P.E.R.C. NO. 82-87

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LOCAL 2293, AFSCME COUNCIL
#73, AFL-CIO,

Respondent,

-and- Docket No. CI-81-23-108

STANLEY T. VOZNIAK, ANTHONY
STRZALKOWSKI, ET AL,

Charging Parties.

SYNOPSIS

The New Jersey Public Employment Relations Commission, adopting the recommendation of its Hearing Examiner in the absence of exceptions, dismisses a Complaint issued on the basis of an unfair practice charge which a group of custodians employed by the Woodbridge Township Board of Education had filed against the Local President and Council representative of their exclusive representative, Local 2293, AFSCME, Council #73, AFL-CIO. The charge alleged that the Respondents breached their duty of fair representation when they incorrectly informed the Charging Parties at a contract ratification meeting that the proposed contract placed them at the top step of the salary guide. The Charging Parties failed to meet their burden of proving a violation by a preponderance of the evidence.

P.E.R.C. NO. 82-87

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HENRY KRISOFF and DON DILEO,

Respondents,

-and-

LOCAL 2293, AFSCME COUNCIL #73, AFL-CIO,

Intervenors,

-and- Docket No. CI-81-23-108

STANLEY T. VOZNIAK, ANTHONY STRZALKOWSKI, ET AL,

Charging Parties.

Appearances:
For the Respondent, Carlton Steger, Council #73 Staff Representative

For the Charging Party, Daniel J. Hussey, Esquire

DECISION AND ORDER

On November 3 and 26, 1980, Stanley T. Vozniak, August A. DeSalvio, Anthony Strzalkowski, Raymond Jackowski and Evariato Vornoli ("Charging Parties")filed, respectively, an unfair practice charge and amended charge against Henry Krissoff and Don Dileo ("Respondents") with the Public Employment Relations Commission. The Charging Parties are custodians employed by the Woodbridge Township Board of Education ("Board"). The Respondents are the former Local President (Krissoff) and Council representative (Dileo) of Local 2293, AFSCME Council #73 ("Council #73"), the exclusive representative of, inter alia, the Board's custodians, bus drivers, and cafeteria workers. The Charge, as amended, alleges that the Respondents violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"),

specifically subsection N.J.S.A. 34:13A-5.4(b)(1),[1/] when, at a July 6, 1980 contract ratification meeting, they incorrectly informed the Charging Parties that the proposed contract placed them at the top step of the salary guide.[2/]

On February 24, 1981, the Director of Unfair Practices issued a Complaint and Notice of Hearing pursuant to N.J.A.C. 19:14-2.1. On March 6, Council #73 filed a Motion for Leave to Intervene and an Answer in which it denied the Complaint's allegations.

On August 4 and October 5, 1981, Commission Hearing Examiner Arnold H. Zudick conducted a hearing. He granted Council #73's motion to intervene and then afforded all parties the opportunity to examine witnesses, present evidence, and argue orally. The parties filed briefs by December 4, 1981.

On January 22, 1982, the Hearing Examiner issued his Recommended Report and Decision, H.E. No. 82-27, 8 NJPER ____ (¶_____ 1982) (copy attached). Finding that the Charging Parties had not met their burden of proof, he recommended dismissal of the Complaint.

The Hearing Examiner sent the parties a copy of his Recommended Report and Decision and informed them that exceptions, if any, had to be filed no later than February 4, 1982. None of the parties filed exceptions or asked for an extension of time.

We have reviewed the record and, in the absence of exceptions, adopt the Hearing Examiner's recommended findings of

1/ This subsection prohibits 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/ The amended charge added the date of the ratification meeting.

fact and conclusions of law. We agree that Charging Parties have failed to discharge their burden of proving, by a preponderance of the evidence, a violation of N.J.S.A. 34:13A-5.4(b)(1).

ORDER

IT IS HEREBY ORDERED that the Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

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

DATED: Trenton, New Jersey
March 9, 1982
ISSUED: March 10, 1982

H. E. No. 82-27

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

In the Matter of

LOCAL 2293, AFSCME COUNCIL #73,
AFL-CIO,

Respondent,

-and-

Docket No. CI-81-23-108

STANLEY T. VOZNIAK, ANTHONY
STRZALKOWSKI, ET AL,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that AFSCME did not violate the New Jersey Employer-Employee Relations Act. The Charging Party failed to prove that the Respondent breached its duty of fair representation when one union member was mistakenly informed that he was on the top step of the new guide. There was no showing of bad faith, intent, reckless disregard, or knowledge by the union. The information was an unintentional mistake and no real harm resulted.

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. 82-27

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

In the Matter of

LOCAL 2293, AFSCME COUNCIL #73,
AFL-CIO,

Respondent,

-and- Docket No. CI-81-23-108

STANLEY T. VOZNIAK, ANTHONY
STRZALKOWSKI, ET AL,

Charging Party.

Appearances:

For the Respondent
Carlton Steger, Council #73 Staff Representative

For the Charging Party
Daniel J. Hussey, Esq.

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") on November 3, 1980, and amended on November 26, 1980, by Stanley Vozniak, Anthony Strzalkowski, August DiSalvo, Evariato Vornoli, and Raymond Jackowski (the "Charging Party") alleging that Henry Krissoff, President of Local 2293, AFSCME Council #73, and Don Dileo, representative of Local 2293, AFSCME Council #73 (the "Respondent") has 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. (the

"Act"). The Charge(s) alleges that the Respondent, particularly staff representative Don Dileo, discriminated against them with respect to their placement on the salary guide which was alleged to be a violation of N.J.S.A. 34:13A-5.4(b)(1) of the Act. 1/

Specifically, the Charging Party asserted in the original charge that Don Dileo told them that step #5 of the existing contract salary guide would be eliminated and that they would move to the top step of the new contract which was step #3. In the amended charge the Charging Party asserted that Dileo told them that they would move to the top step which was step #3, and that he told Vozniak that he would be on step #3, annual rate of $13,583. The Respondent denied that Dileo made the above statements or that it in any way discriminated against the Charging Party.

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on February 24, 1981, and hearings were held herein on August 4 and October 5, 1981, 2/ in Newark, New Jersey, at which time the parties were given the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. The parties filed post-hearing briefs, both of which were received on December 4, 1981.

1/ This subsection prohibits public employee organizations, their representatives or agents from: "Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act."

2/ The hearing in this matter was originally scheduled for April 13, 1981. However, by letter dated March 30, 1981, the Charging Party requested that the hearing be rescheduled. The hearing was rescheduled for April 21 and 22, 1981, however, on April 14, 1981, the parties requested that the hearing be cancelled to give them additional time to attempt to settle the case.

Finally, on July 17, 1981, the Charging Party advised the Hearing Examiner that the matter could not be settled and he requested the hearing be rescheduled. The first hearing then took place on August 4, 1981.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act exists and, after hearing, and after consideration of the post-hearing briefs, 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

1. Local 2293, AFSCME Council #73, is a public employee representative within the meaning of the Act and is subject to its provisions.

2. The individuals comprising the Charging Party are public employees within the meaning of the Act and are subject to its provisions.

3. On July 6, 1980, a meeting was held by the Respondent and was conducted by Don Dileo and Henry Krissoff for the purpose of reviewing and then conducting a ratification vote on the collective agreement negotiated between the Respondent and the Woodbridge Township Board of Education (the "Board"). Both Dileo and Krissoff conducted the meeting and answered questions from the members.

4. Of the five charging parties, only Stanley Vozniak and Anthony Strzalkowski testified as to the alleged comments made by Dileo and Krissoff. The evidence shows that neither August DiSalvo nor Raymond Jackowski were permitted to attend the union meeting and they were therefore not privy to any comments made by

the Respondent. Finally, it is not entirely clear from the evidence whether Evariato Vornoli attended the union meeting, but since he did not testify at the hearing his attendance or non-attendance at the meeting is immaterial.

5. The record reflects that there was considerable confusion and noise at the July 6 ratification meeting. Both Dileo and Krissoff testified that there were many separate conversations taking place with various clusters of people, that it was very loud, that people were spread out throughout the room, and that this was going on while Dileo and Krissoff attempted to respond to questions raised by the members. 3/ When asked whether a majority of janitors would have heard particular questions on their salary, Dileo responded, "not necessarily." He indicated that because of the noise and groups of people that even a minority of people may not have heard any specific questions. 4/

6. In support of the Charging Party's position, Stanley Vozniak testified that at the July 6 union meeting he asked Dileo where on the new guide would he be placed. He alleged that Dileo replied that he would go to the top step of the guide, $13,583. 5/ On cross-examination Vozniak admitted that neither he nor Dileo mentioned step five in their discussion, but Vozniak believed he was on step 5 of a 6-step guide and that the guide was being reduced from six steps to three steps. 6/

3/ Transcript ("T"), pp. 88, 162-163.

4/ T, p. 102.

5/ T, pp. 122-123, 131.

6/ T, pp. 131, 129-130.

Anthony Strzalkowski also testified at the hearing. He admitted that although he did not ask Dileo any questions, he heard Dileo respond to Vozniak's question by saying he (Vozniak) would go to the top step. 7/ On cross-examination, however, Strzalkowski demonstrated that he was confused. He testified at first that he did not understand that the salaries were proposed salaries that people would be getting. Although he changed that testimony later, he continued to demonstrate confusion over the salaries. 8/ Later, Strzalkowski admitted that nobody had mentioned step 5, but that he thought there were five or six steps (later he said six steps) in the contract and he wasn't aware of any steps being dropped. 9/

The record demonstrates that both Dileo and Krissoff were actively included in the negotiations process that resulted in the drafting of the new salary guides. Krissoff was the Respondent's chief negotiator, and Dileo was present at the negotiations. 10/ Elizabeth Toth, the Board's negotiator, indicated that the Respondent and the Board reached an agreement on the reduction of steps in the salary guide, and that the union's negotiators understood the agreement. 11/ None of the Charging Parties attended the negotiations.

8. In support of the Respondent's position Dileo testified that he did not know or recognize any of the Charging Parties nor did he recall specific questions. However, he was certain that no janitor told him he was on step 5 of the old scale and then asked what step he would be on in the new scale. 12/ Dileo also denied making

7/ T, p. 142.
8/ T, pp. 143-145.
9/ T, pp. 145-147.
10/ T, p. 50.
11/ T, pp. 33-41.
12/ T, pp. 86-87.

the statement attributed to him by the Charging Party. Although he did not specifically recall the question or answer, he indicated that if anyone had asked that question (Vozniak's question) he would not have given the answer attributed to him. 13/ In addition, Dileo and Krissoff testified that the bulk of the questions from the members did not pertain to salary, rather, the big issue concerned the use of employee uniforms. 14/

Finally, Dileo admitted that there was nothing in Exhibits CP-1 and CP-2, the documents which he provided to the members at the union meeting, which would correlate for a person the step he was previously on and the step he would be on in the proposed contract. 15/

The Issues

1. Did the Respondent through its representative(s) deliberately or mistakenly misrepresent the placement of the employees on the salary guide?

2. If there was a misrepresentation, would such action constitute a violation of the Act?

Discussion and Analysis

The Charging Party's case is based entirely upon the testimony of Vozniak and Strzalkowski. Both men testified that Dileo told Vozniak he'd be on the top step of the new guide. Even if their testimony was totally accurate, neither man testified or alleged that Dileo had an unlawful, improper or deliberate intent to mislead them or misrepresent their placement on the salary guide.

13/ T, p. 90.

14/ T, pp. 102-103, 173.

15/ T, p. 81.

Furthermore, a review of the evidence raises doubts as to the relative strength and accuracy of the Charging Party's testimony. Vozniak, for example, testified that the existing guide was a six-step guide when in fact it was four steps, and he admitted at the hearing that there was no mention of step 5 by Dileo or himself despite having alleged in the original charge that Dileo stated that step 5 would be eliminated. Strzalkowski testified that he too thought there were six steps in the guide and he demonstrated confusion over the number of steps - if any - that would be eliminated from the existing guide.

This analysis suggests that both Vozniak and Strzalkowski were confused about the existing salary guide even prior to the July 6 meeting, and it also shows that Vozniak was mistaken about Dileo's response at least with respect to mentioning step 5. Although this analysis is not intended to totally negate Vozniak or Strzalkowski's testimony, it does establish that their own recollections of certain perinent facts was not entirely clear.

While the Charging Party's testimony was somewhat unclear, so too was the Respondent's testimony. Dileo admitted that he did not know or remember any of the Charging Parties and that he did not recall Vozniak's question nor his (Dileo's) answer. In addition, Krissoff's testimony did not demonstrate that he was aware of Vozniak's question or Dileo's answer.

The above information demonstrates to the undersigned that none of the witnesses were entirely clear or sure of exactly what was asked by Vozniak or answered by Dileo and Krissoff. When

combined with the fact that the July 6 meeting was very loud an disruptive it is entirely possible that Dileo did not accurately hear Vozniak's question or that Vozniak did not accurately hear Dileo's response or both.

The burden of proof in an unfair practice charge is on the Charging Party to prove a violation of the Act. The evidence adduced at the hearing did not meet that requirement. Rather, the evidence merely suggests confusion on both sides, and at most demonstrates that even if Dileo did make the response attributed to him, it was a mistake, and not based upon any intent to mislead or misrepresent the salary to the Charging Party nor did it demonstrate bad faith.

The Charging Party suggested in its brief that had Dileo acknowledged that he unintentionally misspoke himself to Vozniak, it would not have been a breach of the duty of fair representation, but, because he (Dileo) denied making the statement attributed to him this demonstrated an intent or at least an affirmative misrepresentation of the collective agreement to Vozniak. Such reasoning is without merit. Dileo testified that he did not recall Vozniak's question nor his own answer. He only denied giving the answer attributed to him because he did not recall giving it and did not believe that he would have given such an answer. 16/ How could Dileo have admitted he unintentionally misspoke himself to Vozniak when he did not recall the question or the answer? He could not.

16/ Given Dileo's involvement in the negotiations of the collective agreement it follows that he was intimately aware of how the guide was reached and prepared and it would not have made sense for Dileo to deliberately give Vozniak the wrong information. Consequently, absent any showing of intent to mislead or deliberate misrepresentation Dileo's response to Vozniak - even if true - would only have been a mistake.

He testified only that he did not believe he would have given such an answer and his testimony cannot be construed to demonstrate intent or bad faith. In fact, the undersigned believes that if Dileo did state that Vozniak would be on the top step of the guide it was unintentional and, even as the Charging Party recognized, such an unintentional statement did not breach the duty of fair representation.

Moreover, the Charging Party's assertion that Dileo "affirmatively" misrepresented the contract to Vozniak is also not persuasive. Misrepresentation in the labor relations context suggests something more than a mere unintentional mistake which is the most that Dileo's alleged answer - even if true - would have established. Additionally, by using the word "affirmative" the Charging Party seems to suggest that Dileo knew he was giving Vozniak the wrong information. The evidence, however, did not establish that Dileo knowingly or intentionally gave an incorrect answer to Vozniak.

Finally, even assuming that Dileo unintentionally told Vozniak that he would be on the top step of the guide, this establishes - at most - only a de minimis amount of harm that would fall short of a breach of the duty of fair representation. Moreover, there was no showing at all how Charging Parties DiSalvo, Vornoli or Jackowski were adversely affected by Dileo's response to Vozniak, and hardly even a de minimis showing how Strzalkowski was affected by Dileo's alleged response to Vozniak.

Consequently, based upon the above discussion the undersigned concludes that the Respondent did not deliberately, inten-

tionally or affirmatively misrepresent to Vozniak his placement on the salary guide. Dileo's answer - even if made - was at most an unintentional mistake with virtually harmless results. It may have caused Vozniak (and the others) some very real resentment and disappointment when he learned that he was not on the top step, but it hardly amounted to a failure of fair representation.

With respect to the legal issue, first, even assuming that Dileo's answer was as Vozniak testified, there was no showing of bad faith, intent to mislead, knowledge that the answer was incorrect, or that there was deliberate misrepresentation. Absent these elements it is extremely difficult to support a finding of a breach of fair representation.

For example, in In re Woodbridge Twp. Federation of Teachers, P.E.R.C. No. 81-66, 6 NJPER 463 (¶11237 1980), affmd App. Div. Docket No. A-1095-80 (12/3/81), an individual alleged that the union breached the duty of fair representation by failing to keep non-union members apprised of the progress of a grievance filed on behalf of all employees. The court and Commission upheld the hearing examiner's dismissal of the charge when he held that although the union's actions were objectionable, the same were de minimis and there was no substantive harm, and consequently the union's actions did not rise to the level of a breach of the duty of fair representation.

The instant matter is similar to Woodbridge, supra, in that Dileo's answer (assuming Vozniak was correct) may have been inaccurate and caused some disappointment, but it was de minimis in nature and no substantive harm resulted. In fact, the union's actions -

or inactions - in Woodbridge were, in the undersigned's estimation, actually more detrimental than Dileo's alleged statement in the instant matter. If the former was not a violation, certainly the latter would not rise to the level of a violation.

The Charging Party, in its brief, cited several decisions to support its position. The undersigned has reviewed those decisions but believes that they can be distinguished from the instant matter. First, the evidence does not support a finding that the Respondent failed to "adequately" explain the contract and, second, Dileo's answer to Vozniak was not an explanation of the terms of the contract. The contract was silent as to specific names and placement on the guide. Rather, Dileo's answer to Vozniak was merely his assessment - albeit incorrect - of Vozniak's placement on that guide.

The undersigned is aware that certain unintentional acts or omissions by majority representatives may breach the duty of fair representation if they are arbitrary or reflect reckless disregard for individual rights. See Robesky v. Quantas Airways, 573 F.2d 1082, 98 LRRM 2090 (9th Cir. 1978); and, N.L.R.B. v. American Postal Workers Union, 618 F.2d 1249, 103 LRRM 3045 (8th Cir. 1980). However, Dileo's (and Krissoff's) actions were neither arbitrary nor even close to being classified as reckless disregard.

Finally, another case for comparison with the instant matter is Teamsters, Western Conference (Calif. Cartage Co.), 251 NLRB #52, 105 LRRM 1271 (1980). In that case the union had failed to warn members prior to their ratifying a rider agreement that

approval of the same would result in the loss of an expected wage increase. The NLRB found that the union did not violate its fair representation duty and that there had been no bad faith. In the instant matter there was far less harm - if any - to the Charging Party than in the cited case, and absent bad faith, there is insufficient basis herein to find a breach of fair representation.

Accordingly, based upon the foregoing discussion, and upon the entire record, the Hearing Examiner makes the following:

Conclusions of Law

1. The Respondent did not violate N.J.S.A. 34:13A-5.4 (b)(1) by telling Charging Party Vozniak (or others) that he was on step 3 instead of step 2 of the new salary guide.

Recommended Order

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.

Arnold H. Zudick
Hearing Examiner

DATED: January 22, 1982
Trenton, New Jersey