H.E. NO. 95-12

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

In the Matter of

HOBOKEN TEACHERS ASSOCIATION,

Respondent,

-and- Docket No. CI-H-91-45

STEVEN M. REPETTI,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission grants the motion of the Respondent Association to dismiss the Complaint at the conclusion of the Charging Party's case. The Respondent Association was alleged to have failed to fairly and promptly represent the Charging Party in connection with a petition under N.J.S.A. 18A:29-11 which provides for salary guide advancement for past military service. The Hearing Examiner concluded that the charge was untimely filed. The Charging Party had alleged that he was "prevented" from filing a charge because he had no knowledge of certain facts until three years after the alleged unlawful acts. The Hearing Examiner, however, found that the Charging Party had knowledge of the alleged acts constituting the basis for the charge at least three years prior to the filing of the charge.

The Hearing Examiner found that the Charging Party had not adduced even a scintilla of evidence that he was prevented from filing his charge against the Respondent within six months of learning that, in eight years, no action had been taken on his claim though he had been misled to believe that something had been done. The Hearing Examiner further found that no facts were alleged showing that Respondent had failed to fairly represent him within six months prior to filing the charge or that Respondent had failed to negotiate in good faith with the public employer.

A Hearing Examiner's decision to grant a Motion to Dismiss a charge in its entirety may be reviewed by the filing of a request with the Public Employment Relations Commission. If within ten days no such request is received by the Commission, the case will be closed.

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Appearances:

For the Respondent,
Paul L. Kleinbaum, Esq.

For the Charging Party,
Steven M. Repetti

HEARING EXAMINER'S DECISION
ON MOTION TO DISMISS

On February 14, 1991, Steven Repetti filed an unfair practice charge, which was amended on March 7, 1991, against the Hoboken Teachers Association. The charge alleges that the Association violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4(b)(3) and (5)[1/] by failing to initiate a claim

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

with the Hoboken Board of Education for salary guide credit for military service, and by delaying in seeking relief for retroactive compensation before the Commissioner of Education.[2/] The charge also alleges that the Association misled Repetti by assuring him that a claim was being pursued when, in fact, no claim was filed.

A Complaint and Notice of Hearing issued on July 3, 1991.[3/] On July 19, 1991, the Hoboken Teachers Association filed an Answer. The Association denied each allegation in the charge and also raised the affirmative defenses that the charge was untimely and should be dismissed under the doctrines of laches and unclean hands. On October 16, 1991, the Association filed a Motion for Summary Judgment with supporting documentation with the Commission's Chairman seeking judgment in its favor. On October 18, 1991, the Chairman's Special Assistant, pursuant to N.J.A.C. 19:14-4.8, referred that Motion to me for determination. On May 19, 1992, I denied the Association's Motion by letter. On May 26, 1992, the Association requested special permission to appeal the denial of its

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2/ This matter will be decided as if Repetti had also alleged a violatation of §5.4(b)(1) of the Act, which prohibits public employee representatives from "Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act," since this issue was fully and fairly litigated though not specifically pled.

3/ By letter of March 18, 1991, the Director of Unfair Practices refused to issue a complaint on the charge. On June 21, 1991, the Commission remanded the case for hearing, after Repetti's appeal of the Director's decision. Hoboken Bd. of Ed., P.E.R.C. No. 91-110, 17 NJPER 331 (¶22145 1992)

Motion and on June 30, 1992, that request was denied. On October 2, 1992 and April 29, 1993, hearings were conducted. At the close of the charging party's case, on April 29, 1993, the Association moved to dismiss the charge.[4/]

Granting every favorable inference to the charging party, I accept these facts as true for purposes of this motion:

FINDINGS OF FACT

1. Steven Repetti has been a teacher at the Hoboken Board of Education since 1973 and is a member of the negotiations unit represented by the Hoboken Teachers Association, NJEA (C-1, 1T32-1T33).

2. In 1979 Repetti first met with Vincent Germinario, then president of the Hoboken Federation of Teachers. At this time, Germinario was not an officer in the Association, but later became the Association's president and held that position from about 1984 to 1989 (2T21).[5/] They discussed whether Repetti was entitled to

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4/ "C-" refers to Commission exhibits; "CP-" refers to charging party's exhibits; "R-" refers to respondent's exhibits; "1T1" refers to transcript for hearing on October 2, 1992, at page 1; "2T1" refers to transcript for hearing on April 29, 1993, at page 1.

5/ The Hoboken Federation of Teachers has never been the majority representative of teachers at the Board. Repetti alluded to conflicts between the two organizations in the late 1970s-early 1980s (1T33).

salary guide credit for his military service in the National Guard between 1970 and 1976 (C-1, 1T11, 1T15).

3. On September 5, 1979, the Board's superintendent distributed a survey form regarding military service credit to employees,[6/] including Repetti (1T17, R-1, 1T30-1T31). Repetti gave the completed survey to Germinario (1T17, R-1, 1T30-1T31, C-1, Commissioner's decision)[7/] At no time did Repetti speak to the superintendent about the survey or ask Germinario whether his survey form had been submitted to the Board (1T19, 1T31).

4. Between 1979 and 1987 Repetti met with Germinario several times[8/] and asked him what was being done about his claim for salary guide credit for military service (1T16, 1T19). At all such times, Germinario informed Repetti that it was being worked on.[9/]

6/ The Board distributed the survey because the issue of salary guide advancement for military service credit had been raised in litigation pursuant to N.J.S.A. 18A:29-11 (C-1, Commissioner's decision).

7/ I take administrative notice of the Commissioner's decision, incorporated as part of C-1 and all facts therein.

8/ Repetti testified that he asked Germinario seven or eight times during this period; Germinario testified as a hostile witness for charging party, that they discussed the matter 2 or 3 times (2T14, 2T22); Morris Fusco, vice president of the Association from 1977-1981 testified that on two occasions in 1986 he overheard Germinario respond to Repetti's inquiries that "he was working on it" (1T34-1T36).

9/ Germinario's testimony does not corroborate this, but for the purposes of this motion, all inferences are resolved in Repetti's favor.

5. In September 1987, Repetti again inquired about the status of his claim and was told by Germinario to personally speak to NJEA Uniserv Representative Jerry Lange (1T12, 1T21-1T22). At this point, Repetti was unaware that Germinario had done nothing regarding his case (1T22).

6. In late September 1987, Repetti called Lange, explained his situation and asked for assistance. (1T12-1T13). Four weeks later, Lange told Repetti that he was wasting his time and should drop the issue (1T13, 1T23).

7. Shortly thereafter, Repetti called Lange back to argue that his case had merit and should be pursued but reached NJEA Uniserv Representative Frank Cocuzza instead (1T14, 1T23). Cocuzza, who was covering some of Lange's districts in the latter's absence, listened to Repetti and arranged a meeting between Repetti and Gregory Syrek, an attorney retained by the NJEA (1T14, 1T24, 2T32).

8. On November 2, 1987, Repetti met with Syrek (R-2, 1T14, 1T24). Syrek wrote to Frank Cocuzza on November 3, 1987, summarizing his interview with Repetti and expressing the legal opinion that the Commissioner of Education had never decided the issues raised by Repetti's situation, but he believed Repetti's chances of obtaining salary guide credit for his past military service were slim (R-2). Syrek also noted that he had asked Repetti to provide additional information and requested that Cocuzza advise him whether a petition was to be filed for Repetti before the Commissioner of Education (R-2, page 2, ¶3, 1T25). Repetti received a copy of this letter (1T25).

9. As of his November 2, 1987, meeting with Syrek, Repetti knew that no action had been initiated to obtain credit for his military service (1T29).10/

10. On May 2, 1988, Syrek wrote to Repetti informing him that:

> "The information received from the Department of the Army specifies that your "Total Active Service" was only four (4) months and one (1) day. This amount of active service would be insufficient to satisfy the Commissioner's requirements" (R-3).

11. On June 22, 1989, Syrek advised Repetti that he had been authorized by the NJEA to file a petition to obtain military service credit on Repetti's behalf. Syrek sent Repetti a petition to be reviewed for accuracy and a certification which Repetti signed and returned (R4, 1T28-1T29). Syrek filed the petition and certification.

10/ The testimony was as follows:

> Mr. Kleinbaum: Now, you certainly knew when you spoke with Mr. Syrek on November 2 that if Mr. Germinario had been doing something for you that at that point nothing had been done to get you credit for your military service. Isn't that correct?
>
> Mr. Repetti: Yes (1T29).

On oral argument, Repetti sought to clarify the meaning of this testimony to be that he knew nothing had been resolved, and not that nothing had been done. Repetti's oral argument does not serve as testimony or evidence in this case, and I cannot rely on it to disturb the clear question and answer from his testimony which is evidence.

12. On August 17, 1990, the Commissioner of Education issued his decision in Steven M. Repetti v. Board of Education of the City of Hoboken, Hudson County. The Commissioner found that Repetti's creditable service under N.J.S.A. 18A:29-11 totalled 5 months and 14 days and this entitled him to one year's [salary guide] credit. The Commissioner further held that because Repetti was at the maximum step on his district's salary guide, he would receive no relief beyond establishment of his entitlement. Finally, applying the doctrine of laches, the Commissioner found Repetti's claim for retroactive relief barred.

The Commissioner noted:

> By his own admission (Exhibit P-1), petitioner has been aware of a potential entitlement at least since he completed the district's 1979 military service survey form (Exhibit B-1). Despite his evident recognition that no action appeared to be forthcoming as a result of his claim, petitioner did nothing to check on its status with the Board or any of its agents in the intervening ten years and relied instead on vague assurances from his union representative that the matter was under consideration by the district. (Stipulation of Fact No. 10, Exhibit P-1) Moreover, he continued to rely on such assurances for five years after the protracted litigation which gave rise to the above-mentioned survey -- litigation involving dozens of Hoboken teaching staff members and surely well known both the union and staff in general -- was definitively resolved (see below). In the Commissioner's view, it simply strains belief beyond all bounds to hold, as petitioner does, that under the circumstances he did not sit on his rights or inexplicably delay in filing his claim for restitution. (C-1, Commissioner's Decision at pp. 16-17)

ANALYSIS

The Commission has set forth the standards for determining whether to grant a motion to dismiss in New Jersey Turnpike Auth., P.E.R.C. No. 79-81, 5 NJPER 197 (1979):

> [T]he Commission utilizes the standard set forth by the New Jersey Supreme Court in Dolson v. Anastasia, 55 N.J. 2 (1959). Therein the Court declared that when ruling on a motion for involuntary dismissal the trial court "is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion" (emphasis added). [Id. at 198]
>
> The test is whether "the evidence, together with the legitimate inferences therefrom, could sustain a judgment in...favor" of the party opposing the motion, i.e., if, accepting as true all the evidence which supports the position of the party defending against the motion and affording him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied. [55 N.J. at 5]

See also Essex Cty. Educational Services Comm'n, P.E.R.C. No. 86-68, 12 NJPER 13 (¶17004 1985).

Timeliness

The Act has a six month statute of limitations. N.J.S.A. 34:13A-5.4(c) states that:

> "no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the 6 months period shall be computed from the day he was no longer so prevented.11/

11/ Cases interpreting this subsection are Piscataway Township Teachers Association, NJEA (Abbamont) D.U.P. No. 90-10, 16 NJPER 162 (¶21066 1990); N.J. Turnpike Employees Union Local 914, IFPTE, AFL-CIO, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979); No. Warren Bd. of Ed., D.U.P. No. 78-7, 4 NJPER 55 (¶4026 1977).

The Legislature included a six month statute of limitations in the Act to prompt charging parties to expeditiously file charges before the Commission and to prevent the litigation of stale claims. The Legislature included only one exception to the statute, that was in the event a party was prevented from filing a charge.12/

The New Jersey Supreme court described how someone is prevented from filing a charge in Kaczmarek v. N.J. Turnpike Authority, 77 N.J. 329 (1978), :

> The term "prevent" may in ordinary parlance connote that factors beyond the control of the complaintant have disabled him from filing a timely complaint. Nevertheless, the fact that the Legislature has in this fashion recognized that there can be circumstances arising out of an individual's personal situation which may impede him in bringing his charge in time bespeaks a broader intent to invite inquiry into all relevant considerations bearing upon fairness of imposing the statute of limitations. Cf. Burnett v. N.Y. Cent. R.R., supra, 380 U.S. at 429, 85 S. Ct. at 1055, 13 L.Ed.2d at 946. The question for decision becomes whether, under the circumstances of this case, the equitable considerations are such that appellant should be regarded as having been "prevented" from filing his charges with PERC in timely fashion.
> [Id. at 340.]

Repetti claims that the Association and NJEA violated the duty of fair representation by failing to promptly pursue his military service claim from 1979 to 1987 and by continuing to

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12/ City of Margate, H.E. No. 93-28, 19 NJPER 296 (¶24153 1993); aff'd., City of Margate, P.E.R.C. No. 94-40, 19 NJPER 572 (¶24270 1993)

mislead him during that entire period into believing that they were pursuing his claim. His charge was not filed until February 14, 1991. He argues that the statute of limitations should begin to run on August 17, 1990, when he alleges he first learned that the union had not pursued his claim in a timely manner and had misled him. I disagree and find that the operative date for the statute to begin tolling is late October or early November 1987, the date when Repetti was first put on notice that no claim petition had been filed on his behalf and no action taken on his claim. The significance of August 17, 1990, is that it was then that Repetti first learned that he had been harmed by the lack of promptness in pursuing his claim. On that date, Repetti received the Commissioner of Education's final administrative decision, wherein the Commissioner denied retroactive relief and criticized Repetti for failing to actively pursue his rights and relying for so long a period upon the vague assurances by his union.

Applying the above standards to all of the circumstances here, I find, as a matter of law, that Repetti was not "prevented" from filing his charge before August 17, 1990. Accepting as true that the Association, through Germinario, had continuously misled Repetti from 1979 to 1987 in the belief that it was pursuing his claim when it was not, Repetti was on notice that no claim had been filed in October 1987 when Repetti learned from Gerald Lange of the NJEA that he believed Repetti's claim had little merit. At that point, the misrepresentation ceased. Repetti's subsequent actions in rejecting Lange's advice and further pursuing his case by seeking

out help and cooperating with NJEA Attorney Gregory Syrek during the next three years, amounted to a reauthorization to the NJEA to pursue his case. Alternatively, Repetti was aware of the past misrepresentation on November 2, 1987, when he met with Syrek. Or, at the latest, he was informed of the non-filing of any claim when he received a copy of Syrek's letter dated November 3, 1987, requesting the NJEA to "please advise me if a petition is to be filed in this matter" (R-2).

There are insufficient equitable considerations here to support a finding that Repetti was prevented from filing a timely charge. There were no factors beyond Repetti's control that "disabled" him from filing the charge within six months of November 3, 1987. Finally, there was no showing of any personal problems that may have impeded his ability to bring a timely charge. (Compare Kaczmarek, where the charging party's diligent pursuit and timely filing of a charge, although in an inappropriate forum, justified the tolling of the statute of limitations as the plaintiff "at no time 'slept on his rights.'" Id. at 341)

The Duty of Fair Representation

The Act vests in employee representatives the power to negotiate terms and conditions of employment, but requires them to fairly represent the interests of all unit members without discrimination. N.J.S.A. 34:13A-5.3. A breach of the duty of fair representation occurs only when a union's conduct toward a unit member is "arbitrary, discriminatory or in bad faith." Belen v.

Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super 486 (App. Div. 1976), citing Vaca v. Sipes, 386 U.S. 171 (1967). The Commission and New Jersey Courts apply the Vaca standard in evaluating fair representation cases. The Vaca standard has been applied in cases involving alleged breaches during contract negotiations and to claims arising during grievance processing.[13/] A majority representative's mere negligence, standing alone, does not prove a breach of the duty of fair representation. Fair Lawn Bd. of Ed., P.E.R.C. No. 84-138, 10 NJPER 351 (¶15163 1984). However, active misrepresentation to a unit member has been held to be bad faith. Camden County College and Camden County College Association of Administrative Personnel (La Marra), P.E.R.C. No. 93-90, 19 NJPER 222 (¶24107 1993) Here, however, Repetti has not alleged any facts demonstrating misrepresentation by the Association after November 3, 1987 or during the six months immediately preceding the filing of this charge.

Finally, I grant the motion to dismiss as to the allegation that the Association violated subsections 5.4(b)(3) or (5) since Repetti has failed to assert any facts or even a scintilla of evidence implicating these subsections. These allegations are dismissed.

13/ Fair Lawn Bd. of Ed..Saginario v. Attorney General, 87 N.J. 480 (1981); Union City and FMBA Local No. 12, P.E.R.C. No. 82-65, 8 NJPER 98 (¶13040 1982); Hamilton Tp. Ed. Assn., P.E.R.C. No. 79-20, 4 NJPER 476 (¶4215 1978); Lawrence Tp. PBA, Local 119, P.E.R.C. No. 84-76, 10 NJPER 41 (¶15023 1983).

CONCLUSION

Based upon the above facts and analysis, I conclude that the allegations that the Hoboken Teachers Association violated §§5.4(b)(1), (3) or (5) of the Act be dismissed. The Charging Party has failed to adduce even a scintilla of evidence that the Association breached its duty of fair representation within the six months prior to his filing his charge, or failed to negotiate in good faith with the Board, and has failed to adduce even a scintilla of evidence that he was prevented from filing his unfair practice charge within six months from the dates he alleges the Association committed the acts upon which he based his unfair practice charge.

Accordingly, upon the foregoing, the Hearing Examiner makes the following:

ORDER

Upon the entire record adduced by the Charging Party, the Hearing Examiner concludes that the Hoboken Teachers Association did not violate N.J.S.A. 34:13A-5.4(b)(1), (3) or (5) and hereby grants the Respondent Association's Motion to Dismiss. The Complaint is, therefore, dismissed.

Elizabeth J. McGoldrick
Hearing Examiner

DATED: October 31, 1994
Trenton, New Jersey

Attachment:

In the Matter of

Hoboken Board of Education
-and-
Steven M. Repetti
Docket No. CI-H-91-45

Sent to the following:

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