H.E. NO. 87-44

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

In the Matter of

NEW JERSEY HIGHWAY AUTHORITY
and I.F.P.T.E., LOCAL 196,

Respondents,

-and-

DOCKET NO. CI-85-117-36

ELWOOD FAUNCE,

Charging Party.

SYNOPSIS

A Hearing Examiner denies a motion for summary judgment filed by the New Jersey Highway Authority, which sought dismissal of Charging Party's allegations that it unlawfully demoted him, denied his grievance and misinterpreted provisions of relevant collective negotiations agreements between it and Local 196, IFPTE. The Hearing Examiner found that based upon undisputed facts, the employer failed to meet the standard for the granting of the motion set forth in N.J.A.C. 19:14-4.8(d) and Bergen County College, P.E.R.C. No. 83-47, 8 NJPER 608 (¶ 13288 1982). Having denied the motion, the Hearing Examiner ordered that the Hearing proceed.

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Appearances:

For the Respondent, N.J. Highway Authority
Apruzzese, McDermott, Mastro & Murphy, Esqs.
(Melvin L. Gelade, of counsel)

For the Respondent, IFPTE, Local 196
Klausner, Hunter & Oxfeld, Esqs.
(Nancy I. Oxfeld, of counsel)

For the Charging Party
Cooper, Perskie, April, Niedelmen,
Wagenheim & Weiss, Esqs.
(Paul Tendler, of counsel)

DECISION ON MOTION FOR SUMMARY JUDGMENT

On May 16, 1985, Elwood Faunce ("Charging Party") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") alleging that New Jersey Highway Authority ("Authority" or "Employer") and Local 196, International Federation of Professional and Technical Engineers ("Local 196" or "IFPTE") had engaged in unfair practices within the meaning of the New Jersey

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). Faunce alleged that in or around October 1984, the Authority demoted him from Maintenance General to Maintenance Person I, failed to notify him of its decision to cut the work force in the former title, denied his grievance concerning the demotion based upon Local 196's agreement with it not to proceed with any complaint filed on his behalf and misapplied or misinterpreted seniority provisions of the 1976-77 collective negotiations agreement executed by the Authority and Local 196, all in violation of subsections 5.4(a)(1), (3) and (5) of the Act.[1/]

Faunce also alleged that Local 196 breached its duty of fair representation by failing to advise him of meetings it had with the Authority concerning a promotional decision affecting his terms and conditions of employment, by supporting the promotion of another employee who had not filed a grievance concerning the title, by failing to assert to the Authority that he was entitled to the promotion under applicable provisions of the collective negotiations

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

agreement in effect in 1978, all allegedly in violation of subsections 5.4(b)(1), (3) and (5) of the Act.[2/]

On August 29, 1985, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On September 4, 1985, the Authority filed an Answer. It denied that it committed any unfair practice and asserted that the resolution of the grievance and the promotion decision were made in accord with the terms of the collective negotiations agreement. On September 25, 1985, Local 196 filed an Answer. It denied that it committed any unfair practice and asserted that it "actively represented Mr. Faunce in pursuing a grievance..." on his behalf.

On November 22, 1985, a Commission staff agent conducted a prehearing conference in this matter. On January 13, 1986, the Employer, pursuant to N.J.A.C. 19:14-4.8, filed a Motion for Summary Judgment and an accompanying brief. On February 24, 1986, also pursuant to N.J.A.C. 19:14-4.8, Charging Party filed a brief in opposition to the Authority's Motion. In April 1986, the Commission referred the Motion to me for determination.[3/]

2/ These subsections prohibit employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (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 matter was originally assigned to another Commission staff agent who has resigned.

Upon the record papers filed by the parties, I make the following:

UNDISPUTED FINDINGS OF FACT

1. The New Jersey Highway Authority is a public employer within the meaning of the Act.

2. Local 196, International Federation of Professional and Technical Engineers is an employee representative within the meaning of the Act.

3. Local 196 and the Authority executed a series of collective negotiations agreements running from July 1, 1976 - June 30, 1979; July 8, 1979 - June 30, 1981; July 24, 1981 - June 30, 1983; and July 1, 1983 - June 30, 1985. The latter agreement contains a 3 step grievance procedure ending at arbitration. A grievance may proceed to arbitration upon the decision of Local 196's Grievance Committee after a denial at step 2.

4. Elwood Faunce was hired by the Authority as a Maintenance Person 2 on January 6, 1971. In or about July 1979, he was promoted to Maintenance Person 1. On November 3, 1965, Robert Brown was hired by the authority as a Toll Collector. On October 2, 1978, he was transferred to the Maintenance Department as a Maintenance Person 2. Brown was promoted to Maintenance Person 1 (Charging Party alleges the promotion occurred on July 1, 1979 and the Authority maintains he was promoted on October 2, 1979).

5. On or about July 25, 1984, Faunce was promoted to Maintenance Person General and successfully completed the one-month probationary period pursuant to the collective negotiations agreement in effect. At the time of promotion, only one Maintenance Person General position was available.

6. In the fall of 1984, Local 196 processed a grievance on behalf of Brown concerning Faunce's promotion to the Maintenance Person General position. IFPTE took the position that the Authority violated provisions of the 1976 - 1979 agreement when it promoted Faunce instead of Brown to the Maintenance Person General position.

7. Representatives of the Authority and Local 196 met on several occasions to discuss the matter. On or about October 1, 1984, the Authority offered a written proposal to Local 196 calling for (among other things) a retroactive promotion of Brown to Maintenance Person General and a demotion of Faunce to Maintenance Person 1. Local 196 did not execute any agreement concerning the resolution of the proposed promotion and demotion.

8. On or about December 17, 1984, Faunce was demoted to Maintenance Person 1 and Brown was promoted to Maintenance Person General. On December 28, counsel for the Authority sent a letter to Local 196 confirming a settlement of "the Brown matter" within the terms of the October proposal. The letter requested a written confirmation of the settlement from Local 196.

9. On or about January 15, 1985, Faunce filed a grievance with the Authority concerning his demotion to Maintenance Person 1.

On January 25 the grievance was denied at step 1 of Article IX of the 1983-1985 contractual grievance procedure. The matter proceeded to the step 2 meeting sometime in February 1985, pursuant to the same procedure. Local 196 represented Mr. Faunce on both occasions and agreed at step 2 that he should be reinstated to the Maintenance Person General position. Local 196 did not seek to arbitrate the grievance.

10. On March 5, 1985, the Authority sent a letter denying the grievance to the newly instated president of Local 196. The letter recounted the Authority's view of the facts concerning the grievance and its proposal of October 1, 1984 to resolve the matter. The letter stated:

> [The] proposal reflected the basic agreement of the parties that Brown was to be given a retroactive promotion to General and Faunce was to be returned to his former position as Maintenance Person 1. It was further agreed that future promotions will be based upon the employee's status as of 1979, with those employees who transferred into Maintenance prior to July 8, 1979 having their date of hire as their seniority date and those transferring after that date will have their date of transfer as their seniority date. All Local 196 officials involved specifically agreed that there would be no complaint on behalf of Mr. Faunce...

The letter also recited the resolution of an issue regarding back pay for Brown and denied Faunce's grievance. It concluded that

> ...the outcome of this matter was predicated upon a specific understanding with Local 196, the details of which are outlined in this letter. The Authority has fulfilled its obligation and expects the Union to do the same.

ANALYSIS

N.J.A.C. 19:14-4.8(d) states the standard which must be met in order for a Hearing Examiner to grant a motion for summary judgment. The standard provides that summary judgment may be granted.

> ...if it appears from the pleadings, together with the briefs and other documents filed that there exists no genuine issue of material fact and the movant or cross-movant is entitles to its requested relief as a matter of law.

A motion for summary judgment should be granted with extreme caution. The moving papers are to be considered in the light most favorable to the party opposing the motion and all doubts are to be resolved against the movant. The summary judgment procedure is not to be used as a substitute for a preliminary trial. Baer v. Sorbello, 177 N.J. Super 182, 185 (App. Div. 1981). In view of these principles, the Commission has been reluctant to grant summary judgment. See, Bergen County College, P.E.R.C. No. 83-47, 8 NJPER 608 (¶ 13288 1982)).

Subsection 5.4(a)(5) of the Act requires public employers to negotiate in good faith with a majority representative of employees in an appropriate unit or to process grievances presented by the majority representative.[4/]

4/ I note that Charging Party has not alleged that the employer has committed an independent violation of subsection 5.4(a)(1). Accordingly, I shall treat it as derivative of the (a)(5) and (3) charges at this time.

> Unfair practice claims against an employer concerning subsection (a)(5) cannot normally be maintained unless the employee first demonstrates that the majority representative

Footnote Continued on Next Page

In Saginario v. Attorney General, 87 N.J. 480 (1981) the New Jersey Supreme Court held that,

> "when a public employee has a substantial interest arising out of an agreement extended by the State and the majority representative of the employees as a result of collective negotiations and the agreement provides for a grievance mechanism to resolve disputes arising out of the agreement including a particular dispute of the public employee, then the public employee is entitled to be heard within that dispute mechanism either through his majority representative or if his position is in conflict with the majority representative, then through his personal representative or pro se. Id. at 496.

In Saginario, the plaintiff was promoted form State Trooper I to Sergeant in the Division of State Police. After the promotion the State Troopers Fraternal Association (and Saginario's majority representative) filed a grievance, alleging that the promotion violated the collective negotiations agreement. The Division denied the grievance and the Association filed for arbitration pursuant to the collective negotiations agreement. Plaintiff was not notified of either the grievance or arbitration proceedings. He did not attend the arbitration hearing.

4/ Footnote Continued From Previous Page

violated its duty of fair representation. See, New Jersey Turnpike Authority, 6 NJPER 106 (¶ 11105 1980) and Saginario v. Attorney General, 87 N.J. 480 (1981) at 493. Faunce has alleged that Local 196 has engaged in unfair practices, specifically subsections 5.4(b)(1), (3) and (5) of the Act, when it "failed to adequately represent [his] interest" concerning his demotion. Thus, the instant case is procedurally in accord with N.J. Turnpike and Saginario.

The matter proceeded to arbitration and the arbitrator held that the promotion should be rescinded for the reasons alleged by the Association. Plaintiff was returned to the Trooper I position. The case proceeded to the Appellate Division where the Court vacated the arbitration award and ordered another arbitration hearing in which the plaintiff could participate. The Association appealed and the Supreme Court granted its petition.

The Court in Saginario stated that the legislative intent of the Act is to afford the public employee participation in the grievance procedure when he is directly involved in the dispute. It also stated that the collective negotiations agreement creating the employees' interest entitled him to use the machinery for dispute resolution and that "the union cannot represent him since its position is in direct conflict with him." Id. at 493. The Court also stated that, "since the employer and majority representative have created certain benefits they should not be able to ban him from the grievance procedure..." Id. at 494.

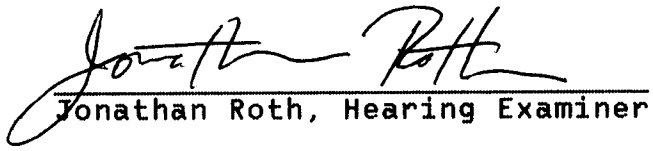
In its motion urging dismissal of the (a)(5) allegations the Authority maintains that it fulfilled its statutory obligations by participating fully in the grievance procedure concerning the grievance which Faunce filed on January 15, 1985. Notwithstanding its participation in Faunce's grievance, the Authority met with Local 196 in early fall 1984 in attempt to resolve the Brown grievance. The result of those discussions in part (according to the Authority's March 5 letter) was their "agreement" that "there would be no complaint filed on behalf of Mr. Faunce."

A significant factual issue exists as to the meaning of that portion of the "agreement." Does "complaint" mean a "contractual" grievance?" Does the entire phrase mean that the Authority and Local 196 reached an ultimate resolution of Faunce's employment status? The Authority and Local 196 may have unlawfully agreed to waive Faunce's right to proceed in a matter of "substantial interest" to him i.e., his right to the promotion, when it resolved Brown's grievance in Faunce's disfavor. Following the resolution of Brown's grievance, Faunce's interests may have been in direct conflict with those of the Authority and Local 196. Although Local 196 subsequently represented Faunce through the processing of his grievance, and although the Authority "processed" that grievance, I find that given summary judgment standards, Faunce should be allowed to present additional facts concerning the nature of the "agreement" reached in the Brown matter in order to substantiate his claim that the Court's ruling in Saginario requires a finding that the Authority and Local 196 have engaged in unfair practices.

Another issue raised by these facts is whether the Authority reached an ultimate resolution of Faunce's employment status in advance of the processing of his grievance. Such a resolution, in combination with other facts, either disputed or not yet in the record, could violate subsections (a)(1), (3) or (5) of

the Act.[5/] Accordingly, I deny the Authority's Motion and order that the Hearing proceed in accord with the enclosed Notice of Hearing.

Respectfully submitted



Jonathan Roth, Hearing Examiner

DATED: January 23, 1987
Trenton, New Jersey

5/ I am not unmindful of decisions like Township of Rockaway, D.U.P. No. 83-5, 8 NJPER 13 (¶ 13309 1982), which hold that a public employer's refusal to process a grievance does not violate subsection (a)(5) if the self-executing nature of the grievance/arbitration provision in the agreement provides for ex parte processing through arbitration. Although Rockaway may very well apply in this matter, at this stage of the proceedings the Charging Party must be allowed to present facts concerning processing of the Faunce grievance and whether the outcome of the grievance was undermined by collusion between Local 196 and the Authority.