having learned of the meeting after the fact, Petino was entitled to assume that Akin-Martins preferred to handle the matter himself.

There are no facts in this record indicating that Petino treated Akin-Martins arbitrarily or discriminatorily. He investigated Akin-Martins' problem by reviewing the facts with him. He provided Akin-Martins with a contract. He reviewed the contract for possible violations. He contacted the Board to determine whether it had violated the contract regarding Akin-Martins' rights. He discussed the facts about Akin-Martins' suspension and termination with Nolan. Once apprised of the Board's actions, he told Akin-Martins that the contract could not help him because it appeared that the Board accorded him his rights to a meeting pursuant to the contract. The Board had complied with its contractual obligations when terminating a non-tenured teacher. Thus, the NTU was within its discretionary right to decide not to pursue a grievance for Akin-Martins because the likelihood of

success would be minimal since the contractual obligations had been met.

Additionally, nothing in the record indicates that Petino prevented Akin-Martins from filing his own grievance. Petino would not have opposed such action. The record indicates that Akin-Martins has never hesitated handling his own problems. He represented himself before DYFS even though he believed he was entitled to union representation. He also challenged the Board's nepotism in hiring matters involving Antonacci, Caponegro and Lucas. The fact that he handled his termination problem by scheduling and meeting with Nolan by himself, without Union participation, mirrors his past conduct.

Akin-Martins' allegations that the Board and NTU acted in collusion to "disenfranchise" him from his job are unsupported by the record. One conversation occurred between Nolan and Petino. Their discussion confirmed that Akin-Martins had pursued his rights under the contract for a meeting with management about his termination. A discussion confirming that rights were afforded to an employee pursuant to the contract hardly indicates behavior which could be considered detrimental to the involved employee.

Consequently, I find that the NTU did not violate section 5.4(b)(1) of the Act. Akin-Martins also alleged that the NTU violated subsections 5.4(b)(3) and (5) of the Act. He has not, however, introduced any evidence showing that the NTU refused to negotiate in good faith with the Board, and there is no evidence

that the NTU violated any of the rules and regulations established by the Commission.

The Charging Party's allegation of a 5.4(a)(1), (4) and (7) violation, charges against an employer, were not supported by any evidence.

Additionally, there is no evidence in the record to support Akin-Martins allegation that the NTU violated N.J.S.A. 34:13A-8.2. That statute solely describes the Commission's responsibility to keep on file collective negotiation agreements provided by public employers. It is not relevant to this case.

Finally, Akin-Martins' allegation that his rights under the Conscientious Employee Protections Act, N.J.S.A. 34:19-1 et seq. were violated does not come within the jurisdiction of the Commission. City of New Brunswick, D.U.P. No. 94-23, 20 NJPER 112 (125057 1994).^{13/}

Accordingly, based upon the entire record and the above analysis, I make the following:

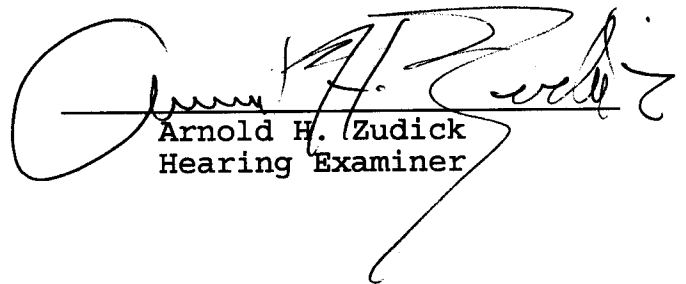
^{13/} City of New Brunswick refers to the Conscientious Employee Act as N.J.S.A. 11A:2-24. That is a mistake. The Conscientious Employee Act is found at N.J.S.A. 34:19-1 et seq. N.J.S.A. 11A:2-24 provides for employee protection against reprisals by employers for lawfully reporting violations by others. That protection is similar to the protections provided by the Conscientious Employee Act.

Conclusions of Law

The Newark Teachers Union did not violate N.J.S.A. 34:13A-5.4(a) (1), (4) and (7), or 5.4(b) (1), (3) and (5); N.J.S.A. 34:13A-8.2; or N.J.S.A. 34:19-1, and did not breach its duty of fair representation to Henry Akin-Martins.

Recommendations

I recommend the Complaint be dismissed.


Arnold H. Zudick
Hearing Examiner

Dated: December 6, 1996
Trenton, New Jersey