P.E.R.C. NO. 90-83

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and- Docket No. CO-H-88-282

AFSCME, COUNCIL 52, LOCAL 2299,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the City of Newark violated the New Jersey Employer-Employee Relations Act when it refused to process grievances contesting the firing of provisional employees. The Commission finds that N.J.S.A. 34:13A-5.3 mandates that public employers negotiate disciplinary review procedures. The Complaint was based on an unfair practice charge filed by the AFSCME Council 52, Local 2299.

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-and- Docket No. CO-H-88-282

AFSCME, COUNCIL 52, LOCAL 2299,

Charging Party.

Appearances:

For the Respondent, Glenn A. Grant, Corporation Counsel (Vincent Leong, Ass't Corporation Counsel)

For the Charging Party, Balk, Oxfeld, Mandell & Cohen (Arnold S. Cohen, of counsel)

DECISION AND ORDER

On May 2 and 17, 1988 and March 22, 1989, AFSCME, Council 52, Local 2299 filed an unfair practice charge and amended charges against the City of Newark. The charge, as amended, alleges that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (5),[1/] when it refused to process grievances contesting the firing of provisional employees.

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

On February 23, 1989, a Complaint and Notice of Hearing issued. On March 2, 1989, the City filed an Answer denying that it had violated the Act.

On May 16, 1989, Hearing Examiner Joyce M. Klein conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs by July 21, 1989.

On September 20, 1989, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 90-10, 15 NJPER 576 (¶20236 1989). She found that even though the parties' contract covers provisional employees, an arbitrator must determine the applicability of the grievance procedure to provisional employees. She also found that AFSCME did not present evidence that it was prevented from continuing to process the grievances to arbitration.

On October 23, 1989, the City filed a letter supporting the recommended decison but excepting to certain portions of the report. On November 2, AFSCME filed exceptions to the Hearing Examiner's legal conclusions.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 2-11) are accurate. We incorporate them here.

We summarize the most significant facts. Four provisional employees were terminated. A first set of grievances was filed by AFSCME and processed by the City. But those grievances did not specifically seek review of the discipline. AFSCME's representative questioned the division manager about the terminations. That

manager normally accepts and signs grievances. The manager stated that the representative would have to take it up with the department director who was responsible for the terminations. At a third step "hearing"[2/] to address the first set of grievances, AFSCME's representative presented a second set of grievances that challenged the terminations. The department director refused to sign those grievances and returned them to AFSCME's representative. During the meeting that followed, the City's representatives maintained that since provisional employees are not protected by civil service statutes and regulations, they are not entitled to a hearing in any forum over the merits of their discharges. The City never advised AFSCME of the reasons for the discharges and never responded in writing to the second set of grievances.

The issue before us is narrow. Did the City violate the Act when its representatives refused to consider grievances contesting the discipline of provisional employees?

In 1982, in response to caselaw holding disciplinary disputes non-negotiable and non-arbitrable, see State v. Local 195, IFPTE, 179 N.J. Super. 146 (App. Div. 1981), certif. den. 89 N.J. 433 (1982), the Legislature amended N.J.S.A. 34:13A-5.3. That section now mandates that public employers negotiate disciplinary review procedures. It obligated the City to consider, through

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2/ The parties' representatives referred to the third step meeting with the department director as a hearing although the grievance procedure simply provides for the director's review and determination.

negotiated grievance procedures, AFSCME's grievances contesting the discipline of provisional employees.[3/]

The City argues that the contract's management rights clause immunizes disciplinary actions from grievance review. It relies on Bor. of Stone Harbor v. Wildwood Local 59, PBA, 164 N.J. Super. 375 (1978), certif. den. 81 N.J. 270 (1979). Stone Harbor's holding does not control this case. That case's supplemental opinion on reconsideration made clear that the scope of grievability was not in dispute since the grievant had been afforded a hearing concerning his discharge. The issue presented was whether the contract authorized binding arbitration as the means for resolving disputes concerning police officer discipline. Id. at 383-385. Here, the scope of grievability is in dispute. The City's representatives refused to consider grievances contesting the discipline of provisional employees. That refusal contravenes section 5.3's command.

The City also argues that even if discipline were grievable, AFSCME never properly initiated the second set of grievances through the negotiated grievance procedures. The facts

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3/ Section 5.3 cautions that disciplinary review procedures may not replace or be inconsistent with any alternate statutory appeal procedure including civil service laws. Newark is a civil service community, but civil service appeal procedures are not available to provisional employees. In Cty. of Hudson, P.E.R.C. No. 85-33, 10 NJPER 563 (¶15263 1984), we held that employers could agree to binding arbitration of provisional employee discipline. We need not address that issue here. We simply hold that these employees were entitled to avail themselves of some kind of disciplinary review procedures. Contrast State of New Jersey, P.E.R.C. No.89-39, 14 NJPER 656 (¶19277 1988) (dispute over contractual, not statutory, right to process particular grievances).

belie that argument. While subsection 5.4(a)(5) only prohibits an employer from refusing to process a grievance and does not require a formal hearing, the record supports a finding that the City was not prepared to process these employees' grievances through any procedure. In fact, the City continues to claim that "there is no language in the collective bargaining agreement that provides for grievance review of disciplinary terminations."

We therefore find that the City's blanket refusal to process disciplinary grievances for provisional employees conflicts with section 5.3's mandate and violates subsection 5.4(a)(5). Cf. N.J. Transit Bus Operations, Inc., P.E.R.C. No. 89-29, 14 NJPER 638 (¶19267 1988). Decisions holding that an employer's failure to follow intermediate steps of a self-executing grievance procedure is not an unfair practice are inapposite in a case like this where the employer claims it need not process any disciplinary grievances. Id.

AFSCME seeks an order directing the City to consider and discuss the disciplinary grievances. At that point, AFSCME claims it will be able to determine whether it wants to proceed to arbitration. We believe that discussion during the early steps of a grievance procedure promotes communication between the parties and contributes to the voluntary resolution of disciplinary disputes. Hunterdon Cty. Freeholder Bd. v. CWA, 116 N.J. 322 (1989).

ORDER

The City of Newark is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act,

particulary by refusing to process disciplinary grievances for provisional employees represented by AFSCME, Council 52, Local 2299.

2. Refusing to process disciplinary grievances for provisional employees represented by the majority representative AFSCME, Council 52, Local 2299.

B. Take this action:

1. Process on demand any disciplinary grievances for provisional employees represented by AFSCME, Council 52, Local 2299.

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

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Wenzler, Smith, Johnson and Bertolino voted in favor of this decision. None opposed. Commissioners Reid and Ruggiero were not present.

DATED: Trenton, New Jersey
February 28, 1990
ISSUED: March 1, 1990

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

AND IN ORDER TO EFFECTUATE THE POLICIES OF THE

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED,

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce employees in the exercise of the rights guaranteed to them by this Act, particulary by refusing to process disciplinary grievances for provisional employees represented by AFSCME, Council 52, Local 2299.

WE WILL NOT refuse to process disciplinary grievances for provisional employees represented by AFSCME, Council 52, Local 2299.

WE WILL process on demand any disciplinary grievances for provisional employees represented by AFSCME, Council 52, Local 2299.

Docket No. CO-H-88-282

CITY OF NEWARK
(Public Employer)

Dated: _____

By: _____

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

H.E. NO. 90-10

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

In the Matter of

CITY OF NEWARK,

Respondent,

-and- Docket No. CO-H-88-282

AFSCME, COUNCIL 52, LOCAL 2299,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the City of Newark did not violate subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when it refused to provide provisional employees with a grievance hearing to challenge their discharges. The Hearing Examiner dismissed the City's arguments that provisional employees are not included in the inspectors' unit and are not entitled to a hearing to challenge their discharge under Battaglia v. Union Cty. Welfare Board, 88 N.J. 48 (1981). The Hearing Examiner did not find that the City violated the Act, because AFSCME did not continue to process the grievances to arbitration.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 90-10

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

In the Matter of

CITY OF NEWARK,

Respondent,

-and- Docket No. CO-H-88-282

AFSCME, COUNCIL 52, LOCAL 2299,

Charging Party.

Appearances:

For the Respondent, Glenn A. Grant, Corporation Counsel,
(Vincent Leong, Ass't Corporation Counsel)

For the Charging Party, Oxfeld, Cohen, Blunda,
Friedman,LeVine & Brooks
(Arnold S. Cohen, Esq.)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On May 2 and 17, 1988 and March 22, 1989, AFSCME, Council 52, Local 2299 ("AFSCME") filed an unfair practice charge and amendments alleging that the City of Newark ("City") violated subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act")[1/] when it

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

refused to process grievances protesting the firing of provisional employees.

On February 23, 1989, the Director of Unfair Practices issued a Complaint and Notice of Hearing and assigned the matter to Hearing Examiner Susan A. Weinberg. On March 2, 1989, the City filed an Answer denying that it violated the Act.[2/] It argues that it had no duty to process the grievances because provisional employees are not protected by the contract, and, even if they are protected, the grievance procedure does not apply to their disciplinary review. The City alternatively argues that it had no obligation to continue processing the grievance because the grievance procedure is self-executing and AFSCME failed to pursue the grievance to arbitration. On May 12, 1989, the Director issued an Order Substituting Hearing Examiner and assigned the case to me.

I conducted a hearing on May 16, 1989. The parties examined witnesses, introduced exhibits and filed post-hearing briefs by July 21, 1989.

Findings of Fact

1. AFSCME is the majority representative of a unit of these employees:

2/ The City also filed a Motion for a More Definitive Statement on March 2, 1989. On March 22, 1989, AFSCME responded by amending the Charge to specifically allege that the City failed to process grievances challenging the discipline of Hazel Singleton, Julio Quinones, Gerald Byrd, Rocco Smalldone and Kenneth Turner.

> All inspectors employed by the City of Newark but excluding engineering specifications inspector, purchasing inspector, office clerical, craft and professional employees, policemen, managerial executives, department heads, deputy department heads and supervisors within the meaning of the Act. (J-1).3/

2. The parties' most recent agreement extended from January 1, 1986 through December 31, 1988. Section B of the grievance procedure (Article IV) defines a grievance as "any controversy arising over the interpretation, application or alleged violation of the terms of this Agreement by the Union or the City." (J-1). The grievance procedure provides:

> The following constitutes the sole and exclusive method for resolving grievances between the parties covered by this Agreement and shall be followed in its entirety unless any step is waived by mutual consent...
>
> Step One
>
> a. An aggrieved employee shall institute action under the provisions hereof within five (5) working days of the occurrence of the grievance and an earnest effort shall be made to settle the difference between the aggrieved employee and his immediate supervisor for the purpose of resolving the matter informally. Failure to act within five (5) working days shall be deemed to constitute abandonment of the grievance.
>
> b. The Supervisor shall render a decision within five (5) working days after receipt of the grievance.

3/ The transcript of the May 16, 1989 hearing is cited as T. Commission exhibits are cited as C. Joint exhibits are cited as J. Charging party's exhibits are cited as CP and the Respondent's exhibits are cited as R.

Step Two

a. In the event a satisfactory settlement has not been reached, the employee shall, in writing and signed, file his complaint with the Division Head (or his representative) within five (5) working days following the determination be the Supervisor.

b. The Division Head, or his representative shall render a decision in writing within five (5) working days from receipt of the complaint.

Step Three

a. In the event the grievance has not been resolved at Step Two, then within five (5) working days following the determination of the Division Head, or within five (5) working days following the time allotted for such determination, the matter may be submitted to the Director of the Department.

b. The Director of the Department, or his representative, shall review the matter and make a determination within five (5) working days from receipt of the complaint.

Step Four

a. In the event the grievance has not been resolved at Step Three, then within five (5) working days following the determination of the Director of the Department, or within five (5) working days following the time allotted for such determination, the matter may be submitted to the Business Administrator.

b. The Business Administrator, or his representative, shall review the matter and make a determination within five (5) working days from receipt of the complaint.

Step Five

a. Should the aggrieved person be dissatisfied with the decision of the Business Administrator, the Union may within ten (10) working days request arbitration. The Arbitrator

> shall be chosen in accordance with the rules of the American Arbitration Association. (J-1).

Similar grievance procedures were included in the agreements effective from January 1, 1976 through December 31, 1978 and from January 1, 1979 through December 31, 1981 (J-2, J-3).

Article XI, section E entitles provisional employees to insurance coverage after they have been employed for ninety days (J-1). Article XII.B. entitles full time provisional employees to sick leave (J-1).

Article XVI provides:

> A. The Union agrees to support and cooperate with the City to improve employee performance. In furtherance thereof the Union shall encourage all employees to:
>
> 7. Assist where possible in building good will between the City, the Union and the public at large. (J-1).

Article II permits the City to "suspend, demote, discharge or take other disciplinary action for good and just cause according to law." (J-1, Art. II.A.3). A similar clause was included in the agreements effective from January 1, 1976 through December 31, 1978 and from January 1, 1979 through December 31, 1981 (J-2, J-3).

3. In April 1988, Gerald Byrd, Rocco Smalldone, Kenneth Turner and Hazel Singleton were terminated.[4/] All were provisional employees, though the City sent Turner a Preliminary Notice of Discipline causing AFSCME to believe that he was a

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4/ Singleton was subsequently reinstated and her grievance is not at issue (T46).

permanent employee (T48). After their termination, local president Joseph Armstrong was called. He asked if they had received a Civil Service termination form. When he learned that they had not, he told them to file grievances (T50-T51).

4. Two sets of grievances were filed. The first set was filed between April 12 and April 22, 1988 (R-1, R-2, R-3, R-4). Smalldone's listed his classification as "temporary". His step two grievance stated:

> CONTESTING NOTICE OF TERMINATION. Article XVI Employee Performance #7 Assist where possible in building good will between the City, the Union and the public at large. (R-1).

It was dated April 12, 1988 and signed by Smalldone and shop steward Norman Cogman. Millard Monroe, manager of the division of inspections and environment, received it on April 13, 1988 (T65).

Gerald Byrd's grievance was not dated or signed by a shop steward and listed only a violation of Article XVI.7. Monroe received it on April 22, 1988 (T65).

Hazel Singleton's grievance, dated April 22, 1988, was signed by shop steward Derek Gardner. It listed only a violation of Article XVI.7. Monroe received the grievance on April 22, 1988. (T65, R-3).

Kenneth Turner's grievance listed Article XVI.7, but said "see attached". No attachment was included. Turner and Gardner signed the grievance dated April 20. Monroe received the grievance on April 21. Turner's grievance lists the following disposition: "Grievance denied. Terminated for valid reasons as per City

employment rules and regulations." Monroe initialed the disposition (R-4).

Smalldone's Byrd's and Singleton's grievances were each initialed "DG" on April 25, 1988 but did not list a disposition (R-1, R-2, R-3).

A second set of grievances dated April 26 and 27, 1988 were filed on behalf of Smalldone, Byrd and Turner. Each stated the grievance as "unjustified termination of employment" (CP-1, CP-2, CP-3). Each was signed by Gardner but not by Monroe or any other management representative.

Monroe received the first set of grievances (R-1 through R-4), signed for them and forwarded them to Chavall Rao, chief clerk in the Department of Land Use Control (T66, T68). Monroe did not advise the union of a decision at the second step (T67, T68). Rao received the grievances for Edwin McLucas, Director of the Department of Land Use Control on April 22 or 23.(T69).

5. Before April 27, 1988, Armstrong met with Monroe to discuss the terminations (T51). Monroe told Armstrong that McLucas was responsible for the terminations and that Armstrong would have to discuss them with McLucas. Monroe did not accept or deny the grievances (T52).

6. A third step grievance hearing was scheduled for April 27 in McLucas' office. Kathy Mazzauccolo, AFSCME Staff representative, Joseph Armstrong, president of Local 2299 and the grievants were present for AFSCME (T54, R-5). McLucas, Monroe,

Gregory Franklin, labor management specialist, Vincent Leong, labor counsel and Denise Tucker from the Division of Personnel attended for the City (R-5).

McLucas' office includes a secretarial area outside of the conference room (T53). Before the meeting began, Armstrong approached McLucas in the secretarial area and attempted to present the second set of grievances (CP-1, CP-2, CP-3) to him.[5/] McLucas told Armstrong that he would not sign the grievances and handed them back to Armstrong (T53). Armstrong told McLucas that Armstrong would have to take the grievances to the next step (T56). McLucas also asked Armstrong why the grievants were present and not working. Armstrong responded that the contract allows grievants to attend grievance hearings. They continued to disagree and began shouting (T54).

6. The meeting proceeded in McLucas' conference room. Vincent Leong, represented the City and Mazzauccolo represented AFSCME. Mazzauccolo attempted to discuss the grievances with the City, but Leong maintained that provisional employees are not

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5/ Franklin testified that McLucas was present during the whole meeting and that he did not see Armstrong attempt to give forms to McLucas (T59, T63). Franklin acknowledged, however, that there may have been some discussion outside the conference room before the meeting (T63). Therefore, I credit Armstrong's testimony concerning the incident described above.

entitled to a hearing (T55, T62).[6/] Leong maintained that since provisional employees were not entitled to a Civil Service protection, they were not entitled to a hearing in any other forum (T20). Though the meeting was punctuated with shouting, both sides were able to state their positions on the issue of whether the grievants were entitled to a hearing (T45, T58).[7/] Mazzauccolo thought the the City's position was based upon its interpretation of Battaglia v. Union Cty Welfare Bd., 88 N.J. 48 (1981) (T23, CP-4).[8/]

6/ Mazzauccolo was only aware of the second set of grievances (CP-1, CP-2, CP-3). The City contends that it only knew about the first set of grievances (R-1 through R-4). I find that the first set of grievances were filed and received by Monroe (R-1 through R-4). It is improbable that the City would agree to hold a grievance hearing at the third step if no grievance had been filed long before the hearing. It is likely that AFSCME filed the second set (CP-1, CP-2, CP-3) of grievances because the first set (R-1 through R-4) did not properly state the grievance.

7/ Mazzauccolo described the meeting as confusing with, "a lot of shouting back and forth." (T25). Armstrong described his confrontation with McLucas as a "shouting match" and testified that it was "still loud inside of the meeting room" (T55). Franklin testified that the meeting was orderly in the respect that everyone had a chance to state his or her position (T58). He agreed that the meeting was adversarial, but did not recall shouting or outbursts (T58). I credit Mazzauccolo and Armstrong. While Franklin did not recall a boisterous meeting, his testimony that it was orderly enough for everyone to state their positions, does not necessarily contradict Mazzauccolo's and Armstrong's testimony.

8/ In Battaglia, an legal assistant to a county welfare board was not reappointed to the position due to his political affiliation. The position was not entitled to protection under Civil Service laws. N.J.S.A. 44:7-9. Our Supreme Court found that Battaglia did not have a due process right to a hearing.

Franklin testified that Leong told Mazzauccolo that "it was the City's position that provisional employees were not entitled to a hearing." (T62). According to Franklin, Leong did not cite legal support for the City's position at that meeting. Whether or not Leong cited the Battaglia decision at that meeting, the City's position was that provisional employees were not entitled to a hearing over the merits of their discharge.

At Franklin's request, Rao took notes at the meeting. According to the notes, Leong initially stated that the hearing should cover the grievances referring to Article XVI, section 7. The notes state that Leong asked Mazzauccolo about what the grievances specifically concerned. According to the notes,

> Mr. Leong, (sic.) further stated, that if by quoting the section mentioned, they are referring to the terminations of the employees - Hazel Singleton, Gerald Byrd, and Rocco Smalldone, Temporary Property Maintenance Inspectors, then his opinion is that the City has the right to terminate their services. (R-5).

Mazzauccolo responded by mentioning a Commission decision holding that provisional employees may grieve disciplinary terminations under N.J.S.A. 34:13A-5.3. (T24, R-5, CP-6).[9/] Mazzauccolo did not have the case citation and she told the City she would try to provide it (T24). She never did (T40). No hearing was conducted on the merits of either the first or second set of grievances (T25).

9/ The Commission decision is Hudson Cty., P.E.R.C. No. 85-33, 10 NJPER 563 (¶15263 1984).

7. The City never advised AFSCME of the reasons for the discharges (T26, T27). AFSCME received a copy of the written charge from Turner (T26-T27). Mazzauccolo knew the substance of the charges against Turner, but not against the other employees (T38).

AFSCME never received a written decision at step three, but Mazzauccolo was aware of the City's position (T45). AFSCME did not pursue either set of grievances (R-1 through R-4 or CP-1 through CP-3) at step 4 or 5 of the parties' grievance procedure.

The City terminated another provisional employee in January 1989. AFSCME grieved the termination. A request for arbitration is pending (T46). The City denies that the dispute is arbitrable and is awaiting the outcome of this decision (T49).

ANALYSIS

N.J.S.A. 34:13A-5.4(a)(5) prohibits public employers from,

> Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative.

Subsection 5.3 requires public employers to negotiate grievance and disciplinary review procedures. Grievance and disciplinary review procedures may provide for binding arbitration where no alternate statutory review procedure is available. N.J.S.A. 34:13A-5.3.

Repudiation of a negotiated grievance procedure violates the Act State of New Jersey (Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). An employer's refusal to respond to a grievance is not always an unfair practice. A self-executing

grievance procedure permits an employee organization to unilaterally process a grievance through arbitration. When a contract includes a self-executing grievance procedure ending in binding arbitration which may be invoked by either party, an employer's failure to respond to a grievance is not usually an unfair practice. See City of Trenton, D.U.P. No. 87-7, 13 NJPER 99 (¶18044 1986); Township of Rockaway, D.U.P. NO. 83-5, 8 NJPER 644 (¶ 13309 1982); Rutgers University, D.U.P. No. 82-28, 8 NJPER 237 (¶13101 1982); City of Pleasantville, D.U.P. No. 77-2, 2 NJPER 372 (1976); Englewood Board of Education, E.D. No. 76-34, 2 NJPER 175 (1975).

In City of Pleasantville, the Director of Unfair Practices explained why an employer's failure to respond to a grievance at intermediate steps of the grievance procedure is not usually a violation of subsection 5.4(a)(5).

> ...[a]s a matter of law a public employer's failure to participate in contractual arbitration proceedings does not, on the facts alleged in most instances, constitute a refusal to process grievances within the meaning of N.J.S.A. 34:13A-5.4(a)(5). The underlying theory in refusing to issue a Complaint in such instances is that absent an affirmative step by the public employer to restrain the arbitration proceeding, the failure of the public employer to participate in the arbitration proceeding will not prevent the arbitration provisions of the grievance procedure from proceeding on a self-executing basis to arbitration. Thus, the employee organization is not precluded from pursuing the arbitration to conclusion ex parte and the grievance will be "processed" to arbitration pursuant to the parties' contract notwithstanding the public employer's failure to take part in that process.

> The undersigned finds that the reasoning of the Englewood case is applicable as well to the earlier stages of the grievance procedure. A public employer's failure to respond to a grievance at a given level is presumed to be a rejection of the grievance. Normally, the next level of the grievance procedure may be invoked unilaterally by the aggrieved party inasmuch as the grievance has not been resolved to the aggrieved party's satisfaction. The grievance will thus be "processed" through the given levels until it proceeds to arbitration.

An employer's failure to follow intermediate steps of a grievance procedure on individual grievances is not contract repudiation. New Jersey Transit Bus Operations, P.E.R.C. No. 86-129, 12 NJPER 442 (¶17164 1986). Blanket refusal to process a class of grievances is, however, an unfair practice. New Jersey Transit Bus Operations, P.E.R.C. No. 89-29, 14 NJPER 638 (¶19267 1988).

In New Jersey Transit Bus Operations, 14 NJPER 638, the Commission found that the employer repudiated the grievance procedure when it refused to hold grievance proceedings without the grievants present where arbitrators had found the grievants' presence unnecessary. There, the employer continually rejected grievances at interim steps of the grievance procedure if the grievant was not present for the hearing. The employer continued this practice notwithstanding that several arbitrators found the parties' contract did not require the grievants' presence. The union continued to process each grievance to arbitration. Although the Commission found the employer could legally invoke other defenses, including timeliness and contractual waivers, it

determined that the employer's blanket policy on attendance, in the face of arbitral decisions to the contrary, was a repudiation of the agreement.

In contrast, the Commission affirmed the Director of Unfair Practices' refusal to issue a complaint where the union alleged that the employer refused to provide a hearing at an intermediate step of the grievance procedure in all grievances concerning the "dignity clause" of the parties' agreement. State of New Jersey, P.E.R.C. No. 89-39, 14 NJPER 656 (¶19277 1988). There, the parties' agreement contained a self-executing grievance procedure and the employer agreed to arbitrate the grievances. Since the "dignity" clause appeared in the contract for the first time and had not yet been interpreted by an arbitrator, the Commission deferred to the arbitrator for an interpretation. The Commission suggested that if an arbitrator rejects the employer's contractual arguments and the employer continues to refuse to process grievances at intermediate steps of the grievance procedure, it would examine the arbitral opinions to determine whether the employer repudiated its contractual obligations.

AFSCME argues the City violated the Act when it refused to process disciplinary grievances concerning Byrd, Smalldone and Turner, all provisional employees.[10/] The City argues that it had

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10/ Though the Complaint challenges the City's refusal to process a grievance concerning the discipline of Julio Quinones, no evidence concerning his discipline or grievance was proffered.

no duty to process the grievances because provisional employees are not entitled to a hearing under the contract, and, even if they are, the grievance procedure does not apply to disciplinary matters. In the alternative, it asserts that AFSCME could have continued to process the grievance to arbitration and did not.[11/]

In order to find that the City repudiated the grievance procedure when it refused to provide a hearing on the merits of the discharges of provisional employees before arbitration, I must find that it had an obligation to provide such a hearing. If I find that the City had that obligation, I must also determine if AFSCME adequately processed the grievance under the parties' grievance procedure. New Jersey Transit Bus Operations, 14 NJPER 638.

The City argues that it has no obligation to process grievances concerning provisional employees because they are not included in the unit.[12/] The recognition clause neither specifically includes or excludes provisional employees. Articles XI and XII provide contractual benefits to provisional

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11/ Neither party addresses whether the City permitted AFSCME to present the grievance as required by Tp. of West Windsor v. PERC, 78 N.J. 98, 116 (1978). See Rutgers University, P.E.R.C. No. 89-38, 14 NJPER 655 (¶19276 1988) for a discussion of the elements of grievance presentation.

12/ Arbitrators generally determine contractual arbitrability, but the Commission has jurisdiction over bargaining unit composition in the event of a dispute. Borough of Wood-Ridge, P.E.R.C. No. 88-68, 14 NJPER 130 (¶19051 1988).

employees.[13/] By negotiating over provisional employees, the parties demonstrated their intent to include them in the inspectors' unit. (See Carlstadt-East Rutherford Board of Education, P.E.R.C. No. 89-59, 15 NJPER 18 (¶20006 1989) app. pending. App. Div. Dkt. No. A-2277-88T1, finding the parties' negotiation over benefits for coaches was sufficient evidence of intent to include them in the unit.) I find that the recognition clause covers provisional employees.

That provisional employees are included in the recognition clause does not mean they are necessarily covered by the grievance procedure. Only an arbitrator has the authority to interpret the grievance procedure. East Windsor Bd. Of Ed., E.D. No. 76-6, 1 NJPER 59 (1975). Nothing in the record suggests that the grievance procedure has been applied previously to provisional employees and I can not find that it protects them.[14/] Since the City raises

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13/ Provisional employees are appointed, "...to a permanent position pending the regular appointment of an eligible person from a special reemployment, regular employment or employment list." N.J.A.C. 4A:1-1.3 As the Commission noted in City of Jersey City, P.E.R.C. No. 85-78, 11 NJPER 84 (¶16037 1985), many provisional employees continue in that status indefinitely. 11 NJPER at 87, n.6.

14/ In its post-hearing brief, the City asserts that the grievance procedure does not cover disciplinary disputes because it has not been modified since the 1982 amendment to the Act. The 1982 amendment permits binding arbitration of disciplinary disputes where employees do not have alternate statutory review procedures. It appears that disputes arising under Article II, which permits the City to discharge employees for good cause, are subject to the grievance procedure. Article II has not been changed since 1982. As with the grievance procedure, Article II's applicability to provisional employees must be determined by an arbitrator.

contractual arbitrability questions not yet answered by an arbitrator, I can not find that it repudiated the agreement when it did not provide a hearing on the merits of the discharge of provisional employees.

The City also relies on Battaglia v. Union Cty. Welfare Bd., 88 N.J. 48 (1981) to argue that provisional employees are not entitled to disciplinary hearings under the grievance procedure. Battaglia was an attorney whose appointment as legal assistant to the Union County Welfare Board had expired. He was not reappointed due to his political affiliation. Our Supreme Court found that he did not have a due process right to a hearing. Nothwithstanding any constitutional rights of provisional employees, I find that they may be protected by a contractual grievance procedure that was not available to Battaglia. Provisional employees who are protected by contractual grievance procedures ending in binding arbitration have a statutory right to challenge their discharge at binding arbitration. N.J.S.A. 34:13A-5.3; Hudson Cty., P.E.R.C. No. 85-33, 10 NJPER 563 (¶15263 1984).

Having distinguished this case from Battaglia and dismissed the City's contention that provisional employees are not included in the unit, I find that the City's refusal to permit a hearing on the

merits of the firing of provisional employees supports an unfair practice finding.[15/]

AFSCME did not process the grievance after the April 27 meeting. AFSCME argues that the filing of the charge suspends its duty to process the grievance to arbitration. Under a self-executing grievance procedure, the union is excused from pursuing the grievance through binding arbitration only if the employer prevents it from continuing to process the grievance. City of Pleasantville. AFSCME's belief that filing a charge suspends the processing of a grievance is mistaken. The grievance procedure is self-executing. It permits AFSCME to continue to process grievances to arbitration. AFSCME has not presented evidence that the City's actions prevented it from continuing to process the grievances through the arbitration process.[16/] City of Pleasantville.

15/ Since the protection afforded provisional employees by the grievance procedure must first be determined by an arbitrator, I would not find a violation of the Act. If an arbitrator finds that the contractual grievance procedure covers the provisional employees' discharge and the City continues to refuse to process these grievances, it violates the Act. State of New Jersey.

16/ Filing and processing of a grievance does not stop the statute of limitations from running. Borough of Tenafly, P.E.R.C. No. 88-92, 14 NJPER 274 (¶19102 1988), aff'g H.E. No. 88-39, 14 NJPER 193 (¶19072 1988); State of N.J.(N.J. State College Locals), P.E.R.C. No. 77-14, 2 NJPER 308 (1976), aff'd 153 N.J. Super. 91 (1977); State of N.J. (Sachau), D.U.P. No. 84-28, 10 NJPER 216 (¶15110 1984).

Based upon the above analysis, I make the following:

Recommended Order

I recommend that the Complaint be dismissed.

Joyce M. Klein
Hearing Examiner

DATED: September 20, 1989
Trenton, New Jersey