P.E.R.C. NO. 79-81

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TURNPIKE AUTHORITY,

Respondent,

-and-

NEW JERSEY TURNPIKE EMPLOYEES UNION, LOCAL 1954, I.F.P.T.E., AFL-CIO,

Respondent,

Docket No. CI-76-19-94

-and-

WALTER A. KACZMAREK, JR.,

Charging Party.

SYNOPSIS

In an interlocutory decision the Commission affirms the Hearing Examiner's decision to grant the Turnpike Authority's motion for involuntary dismissal. Applying the standard established in In re North Bergen, P.E.R.C. No. 78-28, 4 NJPER 17 (¶4008 1978), the Hearing Examiner correctly found that the Charging Party had failed to present more than a scintilla of evidence of an (a)(1) violation by the Authority. The Commission declines to join the Authority as an indispensable party to this proceeding since we are satisfied that this matter may be adequately remedied by Local 194 in the event a violation is found. Furthermore, we upheld the Hearing Examiner's refusal to grant Local 194's motion for dismissal.

P.E.R.C. NO. 79-81

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TURNPIKE AUTHORITY,

Respondent,

-and-

NEW JERSEY TURNPIKE EMPLOYEES UNION, LOCAL 194, I.F.P.T.E., AFL-CIO,

Docket No. CI-76-19-94

Respondent,

-and-

WALTER A. KACZMAREK, JR.,

Charging Party.

Appearances:

For the New Jersey Turnpike Authority, Herbert I. Olarsch, Esquire (Bernard M. Reilly, Esq.)

For the New Jersey Turnpike Employees Union, Local 194, I.F.P.T.E., AFL-CIO, Parsonnet, Parsonnet & Dugan, Esqs. (Victor J. Parsonnet, Esq.)

For Walter A. Kaczmarek, Jr., Craner and Nelson, Esqs. (Ronald J. Nelson, Esq.)

DECISION ON MOTIONS TO DISMISS

An Unfair Practice Charge was filed with the Public Employment Relations Commission on April 13, 1976 by Walter A. Kaczmarek, Jr. (the "Charging Party") which was amended and supplemented by letter filed April 26, 1976, alleging that the New Jersey Turnpike Authority (the "Turnpike Authority") and the New Jersey Turnpike Employees Union, Local 194, I.F.P.T.E., AFL-CIO ("Local 194") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A.

34:13A-1 et seq. (the "Act"). Specifically, it is alleged that Local 194 violated N.J.S.A. 34:13A-5.4(b)(1) and (5) by improperly refusing to proceed to arbitration on the question of Kaczmarek's allegedly improper discharge and that the Turnpike Authority violated N.J.S.A. 34:13A-5.4(a)(1) and (7) by obstructing the presentation of witnesses by the Charging Party at the discharge hearing.

The charge was processed in accordance with the Commission's Rules, and it appearing to the Commission's Director of Unfair Practices that the allegations of the charge, if true, might constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on July 29, 1976. On September 22, 1976, the Commission granted the Turnpike Authority's motion for summary judgment, in which Local 194 joined, on the grounds that the charge was filed more than six months after Kaczmarek's discharge. On August 7, 1978, the Supreme Court of New Jersey reversed the Appellate Division's affirmance of the Commission's summary dismissal and remanded the matter to the Commission for proceedings not inconsistent with its opinion.[1/] In accordance with the Supreme Court's directive, a Notice of Hearing was issued on August 31, 1978, pursuant to which hearings were held on October 10 and October 12, 1978 before Commission Hearing Examiner Alan R. Howe, at which time the charging party was given an opportunity to examine witnesses and present relevant evidence.

At the close of the charging party's case, counsel for respondents made oral motions to dismiss. Pursuant to a briefing

1/ 77 N.J. 329 (1978)

schedule established by the Hearing Examiner, the Turnpike Authority and Local 194 filed briefs by November 29, 1978, the Charging party filed a reply brief on December 14, 1978 and the Turnpike Authority filed its reply brief on December 18, 1978. On February 15, 1979, the Hearing Examiner filed with the Commission and served upon the parties his recommended interlocutory decision on respondents' motions for dismissal, H. E. No. 79-31, 5 NJPER 76 (¶10045 1979),a copy of which is attached and made a part hereof.

Applying the standard for ruling on motions for involuntary dismissal adopted by the Commission in In re North Bergen, P.E.R.C. No. 78-28, 4 NJPER 15 (¶4008 1978), the Hearing Examiner granted the Turnpike Authority's motion and denied Local 194's motion. The Hearing Examiner found that the charging party had failed to provide more than a scintilla of evidence against the Turnpike Authority with respect to its alleged role in obstructing the production of witnesses by Kaczmarek at an administrative hearing on his discharge, but concluded that more than a scintilla of a violation by Local 194 of its statutory duty of fair representation had been established.

On March 7, 1979, the Charging Party filed a brief requesting review of the Hearing Examiner's decision granting the Turnpike Authority's motion to dismiss. Insofar as Local 194 has declined to seek review of the Hearing Examiner's denial of its motion for dismissal, and after a thorough review of the entire record compiled to date, the Commission upholds the Hearing Examiner's conclusions of law and fact pertaining to this aspect of the case without further discussion.

We now turn to the arguments raised by Kaczmarek in opposition to the dismissal of the charges against the Turnpike Authority. It is maintained that the Hearing Examiner's finding that Grayson's testimony was the only evidence adduced at hearing demonstrating culpability on the part of the Turnpike Authority is inaccurate.[2/] According to the Charging Party the transcript of the discharge hearing, which was submitted into evidence, reveals that instructions minimizing the import of the subpoenas were given to identified individuals by Turnpike Authority managerial personnel. Moreover, it is alleged that even assuming that there is not more than a scintilla of evidence of an (a)(1) violation, nevertheless sufficient evidence was presented at hearing to establish (a)(3) and (a)(5) violations. Despite the fact that the Charge in the instant matter was never amended to reflect these new legal theories, it is argued that they should be given due consideration so that the pleadings may conform to the evidence. New Jersey Civil Practice Rule 4:9-2 is cited in support of this contention. The Commission determines that it is unnecessary to pass judgment upon upon the Charging Party's right to incorporate new violations into its original charge at this point in the proceedings. The gravamen of the Charging Party's complaint against

2/ Grayson testified that one or more of the subpoenaed individuals advised him that they had been told by representatives of the Authority that they did not have to appear at the hearing if they did not wish to. (T. 122)

the Turnpike Authority is that said Authority collaborated with Local 194 in obstructing the presentation of Kaczmarek's grievance. If the evidence presented by the Charging Party does not support an (a)(1) violation, then *a fortiori* a violation of (a)(3) and (a)(5) will not be made out.

Therefore the essential question presently before the Commission is whether or not the Charging Party presented more than a scintilla of evidence of an (a)(1) violation by the Turnpike Authority. The Commission recognizes that a certain degree of confusion may exist with regard to the application of the standard for dismissal enunciated in *In re North Bergen*, *supra*, and shall accordingly take this opportunity to amplify upon our analysis in that decision.

As the Hearing Examiner noted, the Commission utilizes the standard set forth by the New Jersey Supreme Court in *Dolson v. Anastasia*, 55 *N.J.* 2 (1959). Therein the Court declared that when ruling on a motion for involuntary dismissal the trial court "is not concerned with the worth, nature or extent (*beyond a scintilla*) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion" (emphasis added). Unlike a number of other jurisdictions, New Jersey Courts have consistently held that before a motion for involuntary dismissal will be granted the moving party must demonstrate that not even a

scintilla of evidence exists to support plaintiff's case. Thus, while the process does not involve the actual weighing of evidence (as that concept is traditionally understood) some consideration of the worth of the evidence presented may be necessary. This is particularly true in the administrative context where evidence, which would ordinarily be ruled inadmissible in a trial court may, under In re application of Howard Savings Bank, 143 N.J. Super 1 (App. Div. 1976), be allowed in at an administrative hearing. This less rigorous standard for ruling upon evidentiary questions of admissibility was not designed to encourage or sanction administrative decisions based upon incompetent or otherwise unreliable evidence. Rather, the Court in Howard Savings Bank, supra, stressed that "an administrative decision must be based on a residuum of legal and competent evidence and not on hearsay alone." Moreover, when the Supreme Court in Weston v. State, 60 N.J. 36 (1972), articulated the residuum rule, it registered its disaproval of administrative decisions based upon hearsay where the source of the information is unidentified. Thus, the Court in Weston, supra, expressed concern that the plaintiff therein could not be reasonably expected to overcome "faceless" opposition where the identity of those whose adverse views formed the foundation for the judgment against him were not disclosed. In the instant matter, the incriminating evidence cited by the Hearing Examiner also derives from

We conclude that while the testimony cited above indicates that the Turnpike Authority may not have conveyed the impression that compliance with the subpoena was mandatory, there is no evidence to support the Charging Party's contention that witnesses were discouraged from attending the hearing. Moreover, testimony by Grayson indicates that Forst had told him that there was no authority at the first level of hearing to have subpoenas issued (T.96). This is further supported by the pertinent provision of the contract between the Authority and Local 194 which provides that an ecmployee may "request in his defense such witnesses as he may wish to have present" (Article XVII) but which makes no mention of the right to have witnesses subpoenaed. Accordingly, the Hearing Examiner was correct in finding that insufficient evidence had been adduced by Kaczmarek against the Turnpike Authority to warrant a denial of the Authority's motion for dismissal.

Having concluded that the Hearing Examiner properly granted the Turnpike Authority's motion, the Commission is now confronted with another question raised by the Charging Party. It is argued that even if no evidence was presented that the Turnpike Authority had committed an unfair practice, the Hearing Examiner should have continued the joinder of the Authority for the purposes of ordering an effective remedy. New Jersey Civil Practice Rule 4:28-1(a) and Rule 19(a) of the Federal Rules of Civil Procedure (after which the New Jersey rule was modeled), are cited as support for the retention of jurisdiction by the Commission over the Turnpike Authority.

a "faceless" source.[3/]

Therefore, if the only record evidence was Grayson's testimony, then without question the Hearing Examiner's grant of respondent Authority's motion for dismissal must be upheld. However, it is the Charging Party's contention that additional supportive evidence was introduced by way of the transcript of the discharge hearing before the Turnpike Authority.

For example, in response to a question at Kaczmarek's dismissal hearing by Francis A. Forst, Business Manager of Local 194, as to whether the Turnpike Authority notified six employees subpoenaed by Kaczmarek, Daniel Valenti, the Northern Division Manager of Maintenance for the New Jersey Turnpike Authority, responded, "We didn't ask them do you want to appear. We said it has been requested that you will appear. It is not mandatory. Its up to you if you want to appear." "You have been requested to be a witness by Mr. Kaczmarek." In response to a similar question, Herbert Olarsch, Attorney for the New Jersey Turnpike Authority, stated, "Yes, I make the representation that they were contacted by their supervisors with instructions that their presence has been requested if they wish to appear."

3/ As the Hearing Examiner notes, although the charging party could have subpoenaed the unnamed individuals, who allegedly disclosed to Grayson that they were discouraged by the Turnpike Authority from attending the dismissal hearing, the charging party elected not to do so.

Under New Jersey Civil Practice Rule 4:28-1(a), a person who is subject to service of process shall be joined as a party to the action if, in his absence, complete relief cannot be accorded those already parties. Generally, New Jersey Courts have held that if a final decree cannot be made without affecting the interest of the party sought to be joined, or if the final determination of the controversy in the party's absence would be inconsistent with equity and good conscience, then the party will be considered indispensable.[4/]

We are satisfied that this matter may be adequately remedied by Local 194 in the event that a violation of the Act is found. The Turnpike Authority is not indispensable for the purposes of accomplishing complete and appropriate relief. We believe, therefore, that the Turnpike Authority should not and need not be retained as a party to the proceedings for purposes of remedy.

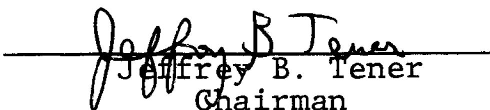
Accordingly, the Commission affirms the Hearing Examiner's interlocutory decision in all respects.

4/ See Garnick v. Serewitch, 39 N.J. Super. 486, 121 A2d 423 (Ch. Div. 1956); Jennings v. M & M Transportation Co., 104 N.J. Super. 265 (Chan. Div. 1969); In Stokes v. Twp. of Lawrence, 111 N.J. 134 (App. Div. 1970).

ORDER

By reason of the foregoing it is ordered that Respondent Local 194's motion for dismissal be denied and that Respondent Authority's motion for dismissal be granted.

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Hartnett, Newbaker and Parcells voted for this decision. None opposed. Commissioners Graves and Hipp abstained.

DATED: Trenton, New Jersey
April 26, 1979
ISSUED: May 1, 1979

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

In the Matter of

NEW JERSEY TURNPIKE AUTHORITY,

Respondent,

- and -

NEW JERSEY TURNPIKE EMPLOYEES UNION, LOCAL 194, I.F.P.T.E., AFL-CIO

Docket No. CI-76-19-94

Respondent,

- and -

WALTER A. KACZMAREK, JR.,

Charging Party.

SYNOPSIS

A Hearing Examiner grants the motion of the Turnpike Authority to dismiss Kaczmarek's charge of unfair practices, alleging violations of Subsections 5.4(a)(1) and (7) of the New Jersey Employer-Employee Relations Act on the ground that Kaczmarek has failed to prove a prima facia case against the Turnpike Authority with respect to its alleged obstruction in the calling of witnesses by Kaczmarek at an administrative hearing on his discharge, which was held July 31, 1975.

Further, the Hearing Examiner denies a motion to dismiss by Local 194 on the grounds that Kaczmarek has made out a prima facia case of alleged violation by Local 194 of its statutory duty of fair representation under Subsection 5.4(b)(1) of the Act. The Hearing Examiner drew an inference favorable to Kaczmarek that Local 194's conduct in failing to call the witnesses requested by Kaczmarek at the aforesaid administrative hearing, and thereafter refusing to take Kaczmarek's case to arbitration, was arbitrary, discriminatory or in bad faith under decisions of the United States Supreme Court and the National Labor Relations Board. The Hearing Examiner did grant Local 194's motion to dismiss as an alleged Subsection 5.4(b)(5) violation.

A Hearing Examiner's granting or refusing to grant a motion to dismiss is subject to appeal to the Public Employment Relations Commission pursuant to its rules.

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

In the Matter of

NEW JERSEY TURNPIKE AUTHORITY,

Respondent,

- and -

NEW JERSEY TURNPIKE EMPLOYEES UNION, LOCAL 194, I.F.P.T.E., AFL-CIO

Docket No. CI-76-19-94

Respondent,

- and -

WALTER A. KACZMAREK, JR.,

Charging Party.

Appearances:

For the New Jersey Turnpike Authority
Herbert I. Olarsch, Esq.
(Bernard M. Reilly, Esq.)

For New Jersey Turnpike Employees Union, Local 194, I.F.P.T.E., AFL-CIO
Parsonnet, Parsonnet & Dugan, Esqs.
(Victor J. Parsonnet, Esq.)

For Walter A. Kaczmarek, Jr.
Craner and Nelson, Esqs.
(Ronald J. Nelson, Esq.)

DECISION ON MOTIONS TO DISMISS AND ORDER

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on April 13, 1976 by Walter A. Kaczmarek, Jr. (hereinafter "Kaczmarek" or the "Charging Party"), which was amended and supplemented by letter filed April 26, 1976, alleging that the New Jersey Turnpike Authority (hereinafter the "Turnpike Authority") and the New Jersey Turnpike Employees Union, Local 194, I.F.P.T.E., AFL-CIO (hereinafter "Local 194") had engaged in unfair practices within the meaning of the New Jersey Employer-Employees Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act", in

that the Turnpike Authority had improperly discharged Kaczmarek on July 18, 1975 and that Local 194 thereafter improperly refused to proceed to arbitration of the discharge pursuant to the collectively negotiated agreement between it and the Turnpike Authority, all of which was alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1) and (7) and N.J.S.A. 34:13A-5.4(b)(1) and (5). 1/

It appearing that the allegations of the Unfair Practice Charge, as amended, if true may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on June 29, 1976. Following the issuance of the Complaint, the Turnpike Authority filed a motion for summary judgment, in which Local 194 joined, contending that the complaint should be dismissed inasmuch as the charge was filed more than six months after the discharge. 2/

The Commission on September 22, 1976 granted the motion for summary judgment and dismissed the complaint. 3/ Thereafter, Kaczmarek filed an appeal to the Appellate Division, seeking to reverse the decision of the Commission, supra. The Appellate Division affirmed the Commission, but on August 7, 1978 the Supreme Court of New Jersey reversed and remanded the matter to the Commission for proceedings not inconsistent with its opinion. 4/

Pursuant to the decision of the Supreme Court, the Director of Unfair Practices, on August 31, 1978, issued a Notice of Hearing. Pursuant to the said Notice of Hearing, hearings were held on October 10 and October 12, 1978 in Newark, New Jersey, at which time the Charging Party was given an opportunity

1/ Subsection (a) prohibits employers, their representatives and agents from:
"(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.
"(7) Violating any of the rules and regulations established by the Commission."

Subsection (b) 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.
"(5) Violating any of the rules and regulations established by the Commission."

2/ N.J.S.A. 34:13A-5.4(c) establishes a six-month statutory period of limitations on the filing of an Unfair Practice Charge.

3/ P.E.R.C. No. 77-15, 2 NJPER 309 (1976).

4/ 77 N.J. 329 (1978).

to examine witnesses and present relevant evidence. At the conclusion of the Charging Party's case, counsel for the Turnpike Authority and Local 194 made oral motions to dismiss. Pursuant to a briefing schedule established by the Hearing Examiner, the Turnpike Authority and Local 194 filed briefs by November 29, [5/] the Charging Party replied on December 14 [6/] and thereafter a reply brief was filed by the Turnpike Authority on December 18, 1978. Local 194 did not file a reply brief.

Unfair Practice Charges, as amended, having been filed with the Commission, and motions to dismiss having been filed by the Turnpike Authority and Local 194, and, after consideration of the briefs of the parties, the matter of the motions to dismiss is appropriately before the Hearing Examiner for determination.

Upon the record to date, namely, the presentation of the Charging Party's case, the Hearing Examiner makes the following interim:

FINDINGS OF FACT [7/]

1. The New Jersey Turnpike Authority is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The New Jersey Turnpike Employees Union, Local 194, I.F.P.T.E., AFL-CIO, is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. Walter A. Kaczmarek, Jr. is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

5/ At the request of the Hearing Examiner, the Turnpike Authority also filed a letter in supplement to its original brief on December 6.

6/ The Charging Party did not at the hearing seek to amend his charge. References in the Charging Party's brief to alleged violations by the Turnpike Authority of Subsections (a)(3) and (a)(5) of the Act are ignored since a review of the record discloses that there was no notice or litigation of such allegations. Further, there is the matter of the six-month rule (footnote 2, supra), and the fact that as to Subsection (a)(5) the Commission has recently held that an individual has no standing to file: Borough of Shrewsbury, P.E.R.C. No. 79-42, 5 NJPER ___ (1979).

7/ In making these findings the Hearing Examiner is guided by Township of North Bergen, P.E.R.C. No. 78-28, 4 NJPER 15 (1977).

4. Kaczmarek was hired by the Turnpike Authority on March 21, 1966 as a toll collector. At the time of his discharge by the Turnpike Authority on July 18, 1975, Kaczmarek was a maintenance man in District 2, Southern Division. His supervisor was Everett R. Loeber, the Superintendent of Maintenance for the Southern Division.

5. Sometime in April 1975 Loeber spoke to Detective Sgt. Richard H. Kelly of the New Jersey State Police regarding a spilled cargo of coffee on the Turnpike where Loeber observed a number of Turnpike employees putting the coffee into their own cars. Loeber said he could have fired them all but instead decided to re-issue and post on all bulletin boards the "cargo directive" (see CP-17, dated April 28, 1975). Thereafter, at the end of April 1975, Kaczmarek was speaking to his shop steward, Baricki, regarding the "directive" and, in the presence of Loeber, Kaczmarek said that he knew of pilferage some 18 months earlier in the Northern Division involving cases of liquor having been put into a panel truck. Loeber said that he would take the matter to Kelly and when he did so Kelly said that he wanted to see Kaczmarek. Loeber took Kaczmarek to Kelly on April 30, 1975 and Kelly took a statement from Kaczmarek on that day (CP-1). In this statement Kaczmarek implicated a number of Turnpike employees in the "theft" of a van-load of cases of Seagram's Seven whiskey, following a multi-vehicle accident in the fog on the Turnpike on or about October 23 and October 24, 1973. More specifically, the implicated employees were alleged by Kackmarek to have loaded a Turnpike van (No. 412) with cases of Seagram's Seven whiskey, which had been deposited at dump No. 109, following the accident on the Turnpike, <u>supra</u>, and to have driven the said Turnpike vehicle to the Turnpike Division Headquarters at Newark where the van was unloaded and the cases of Seagram's Seven whiskey taken in through the front door of the Division Headquarters.

6. At an administrative hearing on July 31, 1975, <u>infra</u>, Detective Sgt. Kelly testified, <u>inter alia</u>: that all of the persons implicated by Kaczmarek denied any involvement and that he, Kelly, was impressed by their demeanor (CP-5, pp. 17, 18); that his collateral investigation of persons <u>not</u> implicated by Kaczmarek indicated that the events of the day in question were "contrary to the Kaczmarek statement" (CP-5, pp. 18-29); that he confronted Kaczmarek with the "inconsistencies" and Kaczmarek reiterated his original statement to Kelly (CP-5, p. 29); and that based on the results of his investigation, Kelly concluded that Kaczmarek was "untruthful" in his statement of April 30, 1975 (CP-5, p. 31). [8/]

8/ Kelly told Loeber he thought Kaczmarek was a liar.

7. Under date of July 15, 1975 the Turnpike Authority sent a letter to Kaczmarek (CP-2), which stated as follows:

> "As a result of your malicious and unfounded accusations against fellow employees, your employment with the New Jersey Turnpike Authority is hereby terminated as of Friday, July 18, 1975. 9/
>
> Your statements to the New Jersey State Police concerning fellow employees have been thoroughly reviewed and found to be baseless. As a result of your actions there has been disruption to the Department and unnecessary anguish to your co-workers.
>
> You are further advised that a Hearing has been set for Thursday, July 31, 1975 at 10:00 a.m. at the Administration Building, Conference Room #2, New Brunswick, New Jersey, as to why your termination shall not be confirmed." 10/

8. Approximately one day after receiving the discharge letter (CP-2) Kaczmarek went to the Local 194 union office and discussed the contents of the letter with Francis A. Forst, the Business Manager. Mr. Battaglia, the President, was present. Kaczmarek asked Forst what the union intended to do about the matter and Forst said there would be a hearing. When Kaczmarek said he thought he was entitled to a hearing before termination, Forst "chuckled". Forst stated to Kaczmarek that he, Kaczmarek, had named a number of individuals and that they could get fired. Forst asked Kaczmarek if his statement (CP-1) was true and Kaczmarek replied that it was.

9/ Loeber testified that the procedure in Kaczmarek's case was contrary to past practice - the Turnpike Authority always suspended first before dismissal.

10/ The 1974-77 collective negotiations agreement (CP-14) provides in Article XVII, B. (pp. 30, 31) that in cases of "Administrative Discipline", which shall "consist of those major or flagrant violations of rules, regulations or procedures;" where, inter alia, a penalty of dismissal has been recommended, a notice of formal hearing of the charges shall be served upon the employee no less than ten days in advance. It is also provided that "the employee involved shall be entitled to request in his defense such witnesses as he may wish to have present; the right of cross-examination of all witnesses and the right to have made available to him such records, files, and documents as he may consider necessary to his defense." Further, the hearing officer is charged with conducting the hearing and advising the employee of his findings. Any employee who is found guilty of a major or flagrant violation of rules, regulations or procedures shall have the right to appeal in writing to the Executive Director within five days after the decision of the hearing officer. In the event that the decision of the Executive Director is unsatisfactory, the union may submit the matter to binding arbitration.

9. At the suggestion of Loeber, Kaczmarek retained an attorney, Matthew Grayson. Kaczmarek met with Grayson on July 25 or July 26, 1975 where he discussed with Grayson the defense and who would be called as witnesses. Based on information from Kaczmarek, Grayson prepared a subpoena (CP-4) for the hearing on July 31, 1975, which included the names of Loeber and Kelly plus five other individuals, three of whom were named by Kaczmarek in his statement to Kelly on April 30, 1975 (CP-1). Kaczmarek either personally served or arranged for service of the subpoenaed individuals and Grayson spoke to each of them prior to the hearing, except for Kelly, and Grayson said that each appeared willing to testify. 11/ Grayson also said that Petrowski (who is listed on CP-4, but not mentioned in CP-1) admitted that Kaczmarek told the truth and that he, Petrowski, had been there. Grayson said that Farinella admitted that he had been driving the truck and that Donatelli admitted that Kaczmarek told the truth.

10. Grayson testified that he told Forst of the results of his conversations with the subpoenaed witnesses shortly before the hearing on July 31, 1975, and that Forst replied that the subpoena was not necessary and should not have been issued. Also, two or three days prior to the hearing Kaczmarek had told Forst of the issuance of the subpoena and he asked Forst to get the prospective witnesses to the hearing. Forst replied, "if they show up, they show up." Both Grayson and Kaczmarek admitted that they did not know what help to Kaczmarek the subpoenaed witnesses would be except for Loeber. Kaczmarek admitted that he had not talked to any of the witnesses regarding their testimony prior to the hearing.

11. On July 31, 1975 the hearing officer was Oliver K. Compton, Jr., who asked at the outset who was going to conduct the hearing and why Grayson was present. Forst said that he would handle the case for Kaczmarek and Kaczmarek agreed. Forst had also said that if Grayson was going to represent Kaczmarek then the union (Local 194) would leave. Grayson indicated he was willing to cooperate with Forst and said that he was content to let Forst conduct the hearing.

12. At the hearing Grayson said that he gave Forst questions to ask but Forst ignored the questions. 12/ Grayson said that he asked Forst about calling as

11/ Grayson also testified that he never took statements from the subpoenaed indiviuals and that some of them expressed reluctance because their jobs were on the line.

12/ Forst did take one suggestion from Grayson, that being a motion to dismiss at the conclusion of the Turnpike Authority's case (CP-5, p. 146).

witnesses Loeber, who was present, and the others who were subpoenaed, and that Forst said that subpoena was improper and that he did not intend to call them. 13/ At the conclusion of the Turnpike Authority's case, Kaczmarek also asked Forst to call Loeber and Forst refused stating that Loeber is management and that would be management against management. Grayson did not request an adjournment of the hearing when the subpoenaed individuals did not appearl. 14/ Kaczmarek alone testified on his behalf.

13. The report of Hearing Officer Compton is dated August 21, 1975 (CP-6) wherein he sustained the discharge of Kaczmarek by the Turnpike Authority. Under date of August 28, 1975 Compton notified Kaczmarek by letter of his decision (CP-7) but did not enclose a copy of his report. Kaczmarek did not appeal to the Executive Director of the Turnpike Authority. 15/

14. The day after Kaczmarek received Compton's letter of August 28 he went to Local 194 and requested of Forst that the union take the case to arbitration. In response Forst stated at one point, "appeal what, it's final and binding," but subsequently Forst said that he would bring the matter before the Executive Board at its next meeting.

15. Under date of September 2, 1975 Grayson wrote to Forst, also requesting arbitration on behalf of Kaczmarek, and stated at one point that he felt that Forst had "won the case" (CP-9).

16. The Executive Board met on September 8, 1975 and, at the "suggestion" of Forst, voted not to take Kaczmarek's case to arbitration (CP-10).

17. The decision of the Executive Board was communicated to Kaczmarek by Forst in a letter dated September 10, 1975 (CP-11), which stated:

> "I regret having to advise you that the Executive Board, by unanimous vote, has rejected your request for arbitration. Both your letter and that of your attorney were presented to the board at its regular monthly meeting, Monday, September 8th.

13/ In response to a question about what Loeber would have testified to as a witness, Grayson acknowledged that Loeber only knew the individuals involved by name and the truck number.

14/ Grayson testified that one or more of the subpoenaed individuals had advised him that they had been told not to appear by the Turnpike Authority but he never contacted them after the hearing as to why they did not appear.

15/ See footnote 10, supra. It is noted that the Executive Director affixed his signature indicating "approved" as to the recommendation of Compton that Kaczmarek's discharge be sustained (CP-6, p. 10).

> "After a review of the case and a general discussion, it was the determination of the board that the case did not merit arbitration.
>
> "While I, as Business Manager, cannot explain each individual's reason for voting, it appeared to me that, in essence, the board agreed that your accusations against fellow employees, having been unfounded, were disruptive of the work force. In addition, your attorney's letter suggested that your defense pursue improper acts alledged against the investigation which, if proven, would reopen the question of your fellow-workers' guilt.
>
> "It is our belief that Local 194 diligently and vigorously represented your point of view before an appropriate Hearing Officer of the Authority and the Executive Board is satisfied that the matter was properly aired and the decision justified.
>
> "It would seem that we could not upset the two basic facts in the case: (1) Your charges against your fellow workers came long after the incident, and (2) They were unfounded. Since no good reason could come forth for your presenting this story, the Authority determined it was malicious."

18. Kaczmarek did not appeal the decision of the Executive Board to the Local 194 union membership, stating that he did not know that he could do so and that he never had a copy of the Local 194 by-laws.

THE ISSUE

Has the Charging Party presented against the Turnpike Authority and Local 194 a prima facie case of violations of the Act as alleged?

DISCUSSION AND ANALYSIS

The Applicable Standard On A Motion To Dismiss

The Commission in Township of North Bergen [16/] stated that a respondent's motion to dismiss made at the conclusion of the charging party's case "...is the equivalent of a motion for involuntary dismissal at the close of the plaintiff's case in a civil action pursuant to New Jersey Court Rule 4:37-2(b)." (4 NJPER at 16). Citing Pressler, Current N.J. Court Rules Annotated, on R. 4:37-2(b), the

16/ See footnote 7, supra.

Commission concluded that the standard on a motion to dismiss in an unfair practice case is that the motion must be denied if there is any evidence, including any favorable inference to be drawn therefrom, which could sustain a judgment in the charging party's favor. See, also, Pressler's comment on R. 4:40-1, Motion for Judgment at Trial, to the same effect. Finally, the Commission cited the New Jersey Supreme Court's decision in Dolson v. Anastasia, 55 N.J. 2 (1969) where the Court, after stating the above enumerated standard, went on to say:

> "The point is that the judicial function here is quite a mechanical one. The trial Court is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion." (55 N.J. at 5, 6).

Having set forth the applicable standard on a motion to dismiss, the Hearing Examiner now turns to a consideration of the evidence presented by the Charging Party herein as against each Respondent's alleged violations of the Act.

The Turnpike Authority's Motion
To Dismiss is Granted

The allegation in the charge, as amended, is that the Turnpike Authority violated Subsections (a)(1) and (7) of the Act. [17] No evidence whatever was offered by the Charging Party with respect to an alleged Subsection (a)(7) violation and this warrants a perfunctory recommendation of dismissal by the Hearing Examiner.

The Turnpike Authority in its Main Brief (pp. 1-7) makes much of Kaczmarek's failure to have appealed the decision of Hearing Officer Compton to the Executive Director of the Turnpike Authority within five days under the provisions of Article XVII, B. of the collective negotiations agreement (footnote 10, supra). The Turnpike Authority urges that this failure of Kaczmarek to exhaust his contractual remedies is fatal and that Kaczmarek's charge against the Turnpike Authority should therefore be dismissed.

It is true that Kaczmarek did not appeal the adverse decision of Compton to the Executive Director of the Turnpike Authority (Finding of Fact No. 13, supra). But, as the Hearing Examiner noted in footnote 15 thereto the Executive Director affixed his signature to the report of Compton indicating "approved" as to the recommendation that Kaczmarek's discharge be sustained.

Under the principles restated by the New Jersey Supreme Court in Galloway Township Board of Education it is appropriate to look to the "experience and adjudications" under the Federal Act as a guide in "the interpretation of the provisions

17/ See footnote 1, supra.

of the New Jersey statutory scheme." 18/ Basic under federal law is that the National Labor Relations Board is without jurisdiction to construe collective bargaining agreements except where the entire case turns "upon the proper interpretation of the particular contract..." 19/ The Hearing Examiner is of the opinion that the question of the failure of Kaczmarek to have complied with the procedural steps of the grievance procedure does not invest in him or the Commission jurisdiction to construe the collective negotiations agreement in that respect under the limited exception of Mastro Plastics and C & C Plywood, supra. 20/ Therefore, the "exhaustion" argument of the Turnpike Authority is rejected. 21/

Turning now to the alleged Subsection (a)(1) violation by the Turnpike Authority, the Hearing Examiner finds and concludes that even under the standards enunciated above on a motion to dismiss there is insufficient evidence of a violation of this Subsection by the Turnpike Authority as a matter of alw.

The Charging Party's theory of the Turnpike Authority's alleged (a)(1) violation is apparently that the Turnpike Authority participated in Local 194's alleged failure to represent Kaczmarek by having obstructed the production of crucial witnesses who were under subpoena by Kaczmarek to testify in his behalf (Charging Party's Brief in Opposition, pp. 2, 3). The only evidence adduced by the Charging Party on this point is the testimony of Grayson that one or more of the subpoenaed individuals advised him that they had been told not to appear by the Turnpike Authority (footnote 14, supra). The individuals who may have made such statements were not identified, nor were they subpoenaed to testify at the

18/ Galloway Township Board of Education v. Galloway Township Association of Educational Secretaries, 78 N.J. 1, 9 (1978).

19/ Mastro Plastics Corp. v. NLRB 350 U.S. 270, 279, 37 LRRM 2587, 2591 (1956) and NLRB v. C & C Plywood Corp. 385 U.S. 421, 64 LRRM 2065, 2067, 2068 (1967).

20/ It is noted that questions of compliance with the steps of the grievance procedure are matters for the arbitrator: John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 55 LRRM 2769, 2775 (1964).

21/ Even if the Hearing Examiner was of a contrary view, the Hearing Examiner would conclude that Kaczmarek's failure to exhaust his contractual remedies by having appealed to the Executive Director was excused and would have been futile in view of the Executive Director having "approved" the recommendation of Hearing Officer Compton before issuance of the latter's report (see Finding of Fact No. 13 and footnote 15, supra).

unfair practice hearing, and further, no persons in the administration of the Turnpike Authority were identified as having told subpoenaed employees not to appear at the administrative hearing on July 31, 1975. Thus, although the Charging Party had it within his power to subpoena to the unfair practice hearing the individual employees named in Grayson's subpoena (CP-4), the Charging Party elected not to do so and he therefore has on the instant record only the general testimony of Grayson, supra.

Further, it should be noted that the NLRB, in unfair representation cases involving both the employer and the union, has been most sparing in finding violations by the employer of Section 8(a)(1) of the National Labor Relations Act. 22/

Other than the alleged obstruction by the Turnpike Authority of Kaczmarek's obtaining witnesses for his administrative hearing on July 31, 1975, no other evidence or theory of a Subsection (a)(1) violation has been adduced or urged by the Charging Party. Nor, can the Hearing Examiner conceive of any alternative theory. 23/

For the foregoing reasons, the Hearing Examiner grants the Turnpike Authority's motion to dismiss.

Local 194's Motion To
Dismiss is Denied in Part

The allegation in the charge, as amended, is that Local 194 violated Subsections (b)(1) and (5) of the Act. 24/ No evidence whatever was offered by the Charging Party with respect to an alleged Subsection (b)(5) violation and this warrants a dismissal by the Hearing Examiner.

Under the above standard on a motion to dismiss, the Hearing Examiner finds and concludes that the Charging Party has made out a prima facia case of alleged violation by Local 194 of its duty of fair representation under Subsec-

---

22/ Compare Port Drum Co. and Oil, Chemical & Atomic Workers International Union, 170 NLRB No. 51, 67 LRRM 1506 (1968) and Groves-Granite, etc. and Carpenters, Local 2205, 229 NLRB No. 15, 96 LRRM 1146 (1977) with Western Exterminator Co. and Industrial Carpenters Union, Local 2565, 223 NLRB No. 181, 92 LRRM 1161 (1976).

23/ Plainly, Kaczmarek's activity prior to his discharge of accusing co-workers of criminal wrongdoing was not a protected activity under Subsection (a)(1) of the Act. See Arnett v. Kennedy, 416 U.S. 134 (1974); Pietrunti v. Board of Education of Brick Township, 128 N.J. Super 149, 166, 168, certif. den., 65 N.J. 579, cert. den., 419 U.S. 1057 (1974); and see, also, Pickering v. Board of Education, 391 U.S. 563, 569, 570 (1968).

24/ See footnote 1, supra.

section (b)(1) of the Act. In so finding and concluding, the Hearing Examiner relies on Findings of Fact Nos. 10, 12, 14, 16 and 17, supra. There is at least an inference to be drawn from these Findings of Fact, in the aggregate, that Local 194 failed to call the witnesses subpoenaed by Kaczmarek to the administrative hearing on July 31, 1975, and thereafter refused to take Kaczmarek's case to arbitration, for reasons which were "irrelevant, invidious or unfair", 25/ or that Local 194 acted in a manner which was "arbitrary, discriminatory, or in bad faith". 26/

For of the foregoing reasons the motion of Local 194 to dismiss as to the alleged Subsection (b)(1) violation is denied.

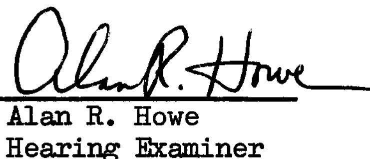
ORDER

It is hereby ORDERED that:

1. The Turnpike Authority's motion to dismiss the Complaint is granted as to alleged violations by it of Subsections 5.4(a)(1) and (7) of the Act.

2. Local 194's motion to dismiss the Complaint as to alleged violation of Subsection 5.4(b)(1) of the Act is denied.

3. Local 194's motion to dismiss the Complaint as to alleged violation of Subsection 5.4(b)(5) of the Act is granted.



DATED: February 15, 1979
Trenton, New Jersey

Alan R. Howe
Hearing Examiner

25/ Miranda Fuel Co., 140 NLRB 181, 51 LRRM 1584, 1587 (1962). There is ample NLRB precedent, subsequent to Miranda, holding that a union violates Section 8(b)(1)(A) of the National Labor Relations Act when it breaches its duty of fair representation. See, for example: Port Drum Co. and Oil, Chemical & Atomic International Workers Union, supra; Local 485, I.U.E. (Automotive Plating Corp.), 170 NLRB No. 121, 67 LRRM 1609 (1968); I.B.E.W., Local 2088 (Federal Electric Corp.), 218 NLRB No. 48, 89 LRRM 1590 (1975); United Steelworkers of America (Inter-Royal Corp.), 223 NLRB No. 177, 92 LRRM 1108 (1976); Western Exterminator Co. and Industrial Carpenters Union, Local 2565, supra; Laborers, Local 324 (Centex Homes of Calif.), 234 NLRB No. 60, 97 LRRM 1265 (1978); and Brown Transport Corp., 239 NLRB No. 91, 100 LRRM 1016 (1978).

26/ Vaca v. Sipes, 386 U.S. 171, 190, 64 LRRM 2469, 2376 (1967). See also, Ford Motor Company v. Huffman, 345 U.S. 330, 338, 31 LRRM 2548 (1953); Humphrey v. Moore, 375 U.S. 335, 350, 55 LRRM 2031 (1963) and, most recently, Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 91 LRRM 2481, 2484, 2485 (1976).