

P.E.R.C. NO. 98-131

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PASSAIC COUNTY COMMUNITY COLLEGE
ADMINISTRATORS' ASSOCIATION, OPEIU,
LOCAL 153,

Respondent,

-and-

Docket No. CI-H-92-28

RUTH B. WASILEWSKI,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against Passaic County Community College Administrators Association, OPEIU, Local 153. The Complaint was based on an unfair practice charge filed by Ruth Wasilewski. The charge alleges that Local 153 violated the New Jersey Employer-Employee Relations Act when it failed to represent Wasilewski when she was directed to vacate her office, threatened with termination, denied leave time and, ultimately, terminated. The Commission finds that Local 153 did not breach its duty of fair representation.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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PASSAIC COUNTY COMMUNITY COLLEGE
ADMINISTRATORS' ASSOCIATION, OPEIU,
LOCAL 153,

Respondent,

-and-

Docket No. CI-H-92-28

RUTH B. WASILEWSKI,

Charging Party.

Appearances:

For the Respondent, Schneider, Goldberger, Cohen, Finn,
Solomon, Leder, Montalbano, attorneys (Bruce D. Leder, of
counsel)

For the Charging Party, Ruth B. Wasilewski, pro se

DECISION

On November 7, 1991, January 6, 1992, and July 14, 1992,
Ruth B. Wasilewski filed an unfair practice charge and amended
charges against the Passaic County Community College
Administrators' Association, OPEIU, Local 153. Wasilewski alleges
that Local 153 violated the New Jersey Employer-Employee Relations
Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4b(1), (2), (3),
and (5),^{1/} when it failed to represent her when she was directed

^{1/} These provisions prohibit employee organizations, their
representatives or agents from: (1) Interfering with,
restraining or coercing employees in the exercise of the
rights guaranteed to them by this act. (2) Interfering

to vacate her office, threatened with termination, denied leave time and, ultimately, terminated.

On May 27 and July 14, 1992, Wasilewski filed an unfair practice charge and amended charge against Passaic County Community College (Docket No. CI-92-34) alleging that the College violated the Act, specifically 5.4a(1), (2), (3), (4), (5) and (7),^{2/} by violating its collective negotiations agreement with Local 153, not following grievance procedures, and denying her leave requests.

1/ Footnote Continued From Previous Page

with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances. (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. (5) Violating any of the rules and regulations established by the commission.

2/ These provisions 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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (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. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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. (7) Violating any of the rules and regulations established by the commission.

On August 19, 1992, the Director of Unfair Practices refused to issue a Complaint on either charge. D.U.P. No. 93-6, 18 NJPER 453 (¶23205 1992). On December 18, the Commission affirmed the Director's decision refusing to issue a Complaint against the College but reversed and remanded his decision as to Local 153. P.E.R.C. No. 93-51, 19 NJPER 53 (¶24024 1992).

On January 8, 1993, a Complaint and Notice of Hearing issued. On January 13, Local 153 filed an Answer denying the allegations in the unfair practice charge and amendments. Hearings were conducted on April 2 and April 15, 1993 before Hearing Examiner Alan R. Howe. On September 3, 1993, the Hearing Examiner granted Local 153's motion to dismiss the charges. H.E. No. 94-3, 19 NJPER 526 (¶24245 1993). Wasilewski appealed to the Commission and, on November 15, 1993, the Commission denied Local 153's motion and the matter was remanded to the Hearing Examiner. P.E.R.C. No. 94-53, 19 NJPER 589 (¶24283 1993). At Wasilewski's request, the hearing was adjourned due to illness. On November 19, 1994, after Mr. Howe's leaving the agency, the matter was assigned to Hearing Examiner Stuart Reichman. See N.J.A.C. 19:14-6.4. After additional requests for adjournment, primarily by Wasilewski, additional testimony was taken on June 19, August 8 and September 4, 1996. The parties examined witnesses, introduced exhibits and filed post-hearing briefs.

On July 24, 1997, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 98-4, 23 NJPER 573 (¶28287

1997). He concluded that, because the negotiated agreement stated that administrator terminations were not appealable through the grievance procedure, Local 153 did not breach its duty of fair representation by not grieving Wasilewski's termination. He also concluded that Local 153 did not violate the duty of fair representation by not promptly informing Wasilewski that it would not retain an attorney to represent her at an appearance before the College's Board of Trustees. Finally, the Hearing Examiner found no evidence that Local 153 was hostile to Wasilewski or that it failed to investigate her complaints.

On October 12, 1997, after an extension of time, Wasilewski filed exceptions. She objects to several factual findings and evidentiary rulings. She also contends that the Hearing Examiner erred in concluding that Local 153 did not breach its duty of fair representation. On November 3, Local 153 filed an answering brief supporting the Hearing Examiner's findings of fact and conclusions of law. Wasilewski was granted permission to file a response to Local 153's answering brief and did so on December 16, 1997.

We have reviewed the record. We adopt the Hearing Examiner's findings of fact as supplemented and modified in our footnoted factual summary.

Wasilewski specifically objects to findings 4, 13 and 15. Her exceptions also include additional information which, we surmise, she proposes to add to the Hearing Examiner's findings.

We reject Wasilewski's specific exceptions to the Hearing Examiner's findings and evidentiary rulings for the reasons set forth in this decision. We find it unnecessary to supplement the Hearing Examiner's findings with the information highlighted by Wasilewski. We begin with a summary of facts and chronology.

Wasilewski began working for the College as supervisor of accounts receivable in December 1987. She initially reported to Dean Westerfield, who was replaced by Dean Michael Yosifin. Beginning around June 30, 1990, Wasilewski reported to Yosifin through the newly-hired bursar, Martin Malloy.^{3/} While there were tensions between Wasilewski and her supervisors and subordinates between July 1990 and April 1991, the College's interim president, Elliott Collins, reappointed her for the 1991-1992 fiscal year.^{4/}

^{3/} Wasilewski asks us to consider CP-16, a September 21, 1987 employment reference that was identified but not admitted into evidence. It is not clear whether she contends the document should have been admitted but, in any case, it is not relevant.

^{4/} We modify the first sentence in finding 21 to state that, for more than one year preceding the filing of her unfair practice charge, Wasilewski sought Local 153's assistance in setting up "grievance meetings" with herself, her supervisors and union representatives so that she could have an "airing out" of her concerns about understaffing, the decision to give the newly-hired bursar her office, her threatened termination, the College's denial of her leave requests and other matters (1T103; 1T112; 3T13; 3T60; 5T13). Wasilewski defined a "grievance" as this type of meeting (4T22).

On April 30, 1991, Wasilewski sought to arrange a meeting with Collins to discuss problems she was having with Yosifin. Because College policy required that an employee meet with his or her dean before proceeding to the president, Wasilewski approached Yosifin about the meeting and asked Local 153 Vice President Walter Mack to accompany her. Mack did so but Yosifin yelled at Mack and did not allow him into the meeting.^{5/}

On May 21, 1991, Yosifin advised Wasilewski by memorandum that he was recommending her termination. On June 6, Wasilewski wrote to OPEIU headquarters requesting the immediate assistance of a union attorney. On June 12, OPEIU business representative John Heffernan wrote to Yosifin and requested copies of all memoranda, letters, records of discipline and other documents relied upon in support of this recommendation.^{6/} Yosifin did not respond and,

^{5/} Wasilewski objects that the "meeting" never happened because Yosifin disallowed it. Further, while she acknowledges that she asked Mack to accompany her to a March 1991 meeting with Yosifin, she contends that the request was not triggered by the above-noted College policy, which was not established until May 1991. The Hearing Examiner's findings are supported by transcript references to Wasilewski's testimony. In any case, the pertinent issues are not whether a meeting occurred or why Wasilewski requested that Mack accompany her to Yosifin's office, but how Local 153 responded to Wasilewski's requests for assistance.

^{6/} The record includes evaluations and memoranda which commend Wasilewski for her solid job knowledge, but criticize her supervisory skills, inability to accept criticism, chronic lateness and lack of cooperation with co-workers.

despite Wasilewski's requests to pursue the matter, Heffernan took no further action.^{7/}

In June 1991, at Mack's urging, Wasilewski filed a complaint with the New Jersey Division on Civil Rights, alleging that the College was discriminating against her because of her age. In August 1991, the College denied Wasilewski's request for personal leave to attend a fact-finding meeting at the Division on Civil Rights. Also in August 1991, the College denied her requests for four vacation days and for release time to keep a doctor's appointment. Wasilewski informed Local 153 of these leave denials. On September 6, Local 153 President Conn sent Yosifin a memorandum stating that Wasilewski's "basic rights had been abused" when she was denied leave time. He expressed his hope that he could work with Yosifin to avoid further abuses and asked that Wasilewski be allowed to take time when requested.

^{7/} We supplement finding no. 3 to state that Heffernan: (1) advised Wasilewski to respond in writing to memoranda criticizing her performance and conduct and (2) explained to Wasilewski that Local 153 could only file grievances in response to employer actions (5T11; 5T15). We reject Wasilewski's contention, which we consider to be a proposed factual finding, that Local 153 representatives told her they could not help her until she was fired. Heffernan denied making that statement and we will not disturb the Hearing Examiner's implicit decision to credit his testimony on this point. In any case, the record includes several examples of Local 153's assisting her prior to her termination. We also reject Wasilewski's contention, which we also consider to be a proposed factual finding, that Local 153 advised her not to take any steps on her own behalf until she was fired. The record does not support such a finding.

On September 9, 1991, Wasilewski's supervisor directed her to fill out an insurance waiver form on a student who could not provide proof that he was covered by a private insurance plan. Wasilewski refused and she was directed to leave her work station. On September 11, the College's director of personnel wrote Wasilewski stating that, because she was unable to interact appropriately with superiors and subordinates, the president was recommending that the Board of Trustees terminate her at its September 23, 1991 meeting. On September 18, Wasilewski wrote Conn, requesting that a Local 153 representative, Heffernan, and a union attorney attend the September 23 meeting.^{8/}

On September 23, 1991, after being called by Mack earlier in the day, Heffernan attended the Board meeting, along with Mack, Wasilewski and Sister Rosemary McSorley, a law student acting as Wasilewski's "personal representative." Heffernan conferred with McSorley and made a five-minute presentation urging the Board not to terminate Wasilewski. He also asked it to deliberate over his

^{8/} The agreement between Local 153 and the College provides that matters of administrator separation are within the Board's sole discretion and shall not be subject to grievance arbitration. The agreement also states that, upon request, the Board shall provide the administrator with a statement of reasons for a separation and an opportunity to appeal to the Board or a Board committee. In making personnel decisions, the Board acts on the president's recommendation.

comments and not make an immediate decision. Nevertheless, the Board decided to terminate Wasilewski that evening.^{9/}

Sometime after the meeting, the Board agreed to allow Wasilewski to present her case to the Board a second time.^{10/} Mack told Wasilewski that the union would provide her with an attorney to represent her at this second Board meeting. He also wrote the Chair of the Board of Trustees, stating that Local 153's attorney would contact her to arrange a mutually agreeable date for the Board meeting.^{11/}

Sometime after the September 23 meeting, Heffernan wrote to Local 153's attorney inquiring as to what steps could be taken

^{9/} Wasilewski excepts to the finding that Heffernan first described how Wasilewski had been mistreated by her supervisors and subordinates and, after that, questioned the Board as to what would happen to her if she were thrown out on the streets "at her age." She contends that he made only a plea for sympathy based on her age, along with a "few insignificant comments." She also excepts to the Hearing Examiner's finding that Heffernan asked the Board to postpone its decision. The Hearing Examiner's findings are supported by transcript references to Heffernan's testimony and we have no grounds to disturb his determination to credit that testimony. Wasilewski also requests that we consider the testimony of William J. DeMarco, attorney for the Board, concerning his recollection of Heffernan's presentation. We do so in our discussion of the Hearing Examiner's legal analysis.

^{10/} The contract entitles an administrator to one appearance before the Board.

^{11/} Wasilewski argues that Mack's letter undercuts the Hearing Examiner's finding that Heffernan never stated that Local 153 would provide an attorney at a second Board meeting. We disagree. The letter supports the finding that Mack had advised Wasilewski that an attorney would be provided but is not probative of Heffernan's statements.

to appeal Wasilewski's termination. On September 30, the attorney responded that, if the Board sustained its decision, there were no other contractual grounds for appeal, although a cause of action might exist under discrimination statutes or "whistleblower" laws. On October 3, Heffernan forwarded the opinion letter to Mack with a cover letter stating that administrator terminations could only be challenged by an appeal to the Board "which was essentially done on September 23." Heffernan concluded that further action by the Association would not result in any change in the College's decision to terminate Wasilewski.^{12/}

The College informed Wasilewski on October 11 (a Friday) that her second appearance was scheduled for October 14. When Wasilewski called Mack on October 14 to inquire about legal representation, Mack told her that, despite previous representations, Local 153's attorney had decided not to proceed. Wasilewski was unsuccessful in her attempt to have the second appearance before the Board delayed. It does not appear that Wasilewski appeared before the Board on October 14.

After Wasilewski's termination, Heffernan met with College representatives and arranged for Wasilewski to be paid for

^{12/} The record includes an undated letter from Mack to Wasilewski in which he explains that Local 153's attorneys had decided not to pursue her appeal. During a colloquy concerning the admission of this and other documents, Wasilewski stated that Mack never mailed the letter. Mack did not testify and we make no finding as to whether the letter was mailed.

her accrued leave time. He reviewed the College's records and was satisfied that they accurately reflected her time, although Wasilewski disagrees.

On October 18, 1993, the Division on Civil Rights found that there was no probable cause to credit Wasilewski's allegations that she was discriminated against because of age and sex. However, it found probable cause to credit her allegations that she was terminated in reprisal for filing a complaint with the Division. On December 8, 1995, Wasilewski entered into a release and settlement with the College with respect to the Division on Civil Rights complaint and any other employment-related actions against the College.^{13/}

Section 5.3 of the Act empowers a union to negotiate on behalf of all unit employees and to represent all unit employees in administering the contract. With that power comes the duty to represent all unit employees fairly in negotiations and contract

^{13/} We reject Wasilewski's exception to the Hearing Examiner's March 4, 1997 decision to deny her motion to admit an additional thirteen documents into evidence. There is no basis to disturb his ruling, which was based on the fact that, although the documents were available at the time of the hearing, the motion was made four days before post-hearing briefs were due. In any case, Wasilewski does not state why the proffered documents, mostly attendance reports for her department, are relevant. Further, we cannot consider Wasilewski's contention that Local 153's attorney signaled his witness at the hearing. No objection was made to the Hearing Examiner and we cannot evaluate the allegation. Similarly, Wasilewski's request to subpoena the minutes of the September 23 Board meeting should have been made to the Hearing Examiner. N.J.A.C. 19:14-6.3.

administration. The standards in the private sector for measuring a union's compliance with the duty of fair representation were articulated in Vaca v. Sipes, 386 U.S. 171 (1967). Under Vaca, a breach of the statutory duty of fair representation occurs only when a union's conduct towards a member of the negotiations unit is arbitrary, discriminatory, or in bad faith. Id. at 191. That standard has been adopted in the public sector. Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976); see also Lullo v. International Ass'n of Fire Fighters, 55 N.J. 409 (1970); OPEIU Local 153, P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983). The duty of fair representation does not require a union to process non-meritorious grievances or inform a member that he or she may file a grievance independently. Carteret Ed. Ass'n, P.E.R.C. No. 97-146, 23 NJPER 390 (¶28177 1997); Camden Cty. College (Porreca), P.E.R.C. No. 88-28, 13 NJPER 755 (¶18285 1987). However, the representative may not mislead or misinform an employee concerning that right. Carteret.

Against this backdrop, we reject Wasilewski's contentions that Local 153 violated its duty of fair representation by denying her access to grievance procedures and failing to offer her assistance once she was terminated.

This is not a case where a union refused to process a written grievance alleging a specific contract violation and seeking a specific remedy. At most, Wasilewski requested

"grievance meetings" and understood a "grievance" to be a meeting between her, union representatives and her supervisors, where she could have an "airing out of her problems." Local 153's apparent decision not to arrange these meetings is not a breach of its duty of fair representation.

The grievance procedure in Local 153's agreement with the College includes an informal step where an administrator may orally present and discuss a grievance with his or her supervisor. A union representative may be present at the administrator's option but if that option is exercised, the supervisor may determine that the grievance should be moved to the first formal step. Thus, it is the responsibility of an administrator to initiate an informal meeting and there is no contractual right to informal meetings with a union representative. In this posture, Local 153 did not act arbitrarily or in bad faith by not arranging the meetings requested by Wasilewski. There is no indication that Local 153 arranged such meetings for other employees.

We also agree with the Hearing Examiner that, prior to her termination, Local 153 made good faith efforts to respond to Wasilewski's requests for assistance. It directed her to what it thought was the most appropriate forum for her discrimination complaints; advised her to respond in writing to critical memoranda by supervisors; requested the material on which the administration intended to rely in recommending her termination

and wrote to the administration on her behalf with respect to denials of her leave requests. While Wasilewski might believe that other actions, such as filing formal grievances, would have been more appropriate, the record supports the Hearing Examiner's findings that Wasilewski had a copy of the contract and should have known that unit employees could present and process grievances up to the Board of Trustee level. Local 153 was under no obligation to inform her of this right.

Nor do we find arbitrary, discriminatory or bad faith conduct in Local 153's representation of Wasilewski in connection with her termination.^{14/} Heffernan appeared on Wasilewski's behalf before the Board of Trustees, which had the sole discretion to decide whether to terminate her based on the president's recommendation to do so. Even if we assume that a more effective presentation could have been made, that circumstance would at most support a finding of negligence, which does not constitute a breach of the duty of fair representation. See Steelworkers v. Rawson, 495 U.S. 362, 134 LRRM 2153, 2158 (1990).^{15/}

^{14/} She does not except to the Hearing Examiner's determination that the termination was not subject to a grievance under Article XXI.

^{15/} For this reason, our analysis is not changed by Board attorney William DeMarco's statements that Heffernan made an unremarkable presentation and did not present witnesses. Similarly, Heffernan's decision not to follow up on his request for documents, even if negligent, does not establish a breach of the duty of fair representation.

Nor does Local 153's decision not to represent Wasilewski at a second appearance before the Board constitute a breach of the duty of fair representation. The decision was made after consultation with Local 153's attorney, who advised that administrator terminations were within the Board's sole discretion. Based on this advice, Heffernan made a determination that the Board was not likely to change its original decision, which had been based on the president's recommendation and, we think it can be fairly assumed, administrative memoranda which were critical of some aspects of Wasilewski's job performance. Wasilewski did not have a contractual right to two appearances before the Board and there is no evidence of bad faith or hostility toward Wasilewski, nor any suggestion that similarly situated employees were treated differently.

We agree with the Hearing Examiner that, ideally, Local 153 should have notified Wasilewski sooner that, contrary to Mack's initial statements, it would not retain an attorney to represent her at a second Board meeting. However, we find no evidence of arbitrary, bad faith or discriminatory conduct by Local 153.

Mack presumably received Heffernan's October 3, 1991 letter a few days later. Since the College had not yet scheduled Wasilewski's second Board appearance, Local 153 did not act arbitrarily or in bad faith in not immediately informing Wasilewski of the decision not to pursue the appeal. Mack intended to inform Wasilewski in writing of the decision. Even if


we assume that his letter was never mailed, there is no evidence that this oversight was intentional.^{16/} Mack responded to Wasilewski's October 14 telephone call that day and advised her of Local 153's decision. Given this chronology, we cannot say that Local 153 acted arbitrarily or in bad faith by not informing her, before October 14, that it had decided not to retain an attorney to pursue her appeal. Nor is there any suggestion that Wasilewski was treated differently from other employees. The record supports the Hearing Examiner's finding that Local 153 had never provided counsel to employees in termination appeals.

For all these reasons, we find that Local 153 did not breach the duty of fair representation. In the absence of exceptions, we adopt the Hearing Examiner's recommendations that the 5.4b(2), (3) and (5) allegations be dismissed.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose, Buchanan, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioners Finn and Klagholz were not present.

DATED: April 30, 1998
Trenton, New Jersey
ISSUED: April 30, 1998

^{16/} In her exceptions, Wasilewski states that she believes Mack wanted to help her.

H.E. NO. 98-4

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

In the Matter of

PASSAIC COUNTY COMMUNITY COLLEGE
ADMINISTRATORS' ASSOCIATION, OPEIU, LOCAL 153,

Respondent,

-and-

Docket No. CI-H-92-28

RUTH B. WASILEWSKI,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that OPEIU Local 153 did not breach its duty of fair representation owed to Ruth Wasilewski. The Hearing Examiner found that Local 153 represented Wasilewski on numerous occasions and never impeded or misled Wasilewski with regard to her right to file grievances or appeal her termination on her own.

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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. NO. 98-4

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

In the Matter of

PASSAIC COUNTY COMMUNITY COLLEGE
ADMINISTRATORS' ASSOCIATION, OPEIU, LOCAL 153,

Respondent,

-and-

Docket No. CI-H-92-28

RUTH B. WASILEWSKI,

Charging Party.

Appearances:

For the Respondent,
Schneider, Goldberger, Cohen, Finn, Solomon, Leder,
Montalbano, attorneys
(Bruce D. Leder, of counsel)

For the Charging Party,
Ruth B. Wasilewski, pro se

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On November 7, 1991, Ruth B. Wasilewski ("Wasilewski" or "Charging Party") filed an unfair practice charge with the Public Employment Relations ("Commission") against the Passaic County Community College Administrators' Association, OPEIU, Local 153 ("Local 153" or "Respondent"). Wasilewski alleged that Local 153 failed to represent her when she was directed to vacate her office, threatened with termination and appealed her termination. On January 6, 1992, Wasilewski filed an amended unfair practice charge against Local 153 setting forth a chronology of events. On May 27,

1992, Wasilewski filed a second unfair practice charge naming the Passaic County Community College ("College") as a respondent (Docket No. CI-92-34). In that charge Wasilewski alleged that the College violated the collective agreement by failing to follow the grievance procedure, denying her personal leave days and committing other contractual infractions. On July 14, 1992, Wasilewski filed an amendment to unfair practice charges CI-92-28 and CI-92-34.

Wasilewski again alleged that the respondents failed to adhere to the terms of the collective agreement and Local 153 failed to appeal her termination. In her unfair practice charge and amendments against Local 153 (CI-92-28), Wasilewski alleged that Local 153 violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically, sections 5.4(b)(1), (2), (3), and (5).^{1/} In her unfair practice charge against the College

^{1/} 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. (2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances. (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. (5) Violating any of the rules and regulations established by the commission."

(CI-92-34), Wasilewski alleged that the College violated subsections 5.4(a) (1), (2), (3), (4), (5) and (7) of the Act.^{2/}

On August 19, 1992, the Director of Unfair Practices refused to issue a complaint in both charges. D.U.P. No. 93-6, 18 NJPER 453 (¶23205 1992). He found that Wasilewski did not have standing to allege a refusal to negotiate, and that her allegations against the College did not rise to the level of an unfair practice; did not involve reprisals for activity protected by our Act; were not timely; and did not allege facts indicating a violation. The Director also found that Wasilewski's allegations against Local 153 did not rise to the level of an unfair practice because the union's determination not to pursue an appeal of her discipline did not breach its duty of fair representation. In P.E.R.C. No. 93-51, 19 NJPER 53 (¶24024 1992), the Commission affirmed the Director's decision refusing to issue a complaint in CI-92-34, and reversed and remanded his decision as to Local 153 in CI-92-28.

^{2/} 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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (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. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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. (7) Violating any of the rules and regulations established by the commission."

On January 8, 1993, the Director of Unfair Practices issued a Complaint and Notice of Hearing (C-1) in Docket No.

CI-H-92-28.^{3/} On January 13, 1993, Local 153 filed its answer (C-2) generally denying the allegations contained in the unfair practice charge and amendments. Hearings were conducted on April 2, 1992, April 15, 1993, June 19, August 8, and September 4, 1996, at the Commission's offices in Newark, New Jersey. The parties had the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally.

Initially, this matter was assigned to Hearing Examiner Alan R. Howe. On April 15, 1993, the second scheduled hearing date, Respondent moved to dismiss this matter and no testimony was taken. In H.E. No. 94-3, 19 NJPER 526 (¶24245 1993), Hearing Examiner Howe granted Respondent's motion to dismiss finding, as a matter of law, that Respondent did not breach its duty of fair representation. In P.E.R.C. No. 94-53, 19 NJPER 589 (¶24283 1993), the Commission denied Local 153's motion to dismiss and remanded the matter to the hearing examiner. On December 23, 1993, upon Wasilewski's request due to illness, Hearing Examiner Howe adjourned the scheduled hearing dates and held the matter in abeyance. On November 29,

^{3/} Exhibits received in evidence marked as "C" refer to the Commission's exhibits, those marked "CP" refer to the charging party's exhibits and those marked "R" refer to the respondent's exhibits. The transcript citation 1T1 refers to the transcript developed on April 2, 1992, at page 1. Transcript citations 2T, 3T, 4T and 5T refer to the transcripts developed on April 15, 1993, June 19, August 8 and September 4, 1996, respectively.

1994, due to Hearing Examiner Howe's retirement, this matter was reassigned to me. N.J.A.C. 19:14-6.4(a). On April 12, 1995, Wasilewski requested that the matter be adjourned until the fall of that year or later. Respondent agreed to the adjournment request.

On December 14, 1995, Wasilewski requested an additional adjournment of the hearing scheduled for December 21, 1995, on the grounds that she had not yet retained an attorney to represent her in this matter. Wasilewski asked that the matter be continued until March or April 1996. Over Respondent's objection, I granted Wasilewski's adjournment request and rescheduled the matter for February 16, 1996. I advised Wasilewski that I would not be inclined to grant further continuances without good cause and indicated that failure to retain counsel might not constitute good cause (C-3).

On January 5, 1996, Respondent requested the adjournment of the scheduled February 16, 1996 hearing date due to the unavailability of a witness. The hearing was adjourned with Wasilewski's consent and rescheduled to March 21, 1996. The March 21 date was adjourned, with Wasilewski's consent, due to Respondent's counsel's unavailability. The hearing was rescheduled to June 19, 1996.

At the conclusion of the hearing, the parties waived oral argument and established a briefing schedule. The schedule called for briefs to be submitted on February 28, 1997. On February 26, 1997, Wasilewski requested an extension to file her brief no later

than March 5, 1997. I granted her extension request. Briefs were filed by March 4, 1997. In correspondence dated February 24, 1997, Wasilewski made a motion to admit 13 documents into evidence. On February 28, 1997, Local 153 objected to the admission of the documents on numerous grounds. In correspondence dated March 4, 1997, I denied Wasilewski's motion for admission of the additional documents.

Upon the entire record, I make the following:

FINDINGS OF FACT

1. The parties stipulated that Local 153 was a public employee representative and Wasilewski was a public employee within the meaning of the Act during all times relevant to this charge (1T9).

2. Wasilewski began working for the College in December 1987, as Supervisor of Accounts Receivable (1T16; 1T18). Initially, Wasilewski reported to Dean Westerfield, who was subsequently replaced by Dean Michael Yosifon (1T17). Beginning around June 30, 1990, Wasilewski reported to Yosifon through the Bursar, Martin Malloy (1T18-1T19).

3. On May 21, 1991, Yosifon sent Wasilewski a memorandum advising her that he was recommending her termination (CP-4). Wasilewski immediately gave copies of CP-4 to Local 153 officials Thomas Conn and Walter Mack. Wasilewski also showed CP-4 to Local

153's Business Representative John Heffernan (1T114-1T115). Wasilewski asked that a grievance meeting be arranged among her, the Local and Yosifon (1T117). On June 12, 1991, in response to CP-4, Heffernan sent Yosifon a letter asking for copies of all memoranda, letters, records of discipline and any other documents Yosifon relied upon in support of his termination recommendation (CP-7; 4T106; 4T156-4T157). Wasilewski asked Heffernan, Conn and Mack to follow up on CP-7 (1T117). The College never responded to Heffernan's discovery request (4T150; 5T10). Heffernan took no further action to obtain the materials sought in CP-7 because he believed the College's failure to respond best suited Local 153's purpose to pursue an appeal on Wasilewski's behalf. Heffernan believed the College's failure to respond would allow Local 153 to argue that the Employer ignored the Union's request for information (5T26). Although Wasilewski wanted Local 153 to arrange for a grievance meeting with Yosifon, such meeting never took place since the College took no action against Wasilewski as a result of CP-4 (1T117; 5T10). Local 153 did not take further steps to obtain the documents it sought from the College in CP-7.

4. On April 30, 1991, Wasilewski sent a memorandum to College President Collins requesting a meeting to discuss problems she was having with Yosifon (CP-5). Although Wasilewski met Collins in the hallway numerous times after April 30, and although Collins told her that he would meet with her at any time, such meeting did not occur until September 11, 1991, subsequent to Wasilewski's

termination (3T69; 3T77-3T78). On May 28, 1991, Yosifon issued a memorandum to all supervisors regarding private meetings with the College President (CP-25). Yosifon's memorandum states in relevant part the following:

President Collins recently informed his Executive Group that far too many employees seek private meetings with him to express a host of concerns, problems and issues.

In order to curtail such visits, President Collins will require employees who insist on such visitations, to be accompanied by their area Dean. It is naturally anticipated that the area Dean will make every effort to remedy the problem at hand and only after a failed effort will a joint meeting be scheduled with the President.
[CP-25]

CP-25 contained a distribution list naming the supervisors to receive the memorandum. Wasilewski's name was not contained on that list (4T74; CP-25). Pursuant to CP-25, Wasilewski scheduled a meeting with Yosifon to arrange a meeting with Collins. Mack accompanied Wasilewski to the Yosifon meeting (4T75). Yosifon yelled at Mack and did not allow him into the meeting (4T76).

5. Periodically, the College denied Wasilewski the use of accrued sick, vacation and personal days. On or about August 5, 1991, the College denied Wasilewski's request to use a personal day to attend a factfinding meeting conducted by the New Jersey Division on Civil Rights (1T111). On August 12, 1991, Wasilewski requested release time in order to keep an appointment with her doctor. The College denied her request (3T26). On August 13, 1991, Wasilewski submitted a vacation request form seeking the use of vacation time

from August 20 through August 23, inclusive (CP-19). On that same day, Robert Puri, Wasilewski's supervisor, sent Wasilewski a memorandum stating the following:

Regrettably, I cannot approve your vacation request. The in-person registration process, as you know, begins August 24. I anticipate that this will require considerable preparation. Since this will be my first registration, your experience and assistance in setting up the program is essential. [CP-19]

6. Wasilewski informed Local 153 of the above-enumerated leave time denials at the time the College denied her request, however, the College did not rescind its denial of her use of leave time on any of those occasions (3T36). On September 6, 1991, Local 153 President Conn sent Yosifon a memorandum stating the following:

It has come to my attention recently that Ms. Ruth Wasinlenski (sic) from the accounts payable department has been unable to take vacation time at the times she requested. It further seems to be the case that other members in the same department were granted extended periods of vacation even during some of our busy registration periods. Such a situation as I described placed one of our unit members in a position where she had to work long periods of time in an office which was short staffed with little or no relief. Such a situation is unfair and does not meet the expressed purposes of granting employees vacation time.

The Association understands management rights in the planning of vacation time but clearly this is a case where our unit member's basic rights have been abused. I hope to work with you closely to avoid any further abuses and I ask that because of these past circumstances that she be extended certain leeway in being allowed to take vacation time when requested. [CP-18]

7. When Wasilewski was terminated in September 1991, she still carried accrued vacation, sick and personal leave days. Among others, Wasilewski called Heffernan to enlist his assistance to receive the dollar value of her accrued leave time (4T62). Wasilewski raised only vacation and overtime with Heffernan; she did not tell Heffernan that he should also investigate compensation for any accrued sick time balance (4T118-4T119). Heffernan told Wasilewski that he would obtain the cash value of all of the accrued leave time to which she was entitled (5T61). Heffernan met with the College's Director of Human Resources, Walter Lysaught, and reviewed the College's records of Wasilewski's leave time use against Wasilewski's claim for leave time owed (5T64). Wasilewski's and the College's records differed (5T61). The College demonstrated to Heffernan that their records were accurate and showed that Wasilewski was entitled to compensation for less time than she claimed was due her (5T62; 5T65). On October 11, 1991, Heffernan sent Lysaught a letter confirming their conversation regarding the amount of compensation Wasilewski was due to receive from the College (CP-29; 5T60). Wasilewski was sent a copy of CP-29 (5T83). While Wasilewski was dissatisfied with the amount of money she received, in light of what she believed the College owed her for accrued leave time and overtime, she never responded to Heffernan regarding CP-29 (4T62; 4T118-4T119; 5T83). The collective agreement provides for employees to be compensated for unused vacation time but not for unused personal days (4T118).

8. On September 9, 1991, Wasilewski was assigned to assist with the student registration that was being conducted in the College's gymnasium (1T119). Students were required to enroll in the College's insurance plan unless they could satisfactorily prove that they maintained coverage through another insurance carrier. Students maintaining their own health insurance coverage filed a student health insurance waiver form which showed the name of the insurance carrier, the policy and group numbers and certain other information (CP-13). Wasilewski was directed by her supervisor to fill out an insurance waiver form on a student who could not provide adequate proof that he was covered by a private insurance plan. The student did not have an insurance card in his possession nor did the student know the policy or group numbers (1T118; 3T22). Notwithstanding the lack of this information, Wasilewski was directed to fill out the insurance waiver form, and fabricate any information which was not available regarding the student (3T23-3T24). Wasilewski refused (1T18; 3T22). She was directed to leave the gymnasium immediately (1T119).

9. On September 11, 1991, Lysaught sent Wasilewski a letter terminating her employment with the College (CP-8).^{4/} CP-8 indicated that Wasilewski had been repeatedly cautioned concerning

^{4/} On September 16, 1991, Lysaught sent Wasilewski another letter which was exactly the same as CP-8 except that it requested that Wasilewski advise the College President in writing if she wanted to appear before the Board of Trustees to appeal her termination (R-1).

her inability to interact with superiors and subordinates, thereby placing her employment relationship with the College in jeopardy. The letter stated that Wasilewski refused to acknowledge the fact that her performance, especially in the area of personal contact, was unacceptable and that she demonstrated an insubordinate attitude in her compliance with supervisors' directives. Wasilewski acknowledged receiving, reading and understanding CP-8 and R-1, however, she disagreed with the assertions contained therein (3T67; 4T30). Wasilewski never submitted a written response to CP-8 and R-1 (3T68). CP-8 and R-1 indicated that the matter of Wasilewski's termination would be raised to the Board of Trustees during their meeting on September 23, 1991, and invited her to attend along with counsel, if she so desired.

10. On September 18, 1991, Wasilewski sent a letter to Local 153 representative Conn requesting assistance with her termination. Wasilewski asked that a Local 153 representative attend the September 23, 1991, Board of Trustees meeting along with a union attorney and Business Representative Heffernan (CP-9). Also on September 18, Wasilewski sent a letter to College President Elliott Collins advising him that she would appear with her attorney or advisor and a Local 153 representative at the September 23 Board of Trustees meeting (CP-10).

11. Wasilewski wanted to meet with Local 153's grievance committee. She asked grievance committee member Cindy Bink to arrange the meeting (1T132). On September 20, 1991, Wasilewski met

with Local 153's grievance committee. At the conclusion of the meeting, the Committee told Wasilewski that there was insufficient time between the date of that meeting and her September 23 Board of Trustees meeting for them to assist her, however, they would ask Local 153's president to help her (1T133). On September 23, 1991, the grievance committee sent Mack the following memorandum:

On September 20, 1991 the grievances committee met with Ruth Wasilenski (sic) regarding her termination of employment. Based on the materials supplied to us by Ms. Wasilenski (sic) and the extended time period in which it covers, it is difficult to cite specific cases in which the contract has been violated.

However, the committee recommends that Ruth Wasilenski (sic) receives full legal representation entitled to her as a union member by our Local 153. The committee agrees to abide by the decision in accordance with the union representative. [CP-11]

12. On September 23, 1991, Mack called Heffernan and asked him to attend a Board of Trustees meeting that evening which would be considering Wasilewski's termination (4T107; 4T145). Heffernan attended the meeting, however, since he had no advance notice concerning Wasilewski's termination and the Board of Trustees meeting, he did not have the opportunity to prepare for his presentation to the Board (4T148). Before the Board of Trustees meeting started, Heffernan discussed the College's allegations with Wasilewski (4T108). Mack was also present before, during and after the Board meeting with Heffernan and Wasilewski (1T140; 4T108; 4T112).

13. Wasilewski brought a law student, Sister Marie McSorley, as her own personal representative to appear before the Board of Trustees (4T33; 4T38; 4T83). Before the Board meeting began, Heffernan and McSorley conferred regarding Wasilewski's discharge (4T145). McSorley prepared a written statement which she read to the Board (4T39; R-3). On McSorley's advice, Wasilewski did not make her own oral presentation (4T39-4T40). Neither Heffernan nor Mack told Wasilewski that she should not address the Board (4T41). Heffernan spoke to the Board on Wasilewski's behalf for approximately 5 minutes (4T109). Heffernan discussed the chronology of events which related to Wasilewski's treatment by supervisors and subordinates, the actions of her supervisors that interfered with her ability to function, the manner in which her superiors embarrassed her in front of her subordinates which resulted in the undermining of Wasilewski's authority, and in July 1990, the way she was mistreated by having to vacate her office upon the arrival of the newly hired bursar, without advance notice (4T109-4T110). Heffernan noted that the Board of Trustees was paying little attention to the arguments that he was making on Wasilewski's behalf. The Board were talking among themselves and laughing. At one point, Heffernan stopped his presentation and asked for the Board's attention (4T110). Heffernan argued that in light of how Wasilewski was treated over time, she should not be terminated (4T110). Heffernan asked the Board the following question: If the Board throws Wasilewski out on the street at her age, what will

become of her? (1T139). Wasilewski did not feel that Heffernan argued the rights that she had to the job (1T139). Heffernan concluded his remarks by asking the Board to review and investigate the validity of his comments and postpone its decision to terminate Wasilewski (4T130). Mack did not make an oral presentation (4T111).

14. After the oral presentations, Mack, Heffernan, McSorley and Wasilewski left the meeting. They discussed what happened in the meeting. Wasilewski did not indicate that she was dissatisfied with Heffernan's presentation (4T112). Later that evening, Mack and Heffernan told Wasilewski that the Board decided to terminate her employment (1T140; 4T41). Subsequently, Wasilewski asked the Board if she could return at a later time to make further argument. The Board agreed to allow Wasilewski to have a second opportunity (1T97). Mack told Wasilewski that the union would appeal her termination and provide her with an attorney to represent her upon her return to the Board of Trustees (1T140). On September 26, 1991, Mack sent a letter to Mary Kowal, Board of Trustees Chairperson, advising her that Ruth Wasilewski would exercise her right to appeal her termination at a subsequent Board meeting and that Local 153's attorney would contact her to schedule a mutually convenient date for the appeal (CP-12).

15. After the September 23 Board of Trustees meeting, Heffernan wrote to Local 153's attorney, Bruce Leder, asking that he review the collective agreement and documents pertaining to Wasilewski's termination and advise regarding other actions Local

153 might take to appeal the College's action against Wasilewski (4T113-4T114). While Heffernan never told Wasilewski that Local 153 would supply an attorney to represent her in an appeal of her termination, he did indicate that he would ask an attorney to advise regarding what steps could be taken to appeal the College's termination decision (4T130-4T131; 4T139). On September 30, 1991, Leder responded to Heffernan indicating that the collective agreement did not provide for terminations for cause, as was Wasilewski's case, to be appealed through the grievance arbitration provision. The attorney concluded as follows:

Assuming that the College sustains the decision to terminate, there is no other avenue to appeal unless some non-contractual grounds exist. This might include a cause of action under the Whistle Blowers Statute or under Discrimination Law. If none of these statutory grounds exist, there is no appeal under the contract. On the other hand, the College may reverse the decision and therefore, resolve the dispute. [R-9]

16. On October 3, 1991, Heffernan sent a copy of R-9 to Mack. In his cover letter, Heffernan states:

Enclosed is the opinion of attorney Bruce Leder, re: Ruth Wasilewski's termination and recourse thereof. As you will note, Bruce states that since matters of termination are excluded from the grievance and arbitration procedure, the ability to challenge any termination is limited to an appeal hearing. This essentially was done on September 23, 1991 and his opinion is that any further hearing before the same Board of Trustees would not result in a change in their decision. However, he does indicate that she may have other rights of appeal for due process under Discrimination Law. [R-10]

17. Since 1988, Wasilewski had a copy of the collective agreement covering the period July 1, 1988 through June 30, 1991 (R-2). The successor agreement covering the period July 1, 1991 through June 30, 1994, had not been signed at the time of her termination, however, it contained identical Grievance Procedure and Separation articles (4T8).

18. Article XXI of the collective agreement in effect at the time of Wasilewski's termination sets forth the grievance procedure (J-1). Relevant parts of the grievance procedure are set forth below:

21.2 The following procedure, which may be initiated by the administrator covered by this agreement or the association acting as the administrator's representative shall be the sole and exclusive means of seeking adjusting and settling grievances.

21.3 Definition of a grievance

A grievance is an allegation by the administrator or the association that there has been:

21.3.1 A breach, misinterpretation or improper application of terms of this agreement; or

21.3.2 An arbitrary or discriminatory application of the policies of the Board of Trustees, related to terms and conditions of employment.

21.4 Informal procedure

An administrator may orally present and discuss a grievance with the administrator's supervisor on an informal basis. At the administrator's option, the administrator may request the presence of an association representative.

* * *

Should an informal discussion not produce a satisfactory settlement, the grievant may, within three working days, move the grievance to the first formal step.

21.5 Formal steps

21.5.1 Step One

A grievant shall initiate the administrator's grievance in writing and present it formally to the administrator's dean, and such dean, or his designee thereof, shall meet with the grievant and a representative of the association for the purpose of discussing the grievance.

21.5.2 Step Two

If the grievant is not satisfied with the decision rendered at step one, the administrator may submit the administrator's grievance to the college president.

* * *

21.5.3 Step Three

If the grievant is not satisfied with the disposition of the grievance at step two, the administrator may appeal to the Board of Trustees on the record.

* * *

21.5.4 Step Four

If the aggrieved administrator is not satisfied with the disposition of the grievance at step three, the association, as representative of the administrator, shall file a notice, within ten (10) working days of the receipt of the decision of the Board of Trustees, requesting submission to arbitration.^{5/}

* * *

^{5/} Arbitration is advisory unless the parties agree otherwise in writing prior to the arbitration hearing (J-1; R-2).

21.6.3 Should an administrator be dissatisfied with the decision or should no decision be forthcoming in the prescribed time, the administrator may submit the administrator's grievance to the next step, within seven (7) calendar days to step two and within ten (10) calendar days to step three.

* * *

21.7 Nothing in this Article shall be construed as compelling the Association to submit a grievance to arbitration.

19. Article VIII of J-1 pertains to separation. Relevant portions of Article VIII are set forth below:

8.1 Separation is caused by resignation, non-reappointment, termination for cause, lay-off or death of a unit member.

8.4 Termination for cause:

Administrative decision to separate an administrator due to unsatisfactory job performance, serious misconduct, or as a result of the commission of a serious crime.

8.9 Matters of administrators separation shall be within the sole discretion of the Board and shall not be subject to the grievance arbitration provisions of this agreement. However, upon request, the Board shall provide the administrator with a statement of reason(s) for its action to non-reappoint, terminate for cause, layoff, and shall afford an opportunity to the administrator to appeal before the Board or a committee of the Board concerning the separation.

Thus, separation appeals filed by unit employees with the Board of Trustees are not grievances within the meaning of Article XXI of the collective agreement (1T70; 1T94). Employees appealing their termination have the option of choosing whether or not they wish to be represented (1T95). The Association has never assigned an

attorney to represent any employee appealing a termination to the Board of Trustees (1T99).

20. After the September 23, 1991 Board of Trustees meeting, Wasilewski requested another opportunity to appear before the Board to appeal her termination (4T41-4T42). The College scheduled October 14, 1991, as the date for Wasilewski's second termination appeal (1T140-1T141). On October 11, 1991, Wasilewski received a letter from the College advising her she could appear before the Board on October 14 (3T57; 4T42). Wasilewski attempted to postpone the appeal date, however, the College would not agree (4T42-4T44). On October 14, Wasilewski contacted Mack to ascertain the status of the assignment of a Local 153 attorney to present her appeal. Mack told Wasilewski that although she was previously told that Local 153 would represent her in her termination appeal, the Local's attorney determined not to proceed (1T141; 3T57; 4T42; CP-28). The record is unclear regarding whether Wasilewski appeared before the Board of Trustees on October 14, 1991. Mack did not tell Wasilewski not to attend the October 14 meeting (4T42). Neither Mack nor Wasilewski asked Heffernan to appear on October 14, and Heffernan was not aware that Wasilewski's second appeal was scheduled for that date (4T116; 4T137).

21. On numerous occasions, extending more than one year before the filing of her unfair practice charge, Wasilewski sought Local 153's assistance in filing various grievances (1T42-1T43; 3T13-3T14; 4T68-4T69; 4T73; CP-20). Wasilewski thought that the

contractual mechanism to appeal her termination was through the grievance procedure (1T134). Wasilewski never filed a grievance concerning any issue on her own (4T163; 5T12-5T13; 5T43). Heffernan's standard practice was to advise employees to file grievances if they believe that the employer is not handling a matter properly (5T45). Since the collective agreement clearly excluded appeals of termination for cause from the grievance procedure, Heffernan never filed a grievance or sought arbitration of Wasilewski's termination (4T112-4T113; 4T117).

22. Wasilewski stated several different reasons as the College's underlying motivation for her termination. Wasilewski stated that the College set forth its reasons for her termination in CP-8 and R-1 (3T64). She stated that the reasons contained in CP-8 and R-1 were untrue and merely constituted a pretext for the College's real reason for her termination (3T67; 4T30). Wasilewski believed that the true reason for her termination was that the College had insufficient money in its budget for both her position as supervisor of accounts receivable and the newly hired bursar's position (4T31; 4T35-4T37). During the first two days of the hearing in this matter, Wasilewski was represented by counsel, however, she never told her attorney that the reason for her discharge was that there was insufficient money in the budget to support the two supervisory positions (4T59-4T60). Similarly, Wasilewski did not tell McSorley that the reason for her termination was the lack of funds for the supervisory positions (4T55).

Wasilewski merely told McSorley that she thought that she was being replaced by the bursar (4T83).

23. Wasilewski also indicated that she was terminated because of her age, gender and in retaliation for filing a complaint with the New Jersey Division on Civil Rights (4T50-4T51; 4T65). When Heffernan met with Wasilewski on September 23, 1991, in preparation for the Board of Trustees meeting, she did not tell him that her discharge was because of age, gender, reprisal for filing a civil rights complaint or the lack of money in the budget to support two supervisory position (4T108).

24. On June 10, 1991, Wasilewski filed a complaint with the Division on Civil Rights alleging that the College was engaging in a pattern of differential treatment because of her age (R-4). On October 10, 1991, Wasilewski filed an amended complaint alleging that the College terminated her because of her age, gender, and in retaliation for having filed the initial complaint (R-5). Before filing the complaint with the Division on Civil Rights, Wasilewski tried to file a complaint with the Passaic County affirmative action officer (4T45). Mack convinced Wasilewski's daughter, an attorney, to urge Wasilewski to file the civil rights action (3T96; 4T45-4T46). On October 18, 1993, the Division on Civil Rights issued an Agency Determination finding that no probable cause existed to credit the allegations that Wasilewski was discriminated against on the basis of gender or age. The determination found that probable cause existed regarding allegations that Wasilewski was

retaliated against for having filed a complaint (R-6). On December 8, 1995, Wasilewski entered into a general release regarding the civil rights matter with Passaic County, the College and the Board of Trustees of the College with respect to all claims she had against them (R-7).

25. Wasilewski testified regarding a number of disputes that she had with the College and her supervisors for which she sought Local 153's assistance in filing grievances. These matters occurred more than six months before the filing of this unfair practice charge.

26. On October 26, 1993, Wasilewski filed an application for disability insurance benefits with the Social Security Administration. The Administrative Law Judge for the Social Security Administration found that Wasilewski had been disabled since September 11, 1991. In part, he found that:

the claimant does not have the residual functional capacity for even sedentary work because of exertional and non-exertional limitations. The range of sedentary work which the claimant could perform is significantly compromised...[and concluded] that a finding of disability is appropriate. [R-8; 4T96]

ANALYSIS

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

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

for representing the interest of all such employees without discrimination and without regard to employee organization membership.

A majority representative does not have an obligation to file every grievance which a unit member asks it to submit. Camden Cty. College (Porreca), P.E.R.C. No. 88-28, 13 NJPER 755 (¶10285 1987); Trenton Bd. of Ed., P.E.R.C. No. 86-146, 12 NJPER 528 (¶17198 1986). However, the majority representative has an obligation to investigate the claimed contract violation to determine if it has merit. In OPEIU Local 153, P.E.R.C. No. 84-60, 10 NJPER 12, 13 (¶15007 1983), the Commission stated:

In a specific context of a challenge to a union's representation in processing a grievance, the United State 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, 191 (1967).

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); [Mackaronis and Middlesex County and NJCSA], P.E.R.C. No. 81-62, 6 NJPER 555 (¶11282 1980), [aff'd NJPER Supp.2d 113 (¶94 App. Div. 1982), certif. den. 91 N.J. 242 (1982)] ("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 #1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978).

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 equal merit. Middlesex Cty.; 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 the Vaca standards.^{6/}

The Commission recently addressed a matter similar to this case. In Carteret Education Association, P.E.R.C. No. 97-146, 23 NJPER ____ (____ 1997), Charging Party Saad Radwan alleged that the Association had deprived him of access to the grievance procedure. In September and October 1994, Radwan asked the Association to file grievances over three incidents. The collective agreement allowed unit employees to file grievances without going through the Association. The Association president told Radwan that he did not think that the incidents involved contract violations. Regarding the second and third incidents, the Association president told Radwan that the Association was not interested in filing nuance grievances and that Radwan could do as he pleased. The hearing examiner found that the Association president's decision not to press non-meritorious grievances was not arbitrary, discriminatory or taken in bad faith. Consequently, the hearing examiner found

^{6/} 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 Printing and Graphic Communication, Local 4, 249 NLRB 23, 104 LRRM 1040 (1980). The Commission may look to private sector precedent for guidance. Lullo v. International Association of Firefighters, Local 1066, 55 N.J. 409 (1970).

that the Association president's decision did not breach its duty of fair representation. The Commission affirmed. However, the hearing examiner found that the Association breached its duty of fair representation and violated of the Act when it failed to affirmatively inform Radwan that he could file a grievance on his own. The Commission reversed the hearing examiner's finding that the Association had an affirmative duty to inform Radwan that he could individually file a grievance. The Commission found that the Act does not require a majority representative to affirmatively notify an employee that s/he can individually file a grievance. The Commission found that since the Association did not mislead Radwan or otherwise impede his right to file a grievance on his own, and since the Association provided Radwan with a copy of the collective agreement when it became available and that agreement specified the employees' right to present their own grievances, no violation of the Act occurred.

In the instant matter, Wasilewski had a copy of the collective agreement since 1988. The agreement indicates that unit employees could present and process a grievance up to the Board of Trustees level on their own. Thus, Wasilewski was never misled by the Association or prevented from filing grievances on her own, if she so desired.

Although Local 153 may not have acted to Wasilewski's satisfaction, there are numerous examples of it acting on her behalf. In May 1991, Yosifon threatened to terminate Wasilewski.

Heffernan sought discovery but the College never responded. Heffernan took no further action to obtain the materials he sought in discovery because the College took no action to actually terminate Wasilewski, and he believed that if it became necessary, it would serve the Union's purpose to be able to later argue that the Employer ignored the Union's request for information. Thus, Heffernan's decision not to further pursue obtaining the materials sought in discovery was not done arbitrarily or in bad faith, rather it was strategic in nature.

Local 153 was responsive to Wasilewski's complaint that the College denied her requests for use of accrued paid leave time. Conn sent a memorandum to Yosifon arguing that Wasilewski was being treated differently than other employees and requested she be granted special consideration with regard to future leave requests. Subsequent to Wasilewski's termination, Heffernan met with Lysaught to review the College's records to ensure that Wasilewski received pay for all accrued time to which she was entitled. Local 153 assisted Wasilewski in her efforts to meet with President Collins. Mack attempted to accompany her in a meeting with Yosifon which was a prerequisite to her meeting with the college president. Local 153 was instrumental in directing Wasilewski to the New Jersey Division on Civil Rights regarding her claims of discrimination. Again, while none of these incidents may have been handled by Local 153 to Wasilewski's satisfaction, they, nonetheless, show a union representing its membership in a reasonable and good faith manner.

Unions are permitted a wide range of reasonableness in representing their membership. Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); PBA Local 119, P.E.R.C. No. 84-76, 10 NJPER 41 (¶15023 1983). See also New Jersey Transit and ATU, D.U.P. No. 95-23, 21 NJPER 54 (¶26038 1995); Jersey City Board of Education, D.U.P. No. 93-7, 18 NJPER 455 (¶23206 1992); Essex-Union Joint Meeting and Automatic Sales, Servicemen and Allied Workers, Local 175, D.U.P. No. 91-26, 17 NJPER 242 (¶22108 1991). Wasilewski argues that Local 153 breached its duty of fair representation when it failed to file a grievance appealing her termination. That argument lacks merit. Wasilewski's termination was not appealable through the grievance procedure but, rather, through the separation article contained in the collective agreement. Mack and Heffernan represented Wasilewski at the level provided for in the separation article by accompanying her to the September 1991, Board of Trustees meeting, and Heffernan spoke on her behalf.

Wasilewski also argues that Local 153 breached its duty of fair representation when it failed to represent her during the October 1991, Board of Trustees meeting and refused to assign an attorney as promised. While the Local did not notify Wasilewski that it would not represent her during the October Board of Trustees meeting, such late notice appears to have been caused more by inadvertance than by bad faith or arbitrariness. After the Board sustained Wasilewski's termination in September, Heffernan sought advice concerning additional action which Local 153 could take on

Wasilewski's behalf. Leder's response to Heffernan's inquiry was dated September 30, 1991. On October 3, 1991, Heffernan forwarded Leder's response to Mack. Mack did not advise Wasilewski that Local 153 would not appear on her behalf until October 14, the date of the Board of Trustees meeting. Clearly, Local 153 should have advised Wasilewski prior to October 14, 1991, that it would not represent her in the Board of Trustees meeting. However, Local 153 is entitled to a wide range of reasonableness and mere negligence on the part of Local 153 does not constitute a breach of the duty of fair representation. Pemberton Tp. Bd. of Ed., D.U.P. No. 97-26, 23 NJPER 70 (¶28042 1996); PBA Local 119. Local 153's decision not to again appear before the Board of Trustees, a proceeding in which the Board had the sole discretion to sustain or reverse Wasilewski's termination, was not arbitrary since it was based upon its attorney's review of the facts and his legal conclusions. Wasilewski was always free to proceed before the Board on her own. Moreover, Local 153 had never supplied an attorney to represent any employee appealing his/her termination before the Board of Trustees, and treated Wasilewski no differently. Employee organizations are not required to provide employees with legal counsel. Bergen Community College, P.E.R.C. No. 84-117, 10 NJPER 262 (¶15127 1984). See also Carteret Education Association (Radwan), D.U.P. No. 95-31, 21 NJPER 189 (¶26122 1995); Camden County College, D.U.P. No. 89-11, 15 NJPER 171 (¶20072 1989).

I find no evidence that Local 153 was hostile towards Wasilewski nor that it failed to investigate her complaints. See Ford Motor Co. There is evidence that on numerous occasions Local 153 represented Wasilewski in an effort to resolve her complaints against the College. Local 153 never impeded Wasilewski from filing a grievance or misled her with respect to the exercise of any of her other rights.

I find no facts in support of Wasilewski's contention that Local 153 interfered with, restrained or coerced her in the selection of her representative for purposes of negotiations or the adjustment of grievances, refused to negotiate in good faith with a public employer concerning terms and conditions of employment of employees in that unit, or violated any of the rules and regulations established by the Commission.

Accordingly, based upon the entire record and the analysis, I make the following:

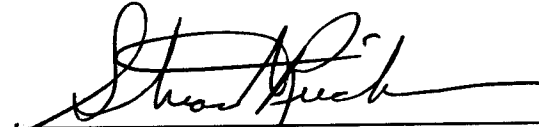
CONCLUSIONS OF LAW

1. Local 153 did not breach its duty of fair representation owed to Ruth Wasilewski and, consequently, did not violate sections 5.4(b)(1) of the Act.

2. Local 153 did not violate sections 5.4(b)(2), (3) or (5) of the Act.

RECOMMENDATION

I recommend that the Commission **ORDER** that the complaint be dismissed.



Stuart Reichman
Hearing Examiner

Dated: July 24, 1997
Trenton, New Jersey