

P.E.R.C. NO. 82-61

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WILLINGBORO EDUCATION ASSOCIATION,

Respondent,

-and-

Docket Nos. CI-79-53-69  
and CI-70-56-61

ERNEST E. GILBERT,

Charging Party.

SYNOPSIS

In an unfair practice proceeding, the Public Employment Relations Commission affirms a Hearing Examiner's Recommended Report and Order that the Association did not violate N.J.S.A. 34:13A-5.4(b)(1) when it provided legal assistance to the Petitioner in a private matter and the Petitioner was unsatisfied with the results. Further, it was found that the Petitioner failed to prove by a preponderance of the evidence that certain distasteful deeds committed against the Petitioner were done either at the urgings of the Association or by its agents or representatives, in retribution for him having crossed a picket line during an Association strike in 1977.

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WILLINGBORO EDUCATION ASSOCIATION,

Respondent,

-and-

Docket Nos. CI-79-53-60  
and CI-79-56-61

ERNEST E. GILBERT,

Charging Party.

Appearances:

For the Respondent, Selikoff & Cohen, P.A.  
(Joel S. Selikoff, of Counsel)

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

DECISION AND ORDER

On April 20, 1979 Ernest Gilbert (the "Charging Party" or "Gilbert") filed an Unfair Practice Charge against the Willingboro Board of Education which was docketed as No. CI-79-53-60.

On May 7, 1979 the Charging Party amended said charge to also name the Willingboro Education Association (the "Respondent" or "Association"), and added allegations that the Association 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.

(the "Act").<sup>1/</sup> Specifically, Mr. Gilbert alleged that the Association

<sup>1/</sup> All unfair practice charges against the Willingboro Board of Education have been dismissed by the Commission with the exception of an alleged violation of N.J.S.A. 34:13A-5.4(a)(4). That charge was based upon the Charging Party's assertion that the Board suspended him and filed tenure charges against him with the Commissioner of Education in retaliation for his filing unfair practice charges with this Commission. This charge has been consolidated with the tenure charges filed with the Commissioner of Education and is presently being litigated before an administrative law judge. See In re Willingboro Board of Education, P.E.R.C. No. 81-79, 7 NJPER 37 (¶12016 1980) for the procedural history of this matter.

through certain of its members, had, inter alia, conspired to harass Mr. Gilbert and ostracize him from the Association and from school activities because he had crossed a picket line during an "illegal strike," and because he had filed an Unfair Practice Charge against the Association due to its denial of his "civil rights" and the ineffectiveness of the grievance procedure; all of which was alleged to be a violation of N.J.S.A. 34:13A-5.4(b)(1) and (4) of the Act.<sup>2/</sup>

In addition to the foregoing, the Charging Party, on May 7, 1979, also filed a second Unfair Practice Charge against the Association, which was docketed as No. CI-79-56-61, and which was amended on May 14, 1979. The second charge as amended alleged 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 work "scab" thereon; and, further, that the Association breached its contract

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2/ 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."

with Gilbert by denying him the rights and privileges set forth in its constitution and by-laws and, additionally, that the Association denied Gilbert support for his "grievance 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>3/</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

<sup>3/</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."

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 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, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on February 26, 1980. Pursuant to the Complaint and Notice of Hearing, hearings were held on March 25 and 26, and April 16, 1981<sup>4/</sup> in Trenton, New Jersey, before Hearing Examiner Alan R. Howe, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the Respondent only filed a timely post-hearing brief on June 11, 1981.

<sup>4/</sup> The hearing was originally scheduled to commence on April 28, 1980. However, the Hearing Examiner granted two Motions by the Association to Dismiss on May 9, 1980 and June 18, 1980 (see H.E. No. 80-45, 6 NJPER 284 and H.E. No. 80-51, 6 NJPER 344). The Commission in P.E.R.C. No. 81-30, 6 NJPER 440 (August 21, 1980) sustained the dismissal by the Hearing Examiner of allegations that N.J.S.A. 34:13A-5.4(b)(3), (4) and (5) had been violated by the Association. However, the Commission ordered a hearing on the issue as to whether or not N.J.S.A. 34:13A-5.4(b)(1) had been violated by the Association. Due to these motions and subsequent appeals filed by the Charging Party in the intervening months, the commencement of the hearing was delayed until March 1981.

The Hearing Examiner issued his Recommended Report and Decision, H.E. No. 81-49, 7 NJPER \_\_\_\_ (¶ \_\_\_\_ 1981), on June 23, 1981. He concluded that the Association had not violated N.J.S.A. 34:13A-5.4(b)(1) by its conduct with respect to Ernest E. Gilbert. He recommended that the Complaint be dismissed in its entirety.

Gilbert has filed what he has labeled the Charging Party's Position on Motion to Review Hearing Examiner's Recommended Report which the Commission will treat as exceptions. He has also filed a series of motions for Commission determination. The Association has filed a reply to these exceptions and argues against the granting of any motions requested. Upon a thorough review of the entire record in this matter and upon careful consideration of the exceptions filed by Gilbert, the Commission affirms the Hearing Examiner's Recommended Report and Decision.

However, before we discuss the exceptions raised by Gilbert, we will consider the various motions which were presented.

The motion for oral argument before the Commission is hereby denied. The Commission finds that all parties have had more than adequate opportunity to present all relevant arguments and that additional oral presentations are not necessary for us to resolve this case.

The Charging Party has also moved to supplement the already extensive record with documents which he declares were previously filed with the Commission but misplaced by this agency. There is no mention as to what these documents might be and the Commission has reviewed everything filed in reaching its present decision. The only mention of anything specific to

be included in the record is a "72 page Statement Under Oath" which he had filed in the United States District Court for the District of New Jersey involving a separate action brought by him with no indication that the issues are identical or even similar to those before us now. At no time did Mr. Gilbert attempt to introduce this "statement" into the record so the Hearing Examiner never had an opportunity to rule on its admissibility. Mr. Gilbert himself did testify at length. If, in fact, there are documents that Gilbert believes are relevant to the matter, he provides no reason why they were not introduced during the hearing.

The Charging Party has stated very generally that the exclusion of pictures, exhibits and pleadings has prejudiced his position. We cannot agree that his position has been prejudiced. No specific prejudice has been alleged by Gilbert and without knowing what documents are being referred to and what information they contain, the Commission will not grant this motion, especially in light of the fact that he was never denied the chance to introduce these documents during the hearing.

The final motion raised by the Charging Party requires some brief background information before it can be discussed. Originally the charges brought by Gilbert, not only alleged violations of the Act by the Association, but violations by the Board as well. (See fn. 1, supra) The charges against the Board were dismissed except for one which was based upon Gilbert's assertion that the Board had suspended him and filed tenure charges against

him with the Commissioner of Education in retaliation for his filing unfair practice charges with this Commission. A hearing was stayed on this charge as we had been advised that a proceeding had been commenced before the Office of Administrative Law as to whether the unfair practice charges against the Board should be consolidated for the purpose of hearing with the tenure charges filed with the Commissioner of Education.

On November 7, 1980, a decision was rendered by Administrative Law Judge Beatrice S. Tylutki in which she stated that the matter pending before PERC involving Gilbert's unfair practice charges against the Board would be consolidated with the tenure matter. She also found that the Commissioner had the predominant interest in the common questions presented by both the unfair practice and the tenure charges. She, therefore, recommended that the Commissioner of Education render the final decision on these allegations.<sup>5/</sup>

Pursuant to N.J.A.C. 1:1-9.7, the Commission reviewed Judge Tylutki's order<sup>6/</sup> and held that she had properly determined that the tenure matter and the charge against the Board should be consolidated.<sup>7/</sup> It was stated that "The unfair practice charge filed by Mr. Gilbert challenges the validity of the reasons for filing tenure charges, a matter which is certainly relevant to the litigation of the tenure charges."<sup>8/</sup>

<sup>5/</sup> In that same decision Judge Tylutki determined that the unfair practice charges brought by Gilbert against the Association, presently before this Commission, should not be consolidated with any other pending cases.

<sup>6/</sup> See Willingboro Board of Education, P.E.R.C. No. 81-79, 7 NJPER 37 (¶12016 1980).

<sup>7/</sup> All parties to this action were given the opportunity to address comments to the Commission with respect to Judge Tylutki's order.

<sup>8/</sup> See footnote 6, page 38.



It was also held by this Commission that the predominant interest in the allegations of both the tenure matters and the unfair practice charges against the Board lay with the Commissioner of Education. Mr. Gilbert has now filed a Motion to Consolidate and Stay Final Review, requesting that all matters, including the charges against both the Association and the Board and the tenure proceedings, be consolidated and that any any decision that we may render be stayed until such consolidation and review of all records is made. As indicated (fn. 5, supra) the Judge in her decision determined that the instant unfair practice charges against the Association should not be consolidated with the tenure charges pending before her. The Commission affirmed Judge Tylutki's order in its entirety. See fn. 3 of P.E.R.C. No. 81-79, supra. Given that Judge Tylutki has already refused the relief sought, there would be no point to our acquiescence in Mr. Gilbert's request even if we felt disposed to reconsider our earlier ruling, which we do not.

Turning now to those matters raised by Gilbert in his exceptions to the Hearing Examiner's Recommended Report and Decision, the Charging Party has not stated his exceptions in a manner which specifically sets forth the questions of procedure, fact, law or policy so it is difficult to pinpoint those parts of the Hearing Examiner's decision which he finds objectionable.<sup>9/</sup>

<sup>9/</sup>

(b) Each exception shall set forth specifically the questions of procedure, fact, law, or policy to which exception is taken; shall identify that part of the recommended report and decision to which objection is made; shall designate by precise citation of page the portions of the record relied

(continued)

The Commission is aware, however, that the Charging Party is acting pro se and has attempted to treat each exception raised.

These exceptions will be treated seriatim.

Most of the Charging Party's exceptions focus upon the separate treatment given to the unfair practice charges against the Board and the Association and the inseparability of these charges. Gilbert stated that he was not given a full hearing because no testimony was taken concerning the charges against the Board. This hearing only concerned charges against the Association and not charges against the Board. As was discussed earlier in this decision, consolidation of the charges has been thoroughly argued previously and Gilbert had every chance to make his position known.

Gilbert also states that the testimony given in the tenure matter should also be heard in the present matter without him having to call witnesses a second time. In effect, he stated that the burden was on the Commission to ferret out any and all evidence he believed pertained to the matter before us and that failure to do so would place an undue burden upon him. Mr. Golbert was given an opportunity at the hearing in this matter to introduce all evidence he believed to be relevant concerning his charges against the Association. His exception here seems to relate to his desire that this case be consolidated with the charges against the Board before the Commissioner of Education,

9/ (continued)

on; and shall state the grounds for the exception and shall include the citation of authorities unless set forth in a supporting brief. Any exception which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded. (emphasis supplied)

in the hope that some evidence developed there might assist him in this case. As previously discussed, these matters have not been consolidated. It should be noted that Mr. Gilbert previously opposed the consolidation.

The next set of exceptions, and those most directly involved with the Hearing Examiner's decision, concerned the Examiner's conclusion that the Association had not violated subsection (b)(1) of the Act by its conduct toward Gilbert. This conduct centered around the Association's treatment of Gilbert in handling his various grievances and in its treatment of him after Gilbert crossed the Association's picket line during an illegal strike against the Board. Upon a review of the record, it appears that Gilbert has filed numerous grievances against the Board and he alleges that he has repeatedly been denied access to the grievance procedure. The only instances we found where the Association has not aided Gilbert with his grievances were when Gilbert failed to operate within the grievance procedure set forth in the collective agreement and chose to take his grievance directly before the Board.

When Gilbert did use the proper procedure, he was afforded the full support of the Association and was given legal opinions as to the merits of his case. When Gilbert filed a grievance regarding the Board's failure to appoint him to the position of Department Chairperson, and that grievance was denied by the Superintendent, he was given full cooperation by the Association and a legal opinion was offered stating that the

attorney could see no legal basis for proceeding to arbitration.

Early in January 1977, the NJEA representative and the Association arranged a meeting with the NJEA attorney to discuss a complaint by Gilbert with respect to the appointment of Department Heads and the issuance of a two-month County certificate. A meeting was held with the attorney, who concluded that the Association would be unsuccessful in seeking to force the Board to appoint Gilbert as a Department Head or to claim that the two-month County certificate was inappropriate. Several months later, in March or April 1977, another meeting was arranged for Gilbert and the representative to meet with the NJEA attorney on the subject of the "breadth" of Gilbert's certification. Once again the NJEA attorney concluded that there was no legal basis for challenging the actions of the Board with respect to Gilbert.

Gilbert stated in his exceptions that the simple fact that the Association had afforded him the right to confer with an attorney was not indicative of fair representation when the attorney's opinion was not made in good faith, or in his best interests, or in support of his position. However, Mr. Gilbert bears the burden of proof on his allegation, and the Commission will not find that an Association has breached its duty of fair representation simply because it advises a member that his or her complaint does not have merit.

The record also supports the Hearing Examiner's finding that Gilbert filed a second grievance regarding the denial of a promotion to Department Chairperson. When the grievance was denied by the Superintendent, the Association initiated arbitration

and, after a hearing in May, 1980, an arbitrator, under date of July 11, 1980, denied the grievance as not being arbitrable with the caveat that the arbitration award "was not res adjudicata as to Equal Employment Opportunity allegations, and does not bar further proceedings before bodies/agencies having or asserting jurisdiction in such matters." Gilbert never requested that the Association assist him in pursuing the promotion matter following the rendering of the arbitrator's award.

The Association also provided legal services to Gilbert, as a dues paying member, for his defense of a criminal assault charge filed against him in 1979. Again, Gilbert was not satisfied with the quality of the legal representation he received, but this cannot be attributed to any discriminatory intent which he alleges the Association had against him. Further, Gilbert is currently represented by an NJEA attorney in defense of the tenure charges filed by the Board.

The Commission is unable to find that the Association has breached its duty of fair representation. In New Jersey Turnpike Employees Union, Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (1979), the Commission stated:

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.

In setting out the standards for determining when the duty of fair representation has been breached, the Supreme Court has held: "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." Vaca v. Sipes, 386 U.S. 171, 190 (1967). The Commission is satisfied that the record cannot support a finding that the Association has breached its duty of fair representation toward Gilbert. There is no evidence that the Association's determination not to proceed to arbitration on certain of Mr. Gilbert's grievances was arbitrary or capricious. The record indicates that those grievances properly presented by Gilbert were duly processed by the Association and that the Association has provided him with legal assistance in matters unrelated to the grievance procedure.

Another exception raised by the Charging Party concerned the discriminatory treatment he allegedly was subjected to by the Association due to his having crossed a picket line during an Association strike in 1977. The matter was first raised by Gilbert and treated by the Commission in P.E.R.C. No. 81-30, 6 NJPER 440 (1980), at which time it was remanded to the Hearing Examiner for hearing on the alleged violation by the Association of subsection (b)(1). Gilbert had alleged that the Association had conducted a campaign of harassment, intimidation and discrimination through its members because of his having crossed the picket line. He described such incidents as damage to his automobile, painting the word "scab" on his mailbox, obstructions in seeking promotions, encouraging students to disrupt his

classes, provoking an assault incident with a department chairman, and receipt of magazines and demands for subscription fees which he never ordered. The Commission remanded this to the Hearing Examiner for a determination as to whether this conduct was attributable to an "agent" or "representative" of the Association within the meaning of N.J.S.A. 34:13A-5.4(b).

The Hearing Examiner found that the activity directed against Gilbert could not be attributable to the Association through its officers or representatives. He concluded that Gilbert failed in his proofs and we concur with that conclusion. Even though this Commission is convinced that Gilbert has been the victim of some very distasteful deeds, we cannot find that these deeds were done either at the urgings of the Association or by its agents or representatives. Again, the Charging Party bears the burden of proving the allegations of the Complaint by a preponderance of the evidence. N.J.A.C. 19:14-6.8.

The final exception raised by the Charging Party was directed toward the Hearing Examiner himself rather than to the decision which he rendered. We find no basis at all for Gilbert's allegation that the Hearing Examiner abused his discretion in any manner or treated Gilbert unfairly because he was acting pro se. We are convinced that the Hearing Examiner conducted his hearings in a thorough and fair manner and that Gilbert was given every opportunity to present his case before him.

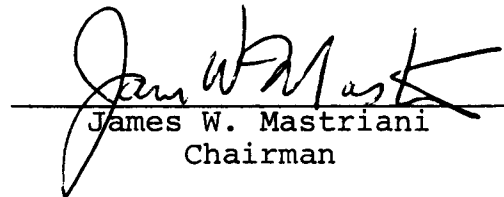
Upon a review of the entire record in this matter, we hereby adopt the findings of fact and conclusions of law made in H.E. No. 81-49. We find that the Association's actions did

not violate N.J.S.A. 34:13A-5.4(b)(1) and we hereby adopt the Hearing Examiner's recommendation that the Complaint be dismissed in its entirety.

ORDER

For the foregoing reasons, IT IS HEREBY ORDERED that the Complaint be dismissed in its entirety.

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Hartnett, Parcels, Graves, Suskin and Newbaker voted for this decision. Commissioner Hipp abstained. None opposed.

DATED: Trenton, New Jersey  
December 15, 1981

ISSUED: December 17, 1981



STATE OF NEW JERSEY  
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-and-

Docket Nos. CI-79-53-60  
CI-79-56-61

ERNEST E. GILBERT,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Association did not violate Subsection 5.4(b)(1) of the New Jersey Employer-Employee Relations Act, i.e., it did not breach its "duty of fair representation" or engage in a plan or operation of intimidation, harassment, slander or defamation of Gilbert for having crossed a picket line during an illegal strike by the Association in November 1977. The Hearing Examiner found that Gilbert had failed to prove the allegations in his Unfair Practice Charge by a preponderance of the evidence as required by the Commission's rules. The Hearing Examiner found as a fact that the Association had at all times stood willing to process Gilbert's grievances under the collective negotiations agreement between the Association and the Willingboro Board of Education and did in fact process a grievance through arbitration in the 1979 school year. Further, the Association twice provided Gilbert with a lawyer to represent him in defending a school-related criminal assault charge and also in tenure proceedings filed by the Willingboro Board of Education.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

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(Joel S. Selikoff, Esq)

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

HEARING EXAMINER'S RECOMMENDED  
REPORT AND DECISION

On May 14, 1979 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>1/</sup> against the Willingboro Education Association (hereinafter the "Respondent or the "Association") 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

1/ The Charging Party initially filed an Unfair Practice Charge against the Willingboro Board of Education only on April 20, 1979, which was docketed as No. CI-79-53-60, and on May 7, 1979 he first amended, with respect to the Association, having been superceded by the aforesaid second amended charge filed on May 14, 1979, supra.

he had filed an Unfair Practice Charge in denial of Gilbert's "civil rights"<sup>2/</sup> and the "effectiveness of the grievance procedure," all of which was alleged to be a violation of N.J.S.A. 34:13A-5.4(b)(1) and (4) of the Act.<sup>3/</sup>

In addition to the foregoing, the Charging Party on May 7, 1979 had filed an Unfair Practice Charge against the Association, 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 Gilbert support for his "grievance 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) & (5) of the Act.<sup>4/</sup>

2/ The Hearing Examiner takes administrative notice that Gilbert is black.

3/ 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."

4/ 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 appropriate unit concerning terms and conditions of employment of employees in that unit.

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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. Pursuant to the Complaint and Notice of Hearing, a hearing was held on March 25 and 26, and April 16, 1981<sup>5/</sup> in Trenton, New Jersey, at which time the parties

<sup>5/</sup> The hearing was originally scheduled to commence on April 28, 1980. However, the Hearing Examiner granted two Motions by the Association to Dismiss on May 9, 1980 and June 18, 1980 (see H.E. No. 80-45, 6 NJPER 284 and H.E. No. 80-51, 6 NJPER 344). The Commission in P.E.R.C. No. 81-30, 6 NJPER 440 (August 21, 1980) sustained the dismissal by the Hearing Examiner of allegations that N.J.S.A. 34:13A-5.4(b)(3), (4) and (5) had not been violated by the Association. However, the Commission ordered a hearing on the issue as to whether or not N.J.S.A. 34:13A-5.4(b)(1) had been violated by the Association. Due to these motions and subsequent appeals filed by the Charging Party in the intervening months, the commencement of the hearing was delayed until March 1981.

were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the Respondent only filed a timely post-hearing brief on June 11, 1981

An Unfair Practice Charge, as amended, having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing brief of the Respondent, 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 Willingboro Education Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.
2. Ernest E. Gilbert is a public employee within the meaning of the Act, as amended, and is subject to its provisions.
3. Gilbert has been employed as a High School science/mathematics teacher by the Willingboro Board of Education (hereinafter the "Board") since January 16, 1973. He has also been a dues paying member of the Association since that date.
4. In the period between September and November 1976, Gilbert filed a grievance under the collective negotiations agreement between the Association and the Board regarding the failure of the Board to have appointed Gilbert to the position of Department Chairperson. The grievance was denied by the Superintendent under date of November 1, 1976 (CP-6). Thereafter, Gilbert sought to persuade the Association to pursue the matter to arbitration under the agreement, as a result of which Connie Smith, a Vice-President of the Association, addressed a letter to George Suleta, the NJEA Field Representative, under date of November 16, 1976, in which Smith outlined the factual background of the dispute and requested a legal opinion (CP-7). Under date of November 22, 1976 the NJEA attorney responded, stating that, based upon the information submitted, he did not see any legal basis for proceeding to arbitration (CP-8).

5. Early in January 1977 Suleta arranged a meeting with the NJEA attorney to discuss a complaint by Gilbert with respect to the appointment of Department Heads and the issuance of a two-month County certificate. A meeting was held with the attorney, who concluded that the Association would be unsuccessful in seeking to force the Board to appoint Gilbert as a Department Head or to claim that the two-month County certificate was inappropriate. (See R-4).

6. Several months later, in March or April 1977, Suleta arranged for Gilbert and himself to meet again with the NJEA attorney on the subject of the "breadth" of Gilbert's certification. Once again the NJEA attorney concluded that there was no legal basis for challenging the actions of the Board with respect to Gilbert.

7. During the years that Gilbert has been an employee of the Board there has been in effect a collective negotiations agreement between the Association and the Board, except for the period 1977-80 when there was no formal agreement reduced to writing; instead, the terms and conditions of employment were as set forth in a mediator's recommendations at the conclusion of a strike in November 1977. Each year that there was a formal collective negotiations agreement in effect there was also issued by the Association a "Member's Handbook," which explained and clarified the terms of the agreement and included the Association's By-Laws (See R-3). The Hearing Examiner finds as a fact that Gilbert was totally familiar with the grievance procedure contained in the collective negotiations agreements between the Board and the Association, as indicated as early as 1976 when he filed the grievance which was denied on November 1, 1976 (See CP-6, supra).

8. Having heard the testimony of Gilbert that over the years he was repeatedly denied access to the grievance procedure, and the contrary denials of the witnesses for the Association, the Hearing Examiner finds as a fact that at no time was Gilbert denied access to the grievance procedure and that any claimed inability of Gilbert to file grievance was due to his inexcusable failure to

follow the grievance procedure, including timely requests for grievance forms.

9. Gilbert also filed a second grievance regarding the denial of a promotion to Department Chairperson, which was initially presented on October 18, 1976 (See R-1, R-5 and R-6). In the grievance, Gilbert sought monetary compensation retroactive to September 1, 1979 (R-6). When the grievance was denied by the Superintendent the Association initiated arbitration and, after a hearing in May, 1980, an arbitrator under date of July 11, 1980 denied the grievance as not being arbitrable with the caveat that the arbitration award "was not res adjudicata as to Equal Employment Opportunity allegations, and does not bar further proceedings before bodies/agencies having or asserting jurisdiction in such matters." (R-2). Gilbert never requested that the Association assist him in pursuing the promotion matter following the rendering of the arbitrator's award, supra.

10. Gilbert, being a dues paying member of the Association, was entitled to the services of an NJEA-provided attorney as a membership benefit. Gilbert sought and received the services of an attorney in April-June 1979 by way of the defense of Gilbert to a criminal assault charge filed by Mark Franceschini as a result of an altercation on April 24, 1979. Although Gilbert was not satisfied with the quality of legal representation received, nevertheless the NJEA provided Gilbert with an attorney who represented him at the hearing on the assault charge.

11. As a result of an incident with a student on March 5, 1980, Gilbert was suspended and the Board filed tenure proceedings against him with the

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6/ Gilbert testified regarding many instances where he took his complaints directly to the Superintendent and/or the Board at Public Meetings. James McAndrew, a President of the Association from 1975 to 1979, testified credibly that when Gilbert would make a presentation to the Board at a public meeting he, McAndrew, would ask Gilbert why he did not bring the matter through the grievance procedure, and that typically Gilbert would reply that he could get results faster the way he was proceeding.

Commissioner of Education. Gilbert is currently being provided with legal representation by the NJEA in defense of the tenure charges filed by the Board.

12. In November 1977 the Association's members engaged in an illegal strike against the Board after failing to obtain a collective negotiations agreement. Following the issuance of a court injunction against the strike Gilbert, among other teachers, crossed the picket line and worked during the strike. The Hearing Examiner finds as a fact that Gilbert failed to prove by a preponderance of the evidence that the Association, by its officers, agents, and representative, thereafter engaged in a campaign of intimidation and harassment of Gilbert and denied Gilbert access to the grievance procedure both allegedly as a consequence of Gilbert having crossed the picket line in November, 1977. In so finding, the Hearing Examiner has discredited the general testimony of Gilbert that such occurred and has credited the denials of the Association's witnesses.

#### THE ISSUE

Did the Respondent Association violate Subsection (b)(1) of the Act by the enumerated instances of its conduct herein?

#### DISCUSSION AND ANALYSIS

The Respondent Association Did Not Violate Subsection (b)(1) Of The Act By Its Conduct Herein With Respect To The Charging Party

The Hearing Examiner finds and concludes that the Charging Party has failed to prove by a preponderance of the evidence that the Respondent Association violated Subsection (b)(1) of the Act by its conduct toward Gilbert over the course of several years.

A violation of Subsection (b)(1) of the Act occurs when a public employee representative by its representatives of agents actively interferes with, coerces or restrains a public employee in the exercise of the rights guaranteed to him by the Act. Most typically an alleged violation involves the failure of the public employee representative to represent properly the public employee in



the processing of grievances, which is referred to as a breach of the "duty of fair representation."

The Commission's definitive statement of what is embraced by the "duty of fair representation" by a public employee representative is found in New Jersey Turnpike Employees Union, Local 194, etc., P.E.R.C. No 80-38, 5 NJPER 412 (1979) where the Commission said:

"In considering a union's duty of fair representation, certain principles can be identified. The union must exercise reasonable care and diligence in investigating, processing and presenting grievances; it must make a good faith judgment in determining the merits of the grievance; and it must treat individuals equally by granting equal access to the grievance procedure and arbitration for similar grievances of equal merit." (5 NJPER at 413) (Emphasis supplied).

See also, Council No. 1, AFSCME, AFL-CIO, P.E.R.C. No. 79-28, 5 NJPER 21 (1978); Hamilton Township Education Association, P.E.R.C. No. 79-20, 4 NJPER 476 (1978); and Township of Springfield, D.U.P. No. 79-13, 5 NJPER 15 (1978).

The above decisions rely heavily on Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967) where the United State 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).

It is plain as pikestaff that the Respondent Association has not violated its "duty of fair representation" as to Gilbert. Notwithstanding that the statute of limitations in this case mandates that the conduct complained of by Gilbert must have occurred on or after November 7, 1978, the six-month limitation period under Section 5.4(c) of the Act, it is clear that at no time since Gilbert became an employee of the Board in 1973 has the Respondent Association failed in its duty to represent Gilbert under the grievance and arbitration provisions of the operative collective negotiations agreements. Gilbert, whom the Hearing Examiner has found was at all times totally familiar with the grievance and arbitration provisions of the agreements between the Association and the Board,

filed his first grievance in the Fall of 1976. The Association made a good faith determination not to proceed to arbitration after its attorney rendered an opinion that he saw no legal basis for arbitration (see Finding of Fact No. 4, supra). Notwithstanding that Gilbert did not file another proper grievance under the agreement until 1979, the Association provided Gilbert with legal advice regarding complaints by Gilbert with respect to his employment with the Board in two instances in 1977 (see Findings of Fact Nos. 5 & 6, supra).

In the period between 1977 and 1979 Gilbert's problems with the Board were taken directly by Gilbert to the superintendent and/or the Board at public meetings. Gilbert actively resisted suggestions from the then President of the Association that he follow the grievance procedure. Gilbert's typical response was always that he could get results faster by the way in which he was proceeding (see footnote 6, supra).

When Gilbert finally did file a second grievance under the grievance procedure of the current agreement in October 1979 it was duly processed by the Association through the final step of arbitration. As arbitrator rendered as award denying the grievance on procedural grounds on July 11, 1980. Gilbert never thereafter requested the Association to assist him in pursuing the matter further following the rendering of the arbitrator's award. (See Finding of Fact No. 9, supra).

It is noted that in two instances the Association has provided Gilbert with an attorney in matters unrelated to the grievance procedure as a membership benefit of the NJEA. Thus, in April-June 1979 Gilbert was provided with a lawyer to defend him against a criminal assault charge and Gilbert is currently being provided with a lawyer to defend him in tenure proceedings filed against Gilbert by the Board. (See Findings of Fact Nos. 10 & 11, supra).

Finally, with regard to Gilbert's allegations that the Association by its officers, representatives and members engaged in campaign of intimidation and

harassment of Gilbert since the illegal strike in November 1977, the Hearing Examiner has refused to credit the general testimony of Gilbert that such conduct occurred. To the contrary, the Hearing Examiner has credited the denial of the Association witnesses that there ever was a campaign of intimidation and harassment of Gilbert and denial of access by him to the grievance procedure, all because of Gilbert having crossed the picket line in November 1977. (See Finding of Fact No. 12, supra).

The Commission, in remanding the instant matter to the Hearing Examiner for hearing on the alleged violation by the Association of Subsection (b)(1)<sup>7/</sup> directed that the Hearing Examiner conduct an evidentiary hearing on the allegations by Gilbert that a harassment campaign existed, as indicated by a "plan" and an "operation" of the Association to "slander, defame, harass and intimidate (Gilbert)." The Hearing Examiner was also directed to consider the question of "agency," particularly with respect to whether or not Gilbert's allegations pinpointed conduct attributable to the Association through its officers and representatives.

The Hearing Examiner having conducted a full and complete evidentiary hearing, and having found that the Charging Party has failed in his proofs, supra, will therefore recommend dismissal of the unfair practice charges and complaint against the Association.<sup>8/</sup>

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

<sup>7/</sup> See footnote 5, supra, and P.E.R.C. No. 81-30, 6 NJPER 440 (August 21, 1980).

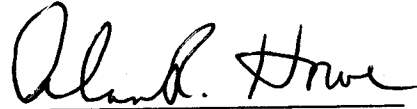
<sup>8/</sup> In so doing, the Hearing Examiner substantially concurs with the legal argument and cases cited by the Respondent Association in its post-hearing brief (see pp. 4,8,10,13,14,17,18).

CONCLUSIONS OF LAW

The Respondent Association did not violate N.J.S.A. 34:13A-5.4(b)(1) by the enumerated instances of its conduct here with respect to Ernest E. Gilbert.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.



Alan R. Howe  
Hearing Examiner

Dated: June 23, 1981  
Trenton, New Jersey