

P.E.R.C. No. 90-87

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEWARK TEACHERS UNION,

Respondent,

-and-

Docket No. CI-H-89-72

BARBARA A. TODISH,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by Barbara A. Todish against the Newark Teachers Union. The charge alleged that the union violated the New Jersey Employer-Employee Relations Act when it refused to file grievances contesting Todish's discharge allegedly in retaliation for her efforts on behalf of the Alternate Route Teachers Association. The Commission finds no basis for finding that the union breached its duty of fair representation.

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BARBARA A. TODISH,

Charging Party.

Appearances:

For the Respondent, Szaferman, Lakind, Blumstein, Watter & Blader (David B. Beckett, of counsel)

For the Charging Party, Barbara A. Todish, pro se

DECISION AND ORDER

On February 16, 1989, Barbara Todish filed an unfair practice charge against the Newark Teachers Union ("NTU"). The charge alleges that the NTU violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(b)(1), (2), (3), (4) and (5),<sup>1/</sup> when

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<sup>1/</sup> These subsections prohibit employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances. (3) Refusing to negotiate in good faith with a public employer, if they are the

it refused to file grievances contesting her discharge in retaliation for her efforts on behalf of the Alternate Route Teachers Association.

On March 30, 1989, a Complaint and Notice of Hearing issued. On May 23 and June 20, 1989, Hearing Examiner Edmund G. Gerber conducted a hearing. After the charging party's case, the NTU moved for dismissal. The Hearing Examiner found that the NTU's failure to grieve the charging party's negative evaluation did not violate the Act and that the NTU was not hostile to the creation of the Alternate Route Teachers Association. He denied the NTU's motion regarding the allegation that it had refused to file a grievance contesting the charging party's discharge.

On December 14, 1989, the Hearing Examiner recommended dismissing the Complaint in its entirety. H.E. No. 90-28, 16 NJPER 25 (¶21012 1990). He found that the charging party had filed her charge before the NTU had a reasonable opportunity to review her case or file a grievance. Therefore, the NTU's actions were not arbitrary, discriminatory or taken in bad faith.

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

On December 29, 1989, the charging party filed exceptions. She claims that: special care should have been taken because she appeared pro se; at a prehearing conference she indicated her willingness to drop this charge if the NTU would try to get her job back; the Commission should emphasize settlement, and she intends to file a federal lawsuit.<sup>2/</sup>

On January 9, 1990, the NTU filed a reply. It claims that the Hearing Examiner gave the charging party great latitude and help in presenting her case; that the charging party never tried to put the alleged settlement offer into evidence, and that implied threats of a federal lawsuit are improper. It urges adoption of the recommended decision.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 4-6) are accurate.<sup>3/</sup> We incorporate them here.

The Hearing Examiner applied the correct legal standard: was the respondent's conduct arbitrary, discriminatory, or taken in bad faith? Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976), citing Vaca v. Sipes, 386 U.S. 171 (1967). Applying that standard, we dismiss the

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2/ The charging party requests oral argument. We deny that request.

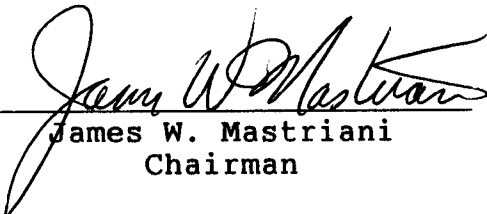
3/ We clarify that the charging party testified that she gave her first name to the superintendent during her "anonymous" telephone call.

Complaint. The charging party did not prove that the NTU did not file a grievance on her behalf because of her involvement with the Alternate Route Teachers Association. The NTU's representative told the charging party to ask the employer to give her copies of any documents concerning her termination. The NTU allowed the charging party to use its office equipment and supplies to prepare her request. Once the charging party received the information from the employer, she did not give the NTU any time to review the documents or decide whether to file a grievance. Instead she filed this charge right away. Under these circumstances, we see no basis for finding that NTU breached its duty of fair representation.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Ruggiero, Reid, Bertolino and Smith voted in favor of this decision. None opposed. Commissioners Wenzler and Johnson were not present.

DATED: Trenton, New Jersey  
March 26, 1990  
ISSUED: March 27, 1990

H.E. NO. 90-28

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

In the Matter of

NEWARK TEACHERS UNION,

Respondent,

-and-

Docket No. CI-H-89-72

BARBARA A. TODISH,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission dismiss a complaint in an action brought by Barbara Todish, an individual, alleging a breach of the duty of fair representation by the Newark Teachers Union (NTU) when it failed to file a grievance on her behalf. It was found that the NTU did not have a reasonable opportunity to file a grievance before this charge was filed. Accordingly, there was not a breach of the duty of fair representation.

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.

H.E. NO. 90-28

STATE OF NEW JERSEY  
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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Appearances:

For the Respondent  
Szaferman, Lakind, Blumstein, Watter & Blader  
(David B. Beckett, of counsel)

For the Charging Party  
Barbara A. Todish

HEARING EXAMINER'S REPORT  
AND RECOMMENDED DECISION

On February 16, 1989, Barbara Todish filed an unfair practice charge with the Public Employment Relations Commission ("Commission") alleging that the Newark Teachers Union ("NTU") violated the New Jersey Employer-Employee Relations Act ("Act"), N.J.S.A. 34:13A-1 et seq., specifically subsection 5.4(a)(1), (2), (3) and (4)<sup>1/</sup> by refusing to file a grievance contesting her

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<sup>1/</sup> These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of

termination. Todish alleges that the NTU failed to file her grievance because she had attempted to "certify the Alternate Route Teachers Association thereby causing a potential drain upon...(NTU's) current membership". She also alleges collusion between the NTU and the Newark Board of Education ("Board") concerning her termination.

On March 30, 1989, the Director of Unfair Practices issued a Complaint and Notice of Hearing.

On May 3, 1989, the NTU filed a "Motion to Compel Discovery to adjourn the hearing or in the alternative to dismiss". The Motion contained a certification which was accepted in lieu of a formal answer. The Motion was denied in part and granted in part.

On May 23 and June 20, 1989, I conducted a hearing.<sup>2/</sup>

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any employee organization. (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. (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."

2/ Both parties examined witnesses and presented documentary evidence and both parties were given an opportunity to file briefs. The NTU filed its brief on August 18, 1989. Todish filed a Petition of Appeal before the Commissioner of Education contesting her removal from the Alternate Route Teacher program. Todish filed a Motion to Consolidate that matter with this one with the Office of Administrative Law. On October 17, 1989, Administrative Law Judge Ward J. Young issued a decision denying Todish's Motion to Consolidate. On December 4, 1989, in the absence of objections by the Commission, Judge Young's decision became a final decision. See N.J.S.A. 52:14B-10.



At the conclusion of the charging party's case, the NTU moved to dismiss the Complaint. I granted the motion in part on the record for the following reasons.

Todish was a non-tenured teacher whose employment was terminated by the Newark Board of Education in the middle of the 1988-89 school year. She testified that in the spring of 1988 she anonymously called the Superintendent of Schools about cheating on the Basic Skills exam at her school. She told the Superintendent that a teacher was giving students the answers to test questions in class. Todish also formed the "Alternate Route Teachers Association". Todish argued that the NTU viewed this Association as a competing employee organization and consequently conspired with the Board to remove her. She contended that the Board wanted to remove her as a teacher from the school district because she reported about the cheating. Todish also alleges that after her discharge, the NTU refused to file a grievance on her behalf.

After resolving every inference in favor of the charging party, I found that Todish's call to the Superintendent was irrelevant to the issue of the union's motivation. Todish testified that the call was anonymous. Accordingly, I cannot infer the Superintendent knew she was the caller or shared that fact with the union. Moreover, the NTU decided not to represent Todish almost one year after her call. I also found that the NTU did not discriminate against Todish prior to her discharge because of her creation of the Alternate Route Teacher Association. Todish testified that she

first informed the NTU and the Board of the Alternate Route Teacher Association one or two days after the Board gave Todish notice that she would be discharged in 30 days (see below). Further, there is no indication on the record that NTU was otherwise aware of the Association prior to the Board's termination notice.

I denied the NTU's Motion on Todish's final allegation -- that the NTU refused to file a grievance on her behalf after her discharge. The findings of fact and analysis here are limited to this allegation.

I make the following findings of fact.

Barbara Todish was employed as a teacher by the Newark Board of Education in the primary grades in November 1987. She took the National Teachers exam and was hired through the Alternate Route Teacher program.

On January 20, 1989, Todish was notified by a hand delivered letter that she was to be terminated in 30 days or on February 20, 1989.

Michael Porcello, a staff representative for the Newark Teachers Union, testified that Todish first requested that the NTU file a grievance over her discharge on January 20, 1989, when she was first notified of the discharge. Porcello testified that he told Todish that as a non-tenured teacher, she had no grounds to challenge the discharge. The personal employment contract used by the Board for all non-tenured teachers gives both the Board and the teacher the right to terminate employment on 30 days notice.

Porcello advised Todish to ask the Board to give her copies of the documents relied upon by the Board for her termination. Then he could see if the procedures used by the Board violated Todish's rights as a non-tenured teacher. Porcello claimed that the Board would not release this information to the Union and that the request must come from the effected teacher.

The Union allowed Todish to use its office equipment and supplies. After Todish prepared a letter to the Board requesting documentation of her discharge, she served a copy of the letter on Porcello. The Board did not respond to Todish's request. Porcello testified that he spoke to three different people in the Superintendent's office in an attempt to attain the documents. On February 14, 1989, Todish demanded the release of the documents by letter. Porcello had telephoned the Board to say that Todish was personally delivering the letter. The NTU was served with a copy of the letter. The Board released the documents to Todish. Todish returned to the NTU's office to make photo copies of the documents.

Todish gave Porcello copies of the documents sometime after 4 p.m. that day. Porcello spent part of the next morning out of the office and went home sick at about 10:30 a.m. When Porcello returned to work the following day, February 16, 1989, he discovered that Todish had filed this charge before he had even reviewed the Board documents, or otherwise discussed the possibility of filing a grievance with her.

Todish testified that she had "asked for but did not receive any kind of support from the Union".<sup>3/</sup> This statement is the only contradiction of Porcello's testimony on the record. Porcello was a forthright witness and his testimony was consistent with the documentary evidence. Accordingly, I specifically credit all of Porcello's testimony.

The contract between the Union and the Board does not contain any express limitations on the right of the Board to discharge non-tenured employees.<sup>4/</sup> Todish had no contractual right to grieve her discharge as a non-tenured employee and Todish never gave the union sufficient time to grieve any procedural deficiencies in her discharge.

Unions have the authority to negotiate terms and conditions of employment, but must represent the interests of all unit members without discrimination. N.J.S.A. 34:13A-5.3. A breach of the duty of fair representation occurs only when a union's conduct toward a unit member is "arbitrary, discriminatory, or in bad faith." Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976), citing Vaca v. Sipes, 386 U.S. 171 (1967). The Vaca standard has been consistently applied in evaluating fair representation cases. Saginario v. Attorney

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<sup>3/</sup> T.1 p.102 L.3. This statement was made by Todish during her oral argument. She appeared Pro Se at the hearing and had difficulty in distinguishing between testimony and argument. I, therefore, have treated this statement as testimony.

<sup>4/</sup> i.e., such as a "just cause for discipline" provision.

General, 87 N.J. 480 (1981); Fair Lawn Bd. of Ed., P.E.R.C. No. 84-138, 10 NJPER 351 (¶15163 1984); OPEIU Loc. 153 (Thomas Johnstone), P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983); City of Union City, P.E.R.C. No. 82-65, 8 NJPER 98 (¶13040 1982). "[All] the facts of each case must be scrutinized to determine whether a breach has been proven; there are no bright line tests." City of Union City, P.E.R.C. No. 82-65, 8 NJPER 98, 99-100 (¶13040 1982).

Here, Todish filed her charge before the NTU had a reasonable opportunity to review her case, much less file a grievance. Todish simply never gave the NTU time to act. Therefore the NTU could not have acted in a way that was arbitrary, discriminatory or in bad faith.

Accordingly, I recommend that the Commission dismiss the complaint in its entirety.

  
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Edmund G. Gerber  
Hearing Examiner

Dated: December 14, 1989  
Trenton, New Jersey