P.E.R.C. NO. 88-6

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

JERSEY CITY MEDICAL CENTER AND
AFSCME, COUNCIL 52, LOCAL 2254, AFL-CIO,

Respondents,

-and-

Docket No. CI-86-8-74

JOSEPH SHINE,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by Joseph Shine against AFSCME, Council 52, Local 2254, AFL-CIO and Jersey City Medical Center. The charge alleges Local 2254 violated the New Jersey Employer-Employee Relations Act when it failed to file a grievance or otherwise contest Shine's alleged wrongful discharge. The charge alleged the Center violated the Act when it terminated Shine without just cause. The Commission, in agreement with a Hearing Examiner and in the absence of exceptions, finds that Shine did not prove his allegations.

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Charging Party.

Appearances

For the Respondent, Jersey City Medical Center
Grotta, Glassman & Hoffman, Esqs.
(M. Joan Foster, of Counsel)

For the Respondent, AFSCME, Council 52, Local 2254, AFL-CIO, Oxfeld, Cohen, Blunda, Friedman, LeVine & Brooks, Esqs. (Sanford R. Oxfeld, of counsel)

For the Charging Party, Mark E. Gold, Esq.

DECISION AND ORDER

On August 23 and October 23, 1985, Joseph Shine filed an unfair practice charge and amended charge, respectively, against AFSCME, Council 52, Local 2254, AFL-CIO ("Local 2254") and Jersey City Medical Center ("Center"). The charge, as amended, alleges Local 2254 violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(b)(1) and (5),[1/] when it failed to file a grievance or otherwise contest the

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1/ These subsections prohibit employee organizations, their representatives or agents from: "(1) Interfering with,

Footnote Continued on Next Page

charging party's wrongful discharge. The charge, as amended, alleges that the Center violated the Act, specifically subsections 5.4(a)(1), (5) and (7),[2/] when "[it] terminated [Shine] without just cause in violation of the Collective Bargaining Agreement between employer and employee organization" and colluded with Local 2254 to terminate him and deny him a hearing even though the Center knew he was a competent employee.

On November 21, 1985, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On November 27, 1985, Local 2254 filed its Answer. It denied that it failed to adequately represent Shine and contended the charge was untimely. On December 2, 1985, the Center filed its Answer. It denied the material allegations contained in the charge.

On March 20, 1986, Hearing Examiner Richard C. Gwin granted the respondents' motions for summary judgment and recommended

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1/ Footnote Continued From Previous Page

restraining or coercing employees in the exercise of the rights guaranteed to them by this act; and (5) Violating any of the rules and regulations established by the commission."

2/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; and (7) Violating any of the rules and regulations established by the commission."

dismissal of the Complaint. H.E. No. 86-45, 12 NJPER 253 (¶17107 1986). We, however, found that summary judgment should not have been granted because factual disputes existed concerning Local 2254's representation of Shine. We, therefore, remanded the case for a plenary hearing. P.E.R.C. No. 87-19, 12 NJPER 740 (¶17277 1986).

On January 30, 1987, the Hearing Examiner conducted a hearing. The parties examined witnesses and introduced exhibits. Local 2254 and the Center filed post-hearing briefs.

On June 5, 1987, the Hearing Examiner issued his report recommending that the Complaint be dismissed. H.E. No. 87-72, 13 NJPER ___ (¶_____ 1987). He found that Local 2254 did not breach its duty of fair representation towards Shine because it investigated and participated in informally resolving Shine's removal from his E.M.T. position and succeeded in obtaining another position for him with the Center. He also found that the Center did not violate the Act because there was no evidence that it colluded with Local 2254 to deny him rights guaranteed by the Act.

The Hearing Examiner informed the parties that exceptions were due by June 18, 1987. The parties did not file exceptions or request an extension of time.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-12) are accurate. We adopt and incorporate

them here. Under all the circumstances of this case, we agree that the Complaint should be dismissed.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
July 14, 1987
ISSUED: July 15, 1987

H.E. NO. 87-72

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

In the Matter of

JERSEY CITY MEDICAL CENTER AND
AFSCME, LOCAL 2254, COUNCIL 52, AFL-CIO

Respondents,

-and-

DOCKET NO. CI-86-8

JOSEPH SHINE,

Charging Party.

SYNOPSIS

The hearing examiner recommends dismissal of an unfair practice charge filed by Joseph Shine which alleged that the Jersey City Medical Center removed Shine from his E.M.T. position (and subsequently fired him) without just cause and that AFSCME Council 52, AFL-CIO failed to investigate or grieve his discharge. The hearing examiner finds that Council 52 conducted a diligent investigation, advised Shine that his claim was without merit, and assisted him in an informal resolution of the matter. These facts mitigated against finding that Council 52's subsequent failure to file a grievance was a breach of its duty to fairly represent Shine. The hearing examiner also finds that the Center's decision to remove Shine from his E.M.T. position was based on Shine's poor performance.

H.E. NO. 87-72

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

In the Matter of

JERSEY CITY MEDICAL CENTER AND
AFSCME, LOCAL 2254, COUNCIL 52, AFL-CIO

Respondents,

-and-

DOCKET NO. CI-86-8

JOSEPH SHINE,

Charging Party.

Appearances

For the Respondent, Jersey City Medical Center
Grotta, Glassman & Hoffman
(M. Joan Foster, of Counsel)

For the Respondent, AFSCME, Local 2254, Council 52, AFL-CIO,
Oxfeld, Cohen & Blunda
(Sanford R. Oxfeld, of Counsel)

For the Charging Party,
Mark E. Gold, Esq.

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On August 23 and October 21, 1985, Joseph Shine filed an original and amended unfair practice charge against the Jersey City Medical Center ("Center") and AFSCME, Council 52, Local 2254, AFL-CIO ("Local 2254" or "Union"). Shine alleges that the Center

violated subsections 5.4(a)(1), (5) and (7)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by firing him without just cause. Shine alleges that Local 2254 breached its duty to fairly represent him by failing to grieve or investigate the circumstances of his discharge[2/]. Shine further alleges that the Center and Local 2254 colluded in handling his discharge and denying him a related hearing. On November 21, 1985, the Director of Unfair Practices issued a Complaint and Notice of Hearing.

On November 27, 1985, Local 2254 filed an Answer generally denying that it breached its duty to fairly represent Shine.

On December 2, 1985, the Center filed an Answer denying any violation of the Act and asserting that Shine was removed from his Emergency Medical Technician ("E.M.T.") position due to his inability to perform the job. The Center asserts that its decision

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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 rights guaranteed to them by this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; (7) Violating any of the rules and regulations established by the Commission.

2/ Shine claims that Local 2254's alleged conduct violates subsections 5.4(b)(1) and (5) of the Act, which prohibit an employee organization from: (1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (5) Violating any of the rules and regulations established by the Commission.

was based on safety considerations and was an exercise of its managerial prerogative.

On January 13, 1986, Local 2254 and the Center filed motions for summary judgment. On February 4, 1986, the Chairman referred to me these motions and a request for a stay of hearing. On February 6, 1986, I granted the stay request. Shine was granted an extension of time and filed a brief and affidavit opposing the motions on February 24, 1986.

On March 20, 1986, I granted the motions. H.E. No. 86-45. On September 26, 1986 the Commission reversed and remanded for hearing. P.E.R.C. No. 87-19, 12 NJPER 740 (¶17277 1986). After granting an uncontested request for an adjournment, I rescheduled the hearing to January 30, 1987. At that time the parties examined witnesses and introduced exhibits. The Center and Local 2254 filed letters in lieu of post-hearing briefs which I received by April 20, 1987. Shine did not file a brief.

Based on the entire record, I make the following:

FINDINGS OF FACT

1. The Jersey City Medical Center is a public employer within the meaning of the Act and is subject to its provisions.

2. AFSCME, Council 52, Local 2254, AFL-CIO is an employee organization within the meaning of the Act and is subject to its provisions.

3. Joseph Shine was hired by the Center as a per diem E.M.T. in July 1982. He became a full-time provisional E.M.T. on October 9, 1982. Although Shine was not aware of the fact, he remained a provisional employee until he was discharged on March 14, 1984. Shine was a member of Local 2254 and his title was included in its collective negotiations unit.

4. In late February 1984, Shine was advised by John Doyle, the Center's Personnel Director, that he was being removed from his E.M.T. position. The decision to remove Shine was initiated by Keith Holterman, the Director of Emergency Medical Services at the Center. Holterman had concluded that, despite Shine's enthusiasm and dedication, he could not perform up to the standards required of an E.M.T. Holterman based this conclusion in part on his knowledge of Shine's involvement in three incidents. On two occasions Shine allegedly gave inappropriate treatment to patients suffering from medical conditions that he failed to recognize. Shine had allegedly failed to properly diagnose and treat a patient who had choked on a banana and suffered cardiac arrest. He also allegedly failed to recognize that a patient was in diabetic coma and he, contrary to policy, transported the patient to the Center rather than calling in a Mobile Intensive Care Unit. An emergency room nurse discovered syringes on the patient and the patient was immediately given appropriate treatment. Holterman concluded that on both these calls Shine failed to exercise proper judgment. Holterman discussed the incidents with Shine and directed him to fill out incident reports (T147-T159; T184).

The third incident relied on by Holterman in concluding that Shine was not qualified to hold his E.M.T. position involved Shine's operation of an ambulance. While en route to a call, Shine's partner asked him if he knew where a piece of equipment was and Shine allegedly took his eyes off the road to look for it. He did this while driving through an intersection. His partner, who had also been looking for the equipment, glanced out the passenger window and noticed that a car was coming through the intersection. She screamed and Shine took evasive action but was unable to avoid a collision. Shine and his partner were unable to complete the call. Shine's partner wrote a report criticizing his actions and expressing her opinion that Shine had been negligent (T160-T163).

In addition to these three episodes, Holterman had received several complaints about Shine's performance from his collegues (other E.M.T.'s and paramedics) in the ambulance garage. Having concluded that Shine was unable to adequately perform as an E.M.T., Holterman wrote a letter to Doyle seeking Shine's removal (T163; T172; ER-1).

5. Soon after Doyle received this letter from Holterman, Doyle told Shine that he was being removed from his E.M.T. position. Shine then contacted William Sullivan, his Local 2254 shop steward. Sullivan told Shine that he would look into the matter. Sullivan met with Doyle and Holterman. He also talked to several employees in the ambulance garage, including everyone who had worked with Shine or had some knowledge about his performance.

Approximately thirty employees work in the ambulance garage and are relatively well-informed of each other's professional strengths and weaknesses. Although Shine was well-liked by his colleagues, they were critical of his performance. Sullivan talked to several employees who considered Shine to be dangerous. After completing his investigation, Sullivan discovered that he could not find any witnesses uncritical of Shine's performance. Sullivan tried to be delicate when he explained this to Shine. He suggested to Shine that perhaps he was just not meant to be an E.M.T. and should consider another type of work. According to Sullivan, Shine could not understand that he had done anything wrong on the three calls discussed above. Shine had reacted similarly to Holterman when Holterman had discussed the incidents with him (T101-T101; T112-T119; T159; T184).

6. In late February Shine had met privately with Doyle. Doyle explained that Shine was being removed from his E.M.T. position for substandard performance. (Shine temporarily had been reassigned as a dispatcher. Holterman was dissatisfied with Shine's performance as a dispatcher because he lacked clerical skills). Doyle also commended Shine for his dedication and attitude and expressed his intention to find Shine another position. Shortly after this meeting, another was arranged between Doyle, Sullivan and Shine. Another union representative attended the meeting but the record is unclear who that was. At this meeting Doyle offered Shine a position in the Center's storeroom. Shine discussed Doyle's

proposal with Sullivan. Sullivan told Shine that there was no chance of him getting his old job back. He encouraged Shine to take the storeroom position. After this discussion with Sullivan, Shine accepted the storeroom job (T103-T104, T163-T164, T182-T182).

It was Sullivan's understanding that an agreement had been reached whereby Shine would accept this new position and the Center would refrain from bringing disciplinary charges against Shine. This is corroborated by Doyle's testimony. Both Doyle and Sullivan thought the matter had been resolved (T104-T105; T187; T194).

7. Shine worked in the Center's storeroom for approximately two weeks. By that time he had decided that he did not like the job. He called Doyle and Local 2254 President Debbie Mason and requested a meeting. Shine met with Mason and Doyle in Doyle's office on March 14, 1984. Shine told Doyle that he was unhappy in the storeroom and that he wanted a hearing about his removal from the E.M.T. position. Doyle explained, several times, that because Shine was a provisional employee he was not entitled to a hearing. Doyle advised Shine that his choice was to remain in the storeroom position or be terminated. Shine told Doyle he no longer wanted the storeroom job. He apparently did not discuss his decision with Mason. When Shine left this meeting, he pleaded with Mason to get him a hearing. Doyle later gave Shine a notice of discharge citing his inability to perform the duties of an E.M.T. (T53; T129-T131, T189-T193).

8. Soon after the March 14, 1984 meeting, Shine made his first of several attempts to contact Mason by phone. He left several phone messages for Mason at Local 2254's office. Mason did not return his calls. On April 9, 1984, Shine wrote a letter to Mason stating that, "as of today, I feel I was terminated as an [E.M.T.] unjustly,... with this letter, I am requesting that a grievance be filed and an investigation into the matter be conducted...;" (T23-T26; CP-3).

Shine had addressed the letter to Mason in care of the Center. The return receipt was signed by Valerie Williams, a mailroom clerk. Mason testified that she never received the letter. The union took no further action on Shine's behalf.

The collective negotiations agreement between the Center and Local 2254 contains a grievance procedure that culminates in binding arbitration. Article 17.1 requires that grievances be filed within ten days of an occurrence.[3/] Shine's request to grieve his termination was dated April 9, 1984, approximately two weeks after the contractual time limit for filing grievances had expired (J-1).

9. Shine claims that he both accepted and left the storeroom position on the advice of Mason. He claims that he accepted the job only after Mason had told him to try it for a couple of weeks and, if he did not like it, she would "get him a

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3/ Section 17.3 of J-1 provides that an employee may "process his own grievance." The contract also contains a "just cause" provision.

hearing" about his removal from the E.M.T. position. Shine testified that when he left the stockroom position he thought that he would get his hearing (T82-T83; T23).

Mason claims that she first heard of Shine's problems from Sullivan at a monthly shop steward's meeting. She adds that she did not become personally involved with Shine's case until after he had accepted the position in the storeroom. She denies ever having told Shine that he would be entitled to a hearing if he left the storeroom (T126-T128).

There is contradictory testimony in the record about Mason's participation in Shine's decision to leave the Center. Shine contends that he accepted the storeroom job only after Mason assured him that if he did not like it, she would get him some kind of hearing. Mason flatly denies this. The weight of the evidence supports Mason on this point. The idea that Shine might take another position at the Center rather than simply being terminated originated at Shine's private meeting with Doyle in late February 1984. The idea took shape at the subsequent meeting between Shine, Doyle, Sullivan and another Local 2254 representative. The identity of the other union representative is unclear but I credit Sullivan's testimony that it was not Mason and that it was Sullivan that discussed with Shine Doyle's offer of the storeroom job. I further credit the testimony of Sullivan and Doyle that the agreement reached at that meeting was that Shine would take the new job and the Center would not file disciplinary charges. The agreement was

not conditioned on Shine's liking the new job. Shine's own testimony is inconsistent on the question. During cross examination he admitted that he first saw Mason after he had accepted the new job. But on redirect he reiterated that he took the storeroom job on Mason's assurance of obtaining a hearing for him if he was unhappy with the job (compare T47 and T76).

I find that Shine did not accept the storeroom position on Mason's advice or on the condition that if he did not like it he would be entitled to a hearing on his removal from the E.M.T. position.

The more difficult finding to make from this record is what assurances, if any, Mason made to Shine about the availability of a hearing after Shine had accepted the storeroom job. Part of the confusion stems from a lack of clarity about the type of hearing Shine expected. In his unfair practice charge Shine claims that the union failed to grieve his discharge. He also charges both the Center and Local 2254 with failing to inform him about his civil service status (C-1). Shine apparently thought that he was entitled to a civil service departmental hearing. Doyle was convinced that this is what Shine was seeking and Doyle repeatedly told Shine that he was not entitled to it (T192). Shine's own testimony is that he asked both Doyle and Mason for "a hearing." Mason testified that she thought the meeting scheduled for March 14, 1984 was the "hearing" that Shine had wanted (T130; T136). Until he wrote his letter to Mason, he never specifically asked the union to file a grievance.

There is no evidence in the record about any discussion between Shine and Mason at the March 14, 1984 meeting at which Shine declined to continue working in the storeroom. Shine testified that when he left that meeting he "begged" Mason to get him a hearing. The plea came after Doyle told him he could not have one. These two uncontroverted facts suggest that Shine could not reasonably have been assured of a hearing on the merits of his removal from the E.M.T. position at the time he left the March 14, 1984 meeting. Shine never testified about the circumstances under which Mason made her alleged promise; he testified only that she made it. Shine's testimony about Mason's alleged promises is both inconsistent and vague.[4/]

There is little specific evidence about Mason's conduct in representing Shine. There is no evidence that Mason apprised Shine about his situation at or before the March 14, 1984 meeting. Apparently no one explained to Shine the difference between the filing and processing of a grievance and a civil service departmental hearing. Mason did, however, appear at the March 14, 1984 meeting and prior to that had arranged a meeting with the head of security to see if Shine might fill a position in that department.

4/ The only specific evidence of Mason's involvement with Shine concerns a coincidental meeting they had in the storeroom. Shine told Mason he heard there was an opening in security. Mason replied that she would look into it. She subsequently arranged a meeting between Shine and the head of security and the head of security encouraged Shine to fight the Center's decision to remove him from the E.M.T. position.

The record does reveal that Local 2254 conducted an investigation and concluded that Shine could not successfully challenge his removal from the E.M.T. position. It is also clear that the union decided to deal with Shine's problem informally rather than through the grievance procedure. The union apparently never suggested that Shine file a grievance. Sullivan did tell Shine, however, that he had a bad case against the Center's decision to remove him from his E.M.T. position.

ANALYSIS

In his original charge, Shine alleges that he was discharged by the Center without just cause, that he asked Doyle and Mason for "a hearing pursuant to the grievance procedure contained in the collective bargaining agreement between the parties," and that Local 2254, "failed to file a grievance or otherwise contest the...discharge" (C-1). Shine subsequently amended his charge, adding that Local 2254 and the Center colluded in refusing him a hearing on his removal from the E.M.T. position; that they conducted no related investigation, failed to advise Shine of his civil service status, or provide him, "with written charges alleging the facts against him;" and that he was terminated because a supervisor did not like him. Shine also amended his charge to allege that Local 2254 failed to inform him that it would not process a grievance on his behalf (C-1).

In articulating this State's standard of a union's duty to fairly represent unit employees, the Commission has looked both to the Act and to compatible private sector case law. N.J.S.A. 34:13A-5.3 provides in part that:

> A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership.

In OPEIU, Local 153, P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983), the Commission discussed the appropriate standards for reviewing a union's conduct in investigating, presenting and processing grievances:

> In the specific context of a challenge to a union's representation in processing a grievance, the United States Supreme Court has held: 'A breach of the statutory duty of fair representation occurs only when a union's conduct towards a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Vaca v. Sipes, 386 U.S. 171, 190 (1967) ("Vaca"). The courts and this Commission have consistently embraced the standards of Vaca in adjudicating such unfair representation claims. See, e.g., Saginario v. Attorney General, 87 N.J. 480 (1981); In re Board of Chosen Freeholders of Middlesex County, P.E.R.C. No. 81-62, 6 NJPER 555 (¶11282 1980), aff'd App. Div. Docket No. A-1455-80 (April 1, 1982), pet. for certif. den. (6/16/82) ("Middlesex County"); New Jersey Turnpike Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979) ("Local 194"); In re AFSCME Council No. 1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978 [footnote omitted].
>
> We have also stated that a union should attempt to exercise reasonable care and diligence in investigating, processing and presenting grievances; it should exercise good faith in determining the merits of the grievance; and it must treat

> individuals equally by granting equal access to the grievance procedure and arbitration for similar grievances of equal merit. Middlesex County; Local 194. All the circumstances of a particular case, however, must be considered before a determination can be made concerning whether a majority representative has acted in bad faith, discriminatory, or arbitrarily under Vaca standards.5/ Id. at 13-14.

I conclude based on all the circumstances of this case that Local 2254 did not treat Shine's removal from the E.M.T. position and his subsequent termination from the Center in bad faith, arbitrarily or discriminatorily and therefore did not commit an unfair practice.

The union's first involvement with Shine occurred when he told Sullivan that he was being removed from the E.M.T. position. Sullivan's subsequent investigation was diligent. He knew that Shine was removed from his position for poor performance. Sullivan obtained the incident reports submitted by Shine and his collegues concerning the three calls discussed in finding No. 4. Sullivan discussed Shine's performance with most of Shine's collegues. Sullivan discovered that Shine's peers would not refute the Center's

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5/ The National Labor Relations Board has interpreted Vaca to mean that proof of mere negligence, standing alone, does not suffice to prove a breach of the duty of fair representation. See, e.g., Printing and Graphic Communication, Local 4 249 NLRB No. 23, 104 LRRM 1040 (1980); The Developing Labor Law, pp. 1326-28 (2d ed. 1983). Under Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Educational Secretaries, 78 N.J. 1 (1978) and Lullo v. International Ass'n of Firefighters, Local 1066, 55 N.J. 409 (1970), the Commission looks to NLRB decisions for guidance. [Footnote in original]

contention that Shine's performance was inadequate. Based on his experience as a Local 2254 shop steward, Sullivan concluded that Shine could not successfully challenge the Center's decision.

Sullivan found himself in an awkward position. He liked Shine. He did not want to have to tell Shine that, despite the enthusiasm and dedication he brought to his job, he simply lacked the skills vital to an E.M.T. Sullivan tried to be discreet. He told Shine that he had a bad case and that there was no way he was going to get his E.M.T. job back.

Sullivan also told Shine not to deal directly with the Center's administrators, that he should not meet with Doyle without union representation. Shine ignored him. He met with Doyle and there sprang the idea of Shine taking a new position. He first tried the dispatcher job but that did not work. Then, after the late February 1984 meeting and his discussion with Sullivan, Shine accepted the storeroom job.

At this point Sullivan had investigated and participated in informally resolving Shine's removal from the E.M.T. position. No formal charges had been brought, no grievances filed. Doyle and Sullivan thought the matter had been resolved. I find that Sullivan exercised reasonable care in investigating and determining the merits of Shine's problem and in its (albeit short-lived) informal resolution. Shine had a new position and the Center agreed not to file disciplinary charges. Sullivan's conduct can be characterized as reasonable.

The union's subsequent conduct is not praiseworthy, but does not rise to the level of an unfair practice. Mason coincidently met Shine in the storeroom. She must have become aware of the fact that Shine was unhappy with his new job because they discussed the possibility of Shine taking yet another position, this one in security. Mason arranged a meeting with the head of security, who suggested that Shine contest his removal from the E.M.T. position. Shine subsequently asked for the meeting that was held on March 14, 1984. Mason testified that she thought that this meeting was the "hearing" that Shine had wanted.

The disturbing aspect about this case is not what Mason did or allegedly did but what she did not do. She did not tell Shine precisely what his rights were as a provisional employee and she did not ascertain what Shine meant when he repeatedly asked for "a hearing." She apparently did not confirm or deny Doyle's statements to Shine about the unavailability of a departmental hearing. She did not respond to Shine's phone calls. She did not tell him that he could process his grievance personally.

In Trenton Educational Secretaries Ass'n, P.E.R.C. No. 86-146, 12 NJPER 528 (¶17198 1986), the Commission, addressed whether a union has an absolute duty to present the grievance of a unit member by virtue of the New Jersey Supreme Court's rulings in Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122 (1978) and Saginario v. Attorney General, 87 N.J. 480 (1981):

> Red Bank and Saginario do contain strong language which, read literally, would obligate a majority representative to present every grievance upon demand, but their holdings are signally different from the present issue. Red Bank held that an employer may not insist that an employee pursue his grievance personally when the majority representative wished to present and process that grievance. Saginario held that a public employee who might be adversely affected by a grievance's outcome is entitled to be heard at some point within the grievance procedures either through his majority representative or, if his position conflicts with the majority representative, through his personal representative or pro se. These cases establish that a majority representative may not be excluded altogether from a grievance procedure and, in some cases, individual employees may not be excluded from some stages of a grievance procedure. They involve, in short, cases of compelled exclusion from a grievance procedure, not compelled inclusion. Neither case answers the question of whether a majority representative may be forced to present every grievance, no matter how much and sincerely it opposes that grievance, no matter how lacking in merit it believes the grievance to be, and no matter how easily the employee may personally present the grievance. We believe that question is still open, although we doubt the answer is yes (emphasis original).

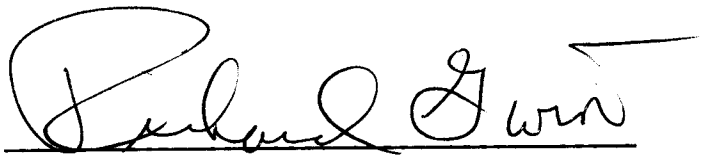
Although the Commission did not specifically rule on the question, it delivered a clear message.

I believe that this case provides an example of when a union does not have a duty to present a grievance after receiving a request to do so from a unit member. I attach little weight to the fact that Shine made his written request after the contractual time limits had expired. This fact is relevant but its significance diluted because the lateness of Shine's request may have been due, in part, to the union's failure to respond to his phone messages. Also, employers sometimes waive time limits.

I base my conclusion (that Local 2254 did not breach its duty to fairly represent Shine by failing to file a grievance) on its conduct prior to Shine's termination. The union had diligently investigated Shine's claim (that the Center removed him from the E.M.T. position without just cause) and found it without merit. It so advised Shine and assisted him in an informal resolution of his problem. By the time Shine decided to end his employment at the Center rather than continue working in the storeroom, there was nothing to be gained (from the Union's arguably reasonable point of view) in filing a grievance. I conclude that under these very limited circumstances, Local 2254's failure to file a grievance was not arbitrary, discriminatory or the result of bad faith. Its failure to advise Shine that it would not file a grievance on his behalf was also not arbitrary, discriminating or in bad faith. It had already informed Shine that his claim was unmeritorious. While Local 2254's failure to tell Shine that it would not file a grievance could arguably be characterized as negligent, the proof of mere negligence, standing alone, does not prove a violation of the duty of fair representation. (See footnote 5). The things that Local 2254 failed to do cannot be examined in a vacuum. The totality of the union's conduct must be considered. In view of all the facts of this case, I conclude that Local 2254 did not act arbitrarily, discriminatorily or in bad faith in its representation of Shine and therefore did not violate subsections 5.4(b)(1) and (5) of the Act.

Shine did not prove that the Center and Local 2254 colluded to deny him any rights guaranteed by the Act. It is unrefuted that the Center's decision to remove Shine from his E.M.T. position was based on safety considerations. There is no indication that the Center took any action against Shine based on his involvement in protected activity. I find that the Center did not violate section 5.4(a)(5) and, derivatively (1) of the Act be removing Shine from his E.M.T. position and later terminating his employment. Shine also failed to prove that the Center violated subsection 5.4(a)(7) of the Act. See New Jersey Turnpike Authority, PERC No. 81-64, 6 NJPER 560 (¶11284 1980).

Based on the above I recommend that the Complaint be dismissed.



Richard C. Gwin, Hearing Examiner

DATED: June 5, 1987

Trenton, New Jersey