

P.E.R.C. NO. 2001-48

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

AMALGAMATED TRANSIT UNION,
LOCAL 880 and NEW JERSEY TRANSIT,

Respondents,

-and-

Docket No. CI-H-99-66

JOSEPHINE CARROLL,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against the Amalgamated Transit Union, Local 880. The Complaint was based on an amended unfair practice charge filed by Josephine Carroll. The amended charge alleges that the ATU violated the New Jersey Employer-Employee Relations Act when it breached its duty of fair representation by failing to pursue the charging party's claim for reinstatement as a ticket agent at New Jersey Transit Bus Operations following her acquittal on criminal charges of official misconduct and theft. The Commission concludes, under all the circumstances, that ATU did not breach its duty of fair representation to the charging party after her acquittal on criminal charges.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

AMALGAMATED TRANSIT UNION,
LOCAL 880 and NEW JERSEY TRANSIT,

Respondents,

-and-

Docket No. CI-H-99-66

JOSEPHINE CARROLL,

Charging Party.

Appearances:

For the Respondent, ATU, Weitzman & Weitzman, attorneys
(Richard P. Weitzman, of counsel)

For the Charging Party, Holston, MacDonald, Uzdavinis &
Ziegler, attorneys (William F. Ziegler, of counsel)

DECISION

On April 5, 1999, Josephine Carroll filed an unfair
practice charge against Amalgamated Transit Union, Local 880 (ATU)
and New Jersey Transit.^{1/} On July 6, Carroll amended her charge
against ATU. The charge, as amended, alleges that ATU violated
the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1
et seq., specifically 5.4b(1), (3) and (5),^{2/} when it breached

^{1/} Carroll's employer was actually New Jersey Transit Bus
Operations (NJTBO), a subsidiary of New Jersey Transit.

^{2/} These provisions 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

its duty of fair representation by failing to pursue Carroll's claim for reinstatement as a ticket agent at NJTBO following her October 5, 1998 acquittal on criminal charges of official misconduct and theft. The amended charge also alleges that NJT violated N.J.S.A. 34:13A-5.4a(1), (3) and (7),^{3/} when it failed to reinstate Carroll following her acquittal.

On September 8, 1999, a Complaint and Notice of Hearing issued. On September 30, an amendment issued.

On October 1, 1999, ATU filed its Answer denying that it had breached its duty of fair representation or that NJTBO had breached its collective negotiations agreement with ATU by not reinstating Carroll. By way of affirmative defense, ATU asserts that it could not take any action on Carroll's behalf because NJTBO would not waive the contractual time limit to allow a grievance to proceed to binding arbitration.

2/ Footnote Continued From Previous Page

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."

3/ These provisions 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. (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."

On January 14, 2000, NJTBO moved for summary judgment. On February 10, ATU responded that if NJTBO is no longer joined as a party, ATU could not see how the matter could properly proceed against ATU alone.

The motion was referred to Hearing Examiner Regina Muccifori. On January 16, 2000, she granted the motion. H.E. No. 2000-12, 26 NJPER 300 (¶31121 2000). She found that any breach of contract claim against NJTBO had to be pursued in another forum.^{4/} After the Hearing Examiner left the Commission's employ, the case was transferred to Hearing Examiner Kevin St. Onge.

At a pre-hearing conference, Carroll requested that the Hearing Examiner decide whether ATU breached its duty of fair representation by failing to offer her assistance following her acquittal. A hearing was held on August 15, 2000. The parties entered into stipulations, examined witnesses, and introduced exhibits.

After the charging party's case-in-chief, ATU moved to dismiss the Complaint. The motion was denied. ATU renewed its motion at the close of the hearing, but the Hearing Examiner directed the parties to address the issues in their post-hearing briefs.

On December 15, 2000, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 2001-14, 27 NJPER 48 (¶32024

^{4/} The Hearing Examiner's decision was interlocutory. In the absence of exceptions, we adopt her recommendation to dismiss the allegations against NJTBO.

2000). He found that Carroll was not a public employee at the time she requested her former union to represent her interests. He further found that even if she were, the union minimally satisfied its obligation to her by advising her that she was no longer entitled to representation and by, nevertheless, making investigative efforts on her behalf.

On December 27, 2000, Carroll filed exceptions. She argues that the Hearing Examiner erred in concluding that she was not a public employee entitled to the protections of the Act at the time of her acquittal. She further argues that the Hearing Examiner erred in concluding that ATU minimally satisfied its obligation to represent her.^{5/} ATU has not filed an answering brief.

We have reviewed the record. We adopt and incorporate the Hearing Examiner's undisputed findings of fact (H.E. at 5-21).

N.J.S.A. 34:13A-5.3 empowers a majority representative to negotiate on behalf of all unit employees and to represent all unit employees in administering the contract. With that power comes the duty to represent all unit employees fairly in negotiations and contract administration. The private sector standards for measuring a union's compliance with the duty of

^{5/} The charging party requests oral argument. We deny that request. Her arguments are fully explored in her exceptions and attached post-hearing brief.

fair representation were articulated in Vaca v. Sipes, 386 U.S. 171 (1967). Under Vaca, a breach of the duty of fair representation occurs only when a union's conduct towards a member of the negotiations unit is arbitrary, discriminatory, or in bad faith. Id. at 191. That standard has been adopted in the public sector. Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976); see also Lullo v. IAFF, 55 N.J. 409 (1970); OPEIU Local 153, P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983). The duty of fair representation does not require a union to process non-meritorious grievances. Carteret Ed. Ass'n, P.E.R.C. No. 97-146, 23 NJPER 390 (¶28177 1997); Camden Cty. College, P.E.R.C. No. 88-28, 13 NJPER 755 (¶18285 1987).

Under all the circumstances, we agree with the Hearing Examiner that the ATU did not breach its duty of fair representation to the charging party after her acquittal on criminal charges. Accordingly, we dismiss the Complaint.^{6/}

On March 8, 1997, Carroll was terminated for failure to deposit company funds and account for company funds. A grievance contesting the discharge was filed, but denied. On June 10, 1997, ATU's membership voted not to submit the grievance to arbitration.

^{6/} In light of our determination on the merits, we neither adopt nor address the Hearing Examiner's conclusion that Carroll was not a public employee subject to the protections of the Act at the time of her acquittal.

In addition to and separate from her termination, Carroll was indicted on criminal charges of official misconduct and theft by failure to make a required disposition. On October 5, 1998, she was acquitted of the criminal charges after a trial. She then contacted ATU and NJTBO seeking reinstatement under Section 1B of the contract. That section provides:

When employees are called into the office on a charge or charges, they shall answer to such charge or charges only, provided that when complaints are made by Company officials that the employee is personally notified within 72 hours of the alleged offense, except in registration cases, the employee's two (2) days off will not be included in the computation of the 72 hours. The notice of hearing shall include the time of the incident or infraction.

Entries will not be placed against the discipline record of any employee until such employee has been given a hearing and the charge or charges have been proven. Employees shall not be suspended for incivility, minor violations or accidents, until full investigation by the Company and the Union determine the facts of the case. Where existing laws automatically provide for suspension of driver's license, they will, of course, be observed. Due consideration shall be given to the record of the employee for the past five (5) years, when determining proper discipline.

When employees are notified by written notice to come to the office to answer any charge or charges, it may be at the completion of their day's assignment, or on their swing, or before the start of their midday or night assignment, or at the completion of an a.m. tripper. When discipline is applied, any suspension or termination of service shall be effective immediately. When an employee is not permitted to start work or finish assignment, that day shall be applied to discipline. Suspensions shall cover consecutive days.

A copy of the violation slip that spells out the discipline applied by the Supervisor or Company official at the first step of the grievance procedure shall be given to the Union representatives, who shall then make a signed acknowledgment that they have received a copy.

When it is established that employees are innocent of charges against them, they shall be reimbursed for lost time as the result of a suspension or discharge. [Emphasis added]

ATU initially responded that it believed that Carroll was no longer a union employee. Nevertheless, ATU contacted NJTBO and was advised that Carroll was terminated for failure to account for deposits, not theft, and that the 90-day period within which to seek arbitration had expired on Carroll's initial grievance contesting her discharge. Unfortunately, ATU never returned Carroll's telephone inquiry or otherwise reported on its contacts with NJTBO about her case.

NJTBO responded to Carroll that her request for reinstatement was denied since there had been no finding of innocence as to the charges for which her employment was terminated.

Carroll's attorney wrote to the ATU; those letters were referred to the ATU's attorney. The attorney responded that ATU did not agree that Section 1B entitled Carroll to reinstatement, but that it would resubmit the arbitration request to the membership if Carroll were to get NJTBO's consent to waive contractual time limits.

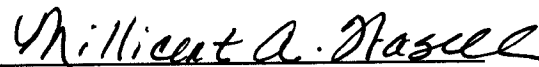
We cannot find that the ATU's decision was arbitrary, discriminatory, or taken in bad faith. Its contractual interpretation in light of Carroll's situation was not unreasonable -- Carroll was discharged for different reasons than those she was acquitted of in the criminal proceeding and the contract article appears to be speaking of disciplinary charges rather than criminal charges.

We note that ATU's initial response was that it no longer considered Carroll a union employee. That response is troubling because it was an ATU representative who suggested to Carroll that she discontinue paying dues after her termination. In addition, Local 880's president's failure to return Carroll's telephone calls is troublesome. We believe, however, that ATU satisfied its duty to represent her fairly by subsequently contacting NJTBO about Carroll's case, corresponding with her attorney, and taking a position on the contractual merits that was not unreasonable. Accordingly, we dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed.

DATED: February 22, 2001
Trenton, New Jersey
ISSUED: February 23, 2001

H.E. NO. 2001-14

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

In the Matter of

AMALGAMATED TRANSIT UNION,
LOCAL 880,

Respondent,

-and-

Docket No. CI-H-99-66

JOSEPHINE CARROLL,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends dismissal of an unfair practice charge alleging violations of the duty of fair representation finding that Charging Party was not a public employee at the time she requested her former union to represent her interests. Even if the union had a duty, it minimally satisfied its obligation by advising her that she was no longer entitled to representation and yet still made investigative efforts on her behalf.

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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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

In the Matter of

AMALGAMATED TRANSIT UNION,
LOCAL 880,

Respondent,

-and-

Docket No. CI-H-99-66

JOSEPHINE CARROLL,

Charging Party.

Appearances:

For the Respondent, ATU Local 880, Weitzman & Weitzman,
attorneys (Richard P. Weitzman, of counsel and on the
brief)

For the Charging Party, Holston, MacDonald & Uzdavinis,
attorneys (William F. Ziegler, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On April 5, 1999, Josephine Carroll (Charging Party or
Carroll) filed an unfair practice charge against Amalgamated Transit
Union, Local 880 (ATU) and New Jersey Transit (NJT). On July 6,
1999, Carroll filed an amendment to her charge against ATU. The
charge and amended charge allege that ATU violated 5.4b(1), (3) and
(5) of the of the New Jersey Employer-Employee Relations Act,
N.J.S.A. 34:13A-1 et seq. (Act)^{1/} when it breached its duty of

^{1/} These provisions prohibit employee organizations, their
representatives or agents from: "(1) Interfering with,

fair representation by failing to pursue Carroll's claim for reinstatement as a ticket agent at NJT following her October 5, 1998 acquittal on criminal charges of official misconduct and theft. She contends ATU's failure to seek reinstatement violated section 1B of the ATU/NJT^{2/} collective negotiations agreement (the parties' collective agreement).^{3/} The charge and amended charge also allege that NJT violated provisions 5.4a(1), (3) and (7)^{4/} of the Act when it failed to reinstate Carroll following her acquittal.

1/ Footnote Continued From Previous Page

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."

2/ The charge refers to NJT, however, ATU's collective negotiations agreement is with New Jersey Transit Bus Operations, Inc. (NJTBO), a distinct subsidiary of NJT. NJT and NJTBO may be used interchangeably herein but both refer to Carroll's employer.

3/ The operative language of the agreement in dispute is as follows: "[w]hen it is established that employees are innocent of charges against them, they shall be reimbursed for lost time as the result of a suspension or discharge." The full text of the applicable section of the agreement is set-forth below at Finding of Fact 17.

4/ These provisions 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. (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."

The Complaint was initially issued on September 8, 1999, however it inadvertently omitted Charging Party's July 6, 1999 amended unfair practice charge. Thus, on September 30, 1999, the Director of Unfair Practices issued an amended Complaint and Notice of Hearing.

On October 1, 1999, ATU filed its Answer denying it breached any duty of fair representation owed to Carroll and denying it violated the parties' collective agreement. ATU denies it failed to assist Carroll in her request for reinstatement and denies that any action it took or did not take following Carroll's acquittal constitutes a violation of any legal obligation owed to her. ATU asserts that Carroll's amended charge fails to state any violation of law and claims that even assuming it had an obligation to represent her following her acquittal, it could not take any action on her behalf without NJT's agreement to waive contractual time limitations to allow a grievance to proceed to arbitration. It asserts that since NJT refuses to waive such limitations it alone bears any liability to Carroll.

On January 14, 2000, NJT filed a motion for summary judgment.

On February 10, 2000, ATU advised that "[w]hile we take no position with regard to the above motion, it has been (and will continue to be) asserted, on behalf of the Union, that the Complaint fails to state a valid claim against the Union. While this is so even with the former employer joined as a party, if the motion of

N.J. Transit should be granted, then, under applicable law, we fail to see how, in any event, the matter can properly proceed against the Union alone."

On June 16, 2000, NJT's motion was granted. Carroll's claims against it were dismissed for, among other reasons, Carroll's lack of standing to raise breach of contract claims before the Commission as between NJT and ATU; such claims have to be pursued in another forum. New Jersey Transit (Carroll), H.E. 2000-12, 26 NJPER 300 (¶31121 2000).

A pre-hearing telephone conference was conducted on August 9, 2000. Pursuant to N.J.A.C. 19:14-6.3(a)(10) Carroll requested the Commission decide whether ATU breached its duty of fair representation by failing to offer her assistance following her October 1998 acquittal. If the Commission so found, she requested the Commission direct ATU to represent her and/or pay counsel fees related to an action at law filed, or to be filed, against NJTBO. A hearing was held in this matter on August 15, 2000^{5/} during which the parties entered stipulations, presented witnesses and submitted exhibits.^{6/}

After Charging Party's case-in-chief, ATU moved to dismiss the allegations contending the following:

^{5/} Transcript references shall be as follows (T__).

^{6/} Exhibit designations are as follows: C - Commission, CP - Charging Party, R - Respondent and J - Joint.

1. As of the date of her acquittal, October 5, 1998, Charging Party was neither a public employee nor a member of ATU, thus, not entitled to the protections of the Act.

2. Charging Party failed to establish the meaning of section 1B of the collective agreement and even if it had, Charging Party's interpretation of the clause is insufficient to create a duty for ATU to represent her under the circumstances of this case.

3. The basis of Charging Party's dismissal were separate and distinct from the basis of the criminal charges and her subsequent acquittal (T126-T135).

The motion was denied (T138-T140). At the close of the hearing ATU renewed its motion and the parties were directed to address arguments thereon in their respective post hearing briefs (T179-T184). Following extensions of time, briefs were submitted by November 16, 2000. Based on the entire record, I make the following:

FINDINGS OF FACT

1. Josephine Carroll was employed by NJTBO as a ticket agent at various locations for seventeen (17) years (T30). She was also a dues paying member of ATU for seventeen years and actively participated in the union by attending meetings when her schedule allowed (T30-T31).

Before the events giving rise to this matter Carroll's only other disciplinary incident related to her participation in, and support of, a "Greyhound" strike. She was "written-up" three times one day and suspended three days. ATU grieved the suspension to the third step of the grievance procedure and she was reinstated (T31-T32).

2. On March 3, 1997, Carroll was working an overnight shift as a ticket agent/inspector B at the Atlantic City bus terminal. As a ticket agent Carroll was provided a \$3,000.00 cash drawer to start her shift selling tickets. At the end of the shift she was responsible for reconciling her drawer with a machine that produces a print-out of her ticket sales. She was responsible for counting the money received for tickets, placing it in a money bag and placing the bag in a safe (T32-T33).

The money room where the reconciling occurs is a secure room requiring an access card for entry (R-2). It is monitored by a time-lapsed video recording machine. The safe is a two chamber device - the bag is placed into a top section which closes around it then when a lever is pulled, it falls into a locked chamber (T82).

At some point before leaving for the day Carroll left the terminal without authorization to run a personal errand at home (T109). She left her cash drawer locked in the ticket office while away (T109). She then returned, counted her drawer and left for the day around 8:00 a.m. (T108, T110). At 12:15 or 12:30 p.m. she was called by a co-worker who advised that her deposit bag had disappeared. Carroll then returned to the terminal to look for it (T33-T34).

By 4:00 p.m., NJT Investigator, Robert LaForte responded to the terminal (T34-T35). Terminal Supervisor Mary Lou Hagen provided LaForte with a list of all employees (except Hagen) who were in the office area at the time the deposit bag disappeared (T39).

Carroll's car and the terminal area were searched. By 7:35 p.m. ATU Local President Joseph Ripa and Carroll had viewed a time-lapsed video tape of the counting room. The tape was inconclusive as to Carroll's conduct and/or the location of the deposit bag (T35, T102, T111-T114).

Carroll's supervisor, Hagan, issued an Employee Notice recording the date and time of the incident and directing Carroll to report to her office with union representation for a first step grievance hearing regarding "FAILURE TO DEPOSIT COMPANY FUNDS; FAILURE TO ACCOUNT FOR COMPANY FUNDS" (J2, T35-T37).

3. On March 8, 1997, Hagan conducted a first step grievance hearing pursuant to the parties' collective agreement. The parties' collective agreement contains a four-step grievance procedure with arbitration as the fourth step (J-1, Section 1A, p.3, J-3). Carroll attended the hearing with ATU representative John Shinn (T37). Hagan found Carroll failed to account for the location of her night's deposit and failed to deposit her receipts of \$2,816.65. The "Action Taken" section of the Employee Incident Report recording the hearing states: "Discharge. 10 days to pay amount back. 2nd Step Req." (J-3, CP-6, CP-7, R-1, R-2, R-3).

It is not clear whether it was on March 8th or later during the grievance process, but at some point Carroll asked Hagan whether she could repay the money and retain her job. Hagan shrugged her shoulders indicating "there's no guarantee" and "probably not" (T37-T38).

Within a year of Carroll's discharge Hagan was also terminated for missing money. Carroll, therefore, believes Hagan may have been responsible for the March 3, 1997, missing money (T39).

4. On March 27, 1997, following a second step grievance hearing, Director of Transportation John L. Broome upheld the discharge (R-2). He prepared a memo to the file memorializing the hearing as follows:

Persons Present: Inspector "B" Jossie Carroll and President of Local 880 Mr. Joe Ripa.

On Wednesday, March 12, 1997, I held a second step hearing with Jossie Carroll who was grieving a discharge for "Failure to account for Company funds."

Jossie Carroll was working as a ticket agent on March 2, 1997, starting at 11:00 PM. She was scheduled to work until 7:00 AM on March 3, 1997. Her ticket sales for that day were \$2,816.65. Ms. Carroll left the Terminal at 6:45 AM unauthorized to do an errand at home. She returned at 7:19 AM to count her receipts for her day's work. At 7:42 AM Ms. Carroll left the Terminal. At 12:00 noon Princeton Armored Car Service came to pick up the receipts for the previous day's work including the 11:00 PM to 7:00 AM shift. When Ticket Agent Ann Katona emptied the safe, Jossie Carroll's money was not in the safe. At 12:30 PM, Supervisor Mary Lou Hagan and Jossie Carroll searched the vault room, ticket office, trash cans, and the trash dumpsters. The money could not be found.

On March 8, 1997, a first step hearing was held and Terminal Supervisor Mary Lou Hagan terminated the grievant for "Failure to account for Company funds", and "Failure to deposit Company funds". Ms. Hagan also instructed the grievant to pay the short back within ten days.

At the second step, Ms. Carroll said that she did not steal the money. She said that she would even see a hypnotist to see where she put the

money. She said she had thought about the money and tried to remember what happened. She again said that she did not steal the money.

I pointed out that no one had accused her of stealing the money-that she was being charged with failure to account for the money. I also told her that it was her responsibility to secure all Company money, and that it was her responsibility to pay it back.

Jossie Carroll felt that she did not take the money so it was not her responsibility to pay it back. Mr. Ripa reminded Jossie that it was her responsibility.

Mr. Ripa said that he saw the tape along with Jossie, and it looked to him like the money was accidentally knocked into the trash can.

I pointed out that the dumpsters were searched by the Terminal Workers, Terminal Supervisor, Jossie and the NJ TRANSIT [sic] Police. Nothing was found.

Mr. Ripa said that he would like to review the tape again. I adjourned the hearing to review the tapes along with Mr. Ripa.

On March 26, 1997, Mr. Ripa, Bob LaForte, Steve Donato, and I reviewed the tapes again. Attached are the times and activities in the vault room that were observed from the tape.

We continued the second step hearing on March 26, 1997, with Jossie Carroll being present. There was not much more to add after seeing the tape except to confirm that we all saw the money on the desk and two seconds later, it was gone with Jossie sitting at the desk. After searching the area, the money could not be found.

I pointed out again that it is the grievant's responsibility to be accountable for the money and because she cannot account for it, I am upholding the decision made at the first step.

Mr. Ripa said he would like to see the tape again and the access card report that shows who goes in and out of the vault room.

He would like the grievant present. I told Mr. Ripa that he would have to discuss that with the third step hearing officer. [R-2].

Carroll agrees that Broome's recitation of the conduct of the hearing is generally accurate with two exceptions: (1) She does not agree with Broome that she was responsible to repay the money; and (2) she does not believe video tapes of the counting room were viewed at the second step hearing - she believes they were viewed at the third step hearing (T86-T92).

5. On April 4, 1997, a summons and complaint was issued charging Carroll with official misconduct in violation of N.J.S.A. 2C:30-2 and theft by failure to make required disposition of property received in violation of N.J.S.A. 2C:20-9 (criminal charges) (CP-1, CP-2, T40).

6. On April 6, 1997, Carroll applied to the New Jersey Department of Labor to claim unemployment benefits (CP-7, CP-8).

7. Carroll was arrested April 7, 1997 on the criminal charges (CP-4).

8. On April 9, 1997, Manager of Labor Relations Frank L. Jones, following a third step grievance hearing, upheld the discharge (R-3). He prepared an April 11, 1997 memorandum of the hearing stating as follows:

On April 9, 1997, I held a Third Step Hearing at the request of Local #880 of the Amalgamated Transit Union on behalf of Ms. Jossie Carroll, E#27458, a Inspector "B" at the Atlantic City Bus Terminal. Ms. Carroll is grieving her "Discharge" for (1) Failure to deposit Company receipts, (2) Failure to account for \$2,816.65 of Company receipts.

Present were the grievant, Ms. Carroll, her Union representative, Mr. Joseph Ripa, President of Local #880, and myself.

On March 2, 1997, the grievant started her scheduled work assignment at 11:00 p.m. at the Atlantic City Bus Terminal, and worked until 7:00 a.m. March 3, 1997. The grievant's ticket sales for her shift were \$2,816.65. The grievant failed to deposit her day's receipts, and could not account for the receipts.

The grievant was issued a notice to report for a first step hearing. On March 8, 1997, the hearing was held. The grievant was discharged for the above noted violations and instructed to repay the \$2,816.65 within ten (10) days of the hearing.

I informed the grievant and Mr. Ripa that the hearing would relate to the charges of failure to deposit Company funds, and failure to account for Company funds. I stated it was my understanding that there was a security tape that had been viewed by the grievant and Union taken on the vault room activities.

I felt there was no need for me to review this tape.

Mr. Ripa stated the grievant and he viewed the tape, and suggested the money bag may have been accidentally knocked into the trash can, and someone could have picked it up.

Mr. Ripa stated the Union was requesting the grievant be reinstated with time served as a suspension.

The grievant stated she counted her money, put it into the money bag but does not remember what she did with the money bag.

A discussion followed in which the grievant suggested that someone may have taken the bag.

I asked the grievant if she had paid any of the money back to the Company. The grievant said she felt that she did not have a job, and she didn't take the money, therefore, it was not her responsibility to pay the money.

I informed the grievant that she sold \$2,816.65 in tickets, it was her responsibility to be accountable for this money, and as Ticket Agent it was her responsibility to deposit Company funds at the end of her shift.

I informed the grievant that her failure to account for the \$2,816.65, and her failure to deposit this money, were just cause for these charges and her discharge.

I stated this grievance was denied at the Third Step.

Mr. Ripa then requested that the grievant be allowed to review the tape one more time. I informed him I would allow them to review the tape, but it would have to be reviewed at the Washington Township garage.

At Washington Township garage the tape was reviewed. Present were Mr. Ripa, the grievant, Investigator Bob LaForte, New Jersey Transit Police, Mr. Steve Donato, Supervisor of Washington Township garage, and myself.

The tape was reviewed for 45 minutes, after which the grievant stated "now I know where the money is". The grievant said she had the money bag in one hand, and an ash tray in the other, went into the lunch room to empty the ash tray, put the money bag on one of the tables and emptied the ash tray. The grievant said she must have left the bag on the table, noting there were five or six employees in the lunch room, and maybe one of them took the bag.

I noted the following: (1) Why would she take the money bag out into the lunch room, (2) she passed the safe going out the door, why not deposit the money then, and (3) if she had the money bag in one hand and the ash tray in the other, how do you open a door?

As previously stated, the grievance was denied at the Third Step. [R-3].

Carroll agrees that Jones' memorandum is substantially accurate but she does not agree that she was directed to repay the missing money

and questioned whether the sequence of viewing the tapes was correct (T98-T108).

9. On April 28, 1997 Carroll was disqualified from unemployment compensation benefits on the grounds that she was discharged for gross misconduct (CP-7). She appealed to the Department of Labor Division of Programs Appeal Tribunal and on May 20, 1997 Appeals Examiner Barry Cavileer found the following:

The testimony of the claimant is credible. As she did not intentionally take or lose the deposit bag, it must be concluded that the claimant was not discharged for a crime and the discharge was not for gross misconduct connected with the work.

The claimant was clearly negligent in not taking the necessary steps to secure the funds of the employer. Her discharge was for negligence which constituted regular misconduct connected with the work. The claimant is disqualified for benefits under N.J.S.A. 43:21-5(b) as of 3/2/97 through 4/12/97.

The Deputy will initially determine the claimant's eligibility for periods subsequent to 4/12/97.

DECISION:

The claimant is disqualified for benefits under N.J.S.A. 43:21- 5(b) as of 3/2/97 through 4/12/97 as she was discharged for regular misconduct connected with the work and not for gross misconduct connected with the work.

The determination of the Deputy is modified.
[CP-7].

10. In early June 1997, Carroll requested the ATU Executive Board submit her termination grievance to arbitration; the fourth step of the grievance procedure. The Executive Board

endorsed her application and referred it to the full membership for a vote (T44, T79).

11. On June 10, 1997 a majority of the ATU membership voted in favor of forwarding Carroll's grievance to arbitration but she was two votes short of the two-thirds needed under the ATU's local procedures (T45, T79, T126). Ripa knew before the membership voted on Carroll's arbitration request that she was being charged with crimes (T169). Also, the membership and Executive Board were aware of the criminal charges then pending against Carroll (T45, T169-T170).

According to Ripa, there have been "many" grievances filed by the ATU on behalf of members in discharge cases and many of those have been approved to go to arbitration (T146- T147). Ripa described two cases in which members were terminated by NJTBO and charged with crimes but arbitration proceedings went forward with varying results. In one case, an ATU member was terminated by NJTBO for conduct unbecoming related to falsification of mortgage documents. The member was found guilty of the related criminal conduct but ATU prevailed in arbitration. Conversely, in a different case, an ATU member was charged then acquitted of driving while intoxicated. The member was discharged by NJTBO. ATU pursued reinstatement through arbitration following acquittal but the arbitrator ruled the company was justified in discharging the employee (T155-T157).

12. Carroll was indicted June 18, 1997 on the criminal charges (CP-4; T40, T41). The indictments charged, in relevant part, as follows:

Count One

. . . .
Josephine Carroll, a public servant employed by the New Jersey Transit Bus Operations, Inc., with purpose to obtain a benefit for herself or another valued in excess of \$200.00, did commit an act or acts relating to her office but constituting an unauthorized exercise of her official functions, knowing that such act or acts were unauthorized or that she was committing such act or acts in an unauthorized manner, contrary to the provisions of N.J.S. 2C:30-2, and against the peace of this State, the Government and dignity of the same.

N.J.S. 2C:30-2
Official Misconduct
Second Degree

Count Two

. . . .
Josephine Carroll, having purposely obtained or retained property of New Jersey Transit Bus Operations, Inc. valued in excess of \$500.00, upon agreement or subject to a known legal obligation to make specified payment or other disposition of said property, did deal with said property as her own and failed to make the required disposition, contrary to the provisions of N.J.S. 2C:20-9, and against the peace of this State, the Government and dignity of same.

. . . .
N.J.S. 2C:20-9
Theft by failure to make required disposition
Third Degree [CP-3, CP-4].

13. Carroll stopped paying union dues after April 1997. ATU officials led her to believe that if she was reinstated, she could repay her dues for the period of absence through a union "per capita tax" (T61-T62, T74-T77, T146-T147, T176).

14. On July 14, 1997, Carroll pled not guilty to the criminal charges (CP-4, T41).

15. Carroll was acquitted October 5, 1998 on the criminal charges in Atlantic County Law Division Criminal Court (CP-4).

16. The week after her acquittal Carroll called the ATU. She advised ATU Secretary/Treasurer Frank Beaber that she was acquitted and wanted her job back. She requested ATU assistance pursuant to the parties' collective agreement - specifically section 1B (T60, T149, T161). Beaber's reply was that "it was basically the union's belief that [she] she was no longer a union employee [sic]." Beaber advised, however, that he would pass her message along to ATU Local President Ripa. Carroll had no further conversations with any ATU representatives after speaking with Beaber (T60-T61, T64).

17. On October 15, 1998 Carroll wrote to NJT demanding reinstatement to her former position with reimbursement for lost time and related benefits (CP-5). Carroll claimed she was entitled to such relief based on Section 1B of the parties' collective agreement and court cases (CP-5, T64-T65). Section 1B of the parties' collective agreement concerning discipline provides, in relevant part,

When employees are called into the office on a charge or charges, they shall answer to such charge or charges only, provided that when complaints are made by Company officials that the employee is personally notified within 72 hours of the alleged offense, except in registration cases, the employee's two (2) days off will not be included in the computation of the 72 hours. The notice of hearing shall include the time of the incident or infraction.

Entries will not be placed against the discipline record of any employee until such employee has been given a hearing and the charge or charges have been proven. Employees shall not be suspended for incivility, minor violations or accidents, until full investigation by the Company and the Union determine the facts of the case. Where existing laws automatically provide for suspension of driver's license, they will, of course, be observed. Due consideration shall be given to the record of the employee for the past five (5) years, when determining proper discipline.

When employees are notified by written notice to come to the office to answer any charge or charges, it may be at the completion of their day's assignment, or on their swing, or before the start of their midday or night assignment, or at the completion of an a.m. tripper. When discipline is applied, any suspension or termination of service shall be effective immediately. When an employee is not permitted to start work or finish assignment, that day shall be applied to discipline. Suspensions shall cover consecutive days.

A copy of the violation slip that spells out the discipline applied by the Supervisor or Company official at the first step of the grievance procedure shall be given to the Union representatives, who shall then make a signed acknowledgment that they have received a copy.

When it is established that employees are innocent of charges against them, they shall be reimbursed for lost time as the result of a suspension or discharge. [J-1, Section 1B, pp. 6-7] (emphasis added).

18. At some point after Carroll's October 1998 call to Beaber, Ripa called NJT's Director of Labor Relations David McDade to inquire about the company's position on Carroll's acquittal and reinstatement request (T149). McDade advised Ripa that Carroll was terminated for failure to account for deposits, not theft, and he noted that the 90-day period within which to seek arbitration had long-since expired on Carroll's third step grievance (J-1, Section 1A, p. 5, T150). Ripa spoke to McDade a second time and was advised that the criminal charges were filed by the NJT police, a separate entity from NJTBO and that it was NJTBO which terminated Carroll (T151).

19. Ripa contends he tried calling Carroll "a couple times" or "two or three times" but never spoke to her. He says he never got an answering machine (T151, T175, T176). Conversely, Carroll contends she had an answering machine and caller identification but never received any calls from Ripa (T178). She says she "made sure that everything was in working order because [she] didn't want him to use that as an excuse." (T178).

I credit Carroll's testimony on this point as being more consistent with contemporary lifestyles - people have and use answering machines and Carroll, doubtless, was eager to hear from the ATU. Moreover, Ripa offered no explanation for why, when he allegedly could not reach Carroll by telephone, he did not send her a letter explaining his attempts to call her. Also, it is suspicious that Ripa offered no explanation for why he called NJT

first, after receiving Beaber's message that Carroll called. He did not seek legal advice from his own ATU counsel until March 1999, 5 months later (T152, T162) (Finding of Fact 22). While there is independent evidence tending to support Ripa's statement that he called McDade, (Findings of Fact 20 and 23), there is no corroborating evidence supporting his statement that he attempted to contact Carroll. I find that he did not.

20. By letter dated November 4, 1998, NJT Vice President and General Manager Maureen Milan denied Carroll's October 15, 1999 request for reinstatement. She explained,

I have reviewed your file, and it appears that your employment was not terminated because of the charge of theft, but was terminated for failure to deposit company receipts and failure to account for company receipts.

Since there has been no finding of innocence as to the charges for which your employment was terminated, your request for reinstatement must be denied [CP-6].

21. On March 4, 1999, Carroll, through counsel, wrote to NJT again requesting reinstatement and reimbursement for her lost time as a result of her discharge and, absent such relief, requested a third-step grievance hearing (R-4).

22. Five months after Carroll was acquitted her attorney, Richard E. Yaskin, wrote to Ripa and NJT (R-4, R-5, R-9). Referring to section 1B of the collective agreement, he requested ATU and NJT honor the "plain meaning" of its terms and reinstate Carroll. Ripa referred the letters to ATU counsel for legal advice (T152-T154). Additionally, Ripa verbally advised Yaskin the matter was being

referred to ATU counsel (T154). Ripa offered no explanation for why, after receiving Carroll's message in October 1998, he did not seek legal advice from ATU counsel until after receipt of these letters in March 1999 (T162).

On March 16, 23 and 29, 1999, Attorney Yaskin and Attorney Richard Weitzman exchanged correspondence regarding ATU's duties to Carroll following her October 1998 acquittal (R-6 - R-8). They disagreed over interpretations of section 1B of the collective agreement, the validity of the 1997 vote not to proceed to arbitration, the effect of the 90-day limitations period in which to request arbitration and whether ATU or Carroll should secure NJTBO's waiver to the 90-day filing period (R-6 - R-8).

23. On March 26, 1999, NJT again denied Carroll's request for reinstatement, stating:

The basis for Ms. Carroll's discharge was her failure to account for company receipts in the amount of \$2,816.65. The fact that she was acquitted of criminal charges does not absolve her of her responsibility to account for company receipts. [R-9].

NJT also denied Carroll's request for a second third-step grievance hearing, noting that a third step hearing had previously been held in April 1997. NJT further explained that under the grievance procedure, a fourth-step hearing (arbitration) must be requested within 90 days after the dispute or grievance arose and that since the ATU failed to request a fourth-step hearing for Carroll within the contractual time period, Carroll is not now entitled to continue the grievance (R-9).

24. ATU contends that if NJT agrees to waive the 90-day limitations period to request arbitration, it will resubmit Carroll's claims to the ATU membership to vote on whether to proceed to arbitration (T157-T158).

25. Carroll's employment status is unclear. She worked briefly during the period between her termination and acquittal, but there was no testimony or evidence concerning her current employment status (T63).

ANALYSIS

Charging Party limited the scope of her allegations against ATU to its post-acquittal conduct. Carroll asserts ATU violated its duty of fair representation in two ways; first, when it refused to request arbitration (effectively continuing the earlier termination grievance), and second, when it refused to initiate a new grievance over NJT's failure to reinstate and reimburse her in accordance with the parties' collective agreement following her acquittal. The issue in this case, therefore, is whether ATU owed Carroll any duty of fair representation following her acquittal.

I conclude that ATU did not owe Carroll any duty of fair representation, post-acquittal, as she was not a public employee at that time and therefore, was not entitled to the protections of the the Act. While ATU had, and still has, a moral obligation to represent Carroll's interests, under the circumstances of this case, it does not have a legally enforceable duty to do so.

N.J.S.A. 34:13A-3(d) defines the term "public employee," in relevant part, as "...any person holding a position, by appointment or contract, or employment in the service of a public employer..." N.J.S.A. 34:13A-5.3 provides, in relevant 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..." Interpretive regulations require that unfair practice charges alleging violations of N.J.S.A. 34:13A-5.4 may only be filed by public employers, public employees, employee organizations, or their representatives. N.J.A.C. 19:14-1.1.

Since Carroll was terminated on March 8, 1997, went through three steps of the contractual grievance procedure, was unable to garner sufficient votes to move forward to arbitration within the contractual 90-day limitations period, she was no longer employed by NJT, included in the negotiations unit (ATU), or entitled to the rights and benefits of the parties' collective agreement as of October 5, 1998. More specifically, Carroll was no longer a public employee at the time she requested ATU to file a grievance on her behalf following her acquittal.

ATU has no duty under the Act to represent non-public employees. Accordingly, ATU's refusal to initiate or continue proceedings under these facts does not constitute an unfair practice and Carroll's charge against the ATU should be dismissed. See Borough of Belmar, P.E.R.C. No. 89-27, 14 NJPER 625 (¶19262

1988) (retired police officers not public employees under the Act); West New York (Sancho), D.U.P. No. 2000-3, 26 NJPER 353 (¶31139 2000); Oakcrest-Absegami Teachers Ass'n (Butler), D.U.P. No. 99-13, 25 NJPER 265 (¶30112 1999) (following resignation, public employee no longer had right to collective agreement); PBA Local 245 (Maggio), D.U.P. No. 97-27, 23 NJPER 72 (¶8043 1996).

Charging Party offered no judicial or Commission authority to support her position that as a "former" public employee she has standing to challenge ATU's inaction. She relies instead on the language of section 1B of the parties' collective agreement. That clause of the agreement provides in pertinent part that "[w]hen it is established that employees are innocent of charges against them, they shall be reimbursed for lost time as the result of a suspension or discharge." Charging Party equates acquittal in the criminal proceeding to a finding of "innocence" thus triggering application of the clause. As a corollary, Charging Party relies on N.J.A.C. 4A:2-2.10 and interpretive cases, Walcott v. City of Plainfield, 282 N.J. Super. 121 (App. Div. 1995) and Scouler v. City of Camden, OAL Docket No. CSV 6228-90, 93 N.J.A.R. 40 (1992). That regulation (N.J.A.C. 4A:2-2.1(b)) provides that where an employee has been suspended based on a pending criminal complaint or indictment, if the employee is subsequently found not guilty, the employee shall receive back pay, benefits and seniority.

Charging Party's reliance on Walcott, Scouler and N.J.A.C. 4A:2-2.10 is misplaced. In Walcott, plaintiff was indefinitely

suspended without pay because of his criminal conduct - possession of cocaine. In Scouler, plaintiff was charged with official misconduct through receipt of bribes and illegal gifts. He was suspended from his employment pending the outcome of the criminal charges. Carroll was not suspended or terminated based on a pending criminal complaint or indictment. Carroll was terminated for her failure to account for funds, not because of alleged criminal conduct. In fact, she was terminated before she was charged with crimes and even completed two steps of the grievance procedure before she was charged (Findings of Fact 3-5).

Moreover, Carroll's acquittal did not disprove her negligence which was the basis for her termination - failure to account for funds. Her acquittal on criminal charges does not establish "innocence" of the negligent conduct for which she was terminated. Rather, Carroll's acquittal demonstrates the prosecuting agent was unable to establish proof beyond a reasonable doubt of all the elements of the crimes for which she was indicted. See generally, N.J. Stat. § 2C:1-13a. "No person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt. In the absence of such proof, the innocence of the defendant is assumed." That standard addresses "innocence" of the charged conduct. The Department of Labor Appeals Examiner even noted, when he modified Charging Party's unemployment compensation award, that her termination was for negligence, not criminal conduct (Finding of Fact 9). Thus, Walcott, Scouler and N.J.A.C. 4A:2-2.10 do not apply to the circumstances of this case.

Charging Party's contention in her brief that she was terminated without any investigation or hearing and "did not have an opportunity to prove herself innocent of the charges against her" is not supported by the record developed during the hearing. To the contrary, Carroll herself testified to a lengthy investigation by NJTBO, three grievance hearings at which she was represented by ATU, and ATU's consideration of her plight by its Executive Board and full membership (Findings of Fact 2-4, 8, 10-11).

Even if Carroll were a public employee as that term is defined by the Act the record in this case does not establish that ATU's post-acquittal conduct was "arbitrary, discriminatory or in bad faith." OPEIU, Local 153, P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983); Belen v. Woodbridge Tp. Bd. of Ed., 142 N.J. Super. 486 (App. Div. 1976) citing Vaca v. Sipes, 386 U.S. 171 (1967). An employee representative is obligated to exercise reasonable care and diligence in investigating the merits of a claimed grievance. Middlesex Cty. and NJCSA (Makaronis), P.E.R.C. No. 81-62, 6 NJPER 555 (¶11282 1980), aff'd NJPER Supp.2d 113 (App. Div. 1982), certif. den. 91 N.J. 242 (1982); Carteret Ed. Assn. (Radwan), P.E.R.C. No. 97-146, 23 NJPER 390 (¶28177 1997).

ATU minimally satisfied its post-acquittal duty as a result of ATU Secretary/Treasurer Beaber's response to Carroll's telephone inquiry - advising her that "it was basically the union's belief that [she] she was no longer a union employee [sic]" thus not entitled to representation (Finding of Fact 16). That statement

placed her on notice of ATU's consideration of her request for representation and justification for denying same. It was subsequently confirmed by ATU's counsel (Finding of Fact 22) and was consistent with information Carroll received from NJTBO (Findings of Fact 20 and 23). Additionally, ATU Local President Ripa's telephone inquiry of NJT (Finding of Fact 18), is unrebutted evidence of investigative efforts ATU made on Carroll's behalf, post-acquittal.

Even if ATU was negligent in investigating Carroll's post-acquittal rights as a result of Ripa's failure to return her call and/or if Beaber's statement was faulty advice, mere negligence is insufficient to find that an employee organization breached its duty of fair representation when it exercises its discretion in good faith. SEIU, Local No. 579, AFL-CIO, 229 NLRB 692, 95 LRRM 1156 (1977); Printing and Graphic Communication, Local No. 4, 249 NLRB 23, 104 LRRM 1050 (1980) rev'd on other ground 110 LRRM 2928 (1982). Based on the totality of the circumstances of this case, it is difficult to ascribe bad faith motivation to ATU considering the pre-acquittal efforts it made on Carroll's behalf; representing her the day of the incident, viewing the video tapes multiple times, processing her discharge grievance through three steps of the grievance procedure, advancing alternate theories for the disappearance of the money, the Executive Board's endorsement to proceed to arbitration and submitting the matter for a membership vote (Findings of Fact 2-4, 8, 10-11, 18).

Charging Party simply reads too much into Ripa's post-acquittal failure to return her telephone call. Ripa's failure to return the call and confirm Beaber's initial statement or relay the information he learned from NJT, while inappropriate and a poor business practice, was not fatal to Carroll's legal rights; she had previously been placed on notice of ATU's position. Likewise, her contention that she was misled into stopping her union dues payments constitutes evidence of ATU's bad faith overstates the facts. ATU's advice to her to stop paying dues was a practical consideration - no sense paying dues if there is a chance she will not be reinstated and where there is a mechanism to repay the dues if she is reinstated. Moreover, it is not her standing as union member that is at issue in this case but rather her standing as a public employee.

Charging Party cites Trenton Bd. of Ed., PERC No. 86-146, 12 NJPER 528 (¶17198 1986) for the proposition that ATU has a duty to process timely, meritorious grievances. In that case, the Commission found a union violated its duty of fair representation when it refused to process an employee-initiated grievance on the grounds that it was untimely and lacked merit. Importantly, the Commission noted the employer apparently waived its potential timeliness objection, there appeared to be a "continuing violation" and a school board agent had determined the employee was entitled to the relief sought.

None of those circumstances are present in this case. The employer has specifically asserted its timeliness objections and has never acknowledged Carroll is entitled to reinstatement (Findings of Fact 18, 22-24). Additionally, the acquittal itself does not trigger a new operative event giving rise to ATU's duty to represent Carroll's interests. She was acquitted of criminal charges, not found innocent of negligent conduct.

Based on the foregoing, I recommend that the complaint and amended complaint be dismissed. ATU did not owe Carroll any duty of fair representation, post-acquittal, as she was not a public employee at that time and therefore, was not entitled to the protections of the Act. Even if Carroll were a public employee as that term is defined by the Act, the record in this case does not establish that ATU's post-acquittal conduct was "arbitrary, discriminatory or in bad faith." ATU minimally satisfied its post-acquittal duty as a result of ATU Secretary/Treasurer Beaber's response to Carroll's telephone inquiry and ATU Local President Ripa's telephone inquiry of NJT.^{7/}


^{7/} I wish to emphasize, however, that this recommendation is based on the procedural posture of the issue raised by Charging Party - ATU's post-acquittal conduct. Interestingly, ATU's own presentation of evidence in its case-in-chief suggests that it did accord Carroll differential treatment when it determined not to seek arbitration. Finding of Fact 11 includes two examples of ATU members being discharged for activities related to criminal conduct yet ATU represented those members in

CONCLUSIONS OF LAW

ATU did not violate 5.4b(1), (3) or (5) of the of the Act nor breach its duty of fair representation by failing to pursue Charging Party's claim for reinstatement as a ticket agent at NJTBO following her October 1998 acquittal on criminal charges of official misconduct and theft.

RECOMMENDATION

I recommend that the Commission issue an Order dismissing the complaint and amended complaint.


Kevin M. St. Onge
Hearing Examiner

Dated: December 15, 2000
Trenton, New Jersey

7/ Footnote Continued From Previous Page

parallel arbitration proceedings. The full circumstances of those cases, however, were not presented. I will not speculate whether those members received the requisite two-thirds membership vote to proceed to arbitration, whether arbitration was requested pre- or post-acquittal or whether termination was based on the criminal conduct or, as in this case, the termination was based on a related but independent standard of negligent conduct. Absent answers to those questions I cannot conclude the pre-acquittal differential treatment accorded Carroll rose to the level of discrimination.

H.E. NO. 2000-12

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

In the Matter of

NEW JERSEY TRANSIT,

Respondent,

-and-

AMALGAMATED TRANSIT UNION
LOCAL 880,

Docket No. CI-H-99-66

Respondent,

-and-

JOSEPHINE CARROLL,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission grants New Jersey Transit's Motion for Summary Judgment. The Hearing Examiner finds that the Charging Party fails to state a viable claim against NJT; specifically, the Charging Party merely alleges a breach of the collective negotiations agreement a claim which does not rise to the level of an unfair practice and which she does not have standing to pursue.

The Hearing Examiner, however, notes that the Charging Party's amended charge against the ATU still exists, as no formal motion was filed with respect to it.

H.E. NO. 2000-12

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

In the Matter of

NEW JERSEY TRANSIT,

Respondent,

-and-

AMALGAMATED TRANSIT UNION
LOCAL 880,

Docket No. CI-H-99-66

Respondent,

-and-

JOSEPHINE CARROLL,

Charging Party.

Appearances:

For the Respondent, NJ Transit
John J. Farmer, Jr., Attorney General
(Virginia Class Matthews, Deputy Attorney General)

For the Respondent, ATU Local 880
Weitzman & Weitzman, attorneys
(Richard P. Weitzman, of counsel)

For the Charging Party,
Holston, MacDonald & Uzdavinis, attorneys
(William F. Ziegler, of counsel)

HEARING EXAMINER'S DECISION ON MOTION FOR SUMMARY JUDGMENT

On April 5, 1999, Josephine Carroll (Charging Party) filed an unfair practice charge against the Amalgamated Transit Union, Local 880 (ATU) and New Jersey Transit (NJT). On July 6, 1999, Carroll filed an amendment to her charge against the ATU. Carroll alleges that NJT violated provisions 5.4a(1), (3) and

(7)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act) when it failed to reinstate her following her October 5, 1998 court acquittal on charges of official misconduct and theft by failure to make required disposition of property, in violation of the parties' collective negotiations agreement.

The charge against the ATU alleges that it violated provisions 5.4b(1), (3) and (5)^{2/} of the Act when it breached its duty of fair representation by failing to pursue Carroll's claim for reinstatement and by denying her assistance, in violation of clear contract language.

On September 30, 1999, the Director of Unfair Practices issued an amended Complaint and Notice of Hearing. On October 1, 1999, NJT filed an Answer requesting that the Complaint be

^{1/} These provisions 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. (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 provisions 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."

dismissed. NJT argued that Carroll failed to request a fourth-step grievance hearing within the time prescribed in the contract grievance procedure. NJT also claims that it is in compliance with the grievance procedure, and that the Complaint fails to state a cause of action under the Act.

The ATU also filed an Answer on October 1, 1999, denying it breached any duty of fair representation owed to Carroll and denying that it violated the collective agreement. The ATU denied it failed to assist Carroll in her request for reinstatement, and denied that any action it took or did not take following Carroll's acquittal constituted a violation of any legal obligation owed to her.

The ATU also argued that Carroll's amended charge fails to state any violation of law, and claims that even assuming it had an obligation to represent Carroll following her acquittal, it could not take any action on Carroll's behalf without NJT's agreement to waive contractual time limitations and allow a grievance to proceed to arbitration. It argued that since NJT refused to waive such limitations, any liability towards Carroll should be NJT's alone.

On January 14, 1999, NJT filed a Motion for Summary Judgment, along with supporting brief and exhibits, with the Commission. On January 19, 2000, the Motion was referred to me for decision. N.J.A.C. 19:14-4.8. On February 10, 2000, the ATU sent me a letter with regard to the pending motion, stating,

"While we take no position with regard to the above motion, it has been (and will continue to be) asserted, on behalf of the Union, that the Complaint fails to state a valid claim against the Union. While this is so even with the former employer joined as a party, if the motion of N.J. Transit should be granted, then, under applicable law, we fail to see how, in any event, the matter can properly proceed against the Union alone."

On February 14, 2000, Carroll filed an opposing response to the Motion with supporting documents.

* * *

Summary Judgment will be granted:

if it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and the movant...is entitled to its requested relief as a matter of law.
[N.J.A.C. 19:14-4.8(d)]

Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995) specifies the standard to determine whether a "genuine issue" of material fact precludes summary judgment. The factfinder must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." If that issue can be resolved in only one way, it is not a "genuine issue" of material fact. A motion for summary judgment should be granted cautiously -- the procedure may not be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 182 (App. Div. 1981); Essex Cty.

Ed. Serv. Comm., P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982); N.J. Dept. of Human Services, P.E.R.C. No. 89-54, 14 NJPER 695 (¶19297 1988).

Applying these standards and relying upon the pleadings, I make the following:

FINDINGS OF FACT

1. Josephine Carroll was employed by NJT as a ticket agent and was terminated on March 3, 1997 for failure to deposit and account for company receipts.

2. The parties' collective agreement contains a fourth-step grievance procedure, with arbitration as the fourth step.

3. The ATU grieved Carroll's discharge through the first three steps of the procedure. NJT denied the grievance at all steps. Carroll requested that the ATU take her grievance to arbitration.

4. Carroll was indicted for official misconduct allegedly in violation of N.J.S.A. 2C:30-2 and theft by failure to make required disposition of property received in violation of N.J.S.A. 2C:20-9. A summons and complaint was issued on April 4, 1997.

5. Carroll presented her grievance at the April 22, 1997 ATU Local 880 Executive Board meeting and again at the June 10, 1997 general union membership meeting for a determination as to whether or not the ATU should take her grievance to arbitration. The union membership voted against proceeding to arbitration.

6. On October 5, 1998, Carroll was acquitted of all criminal charges in Atlantic County Law Division Criminal Court.

7. Section 1B of the collective agreement provides:

When it is established that employees are innocent of charges against them, they shall be reimbursed for lost time as the result of a suspension or discharge.

8. By letter of October 15, 1998 to NJT, Carroll demanded reinstatement to her former position, along with reimbursement for lost time and related benefits. Carroll claimed she was entitled to such relief based on Section 1B of the collective agreement and court cases.

9. By letter of November 4, 1998 to Carroll, NJT Vice President and General Manager Maureen Milan denied Carroll's request for reinstatement explaining:

I have received your file, and it appears that your employment was not terminated because of the charge of theft, but was terminated for failure to deposit company receipts and failure to account for company receipts.

Since there has been no finding of innocence as to the charges for which your employment was terminated, your request for reinstatement must be denied.

10. Carroll believed NJT was failing and refusing to comply with Section 1B of the agreement; thus she sought assistance from the ATU Financial Secretary Frank Berber. Berber advised her she was no longer entitled to union protection. She then requested assistance from the ATU President Joseph Ripa; Ripa did not return her call.

11. By letter of March 4, 1999 to NJT, Carroll again requested reinstatement and reimbursement for her lost time as a

result of her discharge and, absent such relief, requested a third-step grievance hearing.

12. By letter of March 26, 1999, NJT again denied Carroll's request for reinstatement, stating:

The basis for Ms. Carroll's discharge was her failure to account for company receipts in the amount of \$2,816.65. The fact that she was acquitted of criminal charges does not absolve her of her responsibility to account for company receipts.

NJT also denied Carroll's request for a third-step hearing, noting that said hearing had previously been held in April 1997. NJT further explained that under the grievance procedure, a fourth-step hearing must be requested within 90 days after the dispute or grievance arose and that since the ATU failed to request a fourth-step hearing for Carroll within the contractual time period, Carroll is not now entitled to continue the grievance.

ANALYSIS

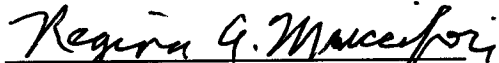
The Charging Party fails to allege any facts indicating that NJT violated provisions 5.4a(1), (3) and (7) of the Act. No facts or allegations were made showing that NJT interfered with, coerced or intimidated Carroll in violation of 5.4a(1) based on her exercise of protected activity, and Carroll has not alleged any facts indicating that NJT discriminated against her for the exercise of rights guaranteed by the Act in violation of 5.4a(3). Finally, Carroll has not presented any facts or allegations

showing that NJT violated any Commission rules or regulations, as prescribed by 5.4a(7).

Rather, it appears that Carroll merely alleges that NJT breached the collective negotiations agreement, specifically Section 1B, when it failed to reinstate her following her court acquittal. The denial of contractual benefits to an individual employee does not rise to the level of an unfair practice. Any such claim would have to be pursued in another forum. City of Newark (Montgomery), P.E.R.C. No. 2000-57, 26 NJPER 91 (¶31306 2000); State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶5191 1984). In any event, Carroll, as an individual, does not have standing to raise such a claim. Burlington Cty., D.U.P. No. 95-16, 21 NJPER 23 (¶26013 1994); Beall and N.J. Turnpike Auth., P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980), aff'd NJPER Supp.2d 101 (¶85 App. Div. 1981).

Finally, Carroll does not allege that NJT and the ATU colluded against her. Accordingly, based on the above, I find that Carroll failed to state any viable claim against NJT. Thus, NJT's Motion is granted and Carroll's charge against it is dismissed.

However, I note that Carroll's amended charge against the ATU still exists. Since no formal motion for summary judgment was filed with respect thereto, the Charging Party may proceed to hearing on the remaining allegation.


Regina A. Muccifori
Hearing Examiner

DATED: June 16, 2000
Trenton, New Jersey