P.E.R.C. No. 80-38

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

N.J. TURNPIKE EMPLOYEES UNION,
LOCAL 194, I.F.P.T.E., AFL-CIO,

Respondent,

- and - Docket No. CI-76-19-94

WALTER A. KACZMAREK, JR.,

Charging Party.

SYNOPSIS

The Charging Party filed an unfair practice charge against the Union alleging that, in violation of N.J.S.A. 34:13A-5.4(b)(1) and (5), it improperly refused to arbitrate his discharge by the New Jersey Turnpike Authority.

The Commission, after a careful consideration of the record, briefs and exceptions, accepts the Hearing Examiner's findings of fact and conclusions of law and adopts his Recommended Order.

The Commission finds that the Union: (1) exercised reasonable care and diligence both in investigating the grievance and representing the Charging Party at the discharge hearing; (2) made a good faith judgment that the merits of the grievance did not justify arbitration; and (3) did not deny the Charging Party equal access to arbitration.

Accordingly, the Commission dismisses the Complaint in its entirety.

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Respondent,

- and - Docket No. CI-76-19-94

WALTER A. KACZMAREK, JR.,

Charging Party.

Appearances:

For the Respondent:

Parsonnet, Parsonnet & Dugan, Esqs.
(Victor J. Parsonnet, Esq.)

For the Charging Party:

Craner & Nelson, Esqs.
(Donald J. Nelson, Esq.)

DECISION AND ORDER

On April 13, 1976 an Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") by Walter A. Kaczmarek (the "Charging Party"), alleging, as amended on April 26, 1976, that the New Jersey Turnpike Authority (the "Authority") and the New Jersey Turnpike Employees Union, Local 194, I.F.P.T.E., AFL-CIO (the "Union") 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. (the "Act"). Specifically, the Charging Party alleges that he was improperly discharged by the Authority, in violation of N.J.S.A. 34:13A-5.4(a)(1)

and (7),[1] and that the Union improperly refused to arbitrate his discharge in violation of N.J.S.A. 34:13A-54.(b)(1) and (5).[2]

The procedural history of this case is quite lengthy and since the Hearing Examiner in his Recommended Report and Decision[3] provided an adequate summary, it need not be restated at this time. Pursuant to the decision of the Supreme Court,[4] a Notice of Hearing was issued on August 31, 1978. A hearing was held on October 10, 1978, October 12, 1978, May 1, 1979 and May 2, 1979, before Alan R. Howe, Hearing Examiner of the Commission, at which both parties were represented and were given an opportunity to examine and cross-examine witnesses, to present evidence, and to argue orally. At the conclusion of the Charging Party's case the Hearing Examiner, in response to motions by the Authority and the Union, issued a Recommended Report and Decision[5] to dismiss the complaint against the Authority. This recommendation was adopted by the Commission.[6] As to the allegations against the Union, the Hearing Examiner issued his Recommended Report and Decision on July 9, 1979,[7] which

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1/ These provisions prohibit employers, their representatives and agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act; and "(7) Violating any of the rules and regulations established by the Commission."

2/ These provisions 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; and "(5) Violating any of the rules and regulations established by the Commission."

3/ H.E. No. 80-1, 5 NJPER ___ (¶_____ 1979).

4/ 77 N.J. 329 (1978).

5/ H.E. No. 79-31, 5 NJPER 76 (¶10045 1979).

6/ P.E.R.C. No. 79-81, 5 NJPER 197 (¶10112 1979).

7/ See footnote 3 for citation.

included findings of fact, conclusions of law, and a recommended order. The original of the Report was filed with the Commission and copies were served upon all parties. A copy is attached to this Decision and Order and made a part hereof. Exceptions were filed by the Charging Party on August 7, 1979.

The Hearing Examiner, after considering numerous decisions by the United States Supreme Court, other federal courts and the National Labor Relations Board, found that the Union had not breached its duty of fair representation by the manner in which it investigated the Charging Party's grievance and represented him at an administrative hearing before the Authority, and by refusing to arbitrate his dismissal. Accordingly, the Hearing Examiner recommended that the complaint be dismissed in its entirety.

The Commission, after a careful consideration of the record, briefs and exceptions, accepts the Hearing Examiner's findings of fact and conclusions of law and adopts his Recommended Order.

The Charging Party's numerous exceptions to the findings of fact are all based on the premise that the Hearing Examiner's analysis of the testimony is incorrect. To summarize, the Charging Party alleges the testimony supports finding that the Union did not properly investigate the facts which resulted in the Charging Party's dismissal, failed to adequately represent him at the administrative hearing, and erroneously concluded that the grievance did not merit arbitration.

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.[8/]

The extent to which a union must conduct a factual background investigation depends on the nature of the grievance and, therefore, will vary from case to case. However, as a general principle the duty of fair representation does not require an investigation so exhaustive as to satisfy the demands of the grievant. Rather, it must provide a reasonably sufficient basis for preparing a presentation of the grievance at an administrative hearing and determining whether there is sufficient merit to warrant arbitration. The Hearing Examiner found credible the testimony of the union's business manager, Mr. Forst, that prior to the hearing, he interviewed four of the five witnesses subpoenaed by the Charging Party, all of whom indicated that their testimony would be detrimental to the Charging Party's case.[9/] He also discussed the grievance with Mr. Kaczmarek and his attorney. Considering the thrust of the allegations presented against the Charging Party as the basis for his discharge, the Commission concludes that this investigation constitutes reasonable care and diligence.

8/ See "The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation," Clyde W. Summers, 126 U. Pa. L Rev., 251. Our summary is fully consistent with the Summers' article and the cases cited therein and relied upon by the Hearing Examiner.

9/ The Charging Party questions the Hearing Examiner's findings in this regard. It is for the trier of fact to weigh the evidence and testimony, and the Commission will not normally choose to substitute its second-hand reading of a transcript for the Hearing Examiner's judgment based on observations of demeanor and the like. In re Long Branch Board of Ed., P.E.R.C. No. 77-70, 3 NJPER 300 (1977); In re Hudson County Board of Chosen Freeholders, P.E.R.C. No. 78-48, 4 NJPER 87 (¶4041 1978).

At the administrative hearing the Union was not obligated to provide unsurpassable representation, but such representation as would adequately protect those interests of the grievant which could be adversely affected. Forst is the business manager of the local union who has had substantial experience in representing public and private employees and who has presented many successful grievances in the past, including those of the Charging Party. Further, Forst conferred with the Charging Party's attorney prior to the hearing, and utilized his expert advice during its course. Whether it was prudent not to call Loeber as the grievant's witness is a question of tactics subject to varying opinions. Accordingly, the Commission concludes that here again the Union exercised reasonable care and diligence and that the Charging Party was more than adequately represented by Forst.

Since the determining factor in the grievance was the Charging Party's credibility and the Authority's hearing officer's decision was adverse, a corroborating witness became essential. The failure to obtain such a witness justified Forst's conclusion that arbitration would be a "can't win" [10/] situation. The Commission adopts the Hearing Examiner's conclusion that, from the totality of the evidence presented, the Union's decision not to proceed to arbitration was based on its good faith determination that there was little likelihood of success on the merits.

If in the past every discharge case had been processed through arbitration no matter how questionable the case, the Charging Party's allegation that the Union had breached its duty of non-

10/ See pp. 10 and 17 to 18 of the Hearing Examiner's Report.

discrimination would have been stronger in this case.[11/] However, the Hearing Examiner found that in prior grievances the Executive Board had determined that some did not merit arbitration, although on at least three occasions these decisions were overruled by a membership vote. Accordingly, the decision not to proceed to arbitration in this instance did not constitute unequal access to the grievance process.

ORDER

Accordingly, for the reasons set forth above, it is HEREBY ORDERED that the Complaint is dismissed in its entirety.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener

JEFFREY B. TENER
Chairman

Chairman Tener, Commissioners Hipp, Hartnett, Graves, Newbaker and Parcells voted for this decision. None opposed.

DATED: Trenton, New Jersey
September 20, 1979
ISSUED: September 21, 1979

11/ Summers, supra, at pp. 272-273.

H.E. No. 80-1

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

In the Matter of

NEW JERSEY TURNPIKE EMPLOYEES UNION,
LOCAL 194, I.F.P.T.E., AFL-CIO,

Respondent,

- and -

Docket No. CI-76-19-94

WALTER A. KACZMAREK, JR.,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss charges of unfair practices by Kaczmarek against the Respondent Union. Kaczmarek, who had been terminated by the New Jersey Turnpike Authority, had alleged that Local 194, as his exclusive collective negotiations representative, had breached its duty of fair representation: (1) by the manner in which its Business Manager prepared for and presented Kaczmarek's case at an administrative hearing before the Authority on July 31, 1975; and (2) after the decision of the Authority to terminate Kaczmarek was sustained administratively, by then refusing to take Kaczmarek's case to final and binding arbitration under the collective negotiations agreement.

Although the Commission has previously considered an alleged breach of the duty of fair representation in the context of negotiations, and in the unilateral settling of a grievance prior to arbitration, a case such as that presented herein has not previously come before the Commission. Accordingly, the Hearing Examiner cited a number of United States Supreme Court decisions, and decisions of other Federal Courts and the National Labor Relations Board, in reaching the conclusion that Local 194 had not breached its duty of fair representation in this case.

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 hereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. No. 80-1

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

In the Matter of

NEW JERSEY TURNPIKE EMPLOYEES UNION,
LOCAL 194, I.F.P.T.E., AFL-CIO

Respondent,

- and - Docket No. CI-76-19-94

WALTER A. KACZMAREK, JR.,

Charging Party.

Appearances:

For New Jersey Turnpike Employees Union, Local 194,
I.F.P.T.E., AFL-CIO
Parsonnet, Parsonnet & Dugan, Esqs.
(Victor J. Parsonnet, Esq.)

For Walter A. Kaczmarek, Jr.
Craner and Nelson, Esqs.
(Ronald J. Nelson, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on April 13, 1976 by Walter A. Kaczmarek, Jr. (hereinafter "Kaczmarek" or the "Charging Party"), which was amended and supplemented by letter filed April 26, 1976, alleging that the New Jersey Turnpike Authority (hereinafter the "Turnpike Authority") and the New Jersey Turnpike Employees Union, Local 194, I.F.P.T.E., AFL-CIO (hereinafter "Local 194" or the "Respondent Union") had engaged in unfair practices within the meaning of the New Jersey Employer-Employees Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that the Turnpike Authority had improperly discharged Kaczmarek on July 18, 1975 and that Local 194 thereafter improperly refused to proceed to arbitration of the discharge pursuant to the collectively negotiated agreement between it and the Turnpike Authority, all of which was

alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1) and (7) and N.J.S.A. 34:13A-5.4(b)(1) and (5). 1/

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 June 29, 1976. Following the issuance of the Complaint, the Turnpike Authority filed a motion for summary judgment, in which Local 194 joined, contending that the complaint should be dismissed inasmuch as the charge was filed more than six months after the discharge. 2/

The Commission on September 22, 1976 granted the motion for summary judgment and dismissed the complaint. 3/ Thereafter, Kaczmarek filed an appeal to the Appellate Division, seeking to reverse the decision of the Commission, supra. The Appellate Division affirmed the Commission, but on August 7, 1978 the Supreme Court of New Jersey reversed and remanded the matter to the Commission for proceedings not inconsistent with its opinion. 4/

Pursuant to the decision of the Supreme Court, the Director of Unfair Practices, on August 31, 1978, issued another Notice of Hearing. Pursuant to the said Notice of Hearing, hearings were held on October 10 and October 12, 1978 in Newark, New Jersey, at which time the Charging Party was given an opportunity to examine witnesses and present relevant evidence. At the conclusion of the Charging Party's case, counsel for the Turnpike Authority and Local 194 made oral motions to dismiss. Thereafter, the parties filed supporting and opposing briefs, the last brief being filed December 18, 1978.

1/ Subsection (a) prohibits employers, their representatives and agents from:
"(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.
"(7) Violating any of the rules and regulations established by the Commission."

Subsection (b) prohibits 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.
"(5) Violating any of the rules and regulations established by the Commission."

2/ N.J.S.A. 34:13A-5.4(c) establishes a six-month statutory period of limitations on the filing of an Unfair Practice Charge.

3/ P.E.R.C. No. 77-15, 2 NJPER 309 (1976).

4/ 77 N.J. 329 (1978).

The Hearing Examiner, after consideration of the briefs of the parties, issued his Decision on Motions to Dismiss and Order on February 15,1979, 5/ in which the Hearing Examiner granted the motion of the Turnpike Authority to dismiss but denied in part the motion to dismiss by Local 194. 6/ The Charging Party filed a request for review with the Commission from the Hearing Examiner's decision granting the motion to dismiss by the Turnpike Authority. Local 194 did not file a request for review.

On April 26, 1979 the Commission affirmed the Hearing Examiner's Decision granting the Turnpike Authority's motion to dismiss. 7/ The hearing was concluded on May 1 and May 2, 1979 in Newark, New Jersey, at which time the Respondent Union presented and examined its witnesses and the Charging Party responded in rebuttal. Post-hearing briefs were filed by the parties by June 28, 1979.

An Unfair Practice Charge, as amended, having been filed with the Commission, a question concerning an alleged violation of the Act, as amended, exists and, after hearing and, after consideration of all briefs filed by the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The New Jersey Turnpike Employees Union, Local 194, I.F.P.T.E., AFL-CIO, is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

2. Walter A. Kaczmarek, Jr. is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

3. Kaczmarek was hired by the Turnpike Authority on March 21, 1966 as a toll collector. At the time of his discharge by the Turnpike Authority on July 18, 1975, Kaczmarek was a maintenance man in District 2, Southern Division. His supervisor at the time of discharge was Everett R. Loeber, the Superintendent

5/ H.E. No. 79-31, 5 NJPER 76.

6/ The Hearing Examiner denied Local 194's motion to dismiss as to the alleged Subsection (b)(1) violation, but granted Local 194's motion to dismiss as to the alleged Subsection (b)(5) violation.

7/ P.E.R.C. No. 79-81, 5 NJPER 197.

of Maintenance for the Southern Division.

4. Sometime in April 1975 Loeber spoke to Detective Sgt. Richard H. Kelly of the New Jersey State Police regarding a spilled cargo of coffee on the Turnpike where Loeber observed a number of Turnpike employees putting the coffee into their own cars. Loeber said he could have fired them all but instead decided to re-issue and post on all bulletin boards the "cargo directive" (see CP-17, dated April 28, 1975). Thereafter, at the end of April 1975, Kaczmarek was speaking to his shop steward, Baricki, regarding the "directive" and, in the presence of Loeber, Kaczmarek said that he knew of pilferage some 18 months earlier in the Northern Division involving cases of liquor having been put into a panel truck. Loeber said that he would take the matter to Kelly and when he did so Kelly said that he wanted to see Kaczmarek. Loeber took Kaczmarek to Kelly on April 30, 1975 and Kelly took a statement from Kaczmarek on that day (CP-1). In this statement Kaczmarek implicated a number of Turnpike employees in the "theft" of a van-load of cases of Seagram's Seven whiskey, following a multi-vehicle accident in the fog on the Turnpike on or about October 23 and October 24, 1973. More specifically, the implicated employees were alleged by Kaczmarek to have loaded a Turnpike van (No. 412) with cases of Seagram's Seven whiskey, which had been deposited at dump No. 109, following the accident on the Turnpike, supra, and to have driven the said Turnpike vehicle to the Turnpike Division Headquarters at Newark where the van was unloaded and the cases of Seagram's Seven whiskey taken in through the front door of the Division Headquarters.

5. At an administrative hearing on July 31, 1975, infra, Detective Sgt. Kelly testified, inter alia: that all of the persons implicated by Kaczmarek denied any involvement and that he, Kelly, was impressed by their demeanor (CP-5, pp. 17, 18); that his collateral investigation of persons not implicated by Kaczmarek indicated that the events of the day in question were "contrary to the Kaczmarek statement" (CP-5, pp. 18-29); that he confronted Kaczmarek with the "inconsistencies" and Kaczmarek reiterated his original statement to Kelly (CP-5, p. 29); and that based on the results of his investigation, Kelly concluded that Kaczmarek was "untruthful" in his statement of April 30, 1975 (CP-5, p. 31). 8/

8/ Kelly told Loeber he thought Kaczmarek was a liar.

6. Under date of July 15, 1975, Wilbur Turner of the Turnpike Authority sent a letter to Kaczmarek (CP-2), which stated as follows:

> "As a result of your malicious and unfounded accusations against fellow employees, your employment with the New Jersey Turnpike Authority is hereby terminated as of Friday, July 18, 1975. 9/
>
> Your statements to the New Jersey State Police concerning fellow employees have been thoroughly reviewed and found to be baseless. As a result of your actions there has been disruption to the Department and unnecessary anguish to your co-workers.
>
> You are further advised that a Hearing has been set for Thursday, July 31, 1975 at 10:00 a.m. at the Administration Building, Conference Room #2, New Brunswick, New Jersey, as to why your termination shall not be confirmed." 10/

7. A day or two after receiving the Turnpike Authority's letter (CP-2) Kaczmarek either telephoned or visited the union office and spoke with Forst. 11/ Forst testified credibly that Kaczmarek asked him if the union was going to

9/ Loeber testified that the procedure in Kaczmarek's case was contrary to past practice - the Turnpike Authority always suspended first before dismissal. Francis A. Forst, the Business Manager of Local 194, registered an objection to this procedure to the Turnpike Authority after receiving a copy of CP-2 (see CP-20).

10/ The 1974-77 collective negotiations agreement (CP-14) provides in Article XVII, B. (pp. 30, 31) that in cases of "Administrative Discipline", which shall "consist of those major or flagrant violations of rules, regulations or procedures," where, inter alia, a penalty of dismissal has been recommended a notice of formal hearing of the charges shall be served upon the employee no less than ten days in advance. It is also provided that "the employee involved shall be entitled to request in his defense such witnesses as he may wish to have present; the right of cross-examination of all witnesses and the right to have made available to him such records, files, and documents as he may consider necessary to his defense." Further, the hearing officer is charged with conducting the hearing and advising the employee of his findings. Any employee who is found guilty of a major or flagrant violation of rules, regulations or procedures shall have the right to appeal in writing to the Executive Director within five days after the decision of the hearing officer. In the event that the decision of the Executive Director is unsatisfactory, the union may submit the matter to binding arbitration.

11/ The Hearing Examiner finds it unnecessary to resolve the conflict between Kaczmarek's and Forst's testimony as to whether or not Kaczmarek telephoned Forst or whether he appeared personally at the union office and spoke to Frost. That which materially transpired between them is essentially uncontradicted.

represent Kaczmarek, to which Forst replied "yes". Kaczmarek advised Forst that he was getting an attorney, to which Forst replied "okay". Forst testified that there had been other instances of a grievant obtaining his own attorney. 12/

8. Kaczmarek met with Grayson on July 25 or July 26, 1975 13/ where he discussed his defense with Grayson and who would be called as witnesses. Based on information from Kaczmarek, Grayson prepared a subpoena (CP-4) for the hearing on July 31, which included the names of Loeber and Kelly plus five other employees, three of whom were named by Kaczmarek in his statement to Kelly on April 30 (CP-1). 14/

9. Kaczmarek served a subpoena personally on Stanley Petrowski (who is listed on CP-4 but not mentioned in CP-1) and Petrowski, as a witness, admitted that he had been served by Kaczmarek. Petrowski testified credibly that he told Kaczmarek he could not help him prove the "truth" according to Kaczmarek. Petrowski testified that someone representing Kaczmarek called him and asked for Kaczmarek; he could not state that it was Grayson. Petrowski testified credibly that he never told anyone that the content of Kaczmarek's statement (CP-1) was true. 15/

10. Kaczmarek "arranged" for the service of the remaining subpoenaed individuals, testifying specifically that a Turnpike Authority clerk, Anthony Grotto, said he served Farinella, Kirkman and Donatelli, who are named in the subpoena. 16/

12/ Loeber suggested to Kaczmarek that he retain an attorney and Kaczmarek, after his conversation with Forst, retained Matthew Grayson.

13/ All dates hereinafter are in the year 1975 unless otherwise indicated.

14/ Kaczmarek subsequently telephoned Forst and told Forst that Grayson was representing him and that he was subpoenaing some witnesses. When Forst asked Kaczmarek who the witnesses were, Kaczmarek said, "Loeber and some of the people involved in the incident." The Hearing Examiner does not credit Kaczmarek's testimony that he asked Forst to get the subpoenaed witnesses to the hearing and that Forst allegedly said, "if they show up, they show up." Given the demeanor of Forst as a witness, the Hearing Examiner refuses to attribute such an off-handed reply to Forst.

15/ The Hearing Examiner does not credit Grayson's testimony that he spoke to Petrowski and that Petrowski told him that Kaczmarek had told the truth and that he, Petrowski, had been there. Petrowski did testify that he was at the scene of the "fog accident". He did not testify that he was at the scene of the alleged pilferage of the Seagram's Seven whiskey and he was not named by Kaczmarek in Kaczmarek's statement (CP-1).

16/ Nicholas Bilotta, Charles Farinella and James Kirkman testified at the hearing that they had never received or seen the subpoena (CP-4). Kaczmarek adduced no evidence at all with respect to service of the subpoena on John Donatelli or Det. Sgt. Kelly.

11. Grayson testified that he spoke to each of the subpoenaed individuals, except for Kelly, presumably by telephone, prior to the July 31 hearing and that Farinella admitted that he had been driving the truck and that Donatelli admitted that Kaczmarek told the truth. The Hearing Examiner discredits Grayson's testimony with respect to Farinella, finding more credible Farinella's testimony: that while he assisted in clean-up after the "fog accident" he was never at dump No. 109; that he never drove Turnpike van No. 412, stating that it was only used for auto parts and was driven by mechanics; that all of the whiskey bottles he saw were broken; and that to his knowledge the content of Kaczmarek's statement (CP-1) was not true. 17/

12. Both Grayson and Kaczmarek admitted that they did not know of what help to Kaczmarek the subpoenaed witnesses would be, with the possible exception of Loeber and, even Kaczmarek admitted that he did not know what Loeber would testify to. 18/ Further, Kaczmarek testified that he had not talked to any of the subpoenaed individuals prior to the hearing with respect to what their testimony might be; this included Petrowski.

13. Wilbur Turner telephoned Forst prior to the hearing, stating that Kaczmarek had requested some witnesses for the hearing and Turner asked Forst if he wanted them at the hearing. Forst replied that he wanted all persons that were subpoenaed at the hearing. Forst then obtained a list of the names on the subpoena from Turner.

14. The day before the hearing, Forst testified credibly that he went to the Northern Division and spoke to all of the employees named in the subpoena, except Petrowski, 18a/ and that they indicated that they did not want to testify at the hearing "and wind up having to say something about Mr. Kaczmarek that would be detrimental to his position" (3 Tr. 19). 19/ Forst also said he told these employees that he would like them to appear but they indicated they would not do so. 19a/

17/Although Donatelli did not testify at the hearing, the Hearing Examiner refuses to credit Grayson's testimony that Donatelli told him that Kaczmarek told the truth, in view of the discrediting of Grayson with respect to his alleged conversation with Farinella.

18/Grayson testified that Loeber only knew the names of the individuals identified by Kaczmarek and the van number.

18a/This would have included Farinella, Bilotta, Donatelli and Kirkman (CP-4).

19/These same employees also indicated to Forst that "they were not even particularly interested in helping Mr. Kaczmarek." (3 Tr. 19).

19a/The Hearing Examiner credits Forst's testimony in this regard, notwithstanding that Bilotta, Farinella and Kirkman each testified on cross-examination that if they had been asked to appear they would have done so (4Tr. 11, 33, 46). It is noted that they were not asked specifically if Forst asked them to appear. Forst's overall testimony appears to be a more convincing recollection of what actually occurred (3 Tr. 18-20, 90-95).

15. On July 31 Forst met Grayson prior to the commencement of the hearing and discussed the presentation of Kaczmarek's case. Forst told Grayson that he could present the case and that he, Forst, would assist him on such matters as the procedure under the collective negotiations agreement. This meeting lasted approximately ten to fifteen minutes. Grayson agreed that Forst would represent Kaczmarek at the hearing.

16. Before the formal opening of the hearing on July 31, the Hearing Officer, Oliver K. Compton, Jr., asked who was going to be represent Kaczmarek. Forst said that he was going to represent Kaczmarek with the assistance of Grayson and that Kaczmarek was in agreement with this procedure. Forst testified credibly that he did not state to Grayson that he, Forst, would leave if Grayson presented the case. Grayson stated to Compton that he was willing to cooperate with Forst and that he was content to let Forst conduct the hearing. Forst then observed that the subpoenaed employee witnesses were not present and he asked the Turnpike Authority representatives why they were not there. The response was "they" are your members and they do not want to appear. Forst took the position that the Turnpike Authority had the obligation to produce the subpoenaed employee witnesses.

17. The hearing opened and the Turnpike Authority presented its case. During the course of the presentation Grayson wrote questions on a yellow pad for consideration by Forst in his cross-examination. Forst testified credibly, and contrary to Grayson, that if the questions of Grayson were deemed by Forst to be pertinent to the immediate line of questioning that he, Forst, would ask the questions immediately; if not immediately pertinent, then Forst "worked the questions in later". Forst specifically recalled that he "worked in" Grayson's questions with respect to the cross-examination of Det. Kelly. Forst testified credibly that all of the questions that Grayson suggested were asked by Forst. 20/

18. At the conclusion of the Turnpike Authority's case Forst, Grayson and Kaczmarek caucused for 15 to 20 minutes to discuss Kaczmarek's defense. The question of calling Loeber was discussed and Forst told Grayson that Loeber is "management" and it would therefore be management against management, and further that, based on past experience with Loeber, he was of questionable reliability

20/ It is noted that the transcript of the hearing of July 31 reflects that Forst, at the suggestion of Grayson, made a motion to dismiss at the conclusion of the Turnpike Authority's case (CP-5, p. 146).

and could not be trusted. As to the subpoenaed employees, who were not present, Forst said he thought they would be hostile and not helpful even if present. Forst then stated his strategy, that being that Kaczmarek tell his story, indicating that Loeber was the sole person responsible for bringing out the whiskey incident, and that the Turnpike Authority's reaction was thus a reaction of management to Loeber rather than to Kaczmarek's statement, and finally, that Kaczmarek was not malicious and had caused no disruption. As Forst put it, the theory of the defense was to "pin it on Loeber". Forst further testified credibly that Grayson and Kaczmarek agreed to his strategy. 21/ Thus, Kaczmarek alone testified on his behalf at the hearing.

19. By report dated August 21 Hearing Officer Compton sustained the discharge of Kaczmarek by the Turnpike Authority (CP-6). By letter dated August 28 (CP-7) Compton notified Kaczmarek of his decision but did not enclose a copy of the report. Kaczmarek did not appeal to the Executive Director of the Turnpike Authority. 22/

20. Kaczmarek testified on rebuttal that he was in Princeton Hospital at the time that he learned of Compton's decision. Forst received a telephone call from Kaczmarek complaining about Compton's decision. 23/ Forst also received a letter from Grayson dated September 2 requesting that the case be taken to arbitration (CP-9). 24/

21. Forst testified credibly that he told Kaczmarek that he would place

21/ It is noted that Grayson did not request an adjournment of the hearing when the subpoenaed employees did not appear.

22/ See footnote 10, supra. It is noted that the Executive Director affixed his signature indicating "approved" as to the recommendation of Compton that Kaczmarek's discharge be sustained (CP-6, p. 10).

23/ Based on Kaczmarek's rebuttal testimony, the Hearing Examiner does not credit Kaczmarek's earlier testimony that when he received Compton's letter of August 28 he went to Forst and requested that the union take the case to arbitration. Rather, the Hearing Examiner credits Forst's testimony that, after receiving Kaczmarek's telephone call regarding Compton's decision, Forst requested that Kaczmarek make a written request that Local 194 go to arbitration, and that Kaczmarek thereafter sent a note to Mr. Battaglia, the President of Local 194, requesting arbitration.

24/ It is noted that in Grayson's letter to Forst, Grayson stated that he was of the opinion that Forst "won the case and that the decision is in error both in law and fact." Forst also testified credibly that at the conclusion of the hearing on July 31 Grayson and Kaczmarek both congratulated him on the handling of the case.

the matter before the Executive Board, but that he would not recommend arbitration since it was a "can't win" case. Notwithstanding his opinion, Forst further testified credibly and without contradiction that he told Kaczmarek that if he, Kaczmarek, could find one witness to corroborate his story then he, Forst, would recommend arbitration.

22. At the Executive Board meeting on September 8 Forst presented Kaczmarek's request for arbitration and Grayson's letter (CP-9). Forst recommended that the Executive Board deny the request for arbitration. In the course of so doing Forst outlined to the Executive Board what had transpired at the July 31 hearing and discussed the difficulty in proving in arbitration that what Kaczmarek said was true without at least one corroborating witness. The Executive Board unanimously agreed with Forst and approved his recommendation (see CP-10).

23. Forst testified credibly that after the Executive Board meeting Kaczmarek telephoned him to find out the result, and then asked Forst to put it in "writing". Forst agreed to send a letter, which was done under date of September 10 (CP-11) and reads as follows:

> "I regret having to advise you that the Executive Board, by unanimous vote, has rejected your request for arbitration. Both your letter and that of your attorney were presented to the board at its regular monthly meeting, Monday, September 8th.
>
> "After a review of the case and a general discussion, it was the determination of the board that the case did not merit arbitration.
>
> "While I, as Business Manager, cannot explain each individual's reason for voting, it appeared to me that, in essence, the board agreed that your accusations against fellow employees, having been unfounded, were disruptive of the work force. In addition, your attorney's letter suggested that your defense pursue improper acts alleged against the investigation which, if proven, would reopen the question of your fellow-workers' guilt. 25/
>
> "It is our belief that Local 194 diligently and vigorously represented your point of view before an appropriate Hearing Officer of the Authority and the Executive Board is satisfied that the matter was properly aired and the decision justified.
>
> "It would seem that we could not upset the two basic facts in the case: (1) Your charges against your

25/ This latter sentence was placed in Forst's letter at Kaczmarek's request.

> fellow workers came long after the incident, and (2) They were unfounded. Since no good reason could come forth for your presenting this story, the Authority determined it was malicious."

24. Forst testified that Kaczmarek had the right to appeal the Executive Board's decision to the membership, seeking reversal of the Executive Board's decision not to take Kaczmarek's case to arbitration. 26/ Forst testified further that prior to July 1975 at least three members had taken such an appeal from adverse decisions of the Executive Board and that the Executive Board had always been reversed. He cited, for example, the case of Paul Cancro in 1971 or 1972. 27/

25. Forst testified, and Kaczmarek admitted, that Forst had effectively represented Kaczmarek previously on several occasions. For example, prior to Local 194 being recognized by the Turnpike Authority, Forst in December 1969 was successful in obtaining Kaczmarek's reinstatement after he was terminated by the Turnpike Authority. Further, in a grievance by Kaczmarek involving a promotional opportunity, Forst was successful in obtaining the Turnpike Authority's agreement to permit Kaczmarek to take the promotional test and thereafter, when Kaczmarek protested the inclusion of certain questions on the test, these questions were deleted at the instance of Forst. Also, in an arbitration case involving six to eight employees, including Kaczmarek, Local 194 successfully prosecuted the case and the grievance was sustained. Finally, Forst represented Kaczmarek in two grievances involving minor suspensions in 1973, the outcome of which was not testified to by Forst.

26/ See Local 194 By-Laws (CP-21). In particular, Forst referred to paragraph 14 (p.8).

27/ Kaczmarek testified that he recalled the Executive Board refusing to take Cancro's case to arbitration, but did not recall Cancro appealing to the union membership and its overruling the Executive Board. The Hearing Examiner credits Kaczmarek's testimony that he did not know he could appeal to the union membership from the decision of the Executive Board, notwithstanding that he had been a steward for Local 194 for at least one year and should have had a copy of the By-Laws. It is noted that the provision of the By-Laws cited by Forst (CP-21, p. 8) does not make clear by its terms that a member has a right to appeal an adverse decision of the Executive Board to the membership.

THE ISSUE

Did the Respondent Union violate Subsection (b)(1) of the Act by its conduct in connection with the administrative hearing on July 31, 1975 and by its subsequent refusal to submit Kaczmarek's case to arbitration? 28/

DISCUSSION AND ANALYSIS

The Applicable Law

It should first be noted that the Commission has considered and decided two cases involving the alleged breach by a union of the duty of fair representation, first in a negotiations context 29/ and second, in the settling of a grievance by the union in a step prior to arbitration. 30/ The Commission has not, however, considered and decided a case such as that herein presented, namely, an alleged breach of the duty of fair representation where a union represents a grievant at an administrative hearing and thereafter refuses to take the grievant's case to arbitration.

The Supreme Court of the United States first articulated the duty of fair representation in a case arising under the Railway Labor Act: Steele v. Louisville & N. R. Co., 323 U.S. 192, 15 LRRM 708 (1944), which was subsequently extended to industries covered by the National Labor Relations Act: Ford Motor Co. v. Huffman, 345 U.S. 330, 31 LRRM 2548 (1953); Syres v. Oil Workers, Local 23, 350 U.S. 892, 37 LRRM 2068 (1955).

In Ford Motor Co. v. Huffman, supra, the Supreme Court said, in a case where the union had exercised discretion resulting adversely upon one group of unit employees relative to others: "...A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." (345 U.S. at 338, 31 LRRM at 2551).

In Humphrey v. Moore, 375 U.S. 335, 55 LRRM 2031 (1964) the Supreme

28/ Although the Unfair Practice Charge (C-1) alleges only that the Respondent Union violated the Act by its refusal to submit Kaczmarek's case to arbitration, nevertheless the conduct of the Respondent Union, in connection with the administrative hearing on July 31, 1975, was fully litigated and will be considered on the merits herein.

29/ See Hamilton Township Education Association, P.E.R.C. No. 79-20, 4 NJPER 476 (1978), aff'g. H.E. No. 79-10, 4 NJPER 381 (1978) - no violation found.

30/ See Council No. 1, AFSCME, AFL-CIO, P.E.R.C. No. 79-28, 5 NJPER 21 (1978), aff'g. H.E. No. 79-25, 4 NJPER 483 (1978) - no violation found.

Court, in sustaining the union's right to have made a seniority dovetailing decision, stated that the union had the right to take a position favoring one group over another, but must do so "...honestly, in good faith and without hostility or arbitrary discrimination." (375 U.S. at 350, 55 LRRM at 2038).

The Supreme Court further considered the duty of fair representation in Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967), a case involving the refusal of a union to process a grievance to the final step of arbitration. At one point in its decision, the Supreme Court noted that the duty of fair representation "...includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." (386 U.S. at 177, 64 LRRM at 2371). In its decision the Supreme Court also said,"A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith..." (386 U.S. at 190, 64 LRRM at 2376). (Emphasis supplied).

In a case involving the failure of an employee to utilize the grievance procedure before suing the employer, the Supreme Court in Republic Steel Corp. v. Maddox, 379 U.S. 650, 58 LRRM 2193 (1965) distinguished the situation where "...the union refuses to press or only perfunctorily presses the individual's claim..." (379 U.S. at 652, 58 LRRM at 2194).

The Supreme Court last spoke on the subject of the duty of fair representation in Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 91 LRRM 2481 (1976) [31] where the Court reviewed and confirmed all of the foregoing authorities. The facts of that case are in no way material hereto.

The National Labor Relations Board has held in many cases, beginning with Miranda Fuel Co., 140 NLRB 181, 51 LRRM 1584, 1587 (1962),that a union violates Section 8(b)(1)(A) of the National Labor Relations Act when it breaches its duty of fair representation. [32]

31/ The Hearing Examiner excludes from consideration as not pertinent the most recent Supreme Court case in IBEW v. Foust, U.S. , 101 LRRM 2365 (1979), which was limited exclusively to the question of the imposition upon a union of punitive damages for an alleged breach of the duty of fair representation. The Court held that punitive damages could not be assessed in such cases.

32/ See, for example: Port Drum Co. and Oil, Chemical & Atomic Workers International Union, 170 NLRB No. 51, 67 LRRM 1506 (1968); Local 485, I.U.E. (Automotive Plating Corp.), 170 NLRB No. 121, 67 LRRM 1609 (1968); I.B.E.W., Local 2088 (Federal Electric Corp.), 218 NLRB No. 48, 89 LRRM 1590 (1975); United Steelworkers of America (Inter-Royal Corp.), 223 NLRB No. 177, 92 LRRM 1108 (1976);

(continued next page)

The Respondent Union Did Not Breach Its Duty of Fair Representation of Kaczmarek in Connection With The Administrative Hearing July 31, 1975

The Charging Party contends first that the Respondent Union, through its Business Manager, Forst, breached its duty of fair representation of Kaczmarek by Forst's conduct prior to and at the administrative hearing on the termination, which was held on July 31, 1975. The Hearing Examiner rejects this contention.

Shortly after receiving the termination letter from the Turnpike Authority (CP-2) Kaczmarek inquired of Forst as to whether or not the Union was going to represent him, to which Forst replied "yes". Kaczmarek advised Forst that he was getting his own attorney, to which Forst replied "okay". 33/ Kaczmarek retained Matthew Grayson, with whom he met on July 25 or July 26, and discussed his defense and who would be called as witnesses. Based on information from Kaczmarek, Grayson prepared a subpoena (CP-4) and Kaczmarek arranged for the service of the subpoena. See Findings of Fact Nos. 7-10, supra.

Grayson and Kaczmarek admitted that they did not know of what help to Kaczmarek the subpoenaed witnesses would be, with the possible exception of Loeber, although Kaczmarek acknowledged that he did not know what Loeber would testify to and Grayson testified that Loeber only knew the names of the individuals identified by Kaczmarek and the van number. Finding of Fact No. 12, supra. Although Grayson testified that he spoke to each of the subpoenaed individuals the Hearing Examiner has discredited Grayson with respect to Farinella and Donatelli. Finding of Fact No. 11, supra. Petrowski, with whom Kaczmarek spoke personally, testified credibly that he could not help Kaczmarek prove the "truth" of his statement (CP-1), and Petrowski further testified that he never told anyone that the content of the statement was true. Finding of Fact No. 9, supra.

It was in this context that the Hearing Examiner credited Forst when he testified that he went to the Northern Division the day before the hearing, July 30, and spoke to all the subpoenaed employees, except Petrowski, and that they indicated they did not want to testify at the hearing and "wind up" saying

32/ (continued from page 13)
Western Exterminator Co. and Industrial Carpenters Union, Local 2565, 223 NLRB No. 181, 92 LRRM 1161 (1976); Laborers, Local 324 (Centex Homes of Calif.), 234 NLRB No. 60, 97 LRRM 1265 (1978); and Brown Transport Corp., 239 NLRB No. 91, 100 LRRM 1016 (1978).

33/ It is noted that Forst testified that there had been other instances of a grievant obtaining his own attorney.

something "detrimental" to Kaczmarek's position. Notwithstanding this, Forst told the employees that he would like them to appear, but they indicated they would not do so. Finding of Fact No. 14, supra. It is also noted, that Forst earlier, upon receiving a telephone call from Wilbur Turner of the Turnpike Authority, stated that he wanted the subpoenaed witnesses to be at the hearing. Finding of Fact No. 13, supra. 34/

The Hearing Examiner next considers the conduct of Forst on July 31, the day of the administrative hearing. Forst first met Grayson prior to the commencement of the hearing and offered to let Grayson present the case with Forst's assistance on such matters as procedure under the collective negotiations agreement. After a 10-15 minute meeting, Grayson agreed that Forst would represent Kaczmarek. Finding of Fact No. 15, supra.

Before the hearing opened the Hearing Officer asked who was going to represent Kaczmarek and Forst replied that he was, with the assistance of Grayson. Kaczmarek stated his agreement with this procedure as did Grayson. Also, before the formal opening of the hearing, Forst observed that the subpoenaed employees were not present, and he asked the representatives of the Turnpike Authority why they were not there, to which the response was that "they" are your members and they do not want to appear. Forst took the position that the Turnpike Authority had the obligation to produce them. 35/ With that the hearing commenced. Finding of Fact No. 16, supra.

As the Turnpike Authority presented its case, Grayson wrote questions on a yellow pad for consideration by Forst in his cross-examination. Contrary to Grayson, Forst testified credibly that if the questions were deemed pertinent to the immediate line of questioning then he, Forst, would ask the questions immediately; if not, then Forst "worked the questions in later". All of the questions that Grayson suggested to Forst were asked by him. Finding of Fact No. 17, supra.

At the conclusion of the Turnpike Authority's case, Forst, Grayson and Kaczmarek caucused for 15 to 20 minutes to discuss Kaczmarek's defense, at which time the question of calling Loeber was discussed. Forst rejected the suggestion of calling Loeber, based in part on his past experience with Loeber. As to the

34/ It is again noted that the 1974-77 collective negotiations agreement (CP-14) provides only that the employee, and presumably his representative, may request the presence of witnesses. See footnote 10, supra. It does not obligate the Turnpike Authority to produce witnesses.

35/ Id.

subpoenaed employees, who were not present, Forst said that he thought they would be hostile and not helpful. Forst then stated his strategy, that being that Kaczmarek tell his story indicating that Loeber was the sole person responsible for bringing out the whiskey incident, and that the Turnpike Authority's reaction was thus a reaction of management to Loeber rather to Kaczmarek's statement. Finally, it was decided that Kaczmarek should by his testimony establish that he was not malicious and had caused no disruption. Grayson and Kaczmarek agreed to Forst's strategy. Kaczmarek alone testified on his behalf. Finding of Fact No. 18, supra.

Considering the conduct of Forst, both prior to and at the administrative hearing on July 31, the Hearing Examiner finds and concludes that the instant case is not one where the Respondent Union "...refuses to press or only perfunctorily presses the individual's claim...": Republic Steel Corp. v. Maddox, supra. 36/ The Hearing Examiner further finds and concludes that the conduct of Forst, on behalf of the Respondent Union, through July 31 in no way constituted a breach of the statutory duty of fair representation as to Kaczmarek inasmuch as the Hearing Examiner is of the view that Forst acted "...honestly, in good faith and without hostility or arbitrary discrimination": Humphrey v. Moore, supra. 37/

The Respondent Union Did Not Breach Its Duty of Fair Representation of Kaczmarek When it Refused to Take His Case to Arbitration in September 1975

The Charging Party contends secondly that the Respondent Union breached its duty of fair representation of Kaczmarek when, upon Forst's recommendation, the Executive Board on September 8 unanimously agreed with Forst and approved his recommendation that Kaczmarek's case not go to arbitration. This contention of the Charging Party is likewise rejected.

Following the issuance of the Hearing Officer's decision, under date of August 21, sustaining Kaczmarek's discharge by the Turnpike Authority, Kaczmarek,

36/ In this connection, see also: Vaca v. Sipes, 386 U.S. at 194, 64 LRRM at 2377; St. Clair v. Local 515, Teamsters, 422 F.2d. 128, 130, 73 LRRM 2048, 2050 (6th Cir. 1969); Bazarte v. United Transportation Union, 429 F.2d. 868, 872, 75 LRRM 2017, 2019 (3rd Cir. 1970); and Minnis v. Automobile Workers, 531 F.2d. 850, 91 LRRM 2081, 2084 (8th Cir. 1975).

37/ Even if Kaczmarek had proven "...that the union may have acted negligently or exercised poor judgment (it) is not enough to support a claim of unfair representation": Bazarte v. United Transportation Union, supra. See also Footnote 24, supra.

who was in the hospital at the time that he learned of the decision, telephoned Forst, complaining about the decision. Forst requested that Kaczmarek make a written request that the Union go to arbitration. Kaczmarek thereafter sent a note to the President requesting arbitration. Forst also received a letter from Grayson dated September 2 requesting that the case be taken to arbitration. Findings of Fact Nos. 19 and 20, supra.

The Hearing Examiner has credited Forst's testimony that he told Kaczmarek that he would place the matter before the Executive Board, but that he would not recommend arbitration since it was a "can't win" case. Nevertheless, Forst said that he told Kaczmarek that if he could find one witness to corroborate his story then he, Forst, would recommend arbitration. Finding of Fact No. 21, supra.

Thereafter, on September 8, the requests of Kaczmarek and Grayson for arbitration were submitted to the Executive Board with Forst's recommendation to deny arbitration. Forst had first outlined what had transpired at the July 31 hearing, and discussed the difficulty in proving in arbitration that what Kaczmarek said was true without at least one corroborating witness. The Executive Board unanimously approved Forst's recommendation. After the Executive Board meeting Kaczmarek telephoned Forst to find out the result. He then asked Forst to put it in "writing". Forst under date of September 10 sent Kaczmarek a letter as requested (CP-11). Although Forst testified that Kaczmarek had a right to appeal the Executive Board's decision to the membership, Kaczmarek did not do so. Kaczmarek testified credibly that he did not know he could appeal to the membership. Findings of Fact Nos. 23 and 24, supra.

Finally, the Hearing Examiner makes especial note of the undisputed fact that Forst had effectively represented Kaczmarek previously on several occasions, in one instance obtaining his reinstatement after termination, and in another, assisting Kaczmarek in a promotional opportunity. Finding of Fact No. 25, supra.

The only possible problem raised by the Respondent Union's conduct subsequent to July 31 is the content of the letter sent by Forst to Kaczmarek under date of September 10 (CP-11). If this letter stood alone as the only evidence in the case, indicating a breach by the Respondent Union of its duty of fair representation, then the Hearing Examiner might be persuaded that a fair reading of the letter manifested evidence of a lack of "good faith" and "arbitrary discrimi-

nation" vis-a-vis Kaczmarek in refusing to take his case to arbitration. However, the letter does not stand alone.

Although not mentioned in Forst's letter of September 10, the Hearing Examiner has credited Forst in his having told Kaczmarek that his is a "can't win" case and that if Kaczmarek could find one witness to corroborate his story then he, Forst, would recommend arbitration. Forst also made the same statement to the Executive Board in the course of his presentation on September 8.

While admittedly the employer in a termination case has the burden of proving "just cause" for termination, the union, in assessing the merits of the case regarding the initial decision as to whether the case should go to arbitration, clearly has the right to exercise its discretion in assessing its defense to the termination. The Supreme Court has mandated that the union "...exercise its discretion with complete good faith and honesty," recognizing further that "...A wide range of reasonableness must be allowed a statutory bargaining representative...": see Vaca and Ford Motor Co., supra.

The Hearing Examiner finds and concludes, considering the totality of the evidence herein adduced, that the Respondent Union did not breach its duty of fair representation to Kaczmarek when on September 8 it refused to take Kaczmarek's case to arbitration. Forst's conclusion that it was a "can't win" case without at least one corroborating witness for Kaczmarek was certainly not an unreasonable conclusion to have reached, and did not constitute "bad faith" or "arbitrary discrimination." 38/

In stating to Kaczmarek that he would not recommend arbitration in the absence of at least one corroborating witness, Forst's subsequent recommendation to the Executive Board that the case not be taken to arbitration falls clearly under the umbrella of Vaca v. Sipes, supra, which also involved the refusal of a union to take a case to arbitration, the Supreme Court stating:

> "Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration..." (386 U.S. at 191, 64 LRRM at 2377). (Emphasis supplied).

The Supreme Court in Vaca also noted further the undesirability of compelling unions to take every case to arbitration at the behest of an individual grievant stating:

38/ The Hearing Examiner attaches substantial weight to Forst's effective representation of Kaczmarek in the past. See Finding of Fact No. 25, supra.

"...Nor do we see substantial danger to the interests of the individual employee if his statutory agent is given the contractual power honestly and in good faith to settle grievances short of arbitration..." (386 U.S. at 192, 64 LRRM at 2377). (Emphasis supplied).

See also, Bazarte v. United Transportation Union, supra.

* * * *

The Hearing Examiner having found and concluded, supra, that the Respondent Union did not breach its duty of fair representation to Kaczmarek either in connection with the July 31 administrative hearing or in its refusal to take Kaczmarek's case to arbitration, the Hearing Examiner will recommend that the Complaint be dismissed.

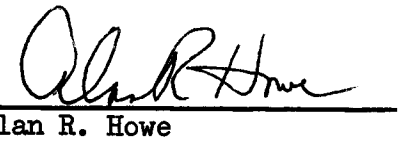
Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

The Respondent Union did not violate N.J.S.A. 34:13A-5.4(b)(1) by its conduct herein with respect to the Charging Party.

RECOMMENDED ORDER

The Respondent Union not having violated the Act, supra, it is HEREBY ORDERED that the Complaint be dismissed in its entirety.



DATED: July 9, 1979
Trenton, New Jersey

Alan R. Howe
Hearing Examiner