P.E.R.C. NO. 84-138

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

FAIR LAWN BOARD OF EDUCATION,

Respondent,

-and- Docket No. CI-82-48-15

STANLEY FRED SOLOMONS,

Charging Party.

FAIR LAWN EDUCATION ASSOCIATION,

Respondent,

-and- Docket No. CI-82-49-16

STANLEY FRED SOLOMONS,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission, adopting a Hearing Examiner's recommendations, dismisses Complaints based on unfair practice charges that Stanley Fred Solomons, a teacher, filed against the Fair Lawn Board of Education, his employer, and the Fair Lawn Education Association, his majority representative. The charge against the Board alleged that the Board violated its contract with the Association when it granted some teachers, but not Solomons, early release time because they had started teaching early. The charge against the Association alleged that it breached its duty of fair representation when it refused to submit Solomons' grievance raising this contractual claim to binding arbitration. The Commission holds that Solomons did not prove either charge by a preponderance of the evidence and, further, that the charge against the Board was untimely.

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STANLEY FRED SOLOMONS,

Charging Party.

Appearances:
For the Fair Lawn Board of Education, Jeffer, Hopkinson & Vogel, Esqs. (Reginald F. Hopkinson, Of Counsel)

For the Fair Lawn Education Association, Schneider, Cohen & Solomon, Esqs. (David Solomon, Of Counsel)

For the Charging Party, Raymond G. Kruse, Esquire

DECISION AND ORDER

On April 15, 1982, Stanley Fred Solomons filed an unfair practice charge against the Fair Lawn Board of Education ("Board") with the Public Employment Relations Commission. Solomons alleged that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4(a)(3) and (7),[1/] when the Board allegedly: (1)

1/ These subsections prohibit public employers, their representatives or agents from: "(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; and (7) Violating any of the rules and regulations established by the commission."

adopted a new practice during the 1980-81 school year which allowed certain teachers at the Fair Lawn High School to commence teaching at 7:30 a.m. rather than the normal starting time of 8:15 a.m.; (2) thereafter permitted those teachers to conclude their teaching day at 2:00 p.m. and to leave the building at 2:30 p.m.; (3) granted those teachers additional compensation for teaching a sixth class pursuant to Article VIII, Section C. of the 1980-82 collective negotiations agreement between the Board and the Fair Lawn Education Association ("Association"); and (4) failed to grant Solomons additional compensation, notwithstanding that he allegedly also commenced teaching at 7:30 a.m., thereafter taught six classes, and was not permitted to leave the school building until 3:00 p.m.

On April 15, 1982, Solomons also filed an unfair practice charge against the Association. He alleged that the Association violated subsections 5.4(b)(1) and (5)[2/] when it refused to submit his grievance to arbitration. In addition, he alleged that Association representatives refused to discuss his grievance with him or give him written reasons for not taking the grievance to binding arbitration.

On August 23, 1982, the Director of Unfair Practices consolidated the two charges and issued Complaints and a Notice of Hearing. The Board and the Association filed Answers. The Board denied that it had violated the contract or the Act and

2/ These subsections 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; and (5) Violating any of the rules and regulations established by the commission."

further alleged that even assuming a contract violation had occurred, Solomons' sole remedy was through the negotiated grievance procedures. The Association denied that it had discriminated against Solomons or represented him unfairly.

On March 7 and November 16, 1983 and January 18, 1984, hearings were conducted.[3/] The parties made preliminary motions,[4/] examined witnesses, and presented exhibits. They waived oral argument, but filed post-hearing briefs.

On April 3, 1984, Commission Hearing Examiner Alan R. Howe issued his report and recommended decision, H.E. No. 84-51, 10 NJPER ___ (¶_____ 1984) (copy attached). He recommended dismissal of the Complaints. He found that the charge against the Board was not timely filed and that the Association had not breached its duty of fair representation.

On April 18, 1984, after receiving an extension of time, Solomons filed exceptions. He asserts that the Hearing Examiner erred in: (1) finding that the charge against the Board

3/ Commission Hearing Examiner Joan Kane Josephson conducted the March 7, 1983 hearing. The matter was reassigned to Commission Hearing Examiner Alan R. Howe following her resignation from the Commission's staff.

4/ At the outset of the first hearing, the Board and the Association made motions to amend their Answers to assert an affirmative defense that the charges were not timely filed under subsection 5.4(c) of the Act. That subsection provides: "...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." Hearing Examiner Josephson allowed the amendment of the defendants' Answers. She reserved decision, however, on their motions to dismiss based on subsection 5.4(c).

was not timely filed; (2) finding he had a teaching day of 7 1/4 hours and that his workday commenced at 7:45 a.m.; (3) finding that four teachers were compensated for teaching an additional sixth period; (4) drawing certain conclusions from evidence relating to the compensation of two special education teachers pursuant to past practice; (5) stating Solomons' grievance to be a demand for compensatory time instead of monetary compensation; (6) finding that John Kelly was an Association Vice-President instead of a grievance chairman; (7) concluding that early morning band was in the nature of an extra-curricular activity; and (8) crediting the then Association's president's testimony as to what happened at the Executive Committee's meeting with Solomons.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-7) are generally accurate. We adopt and incorporate them here with the following modifications and additions. 5/

5/ We modify finding of fact No. 5 to reflect that high school teachers Nicholas Minervini, Richard Stone, Sidney Rosenthal and Ellen Daniel did not receive monetary compensation for teaching an additional sixth period under Article VIII, of the 1980-82 collective negotiations agreement between the Board and the Association; these teachers were instead granted early dismissal at 2:30 p.m., instead of 3:00 p.m. We also modify finding of fact No. 8 to reflect that Solomons sought either compensatory time or monetary compensation for allegedly teaching an additional period. We also modify finding of fact No. 9 to reflect that the Commissioner of Education subsequently issued a decision finding that Solomons' petition before him was untimely and, in the alternative, that he lacked jurisdiction over a claim essentially alleging a breach of a collective negotiations agreement. Solomons v. Fair Lawn Bd. of Ed., OAL Dkt. No. EDU 0155-82 (January 10, 1984), aff'd., (Continued)

We first consider whether the local Association breached its duty of fair representation towards Solomons when it refused to process his grievance through binding arbitration. Under all the circumstances of this case, we hold it did not.

In In re Johnstone, P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983), we recapitulated the appropriate standards for reviewing such a claim:

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

5/ (Continued) Commissioner of Education #84-77 (March 19, 1984). Based upon our review of the record, we reject all other exceptions challenging the Hearing Examiner's findings of fact and specifically accept his decision to credit the Association president's testimony concerning the Association's reasons for declining to arbitrate the grievance, the length of the Executive Committee meeting, and the fact that no decision was reached in Solomons' presence.

[6] For a discussion of unfair representation cases arising in the different context of a challenge to a union's representation in negotiating a collective agreement, see In re FMBA Local No. 12 P.E.R.C. No. 82-65, 8 NJPER 98 (¶13040 1982) (Footnote in original).

> equal merit. Middlesex County; Local 194. All the circumstances of a particular case, however, must be considered before a determination can be made concerning whether a majority representative has acted in bad faith, discriminatorily, or arbitrarily under Vaca standards.[7/] Id. at pp. 13-14.

Here, we agree with the Hearing Examiner that the Association's representatives, after meeting with Solomons, properly declined, for non-discriminatory, non-arbitrary, and good faith reasons, to take the grievance through binding arbitration. These representatives reasonably believed that his grievance lacked merit, as in fact it did.8/

We next consider whether the Board violated subsections 5.4(a)(3) and (7) of the Act. Under all the circumstances of this case, we do not find a violation.

Insofar as a violation of subsection 5.4(a)(3) is alleged, we see no evidence showing either that the Board

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

8/ We need not decide under what circumstances, if any, an NJEA field representative or attorney must meet with a unit member, whether or not a local Association member, to discuss a grievance. The thrust of the instant case concerned the refusal to take the grievance to arbitration and the record clearly establishes the reasonableness of the local Association's refusal following Solomons' presentation before the Executive Committee.

discriminated against Solomons or that he enaged in protected activity. Insofar as a violation of subsection 5.4(a)(7) is alleged, we see no evidence that the Board violated a Commission rule or regulation. Accordingly, we dismiss these allegations on the merits.[9/]

ORDER

The Complaints are dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Suskin and Wenzler voted in favor of this decision. None opposed. Commissioners Graves, Hipp and Newbaker abstained.

DATED: Trenton, New Jersey
May 30, 1984
ISSUED: June 1, 1984

9/ We also note our agreement with the Hearing Examiner that the charge was not timely filed given that it only alleged violations of subsections 5.4(a)(3) and (7). Had an allegation been made that subsection 5.4(a)(5) had also been violated, the statute of limitations analysis might have been somewhat different. An individual employee cannot prevail upon a claim that an employee violated subsection 5.4(a)(5) unless it first establishes that his majority representative violated its duty of fair representation towards him under subsection 5.4(b)(1) in processing (or not processing) his contractual claim. See, e.g., In re New Jersey Turnpike Authority, P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980). Thus, it may be that the six month statute of limitations should not begin running against an employee alleging a violation of subsection 5.4(a)(5) until the acts allegedly showing a breach of the duty of fair representation under subsection 5.4(b)(1) occur, thus making his subsection 5.4(a)(5) claim against the employer cognizable. We raise, but do not now decide this statute of limitations question. We finally note that even if Solomons had alleged a violation of subsection 5.4(a)(5), we would have dismissed that claim on the merits.

H.E. No. 84-51

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

In the Matters of

FAIR LAWN BOARD OF EDUCATION,

Respondent,

-and- Docket No. CI-82-48-15

STANLEY FRED SOLOMONS,

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FAIR LAWN EDUCATION ASSOCIATION,

Respondent,

-and- Docket No. CI-82-49-16

STANLEY FRED SOLOMONS,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss the Unfair Practice Charge filed by Solomons against the Board on the ground that Solomons failed to file such charge within the six-month statute of limitation period under Section 5.4(c) of the New Jersey Employer-Employee Relations Act. The Hearing Examiner also recommended that the Commission dismiss an Unfair Practice Charge filed by Solomons against the Association on the ground that the Association did not breach its duty of fair representation toward Solomons by the mere fact of its refusal to submit his grievance to final and binding arbitration under the collective negotiations agreement between the Board and the Association. The Hearing Examiner cited the Commission's standard for evaluating union conduct in the matter of submitting grievances to arbitration as set forth in New Jersey Turnpike Employees Union, Local 194, P.E.R.C. No. 80-38, 5 NJPER 412, 413 (1979).

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.

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FAIR LAWN EDUCATION ASSOCIATION,

Respondent,

-and- Docket No. CI-82-49-16

STANLEY FRED SOLOMONS,

Charging Party.

Appearances:

For the Fair Lawn Board of Education
Jeffer, Hartman, Hopkinson, Vogel, Coomber & Peiffer, Esqs.
(Reginald F. Hopkinson, Esq.)

For the Fair Lawn Education Association
Schneider, Cohen & Solomon, Esqs.
(David Solomon, Esq.)

For the Charging Party
Raymond G. Kruse, Esq.

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on April 15, 1982, Docket No. CI-82-48-15, by Stanley Fred Solomons (hereinafter the "Charging Party or "Solomons") alleging that the Fair Lawn Board of Education (hereinafter the "Board") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that the Board adopted a new practice during the 1980-81 school year, which allowed certain teachers at the

Fair Lawn High School to commence teaching at 7:30 a.m., rather than the normal starting time of 8:15 a.m., and thereafter permitting those teachers to conclude their teaching day at 2:00 p.m. and to leave the building at 2:30 p.m., and they received additional compensation for teaching a sixth class pursuant to Article VIII, Section C of the 1980-82 collective negotiations agreement between the Board and the Fair Lawn Education Association (hereinafter the "Association"); and the Charging Party alleges further, notwithstanding that he also commenced teaching at 7:30 a.m., and thereafter taught six classes, he was not permitted to leave the building (Memorial Junior High School) until 3:00 p.m. and was discriminatorily treated since he received no additional compensation for the sixth class, and further, the same situation continued during the 1981-82 school year when he taught five classes, all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(3) and (7) of the Act.[1/]

An Unfair Practice Charge was also filed with the Commission by Solomons on April 15, 1982, Docket No. CI-82-49-16, alleging that the Association had engaged in unfair practices within the meaning of the Act, in that the Association failed to represent fairly both members and non-members of the Association, Solomons being a non-member, because the Association refused to submit Solomons' written grievance to binding arbitration on October 14, 1981. In addition, it is alleged that the Association refused to permit Solomons to explain the facts of his case prior to reaching its decision and also refused to allow Solomons to discuss his grievance with the New Jersey Education Association Field Representative and an attorney. Finally, the Association failed to respond in writing with reasons for the refusal of the Association to submit Solomons' grievance to binding arbitration, all of which

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is alleged to be a violation of N.J.S.A. 34:13A-5.4(b)(1) and (5) of the Act.[2/]

It appearing that the allegations of the Unfair Practice Charges, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on August 23, 1982 and the two Unfair Practice Charges were consolidated for hearing. Pursuant to the Complaint and Notice of Hearing, hearings were held on March 7 and November 16, 1983 and January 18, 1984[3/] in Newark, New Jersey, at which time the parties were given an opportunity to make preliminary motions, examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by March 12, 1984.

The Board and the Association were permitted to amend their respective Answers to the Complaint at the first day of hearing on March 7, 1983 in order to assert the defense of statute of limitations under Section 5.4(c) of the Act (1 Tr. 23, 24). However, a decision on the motions to dismiss was reserved by Hearing Examiner Josephson.

Unfair Practice Charges having been filed with the Commission, a question concerning alleged violation of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination. Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT AS TO THE BOARD

1. The Fair Lawn Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. Stanley Fred Solomons is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

2/ These Subsections prohibit public employee representatives, 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) Violating any of the rules and regulations established by the commission."

3/ The matter was originally assigned to Hearing Examiner Joan Kane Josephson. The matter was reassigned to the instant Hearing Examiner in September 1983 due to the imminent resignation of Hearing Examiner Josephson in October 1983.

3. Solomons has been employed as a music teacher by the Board since 1972. He first taught at the Thomas Jefferson Junior High School and continued there until the school was closed in or around 1977 when Solomons moved to the Memorial Junior High School in September 1977.[4/]

4. From 1972 through the end of the 1980-81 school year Solomons taught six classes per day. Contrary to the contention of the Charging Party, the Hearing Examiner finds as fact that Solomons' teaching day commenced at 7:45 a.m. and concluded at 3:00 p.m. for a total of 7¼ hours per day, which total was the same as for all other teachers in the District. Support for this finding, in the case of Solomons, is found in RB-1, which is Solomons' teaching schedule for the 1980-81 school year. This exhibit indicates that "early morning band" commenced at 7:45 a.m. and concluded at 8:15 a.m. and Solomons' teaching day concluded at 2:51 p.m. The fact that Solomons may have reported prior to 7:45 a.m., in the same fashion as other teachers in the District who reported prior to 8:15 a.m., in no way militates against the Hearing Examiner's finding that Solomons' teaching day has always commenced at 7:45 a.m. The Hearing Examiner credits the testimony of Superintendent Thomas J. Cannito in this regard.

5. During the 1980-81 school year two teachers of Drivers Education and two teachers of Physical Education at the High School were scheduled to commence teaching at 7:30 a.m. with early dismissal at approximately 2:30 p.m. These teachers were Nicholas Minervini, Richard Stone, Sidney Rosenthal and Ellen Daniel: See CP-14, pp. 1-5. The Hearing Examiner credits the testimony of the Superintendent that the foregoing situation at the High School occurred only as to these four named teachers and occurred only during the 1980-81 school year. The four named teachers

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4/ There was much fencing by the parties as to whether or not Memorial Junior High School was a secondary school within the meaning of Title 18A or was an upper elmentary school inasmuch at Memorial housed only grades seven and eight. As will be apparent hereinafter the question of whether or not "Memorial" is a secondary school is irrelevant.

at the High School were compensated for teaching an additional sixth period in accordance with the following provision of the 1980-82 collective negotiations agreement between the Board and the Association, i.e., Article VIII, "Teaching Hours and Teaching Load," Section C:

> "In the secondary schools no teacher shall be required to teach more than 5 periods per day without additional compensation. If a teacher is assigned an additional period in a given day, that teacher shall be compensated at the rate of $9.00 per period in 1980-81 and $10.00 per period in 1981-82." (J-7).

6. When the situation of additional compensation for the four named teachers at the High School came to the attention of Solomons he initiated a Level II grievance with Memorial principal David Miller on December 23, 1980 (CP-1). Upon a disclaimer by Miller that he could not resolve the grievance, Solomons submitted a Level III grievance with the Superintendent on January 6, 1981 (CP-2). After a protracted delay the Superintendent denied the grievance on July 16, 1981, giving as his reasons: (1) the existence of a long-standing practice of no change in Solomons' schedule with respect to early morning band; (2) the fact that Solomons' terms and conditions of employment had not changed since his initial acceptance of the band assignment; and (3) the contract specifies monetary payment only at the secondary level and, under certain circumstances, at the elementary level (CP-2). On July 24, 1981 Solomons submitted his grievance at Level IV before the Board (CP-4 and CP-5). Under date of August 3, 1981 Solomons was advised by the Board that his grievance was denied on July 30, 1981 (CP-6).

7. Solomons also contends, in support of his claim for additional compensation in the 1980-81 school year, that two other Memorial teachers, Judith Boyce and Norman Horowitz, received additional compensation under the agreement for additional teaching periods from September 4, 1980 through June 19, 1981 (RB-8 and RB-9). Excerpts from Board minutes from June 8, 1977 through January 20, 1983 (RB-2 through RB-12) were received in evidence, which indicate payment to named teachers for additional teaching periods at Memorial. The Superintendent testified credibly that

the explanation for these payments arose from the fact that these were Special Education teachers who historically received compensation for the sixth period in a teaching day. The Hearing Examiner finds as a fact that this long-standing practice regarding Special Education teachers at Memorial in no way supports a like claim by Solomons who is a music teacher.[5/]

8. In the 1981-82 school year, and continuing to date, Solomons has, in addition to early morning band, had four classes plus two planning periods and one assigned duty. Commencing with the 1981-82 school year Solomons claims compensatory time instead of monetary compensation for an additional teaching period. The Hearing Examiner finds as a fact that Solomons has failed to prove such a claim by a preponderance of the evidence.

9. On November 30, 1981 Solomons filed a Petition with the Commissioner of Education, complaining about the same subject matter as the Unfair Practice Charge against the Board (CP-11). The Board filed a responsive Answer under date of January 4, 1982 (CP-12). The instant record does not disclose the precise status of the matter before the Commissioner of Education.

FINDINGS OF FACT AS TO THE ASSOCIATION

10. The Fair Lawn Education Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

11. After Solomons learned of the Board's denial of his grievance under date of August 3, 1981, supra, Solomons wrote to John Kelly, a Vice-President of the Association, on August 7, 1981, in which Solomons requested that the Association submit his grievance to binding arbitration (CP-7). When he received no response from Kelly, Solomons contacted Amelia Morgan during the first week of school, Morgan

5/ The Hearing Examiner further credits the testimony of the Superintendent that the early morning band which Solomons "teaches" is in the nature of an extra-curricular activity inasmuch as the students don't acquire credits toward graduation and they participate on a voluntary basis with the right to withdraw at anytime (2 Tr. 60-62).

being one of the officers of the Association. Morgan told Solomons that she would go to the Executive Committee of the Association and, as a result, Solomons received a memo from Marie A. Tas, an Association Vice President, under date of September 23, 1981, which advised Solomons that the Executive Committee would meet with Solomons on Monday, October 12, 1981 (CP-8).

12. Solomons testified that the Executive Committee meeting on Monday October 12, 1981 lasted 20 to 25 minutes and that he was not given an opportunity to discuss the merits of his grievance. He said that he was told almost immediately that the Executive Committee had decided not to proceed to binding arbitration (1 Tr. 54, 55). Solomons then requested that he have an opportunity to explain the merits of his grievance to an NJEA Field Representative or an attorney representing the Association (1 Tr. 55). This request was allegedly denied because Solomons was not a dues paying member of the Association.[6/]

13. President Mellor, contradicting Solomons, testified that the Executive Committee met with Solomons on October 12, 1981 for 30 to 45 minutes and gave Solomons an opportunity to explain his grievance. The Executive Committee told Solomons that it would get back to him and did not make a decision in his presence. According to Mellor, the Executive Committee decided not to take Solomons' grievance to arbitration because of the past practice clause in the agreement and the fact that other teachers were like situated, working 7¼ hours per day. The communication to Solomons of the Executive Committee's decision was verbal, there being no practice or policy of the Association to reply to requests for binding arbitration in writing.[7/]

6/ On October 14, 1981 Ilona Mellor, the then President of the Association, sent Solomons a memo, which stated that an NJEA Field Representative meets and talks only with dues paying members (CP-9). This memo was received by Solomons on October 15, 1981.

7/ Although the instant Hearing Examiner was not present during the testimony of Solomons at the first hearing on March 7, 1983, counsel for the parties agreed that the Hearing Examiner could rely on the transcript in rendering a decision in this case. The Hearing Examiner did personally hear the testimony of Mellor on November 16, 1983. Based on an examination of the transcript of March 7, 1983, (Cont'd. page 8).

THE PRELIMINARY ISSUE

Should Solomons' Unfair Practice Charges against the Board and against the Association be dismissed on the ground that they were untimely filed under Section 5.4(c) of the Act?

DISCUSSION AND ANALYSIS

Solomons' Unfair Practice Charge Against The Board Should Be Dismissed As Untimely Filed

Since the Board's amendment of its Answer at the hearing, asserting the defense of the six-month statute of limitations under Section 5.4(c) of the Act, the Board has vigorously pursued this defense, both at the hearing and in its post-hearing brief. The Charging Party's brief does not deal with the statute of limitations defense.

Section 5.4(c) of the Act provides that no complaint shall issue based upon any unfair practice occurring more than six months prior to the filing of the Charge unless the party aggrieved was prevented from such filing. The Board argues that the six months should be deemed to have run from June 30, 1981, the termination of the 1980-81 school year, in which Solomons complained that he was denied compensation for the teaching of an additional sixth class. Thus, the Board perceives that Solomons did not file his Unfair Practice Charge against the Board until more than nine months after the last date of the commission of any alleged unfair practice by the Board.

However, the Hearing Examiner is persuaded that the operative date for the running of the statute of limitations under Section 5.4(c) of the Act is August 3, 1981, the date when the Board's Secretary advised Solomons that the Board had denied his grievance on July 30, 1981 (CP-6). The Board was in no way

7/ (Footnote 7 cont'd.)
and personally observing the demeanor of Mellor, and considering the relative probabilities as to what happened at the meeting on October 12, 1981, as between the conflicting testimony of Solomons and Mellor, the Hearing Examiner finds as a fact that the version of Mellor should be credited as to: (1) how long the meeting lasted; (2) the fact that no decision was reached in the presence of Solomons; and (3) the reasons given for declining to arbitrate Solomons' grievance. The argument of counsel for the Charging Party that the findings of fact should be to the contrary is rejected (see Charging Party's Brief, pp. 13-15).

responsible for what transpired thereafter with respect to Solomons' seeking to have the Association submit his grievance to binding arbitration, which event took place in October, 1981.

Nor, was the Board in anyway involved in Solomons' decision to file a Petition with the Commissioner of Education on November 30, 1981 (CP-11). The filing by Solomons with the Commissioner of Education in no way tolled the running of the statute of limitations and, in this connection, the Hearing Examiner cites State of New Jersey, P.E.R.C. No. 77-14, 2 NJPER 308 (1976), aff'd. 153 N.J. Super. 91 (App. Div. 1977), pet. for certif. den. 78 N.J. 326 (1978). In that case an aggrieved college professor filed several grievances in November and December 1974, was removed from the payroll in June 1975, received an arbitration award in August 1975, was not reappointed in December 1975 and filed an Unfair Practice Charge with the Commission on March 19, 1976. The Commission, affirmed by the courts, held that the filing of grievances and the exhaustion of the grievance procedure did not toll the six-month statute of limitations in Section 5.4(c) of the Act. Thus, when the Charging Party there filed its charge in March 1976, it was more than a year from the filing of the grievances in November and December 1974.

The Hearing Examiner finds the State of New Jersey case, supra, is dispositive of any contention that the statute of limitations was tolled by Solomons' having filed a Petition with the Commissioner of Education in November 1981. This filing no more tolled the statute of limitations under Section 5.4(c) than did the filing of grievances and the exhausting of the grievance procedure in State of New Jersey.

This is not a case where an aggrieved party filed suit in the Superior Court well within the six-month time period as was the case in Kaczmarek v. New Jersey Turnpike Authority, 77 N.J. 329 (1978) where the Supreme Court held that the Superior Court should have transferred the case to the Commission (77 N.J. at 344). There is no suggestion in Kaczmarek [8/] that a filing in an administrative agency, such as

8/ See also, Zaccardi v. Becker, 88 N.J. 245 (1982).

with the Commissioner of Education, tolls the statute of limitations governing another administrative agency.

Thus, for all of the foregoing reasons, the Board's Motion to Dismiss the Unfair Practice Charge filed by Solomons against it on the ground that it was filed more than six months after the Board denied Solomons' grievance is granted.

Solomons' Unfair Practice Charge Against The Association Should Not Be Dismissed As Untimely Filed

The question of timeliness vis-a-vis the Association is quite different from the same question as to the Board. In the case of the Association the time for Solomons to have filed against it ran either from October 14 or October 15, 1981. In the Unfair Practice Charge Solomons alleged that the Association ceased to communicate with him on October 14, 1981. At the hearing Solomons testified without contradiction that he received the October 14, 1981 memo from Mellor (CP-9) on October 15th. The date of October 12, 1981, when Solomons met with the Executive Committee, is not the operative date for the running of the statute of limitations since the Hearing Examiner has found that no decision was reached by the Executive Committee on that date. Thus, the operative date for the running of the statute is either October 14 or October 15, 1981.

The Hearing Examiner elects to use the later date since this was the date that Solomons received the memo from Mellor and this constituted the last communication from the Association to Solomons. Plainly, the filing date of April 15, 1982 is exactly six months from October 15, 1981 and, thus, Solomons' filing was timely under Section 5.4(c) of the Act. The Hearing Examiner will now proceed to consider the merits of the Unfair Practice Charge against the Association.

THE ISSUE

Did the Respondent Association breach its duty of fair representation in violation of Subsection(b)(1) of the Act when in October 1981 it refused to take Solomons' grievance to binding arbitration?

FURTHER DISCUSSION AND ANALYSIS

The Hearing Examiner finds and concludes that the Association did not violate the Act by its conduct herein, namely, its refusal to take Solomons' grievance to binding arbitration in October 1981.

It should be noted first that Solomons failed to prove by a preponderance of the evidence any discrimination or disparate treatment of him by the Association based on his non-membership in the Association. The Association's conduct is thus viewed in the context of actions taken towards Solomons without regard to membership or non-membership in the Association. Solomons' claim that he was denied the opportunity to speak to an NJEA Field Representative or an attorney representing the Association is irrelevant to the determination herein since the gravamen of the Unfair Practice Charge against the Association is its failure to have taken Solomons' grievance to binding arbitration. It was the Executive Committee's ultimate decision as to whether or not to proceed to arbitration, thus any discussion of the merits of the grievance with the Field Representative or the attorney would have been extraneous to the decision of the Committee. Thus, the Hearing Examiner need not decide whether or not a non-member has the right to meet with a Field Representative of the NJEA or the attorney for the Association.

The Commission, relying on the Federal sector precedent in interpreting the Act (Lullo v. Int'l Assn. of Fire Fighters, 55 N.J. 409, 424) has decided a number of cases involving an alleged breach of the duty of fair representation under Subsection(b)(1) of the Act. For example, in New Jersey Turnpike Employees Union, Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (1979), a case involving the refusal of the union to take an employee's grievance to arbitration, the Commission said:

> "In considering a union's duty of fair representation, certain principles can be identified . The union must exercise reasonable care and diligence in investigating, processing and presenting grievances; it must make a good faith judgment 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." (5 NJPER at 413).

In that case the Commission found that the refusal to take an employee's grievance to arbitration was not a breach of the duty of fair representation.

The Federal precedent, upon which the Commission has relied in determining whether or not a union has breached its duty of fair representation regarding a refusal to arbitrate usually begins with Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967) where the United States Supreme Court articulated the test for a breach of the duty of fair representation as being one where the union's conduct towards the employee "is arbitrary, discriminatory or in bad faith." (386 U.S. at 190). See also, Amalgamated Association, etc. v. Lockridge, 403 U.S. 274, 77 LRRM 2501 (1971) and Hines v. Anchor Motor Freight Inc., 424 U.S. 554, 566-69, 91 LRRM 2481 (1976). More recently, see Seymour v. Olin Corp., 666 F.2d 202, 208 (5th Cir. 1982) and Dober v. Roadway Express, ___ F.2d ____, 113 LRRM 2594, 2596 (7th Cir. 1983).

As found above by the Hearing Examiner, Mellor provided good and sufficient reasons why the Executive Committee decided not to take Solomons' grievance to binding arbitration, citing the past practice clause in the agreement and the fact that other employees were liked situated, working 7¼ hours per day. Thus, the Hearing Examiner cannot conclude other than that the Association's conduct towards Solomons was neither arbitraty, discriminatory nor in bad faith.

* * * *

Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Respondent Board's Motion to Dismiss the Unfair Practice Charge filed against it by Stanley Fred Solomons is granted on the ground that it was not timely filed under N.J.S.A. 34:13A-5.4(c).

2. The Respondent Association did not violate N.J.S.A. 34:13A-5.4(b)(1) and (5) when it refused in October 1981 to take Stanley Fred Solomons' grievance to binding arbitration.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaints be dismissed in their entirety.

Alan R. Howe
Hearing Examiner

Dated: April 3, 1984
Trenton, New Jersey