H.E. NO. 92-12

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

In the Matter of

BRIDGEWATER-RARITAN EDUCATION ASSOCIATION,

Respondent,

-and-

Docket No. CI-H-91-48

DANIEL A. SHAFFER, NANCY C. ADAMS, CAROL L. CHRISTIANSEN, LINDA W. WARREN and VICKI SCHOR COBEN,

Charging Parties.

SYNOPSIS

A Hearing Examiner, in granting a Motion to Dismiss at the conclusion of the Charging Parties' case recommends that the Public Employment Relations Commission find that the Respondent did not violate subsection 5.4(b)(3) as alleged in the Complaint, or subsection 5.4(b)(1) as "fully and fairly litigated" at the hearing. The Charging Parties are psychologists employed by the Bridgewater-Raritan Regional Board of Education and their complaint was that the Association breached its duty of fair representation in representing them during the year 1990 in negotiations for a successor agreement, which expired June 30, 1990.

The Charging Parties failed to adduce even a "scintilla of evidence" that the Respondent had breached its DFR in the context of Court and Commission decisions in the area of contract negotiations and the representation of the competing interests of unit members. Principal reliance was placed upon a recent decision of the United States Supreme Court in Air Line Pilots Assn. v. O'Neill, ____ U.S. ____, 136 LRRM 2721, decided on March 19, 1991. This case erected an even high barrier to a finding of a DFR in negotiations than did Ford Motor Co. v. Huffman, 345 U.S. 330, 31 LRRM 2548 (1953).

A Hearing Examiner's Decision to Dismiss upon motion of the Respondent at the conclusion of the Charging Party's case is not a final administrative determination of the Public Employment Relations Commission. The Charging Party has ten (10) days from the date of the decision to request review by the Commission or else the case is closed.

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Charging Parties.

Appearances:

For the Respondent, John A. Thornton, Jr., NJEA Field Representative, Pro Se

For the Charging Parties, Daniel A. Shaffer and Carol L. Christiansen, Pro Se

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION ON MOTION TO DISMISS

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on February 15, 1991, and amended on March 13, 1991, by Daniel A. Shaffer, Nancy C. Adams, Carol L. Christiansen, Linda W. Warren and Vicki Schor Coben ("Charging Parties") alleging that the Bridgewater-Raritan Education Association ("Respondent" or "Association") 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 the Charging Parties, who are psychologists, allege that the Association failed to represent adequately their interests in

collective negotiations for a successor agreement to that expiring June 30, 1990; the Charging Parties had proposed that the "cap" on their salary increases be removed, that the merit evaluation system be retained and that their responsibilities remain the same; however, in negotiations, the Association advised the Bridgewater-Raritan Regional Board of Education ("Board") that the psychologists did not want the merit evaluation system; the Charging Parties also allege that the Association agreed to obtain a comparable salary package to inform them of any significant change in their salary program; on September 10, 1990, the Charging Parties were informed by the Association that it had negotiated to maintain their salaries at the level of the prior year; the Charging Parties later learned of their placement on the teachers' salary guide, which resulted in substantial salary reductions; all of which actions of the Association are alleged to be in violation of N.J.S.A. 34:13A-5.4(b)(3) of the Act.[1/]

1/ This subsection prohibits employee organizations, their representatives or agents from: "(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."

As will be apparent hereinafter, this matter was fully and fairly litigated and will be decided as if the Charging Parties had alleged a violation by the Association of N.J.S.A. 34:13A-5.4(b)(1) of the Act, which provides that public employee representatives are prohibited from "Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act.

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 30, 1991. Although the original hearing dates of July 29, 30 and 31, 1991, were adjourned by agreement, a hearing was ultimately held on September 23 and 24, 1991, in Newark, New Jersey, at which time the Charging Parties alone were given an opportunity to examine witnesses and present relevant evidence.

At the conclusion of the Charging Parties' case on September 23rd, the Respondent stated that it wished to make a motion to dismiss on the record. However, because of the lateness of the hour, the Hearing Examiner put the matter over until the following day, September 24th, at which time the Respondent formally moved to dismiss and oral argument was heard (2 Tr 4-19). The Hearing Examiner rendered a "bench" decision in which he granted the Respondent's motion to dismiss on the record (2 Tr 20-31). Whether or not a written decision would follow was to depend, in part, upon the wishes of the parties (2 Tr 31, 32).[2/].

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 upon the record made

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2/ The transcripts of the two days of hearing were received by October 10, 1991. Although neither party filed a post-hearing submission in support of its position, each party made a written request that a written decision issue, the last being received on October 15, 1991.

by the Charging Parties only, and after consideration of the oral argument of the parties at the hearing on September 24, 1991, the matter is appropriately before the Commission's designated Hearing Examiner for determination.

Upon the record made by the Charging Parties only, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Bridgewater-Raritan Education Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

2. Daniel A. Shaffer, Nancy C. Adams, Carol L. Christiansen, Linda W. Warren and Vicki Schor Coben are public employees within the meaning of the Act, as amended, and are subject to its provisions.

3. The relevant collective negotiations agreement between the Association and the Board was effective during the term July 1, 1988 through June 30, 1990 (J-1). Article I, "Recognition," provides, in part, that the Association is recognized as the exclusive representative for all certificated personnel, which has, for many years, included school psychologists within the phrase "child study team," presently six in number (J-1, p. 1; 1 Tr 47, 52). The salary program for the psychologists has always provided for a merit evaluation system and a "cap," which, historically, increases from year to year (J-1, Appendix B-1, p. 35; 1 Tr 27-29, 48-53).

4. On or about November 1, 1989, the Association submitted to the Board its proposals for a successor agreement to J-1 [J-2]. As to the psychologists, the Association proposed that Appendix B-1 in the prior agreement be replaced in its entirety by the following:

> A. School Psychologists will be placed on the appropriate step and level of the teachers' salary guide. In addition to the monies received for placement on the guide, they will receive an additional stipend of 20% of their individual salary.
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> [J-2, Appendix B-1 (unnumbered)].

5. The Board submitted to the Association its proposed modifications to J-1 on or about November 14, 1989 (J-3A). The Board proposed as a change in Appendix B-1 for the psychologists the elimination of the prior Appendix B-1 in J-1 and the substitution therefor of a stipend, as follows: "The psychologist stipend including payment for the extended work year and chairing the Child Study Team shall be $_____." [J-3A (unnumbered)].

6. On or about January 25, 1990, the Board proposed a modification to its prior proposed Appendix B-1, as follows: "The Board proposes a four-step stipend for psychologists. Each step would be a percentage of their guide salary." [J-3B].

7. Certain "Tentative Agreements" were reached by the Board and the Association on June 6, 1990 (J-4). However, none of these "Tentative Agreements" pertained to the psychologists.

8. On or about August 29, 1990, following mediation, the Board and the Association executed a Memorandum of Understanding,

which provided, in part, for the deletion of the prior Appendix B-1, the "Psychologists Salary Program," supra, and in lieu thereof this Memorandum of Understanding provided at page 2 as follows, pertaining to psychologists:

III. Work Year

> Psychologist work year and day will be the same as the teacher work year and day. Psychologists will be placed on the 1989-90 teacher salary guide at the appropriate step and level.
>
> The additional day in the 1990-91 school calendar will be an in-service day; attendance will be voluntary.
>
> [J-5, p. 2; 1 Tr 16].

* * * *

The Charging Parties' evidence was presented through three witnesses and several additional documents as follows: Carol L. Christiansen, Richard Horowitz and Clara L. Navarrete. The relevant evidence adduced through each witness is as follows:

CHRISTIANSEN[3/]

9. Christiansen has been a psychologist in the school district for nine years and testified that in the 1988 negotiations (for J-1) the settlement agreed to for teachers resulted in the psychologists not receiving the same increase because their salaries were artificially "capped," supra (1 Tr 26, 27).

10. During the negotiations for the successor agreement to J-1, the five Charging Parties (psychologists) met on April 23,

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3/ The testimony of this witness has been included, in part, in the prior Findings of Fact.

1990, with Richard Rowe, who headed the negotiations committee for the Respondent, and Robert Braun, its President. The purpose of the meeting was to make "...it explicitly clear what the psychologists' desires were..." in the negotiations (1 Tr 36). Specifically, the psychologists wanted the "cap system" eliminated but at the same time they wanted the merit evaluation system retained; this was emphasized to Rowe. The main thrust at the meeting was the Charging Parties request that Rowe and Braun communicate with them with respect to the progress of negotiations, adding that input from the psychologists would probably be needed to calculate salaries. Finally, Christiansen testified that the psychologists had no interest in a reduction or change in their responsibilities nor for any change in hours or work year. She stressed that their sole economic objective was the elimination of the salary cap. [1 Tr 35-40, 53-58].

11. The Charging Parties again met with Rowe alone, at his request, in the Association's office sometime in June 1990. This meeting lasted approximately one to two hours. Rowe wanted to know if, in fact, the psychologists were put on the teachers' salary guide, relative to their length of service and education, what would they require as a percentage increase in order that their salaries would not be less than if the present system was retained. The response of the psychologists was that each would have to earn 15% or more over the guide, on which they would then be placed, in order not to lose more financially. It was explained to Rowe that the

psychologists were not currently on the teachers' salary guide. Christiansen testified that Rowe "...very explicitly said that he would take care of us in this negotiations...and that our salary would not be less than it would have been..." (1 Tr 41). Further, Rowe "...guaranteed us that we would make...whatever we made in 1989 plus $4,000..." (1 Tr 42). [1 Tr 40-43, 61, 62].

12. On August 24, 1990, Christiansen telephoned Rowe but did not actually speak to him until August 29th, just before the final mediation session. She pleaded that if the "resolution" for the psychologists was that they would not fare better than at present, could Rowe "...settle for the teachers and deal with our small bargaining unit...after Labor Day..." (1 Tr 44). Rowe's response was that the psychologists would be better taken care of "this night" when the final mediation session occurred as opposed to the start of school. He "guaranteed" that he would do better for the psychologists than if the current system remained. Rowe did not, however, disclose to Christiansen anything that had been agreed to previously in negotiations. [1 Tr 43, 44, 73-75].

13. Christiansen attended the contract ratification meeting on September 5, 1990, where she had an opportunity to look quickly through the proposed settlement and saw that on the last page psychologists were to have the teachers' school day and year and receive a salary based on the teachers' salary guide, including years of service and education level. Although she realized that the proposed settlement would mean substantial salary cuts for

psychologists, she made no statement of disagreement at the membership meeting. Christiansen acknowledged that questions were asked by the membership and answered by the leadership. The vote to ratify was by open ballot and was by acclamation. Christiansen could not recall whether or not she voted "no" nor could she recall whether any other psychologists were present. At the conclusion of the meeting, Christiansen approached Rowe and asked him what had happened and whether the settlement meant what it said. At that point NJEA Field Representative, John A. Thornton, Jr., intervened and questioned her right to speak to Rowe "like this." Christiansen became extremely upset and departed with no response to her inquiry. [1 Tr 45, 46, 81-91].

14. In early September 1990, after the contract ratification, Christiansen learned through the Superintendent that the Board in the negotiations had offered to pay the psychologists ten percent above the teachers' salary guide. This disclosure occurred at a meeting in September where those present were the Superintendent, the psychologists and Rowe and Braun. The psychologists had sought this meeting to determine whether or not the negotiations could be reopened. [1 Tr 94-96]. After the matter of the "ten percent" was discussed, the Superintendent agreed to bring the concerns of the psychologists back to the Board, the psychologists having advised him that they were willing to accept "ten percent" above the teachers' salary guide and maintain the same working conditions and responsibilities. [1 Tr 97-99].

15. At a meeting of the Board on September 20, 1990, it refused the Association's request to reopen negotiations concerning the psychologists' salaries, work year and day and job responsibilities. In a letter of September 21, 1990, to Richard Rowe, Clara L. Navarrete, the chief negotiator for the Board, stated by way of explanation that:

> ...the Board feels that during negotiations a proper offer was made to increase the psychologists' stipend, based on the work year and day, as stipulated in the previous contract. The Association refused that offer and the Board's counter of a reduction in hours and days and placement on the guide was accepted by the Association... [CP-3].

16. By way of background, the Charging Parties introduced a grievance letter of December 5, 1988, in which they claimed that no other professional group had been subjected to an arbitrarily imposed salary limit or cap and that the Charging Parties request that the Board eliminate the present salary cap so that the validity of the merit pay system can be restored (CP-1). This "grievance" by the psychologists was submitted to the Director of Pupil Services (CP-2). [1 Tr 31-33]. Ultimately, the Superintendent responded at a meeting with the Charging Parties that the subject matter was a "negotiations issue" and that any resulting loss of increases was something that should have been brought up during the negotiations procedure (1 Tr 33, 80). The Superintendent added that he could not deal with the matter at an administrative level and that the psychologists should work with the Association during the "next negotiations" to ensure that they did not incur any further salary losses (1 Tr 33, 34, 80).

HOROWITZ

17. He has been the Superintendent for four and one-half years and first became aware of the "cap" problem for psychologists during his role in assisting the Board in negotiations for the prior agreement (J-1). He acknowledged that he had found it difficult to understand the manner in which the "cap" was administered except that he knew that it put "...a lid on the merit program..." (1 Tr 114). [1 Tr 112-114]

18. In the 1990 negotiations for a successor agreement to J-1, Horowitz was a participant in developing the Board's negotiating position and acknowledged that the Board was seeking to eliminate the merit evaluation system for psychologists and the way in which it was administered. In so doing, the Board was looking across the entire state of New Jersey for various options (1 Tr 115).

19. In the Board's additional (modified) proposal for a successor agreement [J-3B, supra] it sought to substitute for the prior compensation arrangement for psychologists a stipend of four steps. However, in negotiations the Board's position evolved to a ten percent stipend, the elimination of the merit evaluation system, the placement of the psychologists on the teachers' salary guide without any changes in the work year, work day or their responsibilities (1 Tr 121, 123). The Association's counter-offer was for an eighteen percent stipend with placement on the teachers' salary guide and the elimination of the merit evaluation system (1 Tr 122-124). The Association's rationale for its eighteen percent proposed stipend was that the work year of the psychologists

was greater than those of the teachers (1 Tr 125, 161). These proposals and counter-proposals occurred at the "eleventh hour" on August 29, 1990. As the Memorandum of Understanding of August 29, 1990 (J-5, supra) indicates, the Association ultimately accepted a provision that the psychologists would receive no stipend (neither 18% nor 10%). It was also agreed that the Child Study Team head responsibilities would no longer be required of psychologists and that they would not work more hours or more days. [1 Tr 127, 147, 148, 156].

20. Horowitz estimated that the average increase for teachers in the 1990-91 first year of the agreement was 8.8% (1 Tr 136, 137).

21. Horowitz acknowledged that as of September 5, 1990, the date of the letter from the Board's professional negotiator, Raymond A. Cassetta (R-2), the Association was attempting to "freeze" the psychologists at some step on the teachers' salary guide that would "...capture some of the extra stipend money..." (1 Tr 154; 153). However, the Board refused to agree to such a "freeze," insisting instead that on the implementation of the August 29th Memorandum of Agreement. Accordingly, the psychologists were placed on the 1989-90 teachers' salary guide and were, thus, treated in the same manner as all other certificated professional staff members. [1 Tr 155, 156].

Navarrete

22. She was Vice-President of the Board and its chief negotiator, who attended all of the sessions involving the psychologists (1 Tr 164, 165).

23. The last night of negotiations on August 29th, was a mediation session. The Board offered a stipend of ten percent for psychologists and the Association countered with eighteen percent (1 Tr 171, 172). The Board's position was an addendum to its original proposal for a four-step stipend for psychologists, which Navarrete had authored on January 25, 1990 (J-3B; 1 Tr 172, 173). She did not recall that her January 25th four-step stipend proposal for psychologists had been discussed during negotiations between January and August 29, 1990 (1 Tr 173, 174).

24. On behalf of the Board, Navarrete wrote to Rowe on September 21, 1990, rejecting his request to reopen negotiations concerning the psychologists' salaries (CP-3; 1 Tr 179-181).

25. Navarrete acknowledged that after the August 29th Memorandum of Agreement was executed, the Association early in September 1990 sought to "freeze" the psychologists at a certain point on the teachers' salary guide but this was rejected by the Board as not being included within the Memorandum of Agreement (1 Tr 194, 195).

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ANALYSIS

The Applicable Standard On a Motion To Dismiss.

The Commission in N.J. Turnpike Authority, P.E.R.C. No. 79-81, 5 NJPER 197 (¶10112 1979) restated the standard that it utilizes on a motion to dismiss at the conclusion of the Charging Party's case, namely, the same standards used by the New Jersey Supreme Court: Dolson v. Anastasia, 55 N.J. 2 (1969). The Commission noted that the courts are not concerned with the worth, nature or extent, beyond a scintilla, of the evidence, but only with its existence viewed most favorably to the party opposing the motion. While the process does not involve the actual weighing of the evidence, some consideration of the worth of the evidence presented may be necessary. Thus, if evidence "beyond a scintilla" exists in the proofs adduced by the Charging Party, the motion to dismiss must be denied.

The Respondent's Motion To Dismiss Is Granted Since the Charging Parties Have Failed To Adduce Evidence Beyond A Scintilla That It Violated The Act By Its Representation Of The Psychologists During The 1990 Negotiations.

Preliminarily, it will be recalled that the Charging Parties alleged a violation by the Respondent Association of Section 5.4(b)(3) of the Act, which prohibits employee organizations from refusing to negotiate in good faith with a public employer. However, it is well settled that the Charging Parties, as individual public employees, lack standing to allege and litigate a violation of this subsection of the Act by the Respondent, a public employee representative. This is so, notwithstanding that the overwhelming

number of decisions by the Commission on this subject have involved individual employees, who have filed an unfair practice charge against a public employer rather than a public employee organization, since the principle is the same. Thus, "...an individual, lacks standing to maintain a claim that an employer has violated subsection 5.4(a)(5) [citing cases][4/]...[Camden County College, D.U.P. No. 89-15, 15 NJPER 292, 293 (¶20131 1989)]. See, also: N.J. Turnpike Auth. (Beall), P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980) and New Jersey Dept. of Higher Ed., P.E.R.C. No. 85-77, 11 NJPER 74, 78 (¶16036 1985).

But, as the Hearing Examiner stated at the hearing, the instant Association "...joined issue on the duty of fair representation..." Therefore, this decision will be based upon the Association's alleged breach of its duty of fair representation as if the Charging Parties had cited the correct subsection of the Act, namely, Section 5.4(b)(1). [2 Tr 22-24].[5/] Thus, the Commission's "fully and fairly litigated" doctrine governs the decision in this case.

4/ Rutgers, The State University, P.E.R.C. No. 88-130, 14 NJPER 414 (¶19166 1988) and City of Jersey City, P.E.R.C. No. 87-56, 12 NJPER 853, 854 (¶17329 1986).

5/ See Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550, 553 (¶13253 1982), aff'd App. Div. Dkt. No. A-1642-82T2 (1983)[an issue may be deemed "fully and fairly litigated" even though the relevant factual allegations do not appear in the unfair practice charge or the Complaint].

* * * *

Historically, DFR cases have originated in two distinct factual settings, namely, (1) the conduct of the majority representative in negotiating terms and conditions of employment or (2) its conduct in administering the negotiated grievance procedure. Since the instant case falls within the first category, namely, the alleged failure of the Association to have represented the psychologists in 1990 with complete good faith and honesty of purpose, only those cases relevant to this area will be referred to and discussed herein.

A good starting point is the United States Supreme Court's decision in Ford Motor Co. v. Huffman, 345 U.S. 330, 31 LRRM 2548 (1953) where the union's collectively negotiated seniority provisions were deemed not to constitute a breach by the union of its duty of fair representation, notwithstanding that they prejudiced the rights of certain veterans. The court stated:

> ...Inevitably, differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed to a statutory bargaining representative in serving a unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.
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> (345 U.S. at 338, 31 LRRM at 2551)(Emphasis supplied).
>
> See also: Humphrey v. Moore, 375 U.S. 335, 350; 55 LRRM 2031, 2038 (1964).

The Supreme Court of New Jersey has faithfully followed the precedent of the United States Supreme Court in matters involving the duty of fair representation as it has evolved from the principle of exclusivity and majority rule. Thus, two years after the enactment of our Chapter 303, it was upheld by the New Jersey Supreme Court in Lullo v. IAFF, 55 N.J. 409 (1970) where it relied upon federal precedent, particularly, the 35-year history of decisions interpreting the National Labor Relations Act. The Court focused upon Section 5.3, especially: (1) the provisions dealing with the designation of an exclusive negotiations representative by a majority of unit employees; and (2) the responsibility of the majority representative to represent the interests of all employees without discrimination or regard to organization membership (55 N.J. at 419).

The Court in Lullo adopted and applied the exclusivity principle and the concomitant of majority rule to the public sector in the State of New Jersey, which is "...now at the core of our national labor policy..." (55 N.J. at 426).[6/] Significantly, the Court embraced the doctrine of DFR, relying principally on Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967). The Court held that although the exclusive representative:

> ...has the sole right to negotiate...a contract respecting the terms and conditions of employment and the processing of grievances for all employees in the unit, the right to do so must always be exercised with

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6/ See also, generally, 55 N.J. at 421-427.

> complete good faith, with honesty of purpose and without unfair discrimination against a dissident employee or group of employees. This is true not only in the negotiating of the employer-employee agreement but in its administration as well...All must be treated fairly and evenly, particularly, with respect to employment of procedures established therein to adjust and settle individual grievances. Vaca v. Sipes, supra...
>
> (55 N.J. at 427, 428). (Emphasis supplied). [See also, 55 N.J. at 429].7/

A most important Appellate Division case, which is relevant to the case at bar, is that of Belen v. Woodbridge Tp. Bd. of Ed., et al, 142 N.J. Super. 486 (App. Div. 1976), certif. den. 72 N.J. 458 (1976). The Court referred to Lullo, Vaca and Huffman, supra, in setting forth the standard for evaluating the conduct of a majority representative in negotiating agreements where six psychologists alleged that the union failed to keep them informed of the progress of negotiations with the school board. Further, the union was alleged to have dishonestly and intentionally misled the psychologists as to the status of negotiations. This resulted in contract provisions which reduced the salaries of the psychologists while all other unit members received salary increases. Finally, the work hours of the psychologists were increased by one-half hour per day.

7/ Most recently, on August 1, 1991, our Supreme Court had occasion to affirm the viability of the law relevant to the duty of fair representation in the negotiations context: Mahr v. N. J. Transit Rail Operations, Inc., 125 N.J. 455, 475-479 (1991).

After noting that Section 5.3 of our Act confers broad power upon a union to represent members of the unit and to negotiate their terms and conditions of employment, the Court in Belen stated that with this power "...comes the obligation to represent all employees 'without discrimination.'...." Since the facts in Belen closely approximated those in Huffman, i.e., a negotiated agreement disparately affected one group of employees in relation to another, it was held:

> ...[T]he mere fact that a negotiated agreement results, as it did here, in a detriment to one group of employees does not establish a breach of duty by the union. The realities of labor-management relations which underlie this rule of law were expressed in Ford Motor Co. v. Huffman...
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> (142 N.J. Super. at 490, 491).

The latest pronouncement from the United States Supreme Court on DFR as it relates to the conduct of the majority representative in negotiating terms and conditions of employment is Air Line Pilots Assn. v. O'Neill, ___ U.S. ___, 136 LRRM 2721, decided March 19, 1991. The factual situation in the O'Neill case was extremely complicated. Suffice it to say, that "ALPA" had negotiated a strike settlement agreement with Continental Airlines that provided for a disputed reallocation of positions covered by a seniority-based bid system between striking and non-striking pilots. The Supreme Court, reversing, concluded that any "discrimination" between striking and non-striking pilots, which resulted from the "reallocation," did not constitute a breach by

ALPA of its DFR since, when viewed in the light of the legal landscape at the time of the settlement, it was not irrational, nor was it illogical, simply because, in retrospect, it might have been a bad settlement.

The Court in O'Neill rejected ALPA's contention that the tripartite standard announced in Vaca[8/] did not apply to a union "...in its negotiating capacity..." (136 LRRM at 2726). Most importantly, after acknowledging that Congress did not intend to permit the courts to substitute their own views as to the bargain reached by the parties, the Court stated:

> ...Any substantive examination of a union's performance ...must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities...For that reason, the final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a "wide range of reasonableness," Ford Motor Co. v. Huffman, 345 U.S., at 338, that it is wholly "irrational" or "arbitrary." ...
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> [Emphasis supplied][136 LRRM at 2726].

* * * *

Finally, the Commission decisions in the area of the conduct of the public employee representative in negotiations are

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8/ [1] A union's statutory authority to represent all members of a designated unit "...includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, [2] to exercise its discretion with complete good faith and honesty, and [3] to avoid arbitrary conduct..." [Vaca v. Sipes, 386 U.S. at 177].

legion and derive from the federal and state court precedent discussed previously. The Commission's first "negotiations" decision was that of Hamilton Tp. Ed. Ass'n, P.E.R.C. No. 79-20, 4 NJPER 476 (¶4215 1978) where it relied upon Huffman and Belen in concluding that the Association had adequately represented the interests of certain Social Workers during its overall negotiations on behalf of all unit members. There, the Social Workers had taken the position that the Association should have pressed further with the Board on their proposal that they receive salary parity with the school psychologists. It was found as a fact that the Association did press the parity issue in negotiations and later accepted a proposal by the Board that the Social Workers be upgraded on the salary guide. This negotiations result was only minimally acceptable to the Social Workers. However, the Commission agreed with its Hearing Examiner that the mere fact that the Social Workers were dissatisfied with the outcome of negotiations did not cause a breach by the Association of its duty of representation. [4 NJPER at 477].9/

The Hearing Examiner also notes that a complaint was dismissed in PBA Local No. 119, P.E.R.C. No. 84-76, 10 NJPER 41 (¶15023 1983), since the union had not violated its DFR by negotiating an agreement that eliminated differential pay for certain employees in order to secure a larger salary increase for

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9/ The Commission also discussed at length the facts in Belen, supra.

all employees [citing Huffman and Belen]. Additionally, in Union Cty. College AAUP, P.E.R.C. No. 85-121, 11 NJPER 374 (¶16135 1985) it was held that the union exercised its "wide range of reasonableness" when it filed a grievance challenging the appointment of one unit member but not that of another because an important matter of contractual principle was involved.

See also: Bridgewater-Raritan Ed. Ass'n, D.U.P. No. 86-7, 12 NJPER 239 (¶17100 1986)[the Director declined to issue on charge that union violated its DFR in negotiating agreement that resulted in increase of teachers' workday by 30 minutes] and AFT Local No. 481, P.E.R.C. No. 87-16, 12 NJPER 734 (¶17274 1986)[no DFR by merely proving a disparity in wages].

The Hearing Examiner calls attention to the following three decisions of the Commission which he deems relevant to the issue at hand: see Old Bridge Ed. Ass'n, P.E.R.C. No. 89-48, 14 NJPER 689 (¶19293 1988) the Commission held that there was no DFR violation where the association agreed to rescind future increases in the doctoral differential in order to gain salary increases for other unit members; see Camden Council No. 10., P.E.R.C. No. 89-54, 14 NJPER 697 (¶19299 1988)[union did not breach its DFR by negotiating lower salary increase for a single employee since action was not retaliatory and was consistent with its past negotiations practice of opposing dual titles]; and see also, Jersey City Ed. Ass'n, D.U.P. NO. 89-10, 15 NJPER 188 (¶20079 1989)[absence of equality in negotiations of salary guides among differing groups of employees is not a breach of DFR].

Each of the above decisions of the Commission and the Director comport with the tenets of Huffman and Belen in analyzing union conduct in the collective negotiations context. Further, although O'Neill is of very recent vintage, its holding adds even greater weight to the Huffman and Belen decisions upon which the Commission has relied since 1978: Hamilton, supra. It would appear that none of these decisions can be distinguished in any way which might provide support for the Charging Parties' theory that the Association breached its DFR in its representation of the psychologists in the 1990 negotiations.

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Having set forth above the state of the law of DFR regarding the conduct of the majority representative in negotiating terms and conditions of employment, it remains to consider the factual record developed by the Charging Parties only, in order to determine whether or not there exists evidence "beyond a scintilla" that the Association breached its DFR in this case.

I.

The evidence adduced through Christiansen (Findings of Fact Nos. 9-16) provided considerable detail as to what transpired between the psychologists and the Association's negotiators during the negotiations in 1990 for a successor agreement to J-1. The

Hearing Examiner has no doubt but what the psychologists' principal objective was the elimination of the "cap system" with the retention of the merit evaluation system. Further, the Hearing Examiner must accept as a fact that Rowe must have understood from his meetings with the psychologists in April and June 1990 that these objectives were, in fact, the psychologists' "demands" or "goals" for inclusion in the successor agreement to J-1. Additionally, at the June meeting, Rowe elicited from the psychologists that they would each have to earn 15% or more over the salary guide in order not to lose more financially. Rowe responded "very explicitly" that he would "take care" of the psychologists in these negotiations and that their salaries would not be less than they had been. Finally, on August 29, 1990, Rowe stated to Christiansen in a telephone conversation his "guarantee" that he would do better for the psychologists than if the current system remained and that this would occur "this night" in the final mediation session. [Findings of Fact Nos. 10-12].10/

10/ Recall that the Association's contract proposals of November 1, 1989, included a proposal that the prior salary provisions for psychologists be completely replaced to provide for their placement on the appropriate step and level of the teachers' salary guide and that they receive an additional stipend of 20% of their individual salary (Finding of Fact No. 4).

Although Christiansen attended the ratification meeting on September 5th, and learned quickly that the proposed contract settlement provided that psychologists would receive a salary based on the teachers' salary guide, meaning a salary cut for psychologists, she failed to state any objection at the ratification meeting, although others than psychologists did so. She could not recall whether other psychologists were present or whether she voted "no."

What happened thereafter in September 1990, as to which considerable evidence was adduced, is largely irrelevant since the negotiations had been concluded and the proposed agreement had been ratified. Plainly, the Board was under no obligation to reopen the negotiations to deal with the complaints of the psychologists and it refused to do so by its action of September 20th. [Findings of Fact Nos. 14 & 15].

What did become known to the psychologists after the conclusion of negotiations, was that Christiansen learned through Superintendent Horowitz that the Board had offered to pay psychologists ten percent above the teachers' salary guide, in response to which the Association had demanded 18% above the salary guide. These proposals and counter-proposals occurred at the final negotiations session on August 29th. Superintendent Horowitz

provided most of the details since he was present. [Findings of Fact Nos. 14 & 19].[11/]

Significantly, Superintendent Horowitz testified that when the psychologists were placed on the 1989-90 teachers' salary guide, as agreed, they were treated in the same manner as all other certificated professional staff members (Finding of Fact No. 21). The Hearing Examiner finds this fact most illuminating because, on its face, it indicates that the psychologists were not singled out for discriminatory treatment by the Association in negotiations since all other certificated personnel staff were treated in a like manner.

II.

Applying the Commission's standard on a motion to dismiss at the conclusion of the Charging Parties' case, this Hearing Examiner, after viewing the evidence in the light most favorable to the Charging Parties, cannot conclude that there exists evidence "beyond a scintilla" that the Association violated the Act as alleged. As appears in his "bench" decision of September 24, 1991, the Hearing Examiner has placed primary weight and reliance upon the United States Supreme Court's recent decision in O'Neill, supra,

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11/ The Memorandum of Understanding of August 29, 1990, provided that the work year and day for psychologists would be the same as for the teachers and that the psychologists would be placed on the 1989-90 salary guide (Finding of Fact No. 8 and J-5, p. 2).

which in turn has evolved from Huffman and other DFR cases. [2 Tr 28-30]. Additionally, when the cases discussed above are factored into the equation, the Hearing Examiner can reach only one result, namely, that not even a scintilla of evidence has been adduced as proof that the Association breached its DFR in the course of its negotiations with the Board vis-a-vis the psychologists in 1990: O'Neill, Huffman, Belen, and Hamilton.

Although the Hearing Examiner has previously set forth at length the test articulated by the Supreme Court of the United States in O'Neill, in granting the instant Association's Motion to Dismiss, he again stresses that "...any substantive examination..." of the Association's performance herein "...must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities..." (136 LRRM at 2726, supra). In the instant case, as in O'Neill, "...the final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a 'wide range of reasonableness,' ...that it is wholly irrational or arbitrary..." [Id.].

Although the Supreme Court principally relied upon Huffman in devising its refined test as to when a DFR occurs in the negotiations context, a comparison of the O'Neill test with its predecessors demonstrates beyond doubt that O'Neill has raised considerably the burden which a charging party must meet in order to

establish a breach of the union's duty of fair representation in contract negotiations vis-a-vis the entire negotiations unit.[12/]

Any doubt that the correct result in the case at bar is the granting of the Association's Motion to Dismiss is eliminated when one compares the instant factual setting with that in Belen, supra. Interestingly, Belen involved school psychologists who complained that their union had failed to keep them informed of the progress of negotiations and that it had dishonestly and intentionally misled them as to the status of negotiations. The result was negotiated contractual provisions which reduced the salaries of the psychologists [as in the instant case], while all other unit members received salary increases [here 8.8% for teachers according to Superintendent Horowitz - Finding of Fact No. 20]. Also, the psychologists in Belen had their work hours increased by one-half hour per day as an additional consequence of the negotiations conducted by their union [here the work year and work day remain the same - Finding of Fact No. 8]. As discussed above, the Court in Belen concluded that the mere fact that a negotiated agreement results "...in a detriment to one group of employees does not establish a breach of duty by the union..." (citing Huffman). The Court also added that to have permitted the psychologists to discuss their own interests with the Board would have placed too heavy a burden on the negotiations process, which requires that negotiations

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12/ Compare Huffman (31 LRRM at 2551) with O'Neill (136 LRRM at 2726).

be conducted by democratically selected bargaining agents. [See 142 N.J. Super. at 492].

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For all of the foregoing reasons, the Hearing Examiner is persuaded that the Association's Motion to Dismiss was properly granted on the record on September 24, 1991, and this conclusion is now restated in this Report and Decision.

* * * *

Upon the foregoing, and upon the testimony and documentary evidence adduced in this proceeding by the Charging Parties only, the Hearing Examiner makes the following

RECOMMENDED ORDER

The Respondent Association did not violate N.J.S.A. 34:13A-5.4(b)(3), or (1), as alleged and litigated and the Respondent Association's Motion to Dismiss is hereby granted. The Complaint is, therefore, dismissed in its entirety.

Alan R. Howe
Hearing Examiner

November 26, 1991
Trenton, New Jersey