

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matters of

WILLINGBORO BOARD OF EDUCATION and  
WILLINGBORO EDUCATION ASSOCIATION,

Respondents,

-and-

Docket No. CI-79-53-60

ERNEST E. GILBERT,

Charging Party.

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WILLINGBORO EDUCATION ASSOCIATION,

Respondent,

-and-

Docket No. CI-79-56-61

ERNEST E. GILBERT,

Charging Party.

SYNOPSIS

In an unfair practice case, the Commission affirms in part and reverses in part a Hearing Examiner's dismissal prior to hearing of portions of two unfair practice complaints filed by the Charging Party against the Willingboro Education Association.

Finding that none of the allegations, if true, would constitute violations by the Association of N.J.S.A. 34:13A-5.4 (b) (3), (4) and (5), the Commission affirms the Hearing Examiner's dismissal of those charges but does not rely upon his conclusion that an individual does not have standing to file a charge alleging a violation of N.J.S.A. 34:13A-5.4(b) (3) or (4).

The Commission reverses the Hearing Examiner's determination that none of the Charging Party's allegations, if true, would constitute violations by the Association of N.J.S.A. 34:13A-5.4(b) (1) and remands this aspect of the charges to the Hearing Examiner for further proceedings.

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Appearances:

For the Willingboro Board of Education  
Barbour & Costa, Esqs. (John T. Barbour, Esq.)

For the Willingboro Education Association  
Selikoff & Cohen, P.A. (Joel S. Selikoff, Esq.)

For the Charging Party  
Ernest E. Gilbert, Pro Se

DECISION AND ORDER 1/

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1/ Although the appearance of counsel for the Willingboro Board of Education (hereinafter the "Board") is noted above, the instant Decision and Order pertains only to the Motions to Dismiss prior to hearing, which were filed by counsel for the Willingboro Education Association.

In two unfair practice charges, initially filed with the Commission on April 20, 1979 (Docket No. CI-79-53-60) and May 7, 1979 (Docket No. CI-79-56-61), which have been amended on several occasions (most recently May 27, 1980), Ernest Gilbert has alleged that the Willingboro Education Association violated N.J.S.A. 34:13A-5.4(b)(1), (3), (4) and (5), in its dealings with him, an Association member and a science teacher employed at all times relevant herein by the Willingboro Board of Education. <sup>2/</sup>

The charges also alleged that the Board committed unfair practices in its dealings with Gilbert, but those allegations are not before us at the present time, as we are reviewing, at the Charging Party's request, two written decisions of the hearing examiner granting motions of the Association to dismiss the portions of the complaints pertaining to the Association. <sup>3/</sup>

In the first of his written rulings, H.E. No. 80-45, 6 NJPER 284 (¶111185 1980) the hearing examiner ordered all allegations of the complaint against the Association dismissed, but granted the Charging Party leave to amend with respect to allegations that the Association had violated N.J.S.A. 34:13A-5.4(b)(1). The Charging Party amended his charges, but did not limit himself to subsection (b)(1), as the conduct described in

<sup>2/</sup> N.J.S.A. 34:13A-5.4(b) provides: Employee organizations, their representatives or agents are prohibited 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. (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement. and (5) Violating any of the rules and regulations established by the commission."

<sup>3/</sup> The portions of the complaint relating to the Board were the subject of a third decision by the Hearing Examiner on a motion to dismiss filed by the Board, H.E. No. 81-3, 6 NJPER \_\_\_\_\_ (¶ \_\_\_\_\_ 1980).

the May 27, 1980 amendments is also alleged to be violative of subsections (b)(3), (4) and (5).

Acting upon a motion filed by the Association to dismiss Gilbert's new allegations, the hearing examiner dismissed all charges made against the Association. (H.E. No. 80-51, 6 NJPER \_\_\_\_\_ (¶ \_\_\_\_\_ 1980)).

Through timely submissions after each of the hearing examiner's decisions, the Charging Party has sought review thereof, which is available as of right pursuant to N.J.A.C. 19:14-4.7. The Association has filed responsive arguments urging us to affirm the hearing examiner's dismissal of the charges against it.

It would be impossible to detail in this decision the allegations made by the Charging Party in this case as they cover several pages of amendments as well as a 33-page "Summary of Related Facts", which is a narrative of the events relative to the charges. With respect to the Association, the Charging Party's allegations are centered upon what he believes has been a campaign of harassment, intimidation and discrimination engaged in by Association members, allegedly because he returned to work, crossing a picket line, during a November 1977 strike, after an order had been issued by a Superior Court Judge directing that teachers return to work. Among the incidents described in the Charging Party's allegations are deliberate damage to his automobile, painting the word "scab" on his mailbox,

obstructions in seeking promotions, lack of support or Association assistance in filing or processing grievances, encouraging students to disrupt his classes, provoking an assault incident with a department chairman which resulted in municipal court charges, receipt of magazines and demands for subscription fees which he never ordered.

This alleged campaign of harassment, according to the Charging Party, has continued since the strike up until his suspension from employment on April 28, 1980, for which he believes the Association is in part responsible. Gilbert in his charges also cites the fact that he is black, and is outspoken about minority rights, as a reason contributing to his problems with the Association.

In dismissing the complaints against the Association, the hearing examiner, in both of his decisions, viewed the allegation in light of each of the subsections of the Act alleged to have been violated. We have thoroughly reviewed all of the Charging Party's allegations, including the 33-page "Summary," the hearing examiner's decisions and the submissions of the parties.

Initially we agree that the allegations, if true, would not constitute a violation of N.J.S.A. 34:13A-5.4(b)(5), as none of the allegations contain any direct or indirect reference to a specific rule of the Commission. We thus affirm the dismissal of the subsection (b)(5) allegation for the

reasons stated by the hearing examiner in both of his decisions.

We also agree that the Association could not be found in violation of either N.J.S.A. 34:13A5.4(b)(3) or (4), but we do so based upon the allegations made by the Charging Party, rather than the ground relied upon by the hearing examiner, i.e. that the Charging Party as an individual employee lacks standing to assert that the majority representative has refused to negotiate with the public employer ((b)(3)) or has refused to reduce a negotiated agreement to writing ((b)(4).)

Assuming, arguendo, that the Charging Party may appropriately bring such alleged transgressions to the Commission's attention, in the instant case, the allegations even if true would not sustain a finding that these subsections have been violated. After carefully combing the charges and their amendments as well as the narrative "Summary", we find only two references to collective negotiations and/or a written collective negotiations agreement. On page 21 of the "Summary"<sup>4/</sup>(which is dated September 29, 1979), the Charging Party states there has been no settled

<sup>4/</sup> We refer to this allegation (and any others mentioned in this decision) only for the purpose of determining whether such allegation, if proven, would constitute an unfair practice. Our comments with respect thereto are not to be taken as an indication of our views of the veracity of the allegation. That is an issue which must be established at a hearing upon proper evidence by the Charging Party. The outcome of the instant proceeding with respect to the Association will not prejudice the proceedings still pending with respect to the allegations against the Board.

contract in the Willingboro District since September 1977. However, he next states that this status is the result of the Board's refusal to agree to a no-reprisal clause. No improper conduct by the Association is alleged with respect to negotiations or the lack of a written collective agreement. The only other reference to negotiations is contained in the amendments filed on May 27, 1980, wherein Charging Party contends that because the Association engaged in a strike, and is hostile to employees who did not support the strike, there is a "conflict of interest" which "makes it impossible for the majority representative to negotiate in 'good faith' with the employer...on behalf of--- employees who did not support the 'strike....", and thus a (b) (3) violation should be found. However, this statement does not make reference to any specific incident or refusal to negotiate and alleges at most that the Association at some unspecified time may not be able to fairly represent some dissident members. Unfair representation is treated, if proven, as a violation of subsection (b) (1), not (b) (3).

Having found an absence of any allegations which if true might constitute a violation of either subsection (b) (3) or (b) (4), we affirm the hearing examiner's dismissal of these aspects of the complaint against the Association. In so doing, we do not rely on the issue of standing as determined by the hearing examiner and we express no opinion with respect to his comments thereon.

Turning next to the allegations that the Association's conduct has interfered with, restrained, or coerced the Charging Party in the exercise of rights guaranteed by the Act, in violation of N.J.S.A. 34:13A5.4(b)(1), we believe the hearing examiner failed to recognize the overall thrust of Gilbert's charges when he held that none of the allegations was legally sufficient to sustain a violation.

Keeping in mind that in deciding a motion to dismiss, the Charging Party's allegations should be accorded all favorable inferences,<sup>5/</sup> Cf. Court Rule, R. 4:37-2(b), we find that in those instances where the Charging Party refers to conduct of named individuals and accompanies such statements with the allegation that the person is or was an officer, representative or even a member of the Association,<sup>6/</sup> an inference, at least, has been made that

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5/ Also relevant to how the allegations of the Charging Party should be viewed when tested in a motion dismiss is section 1:1-1.3(b) of the New Jersey Uniform Administrative Procedure Rules which reads:

This chapter shall not be applied to impose excessive burdens upon pro se parties; formal requirements, particularly, shall be relaxed for their benefit. Time requirements shall not be relaxed unless the interest of justice manifestly require. Ultimate standards of proof and the burdens of production and persuasion shall not be relaxed.

6/ Identifying a person as a member of an employee organization where the statement is made in support of a charge against that organization must be viewed as having some purpose. On the other hand, a reference to the individual as a "teacher" or administrator would not have a similar connotation.



the conduct is attributable to an "agent" or "representative" of the Association within the meaning of N.J.S.A. 34:13A-5.4(b). Moreover in the "Summary" there are references in connection with Charging Party's statements that a harassment campaign existed, to the "plan" of the Association in one instance (p. 23) and an "operation" of the Association to "slander, defame, harass and intimidate (the charging party)." (p. 25).

Since the hearing examiner found much of Charging Party's allegations concerning the subsection (b)(1) violations insufficient for failure to specifically allege "agency", we believe the proper course is to remand the matter to the hearing examiner for hearing.

In so doing we caution the Charging Party that our determination today does not amount to proof that the named individuals who allegedly harassed Charging Party did so as agents of the Association, or that the Association can be called to account for the conduct contained in the allegations, nor that any of the incidents recounted are true.

#### ORDER

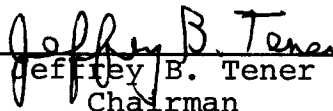
Based upon all of the foregoing, IT IS HEREBY ORDERED:

1. The portions of the Complaints, as amended, in Docket Nos. CI-79-53-60 and CI-79-56-61, alleging that the

Association is in violation of N.J.S.A. 34:13A-5.4(b)(3), (4) and (5) are dismissed in their entirety.

2. The portions of the Complaints, as amended, in Docket Nos. CI-79-53-60 and CI-79-56-61, alleging that the Association has violated N.J.S.A. 34:13A-5.4(b)(1), are remanded to the hearing examiner for proceedings in accordance with N.J.A.C. 19:14-6.1, et seq.

BY ORDER OF THE COMMISSION

  
\_\_\_\_\_  
Jeffrey B. Tener  
Chairman

Chairman Tener, Commissioners Hartnett, Parcels and Newbaker voted for this decision. Commissioner Graves concurred with dismissing the (b)(3), (4) and (5) aspects of the charge but dissented with regard to remanding the (b)(1) aspect of the charge to the Hearing Examiner. Commissioner Hipp abstained.

DATED: Trenton, New Jersey  
August 20, 1980  
ISSUED: August 21, 1980

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

In the Matter of

WILLINGBORO BOARD OF EDUCATION and  
WILLINGBORO EDUCATION ASSOCIATION,

Respondents,

- and -

Docket No. CI-79-53-60

ERNEST E. GILBERT,

Charging Party.

SYNOPSIS

A Hearing Examiner grants the motion of the Willingboro Board of Education to dismiss charges of unfair practices prior to hearing, which alleged violations of Subsections 5.4(a)(1), (3), (6) and (7) of the New Jersey Employer-Employee Relations Act, on the grounds that the Charging Party lacks standing to allege violations of the Act or has failed to allege legally sufficient facts, which could constitute a violation.

The Hearing Examiner denies the motion of the Willingboro Board of Education to dismiss charges of unfair practices prior to hearing, which allege a violation of Subsection 5.4(a)(4) of the Act on the ground that the Charging Party has alleged legally sufficient facts, which, if proven, could constitute a violation of the Act. This Subsection prohibits a public employer, inter alia, from discriminating against any employee because he has signed or filed an affidavit, petition or complaint against the public employer under the Act.

A Hearing Examiner's granting of a motion to dismiss is subject to appeal to the Public Employment Relations Commission pursuant to its rules.

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For the Willingboro Board of Education  
Barbour & Costa, Esqs.  
(John T. Barbour, Esq.)

For the Willingboro Education Association  
Selikoff & Cohen, Esqs., P.A.  
(Joel S. Selikoff, Esq.)

For the Charging Party  
Ernest E. Gilbert, Pro Se

HEARING EXAMINER'S DECISION ON MOTION TO DISMISS  
BY THE WILLINGBORO BOARD OF EDUCATION AND ORDER <sup>1/</sup>

PROCEDURAL HISTORY

On April 20, 1979 the Charging Party, Ernest E. Gilbert  
(hereinafter the "Charging Party" or "Gilbert"), filed an Unfair

1/ Although the appearance of counsel for the Willingboro Education Association (hereinafter the "Association") is noted above, the instant Decision and Order pertain only to the Motion to Dismiss prior to hearing, which was filed by counsel for the Willingboro Board of Education (hereinafter the "Board") on August 6, 1980. The Hearing Examiner's recital of the procedural history, infra, will be restricted to those matters and events, which pertain to the Charging Party and the Board.

- 2 -

Practice Charge against the Board alleging that it 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 Board has allowed the continued use of an "Evaluation Precedure," which subjects the Charging Party to "slander and/or libel" by persons who cannot be relied upon to make evaluations consistent with the Board's policies, and which has denied the Charging Party an equal opportunity for "upward mobility," and further, that the Board has failed to take "effective action" regarding incidents of harrassment of the Charging Party by members of the Board's professional staff such as the tampering with his car tires, the painting of the word "scab" on his mailbox, the removal of mail from the Charging Party's mailbox, etc., all of which have allegedly occurred because Gilbert crossed the "picket line" during the Association's illegal strike in November 1977, all of which was alleged to be a violation by the Board of N.J.S.A. 34:13A-5.4(a)(3) of the Act. <sup>2/</sup>

In addition to the foregoing, the Charging Party on May 14, 1979 filed a second amended Unfair Practice Charge, <sup>3/</sup> which alleged that the Board had engaged in further unfair practices within the meaning of the Act, in that the Board by its Superintendent denied the Charging Party his "Civil Rights" by allowing "...the attitudes, conditioned by the teachers' illegal strike..." as a reason for not giving

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<sup>2/</sup> This Subsection prohibits public employers, their representatives or agents from:

"(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."

<sup>3/</sup> This replaced a first amended Unfair Practice Charge that was filed May 7, 1979.

Gilbert proper consideration for advancement during January 1979 and failing to act on the Charging Party's complaints and grievances because he crossed the teachers' "picket line" in November 1977, all of which was alleged to be a violation by the Board of N.J.S.A. 34:13A-5.4(a)(4) of the Act. <sup>4/</sup>

In addition to the foregoing, the Charging Party on May 25, 1979 filed a third amended Unfair Practice Charge against the Board alleging that it had engaged in further unfair practices within the meaning of the Act, in that the Board by its Superintendent suspended the Charging Party with pay on April 24, 1979, pending the filing of tenure charges, which the Charging Party alleged was discriminatory in that one Mark Franceschini was not suspended, all of which was alleged to be a violation by the Board of N.J.S.A. 34:13A-5.4(a)(1), (3), (4), (6) and (7) of the Act. <sup>5/</sup>

In addition to the foregoing, the Charging Party on October 5, 1979 filed a fourth amended Unfair Practice Charge in the form of a 33-page "Summary of Related Facts," which alleged by way of amplification that the Board had engaged in unfair practices within the

4/ This Subsection prohibits public employers, their representatives or agents from:

"(4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this Act."

5/ These additional 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.

"(6) Refusing to reduce a negotiated agreement to writing and to sign such agreement.

"(7) Violating any of the rules and regulations established by the commission."

- 4 -

meaning of the Act, in that: (1) the Board, in violation of its own policies, refused to allow the Charging Party to present his dissatisfaction with the manner in which its policy with regard to the filling of supervisory positions was being implemented ("Summary" pp. 6,7); (2) The Board acted to "...decrease the potential of upward mobility of the Charging Party..." by failing to promote the Charging Party to the position of Mathematics Chairperson after a vacancy existed as a result of the promotion of the incumbent Mathematics Chairperson, Mark Franceschini, to the position of Assistant Principal in or about April 1979, which the Charging Party avers resulted (a) from his confrontation with Franceschini on April 24, 1979 and (b) because of his filing a charge of unfair practices with the Commission on April 20, 1979 ("Summary" pp. 7, 8); (3) the Board, through its attorney, Steven Heath, acted prejudicially toward the Charging Party during the period of his suspension on and after April 24, 1979 at public meetings of the Board and in a criminal case brought against the Charging Party by Mark Franceschini in May 1979 ("Summary" pp. 8-10); (4) the Board has allowed its Superintendent to re-write the specifications for the vacancy of Assistant Principal in such a way as "...to have an adverse impact upon the potential of the Charging Party to be given an equal employment opportunity for the position..." ("Summary" p. 11); and (5) the Board by its Superintendent in or about August 1979, following the Charging Party's reinstatement, told the Charging Party that he was "...lucky to have a job..." and that if it were not for "...the blunders of the former Board Attorney and certain board members, he would have succeeded in getting rid of me..." ("Summary" p. 15).

- 5 -

Finally, the Charging Party on May 27, 1980 filed a fifth amended Unfair Practice Charge against the Board, alleging violations of the same Subsections of the Act cited heretofore, in that the Board denied the Charging Party's request to be transferred from one department to another within his present school and later arbitrarily withheld three days' pay from the Charging Party, and, finally, the Board filed tenure charges against the Charging Party, as a result of an altercation on March 5, 1980, suspending him with pay, which suspension was converted to a suspension without pay on April 28, 1980, all of which actions of the Board were in retaliation for the Charging Party's having filed prior charges of unfair practices.

It appearing that the allegations in the aforesaid Unfair Practice Charges, as amended, if true may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on February 26, 1980. <sup>6/</sup> Thereafter the Board filed Answers to the Unfair Practice Charges, as amended, on March 27, 1980 and June 9, 1980. On August 6, 1980 the Board filed the instant Motion to Dismiss, supra, and a supporting Memorandum of Law. The Charging Party filed a response in opposition on August 14, 1980. Thus, the instant matter is now properly before the Hearing Examiner for disposition.

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<sup>6/</sup> Since the issuance of the Complaint and Notice of Hearing, a pre-hearing was held on April 28, 1980 and several sets of hearing dates have been adjourned by reason of the filing of Motions to Dismiss prior to hearing by the Association, which Motions to Dismiss were disposed of by the Hearing Examiner in H.E. No. 80-45 and H.E. No. 80-51. Hearings are presently scheduled to commence on September 22, 1980 and continue through September 25, 1980.



THE ISSUE

Viewing the allegations contained in the several Unfair Practice Charges filed against the Board most favorably to the Charging Party, can violations of Subsections (a)(1),(3),(4),(6) and (7) of the Act be sustained?

DISCUSSION AND ANALYSIS

Introductory Statement

The Hearing Examiner stresses at the outset that he is herein ruling on a Motion to Dismiss prior to hearing. Thus, the threshold question as to alleged violation by the Board of each of the above Subsections of the Act is two-fold: (1) Does the Charging Party have standing as a matter of law to allege a violation of the several Subsections of the Act; and (2) Has the Charging Party alleged legally sufficient facts, which, if proven, would constitute a violation of the several Subsections of the Act.

The Charging Party Has Standing To Allege Violations By The Board Of Subsections (a) (1),(3),(4) and (7) Of The Act But Does Not Have Standing To Allege A Violation Of Subsection (a)(6)

The Hearing Examiner finds and concludes that the Charging Party, as an individual complainant, has standing to allege a violation by the Board of all Subsections of the Act, supra, with the exception of Subsection (a)(6).

The Hearing Examiner is of the firm opinion that the reference in Subsection (a)(6) to the refusal by a public employer "...to reduce a negotiated agreement to writing and to sign such agreement..." clearly relates to the end point of collective negotiations between a public

employer and a public employee organization or representative.

Thus, it is the public employee organization or representative alone who can, under the aforesaid Subsection, file a charge of unfair practices against the public employer in the event of the refusal of the latter to reduce a negotiated agreement to writing and to sign it. To construe Subsection (a)(6) in any other way, i.e., to permit an individual public employee to file such a charge, would be to interfere with the orderly administration of the Act and to undermine the Declaration of Policy in Section 2 of the Act.

Therefore, that portion of the Complaint alleging a violation of Subsection (a)(6) is dismissed.

The Charging Party Has Failed To Allege  
A Specific Rule Or Regulation Of The  
Commission That the Board Has Violated  
As Required By Subsection (a)(7) Of The  
Act Nor Can He Do So

Based upon a thorough reading of the various Unfair Practice Charges herein, including the 33-page "Summary of Related Facts," it is apparent that Gilbert has not alleged, either directly or indirectly, a violation by the Board of any of the "...rules and regulations established by the commission." There is ample precedent in the decisions of the Director of Unfair Practices and the Executive Director to enable the Hearing Examiner to conclude that the Charging Party's failure to cite a specific rule or regulation is fatal to a Subsection (b)(7) violation: FOP Lodge 62, D.U.P. No. 79-24, 5 NJPER 178 (1979); PBA Local 113, D.U.P. No. 77-5, 3 NJPER 177 (1977); and Madison Township Board of Education, E.D. No. 76-8 (1975).

The Hearing Examiner rejects any suggestion or contention by the Charging Party that the Hearing Examiner should look beyond the written and published rules of the Commission in deciding the matter herein. Moreover, since the Hearing Examiner cannot discern a Commission rule that could possibly be related to the subject matter of the instant Unfair Practice Charges, the Charging Party will not be granted leave to amend further.

Thus, that portion of the Complaint alleging a violation of Subsection (a)(7) is dismissed.

The Charging Party Has Alleged Legally  
Sufficient Facts With Respect To An  
Alleged Violation By The Board Of Sub-  
section (a)(4) Of The Act

The Hearing Examiner has no doubt that the allegations in the several Unfair Practice Charges filed by Gilbert, supra, if proven, would constitute a violation of Subsection (a)(4) of the Act. In other words, if Gilbert can prove that his suspension of April 24, 1979 and the conduct of the Superintendent and the Board's attorney in the several months thereafter, followed by Gilbert's most recent suspension in 1980, were all in retaliation for his having filed Unfair Practice Charges against the Board on April 20, 1979 then Gilbert has established a prima facie case against the Board under Subsection (a)(4) of the Act.

Therefore, the Hearing Examiner refuses to grant the Board's Motion to Dismiss with respect to Subsection (a)(4) of the Act.

The Charging Party Has Failed To Allege Legally Sufficient Facts With Respect To An Alleged Violation By The Board Of Subsection (a)(3) Of The Act Or An Alleged Independent Violation Of Subsection (a) (1) Of The Act 7/

Essential to the establishment of a Subsection (a)(3) violation, or an independent Subsection (a)(1) violation, is that the Charging Party must prove by a preponderance of the evidence that the Board discriminated against him in the exercise of rights guaranteed to him by the Act, 8/ or that the Board independently interfered with, restrained 9/ or coerced him in the exercise of rights guaranteed to him by the Act.

The Hearing Examiner is unable to discern any allegations in the several Unfair Practice Charges filed by Gilbert herein, which indicate that any actions or conduct of the Board or its Superintendent were in any way involved with the exercise by Gilbert of rights protected by the Act. Plainly, the Board would not be motivated to discriminate against or interfere with, restrain or coerce Gilbert for having crossed the picket line during the Association's illegal strike

7/ In the event that the Charging Party successfully establishes a violation by the Board of Subsection (a)(4) of the Act, supra, then the Board would also be deemed to have derivatively violated Subsection (a)(1) of the Act: Galloway Township Board of Education, P.E.R.C. No. 77-3, 2 NJPER 254, 255 (1976).

8/ See Haddonfield Borough Board of Education, P.E.R.C. No. 77-31, 3 NJPER 71, 72 (1977); City of Hackensack, P.E.R.C. No. 77-49, 3 NJPER 143, 144 (1977), rev'd. on other grounds, 162 N.J. Super. 1 (App. Div. 1978), aff'd. as modif., 81 N.J. 1 (1980); and Brookdale Community College, P.E.R.C. No. 78-80, 4 NJPER 243 (1978), aff'd. App. Div. Docket No. A-4824-77 (Jan. 9, 1980).

9/ See New Jersey Sports and Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550 (1979) and East Orange Public Library, P.E.R.C. No. 80-70, 5 NJPER 546 (1979).

- 10 -

in November 1977. <sup>10/</sup> Gilbert's having reported for work during the illegal strike would, if anything, have merited commendation by the Board and its administration and, thus, cannot reasonably be considered as a basis for discrimination or interference with, restraint or coercion of Gilbert in the exercise of a protected right.

The Hearing Examiner observes finally that the Board's suspension of Gilbert and the filing of tenure charges against him do not in and of themselves constitute discrimination under Subsection (a)(3) or interference, restraint or coercion under Subsection (a)(1) of the Act. Board conduct under either of these Subsections must occur in the context of the exercise by Gilbert of rights protected by the Act.

Thus, those portions of the Complaint alleging independent violations of Subsections (a)(1) and (3) of the Act are dismissed.

\* \* \* \* \*

Based upon the foregoing, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Charging Party lacks standing to allege a violation of N.J.S.A. 34:13A-5.4(a)(6) since standing to allege such a violation is reserved exclusively to a public employee organization or representative.

2. The Charging Party has standing to allege a violation of N.J.S.A. 34:13A-5.4(b)(7) but has failed to allege a specific rule or

10/ Clearly, Gilbert's crossing of the picket line was the exercise of a right protected by the Act.

- 11 -

regulation of the Commission that the Board has violated, nor can he do so based upon the allegations contained in the Complaint.

3. The Charging Party has standing to allege a violation of N.J.S.A. 34:13A-5.4(a)(4) and has alleged legally sufficient facts to require a hearing as to whether or not the Board has violated this Subsection.

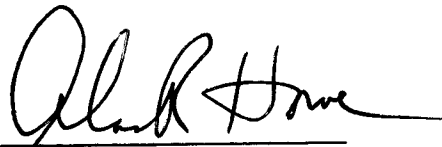
4. The Charging Party has standing to allege a violation of N.J.S.A. 34:13A-5.4(b)(1) and (3) but has failed to allege legally sufficient facts with respect to a violation by the Board by its conduct herein. 11/

ORDER

It is hereby ORDERED that:

1. The Complaint be dismissed in its entirety as to alleged violations by the Board of N.J.S.A. 34:13A-5.4(a)(1), (3), (6) and (7).

2. The matter proceed to hearing on the allegations in the Complaint that the Board violated N.J.S.A. 34:13A-5.4(a)(4).



Alan R. Howe  
Hearing Examiner

Dated: August 18, 1980  
Trenton, New Jersey

11/ As noted previously in footnote 7, supra, a derivative violation of Subsection (a)(1) of the Act would follow from a proven violation of Subsection (a)(4) of the Act.



STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

1180 RAYMOND BOULEVARD, ROOM 838  
NEWARK, NEW JERSEY 07102  
Telephone: (201) 648-3425

COMMISSION MEMBERS:

Jeffrey B. Tener, Chairman  
Carole A. Graves  
Bernard M. Hartnett, Jr.  
Frederick L. Hipp  
Lloyd J. Newbaker  
Charles H. Parcelis

August 18, 1980

John T. Barbour, Esq.  
Barbour & Costa  
6 West Main St.  
Maple Shade, N.J.  
08052

Joel S. Selikoff, Esq.  
Selikoff & Cohen, P.A.  
1101 Kings Hgwy. North  
Cherry Hill, N.J.  
08034

Mr. Ernest E. Gilbert  
100 Melville Lane  
Willingboro, N.J.  
08042

Re: Ernest E. Gilbert  
and  
Willingboro Board of Education  
and  
Willingboro Education Association  
Docket No. CI-79-53-60

Gentlemen:

The undersigned Hearing Examiner encloses herewith his Decision on Motion to Dismiss by the Willingboro Board of Education and Order in the above entitled matter.

Inasmuch as the Hearing Examiner has granted the Motion to Dismiss the Complaint substantially in its entirety, the Charging Party may obtain review of the Decision and Order pursuant to N.J.A.C. 19:14-4.7 by filing an original and nine copies of a request therefor with the Commission, stating the grounds for review; immediately upon such filing serve a copy thereof upon the other parties with proof of service to be filed with the Commission.

The Charging Party is advised that unless such a request for review is filed within ten days from date hereof the case shall be closed as to the Board.

Very truly yours,

Alan R. Howe  
Hearing Examiner

Exceptions due: 9/2/80

ARH:h  
encl.

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

In the Matters of

WILLINGBORO BOARD OF EDUCATION and  
WILLINGBORO EDUCATION ASSOCIATION,

Respondents,

- and -

Docket No. CI-79-53-60

ERNEST E. GILBERT,

Charging Party.

---

WILLINGBORO EDUCATION ASSOCIATION,

Respondent,

- and -

Docket No. CI-79-56-61

ERNEST E. GILBERT,

Charging Party.

---

SYNOPSIS

A Hearing Examiner grants the motion of the Willingboro Education Association to dismiss charges of unfair practices prior to hearing, which alleged violations of Subsection 5.4(b)(1), (3), (4) and (5) of the New Jersey Employer-Employee Relations Act, on the grounds that the Charging Party either lacks standing to allege violations of the Act or failed to allege legally sufficient facts, which could constitute a violation.

A Hearing Examiner's granting of a Motion to Dismiss is subject to appeal to the Public Employment Relations Commission pursuant to its rules.



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

In the Matters of

WILLINGBORO BOARD OF EDUCATION and  
WILLINGBORO EDUCATION ASSOCIATION,

Respondents,

- and -

Docket No. CI-79-53-60

ERNEST E. GILBERT,

Charging Party.

WILLINGBORO EDUCATION ASSOCIATION,

Respondent,

- and -

Docket No. CI-79-56-61

ERNEST E. GILBERT,

Charging Party.

Appearances:

For the Willingboro Board of Education  
Barbour & Costa, Esqs.  
(John T. Barbour, Esq.)

For the Willingboro Education Association  
Selikoff & Cohen, Esqs., P.A.  
(Joel S. Selikoff, Esq.)

For the Charging Party  
Ernest E. Gilbert, Pro Se

HEARING EXAMINER'S DECISION ON MOTION TO DISMISS  
BY THE WILLINGBORO EDUCATION ASSOCIATION AND ORDER <sup>1/</sup>

<sup>1/</sup> Although the appearance of counsel for the Willingboro Board of Education (hereinafter the "Board") is noted above, the instant Decision and Order pertain only to the second Motion to Dismiss prior to hearing, which was filed by counsel for the Willingboro Education Association (hereinafter the "Association") on June 6, 1980 with respect to each of the above docketed cases. The Hearing Examiner's recital of the procedural history, infra, will be restricted, to the extent possible, to those matters and events, which pertain to the Charging Party and the Association.

PROCEDURAL HISTORY

On May 14, 1979 the Charging Party, Ernest E. Gilbert (hereinafter the "Charging Party" or "Gilbert"), filed a second amended Unfair Practice Charge, which was docketed as No. CI-79-53-60 <sup>2/</sup> against the Association alleging that it 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"), the content of which will not be repeated herein, but is set forth fully in H. E. No. 80-45, 6 NJPER 284 (May 9, 1980). The Order in H. E. No. 80-45 provided, in part, that the Charging Party was granted leave to amend with regard to alleged violations by the Association of N.J.S.A. 34:13A-5.4(b)(1) with the proviso that said amendment must be "...only with respect to specific instances of failure by the Association's representatives or agents since November 7, 1978 to support his grievances, cognizable under the collective negotiations agreement, because of the Charging Party having crossed the picket line in November 1977 and/or because of the Charging Party's race."

On May 27, 1980 the Charging Party filed a timely amendment, which was docketed under CI-79-56-60, and which alleged that the Association had engaged in unfair practices within the meaning of the Act, inter alia: (1) that the Association "...began to demonstrate it (sic) animus to the Charging Party by building hostilities within the student body...," (2) that teacher/supervisors wrote defamatory "memorandums" against the Charging Party to "set-me-up for discharge," alleging that Constance Smith and Rita Butchko were "both agent/representatives" of the Board and the Association; (3) that on April 9, 1980 the Charging Party "demanded assistance" of the Association "...in this matter and other matters relative to my employment situation...," which demand for assistance was refused; and (4) that the Association by virtue of a conflict of interest cannot possibly negotiate in good faith with the Board on behalf of employees, such as the Charging party, who did not support the "illegal strike" in November 1977. All of the

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<sup>2/</sup> The Charging Party initially filed an Unfair Practice Charge against the Board only on April 20, 1979, which was docketed as No. CI-79-53-60, and on May 7, 1979 he first amended the said charge to include the Association, the allegations in said amendment, with respect to the Association, having been superseded by the aforesaid second amended charge filed on May 14, 1979, supra.

foregoing is alleged to be a violation of N.J.S.A. 34:13A-5.4(b)(1) and (3) of the Act. <sup>3/</sup>

In addition to the foregoing, the Charging Party on May 27, 1980 filed an amended Unfair Practice Charge against the Board and the Association, which was docketed under Nos. CI-79-53-60 and CI-79-56-61, which alleged, as to the Association, that its members, officers, agents, and representatives have (1) initiated a "secondary strike" against the Charging Party which operates to perpetuate past practices of "discrimination" with respect to "upward mobility and promotion-denial" and (2) made the Charging Party's continued employment status untenable and set him up for discharge and that the Charging Party was on April 28, 1980 suspended without pay, all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(b)(1), (3), (4) and (5) of the Act. <sup>4/</sup>

On June 6, 1980 the Association filed an Answer to the aforesaid amendments to charges of unfair practices and on the same date the Association filed the instant Motion to Dismiss and a supporting Memorandum of Law. The Charging Party filed a response in opposition on June 13, 1980. Thus, the instant matter is now properly before the Hearing Examiner for disposition.

#### THE ISSUE

Viewing the allegations contained in the amended Unfair Practice Charges filed against the Association herein most favorably to the Charging Party can violations of Subsections (b)(1), (3), (4) and (5) of the Act be sustained?

#### DISCUSSION AND ANALYSIS

<sup>3/</sup> 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."

<sup>4/</sup> These additional Subsections prohibit public employee organizations, their representatives or agents from:

"(4) Refusing to reduce a negotiated agreement to writing and to sign such agreement.

"(5) Violating any of the rules and regulations established by the commission."

The Charging Party Does Not Have Standing To Allege Violations of Subsections (b)(3) And (4) Of The Act And Has Failed To Allege A Specific Rule Of The Commission That The Association Has Violated Which Would Constitute A Violation Of (b)(5) Of The Act

The Hearing Examiner finds and concludes that the Charging Party lacks standing to allege violations of Subsections (b)(3) and (4) of the Act for the reasons previously set forth in the Hearing Examiner's prior decision on the Association's Motion to Dismiss in H. E. No. 80-45, 6 NJPER 284 (1980). Additionally, the Hearing Examiner cites as to an alleged Subsection (b)(3) violation, the case of State of New York and Robinson, et al., 13 PERB 4527 (1980) wherein the Director held that an individual employee lacks standing to allege a violation of his union's bargaining obligation vis-a-vis the employer.

The Hearing Examiner also finds and concludes, as he did in the prior decision, supra, that the Charging Party has failed to allege a specific rule of the Commission that the Association has allegedly violated and, that, the Charging Party has failed to satisfy the requirements as to Subsection (b)(5) of the Act. The Hearing Examiner notes again that the Charging Party is required to cite a specific rule or regulation that the Association has allegedly violated in order to satisfy this aspect of the amended charge. Once again, the Hearing Examiner notes that a review of the amended charge, together with the Charging Party's response to the Motion to Dismiss, compels the Hearing Examiner to conclude that he cannot discern a Commission rule which could possibly be related to the subject matter of the Unfair Practice Charges, as amended.

Thus, the amended charge of unfair practices, which allege a violation of Subsections (b)(3), (4) and (5) of the Act are dismissed.

The Charging Party Has Failed To Allege Legally Sufficient Facts, Which, If Proven, Would Constitute A Violation of Subsection (b)(1) Of The Act

As noted above, the Hearing Examiner in his prior decision in H. E. No. 80-45 granted the Charging Party leave to amend as to a possible Subsection (b)(1) violation with the proviso that said amendment must be "...only with respect to specific instances of failure by the Association's representatives or agents since

November 7, 1978 to support his grievances, cognizable under the collective negotiations agreement, because of the Charging Party having crossed the picket line in November 1977 and/or because of the Charging Party's race." Even a most sympathetic reading of the Charging Party's amended Unfair Practice Charges allows of no conclusion other than that he has failed to meet the conditions of the proviso with respect to amendment in all respects. There is nothing in the amended charges of unfair practices which even remotely indicates a specific instance of a failure by the Association's representatives or agents since November 7, 1978 to support the Charging Party's grievances under the collective negotiations agreement because of the Charging Party having crossed the picket line in November 1977 and/or because of the Charging Party's race. The Charging Party merely sets forth again and again conclusory generalities, this time making reference to the building of hostilities within the student body, the writing of defamatory "memorandums" which allegedly set him up for discharge and that the Association refused to grant the Charging Party "assistance...in this matter and other matters relative to my employment situation..." Additionally, the Charging Party alleges that the Association initiated a "secondary strike" against the Charging Party, which operates to perpetuate past practices of "discrimination" with respect to "upward mobility and promotion-denial" and that this has made the Charging Party's continued employment status untenable and set him up for discharge, the Charging Party noting his standing as a suspended employee without pay as of April 28, 1980.

It is noted that nothing in the allegations of the amended Unfair Practice Charges even closely approximates allegations which could constitute a breach by the Association of its duty of fair representation, which was covered thoroughly in the prior decision of the Hearing Examiner on the Association's Motion to Dismiss, supra. The Hearing Examiner is convinced that he granted the Charging Party a full and fair opportunity to amend his charges of unfair practices under the conditions set forth in the proviso in the foregoing Order, supra. The Charging Party having failed to amend as required by the Hearing Examiner, the Hearing Examiner is left with no alternative but to dismiss without further leave to amend.

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Based upon the foregoing, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

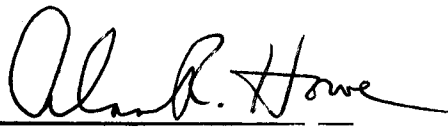
The Charging Party lacks standing to allege a violation of N.J.S.A. 34:13A-5.4(b)(3) and (4) since standing to allege such violations is reserved exclusively to a public employer.

The Charging Party, having standing to allege violations, has failed to allege a violation of N.J.S.A. 34:13A-5.4(b)(1) and (5) in that the Charging Party has failed to allege legally sufficient facts which would constitute a breach by the Association of its duty of fair representation and, further, has failed to allege a specific rule of the Commission that the Association has violated.

ORDER

It is hereby ORDERED that the Complaint be dismissed in its entirety as to alleged violations by the Association of N.J.S.A. 34:13A-5.4(b)(1), (3), (4) and (5).

Dated: June 18, 1980  
Trenton, New Jersey

  
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Alan R. Howe  
Hearing Examiner

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

In the Matters of

WILLINGBORO BOARD OF EDUCATION and  
WILLINGBORO EDUCATION ASSOCIATION,

Respondents,

- and -

Docket No. CI-79-53-60

ERNEST E. GILBERT,

Charging Party.

---

WILLINGBORO EDUCATION ASSOCIATION,

Respondent,

- and -

Docket No. CI-79-56-61

ERNEST E. GILBERT,

Charging Party.

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SYNOPSIS

A Hearing Examiner grants the motion of the Willingboro Education Association to dismiss charges of unfair practices prior to hearing, which alleged violations of Subsections 5.4(b)(1), (3), (4) and (5) of the New Jersey Employer-Employee Relations Act, on the ground that the Charging Party either lacks standing to allege violations of the Act or failed to allege legally sufficient facts, which could constitute a violation.

The Hearing Examiner, however, granted the Charging Party leave to amend within ten days with respect to any alleged breach by the Association of its "duty of fair representation" regarding specific instances of the failure of the Association to support the Charging Party in grievances, cognizable under the collective negotiations agreement, because of his having crossed a picket line in November 1977 and/or because of his race.

A Hearing Examiner's granting of a Motion to Dismiss is subject to appeal to the Public Employment Relations Commission pursuant to its rules.

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

In the Matters of

WILLINGBORO BOARD OF EDUCATION and  
WILLINGBORO EDUCATION ASSOCIATION,

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Docket No. CI-79-53-60

ERNEST E. GILBERT,

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ERNEST E. GILBERT,

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Appearances:

For the Willingboro Board of Education  
Barbour & Costa, Esqs.  
(John T. Barbour, Esq.)

For the Willingboro Education Association  
Selikoff & Cohen, Esqs., P.A.  
(Joel S. Selikoff, Esq.)

For the Charging Party,  
Ernest E. Gilbert, Pro Se

HEARING EXAMINER'S DECISION ON MOTION TO DISMISS  
BY THE WILLINGBORO EDUCATION ASSOCIATION AND ORDER <sup>1/</sup>

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<sup>1/</sup> Although the appearance of counsel for the Willingboro Board of Education (hereinafter the "Board") is noted above, the instant Decision and Order pertain only to the Motion to Dismiss prior to hearing, which was filed by counsel for the Willingboro Education Association (hereinafter the "Association") on April 16, 1980 with respect to each of the above docketed cases. The Hearing Examiner's recital of the procedural history, infra, will be restricted, to the extent possible, to those matters and events, which pertain to the Charging Party and the Association.



PROCEDURAL HISTORY

On May 14, 1979 the Charging Party, Ernest E. Gilbert, (hereinafter the "Charging Party" or "Gilbert") filed a second amended Unfair Practice Charge, which was docketed as No. CI-79-53-60 <sup>2/</sup> against the Association alleging that it 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 Association by Mark Franceschini, Barbara Terry and others of its members had, inter alia, conspired on April 24, 1979 to have Gilbert charged with an illegal "assault", followed by his arrest and, further, had harassed and ostracized Gilbert since November 1977 because he crossed the picket line during an "illegal strike," and because he had filed an Unfair Practice Charge, in denial of Gilbert's "civil rights" <sup>3/</sup> and the "effectiveness of the grievance procedure," all of which was alleged to be a violation by the Association of N.J.S.A. 34:13A-5.4(b)(1) and (4) of the Act. <sup>4/</sup>

In addition to the foregoing, the Charging Party on May 7, 1979 filed an Unfair Practice Charge against the Association only, which was docketed as No. CI-79-56-61, and which was also amended on May 14, 1979, the said amendment alleging that the Association had engaged in unfair practices within the meaning of the Act, in that members of the Association had attempted to harass, coerce, intimidate, slander and otherwise interfere with Gilbert in the performance of his duties since November 1977; that the Association had engaged in a "scab" or "hate" campaign resulting, inter alia, in the tampering with Gilbert's car, the sending of derogatory reports to credit bureaus, the removal of his name plate from his mailbox and the painting of the word "scab" thereon; and, further, that the Association breached its contract with Gilbert by denying him the rights and privileges set forth in its constitution and by-laws and, additionally, that the Association denied

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<sup>2/</sup> The Charging Party initially filed an Unfair Practice Charge against the Board only on April 20, 1979, which was docketed as No. CI-79-53-60, and on May 7, 1979 he first amended the said charge to include the Association, the allegations in said amendment, with respect to the Association, having been superceded by the aforesaid second amended charge filed on May 14, 1979, supra.

<sup>3/</sup> The Hearing Examiner takes administrative notice that Gilbert is black.

<sup>4/</sup> 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.

"(4) Refusing to reduce a negotiated agreement to writing and to sign such agreement."

Gilbert support for his "grievances and complaints;" and, lastly, that the Association did conspire to use the "evaluation process" to "slander and defame" him as an outgrowth of the aforesaid "scab" campaign. All of the foregoing is alleged by Gilbert to have contributed to his suspension from employment on April 24, 1979 and to be a violation of N.J.S.A. 34:13A-5.4(b)(1), (3) and (5) of the Act. <sup>5/</sup>

Finally, the charges of unfair practices under both of the above docket numbers were further amended by Gilbert on October 5, 1979 with the filing of a 33-page "Summary of Related Facts." With respect to the Association only, this "Summary" alleged, inter alia, that: (1) Angelo Coppola, a member of the Board's administration with alleged "strong ties" to the New Jersey Education Association (NJEA), with which the Association is affiliated, participated in "defamatory" evaluations of Gilbert ("Summary" pp. 7, 10, 16, 17, 25); (2) During a meeting held at the time of the strike in November 1977, John Gilligan, a member of the Association, "warned (Gilbert) that members of the organization would be opposing (Gilbert)" in response to his plan to cross the picket line ("Summary" p. 22); (3) Andrew Fedor, a building representative of the Association, told Gilbert that he (Fedor) "could not bring himself" to assist Gilbert in obtaining legal assistance with respect to the physical confrontation between Gilbert and Mark Franceschini ("Summary" pp. 23, 29); (4) During the Association's ratification meeting, held in November 1977, Gilbert was denied the right to speak ("Summary" p. 24); (5) The Association transmitted information to Franceschini, which Gilbert had given to officers of the Association ("Summary" pp. 30, 31); and (6) an attorney, Gerald Skey, who was provided by the NJEA for Gilbert, failed to follow Gilbert's suggestions and inadequately represented him in a legal matter ("Summary" p. 32).

It appearing that the allegations in the aforesaid 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 February 26, 1980. <sup>6/</sup>

<sup>5/</sup> These additional Subsections prohibit public employee organizations, their representatives or agents from:

"(3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit.

"(5) Violating any of the rules and regulations established by the commission."

<sup>6/</sup> It is noted that a pre-hearing in this matter was originally scheduled for April 17, 1980 with hearing dates on April 28, 29, 30 and May 1, 1980. Due to scheduling problems, the first hearing date, April 28, was converted to a pre-hearing and the balance of the original hearing dates were cancelled. The hearing is presently rescheduled to commence on June 25, 1980 and continue on June 26, 30 and July 1, 1980.

Thereafter the Association filed an Answer on March 24, 1980 and a Supplemental Answer on April 7, 1980. On April 16, 1980 the Association filed the instant Motion to Dismiss, supra, and a supporting Memorandum of Law. The Charging Party filed a response in opposition on April 25, 1980. Thus, the instant matter is now properly before the Hearing Examiner for disposition.

#### THE ISSUES

Viewing the allegations contained in the unfair practice charges filed against the Association herein most favorably to the Charging Party can violations of Subsections (b)(1), (3), (4) and (5) of the Act be sustained. 1/

#### DISCUSSION AND ANALYSIS

##### Introductory Statement

The Hearing Examiner stresses at the outset that he is herein ruling on a Motion to Dismiss prior to hearing. Thus, the threshold question as to alleged violation of each of the above Subsections of the Act is two-fold: (1) Does the Charging Party have standing as a matter of law to allege a violation of the Act; and (2) Has the Charging Party alleged legally sufficient facts, which, if proven, would constitute violations of the several Subsections of the Act.

##### The Charging Party Has Standing To Allege A Subsection (b)(5) Violation But Has Failed To Allege A Specific Rule Of The Commission That The Association Has Violated Nor Can He Do So

The Hearing Examiner initially finds and concludes that the Charging Party, as an individual complainant, has standing to allege a Subsection (b)(5) violation.

However, based upon a thorough reading of the Unfair Practice Charges herein, including the 33-page "Summary of Related Facts," it is apparent that Gilbert has not alleged, either directly or indirectly, a violation by the Association of any of the "rules and regulations established by the commission." There is ample precedent in decisions of the Director of Unfair Practices and the Executive Director to enable the Hearing Examiner to conclude that the Charging Party's failure to cite a specific rule or regulation is fatal to an alleged Subsection (b)(5) violation: FOP Lodge 62, D.U.P. No. 79-24, 5 NJPER 178 (1979);

1/ The Hearing Examiner will consider the alleged violation of each of these Subsections separately in reverse order, infra.

PBA Local 113, D.U.P. No. 77-5, 3 NJPER 177 (1977); and Madison Township Board of Education, E.D. No. 76-8 (1975).

The Association is correct in its contention that requiring the Charging Party to cite a specific rule or regulation violated "...is a matter of fundamental fairness to the parties..." <sup>8/</sup> Moreover, since the Hearing Examiner cannot discern a Commission rule which could possibly be related to the subject matter of the instant Unfair Practice Charges, the Charging Party will not be granted leave to amend further.

Thus, that portion of the Complaint alleging a violation of Subsection (b)(5) is dismissed.

The Charging Party Lacks Standing To Allege  
A Subsection (b)(4) Violation Of The Act

The Association correctly contends that the Charging Party, as an individual, could only have standing to assert a violation of Subsection (b)(4) if that provision imposed a duty on the Association, as majority representative, to an individual employee such as Gilbert.

The Hearing Examiner finds and concludes that the reference in Subsection (b)(4) to "...a negotiated agreement..." clearly relates to the end point of collective negotiations between a public employer and a public employee organization or representative. Thus, it is the public employer alone who can, under the instant Subsection, file a charge of unfair practices against a public employee organization or representative in the event of the refusal of the latter "...to reduce a negotiated agreement to writing and to sign such agreement." To construe Subsection (b)(4) in any other way, i.e., to permit an individual public employee to file such a charge, would be to introduce chaos into the orderly administration of the Act and to undermine the Declaration of Policy in Section 2 of the Act. <sup>2/</sup>

Therefore, that portion of the Complaint alleging a violation of Subsection (b)(4) is dismissed.

<sup>8/</sup> See the Association's Brief, p. 1. The Hearing Examiner rejects the Charging Party's suggestion that the Hearing Examiner look beyond "...the written and/or published rules..." See Response, p. 4.

<sup>2/</sup> The Hearing Examiner notes the Charging Party's response with respect to Subsection (b)(4) but finds it unpersuasive. See Response, p. 8.

The Charging Party Lacks Standing To Allege  
A Subsection (b)(3) Violation Of The Act

The Association also contends correctly that the Charging Party, as an individual public employee, lacks standing to assert a violation of Subsection (b)(3) by the Association as majority representative.

The Hearing Examiner finds and concludes that the language of Subsection (b)(3) indicates clearly that it is the public employer only who may file a charge of unfair practices against a public employee organization, which, as the majority representative, has allegedly refused "...to negotiate in good faith with a public employer...concerning terms and conditions of employment..." (emphasis supplied). Clearly, Subsection (b)(3) is the counterpart of Subsection (a)(5), which imposes upon the public employer the obligation and duty "...to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment..." (emphasis supplied).

The Hearing Examiner is satisfied that there is ample precedent to support his conclusion herein: 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); and Township of Springfield, D.U.P. No. 79-13, 5 NJPER 15 (1978). <sup>10/</sup>

Thus, on the basis of the foregoing, the Hearing Examiner must dismiss that portion of the Complaint alleging a Subsection (b)(3) violation. <sup>11/</sup>

The Charging Party Clearly Has Standing To Allege  
A Subsection (b)(1) Violation But Has Failed To  
Allege Legally Sufficient Facts In Support Thereof,  
And Will Be Granted Leave To Amend Further

<sup>10/</sup> Although the Director of Unfair Practices indicated in footnote 8 of his decision in Township of Springfield, supra, that the matter of whether an individual may assert a Subsection (b)(3) violation is "questionable," the Hearing Examiner herein is clear that an individual has no such standing. The Hearing Examiner further notes that the Director of Unfair Practices in Township of Springfield stated in the same footnote that irrespective of whether a Subsection (b)(3) may be asserted by an individual, the issue of "fair representation," which will be dealt with hereinafter, "...may be addressed in the context of a Section 5.4(b)(1) allegation."

<sup>11/</sup> This conclusion is also supported by the fact that the Charging Party failed to allege in his Unfair Practice Charges that the Association has refused to negotiate in good faith with the Board, the public employer herein. The Hearing Examiner has duly considered, and rejects, the contention and argument of the Charging Party that he has sufficiently alleged a Subsection (b)(3) violation. See Response, pp. 10-12.

The Hearing Examiner finds and concludes that the Charging Party's allegations in the Unfair Practice Charges filed against the Association are legally insufficient to sustain a violation of Subsection (b)(1) of the Act. <sup>12/</sup> The disposition of the Subsection (b)(1) aspect of the Association's Motion to Dismiss will be facilitated by first setting forth certain basic legal propositions, which are pertinent to the subject matter of the instant charges of unfair practices.

1. The six-month limitation in Section 5.4(c) of the Act provides that "...no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge..." in which latter event the six-month period is extended pro tanto. In the case of the Association herein, the first charge of unfair practices was filed against it on May 7, 1979. Therefore, any charge of unfair practices allegedly committed by the Association must relate to conduct which occurred subsequent to November 7, 1978. <sup>13/</sup>

2. Section 5.4(b) prohibits "Employee organizations, their representatives or agents..." (emphasis supplied) from committing the enumerated unfair practices in Subsections (b)(1) through (5). Thus, for the Association to be successfully charged with having committed unfair practices the Charging Party must allege "agency," i.e., that authorized representatives or agents of the Association engaged in conduct proscribed by Section 5.4(b) of the Act and that such conduct was either within the scope of their authority or ratified by the Association. <sup>14/</sup>

<sup>12/</sup> In reaching this conclusion, the Hearing Examiner has fully considered all of the Charging Party's allegations as they pertain to the Association's alleged conduct vis-a-vis the Charging Party, including the 33-page "Summary of Related Facts." The standing of the Charging Party to assert a Subsection (b)(1) violation is clear and need not be commented upon further.

<sup>13/</sup> This date governs unless Charging Party alleges that he was prevented from timely filing, supra, or unless the Charging Party alleges that the unfair practices are of a continuing nature and the Hearing Examiner is persuaded accordingly. The Hearing Examiner will, however, consider the conduct of the Association prior to November 7, 1978 by way of background to charges of unfair practices timely filed.

<sup>14/</sup> This means that allegations by the Charging Party herein that individual members of the Association committed certain acts, which would constitute unfair practices, are legally insufficient in the absence of supporting allegations that at the time of occurrence the individual members were acting as "representatives or agents" of the Association. The Hearing Examiner notes at this point that conduct engaged in by officers and/or building representatives of the Association are clearly the actions of the Association assuming, of course, that the actions were within the scope of the authority of any given officer

3. The benefits derived from membership in the Association must be distinguished from the Association's "duty of fair representation." Subsection (b)(1) of the Act clearly embraces the duty of the Association to represent fairly the Charging Party, and others in the collective negotiations unit, in matters pertaining to the administration of collective negotiations agreement, i.e., the fair and impartial processing of grievances through the grievance and arbitration procedure. <sup>15/</sup> However, benefits as an incident of membership do not fall within the ambit of Subsection (b)(1) of the Act. <sup>16/</sup>

The Hearing Examiner now considers more specifically the Charging Party's allegations as they pertain to an alleged Subsection (b)(1) violation by the Association. <sup>17/</sup>

A. With respect to the allegations that on April 24, 1979 Mark Franceschini, Barbara Terry and other unnamed persons "conspired" to bring crimi-

14/ (continued)

or building representative or were subsequently ratified by the Association. The NLRB cases cited by the Association on the agency issue are on point (Association Brief, p. 10).

15/ In New Jersey Turnpike Employees Union, Local 194, etc., P.E.R.C. No. 80-38, 5 NJPER 412 (1979) 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).

16/ Although there is no Commission precedent in this area, the Hearing Examiner refers to NLRB decisions in the private sector for guidance as mandated by the New Jersey Supreme Court in Galloway Township Board of Education v. Galloway Township Ass'n. of Educational Secretaries, 78 N.J. 1, 9 (1978). The Hearing Examiner notes with approval the NLRB cases cited by the Association with respect to distinguishing between Association actions affecting benefits available through membership and Association actions which may constitute unfair practices (Association Brief, p. 15).

17/ In so doing, the Hearing Examiner elects to follow substantially the Association's order of summarization of the allegations in the Unfair Practice Charges (see Association Brief, pp. 8-10).

nal charges against Gilbert and to harass, intimidate and coerce him because he filed an Unfair Practice Charge with the Commission, <sup>18/</sup> the Hearing Examiner finds and concludes that these allegations are insufficient in the absence of an allegation that these individuals were acting as "representatives or agents" of the Association. Further, the actions of unnamed persons, whether in a "conspiracy" or otherwise, cannot be attributed to the Association. <sup>19/</sup>

B. With respect to the allegations that unnamed members of the "staff" have harassed Gilbert since November 1977 because he crossed the picket line during the "illegal strike" at that time, and because he speaks out on "civil rights" and is concerned about "the plight of minorities in Willingboro," <sup>20/</sup> the Hearing Examiner finds and concludes that these allegations are insufficient for the following reasons:

(1) The reference to the activities of unnamed members of the "staff" must fail for want of identification of the members by name and, also, for want of an allegation that said members, if named, were "representatives or agents" of the Association.

(2) Although crossing a picket line may be deemed a protected activity under the Act, there are no allegations that "representatives or agents" of the Association engaged in specific acts or conduct against Gilbert because he crossed the picket line in November 1977. Even if specific acts or conduct were alleged by Gilbert such acts or conduct would have to have occurred subsequent to November 7, 1978 - the six-month limitation period, supra.

(3) While Gilbert's speaking out on "civil rights" and his concern for the "plight of minorities" may be considered protected by the United States and New Jersey Constitutions, there is not, in the opinion of the Hearing Examiner, any like protection afforded by Section 5.3 of the Act. <sup>21/</sup>

C. With respect to the allegations that a "scab" or "hate" campaign has been in operation within the Association since December 1977, as a result of which the Association has denied Gilbert the rights and privileges set forth in

<sup>18/</sup> See May 14, 1979 amendment, Docket No. CI-79-53-60.

<sup>19/</sup> See Janler Plastic Mold Corp., 208 NLRB No. 37, 85 LRRM 1285, 1287 (1974).

<sup>20/</sup> See May 14, 1979 amendment, Docket No. CI-79-53-60.

<sup>21/</sup> Section 5.3 provides, inter alia, that: "...public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from such activity..."



its constitution and by-laws, and that unnamed members of the Association have denied Gilbert support for his "grievances and complaints," the foregoing having been motivated by Gilbert's crossing of the picket line in November 1977 and by racial discrimination, <sup>22/</sup> the Hearing Examiner finds and concludes that these allegations are insufficient for the following reasons:

(1) The denial by the Association of Gilbert's rights and privileges under the constitution and by-laws of the Association may be actionable in a court of law but cannot, in the opinion of the Hearing Examiner, constitute an abridgment of Gilbert's rights under the Act.

(2) The denial of support for Gilbert's "grievances and complaints" by unnamed members of the Association is deficient, first, because of the failure to identify members by name and, second, even if members were named, because of the failure to allege that "representatives or agents" of the Association were involved.

(3) Further, Gilbert's allegations with respect to "grievances and complaints" are deficient in the absence of supporting allegations indicating a specific grievance or grievances that he filed or attempted to file on or after November 7, 1978, the subject matter of such grievance or grievances, and the acts or omissions of the Association's "representatives or agents," which constituted a denial of "support" for any such grievance or grievances. <sup>23/</sup>

D. With respect to the allegations that, as the result of the "scab" or "hate" campaign against Gilbert, which has been in operation within the Association since December 1977, Gilbert's car has been tampered with, derogatory reports have been sent to credit bureaus, Gilbert's name plate has been removed from his mailbox and the word "scab" painted thereon, <sup>24/</sup> the Hearing Examiner finds and concludes that these allegations are insufficient, in that again no representative or agent of the Association is identified or connected with any of the acts com-

<sup>22/</sup> See May 14, 1979 amendment, Docket No. CI-79-56-61.

<sup>23/</sup> Since the Charging Party may conceivably be able to allege with specificity instances of failure by the Association's "representatives or agents" to support his grievances, cognizable under the collective negotiations agreement, because of his having crossed the picket line and/or because of racial discrimination, which, if true, might constitute a breach of the "duty of fair representation" (see footnote 15, supra), the Hearing Examiner will hereinafter grant the Charging Party leave to amend further his charges of unfair practices in this respect only. The Charging Party's Response to the Motion to Dismiss has influenced the Hearing Examiner's decision in this regard (see Response, p. 11).

<sup>24/</sup> See May 14, 1979 amendment, Docket No. CI-79-56-61.

plained of and, further, there is no indication as to when the acts occurred in relationship to the six-month limitation for the filing of charges of unfair practices, supra.

E. With respect to the allegation that Angelo Coppola, Vice Principal and a member of the Board's administration who has "strong ties" with the NJEA, participated in "defamatory" evaluations of Gilbert, 25/ the Hearing Examiner finds and concludes that this allegation is insufficient, in that Coppola, whom the Hearing Examiner presumes is not a member of the Association's collective negotiations unit, is not alleged to be a representative or agent of the Association. Thus, any actions of Coppola vis-a-vis the Charging Party cannot be attributed to the Association. 26/

F. With respect to the allegation that during a meeting held at the time of the strike (November 1977), John Gilligan, a member of the Association warned the Charging Party that members of the Association would oppose his plan to cross the picket line, 27/ the Hearing Examiner finds and concludes that this allegation is insufficient, in that Gilligan's conduct occurred more than six months prior to November 7, 1978, and that Gilligan is not alleged to have been a representative or agent of the Association and, finally, that "opposing" Gilbert does not connote per se job-related reprisals.

G. With respect to the allegation that Andrew Fedor, a building representative of the Association, told Gilbert that he, Fedor, "...could not bring himself" to assist Gilbert in obtaining legal assistance with respect to the physical confrontation between Gilbert and Mark Franceschini on April 24, 1979, 28/ the Hearing Examiner finds and concludes that, notwithstanding that Fedor, as an Association building representative was thereby a representative or agent of the Association, his conduct on April 24, 1979 cannot constitute interference with, restraint or coercion of Gilbert in the exercise of rights guaranteed to him by

25/ See Summary of Related Facts, pp. 7, 10, 16, 17, 25.

26/ The Hearing Examiner notes with approval the NLRB precedent cited by the Association to the effect that there is no union responsibility for the actions of a supervisor even when the supervisor is a member of the union (see Association Brief, p. 13).

27/ See Summary of Related Facts, p. 22.

28/ See Summary of Related Facts, pp. 23, 29.

the Act since the obtaining of legal assistance would clearly be a benefit incident to membership in the Association (see footnote 16, supra).

H. With respect to the allegation that during the Association's ratification meeting held in November 1977, Gilbert was denied the right to speak, the President of the Association, James McAndrews, refusing to "acknowledge" Gilbert, <sup>29/</sup> the Hearing Examiner finds and concludes that this allegation is insufficient, in that it is barred by the six-month limitation, supra, and, since it involves the internal affairs of the Association, it can in no way constitute activity protected by the Act.

I. With respect to the allegation that Association "officials" transmitted information to Franceschini, which Gilbert had given to the said Association officials in the context of a criminal trial involving Gilbert and Franceschini, <sup>30/</sup> the Hearing Examiner finds and concludes that this allegation is insufficient, in that it could not, in the opinion of the Hearing Examiner, possibly constitute an unfair practice by the Association under Subsection (b)(1) of the Act.

J. With respect to the allegation that an attorney, Gerald Skey, who was provided by the NJEA for Gilbert, and who was, in the opinion of Gilbert, "...not adequately prepared for the case" and failed to follow Gilbert's suggestions in a criminal trial, <sup>31/</sup> the Hearing Examiner finds and concludes that this allegation is insufficient for the following reasons:

(1) The providing of an attorney for Gilbert was a benefit incident to membership in the Association and did not involve the Association's "duty of fair representation" to Gilbert in the context of the administration of the collective negotiations agreement.

(2) It is not alleged that the attorney was a representative or agent of the Association, or of the NJEA, with which the Association is affiliated.

(3) Even assuming that the attorney was a representative or agent of the Association and/or the NJEA, at most his conduct involved errors in judgment or inadequacy of representation, which, without more, do not constitute a breach of the "duty of fair representation." <sup>32/</sup>

<sup>29/</sup> See Summary of Related Facts, p. 24.

<sup>30/</sup> See Summary of Related Facts, pp. 30, 31.

<sup>31/</sup> See Summary of Related Facts, pp. 30, 32, 33.

<sup>32/</sup> The Hearing Examiner notes with approval the cases cited by the Association in this respect (see Association Brief, p. 18).

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Based upon the foregoing, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Charging Party has standing to allege a violation of N.J.S.A. 34:13A-5.4(b)(5), but has failed to allege a specific rule of the Commission that the Association has violated, nor can he do so, based upon the allegations contained in the Complaint.

2. The Charging Party lacks standing to allege a violation of N.J.S.A. 34:13A-5.4(b)(4) since standing to allege such a violation is reserved exclusively to a public employer.

3. The Charging Party lacks standing to allege a violation of N.J.S.A. 34:13A-5.4(b)(3) since standing to allege such a violation is reserved exclusively to a public employer.

4. The Charging Party has standing to allege a violation of N.J.S.A. 34:13A-5.4(b)(1), but has failed to allege legally sufficient facts in the allegations contained in the Complaint. The Charging Party will, however, be granted leave to amend further, but only with respect to specific instances of failure by the Association's representatives or agents since November 7, 1978 to support the Charging Party's grievances, cognizable under the collective negotiations agreement, because of the Charging Party having crossed the picket line in November 1977 and/or because of the Charging Party's race.

ORDER

It is hereby ORDERED that:

1. The Complaint be dismissed in its entirety as to alleged violations by the Association of N.J.S.A. 34:13A-5.4(b)(1), (3), (4) and (5).

2. The Charging Party is granted leave to amend further within ten (10) days hereof the charges of unfair practices in the Complaint with regard to alleged violations by the Association of N.J.S.A. 34:13A-5.4(b)(1), but only with respect to specific instances of failure by the Association's representatives or

agents since November 7, 1978 to support his grievances, cognizable under the collective negotiations agreement, because of the Charging Party having crossed the picket line in November 1977 and/or because of the Charging Party's race.



Alan R. Howe  
Alan R. Howe  
Hearing Examiner

Dated: May 9, 1980  
Trenton, New Jersey