P.E.R.C. NO. 93-90

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CAMDEN COUNTY COLLEGE and
CAMDEN COUNTY COLLEGE
ASSOCIATION OF ADMINISTRATIVE
PERSONNEL,

Respondents,

-and- Docket No. CI-H-89-15

GEORGE P. LaMARRA,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that Camden County College and the Camden County College Association of Administrative Personnel violated the New Jersey Employer-Employee Relations Act. The Association arbitrarily represented George P. LaMarra in his grievance proceedings contesting his discharge from Camden County College. The Association and the College permitted LaMarra's supervisor to participate in the Association's handling of that matter. The Commission orders the parties to pursue LaMarra's discharge case to arbitration with representation by the Association or at its expense.

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GEORGE P. LaMARRA,

Charging Party.

Appearances:

For the Respondent Camden County College,
William J. Wilhelm, Dean

For the Respondent Association, Wills, O'Neill & Mellk,
attorneys (Arnold M. Mellk, of counsel; Patricia L. Ratner,
on the exceptions)

For the Charging Party, George P. LaMarra, pro se

DECISION AND ORDER

On July 26, 1988, George P. Lamarra filed an unfair practice charge against Camden County College and the Camden County College Association of Administrative Personnel. The charge alleges that the College violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (2), (3) and (7),[1/] by firing LaMarra for insubordination during a

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the

Footnote Continued on Next Page

telephone call from Robert King, LaMarra's supervisor and president of the Association. The charge alleges that the Association violated subsections 5.4(b)(1), (3), and (5)[2/] by misleading LaMarra to believe that it would represent him and then failing to file for arbitration, by refusing to file six grievances because he was not employed at the time he submitted them, and by allowing King to be involved in the Association's decision not to arbitrate his grievance.

On November 28, 1988, a Complaint and Notice of Hearing issued. At hearing, the respondents adopted the College's earlier statement of position as their Answers. That statement asserts that as a result of the intervention of a New Jersey Education Association ("NJEA") representative, the College offered to reduce LaMarra's penalty to a 30-day suspension without pay and that

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1/ Footnote Continued From Previous Page

rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of 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. (7) Violating any of the rules and regulations established by the commission."

2/ These subsections prohibit employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. (5) Violating any of the rules and regulations established by the commission."

LaMarra rejected that offer. It also asserts that LaMarra's allegations about inadequate representation and conflict of interest on the part of the Association president are unfounded.

On November 28 and 29, 1989, and February 26 and April 18 and 19, 1990, Hearing Examiner Joyce M. Klein conducted a hearing. At the conclusion of the charging party's case, the Hearing Examiner granted the respondents' motions to dismiss. LaMarra requested review. On August 15, 1990, we denied the motions and remanded for further proceedings. P.E.R.C. No. 91-24, 16 NJPER 492 (¶21216 1990). Since Hearing Examiner Klein had resigned from the Commission, the case was assigned to Hearing Examiner Jonathon L. Roth. On December 19, 1990, Hearing Examiner Roth scheduled a hearing. LaMarra did not attend because the Notice of Hearing was mailed to an incorrect address. At the hearing, the respondents rested without presenting any additional evidence. LaMarra later requested permission to file a brief and argue orally. He filed a brief and the Association replied. On May 7, 1991, the parties argued orally during a conference call.

On May 22, 1992, the Hearing Examiner issued his report and recommendations. H.E. 92-35, 18 NJPER 336 (¶23149 1992). He found that the Association violated its duty of fair representation when it failed to process LaMarra's discharge grievance to arbitration and thereafter refused to represent him in his effort to get reinstated. He also found that the College violated the Act when

LaMarra's supervisor, who was also the Association's president, signed a letter from the Association advising LaMarra that he had waived his rights to contest his termination. The Hearing Examiner recommended that we order the Association to promptly pursue LaMarra's discharge to arbitration and provide him with independent counsel at the Association's expense. If an arbitrator would not consider the merits of the discharge because the College asserted a procedural defense, the Hearing Examiner recommended that the Association be ordered to make LaMarra whole. The Hearing Examiner also recommended that the Association and the College be ordered to post notices of their violations.

On June 16, 1992, the respondents offered to settle the case by arbitrating LaMarra's discharge with representation provided by the Association. On September 2, the Association filed exceptions. It contends that since LaMarra failed to accept its recent offer to arbitrate his discharge, the Complaint should be dismissed because LaMarra has, in effect, created his own damages. In addition, it contends that the Hearing Examiner erred by: considering evidence not in the record, making credibility determinations without actually seeing any witnesses testify, applying an incorrect legal standard, and exceeding his remedial authority. Also on September 2, 1992, the College filed exceptions. It claims that since LaMarra sought arbitration in his unfair practice charge and has not responded to the respondents' recent arbitration offer, he has "vacated the complaint."

On November 18, 1992, after an extension of time during settlement discussions, LaMarra filed exceptions.[3/] In addition to numerous proposed additions to the findings of fact, LaMarra seeks reinstatement with back pay apportioned between the College and the Association, compensation for lost benefits, legal fees and a new job description.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 4-29) are generally accurate. We incorporate them here with these modifications.

We do not incorporate those portions of findings 3, 6, 7, 8, and 15 that were excluded from the record by the first Hearing Examiner.

In finding 10, the Hearing Examiner found that LaMarra's supervisor did not participate as Association president in matters affecting LaMarra between January 25 and May 26, 1988. We add to that finding that NJEA representative Leo Galcher testified that he probably had conversations with King and Association vice-president Hoffman about the LaMarra case, although he was not sure (1T110). King recalled an Association meeting where someone commented that they did not think that LaMarra was fairly represented. King, who was running the meeting, stated that the issue could not be discussed at the meeting. King testified that he did

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3/ On November 6, 1992, LaMarra requested oral argument and that the respondents' exceptions be dismissed as untimely. We deny those requests.

not permit the discussion because he was the one who had put in the complaint about LaMarra and because he believed that employee problems should not be discussed at Association meetings. King also testified, however, that Hoffman responded by stating that the Association was representing LaMarra fairly (2T7-2T9). Former Association president David J. Maloney testified that King's presence at the Association meeting partially influenced his input on the LaMarra issue because King was the person who had initiated the discipline (3T138-3T139). LaMarra tape-recorded a number of telephone conversations following his discharge. In a conversation with LaMarra, Association Executive Board member Miriam Mlynarski stated that she had spoken to Association representative Galcher about LaMarra's case the day before and that she would get back in touch with Bob King and then send a letter or get in touch with Galcher again. (4T79-4T81).

In finding 24, the Hearing Examiner discredited Galcher's testimony that Hoffman informed Galcher that LaMarra had no interest in reemployment at the College. We find that Hoffman knew that LaMarra was seeking reemployment. The record evidence is insufficient to find that Galcher knew it as well.

In footnote 27, the Hearing Examiner found that King testified that "the executive board met and the decision was made there." We correct that finding to indicate that Hoffman gave that testimony (3T100).

A majority representative breaches its duty of fair representation when its 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 (1976).[4/] This case is filled with conflicts of interest and contradictory testimony that compel us to conclude that the Association's conduct was arbitrary. Accordingly, applying the Vaca standard, we find that the Association breached its duty to represent LaMarra fairly.

Association president King, the supervisor who initiated LaMarra's discipline, denied that he either represented LaMarra or participated in any decision-making concerning him. Yet the record indicates that King did not extricate himself from the Association's handling of LaMarra's discharge grievance.

Troubling also is the Association's failure to follow its own procedures in processing LaMarra's discharge grievance. According to those procedures, the Association's grievance committee

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4/ The Hearing Examiner stated that the Association did not provide a consistent level of representation. He reached that conclusion because he believed that the Association acted properly when King announced that LaMarra should bring any future union business to the Association's vice-president and when the Association negotiated a reduced penalty with the College president. But the Hearing Examiner also believed that the Association breached its duty of fair representation when it overlooked the deadline for filing for arbitration. And he found that the Association's subsequent conduct was arbitrary. The Hearing Examiner's statement about the inconsistency in the Association's level of representation was not the application of a legal standard. Rather it was his conclusion about the totality of the Association's conduct, based on the entire record.

should have met to decide whether to proceed on his grievance. It never did. Instead it appears that the Executive Board met and made the decision. What that decision was is hard to discern from this record. The Association's witnesses seemed to be saying that LaMarra was precluded from going to arbitration because he never asked the Association in writing to arbitrate his grievance. But, LaMarra's testimony and the documentary evidence indicate that the Association knew he wanted to go to arbitration. In fact, Hoffman told LaMarra that Galcher and the Association had approved arbitration, but the time had expired. Finally, the record indicates that despite a letter to LaMarra from an Association attorney indicating that he had spoken to Galcher about the possibility of renewing the effort to move the matter to arbitration, no such action was taken. Given these facts, we are constrained to find that the totality of the Association's conduct in handling LaMarra's case was arbitrary. We therefore conclude that the Association breached its duty of fair representation and violated subsection 5.4(b)(1).[5/]

We now address the College's conduct. We agree with the Hearing Examiner that there is insufficient evidence to prove that the College discharged LaMarra in retaliation for his protected activity. See In re Bridgewater Tp., 95 N.J. 235 (1984). But we are troubled by the role its supervisor played in the Association's

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5/ We agree with the Hearing Examiner that LaMarra did not prove that the Association violated subsections 5.4(b)(3) or (5).

actions precluding LaMarra from going to arbitration. King's exact role in the Association's actions are hard to pin down. But it is clear that he prevented a discussion of the Association's representation of LaMarra at one meeting and his name appears on the Association's letter falsely claiming that it was LaMarra's fault that he could not arbitrate his discharge. An employer cannot permit its supervisors to participate in any aspects of a union's decision on how to pursue a grievance contesting discipline initiated by that supervisor. The conflict of interest is readily apparent. Camden Cty., P.E.R.C. No. 83-113, 9 NJPER 156 (¶14074 1983); Union City, P.E.R.C. No. 86-35, 11 NJPER 593 (¶16209 1985). By permitting King to participate in the processing of the LaMarra discharge grievance, the College violated subsection 5.4(a)(1) of the Act.[6/]

We now address the appropriate remedy. Both respondents have offered to allow LaMarra to arbitrate his grievance. The Association has offered to provide Lamarra with representation by an Association UniServ Representative or counsel of LaMarra's choosing, with counsel fees of $100 per hour to be paid by the Association. We believe that ordering arbitration on those terms would best effectuate the purposes of the Act. It would put LaMarra back where he would have been had neither respondent put up roadblocks to a fair determination by the Association of whether it would pursue his

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6/ We agree with the Hearing Examiner that LaMarra did not prove that the College violated subsections 5.4(a)(2) or (7).

case to arbitration. We further order that Robert King recuse himself completely from any discussions or decisions associated with any further processing of this case by the Association.

ORDER

The Camden County College Association of Administrative Personnel is ordered to:

A. Cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by arbitrarily representing George P. LaMarra in his grievance proceedings contesting his discharge from Camden County College and by permitting LaMarra's supervisor to participate in the Association's handling of that matter.

B. Take this action:

1. Promptly pursue LaMarra's discharge case to arbitration.

2. Provide LaMarra with the choice of representation in the arbitration by an NJEA UniServ representative or counsel of his own choosing reimbursed at the rate of $100 per hour.

3. Notify the Chairman within twenty days of receipt what steps the Association has taken to comply with this order.

Camden County College is ordered to:

A. Cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by permitting LaMarra's supervisor to

participate in the Association's handling of LaMarra's discharge grievance.

B. Take this action:

1. Promptly participate in arbitration proceedings concerning LaMarra's discharge.

2. Notify the Chairman within twenty days of receipt what steps the College has taken to comply with this order.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Grandrimo, Regan, Smith and Wenzler voted in favor of this decision. None opposed. Commissioner Bertolino abstained from consideration.

DATED: March 29, 1993
Trenton, New Jersey
ISSUED: March 30, 1993

H.E. NO. 92-35

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

In the Matter of

CAMDEN COUNTY COLLEGE AND
CAMDEN COUNTY COLLEGE
ASSOCIATION OF ADMINISTRATIVE
PERSONNEL,

Respondents,

-and- Docket No. CI-H-89-15

GEORGE P. LaMARRA,

Charging Party.

SYNOPSIS

A hearing examiner recommends that the Camden County College Association of Administrative Personnel violated subsection 5.4(b)(1) when it failed to process a discharge grievance to arbitration and thereafter refused to represent the discharged employee in an effort toward his reinstatement.

He also recommends that Camden County College violated subsection 5.4(a)(1) when its representative signed a letter as an Association representative, advising the discharged employee that he essentially waived his rights to contest his termination through the collectively negotiated grievance procedure.

The Commission had remanded this case to the Director of Unfair Practices after rejecting another hearing examiner's decision granting motions for summary judgment by respondents Association and College. After the Director remanded the matter for "further proceedings," both respondents rested without calling any witnesses or proffering any documents.

The hearing examiner recommends that the Association pursue the discharge case to arbitration and reimburse reasonable counsel fees to the charging party. He also recommends that if the arbitrator does not reach the merits of the case because the College asserts a procedural defense, such as timeliness, and the arbitrator rules in favor of the College, the Association must pay backpay, minus mitigation, from the date of discharge. He also recommends that the College post a notice of its violation of the Act.

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. 92-35

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
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Appearances:

For the Respondent Camden County College,
William J. Wilhelm, Dean

For the Respondent Association, Wills, O'Neill & Mellk,
attorneys (Arnold M. Mellk, of counsel)

For the Charging Party, George P. LaMarra, pro se

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

On July 26, 1988, George P. LaMarra filed an unfair practice charge against Camden County College and the Camden County College Association of Administrative Personnel. The charge alleges that the College violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1),

(2), (3) and (7),[1/] when it suspended and then fired LaMarra for insubordination during a telephone call placed to him on his day off by Robert King, LaMarra's supervisor and president of the Association. The charge also alleges that the Association violated subsections 5.4(b)(1), (3) and (5)[2/] by misleading him to believe that it would represent him and then failing to file for arbitration, by refusing to file six grievances because he was not employed at the time he submitted them, and by allowing King to be involved in the Association's decision not to arbitrate his grievance.

On November 28, 1988, a Complaint and Notice of Hearing issued. At hearing, the respondents adopted the County's earlier statement of position as their Answers. That statement asserts that

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the 1/ when it suspended and then fired LaMarra for rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of 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. (7) Violating any of the rules and regulations established by the commission."

2/ These subsections prohibit employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. (5) Violating any of the rules and regulations established by the commission."

as a result of the intervention of a New Jersey Education Association ("NJEA") representative, the College offered to reduce LaMarra's penalty to a 30-day suspension without pay and that LaMarra rejected that offer. It also asserts that LaMarra's allegations about inadequate representation and conflict of interest on the part of the Association president were unfounded.

On November 28 and 29, 1989, and February 26, April 18, and April 19, 1990, Hearing Examiner Joyce M. Klein conducted a hearing. At the conclusion of the charging party's case, the respondents moved to dismiss. The Hearing Examiner granted the motions on the record.

On August 15, 1990, the Commission issued a decision (P.E.R.C. No. 91-24, 16 NJPER 492 (¶21216 1990), denying the motions and "remand[ing] the matter for further proceedings." The Commission also directed that the Director of Unfair Practices reassign the case, since the Hearing Examiner to whom the case was originally assigned had resigned from the Commission. See N.J.A.C. 19:14-6.4. The case was assigned to me.

On December 19, 1990 a hearing schedule was mailed to the parties. On January 28, 1991, I conducted a hearing which was not attended by the charging party. At the hearing and on the record, both respondents called no witnesses, presented no evidence and rested. They also stated they were not inclined to file briefs. Immediately after the hearing, I phoned LaMarra and he informed me that he never received the December 19 notice, which was mailed to

an incorrect address. I advised Mr. LaMarra of the substance of the proceedings that day and inquired whether he wished to argue orally or file a post-hearing brief. He stated that he wished to file a brief. I advised that the brief must be post-marked by March 1, 1991.

Mr. LaMarra also requested that transcripts of telephone conversations which were not admitted into evidence at the first scheduled hearing now be admitted. I advised that such requests must be in writing with copies to the respondents, specifically identifying the quotations, pages, etc.

On February 28, LaMarra requested an extension of time in which to file a brief and requested oral argument. I granted the requests over the Association's objection. On April 10, 1991, LaMarra filed a brief. On April 15, the Association filed a response. On May 7, 1991, the parties argued orally during a conference call.

On May 14, LaMarra filed a letter requesting portions of taped telephone conversations be admitted into evidence. On May 20, the Association filed a letter objecting to the request. My rulings are in the findings of fact.

Upon the record I make the following:

FINDINGS OF FACT

1. George LaMarra is a public employee, Camden County College is a public employer and the Camden County College Association of Administrative Personnel is a majority representative within the meaning of the Act.

2. In 1984, George LaMarra was hired by the College as a computer laboratory technician (CP-9). He worked in the computer studies department under director Robert King, who later served as vice president and then president of the Association (1T149).[3/] Both titles are listed in the recognition clause of the current agreement covering "full-time administrative and technical positions." LaMarra received favorable evaluations and commendations in 1984, 1985, and 1986 (CP-8, CP-9, CP-10, CP-11).[4/] King wrote on two evaluations that LaMarra had worked many hours "beyond normal work hours." On a June 30, 1986 evaluation, King wrote: "Since the lab was reorganized in January of 1986, George has taken on the extra task of supervising a large number of part-time personnel. George's handling of this new task has been exceptional." (CP-11).

3. In August 1986 King wrote a memorandum to John TenBrook, Dean of Business and High Technology, detailing an "expansion" of job duties for the computer laboratory assistant. He recommended that the position be retitled and upgraded from ten to twelve months and the pay increased from about $12,500 to $17,000. (1T191). Attached to the memorandum is a proposed job description

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3/ 1T refers to the transcript of November 28, 1989; 2T refers to the transcript of November 29; 3T refers to the transcript of February 26, 1990; 4T refers to the transcript of April 18, 1990; 5T refers to the transcript of April 19, 1990.

4/ "CP" refers to charging party exhibits; "J" refers to joint exhibits; and "R" refers to Respondent's exhibits.

for "technical assistant-computer laboratories" the goal of which was "to provide laboratory support in computer laboratories on both the Camden and Blackwood campuses." Major responsibilities include, "coordinat[ing] the disposition and return of assigned equipment, software and supplies" and controlling the "physical security of technical areas and equipment during assigned working hours except when classes are in session" (CP-29).[5/]

A handwritten notation dated August 24, 1986 from TenBrook to Dean of Academic Affairs William Wilhelm "recommending approval" appears at the bottom of the memorandum (CP-29) (1T207; 1T209; 2T4). LaMarra's position was upgraded from ten months to twelve months but the title was not changed (1T195-1T196; 1T210). LaMarra's position was listed as "computer studies in the 1986-88 agreement with a starting salary of $16,950 (J-1). He first received the new salary after the agreement was signed by the College and Association in February or March 1987 (1T207).

4. Wilhelm authorized payment of more than $3000 in overtime compensation to LaMarra in 1986 (2T67-2T68). King and Dean Wilhelm acknowledged that LaMarra worked much overtime in 1986, despite the absence of time sheets documenting his efforts.

5. In April 1987, King was elected president of the Association. For an unspecified time before then, King was vice president (2T4, 2T5).

5/ CP-29 was excluded from the record because Hearing Examiner Klein found it to be irrelevant (T535). This document and others remained in the file. I cite it merely to establish some "background."

6. In its remand decision, the Commission wrote that, "LaMarra had a number of disputes with King as supervisor and union president, particularly concerning job descriptions. The intensity of these disputes heightened in the period before January 1988" 16 NJPER at 493. A series of documents not admitted into evidence shows a chronology and background for the "disputes." (CP-28, CP-56, CP-34, CP-60, CP-41, CP-13, CP-61, CP-14, CP-15, CP-42, CP-43, CP-37, CP-32, CP-57, CP-47, CP-35, CP-16, CP-45, CP-53, CP-44).[6/]

On October 2, 1987, LaMarra asked King for $3200 backpay for his "additional responsibilities" from August 11, 1986 to August 10, 1987. He also asked for a pro-rated amount from August to October 1987 (CP-28; 1T104, 1T199).

On October 5, King responded (on the computer system), stating that he "forwarded" the request to Dean TenBrook and to Dean Waite (CP-56).

On October 21, Dean Wilhelm sent LaMarra a memorandum concerning "job analysis." Wilhelm wrote that it was "necessary to evaluate the relative duties of the various positions within the Administrative Association bargaining unit" and that the "overall evaluation process will be the current job descriptions." Wilhelm asked LaMarra to review the attached laboratory technician job description. That description was dated September 1984 and is the

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6/ In this finding of fact only, I assume that the disputed documents were admitted into the record.

ten-month position which King proposed to upgrade in August 1986. The latter description adds these responsibilities; planning and supervising work schedules of student employees and part-time lab assistants and assisting administrative staff and faculty in use of computer equipment (CP-34).

Wilhelm's memo asks LaMarra to "make appropriate recommendations for the modification and/or refinement of the description...to be reviewed, discussed and authorized by your immediate supervisor." He advised that the "finalized description" be sent to his office no later than December 15, 1987 (CP-34).

On October 30, 1987, LaMarra sent a message on the computer system to Wilhelm with copies to King and TenBrook, requesting to "donate" vacation time he values at over $300 in exchange for a "notice" of it so that he may deduct the amount on his 1987 tax return (CP-41).

On November 3, LaMarra acknowledged to King by computer message that he had received his message, and that he had forwarded his request to update the job description (emphasis added). LaMarra believed that it had been "approved," though he had not heard anything further. He responded, "who do I ask about the progress of this matter, you or the [D]ean?" (CP-13).

On the same day, King responded to LaMarra, advising that his request for more money was "in the Dean's office" and that the "updating of the job description is now in your hands (as well as mine is in my hands) per latest memo from [Dean] Wilhelm - due in December" (CP-61).

LaMarra responded minutes later, advising that he knew the "request is in the Dean's office. I have not heard anything from the Dean. My question is do I ask you or do I ask the dean if it has been lost?" (CP-15).

Still on the same day LaMarra sent a computer message to Dean TenBrook, asking him if he received his request for backpay and a "current pay increase." He wrote that he "earned everything that I asked for and much more." He also wrote, "I should not say anything to get myself in anymore trouble than I seem to be in but I guess I will. [The] other day when I said hello to you I felt that you would have preferred that I didn't. I will try to stay out of your way." (CP-42).

TenBrook asked LaMarra to see him the next day (CP-43).

On November 11, the Association had a membership meeting conducted by President King. One matter discussed was service on the negotiating committee; the minutes state, "the president and vice president serve on the negotiations committee in an 'ex officio' status. By virtue of their positions, the president and vice president must serve on the committee." The negotiations committee chairperson asked "individual members to submit any data on the salary range for their position" to the committee. "This data will be used to adjust the minimum and maximum for that position..." (CP-35). Association negotiations committee member Sharon Kohl denied that the negotiations committee created any new job descriptions (3T46).

On November 13, 1987, Dean Wilhelm sent a memorandum to LaMarra (with copies to TenBrook and King, as Association president) rejecting his "donation" of unused vacation time (CP-57).

On November 18, LaMarra sent a computer message to King stating that Dean TenBrook asked that "[we] meet so that an accurate job description can be written" and requesting a meeting with an Association representative who has "access to NJEA and NEA legal councel [sic]" (CP-47; 5T15).[7/]

On December 9, 1987, Dean TenBrook sent a computer message to LaMarra and King (and others) reminding them of Wilhelm's request to review current job descriptions and to file their "input" by December 11 (CP-16).

Also on December 9, Association vice president Hoffman sent a memo to LaMarra stating that he had spoken with Sharon Kohl, who served on the grievance committee and that LaMarra should "formalize the process" and "submit any documents...as soon as possible" (CP-45).[8/]

7/ LaMarra testified that at some unspecified time after November 18, he met with King about his job description. LaMarra asked him to send in "the job description he had already written up...And he said he would do that" (5T15-16). King denied that he spoke to LaMarra about his job reclassification after TenBrook spoke with LaMarra. No other facts in the record allow me to credit either version.

8/ The record is not clear about what this document means. When LaMarra asked Kohl on the witness stand if she had seen CP-45, she replied, "uh-huh. Okay" (3T42). He then stated, "That all I am going to ask." (3T42). LaMarra never asked Hoffman about CP-45.

On December 11, LaMarra gave King a "last list of thoughts" on his job description (5T16; CP-53).[9/]

7. A couple of other documents not admitted as relevant concern the job description "dispute" in January 1988. On or about January 22, LaMarra sent a computer message to TenBrook and King. LaMarra first stated that the personnel office confirmed that his job description was not changed. He asked to be told by January 26 if, "...I am to be paid the money that I earned." King responded that as far as he knew..." nothing is in the works for a raise. Your future earnings will be...negotiated into the new contract...I don't recall that you submitted [sic] a new job description by the deadline" (CP-18). LaMarra responded to King, "Thank you for your honesty. I hope that Dr. TenBrook will still answer my message. As far as the job description goes I did what I was asked to do" (CP-19).

8. On January 25, 1988, LaMarra sent King a computer message requesting compensatory time off for work done between January 6 and 16, 1988. LaMarra asked to take the the time off on January 27, 28, 29, and February 1, 1988 (CP-21).

9/ The record is unclear about whether the College's approval of an updated job description was the condition for an employee's receipt of "backpay." CP-61 suggests that the two processes were independent of each other. The November 11 Association minutes (CP-35) does not suggest that new descriptions would result in receipt of backpay. If history was to repeat, then a new description would have to be approved by the College and then a commensurate salary negotiated with the Association.

A couple of hours later, King responded on the system, stating, "It's ok with me, as long as you submitted the time sheets previously to account for this time (I have checked our files and apparently we misplaced your time sheets for this period. Please send me a copy for our files)" (CP-22).[10/]

9. On or about January 25, King spoke with Association vice president Hoffman about his "adversarial position" with LaMarra. Hoffman, in speaking with Association executive board members (president, vice president, treasurer, secretary) recommended that any of them except King should represent LaMarra in "any and all" Association matters (3T96-3T98).

Also on January 25, King sent LaMarra a computer message, with copies to Deans TenBrook and Waite, advising that his dual roles ("president of the Administrative Association and your supervisor") is problematic. King wrote:

10/ Some other messages were exchanged this day - LaMarra requested notice of new job positions and asked King to "ask the personnel department...why it seems the contract is being violated." He requested a copy of the posting so that an explanation "can be offered at the next union meeting." (CP-20). King responded, stating that there has never been a problem "with an individual filing after the deadline date..." He asked LaMarra which position announcement he did not receive. (CP-20, CP-23). King also sent LaMarra a message stating, "I can't find any contractual requirement whereby the college is required to post the exact number of vacancies" (CP-24).

These documents were excluded by the original hearing examiner as irrelevant. I believe they are relevant to show motive for King's notice to LaMarra about grievance processing (J-2). I consider them part of the record.

> In the future, please address all Association matters directly to Frank Hoffman (Association vice president) who will handle these matters for you in my place.
>
> In this manner, I an objectively serve as your supervisor. (J-2).[11/]

King's unrebutted testimony was that, "George had increasingly become agitated or whatever with the College. Increasingly concerned about issues. Issues that affected me directly as his supervisor..." (1T174). King explained his motive for sending J-2:

> I was [LaMarra's] supervisor by whatever power that the College vested in me. I was the Association president by election. There was an alternative to who could be [LaMarra's] representative from the Association. It could be any other officer. There was not an alternative as to who could be [LaMarra's] supervisor (1T180).

10. King denies that after January 25, as Association president, he either represented LaMarra or participated in any decision-making concerning him (1T176). This testimony is partially contradicted by the appearance of King's typewritten name (along with others on the Association's executive board) on a May 26, 1988 letter to LaMarra on Association letterhead (CP-4). The letter is a response to an April 21 LaMarra inquiry about pursuing his discharge to arbitration and about a series of grievances filed on or about February 24, 1988. In testifying about the document, Association vice president Hoffman (whose name is also on CP-4) first asserted

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11/ In its decision on remand, the Commission wrote that this memo was issued January 5, 1988, the date also reported in the transcript of Hearing Examiner Klein's decision to grant the motion for summary judgment (2T189; 5T201). I rely on King's testimony and on J-2.

that the "entire" executive board wrote the letter and then stated that King did not vote or participate on matters which pertained to LaMarra (3T84-3T85).

Hoffman's response is equivocal and I do not credit testimony which qualfified King's participation in drafting CP-4. However, the record does not show that King participated as Association president in matters affecting LaMarra between January 25 and May 26, 1988.

11. At some unspecified time on or before January 27, Dean TenBrook "warned" LaMarra about communicating directly with the College president, advising that there was a "problem" (5T99-100). No other testimony or document describes the incident in greater detail.

12. On January 27, 1988, LaMarra took a compensatory day off (CP-31, 2T22; CP-21; 5T99).

13. King is responsible for the computer laboratory (which houses valuable equipment), "at all times" (2T30). His office is in another building and he keeps a complete set of keys for the laboratory in his desk drawer (2T29-2T30). King was informed that an instructor teaching an evening class on January 27 needed a file cabinet key to gain access to software (2T33-2T34; CP-31). Four or five duplicate keys existed but the record is unclear about who, besides King and LaMarra, had one. (2T31; 2T42). Some laboratory keys were kept in the "director's" office (2T42).

The College has an informal policy requiring an instructor to reserve in advance the computer laboratory. LaMarra knew of no requests to use the laboratory on January 27 (4T164-4T165; 2T105).[12/]

On the morning of the 27th, King phoned the laboratory and spoke with a "laboratory assistant" about the locked cabinet (2T29). The assistant advised that LaMarra was the only person who had a key to the cabinet. (2T29)[13/]

King then phoned LaMarra at home. LaMarra described King's tone as "not his usual voice...he was usually polite" (5T99). King "tried" to inquire about the key and said that he and LaMarra "did not have a problem" (CP-31; 5T100). LaMarra said, "I don't want to talk to you" and "you've become very forgetful," rebutting King's denial and referring to his difficulties with filing his job description (5T100-5T101). LaMarra again said he did not want to talk to King, asking, "Can't a person get a day off

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12/ LaMarra testified that at his disciplinary hearing, King asserted that some "emergency" occurred on January 27 (5T106). LaMarra's hearsay testimony cannot form the basis for a finding of fact.

13/ Some testimony suggests that the "lab assistant" was Carolyn Miesch, a senior lab technician whose immediate supervisor was LaMarra. She testified at the hearing (2T30; 41-46). She was given keys if LaMarra was absent and had the keys to the file cabinet on January 27th (2T42-2T43). Miesch was never asked if she spoke with either King or LaMarra on January 27th.

LaMarra's testimony suggests that King asked another employee about the keys. That person was not called to testify (5T114).

in peace?" (5T101; 5T113). He also said he was on vacation and was not obligated to speak to him (5T101; CP-31). King responded, "okay or something and hung up" (5T101).

Asked why he phoned LaMarra when the keys were in his desk, King said:

> ...I did not bother going through my desk drawer, looking through everything in my desk drawer for a set of keys when the person that answered the phone in the lab said to me on the phone, 'Mr. LaMarra is the only one that has the set of keys to open the file cabinet.'
>
> [2T29]

On or before January 27, LaMarra received a note from King, requesting an "attendance report." LaMarra brought the report and cabinet keys to the College sometime on January 27 (5T103; CP-40). LaMarra's brother had delivered a key for the cabinet earlier in the day (2T33).

King issued a memorandum to LaMarra, responding to his "electronic mail of 1/27/88 at 1428."[14/] The memorandum chastised LaMarra for not documenting his "extra time." He also wrote that if LaMarra had "delegated some responsibilities" to lab assistants, he would not "have to be disturbed at home and would not have to stay in contact with the lab on [his] days off." King also disputed two other claims LaMarra had asserted about time off (CP-40).

14/ LaMarra sent King a computer message January 27 at 1428 (i.e., 2:28 p.m.). He wrote that he requested compensatory time off procedures from the College and advised that he did not recall "asking for compensatory time off before." He recounted several occasions in which he might have qualified for the benefit but chose not to apply (CP-26).

King also "disapproved" LaMarra's "attendance report" request to take compensatory days off on January 27, 28, and 29 and vacation time on February 2 and 3, 1988 (CP-40).

14. On January 28, King sent a memorandum to Dean Wilhelm requesting that LaMarra be suspended without pay for insubordination and for being absent without approval (2T22; CP-31). King wrote that Hoffman, TenBrook and others were "needlessly inconvenienced" because LaMarra refused to speak with him. He also wrote that on January 27, he discovered LaMarra's attendance report requesting the time off on his desk. He concluded, "needless to say, I could not approve the request." A copy of the memorandum was also apparently sent to Hoffman (among others), the Association vice president. (CP-31; 2T34, 2T38).

Also on January 28, LaMarra sent a computer message to Robert Ramsay, the College president, asking him to instruct Wilhelm to contact "the union" to avoid his formal processing of a grievance about his job description (CP-48).[15/]

15. On January 29, 1988, Wilhelm sent a memorandum to LaMarra stating that he was "hereby suspended, without pay, pending dismissal for insubordination and unauthorized absence from assigned

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15/ The first hearing examiner permitted only this small portion of the document into the record. Another portion states, "...I asked my supervisor, Robert King to speak to Dr. TenBrook. He said that he would. After a long delay I spoke with Dr. TenBrook...I found out...he was not going to make any recommendations....After all of my devotion and hard work, Dr. TenBrook would not even recommend that my job description be changed...." (CP-48).

duties." He also wrote that a hearing date was scheduled for February 3 and advised that LaMarra obtain representation. Copies were sent to TenBrook, King and Hoffman. (CP-46; 4T71).

16. The hearing was held on February 8. Wilhelm, TenBrook, Associate Dean Waite and King attended for the College. Hoffman and LaMarra attended for the Association. (R-1). Hoffman represented LaMarra at the hearing (3T57).

17. On February 9, Wilhelm issued his decision on the charges, finding that the insubordination charge is sustained and dismissing the attendance charge. Although Wilhelm found that LaMarra filed his attendance report late, he also found that the College had not addressed this problem previously.

Wilhelm wrote concerning the alleged insubordination on January 27, that LaMarra had four business calls to the campus that day; that he refused to allow King to inform him of the purpose of the call; and that in the hearing, LaMarra maintained his right of "privacy" and expressed no apology or remorse. Considering his overall record, Wilhelm wrote that the College would accept his resignation by 4:30 p.m., February 11 or he would be discharged. Finally, Wilhelm wrote that if the Association wished to challenge the discharge, it must file for arbitration within the time provisions of the agreement. He concluded that, "insubordination is an offense that...the College will never tolerate" (R-1).

18. Wilhelm denied that the College has a "master list" of "just cause" offenses under Article 6 of the agreement

(2T49-2T50).[16/] Four employees in the support staff unit were discharged for insubordination in the past ten years; LaMarra is the first "discharged" employee in the administrative personnel unit (2T50).

A security guard in the support staff unit was discharged for insubordination after a hearing in 1982. A supervisor phoned him at home to inquire where certain monies were kept and the guard refused to speak with him (2T51-2T52; 2T55). The security guard was a "marginal...not an exemplary employee" (2T55).

LaMarra spoke of two employees in his department who were "insubordinate." King did not recommend discipline of one employee and recommended discharge of another after LaMarra had "warned" him (5T109-5T110).

19. On an unspecified date shortly after the February 9 decision was issued, LaMarra asked Hoffman about pursuing the case to arbitration. LaMarra also asked to speak with an NJEA attorney (3T102). Hoffman stated that the Association "would have to go through the whole process before arbitration..." (3T61). The matter was discussed again in another informal meeting on campus of Hoffman, LaMarra and NJEA representative Leo Galcher (3T62-3T63). Galcher felt that "the punishment did not fit the crime" and in

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16/ Article 6 states that the "cause of discharge of an Association member by the Board of Trustees shall be for the following reasons: inefficiency, incapacity, conduct unbecoming to an administrator or other just cause" (J-1).

agreement with Hoffman, decided to seek a review of Wilhelm's decision under Article 5 of the agreement (1T37, 1T140).[17/]

20. On or about February 19, 1988, Galcher, Hoffman and LaMarra attended a scheduled meeting with College representatives, including President Ramsay and Deans Wilhelm and Waite (1T39). Galcher earlier suggested two options - a termination "package" or a reemployment proposal. LaMarra advised that he wanted his job back (1T43).[18/]

Galcher appealed Wilhelm's decision to Ramsay, who also conferred with Wilhelm about the facts. LaMarra also spoke (1T43). Ramsay decided to reduce the penalty; LaMarra would be reinstated on condition that he a) apologize in writing; b) be suspended for six months; c) agree to some type of counseling at

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17/ In step one of the grievance procedure, the Dean of Personnel issues a written decision, which, in step two, may be appealed to the College president. The president meets with the aggrieved party and Association representative with seven days of receiving the appeal and then is obligated to issue a written decision within seven more days. Step 3 provides the president's decision may be appealed to the American Arbitration Association for binding arbitration within 15 working days. [J-2].

18/ LaMarra denied that any discussion occurred before the meeting with Ramsay and that he ever met with Galcher (4T98-4T99). LaMarra testified that he had spoken briefly with Hoffman more than once. Even if there was no "discussion" before the meeting with Ramsay, LaMarra presumably expressed interest in reinstatement, probably to Hoffman. LaMarra never asserted he was interested in a "buyout" or termination deal.

Hoffman testified that King attended this meeting but King denied he was there (1T177). LaMarra, Galcher, and Wilhelm did not corroborate this testimony. I will assume that King did not attend.

College expense;[19/] and d) remain on probation for six months after his return. The College agreed to "mediate" disputes which could arise between King and LaMarra (2T71; 1T74; CP-2; 5T140).

21. Galcher, Hoffman and LaMarra caucused separately to consider the offer. Upon their return and further discussion, the proposed suspension was reduced to 30 days (including time already served)(1T125; 2T72; 4T102-4T103). The Association did not challenge the insubordination charge - it addressed the penalty (2T72; 4T102-4T103).[20/] Galcher characterized the reinstatement proposal:

> ...it was kind of an agreement between the parties rather than a final - it was not a management-dictated offer to an employee. It was basically give and take and the parties said, "Here's a package under which

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19/ Dean Wilhelm testified that LaMarra had "badgered" employees, behaved oddly before the Board of Trustees and had come to view himself as "the most important person in the entire computer operations" (2T74).

The record does not prove the validity of Wilhelm's concerns; I mention them merely to suggest a motive for imposing this condition.

20/ Wilhelm's testimony on this fact is corroborated by LaMarra, who testified that, "there was no attempt to introduce any evidence on my behalf at this meeting with Dr. Ramsay. I was not permitted to question...or add any new evidence" (4T99).

Galcher had "no track record" in termination proceedings at the College. He testified that ... "the basic rule...in these processes is to move it as quickly as possible at the lowest possible level and that's what I thought we had achieved..." (1T144). He denied that the termination posed any additional organizational or institutional concerns (1T142-1T143).

> all of us can live" and then gave [LaMarra] an opportunity to think about it. (1T49).21/

Galcher testified that the settlement was "appropriate" and would have "put the employee back to work as quickly as possible" (1T123).

22. Galcher told Hoffman that a decision to arbitrate the matter would have to be made by the executive board of the Association, pending LaMarra's answer to the College's offer (3T75-3T76). They told LaMarra to give them his decision and that the Association would have to consider arbitration if he said "no" to the offer (3T76). LaMarra said he was treated unfairly because he did not meet with Galcher before seeing the College president (4T100). Hoffman recalled Galcher's comment (after LaMarra left them) that arbitration would be a "duck shoot, that we could or we couldn't. We weren't sure" (3T76).

23. On February 24, 1988, LaMarra gave Hoffman a memorandum inquiring about the precise terms of Ramsay's offer and asking for a "written copy of his proposal." Hoffman responded by

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21/ Hoffman's characterization of this meeting and the reinstatement offer substantially agrees with Galcher's version (3T75).

LaMarra testified that, "there was no attempt to resolve the issue with respect to all parties. The college had their little thing, and the union, I guess had their little thing" (4T99). The testimonies about the meeting are not inconsistent - they characterize the same facts from the points of view of those attending.

Article 5 states that the President will meet with the grievant and the Association representative "in an effort to adjust the matter to the satisfaction of all concerned."

correcting the list of conditions for reinstatement LaMarra had recounted (CP-2; 4T102). Later the same day, LaMarra advised Hoffman, "no thanks" and rejected the College's offer (CP-2; 5T140).[22/]

24. On or about the same day, LaMarra filed six grievances concerning, 1) termination of extra employment in data processing; 2) denial of his right as "an honorable citizen" to walk on campus, etc.; 3) not being notified of a job vacancy; 4) not being "able" to speak to the Association president on any matter; 5) not receiving a new job description and adjusted salary; and 6) the suspension and discharge (CP-1). Hoffman received the grievances and informed Galcher of them (CP-1; 1T138-1T139). Galcher testified that only the termination could be arbitrated; the grievances were filed "after Mr. LaMarra had determined that he would not return to the institution" (1T135).

Galcher testified that sometime after February 24, Hoffman phoned and informed him that LaMarra "had no interest in having employment at the College, period" (1T46). In view of LaMarra's testimony, and documents written by the Association on or around

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22/ LaMarra gave two reasons for rejecting the College's offer; (1) there was no discussion of the merits of the matter before or during the meeting with Ramsay, and (2) he was not provided "the time allotted under the grievance procedure to give them a response" (4T98; 5T125).

LaMarra was entitled to a written copy of Ramsay's offer, pursuant to Article 5. The Association did not insist on enforcing this portion of the agreement.

February 24, all of which are inconsistent with the implication that LaMarra was no longer interested in employment at the College, I do not credit Galcher's testimony.

25. On February 29, 1988, Hoffman sent a memorandum with attachments to Wilhelm stating that LaMarra rejected Ramsay's offer and that the executive board of the Association had not yet ruled on his "request to pursue his grievance to arbitration...." (CP-2).[23/] LaMarra did not contest that his February 24 suspension and discharge grievance duplicated substantively, the matter discussed in Ramsay's office earlier that month (1T138).[24/]

26. Sharon Kohl was appointed chairperson of the Association "grievance committee" shortly before LaMarra filed his six grievances (3T13; 3T15). Hoffman told her that LaMarra had filed grievances with him and that the committee would have to meet

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23/ Hoffman testified that LaMarra made no "written request" to arbitrate the termination and denied "telling" the College of LaMarra's desire to arbitrate (3T68). He agreed that he wrote and signed the memorandum.

Hoffman's contrary testimony is at worst a prevarication and I do not credit it.

24/ The February 24 grievances were presumably filed in anticipation of being processed at step one of the grievance procedure. That LaMarra requested arbitration and the Association was "considering" it in February shows that the termination matter had advanced to step three.

(3T15, 3T18). The grievance committee never met on "LaMarra's grievance about being terminated" (3T20-3T21).[25/]

The executive board is the "organization of all the officers of the Association to exercise their individual duties outlined [in the Constitution and by-laws]" (3T100-3T101).[26/] It is composed of the president, vice president, secretary and treasurer (3T98).[27/]

27. On March 9, 1988, Wilhelm sent a memorandum to the Association executive board with copies to LaMarra, King (as Director of Computer Studies) and others, advising that under the

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25/ The Association "Constitution" provides that the grievance committee shall have five members, including the president and vice president. It states that the "Association president or grievance committee chairman shall sign the grievance form in the name of the Association" and that the grievant will meet with the committee...and the grievant's expenses, including binding arbitration shall fall under protection of NJEA Legal Services" (CP-6).

26/ Nothing in CP-6 provides for an executive board. It prohibits the Association president from holding the chairpersonship of a committee.

27/ King testified that "the executive board met and the decision was made there" (1T177). He also denied that he attended the executive board meeting at which a "decision" was reached (1T176-1T177). No testimony or document corroborates his statement about such a meeting and Hoffman, Kohl and Galcher did not refer to any such meeting. Accordingly, I cannot find that such a meeting occurred. If such a meeting occurred, it may have been convened between April and May, 1988 (see findings 32-34).

collective agreement, "the period of time for appealing the discharge of George LaMarra has elapsed" (CP-50).[28/]

28. On March 10, LaMarra asked Hoffman about the executive board's decision on arbitrating his discharge from the College. Hoffman asked if he received a letter from the executive board and when LaMarra said no, Hoffman replied "because I sent that out" (CP-62)[see fn.].

29. On or about March 14, 1988, LaMarra phoned Hoffman and secretly tape-recorded the conversation (CP-62; 4T50).[29/] Hoffman told LaMarra he was entitled to 90 minutes of legal advice. He also said in reference to CP-50, "...I dropped the ball on it - not you. And I told Wilhelm that. But he is not going to bend on that. There is not much that I can do." (CP-62, p. 4). Hoffman explained to LaMarra: "The letter never went out. I thought it went out. See I have some personal problems, George...my mother is dying...." In the same conversation, LaMarra tried to distinguish the College president's offer (and Wilhelm's March 9 letter) from

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28/ Article 5, Step 4 of the grievance procedure provides fifteen days to appeal the College president's decision to the American Arbitration Association (J-1). CP-50 relates back to Ramsay's February 19th reinstatement offer.

29/ CP-62 is a transcript of a series of tape-recorded phone calls LaMarra had with Association representatives. Hearing Examiner Klein listened to the tape and relied on them (rather than the transcript) in deeming relevant some portions of the conversations. She also found that the "tape is not completely audible" and stated, "the more I hear the more I realize it's not a fully complete transcript" (4T58; 4T61). She considered portions of the March 14 conversation relevant, specifically that segment about "the letter."

his February 24th grievance protesting his suspension and discharge. Hoffman's response was, "...they are not two separate issues. It is the same basic thing" (CP-62, p. 5).

30. On March 22, 1988, LaMarra spoke with Galcher, who advised that as far as he knew, "nothing is happening with your case." When asked about proceeding to arbitration, Galcher said, "You never requested the Association to go to arbitration." LaMarra responded that he had already informed Hoffman that he wanted the Association to arbitrate his discharge (CP-62; p. 10-12).

31. On March 23, LaMarra sent Hoffman and two other Association executive board members a memorandum advising that he wanted to proceed to arbitration. He asked the Association to inform him if it decides not to "provide any more help" (CP-5).

32. On or about April 13, 1988, a N.J. attorney sent LaMarra a letter after LaMarra had consulted with an associate in the law firm. The attorney advised that the firm has a retainer agreement with the NJEA and "we are not in a position to offer you any legal representation....because you appear dissatisfied with the representation you have received by your majority representative" (CP-3). The attorney also wrote that an arbitrator might find that "the penalty given you by your immediate supervisor was excessive..." though there was no guarantee of such a decision (emphasis added). Finally, the attorney wrote that he had spoken with Galcher "about the possibility of renewing the effort to move your matter to arbitration" and that Galcher would discuss it with the Association and "advise you of its decision."

33. On or about April 20, LaMarra spoke with Hoffman, who advised, "the time for arbitration has way passed." LaMarra then mentioned that the attorney said, "not necessarily," to which Hoffman replied, "Well, fine let him tell us different" (CP-62 at p. 32). LaMarra pressed him for the Association's recommendation on the matter and asked, "...back when we had time to go to arbitration did you guys recommend?" Hoffman replied, "Leo [Galcher] said yes. Take it to arbitration" (CP-62, p. 33). A short time later, LaMarra said, "So you did want to go to arbitration if it was within time," to which Hoffman replied, "Yeah, but the time limit has expired.... What we need to do I think at this point is take it to PERC" (CP-62, pp. 33-34).

Also on April 20, LaMarra sent Hoffman a memorandum requesting the executive board "letter" concerning its decision on arbitrating the discharge, asking the status of his February grievances, etc. (CP-49).

34. On May 26, 1988, the Association executive board sent LaMarra a letter advising that on February 18, Hoffman informed him of the "results of an executive meeting and requested a written response to "the pursuit of further action" and that no response "precluded that you did not wish to proceed..." It also wrote that when LaMarra filed his February 24 grievance, he "was not employed by the college" and "therefore" was not and "are not represented by the Association." Finally, it advised LaMarra to seek private counsel (CP-4). King's name appears as one of four or five

executive board signators to the letter. Hoffman agreed that the entire executive board signed the letter (3T84).

ANALYSIS

Unions 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 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 (1976). The Vaca standard governs fair representation cases. Saginario v. Attorney General, 87 N.J. 480 (1981), Newark Teachers Union, P.E.R.C. No. 90-87, 16 NJPER 252 (¶21101 1990), 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). "[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).

Unions must exercise reasonable care and diligence in investigating, processing and presenting grievances; they should exercise good faith in determining the merits of grievances and treat individuals equally by granting equal access to the grievance procedure and arbitration for similar grievances of equal merit. OPEIU Loc. 153 at 13. But proof of negligence, standing alone, does not establish a breach of the duty of fair representation.

Accordingly, the mere failure to submit a grievance to arbitration may not violate the union's duty. OPEIU Loc. 153; TWU Local No. 225, P.E.R.C. No. 85-99, 11 NJPER 231 (¶16089 1985); Fair Lawn Bd. of Ed.

LaMarra alleges that the Association breached its duty of fair representation by misleading him to believe that it would represented him and then failing to file for arbitration, by refusing to file six grievances and by allowing King (his supervisor and Association president) to participate in the Association's decision not to arbitrate his discharge.

The record shows that LaMarra's difficulties began in early October 1987, when he asked King for more than $3000 in "backpay" from the College. Dean of Personnel Wilhelm had authorized such a payment in 1986, based on King's avowal that LaMarra had earned the money, and despite there being no "time sheets" documenting the extra hours worked. This time, King forwarded the request to his supervisor, Dean TenBrook, who did not immediately respond. Meanwhile, Wilhelm asked LaMarra and other administrative unit personnel for updated job descriptions which would be used to establish negotiated salary ranges. Wilhelm informed LaMarra that the description would have to be approved by King and filed by mid-December 1987.

LaMarra's patience began wearing thin in early November, when he advised King that he had not heard about his request for the money and asked, "do I ask you...or the Dean [TenBrook] if it has

been lost"? LaMarra asked TenBrook for the money, stating he "earned everything...and much more." TenBrook called LaMarra to his office, denied the request and reiterated Wilhelm's directive.

At some unspecified time later that fall LaMarra met with King and asked that a description already completed be filed, and King agreed. In early December, TenBrook asked LaMarra for the updated description, revealing that it had not been filed. One memorandum suggests that LaMarra contacted the Association grievance committee, presumably about backpay or the job description. The record does not show that LaMarra filed a grievance form. The Association had urged that the updated descriptions be filed so the new salary ranges could be negotiated in the successor agreement. King served on the negotiations committee. The Association negotiations committee never used any new descriptions in collective negotiations.

On December 11, LaMarra gave King a list of "final thoughts" about his job description. Inasmuch as LaMarra claims that the "job description" fomented his 1988 employment problems, the record shows that the College deans never received it by the mid-December deadline - and that King never sent it. The record does not show that LaMarra was treated differently by the Association than other unit employees because no new job descriptions were prepared or used.

LaMarra's frustration intensified on or around January 22, 1988, when he informed TenBrook and King that no description had

been filed and asked to be told by January 26 if he would receive the money. King's response - that LaMarra failed to file a new job description by the deadline - was technically correct. But King failed to comply with Wilhelm's directive, i.e., approve an updated description and he never told LaMarra that he disapproved of the older one. LaMarra's agitation with King's response was reflected in his sarcastic return message, "Thank you for your honesty. I hope that Dr. TenBrook will still answer my message. As far as the job description goes, I did what I was asked to do."

Early on January 25 LaMarra sent a message to King, with a copy to Wilhelm, asking about a notice for a job vacancy, questioning why the contract is being violated and hoping for an explanation at "the next union meeting."

These facts support King's view that LaMarra's complaints affected him "directly" as supervisor. King may very well have anticipated a grievance(s) about the job description and posting. Under the circumstances, the January 25, 1988 decision to direct LaMarra to forward "all Association matters" to the Association vice president was prudent (see Camden Council No. 10, P.E.R.C. No. 83-113, 9 NJPER 156 (¶14074 1983), when the Commission found a violation of the duty of fair representation when a union president who also was the employer's personnel assistant, refused to process an employee's grievance; the remedy was to bar the union and employer from permitting the individual to "act both as personnel assistant and as union officer regarding grievances filed by unit employees").

LaMarra received his discharge notice in late January 1988 and a hearing was scheduled in early February. Association vice president Hoffman represented LaMarra at the hearing before Wilhelm. After the hearing, Wilhelm issued a written decision stating that LaMarra was insubordinate and must either resign or be fired. Hoffman cautioned LaMarra that the grievance procedure would have to be exhausted before a decision was reached on arbitration. Hoffman met with NJEA representative Galcher and they agreed that discharge was not fair punishment. They sought to appeal the decision in a step 2 meeting with Ramsay.

Galcher and LaMarra disagree on whether they met just before the February 19, 1988 session with Ramsay. Even assuming, as LaMarra testified, that they did not meet, Galcher must have already learned from Hoffman that LaMarra wanted to be reinstated. Galcher's goal was to secure the reinstatement "as quickly as possible at the lowest possible level," in consideration of the parties having had no previous discharge cases of administrative unit personnel. No facts show that his plan was decided arbitrarily or in bad faith, notwithstanding LaMarra's complaint that he did not present his version of the alleged insubordination.

Ramsay offered reinstatement with a six-month suspension. Galcher and Hoffman further negotiated a reduced penalty to 30 days, including time already served (LaMarra would have about one more week to serve). LaMarra would also have to apologize and undergo counseling; upon reinstatement, his professional relationship with

King would be monitored to avoid further friction. Considering the circumstances, I find that the Association's efforts in adjusting the penalty were reasonable and made in good faith.

LaMarra rejected the offer several days later and filed six grievances, one of which contested the suspension and discharge. Hoffman informed the College of LaMarra's decision, advising that it had not yet determined to arbitrate the matter but would inform the College of its decision. Neither LaMarra nor the College received word of any Association decision before March 9, when Wilhelm wrote to LaMarra and the Association that the contractual period for filing an arbitration request expired.

The Association's omission is explained in LaMarra's surreptitiously recorded March 14 telephone conversation with Hoffman, who conceded that he "dropped the ball...the letter never went out. I thought it went out..." Hoffman also confessed his mistake to Wilhelm and asked him to waive the contractual time limit. Wilhelm refused.

Between March 14 and 23, LaMarra repeated his request to Galcher (whose understanding was that "nothing is happening"), and to the Association executive board. He asked the board to inform him of its decision "not to provide any more help." The Association gave LaMarra a list of several attorneys and he contacted a law firm which had a retainer agreement with the parent organization, NJEA.

On April 13, the firm sent a letter to LaMarra, advising that it could not represent him because of a potential conflict of

interest. More importantly, it wrote that Galcher had been advised about the possibility of "reviving" the effort to arbitrate the discharge and that he or the Association would tell him its decision. The attorney wrote that although an arbitrator might find that the "penalty given you by your immediate supervisor was excessive," there was "no guarantee" of such a decision. He advised LaMarra to await the Association decision and to contact an attorney not affiliated with NJEA.

On May 26, the Association executive board, including King, wrote to LaMarra that it "conveyed the results" of its February 18 meeting to him and asked that he respond "in writing...as to the pursuit of further action." It concluded that his failure to respond indicated he wished to abandon the case.30/

No Association representative testified that an executive board meeting was convened on or around February 18. The only

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30/ The letter also states that on February 24, when LaMarra filed six grievances, he was "not employed by the College [and] [t]herefore... not represented by the Association..." The executive board also advised that the April 13 attorney letter was "VERY CLEAR" and meant that he should seek private counsel.

The Association continued to "represent" LaMarra after February 24 (at least by allowing him to speak with an attorney, etc.). The record shows that LaMarra's suspension and discharge grievance merged with or was superseded by the step 1 hearing and step 2 "adjustment." The record also shows that the grievance committee was never presented his five other grievances to initiate processing or that LaMarra was informed that they would not be processed, pending the outcome of his discharge case. The Association's behavior on these grievances is consistent with a deteriorating level of union representation from March to May 1988.

Association "meeting" on or around that date occurred immediately after Ramsay offered reinstatement with a suspension - and that the only participants were Galcher, Hoffman and LaMarra. Furthermore, the Association knew, no later than February 29, that LaMarra wanted to proceed to arbitration - because Hoffman informed Wilhelm that the executive board had not yet ruled on "[LaMarra's] request to pursue his grievance to arbitration." Just why a "written" response was necessary is unclear. Finally, the executive board did not refer to the possibility of reviving the effort to arbitrate and nothing more was done.

I find that under all the circumstances the Association violated its duty of fair representation. It did not provide a consistent level of representation; I have already found that the Association acted prudently and in good faith on January 25, 1988, when King recused himself as LaMarra's Association representative and designated the vice president to that role, and again on February 19, 1988, when Association representatives Galcher and Hoffman negotiated a reduced penalty for LaMarra's alleged insubordination.

I next consider whether the Association violated the Act or was only negligent and committed no violation when it inadvertently overlooked the deadline for filing a request to arbitrate Ramsay's step two decision.

In Vaca v. Sipes, the U.S. Supreme Court stated:

> Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process

> it in a perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration...
>
> [386 U.S. at 191, 64 LRRM at 2377]

Citing this precedent, the Commission has often found a union's refusal to process a case to arbitration does not violate the Act. N.J. Turnpike Employees Union, Local No. 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979); Jeffrey Beall and N.J. Turnpike Auth., P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980), aff'd App. Div. Dkt. No. A-1263-80T3 (10/30/81); Willingboro Ed. Assn., P.E.R.C. No. 82-61, 8 NJPER 38 (¶13018 1981); Fair Lawn Ed. Assn.; TWU Local No. 225; Distillery Workers Local No. 209, P.E.R.C. No. 88-13, 13 NJPER 710 (¶19263 1987); AFSCME Council No. 52, P.E.R.C. No. 88-130, 14 NJPER 414 (¶19166 1988); AFT, Local No. 2364, P.E.R.C. No. 89-26, 14 NJPER 605 (¶19256 1988); ATU, Div. No. 821, P.E.R.C. No. 91-26, 16 NJPER 517 (¶21226 1990); AFSCME Council No. 52, P.E.R.C. No. 91-34, 16 NJPER 540 (¶21243 1990). In these cases, the Commission generally finds that a union's non-discriminatory, non-arbitrary and good faith reasons not to take a grievance through arbitration is lawful. See e.g., Fair Lawn Bd. of Ed. and AFSCME Local 888 (Brennan), P.E.R.C. No. 89-71, 15 NJPER 71 (¶20027 1988).

In ATU Local No. 819, P.E.R.C. No. 90-46, 16 NJPER 3 (¶21002 1989), the Commission found a violation of the duty of fair representation when the union, upon request, failed to inform a grievant of his right to appeal the decision of the executive board (not to arbitrate his grievance) to the general membership. The

Commission wrote that once the grievant asked, the union had a duty to respond.

In another instance of omission, the Commission found no violation when a union did not pursue a discharge grievance to arbitration. In Rutgers University and AFSCME Local 1761 (Dros-Martinez), P.E.R.C. No. 91-33, 16 NJPER 538 (¶21242 1990), a union representative in good faith attempted to resolve a discharge grievance by arranging for the charging party to bid on other jobs with the employer. The Commission credited a finding that the charging party would likely have found a comparable position through the union had she not failed to follow up on a job interview. The Commission also credited a finding that the union representative reasonably believed that the arrangement had resolved the matter and allowed the grievance to lapse. The Commission wrote, "there is no evidence that AFSCME would not have pursued the grievance had the charging party expressed her desire that it do so, or that AFSCME's conduct in settling the grievance was arbitrary, discriminatory or in bad faith." [16 NJPER at 539-540].

When a unit employee asks the majority representative for information or a decision which is critical to the continued processing of a grievance, the union has a duty to respond. It may also be inferred from Rutgers, AFSCME Local 1761 (Dros-Martinez) that a union has not necessarily completed its obligation to the employee at the precise moment it has tentatively secured a resolution to a grievance (short of arbitration) with the public employer.

In leaving the decision on Ramsay's reinstatement proposal to LaMarra, the Association had a duty to apprise him of its intention to either arbitrate or not arbitrate - if it honestly believed the grievance was not meritorious or that an arbitrator would reach a substantially similar decision and impose a similar penalty. In failing to inform him of either plan, the Association let LaMarra assume that his case would proceed to arbitration if he refused the proposal. The Association also undertook the duty to decide what it would do if LaMarra rejected the proposal, a duty which extended beyond its efforts to reduce the penalty. It did nothing or more precisely, intended to arbitrate and did nothing.[31/]

Several U.S. Circuit Courts of Appeal have found a breach of the duty of fair representation when a union fails to timely process a meritorious grievance "with the consequence that arbitration on the merits is precluded." Young v. U.S. Postal Service, 907 F.2d 305, 134 LRRM 2639 (2nd Cir. 1990); Zuniga v.

31/ I distinguish this case from one in which a union which negligently fails to inform a unit employee of its good faith intention not to process a grievance was found to have not breached the duty of fair representation. The union's action was consistent with the notion that it may choose not to pursue a meritless grievance after adequate investigation. Eichelberger v. NLRB, 765 F.2d 851, 119 LRRM 3333 (9th Cir. 1985).

United Can Co., 812 F.2d 443, 124 LRRM 2888 (9th Cir. 1987);[32/] Ruzicka v. General Motors Corp., 523 F.2d 306, 90 LRRM 2497 (6th Cir.) rehearing den. 528 F.2d 912, 91 LRRM 3054 (6th Cir. 1975); Miller v. Gateway Transp. Co., 616 F.2d 272, 103 LRRM 2591 (7th Cir. 1980)(In Miller v. Gateway Transp. Co., the court stated that the duty of fair representation is of special importance when a wrongful discharge grievance is at stake and a union must avoid "capricious" and "arbitrary" behavior in discharge cases - "the industrial equivalent of capital punishment").[33/]

32/ The Zuniga court specifically determined when an omission rises to the level of arbitrariness sufficient to constitute unfair representation. The "critical inquiry" is whether the union's error involved a judgment or ministerial act. When the union fails to perform a ministerial act not requiring the exercise of judgment and there is no rational or proper basis for the conduct, the omission can constitute arbitrary conduct sufficient to breach the duty of fair representation.

33/ Professor Clyde Summers writes that in the hypothetical case of a unit employee filing a meritorious discharge grievance and the union losing the form and forgetting to do anything about it, the union should be held accountable. He writes:

> There are two special reasons why this failure of reasonable care in grievance handling should be considered a violation of the union's duty of fair representation. First, the union has voluntarily assumed, if not aggressively sought, the authority to represented the employees. Having acquired the statutory authority, it has voluntarily expanded that authority by negotiating contractual provisions giving it exclusive control over grievances. It has, thereby, barred the employee from processing his own grievance or suing the employer to enforce his contractual rights. Having commandeered control over the employee's rights under the contract, the union should owe at least the duty to use reasonable care

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Other Circuits have required a union's "bad faith motive" to show a violation of the duty. See Medlin v. Boeing Vertol Co., 620 F.2d 957, 104 LRRM 2247 (3rd Cir. 1980); Figueroa de Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281, 74 LRRM 2028 (1st Cir.) cert. denied sub nom. De Arroyo v. Puerto Rico Tel. Co., 400 U.S. 877, 75 LRRM 2455 (1970). Indeed, in Amalgamated Assoc. of Street, Electric, Railway and Motor Coach Employees of America v. Lockridge, 403 U.S. 274, 77 LRRM 2501, 2512 (1971), the Court required "substantial evidence of discrimination that is intentional, severe, and unrelated to union objectives."[34/]

I recommend that the Association's failure to process the discharge to arbitration was grossly negligent and amounts to "arbitrary" conduct under Vaca v. Sipes. The Association was grossly negligent because it failed to perform a purely ministerial act (i.e., it intended to arbitrate) when an employee's job was at

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33/ Footnote Continued From Previous Page

> in enforcing those rights. Second, the employer, by giving the union exclusive control over grievances, has insulated himself from the employee's suit unless the union has violated its duty of fair representation. An employer who has wrongfully discharged an employee should not escape liability because of the union's negligence. This would leave the employee who was a victim of two wrongs, one by the union and one by the employer, wholly remediless.
>
> Summers, "The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?" in The Duty of Fair Representation. McKelvey, ed. New York State School of Industrial Relations, Cornell University (1977) at 81.

34/ The Commission has not adopted the Lockridge standard.

stake. I also rely on these facts: (1) the Association had already determined that discharge was too severe a penalty and specifically undertook the duty to inform LaMarra and the College of its decision on arbitration; (2) Galcher and Hoffman represented the Association; if one was understandably distracted by other matters, the other should have "picked up the ball"; and (3) the Association knew before the contractual period lapsed that LaMarra wanted to go to arbitration.

Assuming that the failure to timely file for arbitration did not violate the duty of fair representation, I find that the Association's subsequent conduct was arbitrary, taints its purely negligent failure to seek arbitration, and amounts to a violation of the duty.

Nothing in the record suggests that the Association contacted the College after Hoffman asked Wilhelm to waive timeliness on the discharge case. Nor did the Association file for arbitration and permit an arbitrator to rule on the timeliness issue. Although the NJEA attorney wrote of the possibility of "reviving" arbitration, nothing in the record shows that the executive board deliberated on this option and rejected it for meritorious reasons.

Instead, it mailed a letter, authored in part by King - the immediate supervisor who recommended discipline, setting forth at best a pretextual reason for not pursuing the case to arbitration. The only reason I can glean why the Association now required a

written request was that LaMarra had expressed his dissatisfaction with the Association to the NJEA attorney and it was now "batting down the hatches." (I am not suggesting that the attorney recommended that the Association send the May 26 letter.)

The Association also wrote that from the day LaMarra rejected Ramsay's proposal and lost his job, it no longer represented him. While I appreciate the impracticality of pursuing or even considering the series of work-related grievances at a time when LaMarra's employment with the College hung in the balance, the Association never informed him of this decision and its conclusion was overbroad. The Association knows or should have known that its duty includes representing discharged employees who challenge the merits of the employer's acts. Finally, the Association executive board emphasized only that portion of the attorney's April 13 letter describing the conflict of interest and the implications for it in advising LaMarra to seek private counsel. It did not, for example, express any opinion about the attorney's belief that a suspension - let alone a discharge - was an "excessive" penalty. Nor did it address the attorney's opinion that arbitration might be "revived." These were LaMarra's concerns. Considering these paragraphs together, I find that they strongly suggest that the Association simply wanted to be rid of any further responsibility to LaMarra.

Such behavior is arbitrary and unrelated to legitimate union objectives.[35/]

Accordingly, I find that the Association violated its duty of fair representation and subsection 5.4(b)(1) of the Act.[36/]

I next consider whether the College violated the Act when it suspended and then fired LaMarra. In re Bridgewater Tp., 95 N.J. 235 (1984) sets the standard for determining whether adverse personnel actions violate subsections 5.4(a)(1) and (3). The charging party must prove by a preponderance of evidence on the entire record that activity protected by the Act was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this

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35/ The Association may even concede that its May 26 letter was written defensively, after being advised that LaMarra was considering an action against it. It will argue, however, that it was written long after its purely negligent failure to timely file for arbitration, which is not a violation of fair representation standards under Vaca v. Sipes.

The above argument essentially means that a union, having been negligent, may continue to be held unaccountable by simply doing nothing or almost nothing (the consultation with the NJEA attorney resulted merely in the suggestion that he seek his own lawyer). It belies the strong probability that its actions after March 9 were sorely guided by the knowledge of its significant omission. That knowledge did not stir this Association to act.

36/ The facts do not show that the Association violated subsections 5.4(b)(3) and (5) of the Act and I dismiss those charges.

activity and the employer was hostile towards the exercise of the protected rights. Id. at 246. If the charging party proves an illegal motive, the burden shifts to the employer to prove, again by a preponderance of evidence on the record, that the adverse action would have taken place even absent the protected conduct. Id. at 242. See School Dist. of the Chatams, P.E.R.C. No. 91-112, 17 NJPER 334 (¶22147 1991); UMDNJ--Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987).

LaMarra had been marginally involved in Association matters in the fall of 1987 but was almost completely concerned with his job description and overtime pay. LaMarra had contacted the Association in early December 1987, perhaps to file a grievance, but the record is not clear.

On January 25, 1988, LaMarra asked King for his assistance as both his supervisor and union representative. King responded by designating Association vice president Hoffman as LaMarra's union representative, a decision King made after consulting with others on the executive board. The other messages exchanged that day - King approving LaMarra's request for compensatory time off with an appeal for the "time sheets" - does not show discrimination. Given the College's concern about LaMarra's "documented" time in 1986, King's response is a reasonable exercise of supervisory authority.

The January 27th phone call, ultimately resulting in LaMarra's discharge, does not reveal improper motive. King first phoned a laboratory assistant that morning and asked for keys to the

locked cabinet. This fact suggests that King simply forgot he had keys in his desk drawer. King was told that only LaMarra had keys. King's professed motive for then phoning LaMarra - that he was essentially, too forgetful or lazy to check his desk - was not rebutted. LaMarra admitted saying to King more than once, "I don't want to talk to you" and "can't a person get a day off in peace?" He also admitted that he never answered King's question on the keys whereabouts and testified that he "regretted [his] action." These circumstances legitimately engendered a charge of insubordination.

LaMarra argues that King never mentioned that his call was "official" or an "emergency." This argument is not persuasive because the record fails to show that business calls had to be identified or even that LaMarra and King had any sort of friendship outside the workplace.

King's memorandum to LaMarra later the same day reiterates his concern for documenting "extra time" and chastises him for not "delegating responsibility to lab assistants." It is consistent with the circumstances which prompted the phone call.

On January 28, King recommended that LaMarra be suspended for insubordination and for being absent without approval. On the same day LaMarra sent a computer message to Ramsay complaining about TenBrook's refusal to upgrade his job description. He asked Ramsay to instruct Wilhelm to contact the Association.

The next day Wilhelm upgraded the recommended suspension to a suspension pending discharge. LaMarra was the first

administrative unit employee receiving a notice of discharge. The record does not show that Ramsay read LaMarra's message or told Wilhelm about it or even that Wilhelm knew a message was transmitted.

Wilhelm already had received a recommendation for a suspension. Although the timing of Wilhelm's upgrading of the penalty is suspicious, the facts do not establish either Wilhelm's knowledge of LaMarra's protected activity or any particular unlawful reason for his employment action. LaMarra did not rebut Wilhelm's testimony that insubordination was at the top of the canon of "dischargeable" offenses or that a security guard in the support staff unit was discharged for insubordination after a hearing in 1982 under similar circumstances. LaMarra's reference to another "insubordinate" employee who was not discharged is not specific enough to be relevant. Assuming that the example is relevant, I find no facts showing that King ever informed Wilhelm of that particular problem.

The record fails to show that LaMarra's protected activity was a substantial or motivating factor in either or both adverse actions. Furthermore, LaMarra did not show how the College's failure to provide him a written reinstatement offer, pursuant to the terms of the grievance procedure, violated his rights under the Act. Generally, an employer's failure to follow intermediate steps of a grievance procedure is not a violation of the Act. Brick Tp. Bd. of Ed., D.U.P. No. 92-4, 17 NJPER 391 (¶22186 1991); N.J. Transit Bus Operations, P.E.R.C. No. 86-129, 12 NJPER 442 (¶17164 1986).

Accordingly, I find that the College's discharge of LaMarra for insubordination does not violate 5.4(a)(3) of the Act.

The standard to determine whether an employer independently violates subsection (a)(1) of the Act was stated in New Jersey Sports and Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). The Commission wrote:

> It shall be an unfair practice for an employer to engage in activities which, regardless of direct proof of anti-union bias, tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions lack a legitimate and substantial business justification.
>
> [5 NJPER at 551]

On January 25, 1988, King told LaMarra that he would no longer serve as his Association representative and would continue to serve as his supervisor. The record shows that King did not violate that vow until he, along with other executive board members, sent the May 26, 1988 letter to LaMarra advising that arbitration on the discharge was not possible, his grievances would no longer be processed because he was fired, etc. LaMarra could reasonably infer that King, as an employer representative, was sending a message that the College was interested and active in the disposition of LaMarra's request to arbitrate his discharge. The letter tended to interfere with LaMarra's exercise of rights and violates subsection 5.4(a)(1) of the Act.[37/] See Camden Council 10.

37/ The record does not show that the College violated subsections 5.4(a)(2) and (7) of the Act and I dismiss these charges.

CONCLUSIONS

1. The Camden County College Association of Administrative Personnel violated subsection 5.4(b)(1) when it failed to arbitrate the discharge of George P. LaMarra and when it later failed and refused to represent him between March and May 1988.

2. Camden County College violated subsection 5.4(a)(1) when Director of Computer Services Robert King signed a May 26 letter to George P. LaMarra on Association letterhead stating that the Association executive board was not obligated to represent him in an employment dispute.

3. George P. LaMarra did not prove by a preponderance of evidence the remaining allegations in his charges against the Association and the College. I recommend that those portions of the charges be dismissed.

RECOMMENDED ORDER

I recommend that the Commission **ORDER** that:

A. The Respondent Association cease from

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by failing and refusing to represent George P. LaMarra in a grievance protesting his discharge from Camden County College.

B. The Respondent Association take the following affirmative action:

1. Promptly pursue LaMarra's discharge case to arbitration on the merits, pursuant to the terms of the applicable collective agreement. The Association may also request the College to consider reinstating LaMarra. Recognizing that LaMarra's interests may differ from those of the Association, I also order that LaMarra may be represented by counsel of his choice at the arbitration proceeding and that the Association shall reimburse him reasonable counsel fees. See Rubber Workers Local 250, 290 NLRB No. 90, 129 LRRM 1129 (1988).

2. In the event that the arbitrator does not consider and decide the merits of the discharge because the College asserts a procedural defense, including timeliness, and the arbitrator so rules in favor of the College, I order that the Association must make LaMarra whole by paying backpay, minus mitigation, from January 29, 1988, the date he was discharged from the College.[38/]

38/ Although this remedy appears harsh, I do not believe that LaMarra can otherwise be made whole.

In Rubber Workers Local 250, the National Labor Relations Board considered the proper remedy after a union had violated its duty of fair representation (Section 8(b)(1)) by arbitrarily refusing to process an employee's discharge grievance. The Board required a showing that the grievance was not "clearly frivolous." This demonstrates that "some damage or injury" flows from the union's statutory violation. The Board continued:

...Having shown that some injury flows from the union's

Footnote Continued on Next Page

3. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as

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38/ Footnote Continued From Previous Page

> statutory violation, we have allowed the union to come forward with proof that its conduct did not ultimately "cause" any further injury by establishing that the employee's grievance was not meritorious. In practical effect, the burden of proof regarding the merit (or lack of merit) of the employee's not "clearly frivolous" grievance shifts to the wrongdoing union.
>
> We believe that the union should bear this shifted burden of proof. Admittedly, absent a determination on the merits pursuant to the agreed-on procedure, the outcome of the employee's grievance cannot be certain. This uncertainty, however, is due directly to the fact that the union violated its statutory duty. In keeping with traditional equitable principles that the wrongdoer shall bear the risk of any uncertainty arising from its actions, the union must bear the ultimate risk of any uncertainty regarding the "merits" of the grievance.
>
> Strong policy considerations support this view, especially in the context of an employee's discharge grievance, a grievance as the one we deal with here. As we have noted, part of the injury that an employee suffers when his or her union unlawfully refused to process a grievance is the denial of the opportunity for a fair hearing; the right to challenge the employer's decision; and the right to argue that, even if the employer had "just cause" for discharge, mitigating circumstances support a reduced penalty.
>
> In a disciplinary arbitration proceeding, the burden of establishing the propriety of the employment decision will generally be on the employer. Where, as here, the Union caused the grievance process to malfunction, a union should assume this burden, the burden of establishing that the employee's grievance would have been denied or that the discharge was justified.
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> [129 LRRM at 1132]

Cf. Hines v. Anchor Motor Freight, 424 U.S. 554, 91 LRRM 2481 (1976).

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Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

4. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

C. The Respondent College cease from

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by participating in or having appeared to participate in an Association executive board decision not to pursue LaMarra's discharge to arbitration, pursuant to the applicable collective negotiations agreement.

D. The Respondent College take the following affirmative action:

38/ Footnote Continued From Previous Page

The facts reveal that LaMarra was probably insubordinate but that the discipline he incurred was probably disproportionate to the alleged harm, implicating the just cause provision of the contract. These conclusions persuade me that his grievance was not "clearly frivolous," and that the Association, in failing to put its case on the record, failed to demonstrate that the grievance was not meritorious.

Of course the Commission may require further evidence in this regard.

1. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "B." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

Jonathon L. Roth
Hearing Examiner

Dated: May 22, 1992
Trenton, New Jersey

Recommended Posting
Appendix "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

We hereby notify our employees represented by the Camden County College Association of Administrative Personnel:

WE WILL NOT interfere with, restrain or coerce employees in the exercise of the rights guaranteed to them by the Act, particularly by failing and refusing to represent George P. LaMarra in a grievance protesting his discharge from Camden County College.

WE WILL SEEK to arbitrate his dismissal, and provide him reasonable counsel fees in an effort to have him reinstated to his position with Camden County College.

WE WILL PAY George LaMarra backpay from the date of discharge, if an arbitrator rules in favor of the College on a procedural defense, such as timeliness.

Docket No. CI-H-89-15

Camden County College Association of Administrative Personnel
Employee Representative

Dated _____

By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.

Recommended Posting
Appendix "B"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce employees in the exercise of the rights guaranteed to them by the Act, particularly by participating in or having appeared to participate in an Association executive board decision not to pursue George P. LaMarra's discharge to arbitration, pursuant to the applicable collective negotiations agreement.

Docket No. CI-H-89-15 Camden County College
(Public Employer)

Dated _____ By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.