D.U.P. NO. 2003-6

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

FORT LEE EDUCATION ASSOCIATION AND
NEW JERSEY EDUCATION ASSOCIATION,
Respondents,

-and- Docket No. CI-99-81

LILLIE WILLIAMS,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by a former special services council (Region VI) secretary against the Fort Lee Education Association and the New Jersey Education Association.

Charging Party Williams asserted that the Fort Lee Education Association and New Jersey Education Association violated their duty of fair representation when (1) they agreed to exclude her from the Fort Lee Board of Education negotiations unit and subsequently did not represent her; (2) they acquiesced in the Board's failure to employ Charging Party after the dissolution of Region VI; and (3) after Williams approached the Associations for assistance and they provided her that assistance (by filing and eventually settling a Commissioner of Education case on her behalf for $50,000), Charging Party contends the Associations failed to properly represent her because they settled her claim for less than the full worth of the differential in her earnings caused by the Fort Lee Board's failure to employ her after she was RIFed by Region VI. The Associations deny that their conduct was violative of the duty of fair representation, assert that their conduct toward Williams under the circumstances was correct throughout, and that, after Williams asked for help in May 1997, they represented her properly.

The Director dismisses as untimely the allegations concerning the 1981 agreement to exclude Region VI employees from the Fort Lee Board of Education negotiations unit, the subsequent failure to represent Charging Party and the acquiescence in the Board's decision not to employ Charging Party after the May 1997

RIF. However, even assuming their timeliness, the Director finds these allegations do not constitute a breach of the duty of fair representation. The Director finds there was a reasonable basis for Charging Party's exclusion from the unit. Inasmuch as she was not included in the unit, the Association had no duty to represent her.

The Director finds timely the allegation concerning the Associations' failure to properly represent Charging Party between May 1997 and November 1997. However, the Director finds that once she asked the Associations for assistance in May 1997, they immediately undertook Charging Party's case and provided her with proper representation. This allegation essentially contends that had the Associations better represented her, she might have secured a better result. The Director stated that even if a more effective approach existed, that circumstance does not constitute a breach of the duty of fair representation. Further, because facilitating settlement of litigation -- dispute resolution -- ranks high in the Commission's statutory responsibility and mission, in these circumstances, allowing an employee the opportunity to contest the relative quality of an employee organization's competant representation would tend to discourage the settlement process.

Accordingly, the Director finds that the Respondent Associations' conduct did not constitute an unfair labor practice.

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Charging Party.

Appearances:

For the Respondents,
Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys
(Kenneth I. Nowak, of counsel)

For the Charging Party,
Lillie Williams, pro se

REFUSAL TO ISSUE COMPLAINT

On June 25, 1999 and July 15, 1999, Lillie Williams (Charging Party) filed an unfair practice charge and amended unfair practice charge, respectively, against the Fort Lee Education Association (Association) and the New Jersey Education Association (NJEA)(Respondents or Associations). The charge alleges that Respondents violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically, sections 5.4b(1) and

(2)[1/] when they failed to discharge their duty of fair representation. Williams claims that Respondents wrongfully excluded her from the Fort Lee Education Association negotiations unit and, thereby, deprived her of the higher pay and benefits that such unit inclusion would have provided. Charging Party alleges that her wrongful exclusion from the Fort Lee Education Association unit was based upon age and race discrimination, and constituted violations of both the New Jersey Employer-Employee Relations Act and the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq.

The Associations deny having breached the duty of fair representation, discriminating against Charging Party, and deny that their actions were violative of either the New Jersey Employer-Employee Relations Act or the New Jersey Law Against Discrimination. The Associations assert that when Williams came to them for help, they vigorously represented her and brought her claims to a successful resolution.

Charging Party contends that she was employed by the Fort Lee Board of Education (Board) and was assigned to Region VI, a consortium of twelve school districts created to provide special

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1/ 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. (2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances."

education services. She contends that by virtue of her continuous employment with the Board, she acquired tenure and seniority under the education statutes. Charging Party argues that after Region VI was dissolved in 1997, she should have been employed by the Board and treated as part of the collective negotiations unit but was not due to the Board's race and age discrimination. Charging Party argues that the Associations violated the duty of fair representation when they agreed to exclude all Region VI employees (including Williams) from the Association negotiations unit and, subsequently, did not represent her properly.

Charging Party contends that after Region VI was dissolved, the Board chose to employ/retain other secretaries with less seniority, contrary to tenure and seniority laws and the Fort Lee Board of Education/Fort Lee Education Association collective negotiations agreement. By allowing the Board to do this, Charging Party argues that the Association violated its duty of fair representation.

Charging Party alleges that the Board's conduct -- excluding her from the unit and not employing her after Regional VI was dissolved -- was based upon race and age discrimination factors. Charging Party argues that the Association's agreement or acquiescence as to this treatment violated the duty of fair representation.

Finally, Charging Party seems to allege that after the dissolution of Region VI and the consequent abolition of Charging

Party's position, Respondents resolved the Commissioner of Education action (on Williams' behalf) for less than what Charging Party would have earned over the balance of her career[2/] had she been employed by the Board after being RIFed by Region VI; Charging Party contends that this conduct by Respondents constituted a violation of the duty of fair representation.

The Associations deny that their conduct was violative of the duty of fair representation, the New Jersey Employer-Employee Relations Act or the New Jersey Law Against Discrimination. Respondents assert that their conduct regarding Charging Party's circumstances was correct throughout, and that eventually, when they were apprised of Williams' situation in May 1997, they represented her properly and otherwise acted correctly in all respects.

Respondents contend that in 1981, there was reasonable basis for the exclusion of Region VI employees -- including Williams -- from the Association negotiations unit. They note that there were practical reasons for Williams' exclusion from the Fort Lee unit. Williams worked for the Region VI consortium. She never worked for or at a Fort Lee Board of Education facility; rather, she worked three towns away, at Region VI's offices in Englewood. Williams was supervised by a Region VI supervisor/manager. Although

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2/ After being RIFed in May 1997 by Region VI, it appears that Charging Party Williams resumed working in July 1997 for the Englewood Board of Education -- a member board of Region VI -- and continued working through approximately July 2001. Sometime thereafter, she retired and moved out of state.

she was paid through the Board's payroll office, 90% of the funding for her position came from the State of New Jersey; the other 10% came from the Region VI consortium. Accordingly, Respondents contend that Williams was not a Fort Lee Board of Education employee and thus was not included in the Fort Lee Board of Education/Fort Lee Education Association unit; therefore, the Associations assert that there was then no representation obligation to Williams.

Respondents further note that the employees of Region VI were never organized into a collective negotiations unit; no organization ever petitioned the Commission to represent them. Thus, Respondents note that Williams was not included in the unit represented by the Association or in any other unit represented by the Association or the NJEA. Therefore, they argue that neither Respondent had an obligation to represent her.

The Commission has authority to issue a complaint where it appears that the Charging Party's allegations, if true, may constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3. In correspondence dated October 23, 2002, I advised the parties that I was not inclined to issue a complaint in this matter and set forth the basis upon which I arrived at that conclusion. I provided the parties with an opportunity to respond. Neither party filed a response. Based upon the following, I find that the complaint issuance standard has not been met.

In 1981, twelve Bergen County school districts, including the Fort Lee Board of Education, combined resources to form the Region VI Council for Special Education to provide certain special education services for students in those districts. There were approximately eight employees who were employed at Region VI -- an executive director and seven clerical and secretarial employees. The budget of Region VI was largely funded by the State of New Jersey: 90% came from the State; the remaining 10% was contributed by the twelve member districts.

The Regional VI offices were located in Englewood. Region VI employees (including Williams) worked in the Englewood offices. Salaries were paid to employees through the various member districts' payroll offices. Employee salaries and benefits were determined (unilaterally) by Region VI. Region VI employees were not organized into a collective negotiations unit. Employees were given assignments and supervised by the Executive Director; the Superintendents' Council was the Region VI managerial body.

In August 1981, Williams was hired, ostensibly by the Board, to work as a secretary for Region VI. Charging Party never worked for the Fort Lee Board of Education or at a Board facility. Rather, from the outset of her employment until Region VI was

dissolved and her employment position abolished, Charging Party worked for Region VI at its Englewood offices.3/

In September 1981, the Board and the Association entered into a side-bar agreement providing that due to the nature of the funding of Region VI's budget, its employees and operations were to be excluded from coverage under Board/Association agreements.

Charging Party worked for Region VI without incident from August 1981 through May 1997. During that time, it appears that Charging Party asked a Region VI supervisor about whether she could be included in the unit represented by the Association. Her supervisor told her that Region VI employees were excluded from the unit under an agreement between the Board and the Association. The record does not indicate that Charging Party ever approached the Associations seeking representation until May 1997. Thus, from August 1981 through May 1997, Charging Party was not included in the unit, was not a member of the Association or the NJEA, and neither paid dues nor agency fees to the Association or the NJEA.

In May 1997, Williams was informed that Region VI would soon be dissolved and her position would be eliminated. Williams then asked the NJEA for legal representation.

3/ Region VI employees were "contributed" to the consortium by member boards. Some boards, as did Fort Lee, hired new people to fulfill their Region VI commitment; other boards transferred employees from their existing complement to Region VI.

The NJEA immediately provided Williams membership in the organization and assigned her legal counsel. Counsel met with Williams and promptly filed a timely action before the Commissioner of Education in June 1997, against Region VI and all of its twelve member boards of education. In July 1997, Williams secured employment as a secretary with the Englewood Board of Education, one of the member districts of Region VI. During the processing and investigation of the Commissioner of Education matter, the parties (Williams and Region VI and its member boards) entered into settlement discussions. Several proposals for settlement were discussed. Before finalizing the settlement, Williams' NJEA counsel suggested that she discuss the Commissioner of Education matter and the settlement with counsel she had privately retained (Walter Nealy, Esq., the attorney who subsequently filed this unfair practice charge against the Association and the NJEA). Williams discussed the matter with her private counsel. In fact, Williams' NJEA counsel provided Attorney Nealy with all of the Commissioner of Education documentation and discussed the matter and the proposed settlement with him. In November 1997, Williams decided to settle the Commissioner of Education matter for $50,000. The settlement provided for the unconditional release from all liability for Region VI and all of its member districts.

In March 1998, Williams filed an action in Superior Court against the NJEA and the Association for having violated her rights under the New Jersey Law Against Discrimination, contending that

they discriminated against her based upon race and age and that they violated the duty of fair representation by failing to properly represent her. As relief, Williams sought back pay damages, damages for pain and suffering and attorney's fees and costs of suit.

Pursuant to a motion by the Associations (which was opposed by Williams) in March 1999, the Court ordered that the duty of fair representation claim be submitted to the Commission for consideration. The Court also stayed further action concerning the Law Against Discrimination claims pending the Commission's consideration of the duty of fair representation issue. However, the Court also ordered the parties to continue with discovery on the Law Against Discrimination claims during the stay.

In accordance with the Court's order, in June and July 1999, Williams filed an amended unfair practice charge with the Commission, alleging a violation of the duty of fair representation by the Associations. An exploratory conference was conducted in October 1999 where the parties discussed the issues raised by the charge, their positions on the issues and various possibilities and proposals for settlement of the case.

At the conference, Williams' counsel made it clear that Charging Party did not wish to litigate her claims before this Commission because the essence of the case was a Law Against Discrimination violation, not an improper representation matter; further, Charging Party's counsel noted that any available remedies were likely to be much greater in a Superior Court Law Against

Discrimination case than they would be in a Commission duty of fair representation matter.4/ Charging Party also made clear that her duty of fair representation claim was based upon the alleged Law Against Discrimination violation.

Several proposals for settlement were discussed at the conference. Subsequently, they were reduced to writing and discussed again. However, eventually, it became clear that the parties would be unable to reach an agreement to resolve the unfair practice charge because they could not also reach agreement to resolve the Law Against Discrimination matter.

In evaluating this matter for processing, we concluded that Charging Party's duty of fair representation claim was inextricably linked to her Law Against Discrimination claims. Charging Party's essential claim was that the Board's treatment of her -- i.e., excluding her from the negotiations unit (in 1981) and failing to employ her after the dissolution of Region VI (in 1997) -- was based in part on age and race discrimination factors. Charging Party contends that the Association's agreement to the unit exclusion (and its subsequent failure to represent her) and its acquiescence in the

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4/ In this regard, Charging Party was aware that because Region VI and its twelve constituent boards of education had been granted general releases in the settlement of the Commissioner of Education matter, they were not Respondents in the instant unfair practice matter (or in the Superior Court Law Against Discrimination matter). Consequently, if Charging Party were to prevail on its unfair practice charge, any formulated remedy could not involve the participation or contribution of Region VI or its member boards.

Board's refusal to employ her constituted a breach of the duty of fair representation. Charging Party also seems to suggest that the Associations' treatment of the Commissioner of Education claim, which they filed and prosecuted on her behalf, was somehow lacking and thus also constituted a breach of the duty of fair representation. Thus, we concluded that because the race and age discrimination claims underlied the asserted duty of fair representation violation, a resolution of the discrimination claims was critical to the resolution of the unfair practice charge.

The court's order directing Williams to file the duty of fair representation claim with the Commission indicated that it had retained jurisdiction over the race/age discrimination claims. Because the race and age discrimination claims were still pending before the Superior Court, and because the court has primary jurisdiction concerning such claims and greater expertise in such matters, in August 2000, we determined to hold the unfair practice charge in abeyance, pending the threshold determination of the race/age discrimination claims by the court. We noted that by proceeding in this way, we could appropriately recognize the court's definitive determination of the race/age discrimination issues and avoid presenting the parties with potentially conflicting

determinations concerning those issues.5/ At the same time, Charging Party had sought and received permission from the Superior Court to resume the processing of the Law Against Discrimination claims there. In subsequent response to our inquiries, by March 2002, we received correspondence from counsel indicating that the Law Against Discrimination claims had been dismissed and the Superior Court case was closed. After a subsequent exchange of correspondence and telephone calls, Williams requested that we resume processing the unfair practice charge.6/

5/ We noted that if such discrimination claims had been filed with the Division on Civil Rights and were pending before both the Office of Administrative Law and this Commission for hearing, the parties would have been required to file a motion for predominant interest determination with an administrative law judge, wherein it would likely have been determined that the Division on Civil Rights had the predominant interest in this matter. N.J.A.C. 1:1-17.1 et seq.

6/ After learning of the dismissal of the Law Against Discrimination claims, we contacted Charging Party's counsel to inquire about Charging Party's intentions concerning the processing of the instant charge -- without the predicate finding of a Law Against Discrimination violation, what did Charging Party intend to do with the unfair practice charge? Counsel informed us that at the conclusion of the Superior Court matter, he had withdrawn from further representation of Williams. He suggested that we contact her directly. In correspondence to Williams, we inquired about her intentions concerning the processing of the charge. Williams' reply indicated that she still wished to proceed with the case. As we were somewhat unclear about how Charging Party intended to proceed, we contacted her by telephone and explained the current status of the case and the possible courses of processing that lay ahead. We asked if she had retained new counsel and she indicated that she had not. She indicated that she wished to continue with the unfair practice charge.

ANALYSIS

The charge sets forth three instances of alleged violations: 1) the 1981 exclusion of Williams from the Fort Lee Board of Education negotiations unit and Respondents' subsequent failure to represent her; 2) the Associations' acquiescence in the Board's failure to employ Williams after the dissolution of Region VI and elimination of her position in May 1997; and 3) after Williams went to the Fort Lee Education Association and NJEA for help in May 1997, they provided her with legal representation, which led to the eventual settlement of her Commissioner of Education claims against Region VI and its member boards of education; Williams contends that the Associations failed to properly represent her inasmuch as they settled these claims for less than the worth of the differential in her earnings, i.e., the earnings difference between her actual Englewood employment and the Fort Lee employment she was denied, from 1997 through her retirement in 2001.

I. Timeliness

N.J.S.A. 34:13A-5.4c establishes a six-month statute of limitations period for the filing of unfair practice charges. The statute provides in pertinent part:

> ...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-month period shall be computed from the day he was no longer so prevented.

See City of Newark (Montgomery), P.E.R.C. No. 2000-57, 26 NJPER 91 (¶31036 2000), adopting D.U.P. No. 2000-5, 25 NJPER 392 (¶30169 1999); N.J. Sports & Exposition Auth. (Moraites), D.U.P. No. 99-11, 25 NJPER 145 (¶30066 1999); City of Hoboken (Mancuso), D.U.P. No. 96-11, 22 NJPER 2 (¶27002 1995).

In application, the statute of limitations period normally begins to run from the date of some particular action, such as the date the alleged unfair labor practice occurred, provided the person(s) affected thereby are aware of the conduct. The date of the action is known as the "operative date", and the six-month limitations period runs from that date. Therefore, in order to be timely, a charge must be filed within six months of the operative date. Charges filed past that date are generally untimely. Two exceptions to timeliness requirements are (1) tolling of the limitations period and (2) a demonstration by the charging party that it was "prevented" from filing the charge prior to the expiration of the period.

The standard for evaluating statute of limitations issues was set forth in Kaczmarek vs. N.J. Turnpike Auth., 77 N.J. 329 (1978). The Supreme Court explained that the statute of limitations was intended to stimulate litigants to pursue their litigation diligently and to prevent the litigation of stale claims, but it did not want to apply the statute strictly without considering the circumstances of individual cases. Id. at 337-338. The Court stated it would look to equitable considerations in deciding whether a

charging party slept on its rights. But the Court still expected charging parties to diligently pursue their claims.

Filing with other administrative agencies does not toll the statute of limitations for filing unfair practice charges before us. New Jersey Sports and Exposition Authority, D.U.P. No. 89-6, 15 NJPER 58 (¶20021 1988). However, a charge will be held timely where an action is filed in court within six-months of the alleged unfair practice conduct, and then, upon the court's direction, promptly refiled with the Commission. New Jersey Transit, D.U.P. No. 95-23, 21 NJPER 54 (¶26038 1995).

In this matter, Williams filed an action in Superior Court on March 2, 1998, alleging violations of the New Jersey Law Against Discrimination and the duty of fair representation by the Association and the NJEA. On March 2, 1999, the Associations filed a motion to transfer the duty of fair representation allegation to the Commission and to hold in abeyance the Law Against Discrimination claims before the Court. Charging Party filed its unfair practice charge with the Commission on June 25, 1999.

Based upon the date the charge was filed here, only events occurring on or after December 25, 1998 would be timely. However, because Charging Party had filed an action in Superior Court concerning the same events and the court then transferred the duty of fair representation portion of the filing to the Commission for consideration, the Commission will use the date of the court filing (March 2, 1998) to measure timeliness. See New Jersey Transit.

Accordingly, based upon the court filing date, only those events occurring on or after September 2, 1997 would be timely.

Charging Party asserts three events constituting the alleged violations by the Associations: 1) the 1981 agreement to exclude Region VI employees (Williams) from the Fort Lee Board of Education negotiations unit and the subsequent failure to represent her; 2) the Associations' acquiescence in the Board's decision not to employ Williams after her May 1997 RIF; and 3) the Associations' failure to properly represent Williams in pursuing employment and tenure rights from May to November 1997.

The agreement to exclude Region VI employees was concluded in September 1981. This allegation concerns events occurring long before September 2, 1997[7/] and is untimely.[8/] The allegation of the Associations' acquiescence in the Board's decision not to employ

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7/ The timeliness for unfair practice charges is measured from the date of the alleged unlawful conduct, not from the consequences which may flow from that conduct. N.J.S.A. 34:13a-5.6. See also, Lumberton Tp. Police Officers Assn., D.U.P. No. 2000-4, 25 NJPER 391 (¶30168 1999).

8/ The allegation concerning the failure to represent Charging Party after the exclusion agreement was concluded does not indicate any specific event. No times, dates, places, persons or conduct is referenced. Presumably, as Charging Party was not included in the Fort Lee Education Association unit, she received no representation.

However, in May 1997, when Charging Party approached the NJEA and requested help, it began representing her. Thus, it would seem that the failure-to-represent allegations in this first part of the charge refers to conduct occurring prior to May 1997. In fact, such allegations, even if made specific, would be untimely.

Charging Party after the May 1997 dissolution of Region VI also occurred before September 1997; accordingly, it is also untimely.

Williams offers no facts to suggest that she was prevented from timely filing her charge. Compare Kaczmarek. In 1981, Williams knew she was unrepresented. In Bergen County Vocational Schools, D.U.P. No. 2002-6, 28 NJPER 82 (¶33029 2001), we rejected the charging party's contention that she was unclear about whether the union represented her. In that case, we stated:

> The Association's collective agreement excludes teacher assistants assigned to the day care center. Bertelli stopped paying membership dues upon her transfer and signed two individual employment contracts with the Board for the two years following the transfer. Consequently, I find Bertelli was not prevented from timely filing her charge.
> Bergen County at 83.9/

Accordingly, inasmuch as there were no facts alleged which indicated that Williams was prevented from filing a timely charge, I conclude that the allegations concerning the 1981 agreement to exclude Region VI employees from the Fort Lee Board of Education collective negotiations unit, the subsequent failure to represent Charging Party, and the acquiescence in the Board's decision not to

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9/ Charging Party's counsel orally contended (at the exploratory conference) that at some point during her employment with Region VI, Charging Party Williams inquired about becoming covered by the Fort Lee Board of Education collective negotiations agreement. She was told by a Region VI supervisor that she was excluded from coverage under the contract. There was no indication as to when that exchange had occurred; in any case, it concerns conduct by Region VI.

employ Charging Party after the May 1997 RIF are outside the six-month statute of limitations.

The allegation that the Associations failed to properly represent Charging Party in pursuing employment and tenure rights from May to November 1997 appears to be timely, to the extent that it concerns events occurring after September 2, 1997.

II. The 1981 agreement to exclude Region VI employees from the Fort Lee Board of Education unit, the subsequent failure to represent Charging Party and the Associations' acquiescence in the Board's failure to employ Williams after she was RIFed

Even assuming that these allegations are timely, they do not constitute violations of the Act.

Section 5.3 of the Act empowers an employee representative to represent employees in the negotiations and administration of a collective agreement. With that power comes the duty to represent all unit employees fairly in negotiations and contract administration. The standards in the private sector for measuring a union's compliance with the duty of fair representation were articulated in Vaca v. Sipes, 386 U.S. 171 (1967). Under Vaca, a breach of the statutory 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, 14 N.J. Super. 486 (App. Div. 1976); see also Lullo v. International Ass'n of Fire

Fighters, 55 N.J. 409 (1970); OPEIU Local 153, P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983). Even if a union's assessment of a given circumstance was mistaken, a union is not liable for such errors in judgment if they are made honestly and in good faith. Amalgamated Assoc. of Street, Electric Railway and Motor Coach Employees of Americal v. Lockridge, 403 U.S. 274, 301, 77 LRRM 2501, 2512 (1971); OPEIU Local 153, supra. See also, Steelworkers v. Rawson, 495 U.S. 362, 134 LRRM 2153 (1990).

A union's agreement to exclude an employee or group of employees from a collective negotiations unit, without more, is unremarkable and does not violate the Act. However, an indication that such action was arbitrary, discriminatory or in bad faith implicates duty of fair representation issues. See Essex Cty. Vocational Schools Bd. of Ed., P.E.R.C. No. 89-6, 14 NJPER 508 (¶19214 1988).

The reasons that a union and an employer may agree to exclude employees from a negotiations unit vary greatly -- employees may be confidential, managerial or supervisory; employees may be more appropriately included in another negotiations unit; there may be a history of disharmony or hostility between certain employee groups (See Camden Board of Education, P.E.R.C. No. 87-53, 12 NJPER 847 (¶17326 1986), where the Camden Education Association [appropriately] refused to petition for or otherwise agree to the placement of educational psychologists into the Association's broad-based, employer-wide negotiations unit, for various historical

and pragmatic reasons); or the employees may be in a remote location relative to where the union has other employees that it represents.

Here, the reasons proffered by the union for the agreement to exclude Region VI employees from the negotiations unit represented by the Association were practical. Williams and the other Region VI employees were removed from the location where the Fort Lee Education Association represented employees. Englewood (where Region VI employees were situated) is three densely-populated towns away from Fort Lee.

Williams and other Region VI employees were supervised and evaluated by a Region VI supervisor/manager. Their day-to-day work was assigned and regulated by a Region VI supervisor/manager. Williams did not work with, collaborate with or otherwise interact with Board employees. Rather, she worked with other Region VI employees. Ninety percent of the funding for Williams' position and those of other Region VI employees came from the State, while ten percent came from the consortium. Salary recommendations for Region VI employees were made by a Region VI supervisor/manager and approved by the Superintendents' Council. Work schedules and vacations were determined by a Region VI supervisor/manager. However, Williams and other Region VI employees were paid through the payroll offices of various Region VI member districts. Considering these standard indicia of employment, it appears that Region VI was the employer of the employees working for the consortium, not the various districts that had "contributed" the

employees. At most, the consortium staff might be considered employees of various joint employers -- Region VI and the Fort Lee Board of Education, Region VI and Englewood Board of Education, etc.

Based upon these circumstances, I find that there was a reasonable basis for the Fort Lee Education Association's decision to agree to exclude Region VI employees (Williams) from its Fort Lee Board of Education negotiations unit.10/ Further, the record indicates that there was never any finding that Charging Party had been discriminated against, by either the employer (Region VI and its member boards) -- the Commissioner of Education matter was settled -- or the Respondent Associations -- the Law Against Discrimination case was dismissed by the Superior Court. Thus, there is no evidence of fraud, invidious discrimination or bad faith. Rather, under the circumstances, the Association reasonably determined to agree with the Board to exclude Region VI employees from the negotiations unit.

Charging Party also asserts that the Associations failed to represent her during her employment with Region VI and after she was

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10/ Region VI employees were never organized and represented in a collective negotiations unit by either the Fort Lee Education Association or any other employee organization. Again, practical issues may suggest why: the employee group was small (7-8 employees); there were questions about which governmental entity (or entities) was the public employer of these employees; there were questions about how long Region VI would continue to exist; and, as to the Fort Lee Education Association, the employees were situated at a location removed from the worksite of the Fort Lee Board of Education negotiations unit.

RIFed and not employed by the Fort Lee Board of Education. However, because of the 1981 agreement, Williams was not included in the Board negotiations unit.

N.J.S.A. 34:13A-5.3 provides:

> A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing . . . all such employees. . . .

In Oakcrest-Absegami Teachers Assn., D.U.P. No. 97-35, 23 NJPER 261 (¶28125 1997), we concluded that a non-unit employee lacked standing to maintain a duty of fair representation claim against an employee organization that represented a collective negotiations unit to which the Charging Party did not belong. Because the Charging Party was not included in the unit represented by the Oakcrest-Absegami Teachers Association, the Association had no obligation to represent him. Accordingly, the charge was dismissed. Similarly, in Bergen Cty. Vocational Bd. of Ed., D.U.P. No. 2002-6, 28 NJPER 82 (¶33029 2001), where a unit employee was transferred to a position outside the Association's negotiations unit and subsequently laid off, the employee requested that the Association file a grievance contesting the layoff. We determined that the Association had no duty under the Act to represent non-members. Accordingly, in that matter, we concluded that the Association's refusal to file and prosecute Charging Party's grievance did not constitute an unfair practice.

Here, I have concluded that Williams' exclusion from the unit represented by the Fort Lee Education Association was not inappropriate and was reasonable under the circumstances. Inasmuch as she was not included in the unit (or any other negotiation unit), neither Association had a duty to represent Williams. Accordingly, the Associations' failure to represent Williams during her employment with Region VI does not constitute an unfair practice.11/

In May 1997, when Williams' position was eliminated upon the dissolution of Region VI and she was not employed by the Fort Lee Board of Education, Williams contends the Respondents, by acquiescing in the Board's decision, failed to properly represent her. However, since she was not included in the negotiations unit, there was no obligation by the Respondents to represent her. Further, when she was first RIFed, the Association was unaware of any problem until it was approached by Williams, who then explained her situation and requested assistance. At that point (May 1997), Williams became a member of the NJEA and Respondents began representing her. Accordingly, although when she was initially RIFed the Respondents did not act on her behalf, Williams was not then included in any Association unit and, at that point, they were unaware that the situation warranted their action. However, once

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11/ I further note that there were no facts alleged which indicated a specific instance of a request for representation by Charging Party and a refusal to represent by the Respondents.

approached by Williams, the Associations provided proper representation to her. Based upon the foregoing, I conclude that Charging Party has not alleged facts which indicate a breach of the duty of fair representation.

III. The failure to properly represent Charging Party between May 1997 and November 1997, in pursuing tenure and seniority claims

An employee representative is obligated to exercise reasonable care and diligence in investigating, processing and presenting grievances; it should exercise good faith in determining the merits of the grievance; and it must treat individuals equally by granting equal access to the grievance procedure and arbitration for similar grievances of equal merit. OPEIU Local 153, P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983); Middlesex Cty. (Mackaronis), P.E.R.C. No. 81-62, 6 NJPER 555 (¶11282 1980), aff'd NJPER Supp.2d 113 (¶94 App. Div.1982), certif. den. 91 N.J. 242 (1982); New Jersey Turnpike Employees Union Local 194 (Kaczmarek), P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979). Employee organizations are entitled to a wide range of reasonableness in determining how to best represent their members. Ford Motor Co. v. Huffman, 345 U.S. 330, 337-338, 73 S.Ct. 681, 97 L.Ed. 1048 (1953); Atlantic Cty. Special Services (Postal), D.U.P. No. 99-14, 25 NJPER 272 (¶30115 1999).

Regarding this allegation, once approached by Williams for representation, the Association and the NJEA immediately undertook her case and vigorously and thoroughly prosecuted her claims. They assigned her legal counsel who then filed an appropriate action

Williams' behalf with the Commissioner of Education to enforce her tenure and seniority rights against Region VI and its member boards of education.

The parties to the Commissioner of Education action -- Williams, represented by NJEA counsel Alfred Maurice; and Region VI, the Fort Lee Board of Education and the other member boards of education, represented by attorney Robert Tessaro -- entered into settlement discussions. Williams was kept abreast of these discussions through calls and correspondence. Maurice explained to Williams the nature of her case, the settlement process and ultimately, that whether to settle or proceed with the case was her decision; and that he would counsel and represent her in whatever decision she made. Maurice also advised Williams to consult with her own attorney (Nealy) about the Commissioner of Education case and the settlement, which in fact, she did. Eventually, in November 1997, Williams made an informed decision to settle the Commissioner of Education matter for $50,000.

Through counsel, the Associations properly investigated and assessed Williams' claims and advised her accordingly. They promptly filed a proper and effective case before the Commissioner of Education and, with Williams' agreement, pursued and secured an appropriate settlement. These facts show that Williams was properly represented. Whether there was a better type of action to file or a better theory of law to employ is not the measure of fair representation; even if a more effective approach could have been

found, that circumstance does not constitute a breach of the duty of fair representation. Passaic Cty Vocational Custodial & Maintenance Assn., D.U.P. No. 2001-11, 27 NJPER 58 (¶32027 2000); Steelworkers V. Rawson, 495 U.S. 362, 134 LRRM 2153, 2158 (1990).

Finally, this alleged violation flows from Respondents' prosecution and settlement of a claim on Williams' behalf. Support of litigation settlements ranks high in New Jersey's public policy; courts and administrative agencies are reluctant to set aside or otherwise disturb such agreements. See Red Bank Bd. of Ed., P.E.R.C. No. 87-39, 12 NJPER 802 (¶17305 1986), citing Jannarone v. W.T. Co., 65 N.J. Super. 472 (App. Div. 1961) certif. denied sub nom. Jannarone v. Calamoneri, 35 N.J. 61 (1961). The Commission is charged with the responsibility for "the prevention or prompt settlement of labor disputes". N.J.S.A. 34:13A-2. Consistent with this responsibility, the Commission strongly advocates the voluntary resolution of labor disputes. To this end, the Commission's rules enable its staff to assist the parties in reaching voluntary settlements of unfair practice disputes at all stages of case processing. N.J.A.C. 19:14-1.6(c); N.J.A.C. 19:14-6.2; N.J.A.C. 19:14-6.3(a)(7). See also Borough of Hawthorne, P.E.R.C. No. 82-37, 7 NJPER 602 (¶12268 1981). This policy presumes finality in the settlement process. The Commission will consider reopening a settled matter only for the most compelling circumstances, such as where the agreement is fraudulent or otherwise conflicts with State law. Union Cty. Voc. and Tech. Bd. of Ed., P.E.R.C. No. 2002-8, 28

NJPER 91 (¶33034 2001); N. Brunswick Tp. Bd. of Ed., P.E.R.C. No. 82-107, 8 NJPER 314, 315 (¶13141 1982); Borough of E. Rutherford, P.E.R.C. No. 82-51, 7 NJPER 680 (¶12307 1981).

Here, Charging Party essentially contends that had Respondents better represented her in Spring-Summer 1997, she would have fared better in the resolution of her case. In these circumstances, allowing an employee the opportunity to contest the relative quality of an employee organization's competent representation would tend to discourage the settlement process. Employee organizations might become more reluctant to participate in the settlement process if the organizations conclude that they could later face liability because an affected employee had come to believe that better terms might have been secured. Further, such unfair practice cases would promote litigation in circumstances where the underlying dispute had already been appropriately resolved.

Based upon the foregoing, I find that Respondents' alleged conduct would not constitute an unfair labor practice.

* * * *

Charging Party alleges no facts which indicate a violation of section 5.4b(2) of the Act.

* * * *

Therefore, the Commission's complaint issuance standard has not been met and I decline to issue a complaint on the allegations of this charge.12/

12/ N.J.A.C. 19:14-2.3.

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

Stuart Reichman, Director

DATED: December 4, 2002
Trenton, New Jersey