

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matters of

BOARD OF CHOSEN FREEHOLDERS OF
MIDDLESEX COUNTY,

Respondent,

-and-

Docket No. CI-80-9-81

GREGORY Z. MACKARONIS, JR.,

Charging Party.

MIDDLESEX COUNCIL #7, NJCSA,

Respondent,

-and-

Docket No. CI-80-10-82

GREGORY Z. MACKARONIS, JR.,

Charging Party.

SYNOPSIS

In an unfair practice proceeding, the Commission dismisses the complaint of Gregory Z. Mackaronis against the Board of Chosen Freeholders of Middlesex County and Middlesex Council #7, NJCSA in its entirety. With respect to Mackaronis' contention that the Board violated N.J.S.A. 34:13A-5.4(a)(1), (3) and (5) when it denied him a 6% negotiated wage increase, the Commission holds that no violations were proven since the County had a clearly established policy denying negotiated wage increases to employees who had already received substantial yearly salary increases and since there was a complete absence of evidence of anti-union animus. With respect to Mackaronis' contention that the Council violated N.J.S.A. 34:13A-5.4(b)(1) and (3) by refusing to process his grievance, the Commission holds that no such violations were proven since the Council instructed Mackaronis of the need to file a grievance form and Mackaronis did not do so until six months later, thus making his grievance untimely.

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Charging Party.

Appearances:

For the Board of Chosen Freeholders,
Robert C. Rafano, Esq., Assistant County Counsel

For Middlesex Council #7, NJCSA,
Borrus, Goldin & Foley, Esqs.
(James F. Clarkin, III, of Counsel)

For the Charging Party, Gregory Z. Mackaronis, Jr.,
Pro se

DECISION AND ORDER

On October 10, 1979 Charging Party Gregory Mackaronis ("Mackaronis") filed two unfair practice charges: one against the Board of Chosen Freeholders of Middlesex County (the "Board") and the County's Personnel Director William E. O'Leary and one against Middlesex Council #7, NJCSA (the "Council") and its

Grievance Committee Co-Chairman Ann Montanti.^{1/} The Charge against the Board alleged that it had violated N.J.S.A. 34:13A-5.4(a)(1), (3) and (5),^{2/} by denying Mackaronis a 6% negotiated wage increase for 1978, despite a clause in the collective negotiations agreement purportedly making the raise an across-the-board increase for all County employees. The charge against the Council alleged that it had violated N.J.S.A. 34:13A-5.4(b)(1) and (3)^{3/} by failing to insure the filing of a proper and timely grievance preserving Mackaronis' claim that the Board had a contractual duty to pay him a 6% increase for 1978.

Because these allegations might, if true, constitute unfair practices, the Director of Unfair Practices consolidated the two charges and issued a Complaint and Notice of Hearing

1/ The Hearing Examiner deleted the names of O'Leary and Montanti from the caption because these persons acted solely as agents or representatives. Mackaronis does not contest the propriety of this action.

2/ 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."

3/ 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."

on March 27, 1980. After securing ten-day extensions of time, the Council and the Board filed timely Answers on April 6 and 17, 1980, respectively, denying the allegations. Mackaronis immediately filed a Motion for Summary Judgment and a Stay of Proceedings on the ground that the answers were untimely. The Hearing Examiner denied this motion and the Commission then denied Mackaronis' request to file an interlocutory appeal from that decision.

The Hearing Examiner conducted hearings on June 9 and 10, and July 11, 1980 at which time the parties were given a full opportunity to examine witnesses, present relevant evidence and argue orally. On August 11, 1980, the Charging Party filed an extensive post-hearing brief and appendix; on August 25, 1980, both Respondents waived the filing of post-hearing briefs.^{4/}

On August 26, 1980, the Hearing Examiner issued his Recommended Report and Decision, a copy of which is attached hereto and made a part hereof. H.E. No. 81-5, 6 NJPER ____ (¶ ____ 1980). He recommended that the Commission dismiss the Complaint in its entirety.

Charging Party Mackaronis has filed exceptions to that Recommended Report in which he maintains that the Hearing Examiner erred in recommending that the Commission dismiss his unfair practice charges against the Board and the Council. After reviewing the entire record herein, we adopt the Hearing Examiner's recommendation and dismiss the instant complaint in its entirety.

^{4/} Mackaronis had filed a motion to deny respondents the right to file a post-hearing brief. Their waiver mooted this motion. As the Hearing Examiner explained to Mackaronis, respondents were not obligated to inform him of their decision to waive the filing of a brief.

With respect to the charges against the Board, the Hearing Examiner made the following pertinent and accurate factual findings. On December 12, 1978, the Board and the Council entered into a collective negotiations agreement, effective from January 1, 1978 through December 31, 1979. Article 6 of the agreement provided, in pertinent part: "Effective January 1, 1978, all eligible employees shall receive a wage increase of 6% over their December 31, 1977 base salary." (emphasis added) Article 7(c) of the agreement, entitled Merit Increases, provided, in pertinent part: "...all wage increases are limited to the negotiated contractual amounts arrived at by means of the bargaining process. The only exceptions to this policy will be represented by certification to a higher position or a temporary or provisional appointment to a higher position." Despite this provision, the County has a longstanding practice, not objected to by the Council, of granting salary increases in cases of merit as well as promotion.

On January 1, 1978, Mackaronis received a 31.8% salary increase. In December, 1978, the County decided that Mackaronis was not "eligible" within the meaning of the agreement to receive the 6% negotiated wage increase for 1978 because he had earlier received the 31.8% merit raise for that year.^{5/} The County also deemed 12 other employees ineligible for the negotiated raise

^{5/} It is our finding that the denial of the additional 6% increase to Mackaronis was consistent with existing practice.

because of their receipt of earlier substantial 1978 raises ranging from 12.7% to 77%. In effect, all these employees had already received their 6% wage increase as part of a much greater salary increase.

With respect to the charges against the Council, the Hearing Examiner made the following relevant and accurate factual findings. Article 21 of the collective negotiations agreement contains a grievance procedure which requires the Council or aggrieved worker to "...present the employee grievance or dispute to the employee's immediate supervisor within ten (10) working days of its occurrence, or ten (10) working days after the employee becomes aware of the event..." Further, the aggrieved employee or the Council must present the grievance to the County Supervisory Representative on forms prepared by the County. The Article mandated strict adherence to the specified procedure.

On December 7, 1978, the Union posted notices advising all 1400 members of the collective negotiations unit of the names and telephone numbers of Grievance Committee members and setting forth the proper steps to follow in filing a grievance. For example, the notice instructed members to contact the shop steward or, if a particular employee did not have a shop steward, a member of the Grievance Committee about any grievances. The employees would then fill out and sign a proper grievance form. The notice also stated that Personnel would only accept grievances

presented by the Grievance Committee. The Council's President testified, and the Hearing Examiner found, that the Council posted this notice on each floor of the building where Mackaronis works. Mackaronis, however, denied seeing the notice.

On December 21, 1978, the County Comptroller sent Mackaronis a letter apprising him that he would not receive the 6% negotiated wage increase. On December 25, 1978, Mackaronis, a member of the union in good standing, wrote a letter to the Council's President requesting advice on the legitimacy of his claim that he was entitled to the raise and asking what he should do in order to receive the raise. A few days later, Mackaronis met the Council President in the County building and Mackaronis inquired about his grievance. The Council President responded that Mackaronis would have to fill out a grievance form in order to process the claim.^{6/} Mackaronis did not fill out such a form at that time.

On January 23, 1979, the Council President read Mackaronis' December 25, 1978 letter at a Council meeting, but apparently no other action was taken. When Mackaronis asked about his claim on April 17, 1979, he learned that no grievance had been filed. The next day he attended a Grievance Committee Council meeting and requested an answer to his grievance. Co-Chairman Montanti told him she would discuss his individual grievance with him after the meeting. Mackaronis, however, did not stay for this discussion. A representative of the Grievance Committee then sent Mackaronis a letter advising him that he had to file a grievance

^{6/} Mackaronis did not contradict or deny this testimony. The record also reflects that Mackaronis could have presented the grievance personally.

on the proper form. On May 31, 1979, Mackaronis, for the first time, executed the form and returned it to his shop steward. The shop steward submitted it to County representatives who did not respond. Because Mackaronis had not timely filed his grievance, the Council did not process the grievance further. The Grievance Committee Co-Chairman also testified that Mackaronis was the only employee to file a grievance demanding the 6% negotiated wage increase in addition to a substantial merit or promotional increase.

After receipt of the Hearing Examiner's Recommended Report and Decision, Mackaronis requested an extension of the September 9, 1980 deadline for exceptions and requested oral argument before the Commission. We granted the extension, and on September 18, 1980, Mackaronis filed his exceptions.^{7/} On September 25, 1980, the Respondent Council filed a brief in opposition to the exceptions. The Respondent Board has not filed a brief. We hereby deny the request for oral argument. The matter had been fully litigated before the Hearing Examiner and Charging Party has submitted additional argument in his exceptions and in subsequent correspondence received on October 9, 1980.

We first consider whether the Board violated subsections 34:13A-5.4(a)(1), (3) and (5) when it refused to pay Mackaronis the 6% negotiated wage increase for 1978 allegedly afforded all employees by Article 6 of the collective negotiations agreement. The evidence conclusively establishes that employees who had

^{7/} A large portion of these exceptions attacked the Hearing Examiner's credibility findings. We will not substitute our own secondhand reading of the transcript for the Hearing Examiner's firsthand consideration of the testimony and demeanor of the witnesses. Borough of Seaside Park and Arthur Clark, P.E.R.C. No. 81-18, 6 NJPER 392 (¶11203 1980). Further, we reject the Charging Party's unsupported allegation that the Hearing Examiner was biased.

received substantial salary increases in 1978 as a result of promotion or merit were not eligible under the agreement for the 6% negotiated wage increase effective January 1, 1978. Because the County had already granted Mackaronis a substantial salary increase of 31.8% effective January 1, 1978, Personnel Director O'Leary denied Mackaronis the 6% negotiated wage increase. Furthermore, the County denied the Article 6 increase to 11 other employees who had already received substantial salary increases ranging from 12.7% to 77% of their salaries. Thus, Mackaronis cannot reasonably claim that he was the victim of disparate treatment. Given the uncontested and long-standing County policy denying negotiated wage increases to all employees in the same situation as Mackaronis and the complete absence of any indicia of anti-union animus, we believe that the charges against the Board are without merit. In re Township of Springfield, D.U.P. No. 79-13, 5 NJPER 15 (¶10008 1978).

Because the Charging Party herein is pro se, we have discussed his allegations against the Board in some detail and have found them to be without merit. However, since we also find no merit to his charges against the Association, see infra., we would also have to dismiss his allegations of a violation of N.J.S.A. 34:13A-5.4(a)(5) as a matter of law. In our decision in In re New Jersey Turnpike Authority, P.E.R.C. No. 81- , 6 NJPER

___ (¶ ___ 1980), also issued this day, we have stated our belief that an individual employee cannot litigate the merits of what is in effect a grievance alleging a breach of the collective negotiations agreement unrelated to activity protected by this Act, unless the employee establishes that the majority representative violated its duty of fair representation in its processing of that grievance.^{8/} Without reiterating the discussion set forth in that decision, we held therein that the grievance procedure constitutes the favored forum under this Act for the resolution of grievances alleging that the contract has been breached.

As long as the employer participates in that procedure in good faith and the employee's representative in good faith and in conformity with its duty to represent the employees fairly accepts the resolution of the grievance provided by that forum, the employer has not violated N.J.S.A. 34:13A-5.4(a)(5).^{9/}

We turn now to the question of whether the Charging Party has met his burden of proving that Respondent Council failed

^{8/} Our conclusion was that absent such a showing the individual could not maintain the N.J.S.A. 34:13A-5.4(a)(5) charge. We have yet to conclusively determine if such a charge can be maintained even if the charge against the employee organization is proven. See In re New Jersey Turnpike Authority, P.E.R.C. No. 80-106, 6 NJPER 106 (¶11055 1980), the decision permitting a complaint to issue in the above-cited case.

^{9/} None of this suggests that some other forum might not be appropriate for an individual employee to attempt to vindicate the alleged violations of his/her rights which the breach of the collective negotiations agreement may constitute. However, an unfair practice proceeding brought by the individual alleging that the employer violated N.J.S.A. 34:13A-5.4(a)(5) is not such a forum.

to discharge its duty of fair representation. In Vaca v. Sipes, 386 U.S. 171, 190 (1967), the United States Supreme Court held: "A breach of the statutory duty of fair representation occurs only when a union's conduct towards a member of the unit is arbitrary, discriminatory or in bad faith."^{10/} We applied this standard in AFSCME Council No. 1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1979) in determining that the union's decision to settle a grievance did not violate its duty of fair representation. In New Jersey Turnpike Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979), we stated some of the principles an employee organization should strive to achieve in processing grievances for members of a unit which it represents. We indicated that a union should attempt to exercise reasonable care and diligence in investigating, processing and presenting grievances; it should exercise good faith in determining the merits of the grievance; and it must treat individuals equally by granting equal access to the grievance procedure and arbitration for similar grievances of equal merit.

In the instant case, there is absolutely no evidence that the Council was hostile to Mackaronis,^{11/} that it acted in bad faith, or that it discriminated against him in any fashion.

^{10/} The National Labor Relations Board has interpreted Vaca to mean that proof of union negligence, poor judgment, or even ineptitude standing alone is not enough to make out a breach of fair representation. See Printing & Graphic Communication, Local 4, 249 NLRB No. 23, 104 LRRM 1050 (1980).

^{11/} Indeed, the Union presented undisputed testimony that Mackaronis, a long time Council member in good standing, actively supported the Union's President whom Mackaronis charges with failing to process his grievances.

Mackaronis' charge against the Council reduces itself to his belief that the Council acted negligently in failing to process his grievance in a timely and proper manner. However, the evidence shows that the Council posted notices throughout the building where Mackaronis worked specifying that employees with grievances must fill out and sign proper grievance forms which could be obtained from a shop steward or a member of the Grievance Committee.^{12/} When Mackaronis met with the Council's President, who was not a shop steward or member of the Grievance Committee, the President confirmed the necessity of filling out a grievance form. Nevertheless, Mackaronis did not do so, but instead erroneously continued to presume that he had properly presented his grievance. This erroneous presumption ultimately resulted in the barring of Mackaronis' claim against the Board as the mandatory ten day period for presenting grievances to the employer had expired.

We believe employee organizations can establish reasonable procedures for employees to utilize in bringing grievances they want processed to the attention of their representative. While it may be that the Council and its representatives could have been more explicit in their directions to Mackaronis, specifically in emphasizing the need for him to fill out the

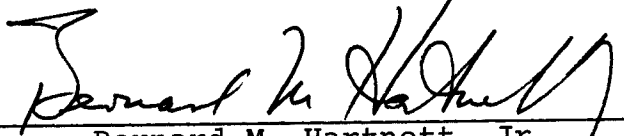
^{12/} Between November 1978 and June 1980, 39 unit employees managed to file timely grievances on the proper form. Mackaronis requested the Hearing Examiner to enforce a subpoena for the entire contents of each of these files, but in response to the Hearing Examiner's request never articulated his reasons for this request. Accordingly, we do not believe the Hearing Examiner erred in refusing to enforce the subpoena.

grievance form within the ten day period,^{13/} we do not believe that, under the circumstances of this case, its conduct violated the duty of fair representation owed Mackaronis. As indicated, no evidence of bad faith or disparate treatment exists. The Council's representative did tell Mackaronis to fill out a form and Mackaronis did not do so until six months later. Moreover, we have found that the grievance itself clearly lacked merit, so Mackaronis has suffered no financial hardship from the action of the Council or the Board.

ORDER

IT IS HEREBY ORDERED that the Complaint, alleging violations of the Act by the Respondent County and the Respondent Council, be dismissed in its entirety.

BY ORDER OF THE COMMISSION


Bernard M. Hartnett, Jr.
Acting Chairman

Commissioners Graves, Hartnett, Hipp, Newbaker and Parcells voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
October 21, 1980
ISSUED: October 22, 1980

^{13/} We do not rely upon the finding of the Hearing Examiner that Mackaronis should be deemed to have knowledge of the ten day period by virtue of his having been an employee of long-standing.

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MIDDLESEX COUNCIL #7, NJCSA,

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- and -

Docket No. CI-80-10-82

GREGORY Z. MACKARONIS, JR.,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss charges of unfair practices filed by Mackaronis against the County, which alleged that the County violated Sections 5.4(a)(1), (3) and (5) of the New Jersey Employer-Employee Relations Act when it failed and refused to pay to Mackaronis a 6% negotiated wage increase in December 1978. The Hearing Examiner found that Mackaronis was properly denied the 6% increase in view of a long-standing County policy of failing to make such payment to employees who received a substantial salary increase during the same year as a result of a promotion or a merit increase. Mackaronis had received an increase of 31.8% as of January 1, 1978 and it was in view of this fact that the County denied him the 6% negotiated wage increase in December 1978. Such conduct by the County did not violate the Act as alleged.

The Hearing Examiner also recommended that the Commission dismiss charges of unfair practices filed by Mackaronis against the Middlesex Council, which alleged that the Council violated Sections 5.4(b)(1) and (3) of the Act when it failed and refused to process a grievance filed by Mackaronis on May 31, 1979 on the ground that it was untimely filed. The County's action occurred on December 21, 1978 and Mackaronis had ten (10) working days to file a proper grievance on forms provided by the County under the Grievance Procedure contained

in the collective negotiations agreement by which Mackaronis was bound. Notwithstanding that Mackaronis claimed that he had never seen a copy of the agreement until the middle of 1979, the Hearing Examiner credited the testimony of the President of the Council that he advised Mackaronis at the end of December 1978 that Mackaronis would have to file his grievance on a proper form in order for it to be processed. Mackaronis failed to do so and instead proceeded to write letters to the President and appear and complain at meetings of the Council. When Mackaronis finally did file a proper grievance on May 31, 1979, it was approximately five months out of time, and the Grievance Committee of the Council acted properly when it declined to process the grievance on the ground that it was untimely filed. Thus, the Council did not breach its duty of fair representation to Mackaronis by its conduct.

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.

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Appearances:

For the Board of Chosen Freeholders of Middlesex County
Robert C. Rafano, Esq., Assistant County Counsel

For the Middlesex Council #7, NJCSA
Borrus, Goldin & Foley, Esqs.
(James F. Clarkin, III, Esq.)

For the Charging Party
Gregory Z. Mackaronis, Jr., pro se

1/The Unfair Practice Charge and Complaint named William E. O'Leary, Personnel Director, as an individual respondent. The Hearing Examiner has deleted O'Leary from the caption as a respondent inasmuch as his actions in the instant proceeding were purely those of an agent or representative of the County of Middlesex.

2/The Unfair Practice Charge and Complaint named Ann Montanti, the Co-Chairman of the Grievance Committee, as an individual respondent. The Hearing Examiner has deleted Montanti from the caption as a respondent inasmuch as her actions in this proceeding were purely those of an agent or representative of Middlesex Council #7.

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on October 10, 1979 by Gregory Z. Mackaronis, Jr. (hereinafter the "Charging Party" or "Mackaronis") alleging that the Board of Chosen Freeholders of Middlesex County (hereinafter the "Respondent County" or the "County") had 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. (hereinafter the "Act"), in that the Respondent County did on or about December 21, 1978 deny the Charging Party the 6% negotiated wage increase for 1978, notwithstanding that it was an across-the-board increase for all County employees in the collective negotiations agreement, of which the Charging Party is a member, all of which was alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (3) and (5) of the Act. ^{3/}

An Unfair Practice Charge was also filed with the Commission on October 10, 1979 by the Charging Party alleging that Middlesex Council #7, NJCSA (hereinafter the "Respondent Union" or the "Council") had engaged in unfair practices within the meaning of the Act, in that the Respondent Union delayed for five months from December 25, 1978 in advising the Charging Party that his "grievance" regarding his having failed to receive the 6% negotiated wage increase for 1978 must be filed on forms supplied by the County, and further, that the Respondent Union thereafter delayed until August 24, 1979 to advise the Charging Party that a grievance filed on the proper form by him on May 31, 1979 was not timely, and finally, that the Respondent Union did not negotiate in good faith on behalf of the Charging Party, all of which

3/ These Subsections prohibit public employers, their representatives or agents from:

"(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.

"(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."

was alleged to be a violation of N.J.S.A. 34:13A-5.4(b)(1) and (3) of the Act. ^{4/}

It appearing that the allegations of the two Unfair Practice Charges, if true, may constitute unfair practices within the meaning of the Act, the cases were consolidated for hearing and a Complaint and Notice of Hearing was issued on March 27, 1980. Pursuant to the Complaint and Notice of Hearing, hearings were held on June 9 and 10, and July 11, 1980, in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. The parties waived oral argument. The Charging Party filed a post-hearing brief on August 11, 1980. The Respondents waived the filing of post-hearing briefs on August 25, 1980.

Unfair Practice Charges having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists, and, after hearing, and after consideration of the post-hearing brief of the Charging Party, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Board of Chosen Freeholders of Middlesex County is a public employer within the meaning of the Act, as amended, and is subject to its provisions.
2. Middlesex Council #7, NJCSA is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

4/ These Subsections prohibit public 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."

3. Gregory Z. Mackaronis, Jr. is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

4. The collective negotiations agreement relevant to the instant proceeding was executed on December 12, 1978 and was effective during the term of January 1, 1978 through December 31, 1979 (J-1). A wage re-opener agreement was executed May 17, 1979, which modified the provisions of J-1 with respect to wages only (J-2).

5. Mackaronis was a member of the collective negotiations unit covered by J-1 and J-2 at all times material hereto. Further, Mackaronis was a member in good standing of the Council at all times material hereto.

6. The provisions of J-1, supra, provide in Article 6 that effective January 1, 1978 "...all eligible employees shall receive a wage increase of 6% over their December 31, 1977 base salary..." (Emphasis supplied).

7. Article 7(c) of J-1 provides for "Merit Increases" and states, inter alia, that all wage increases are limited to the negotiated contractual amounts arrived at through the bargaining process and that the only exceptions to this policy will be represented by certification to a higher position or temporary or provisional appointment to a higher position. ^{5/}

8. Article 21 of J-1 contains the "Grievance Procedure" and defines a grievance as "...any dispute between the parties concerning the application or interpretation of final agreement reached through these negotiations or any complaint by an employee as to any action or non-action taken towards him which violates any right arising out of his employment..." (Emphasis supplied). Article 21 also provides that any employee may process his own grievance.

^{5/} Notwithstanding this provision in the collective negotiations agreement, which has existed for several years, the County has had a practice of unilaterally granting salary increases in cases of merit as well as promotion, with which the Council has never taken issue.

9. The first step of the aforesaid Grievance Procedure provides that the Council "...shall present the Employee grievance or dispute to the employee's immediate supervisor within ten (10) working days of its occurrence, or ten (10) working days after the employee becomes aware of the event..."

10. The aforesaid Grievance Procedure provides further that employee grievances "...shall be presented to the County Supervisor Representative on forms provided by the County." Finally, it is provided that the contractual Grievance Procedure "...shall be strictly adhered to..."

11. The County's Personnel Director, William E. O'Leary, testified credibly that the County policy which he administers is to decide on an ad hoc basis whether or not employees in the collective negotiations unit will receive the negotiated wage increase for any given calendar year in which the employee has received a salary increase as a result of a promotion or a merit increase. He testified that the promotional policy provides for a 4% minimum increase and that receipt of the annual negotiated wage increase would depend on the amount of the promotional salary increase above the 4% minimum. As an example, he testified that an employee who received a promotional increase of 11% in 1978 would also have received the 6% negotiated increase or a total of 17% for the calendar year.

12. Under date of December 8, 1978 the County Comptroller sent to Personnel Director O'Leary a letter attaching a handwritten schedule of those collective negotiations unit employees who had received salary increases during the year 1978 with the request that O'Leary advise the Comptroller as to which of the said employees should receive additionally the 6% negotiated wage increase (CP-7). ^{6/} An examination

^{6/} Effective January 1, 1978 Mackaronis had received an increase of \$2,926 per annum or 31.8% on the basis of merit. Based upon the size of this increase O'Leary decided that Mackaronis should not receive the 6% negotiated wage increase under J-1 for the year 1978. This resulted in a letter to Mackaronis from the County Comptroller under date of December 21, 1978 advising Mackaronis that he would not receive the 6% negotiated wage increase for the year 1978(CP-14).

of this Exhibit CP-7 indicates that the names of 34 employees are listed on the schedule and that 12 of the employees (indicated by an asterisk), including Mackaronis, were deemed by O'Leary to be ineligible for the 6% negotiated wage increase. The percentage rates of increases that these 12 ineligible employees had received during the year 1978 ranged from 12.7% to 77%.

13. In November 1978 the newly elected officers and representatives of the Council assumed their duties, including the five-member Grievance Committee.

14. Under date of December 7, 1978 a notice was posted advising all members of the collective negotiations unit of the names and telephone numbers of the members of the Grievance Committee, and advising specifically of the "proper grievance procedure" to be followed in the filing of grievances (CP-11). The notice stated expressly that an employee should contact his or her Shop Steward for assistance, and that if the employee did not have a Shop Steward he or she should contact the Grievance Committee for assistance. The notice stated further that grievance forms were being supplied to each Shop Steward and that all grievances must be signed in order to be processed. The notice also contained a representation that if these instructions were followed the "...grievance will be handled constructively..."

15. Charles E. King, the President of the Council, testified that, based on personal observation and inspection, he was satisfied that CP-11 was posted as directed, including each floor of the County Building where Mackaronis works. The Hearing Examiner credits King's testimony in this regard, notwithstanding that Mackaronis stated that he never saw CP-11 prior to the hearing in this proceeding.

16. Following receipt by Mackaronis of the December 21, 1978 letter from the County Comptroller, which advised that Mackaronis would not receive the 6% negotiated wage increase for 1978 (CP-14), Mackaronis wrote a letter to King, as President of the Council, under date of December 25, 1978, in which Mackaronis enclosed

a copy of CP-14 and requested King to advise him as to whether or not he had a "legitimate grievance" and asking additionally what course of action he must follow "...in order to receive my retroactive pay if I am entitled to it..." (CP-10).

17. King testified credibly that after receiving CP-10 he met Mackaronis a few days later in December in the County building, at which time Mackaronis asked about his "grievance." King further testified credibly that he told Mackaronis that he would have to fill out "a Grievance Form in order for it...to be processed" (2 Tr. 56). ^{7/}

18. King also testified that he read Mackaronis' letter of December 25, 1978 (CP-10) at a Council meeting on January 23, 1979 but did nothing with it thereafter until May 1979. ^{8/}

19. After being advised by telephone on April 17, 1979 by Ann F. Montanti, the Co-Chairman of the Grievance Committee, that she did not know of any grievance by Mackaronis as of that date, Mackaronis attended a Council meeting on April 18, 1979 and requested that Montanti answer his grievance. She stated that grievances are not answered in public at meetings of the Council and that "...they would give him an answer after the meeting." (CP-2). This was never done.

20. Montanti testified credibly that she first saw Mackaronis' letters to King dated May 14 and 16, 1979 regarding his "grievance" at the May 16, 1979 Council meeting.

21. Under date of May 25, 1979, Jeanne L. Weiss, the Secretary of the Grievance Committee, sent a letter to Mackaronis advising that the Grievance Committee was in receipt of his correspondence to King dated December 25, 1978 and May 14 and 16, 1979. She explained that unfortunately the procedure for filing a grievance, 7/ Mackaronis failed to contradict or deny King's testimony in this regard.

^{8/} The Council minutes for the January 23, 1979, as corrected at the meeting of February 21, 1979, indicate that Mr. King stated that he would turn Mackaronis' December letter over to the Grievance Committee (CP-1).

as outlined in the contract, had not been followed. She referred to Article 21 of J-1 as requiring that grievances must be filed on forms supplied by the County and signed by the grievant, and, finally, she enclosed a copy of a proper grievance form for Mackaronis to utilize. (See CP-15).

22. Under date of May 31, 1979 Mackaronis filed a grievance on the proper grievance form (CP-6), signed it and gave it to his Shop Steward, Cynthia Yatrofsky. Yatrofsky testified that she gave the grievance to John Kennedy, the Deputy County Clerk, and told him that he had three days to answer at the first step of the grievance procedure and that Kennedy said that he would read it. Yatrofsky also told Kennedy that Thomas J. Molyneux, the County Clerk was involved in the second step of the grievance procedure. Yatrofsky said she never received a reply from Kennedy or Molyneux.

23. Under date of July 23, 1979 Molyneux mailed Mackaronis' grievance papers to the Council and Montanti testified that these papers were received by her on July 30, 1979 (RU-2).

24. Under date of August 24, 1979 Montanti wrote to Mackaronis, confirming the Council's "...previous notice to you that your filed grievance...was not processed...because the grievance, when properly filed on the approved form, was, and still is, out of time..." (CP-13).

25. There was received in evidence as Exhibit RU-1 a list of all 39 grievances filed and processed by the Council from November 1978 through June 1980. All of these grievances were filed by aggrieved employees represented by the Council on the proper grievance forms in the proper manner under the agreement. All of the grievances were duly processed by the Grievance Committee and none was rejected as untimely filed.

26. Montanti testified credibly that during her term on the Grievance Committee no employee had ever filed a grievance for failure to receive the negotiated wage increase where the employee involved had also received an increase

prior thereto in the same calender year.

27. Mackaronis testified that although he had received a copy of the Council's Constitution and By-Laws in 1977, which he states he relied upon in filing his "grievance" with King on December 25, 1978 (CP-10),^{2/} Mackaronis testified further that he was not aware of and had never seen either J-1, or any predecessor agreement, at the time that he filed his grievance on a proper form on May 31, 1979.

THE ISSUES

1. Did the Respondent County violate the Act when it failed and refused to pay to Gregory Z. Mackaronis, Jr., the 6% negotiated wage increase in December 1978?

2. Did the Respondent Council violate the Act when it failed and refused to process the May 31, 1979 grievance of Gregory Z. Mackaronis, Jr., on the ground that it was untimely filed?

DISCUSSION AND ANALYSIS

The Respondent County Did Not Violate The Act When It Failed And Refused To Pay To Gregory Z. Mackaronis, Jr., The 6% Negotiated Wage Increase in December 1978

The Hearing Examiner finds and concludes that Mackaronis has failed to

^{2/} Excerpts from the Constitution and By-Laws of the Council were read into the record (1 Tr. 14). These provide, in pertinent part, that the Council's Board of Directors "...may hear Complaints, and if...well founded, they shall refer such complaint or grievance to the...Civil Service and Law Committee for appropriate action." It is thereafter provided that the said Committee "...shall... have jurisdiction over the claims of members arising out of the alleged violation of Civil Service Laws...and...over the rights of members based upon the rules of the Civil Service Commission. All complaints or violations of the Civil Service Laws...shall be made in writing to the President of this Council..." The Hearing Examiner finds as a fact that the "grievance" of Mackaronis regarding the non-payment of the 6% negotiated wage increase did not involve an "...alleged violation of Civil Service Laws..." or the Civil Service Commission's "rules." The County's action of December 21, 1978 was, if anything, an alleged violation of Article 6 of J-1, supra.

prove by a preponderance of the evidence that the Respondent County violated any Subsection of the Act. More specifically, the County did not interfere with, restrain or coerce Mackaronis in the exercise of any rights guaranteed him by the Act within the meaning of Subsection (a)(1) when it refused to make payment to Mackaronis of the 6% negotiated wage increase in December 1978. Further, the County did not discriminate against Mackaronis in regard to hire or tenure of employment or any term or condition of employment within the meaning of Subsection (a)(3) of the Act by the same conduct in December 1978. Finally, the Hearing Examiner finds and concludes that Mackaronis has no standing to allege a Subsection (a)(5) violation of the Act inasmuch as this Subsection is reserved exclusively for a complaint by a public employee representative that a public employer has refused to negotiate in good faith. ^{10/}

The County proffered good and sufficient evidence as to why Mackaronis was denied the 6% negotiated wage increase for 1978 (see Findings of Fact Nos. 12 and 13, supra). The County's Personnel Director O'Leary satisfactorily explained the administration of County policy regarding whether or not unit employees would receive additionally the negotiated wage increases in any given calendar year in which the employee also received a substantial salary increase as the result of promotion or because of merit. Mackaronis received a salary increase of 31.8% because of merit as of January 1, 1978 and he, along with 11 other employees, who were like situated, did not receive the 6% negotiated wage increase for 1978. In other words Mackaronis was not singled out for denial of the increase. The range of promotion or merit increases for the 12 ineligible employees was from 12.7% to 77% (see CP-7). Clearly, Mackaronis was well above the 12.7% and cannot claim disparate treatment.

10/ Cf., New Jersey Turnpike Authority and Jeffrey Beall, P.E.R.C. No. 80-106, 6 NJPER 106 (1980).

Even assuming arguendo that Mackaronis was alone in having been denied the 6% negotiated wage increase, the Hearing Examiner would still reach the same conclusion, namely, that the County did not commit an unfair practice within the meaning of the Act by having denied Mackaronis the 6% negotiated wage increase under the circumstances of a County policy, which takes into consideration substantial increases granted to employees during the same year because of promotion or merit.

Therefore, the Hearing Examiner will recommend that the allegations in the Complaint that the County violated the Act be dismissed.

The Respondent Council Did Not Violate The Act When It Failed To Process The May 31, 1979 Grievance By Gregory Z. Mackaronis, Jr., On The Ground That It Was Untimely Filed

The Hearing Examiner finds and concludes that Mackaronis has failed to prove by a preponderance of the evidence that the Respondent Council violated either Subsection (b)(1) or (3) of the Act by its conduct herein. First, the Hearing Examiner finds and concludes that Mackaronis does not have standing to allege that the Council violated Subsection (b)(3) of the Act. Violations of this Subsection of the Act may only be alleged by public employers on the ground that the public employee representative has refused to negotiate in good faith. ^{11/}

As to Subsection (b)(1) of the Act, it clearly embraces the duty of the Council to represent Mackaronis fairly in matters pertaining to the administration of the collective negotiations agreement, i.e., the fair and impartial processing of grievances through the Grievance Procedure of the collective negotiations agreement (J-1). In this regard the Hearing Examiner refers to New Jersey Turnpike Employees Union, Local 194, etc., P.E.R.C. No. 80-38, 5 NJPER 412

^{11/} See Hamilton Township Education Association, H.E. No. 79-10, 4 NJPER 381 (1978), aff'd., P.E.R.C. No. 79-20, 4 NJPER 476 (1978); Township of Springfield, D.U.P. No. 79-13, 5 NJPER 15 (1978); and Willingboro Education Association, H.E. No. 80-45, 6 NJPER 284, 286 (1980). Accord: State of New York, 13 PERB 4527 (1980).

(1979) where the Commission said: "In considering a union's duty of fair representation, certain principles can be identified. The union must exercise reasonable care and diligence in investigating, processing and presenting grievances; it must make a good faith judgment 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." (5 NJPER at 413) (Emphasis supplied). See also, Council No. 1, AFSCME, AFL-CIO, P.E.R.C. No. 79-28, 5 NJPER 21 (1978); Hamilton Township Education Association, P.E.R.C. No. 79-20, 4 NJPER 476 (1978); and Township of Springfield, D.U.P. No. 79-13, 5 NJPER 15 (1978). These decisions rely heavily on Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967) where the United States Supreme Court said: "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the unit is arbitrary, discriminatory or in bad faith." (386 U.S. at 190). (Emphasis supplied).

The Hearing Examiner has no difficulty in finding and concluding that the Council did not by its conduct herein violate its duty of fair representation to Mackaronis. Mackaronis has been an employee of the County for several years and has during this period been a member of the Council in good standing. Mackaronis has attended a number of Council meetings and has had a copy of the Constitution and By-Laws of the Council since 1977. The Hearing Examiner finds it difficult to comprehend how Mackaronis could have failed to have seen a copy of the collective negotiations agreement governing his terms and conditions of employment until the middle of 1979. The Hearing Examiner further finds it incredible that Mackaronis did not know of the existence of a contractual grievance procedure, and the necessity of filing grievances on forms approved by the County, until he received the May 25, 1979 letter from the Secretary of the Grievance Committee (see Finding of Fact No. 21, supra).

The Council, through its agents and representatives, was in no way derelict in its representation of Mackaronis in this case. The fact that Mackaronis thought that he was filing a proper grievance when he wrote a letter to King on December 25, 1978 is irrelevant. King played no role in the grievance procedure under the collective negotiations agreement (J-1). It was the Shop Steward and the Grievance Committee who had roles to play under the contractual Grievance Procedure. Mackaronis cannot plead ignorance of the Grievance Procedure under the agreement, particularly, in view of there having been posted on the floors of Mackaronis' building the December 7, 1978 notice advising all members of the unit of the names and telephone numbers of the members of the Grievance Committee, and advising further of the "proper grievance procedure" to be followed in the filing of grievances (CP-11). The notice stated expressly that employees should contact their Shop Steward for assistance or, if there was no Shop Steward, then the Grievance Committee members should be contacted. The notice also advised unit employees that if its instructions were followed the "...grievance will be handled constructively..." (see Finding of Fact No. 14, supra).

In view of the testimony of King, the President of the Council, that he personally observed and inspected the posting of the aforesaid notice (CP-11) on each floor of the building where Mackaronis works, the Hearing Examiner finds and concludes that Mackaronis knew, or should have known, of the existence of this notice (see Finding of Fact No. 15, supra). The Hearing Examiner takes especial note of the fact that 39 employees in the unit were able to file proper and timely grievances between November 1978 and June 1980, which were processed. (RU-1).

While it is true that King might have responded in writing to Mackaronis' letter of December 25, 1978 (CP-10), King testified credibly that he met Mackaronis a few days thereafter in December 1978 and, in response to Mackaronis' inquiry regarding his "grievance," King told Mackaronis that he would have to fill out

"a Grievance Form in order for it...to be processed" (see Finding of Fact No. 17, supra). Mackaronis failed to deny or contradict King's critical testimony in this regard.

Thus, although the conduct of King and the Grievance Committee during the months of January through August 1979 is of historical interest it is irrelevant to a proper adjudication of Mackaronis' unfair practice charges against the Council. Mackaronis had ten (10) working days to file a proper grievance under the first step of the Grievance Procedure provided for in the collective negotiations agreement (see Finding of Fact No. 9, supra). In view of the fact that the notice to Mackaronis from the County Comptroller was dated December 21, 1978 (CP-14), presumably Mackaronis received the letter within a few days thereafter and had until the early part of January 1979 to file a proper grievance. He should have enlisted the assistance of his Shop Steward, or if there was none, the Grievance Committee, in order to proceed under the first step of the Grievance Procedure. That he did not do so until May 31, 1979 was no fault or responsibility of the Council, its agents or representatives. Thus, the Hearing Examiner has no alternative but to find and conclude that the Council did not breach its duty of fair representation to Mackaronis by its conduct herein. The Council was on solid legal ground in advising Mackaronis in August 1979 that his grievance was not processed by the Grievance Committee because it was untimely filed.

Therefore, the Hearing Examiner will recommend that the allegations in the Complaint that the Council violated the Act be dismissed.

* * * * *

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

CONCLUSIONS OF LAW

1. The Respondent County did not violate N.J.S.A. 34:13A-5.4(a)(1), (3)


and (5) by having failed and refused to pay to Gregory Z. Mackaronis, Jr., the 6% negotiated wage increase in December 1978.

2. The Respondent Council did not violate N.J.S.A. 34:13A-5.4(b)(1) and (3) when it failed and refused to process the May 31, 1979 grievance of Gregory Z. Mackaronis, Jr., on the ground that it was untimely filed, i.e., the Respondent Council did not violate its duty of fair representation.

RECOMMENDED ORDER

It is hereby ORDERED that the Complaint, alleging violations of the Act by the Respondent County and the Respondent Council, be dismissed in its entirety.

Dated: August 26, 1980
Trenton, New Jersey


Alan R. Howe
Hearing Examiner