

P.E.R.C. NO. 97-146

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CARTERET EDUCATION ASSOCIATION,

Respondent,

-and-

Docket No. CI-H-95-28

SAAD RADWAN,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by Saad Radwan against the Carteret Education Association. The Complaint alleges that the Association deprived Radwan of access to the grievance procedure. The Commission finds that the Association declined in good faith to process Radwan's grievances and did not violate its duty to fairly represent him by not informing him that he could file grievances on his own.

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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SAAD RADWAN,

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Appearances:

For the Respondent, Wills, O'Neill & Mellk, attorneys
(Arnold M. Mellk, of counsel)

For the Charging Party, Saad Radwan, pro se

DECISION AND ORDER

On December 6, 1994 and February 27, 1995, Saad Radwan, a custodial employee of the Carteret Board of Education, filed an unfair practice charge and amendment against the Carteret Education Association. The charge, as amended, alleges that the Association violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsection 5.4(b) (1), 1/ when it allegedly: refused to file and process several grievances; refused to represent him at a 1992 meeting with the employer; failed to ensure that the Board complied with a grievance settlement; refused to provide an attorney to represent

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."

him; negotiated a settlement of termination charges rather than litigate the charges; and in October 1994, denied him access to the grievance process by refusing to file several grievances, failing to inform him that he could file and prosecute grievances without the Association, and failing to provide him with grievance forms.

On April 19, 1995, a Complaint and Notice of Hearing issued concerning the allegations that the Association had deprived Radwan of access to the grievance procedure in October 1994. All other allegations were found to be untimely and/or not to meet the Commission's Complaint issuance standard. N.J.A.C. 19:14-2.1. Carteret Ed. Ass'n (Radwan), D.U.P. No. 95-31, 21 NJPER 189 (¶26122 1995). On April 26, 1995, the Association submitted an Answer generally denying the allegations in the Complaint.

On October 16, 1995, Hearing Examiner Susan Wood Osborn conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs.

On March 5, 1996, the Hearing Examiner issued her report and recommendations. H.E. No. 96-18, 22 NJPER 129 (¶27063 1996). She found that the Association had breached its duty of fair representation and thus violated subsection 5.4(b)(1), when, having refused to process Radwan's grievances, it failed to inform him of his right to present his own grievances.

On March 18, 1996, the Association filed exceptions. It contends that the Hearing Examiner erred in finding that: Radwan was not supplied with a copy of the collective negotiations agreement until January 1995, but not noting that the agreement had not been received from the printer before then; Radwan was not familiar with the specific terms of the grievance process -- more specifically, the provision allowing individual unit members to file and process grievances; and there was no reason for Radwan to have asked for Step I grievance forms in October 1994 because he could not have known that he could file a grievance without the Association's participation. It further contends that the Hearing Examiner's discussion of Radwan's attempt to file a grievance in April 1995 is irrelevant and that the Hearing Examiner failed to apply the proper legal standard for evaluating a duty of fair representation claim.

On April 1, 1996, Radwan filed a brief supporting the Hearing Examiner's recommendations. He specifically asserts that he never received a copy of the contract or any other type of notice about the grievance procedure until January 1995; he tried to file a grievance with Principal Terebetsky in January 1995, but was told that no one ever filed grievances on their own; and Association building representative Campbell told him that she had to get the proper grievance forms from the Association president. Radwan further asserts that the Hearing Examiner's decision was based on the facts in the record and complied with the law.

We incorporate the Hearing Examiner's findings of fact (H.E. at 3-11) with this modification. Finding no. 8 should reflect that when Association president Cowen was asked whether he had said that Radwan's claim was not grievable, he answered that he had said that he did not believe that a violation had occurred (T176-T177). Cowen explained the situation to Radwan in person because he wanted to make him understand that he didn't think the grievance was meritorious (T177).

Radwan had requested that the Association file several grievances over the years. The Association investigated a 1991 discrimination complaint, advised Radwan that there was no real discrimination, and advised him that he could file a complaint with the Division on Civil Rights; represented Radwan and two other custodians disciplined for fighting in mid-1992; pursued a grievance over a 1993 reprimand issued to Radwan; and considered filing a grievance over work assigned to Radwan in August 1994.

In September and October 1994, Radwan asked the Association to file grievances over three incidents. Cowen told Radwan that he did not think that the incidents involved contract violations. As to the second and third incidents, Cowen told Radwan that the Association was not interested in filing nuisance grievances and that Radwan could do as he pleased.

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 administration. Section 5.3 specifically links the power to negotiate and administer with the duty to represent all unit employees "without discrimination and without regard to employee organization membership." 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). Those standards have 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).

The duty of fair representation does not require a union to press non-meritorious grievances. Here, the Association president found no merit to the grievances. The Hearing Examiner found that his decision was not arbitrary, discriminatory or taken in bad faith. Accordingly, that decision did not breach the duty of fair representation.

Instead, the only question is whether the Association, having otherwise met its duty of fair representation, had an affirmative duty to inform Radwan he could file a grievance on his own. There is no such duty in the private sector. Nor does the Employer-Employee Relations Act expressly require a majority representative to notify an employee of that right. Such a duty would be outside the equation linking the exclusive power to represent employees in certain situations and the concomitant duty to represent them fairly in those situations.

Nevertheless, our case law does prevent a majority representative from misleading an employee about access to the grievance procedure. In Trenton Bd. of Ed., P.E.R.C. No. 86-146, 12 NJPER 528 (¶17198 1986), we noted that a majority representative cannot impede an employee's right to present a grievance and speculated, in dictum, that a refusal to present a grievance combined with a failure to inform the employee of the right to present the grievance personally might be such an impediment. Id. at 531 n.4.

In Camden Cty. College (Porreca), P.E.R.C. No. 88-28, 13 NJPER 755 (¶18285 1987), we found that the negotiated grievance procedure foreclosed an employee's right to present a grievance because it could be read to exclude the employee from presenting a grievance personally. Under those circumstances, the union had to advise the employee of the right to present a grievance personally should it decide not to present it organizationally. The Complaint was dismissed because the union later presented the grievance and the dispute was therefore over.

In this case, the Hearing Examiner found that the Association lawfully declined to file the disputed grievances on Radwan's behalf. Unlike Camden, there is no evidence that the Association, by the language of the grievance procedure or by the action of its representatives, misled Radwan into believing that he had no right to present his own grievance. Contrast New Jersey Transit Bus Operations, Inc., P.E.R.C. No. 90-46, 16 NJPER 3

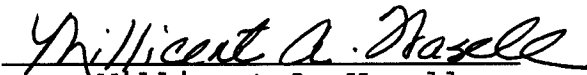
(¶21002 1989) (union violated duty of fair representation where employee asked about right to appeal from union's decision not to arbitrate grievance and where union failed to advise employee of right to appeal to union membership for vote). After declining in good faith to process Radwan's grievances, Cowen told Radwan to "do as he pleased." While that statement might not fulfill a duty to inform, we have declined to recognize such a duty absent some other action by the union that misleads employees or impedes that right. We note that the Association provided employees with contracts when they were available and that those contracts spelled out the employees' right to present their own grievances. We note also that, although the grievance procedure provides that grievances must be filed within 30 calendar days of the occurrence complained of, there is no evidence that the employer refused to accept any grievances from Radwan once he became aware of his right to file personally.

Under all these circumstances, we dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


Willicent A. Wasell
Chair

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

DATED: June 19, 1997
Trenton, New Jersey
ISSUED: June 20, 1997

H.E. NO. 96-18

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

In the Matter of

CARTERET EDUCATION ASSOCIATION,

Respondent,

-and-

Docket No. CI-H-95-28

SAAD RADWAN,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission find that the Carteret Education Association breached its duty of fair representation in violation of 5.4(b)(1) of the Act when it failed to advise Saad Radwan of his rights to present his own grievances after it rejected his grievances for processing.

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. 96-18

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
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Appearances:

For the Respondent
Wills, O'Neill & Mellk, attorneys
(Arnold Mellk, of counsel)

For the Charging Party
Saad Radwan, pro se

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On December 6, 1994, and February 27, 1995, Saad Radwan, an employee of the Carteret Board of Education, filed an unfair practice charge and an amended charge with the Public Employment Relations Commission alleging that his majority representative, the Carteret Education Association, violated subsection 5.4(b)(1) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.^{1/} Radwan alleges that the Association: (1) refused on

^{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.

several occasions to file and process his grievances; (2) refused to provide him with representation at a 1992 meeting with his employer; (3) failed to ensure that the Board comply with a grievance settlement by removing a letter of reprimand from his personnel file; (4) refused to provide an attorney to represent him; (5) negotiated a settlement with the Board rather than defending him against termination charges; and (6) denied him the right to grieve in October 1994 by refusing to provide him with grievance forms and simultaneously refusing to initiate his grievance.

On April 19, 1995, the Director of Unfair Practices issued a Complaint and Notice of Hearing concerning Radwan's allegation that the Association deprived him access to the grievance process in October 1994. The Director dismissed the remaining allegations of the charge as untimely or not violating the Act. Carteret Education Assn. (Radwan), D.U.P. No. 95-31, 21 NJPER 189 (¶26122 1995). On April 26, 1995, the Association filed an Answer denying the allegation in the Complaint.

After two postponements requested by the Respondent and the Charging Party respectively, I conducted a hearing on October 16, 1995, at which the parties examined witnesses and presented exhibits.^{2/} At the close of the hearing, the parties waived oral argument but indicated a desire to file post-hearing briefs. A

^{2/} The transcript of the hearing will be referred to as "T". Exhibits offered by the Charging Party are designated as "CP"; exhibits offered by the Respondent are designated as "R", and jointly submitted exhibits are designated as "J".

briefing period was established, permitting the parties to file by December 15, 1995. The Charging Party filed a post-hearing statement on December 12, 1995. Respondent did not file a brief.

Upon the record, I make the following:

FINDINGS OF FACT

The Carteret Education Association represents the Board's teachers and support staff, including custodial and maintenance personnel (J-1).

1. The Association has a current contract (J-1) with the Board covering employees' terms and conditions of employment for the period July 1, 1993 through June 30, 1996. Article II of the contract contains the following relevant provisions of the grievance procedure:

A. Definitions:

A "grievance" is a claim by an employee or the Association based upon the interpretation or application of policies or administrative decisions and practices affecting an employee or a group of employees.

The term "aggrieved employee" or "aggrieved" shall mean any employee, group of employees or the Association.

B. Procedures.

1. An aggrieved employee shall institute action under the provisions hereof within thirty (30) calendar days of the occurrence complained of, or within thirty (30) calendar days after the aggrieved would reasonably be expected to know of its occurrence...

Level 1.

An employee with a grievance shall discuss it with the principal or immediate superior with the objective of resolving the matter informally.

The principal or immediate supervisor shall render an informal decision within (10) days after the initial discussion.

Level 2.

If, as a result of the informal discussion, the aggrieved is not satisfied with the disposition of the grievance, the aggrieved may formally file the grievance in writing with the principal within twenty (20) school days after the discussion at Level 1....

The contract further provides that the Association's Grievance Committee may move meritorious grievances to Level 3 (the Superintendent) and then Level 4 (the Board), and then Level 5 (binding arbitration).

Section 7 of the contract provides that employees may be represented by the Association at all stages of the process, and when they are not represented, the Association will be notified of a grievance at Level 2.

Section 8 provides that grievance forms will be appropriately distributed to facilitate use of the grievance procedure.

2. Radwan came to the United States from Egypt in 1981. He has some language difficulties, as was evident from the hearing. He has been a custodian for the Carteret Board of Education since 1991 and is currently assigned to the Columbus School (T35). He has been told he is doing a good job (T35). However, he has had "little problems" with his immediate supervisor, Building and Grounds Supervisor Drew Packard, who has "written up" Radwan many times for what Radwan believes are false accusations

(T35-T36). Radwan believes that his supervisor treats him unfairly and discriminates against him (T15; T16; T35).

3. In late September and early October 1994, Supervisor Packard issued three disciplinary memos to Radwan. The first occurred on September 29, 1995, when Packard gave Radwan a written reprimand for his alleged refusal to obey an order to clean a men's room and place the key in the maintenance shop. On October 5, Radwan wrote a memo to Association President Robert Cowen (CP-3). In his memo, which is captioned, "To File a Grievance," Radwan adamantly denies that he failed to follow an order and he explains his account of the incident giving rise to the reprimand. His memo requests that a grievance be filed immediately over the reprimand, which he enclosed with his memo. Radwan delivered his memo to Cowen at the High School where Cowen teaches (CP-3).

4. When asked how he responded to Radwan's request to file a grievance, Cowen stated,

Actually, I didn't do anything. Mr. Radwan came to the High School, and we spoke at the high school regarding the incident. At that time, I advised him that if this information was correct, he had in fact been insubordinate. That if he in fact was given an order by a supervisor that he believes to be contrary to his work responsibilities, he should carry out the order and then grieve it. But I didn't believe at this particular point that a grievance had in fact occurred. (T118-T120).

Cowen's account of this conversation was unrebutted in the record. Cowen further told Radwan that the matter was "not grievable" and that "no violation occurred." (T176-T177).

5. On October 5, 1994, Packard gave Radwan another written reprimand concerning keys that disappeared on October 4. Packard's reprimand accused Radwan of "jeopardizing the school's security" and failing to keep the keys on a safety chain in his pocket. The same day, Packard sent a separate memo to Superintendent Panigrosso and administrators Torre and Resnick advising them that the keys were lost and that Radwan had refused to sign for a new set of keys (CP-1 Attachment, CP-2 Attachment). Copies of each memorandum were placed in Radwan's personnel file (CP-1; CP-2).

6. On October 11, 1994, Radwan wrote two memos to Cowen about the keys reprimands. In the first memo (CP-2), Radwan explained that his keys were stolen on October 3 during wash-up time, that he had reported the theft to Columbus School Principal Terebetsky, that Packard had insisted he sign a receipt for the replacement keys and when he refused, Packard chased him down the hall, telling nearby staff members, "He is crazy." Radwan further asserted in his memo that no other employee was ever required to sign for keys. Radwan ended the memo with,

I want a grievance filed against Mr. Packard for two letters placed in my personnel file...as noted above pertaining to stolen key replacement...Mr. Packard continues to harass me and ruin my reputation by constantly writing me up and placing these letters in my file. I am the only employee that is being treated in this manner. Therefore I want a grievance filed against Mr. Packard for this continuation of treatment. (CP-2).

Radwan attached to CP-2 a copy of Packard's memo to the Superintendent.

7. Radwan's second October 11 memo to Cowen (CP-1), captioned "Re: to file a grievance", begins,

I want a grievance filed against Mr. Packard for insisting that my keys were lost.

Radwan's memo to Cowen again explained that his keys had been stolen. He objected to Packard's characterization that he was irresponsible, disparate treatment over Packard's requirement that he sign for replacement keys, and the placement of the reprimand letter in his personnel file. He also objected to Packard's reprimand for his failure to secure the keys on a security chain, since the Board had not supplied security chains. Radwan attached to CP-1 the theft report he had filed with the police, as well as the reprimand letter.

8. In response to CP-1 and CP-2, Cowen met with Radwan at the High School a few days later (T120-T121). Cowen described that meeting as follows:

Basically, I asked Mr. Radwan if he had the keys or in fact the keys were lost. He admitted that the keys were in fact lost. Again, I advised him that I didn't see where--where we had a grievable matter. And I wouldn't advise that it be in his best interest to file a grievance.

Cowen's testimony about this discussion with Radwan is also unrebutted in the record. It is doubtful that Radwan would have admitted to Cowen that he lost his keys in light of his insistence in CP-1 that they were stolen and the filing of the police report. It appears that there may have been a misunderstanding, possibly

based upon language barrier difficulties, over the use of the term lost. Nevertheless, I credit Cowen's unrebutted testimony that, as a result of the conversation with Radwan, he believed the facts did not support the filing of a grievance.

Cowen advised Radwan that "quite frankly, the Association was not interested in filing nuisance grievances." (T176). Radwan responded that he did not believe he was being treated fairly (T123). Cowen told Radwan that the Association could only take action if a matter was contractually grievable or could be litigated under statute, and could not remedy matters that were simply "unfair." (T123).

9. Although Cowen agreed that the Association has an obligation to advise its members of their rights under the contract (T180-T181), the record does not show that the Association ever advised Radwan of his contractual right to file a grievance without the Association. When Cowen was asked whether Radwan was ever made aware of this right, Cowen said,

...One of the problems that I had in my relationship with Mr. Radwan is that he didn't necessarily always either believe or take the advice issued by the Association. And it had been made clear to him on a number of occasions that while we as an Association didn't believe it was meritorious or should go forward, he basically could do as he pleased. (T122).

10. At the time of the October 1994, grievances, Radwan had not been provided with the collective negotiations agreement (T61). In fact, Radwan was not supplied a copy of the contract until

January 1995 (T52). Although in October 1994, he had some general idea that there was a 30-day time period to initiate a grievance, he was unfamiliar with the specifics of the grievance process (T61-T62).

11. Cowen did not offer to give Radwan grievance forms in October 1994 because Radwan had not specifically asked for forms (T78; T80).^{3/} Although Cowen believed that an employee could initiate a grievance without grievance forms, Radwan's experience was to the contrary (T180). He tried to initiate a grievance on his own with Columbus School Principal Terebetsky in April 1995, Radwan wrote a note to Terebetsky, saying "I am requesting a grievance for the incident that took place on Friday, March 17, 1995." His note describes the incident, which involved inadequate custodial staffing in the lunchroom (CP-4). Terebetsky responded by contacting Association Building Representative MaryLou Campbell.^{4/} Terebetsky told Campbell that Radwan wanted to file a grievance but that no forms were available. Campbell obtained forms from Cowen but wrote a separate memo (CP-4) about the incident on Radwan's behalf, and he was satisfied.

^{3/} There would be no reason for Radwan to ask for forms at this point, because he did not have any way of knowing that he could file a grievance on his own.

^{4/} MaryLou Campbell testified under a subpoena for the Charging Party. Campbell has been a district-wide Association building representative for the last three years. Although her responsibilities include handling employee problems, Radwan was the first employee to request her assistance in initiating a grievance. Therefore, she was unfamiliar with the contractual grievance process.

12. The Association had previously represented Radwan in processing a formal grievance. When Radwan was given a reprimand in 1993, Cowen prepared a grievance form and explained it to Radwan. Radwan signed the grievance, and the Association filed it (T115-T116). Cowen represented Radwan at various conferences relating to that grievance (T116), which proceeded to the third step of the grievance process (the Superintendent). Cowen kept Radwan informed of the process and the time limits as the grievance progressed (T115-T117; T173; T175).

13. There were several other occasions when Radwan asked the Association for assistance. In 1991, Radwan complained to the Association about discriminatory treatment he felt he was receiving from the then school principal (T108-T109). As the then Grievance Chairperson, Cowen met with Radwan together with then Association President Walsh. The Association concluded that there was no real evidence of discrimination, but advised Radwan that he could file a complaint with the Division on Civil Rights (T110).

In 1992, Radwan was involved in two physical altercations with another custodian. Although Cowen testified that he "represented both custodians" concerning the incidents, the record does not show that a grievance was filed over either incident (T38; T111-T112; T115).

In August 1994, Radwan was directed to perform another employee's assignments when that employee was caught sleeping on the job. Believing that he was being treated unfairly, he sought to

grieve through the Association. Although the Association brought in its NJEA Representative to meet with Radwan, no grievance was filed (T124-T126).

Frustrated that the Association would not help him, Radwan addressed the Board's public meeting in late August 1994, accusing the Board of "sitting by" while supervisors discriminated against him and permitted other employees to sleep on the job while he was forced to do their work. He told the Board that if it would not take action, that he would, even if it meant going to jail (T129). The Superintendent reported to Cowen that the Board was preparing tenure charges against Radwan. The Association represented Radwan at the Board's disciplinary hearing, and the Board decided against pursuing tenure charges at that time (T129-T147; T157-T158).

However, except for the 1993 reprimand, which the Association grieved on Radwan's behalf (see Finding of Fact #12), none of these earlier complaints or disciplinary matters involved the filing of formal grievances.^{5/}

^{5/} I do not consider the grievances, complaints and disciplinary matters in the context of evaluating the quality of the Association's overall representation of Radwan. These events, which were partly plead in the original charge and dismissed by the Director, were not before me for consideration. Rather they were permitted into the record only to test whether Radwan was familiar enough with the grievance process to have learned that he could initiate his own grievance.

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 interests 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).

Rather, it has an obligation to investigate the claimed contract violation to determine if it has merit. In N.J. Turnpike Employees Union, Local No. 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979), the Commission identified the union's duty to its members when faced with a claimed contract violation:

...The union must exercise reasonable care and diligence in investigating, processing and presenting grievances; it must make a good faith judgment in determining the merits of the grievance; and it must treat individuals equally by granting equal access to the grievance procedure and arbitration for similar grievances of equal merit... (5 NJPER at 413) (emphasis added).

A union must conduct some minimal investigation of grievances brought to its attention. Jersey City Medical Center, D.U.P. No. 88-3, 13 NJPER 688 (¶18257 1981); NLRB v. American Postal Workers Union, 618 F2d 1249, 103 LRRM 3045 (8th Cir. 1980). The thoroughness with which unions must investigate grievances in order

to satisfy the duty varies with the circumstances of each case. Although unions are afforded a reasonable range of discretion in deciding how to handle grievances, union conduct that shows an egregious disregard for the rights of union members [unit employees] constitutes a breach of the duty of fair representation. Tenorio v. NLRB, 680 F2d 598, 110 LRRM 2939 (9th Cir. 1982).^{6/}

Whether a union's conduct in deciding whether to file a proposed grievance violates its duty of fair representation will be evaluated by this standard: Did it act arbitrarily, discriminatorily or in bad faith? Vaca v. Sipes, 386 U.S. 171 (1967).^{7/}

It appears that the Association met its responsibility to investigate the grievances in October 1994. Cowen reviewed the reprimand letters, met with Radwan, and discussed the matters. Cowen concluded that there was an insufficient basis for the Association to file a grievance over the reprimands. Therefore, I find that the Association did not violate its duty to fairly represent Radwan in its decision not to initiate the grievances.

6/ See Lullo v. Int'l Assn. of Firefighters, 55 N.J. 409 (1970), where the New Jersey Supreme Court approved the Commission's use of federal sector precedent in unfair practice litigation.

7/ See also, Camden County College (LaMarra), P.E.R.C. No. 93-90, 19 NJPER 222 (¶24107 1993); Fair Lawn Bd. of Ed., P.E.R.C. No. 84-138, 10 NJPER 351 (¶15163 1984); OPEIU Local 153, P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983); City of Union City, P.E.R.C. No. 82-65, 8 NJPER 98 (¶13040 1982); Middlesex County, P.E.R.C. No. 81-62, 6 NJPER 555 (¶11282 1980), aff'd App. Div. Docket No. A-1455-80 (April 1, 1982), pet. for certif. den. (6/16/82); N.J. Turnpike Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979); AFSCME Council No. 1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978).

However, this does not end the matter. The next question is whether the Association had a duty to notify Radwan of his right to file his own grievance. Under the New Jersey State Constitution, an employee has a constitutional right to present his grievance, N.J. Constitution (1947), Art. I, par. 19. Our Act, in part, effectuates this guarantee. The Act gives the union the right to negotiate and participate in a grievance procedure. N.J.S.A. 34:13A-5.3. With this right comes the responsibility not to foreclose an employee's constitutional right to present his own grievance. Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122 (1978); Camden Cty. College (Porreca).

Applying these principles, in Trenton the Commission suggested that a union's failure to give the employee notice of his right to initiate his own grievance after refusing to process a grievance might violate the Act. There, the Commission said,

We do distinguish between a possible organizational obligation to inform an employee he may present his grievance personally and a claimed organizational obligation to present and support that grievance. A majority representative cannot impede an employee's constitutional and statutory right to present a grievance; perhaps a refusal to present a grievance combined with a failure to inform the employee of the right to present the grievance personally might be such an impediment. [12 NJPER at 531, n. 4.] (Cited with approval in Porreca.)

Here, under the particular circumstances of this case, I find that the Association failed to make the grievance procedure available to Radwan concerning his October 1994 grievances. First,

the Association did not tell Radwan that he could initiate the grievances himself when it decided not to file them. In fact, with regard to the insubordination reprimand, Cowen advised Radwan that the matter was not grievable,^{8/} but that Radwan could "do as he pleased." I do not infer from this that the Association advised Radwan of his right to grieve independent of the Association's help. Being told to "do as he pleased" is not enough to inform an employee he may initiate a grievance through the contract grievance process (in this instance, at step 1 and step 2). The record does not show that the Association ever made Radwan aware of this right.

Second, when the union provides a copy of its contract to the employee, this may serve as adequate notice of the employee's right to present a grievance, assuming the contract permits such a filing. Here, the parties' contract does permit an employee ("the aggrieved") to present his own grievance at steps 1 and 2, without the union's assistance. But this possibility was not available to Radwan because he was never given a copy of the contract until April 1995. Radwan had no way of knowing he had that right.

The Association argued at the hearing that Radwan had made use of the grievance process so frequently that he would have been aware of his contract right to initiate his own grievance. The record shows that, although the Association represented him with regard to several matters, only one formal grievance was filed: the

^{8/} Why a written reprimand could not be challenged under the contract grievance procedure is not clearly understood.

1993 grievance involving a reprimand was initiated by Radwan's request to the Association. Cowen completing the grievance forms, and Radwan signing the form. Nothing in this process would have led Radwan to understand that he had a contract right to initiate his own grievance. Third, and less significant, no grievance forms were made available to Radwan, despite the contract requirement that they be available. Terebetsky's subsequent conduct implied that a grievance would not be accepted without the forms.

CONCLUSION

The Carteret Education Association breached its duty of fair representation in violation of 5.4(b)(1) of the Act when it failed to advise Saad Radwan of his rights to present his own grievances after it rejected his grievances for processing.

RECOMMENDED ORDER

I recommend that the Commission ORDER that:

A. The Association cease from


Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to notify employees of their contractual rights to present their own grievance when the Association rejects the grievance for processing.

B. The Respondent Association take the following affirmative action:

1. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as

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

2. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.



Susan Wood Osborn
Hearing Examiner

DATED: March 5, 1996
Trenton, New Jersey



NOTICE TO EMPLOYEES



**PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,**

We hereby notify our members that:

WE WILL NOT interfere with, restrain or coerce employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to advise employees of their rights to present their own grievance if we reject the grievance for processing.

WE WILL fulfill our duty to fairly represent unit employees in the future by advising employees of their right to present their own grievance if we reject the grievance for processing.

Docket No. CI-H-95-28

Carteret Education Association
(Employee Representative)

Date: _____

By: _____

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

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