P.E.R.C. NO. 85-121

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNION COUNTY COLLEGE CHAPTER,
AMERICAN ASSOCIATION OF
UNIVERSITY PROFESSORS,

Respondent,

-and- Docket No. CI-84-44-57

DR. GERALD DONAHUE,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge that Dr. Gerald Donahue filed against Union County College Chapter, American Association of University Professors. The charge alleged that the Association breached its duty of fair representation to Donahue when it filed and sought to arbitrate a grievance contesting the appointment of Donahue to the Faculty of Union County College and seeking his removal from the faculty. The Commission holds, in agreement with the Hearing Examiner, that the Association did not violate the Act. The grievance was pursued in good faith and without discriminatory motive in view of the Association's belief that a matter of contractual principle was involved. The Commission further, in the absence of exceptions and in agreement with the Hearing Examiner, restrains arbitration of the grievance since it involved the managerial prerogative of appointments/transfers.

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DR. GERALD DONAHUE,

Charging Party.

Appearances:
For the Respondent, Cohen, Weiss & Simon, Esqs. (April Harris, of Counsel)

For the Charging Party, Sterns, Herbert & Weinroth, Esqs. (Michael J. Herbert, of Counsel and Linda K. Stern, On the Brief))

DECISION AND ORDER

On December 1, 1983, Dr. Gerald Donahue, an instructor of psychology at Union County College, filed an unfair practice charge against his majority representative, the Union County Chapter, American Association of University Professors ("AAUP"), with the Public Employment Relations Commission. The charge alleged that AAUP breached its duty of fair representation and thus violated subsection 5.4(b)(1)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), when it filed and

1/ This subsection prohibits public 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."

sought to arbitrate a grievance contesting the appointment of Donahue to the faculty of Union County College and seeking his removal from the faculty.[2/]

On December 7, 1983, a Complaint and Notice of Hearing was issued. On December 19, 1983, AAUP submitted its Answer. It denied that its pursuit of its grievance violated its duty of fair representation.

On February 9 and 10, 1984, Chief Hearing Examiner Edmund G. Gerber conducted hearings. The parties argued orally, examined witnesses and introduced exhibits. Both parties submitted briefs by April 25, 1984.

On March 1, 1985, the Chief Hearing Examiner issued his report and recommended decision. H.E. No. 85-28, 11 NJPER ___ (Para_____ 1985). He concluded that AAUP did not violate its duty of fair representation, but that nevertheless the arbitration should be restrained since the grievance involved a clearly non-negotiable subject.

On March 25, 1985, Donahue filed exceptions. He asserts that the Hearing Examiner erred in failing to consider the following: (1) the testimony of the president of the Union County Employees Association ("UCEA"), allegedly demonstrating an

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2/ On December 5, 1983, Donahue filed an application for interim relief requesting a restraint of the pending arbitration. Commission designee Edmund G. Gerber granted this restraint pending the Commission's final determination.

impermissible motive for prosecuting the grievance; (2) AAUP's decision not to grieve Dr. John Carmichael's appointment to the Union County College faculty; (3) AAUP's failure to notify Donahue of the grievance and arbitration; (4) AAUP's newsletter issued during its election campaign; (5) AAUP's history of never before pressing a grievance against a faculty member; and (6) AAUP's alleged knowledge of the illegality of the proposed arbitration. He further contends that the Chief Hearing Examiner erred in finding that AAUP's contract applied to Dr. Donahue prior to the AAUP's certification, and determining that there was no violation of the duty of fair representation since the grievance related to contractual integrity.

AAUP elected not to file cross-exceptions and thus does not challenge the recommended restraint of arbitration. It has, however, filed a point-by-point response to the exceptions.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 2-7) are accurate, but incomplete. We adopt his findings and specifically accept his credibility determinations, including his determination (p.8) to credit the testimony of AAUP's president concerning AAUP's concerns in pursuing its grievance.[3/] We add the following facts.

3/ Donahue contends that the year interval between hearing and decision warrants less reliance on the credibility determinations. We regret the delay, but do not agree with this contention in the context of a relatively straightforward case with few witnesses.

AAUP became the majority representative of College employees in November 1983. When it filed the grievance, Donahue was not a member of the negotiations unit it represented.

AAUP did not notify Donahue of the grievance or its decision to submit that grievance to arbitration. It assumed the College would notify Donahue and protect his interests. The College notified Donahue of the grievance in May 1983 and Donahue knew of the arbitration. AAUP's president willingly discussed the grievance with Donahue on three occasions.

Douglas Greenwood, UCEA's president, testified that Donahue asked him to intervene on his behalf concerning the grievance. He agreed to speak with AAUP's president, John Wheeler. Wheeler told him that AAUP had filed the grievance because a matter of contract language and principle was involved. Wheeler also noted that some faculty members in the psychology department were losing overload compensation because of Donahue's appointment. Wheeler suggested the grievance could be resolved if Donahue accepted reclassification as a counsellor. Greenwood also asked Wheeler whether AAUP was protesting the appointment of another employee, Dr. John Carmichael, to the College's faculty. Wheeler said AAUP was not; he further said that the Carmichael example weakened the Donahue grievance and that he would have preferred filing a grievance on both appointments.

AAUP did not file a grievance protesting Carmichael's appointment because, unlike Donahue, he was a "shared administrator" and thus had statutory protection pursuant to N.J.S.A.

18A:64-71(a). AAUP therefore asked that Carmichael be made a temporary faculty member, pending attempts to work out the procedures for a permanent appointment. Neither Carmichael nor Donahue was an AAUP member. More overloads were available in the business department than the psychology department.

The Donahue grievance was the first time AAUP had presented a grievance which could have adversely affected a unit member, while helping others, to arbitration. There is no evidence, however, of a similar dispute in which a grievance might have been filed and was not.

AAUP circulated a newsletter in the summer of 1983. The newsletter reported on nine subjects, including an upcoming representation election and the Donahue grievance. The newsletter stated AAUP's belief that the hiring was not in accordance with the legislation creating the College or with the governing contract. The newsletter added that AAUP was not seeking Donahue's dismissal or contending that the College could not hire him at all in some other capacity.

Donahue asks us to find that AAUP and its officials knew the grievance concerned an illegal and non-arbitrable subject. There is no record evidence of such actual knowledge and AAUP's attorney had in fact advised AAUP that the grievance was arbitrable.

Based on our independent review of the record, we hold that AAUP did not violate its duty of fair representation when it pursued its grievance challenging Donahue's appointment. We also hold, however, that the grievance should not proceed to arbitration.

Under section 5 3 of the Act, a majority representative is responsible for representing the interests of all unit members without discrimination and without regard to employee organization membership. Subsection 5.4(b)(1) makes it illegal for a majority representative to violate that obligation. A majority representative does so when it acts arbitrarily, discriminatorily or in bad faith. Vacca v. Sipes, 366 U.S. 171 (1967). See, Belen v. Woodbridge Twp. Bd. of Ed., 142 N.J. Super. 486 (App. Div. 1976); Lawrence Twp. P.B.A., P.E.R.C. No. 84-76, 10 NJPER 41 (Para15023 1983); Local #3, AFL-CIO, Cooks, Bartenders & Cafeteria Workers, P.E.R.C. No. 82-198, 9 NJPER 146 (Para14069 1983); In re Union City and F.M.B.A. Local No. 12, P.E.R.C. No. 82-65, 8 NJPER 98 (Para13040 1982). Within this standard, the majority representative is entitled to a wide range of reasonableness. Lawrence Twp. PBA, supra, Humphrey v. Moore, 375 U.S. 335 (1964).

In the instant case, the Hearing Examiner found that AAUP pursued its grievance in good faith and without discriminatory motive because it believed a matter of contractual principle was involved. We accept that finding and the credibility determinations underlying it. Greenwood's testimony, the newsletter and the Carmichael situation do not undermine this determination: Greenwood testified that Wheeler told him the grievance concerned a matter of contractual principle; the newsletter also presented the grievance as a matter of contractual rights rather than vindictiveness, and AAUP had a legitimate basis for treating Carmichael differently from

Donahue based on his status as a "shared administrator" within the meaning of N.J.S.A. 18A:64-71(a)."[4/] Nor does the failure to notify Donahue personally of the grievance suggest bad faith under the circumstances of this case where AAUP reasonably believed the College would inform Donahue, the College did inform him, and AAUP's president willingly discussed the grievance with Donahue several times.[5/]

We also cannot say that AAUP's pursuit of its grievance was so arbitrary as to breach any duty of fair representation it may have owed Donahue after its certification. AAUP asserted that Donahue's appointment violated the procedural hiring requirements of

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4/ The decision not to file a grievance in the Carmichael case in part cuts against a finding of discriminatory motivation: Carmichael, like Donahue, was not an AAUP member and if membership in that organization had been a motivating factor, presumably AAUP would have filed a grievance in his case as well as Donahue's case.

5/ A different question is whether a majority representative violates its duty of fair representation when it fails to notify a unit member of a grievance which may adversely affect his or her employment interests. Saginario v. Attorney General, 87 N.J. 480 (1981) holds that where a public employee has a substantial interest in a contractual grievance, then that employee is entitled to be heard within the negotiated dispute mechanism either through his majority representative or, if his position is in conflict with the majority representative, then through his personal representative or pro se. Id at 496-497. Saginario also suggests that such an employee should not have to rely on the public employer to present his position since his and the employer's interests may diverge. Id at 493-494. Given that AAUP was not certified as a majority representative of College employees until November 1983 and that Donnelly had by then discussed the grievance with AAUP officials, we do not consider Saginario's application to this case.

its contract and that the appointment failed to comply with the legislation merging the two predecessor entities into Union County College. AAUP believed the successor clause rendered its contract applicable to all Union County College faculty and, alternatively, that the contract applied to faculty at the Cranford campus.[6/] We are not persuaded that AAUP either did not advance this position in good faith or could not have advanced it in good faith. It is true that its position, if sustained, could have preserved work for other unit members at Donahue's expense, but that possible side effect does not make the claim arbitrary or discriminatory.[7/]

Finally, we consider the Hearing Examiner's recommendation that we restrain arbitration of AAUP's grievance. In the absence of an exception and under the particular and perhaps unique circumstances of this case, we accept that recommendation. That determination affords Donahue practically the same relief he might have received had he prevailed on his subsection 5.4(b)(1) claim. While, however, we find that the underlying grievance predominantly involves an appointment/transfer decision rather than hiring procedures, we do not believe that distinction is so obvious as to establish that AAUP acted arbitrarily or discriminatorily in pursuing its grievance.

6/ N.J.S.A. 18A:64A-50 provides that existing collective negotiations agreements survive the transition of Union College to Union County College.

7/ We are not approving the merits of the grievance or AAUP's decision to pursue it. We hold merely that the grievance did not violate the duty of fair representation.

ORDER

The Complaint is dismissed. Arbitration of AAUP's grievance is permanently restrained.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

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

DATED: Trenton, New Jersey
May 15, 1985
ISSUED: May 16, 1985

H.E. NO. 85-28

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

In the Matter of

UNION COUNTY COLLEGE CHAPTER,
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UNIVERSITY PROFESSORS,

Respondent,

-and-

DOCKET NO. CI-84-44-57

DR. GERALD DONAHUE,

Charging Party.

SYNOPSIS

A hearing examiner recommends that the Public Employment Relations Commission finds that the Union County College Chapter of the AAUP did not commit an unfair practice when it sought to arbitrate the alleged improper hiring of the Charging Party, Dr. Gerald Donahue.

Although the arbitration was adverse to the interest of Donahue, the Association could properly seek to enforce the terms of its contract with Union County College in arbitration.

It was recommended, however, that a current, outstanding temporary restraint which bars this same arbitration be made permanent. The scheduled arbitration concerns the hiring or transfer of Donahue and both hiring and transfers are inherent managerial prerogatives and are not appropriate subjects of arbitration.

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Appearances:

For the Respondent
Cohen, Weiss & Simon
(April Harris, Of Counsel)

For the Charging Party
Sterns, Herbert & Weinroth
(Michael J. Herbert, Of Counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On December 1, 1983, Dr. Gerald Donahue, an individual, filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") alleging that the Union County College Chapter of the A.A.U.P. ("AAUP") committed an unfair practice within the meaning of subsection 5.4(b)(1) [1/] of the New Jersey Employer-Employee Relations Act N.J.S.A. 34:13A-1 et seq. ("Act"), when it filed a grievance and sought arbitration contesting the appointment of Donahue to the faculty of Union County College and thereby sought his removal from the faculty as a remedy to the grievance at the arbitration proceeding. It appearing that the allegations of the charge, if true, might constitute an unfair practice within the meaning of the Act, a

1/ This subsection prohibits public 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."

Complaint and Notice of Hearing was issued on December 7, 1983.

On December 5, 1983, the Charging Party, Donahue, also filed an application for interim relief requesting that the pending arbitration concerning Donahue, be restrained. Interim Relief was granted and the arbitration proceeding was ultimately restrained pending the Commission's final determination in this matter.

On December 19, 1983, the Respondent, AAUP, submitted an answer in which it asserts that the Charging Party both failed to state a cause of action and further, lacks standing to bring this action since the Charging Party is attacking an arbitration between an employer and the designated majority representative.

Hearings in this matter were held on February 9 and 10, 1984, at which time both parties were given opportunities to introduce evidence, examine and cross-examine witnesses and argue orally. Both parties submitted briefs in this matter which were submitted by April 25, 1984.

The Charging Party, Gerald Donahue, was an Instructor-Evaluator at the Union County Technical Institute ("UCTI") in Scotch Plains where his duties included teaching classified [2/] children. He assessed their skill levels and then attempted to improve their social and technical skills with training and teaching for possible placement in vocational programs. Donahue taught both secondary and post-secondary courses at UCTI and served as a psychologist within the institution as well. Donahue taught college level courses in such subjects as psychology, sociology and English. Donahue testified he

2/ That is, children who were classified by child study teams as having certain impairments.

was always considered part of the faculty and was part of the negotiations unit.

In the summer of 1982, UCTI announced that it was going to merge with Union College, a private institution, and the new institution would be a public County College, called Union County College. This action was being taken pursuant to Chapter 242 of the Laws of 1982 (N.J.S.A. 18A:64A-50 et seq.). All faculty at UCTI, including Donahue, were given a form which asked the faculty member to elect whether or not he wanted to teach at the new College. The faculty was also advised that tenure, seniority and salary would be protected regardless of selection. Donahue elected to teach at Union County College. In August of 1982, the Union County College Board of Trustees passed a resolution appointing certain UCTI faculty, including Donahue to its faculty.

In September 1982, classes began at the new institution. Donahue was assigned to the Humanities Department. This department administered courses in the subjects that Donahue had taught at UCTI: English, psychology and sociology. Donahue was assigned three psychology courses. In addition, he was assigned to work with basic skills testing. In the second semester of the 1982-1983 school year, Donahue was given a full teaching load of 15 credits. His classes were divided between the old UCTI campus in Scotch Plains and the main Union County College campus in Cranford.

During this time there was a representation campaign underway for the faculty at the new institution. The faculty of the old Union College was represented by the American Association of University Professors ("AAUP") while the faculty at the old Technical Institute

was represented by the New Jersey Education Association ("NJEA"). Donahue testified that from the time he first went to work for UCTI to the time of the hearing he was an NJEA member and has never belonged to the AAUP.

On May 16, 1983, Donahue received a letter from the Vice President for Academic Affairs, Dr. Kreisman, stating that the AAUP had filed a grievance against him.

Donahue consulted with the Chapter President of the AAUP, Professor Wheeler. Donahue testified that Wheeler told him his (Donahue's) assignment to the College was adversly affecting the overload of faculty in the department. Faculty members were losing opportunities for overload courses. (these are assigned courses which exceed the normal faculty teaching load for which faculty receive additional compensation). Further, according to Donahue, Wheeler suggested that Donahue take no action until after the election, at which time the grievance might be dropped. However, at that point in time Wheeler did not want to drop the matter and risk offending the faculty. Wheeler suggested that he and Donahue talk after the election. In October, the AAUP won the election. Donahue testified that shortly thereafter he went to Wheeler and asked if he (Wheeler) could help (Donahue) now. Wheeler responded, no, the Association was going through with the processing of the grievance. Thereupon, the Charging Party brought the instant case.

Donahue's current schedule requires him to work early classes on the Cranford campus, either 8:00 or 9:20 a.m., and teach evening classes on the Scotch Plains campus. Donahue claims he is the only person in the department who has such a schedule.

John Wheeler testified on behalf of the AAUP. He has been Chapter President since April 1982. It had come to Wheeler's attention that Donahue was going to join the faculty of Union College. When he investigated Donahue, Wheeler discovered that Donahue was not listed as a member of the faculty of the Technical Institute at UCTI ,the college level arm of the UCTI, but apparently was a member of the vocational faculty, i.e., the high school faculty of UCTI. According to Wheeler, the legislation which created the Union County College provided that faculty members of UCTI who had taught in the post-secondary branch were to be transferred to the new institution. However, faculty members of the vocational high school were not given the right to transfer. (The legislation also provided that administrators at the institute were given the option of whether or not to transfer.) Based upon Wheeler's investigation, he did not believe that Donahue fell into either of the categories that the legislation would allow to transfer to the new Union County College.

N.J.S.A. 18A:64A-50 provides that existing collective negotiation contracts would survive the transition of Union College to Union County College. Union College and the AAUP had an agreement that ran from September 1, 1980 through August 31, 1982. The contract contains a procedure for hiring of new faculty. Since Donahue did not fall into the category of those employees with the right to transfer, Wheeler's contention was that Donahue should have been treated as a new hire under the contract and the College should have followed those practices outlined in the contract.

The successor contract, negotiated during the summer of 1982, did not include Donahue's name on the list of faculty. However,

in the final version of the contract between the NJEA and the College, Donahue's name was added. The NJEA objected to this and in fact, in consert with the Respondent AAUP, filed a Letter of Protest concerning Donahue's appointment to the faculty. When the two Associations could not get satisfaction over this letter of protest, the formal grievance protesting Donahue's appointment was filed. The Letter of Protest was written in August of 1982. The grievance was denied by the College on April 11, 1983.

Wheeler testified that his objection to Dr. Donahue's appointment had nothing to do with Dr. Donahue's qualifications. Rather, he objected to the College's failure to follow the contract procedures for the hiring of new employees. These procedures include advertising, affirmative action, faculty search and faculty interviews. Wheeler testified that under the contract procedure, a faculty committee recommends three people for a position and the administration hires from among those three. Since Wheeler had been at the College, every person hired both at Union College, and since the merger, at Union County College has been hired in accordance with contract procedures.

Wheeler recommended that Donahue take a counsellor position; that action would have solved the AAUP's concerns since Donahue would then have been a non-teaching professional and not part of the faculty. Wheeler denies telling Donahue that he had to maintain the grievance to satisfy members of the Psychology Department to get their votes for the AAUP in the representation election. Wheeler does not deny that he may have mentioned the upcoming election in his conversation with Donahue. He also maintains that he told Donahue that the Psychology Department was very concerned with its integrity but that the key

issue as far as both the Psychology Department and he were concerned was that proper hiring procedures have not been followed. Wheeler also mentioned that with Donahue on the staff, now that one Professor Signorelli recently returned to the staff, there is more than a full complement of staff and there was a danger of lay-offs in the Department. Wheeler also admitted talking about overloads. This was one of the issues the AAUP was going to argue in the disputed arbitration. However, the AAUP's primary concern in this matter was its commitment to the idea of faculty participation in the hiring process.

Eileen Kaufman, the Chairperson of the Psychology-Sociology Department testified that Donahue is not the only psychology professor who teaches at two campuses. One faculty member teaches at both the Cranford and New Providence campuses. New Providence is considerably further distant than Scotch Plains. Another faculty member teaches in Cranford and Union.

* * *

It is clear that the AAUP has taken a position in the scheduled arbitration that is adverse to the interests of Donahue and further, the AAUP, as majority representative, has a duty to fairly represent all faculty at the College, including Donahue. However, the Commission and the courts recognize that in the course of representing the interests of employees as a whole, a majority representative may in good faith take a position which is adverse to the interests of an individual employee.

The Commission has adopted the test of the duty of fair representation enunciated in Vaca v. Sipes, 366 U.S. 171, 87 S. Ct. 903

(1967). See, Belen v. Woodbridge Twp. Bd. of Ed., 142 N.J. Super 486 (App. Div. 1976); Lawrence Twp. P.B.A. Local 199 v. Burns et al. P.E.R.C. No. 84-76, 10 NJPER 41 (¶ 15023 1983) and In re Union City and F.M.B.A. Local No. 12, P.E.R.C. No. 82-65, 8 NJPER 98 (¶ 13040 1982).

A union's decision on whether or not to take a matter to arbitration will be violative of its duty of fair representation only if that decision is arbitrary, discriminatory or made in bad faith.

Within this standard, a majority representative is entitled to a wide range of reasonableness. See Lawrence P.B.A., supra.

In the instant matter, I am satisfied that the AAUP's conduct does not violate its duty of fair representation.

The contract clearly requires that certain procedures be followed when a faculty member is hired and those procedures were not followed in Donahue's case. 3/

Wheeler, the President of the AAUP, was a most credible witness. He was forthright and candid in his testimony and I so credit his testimony that his primary concern in this matter was that the College was not following contractual procedure. The interpretation of a collective negotiations contract is an appropriate issue for an arbitration even though, as here, an employee would suffer if the Association prevailed. Such an arbitration fails within the "wide range of reasonableness and is not an unfair practice." See, Saginario v. Attorney General, State of New Jersey, 87 N.J. 480 (1981).

Although the AAUP did not violate its duty of fair representation, I do not believe that the arbitration should be permitted

3/ Whether or not Donahue was a new-hire was one of the issues to have been determined by the arbitrator.

to go forward.

The AAUP points out that N.J.S.A. 18A:64-50 et seq. provides, at § 64A-71, that existing contractual rights under the old contract between Union College and AAUP are to be protected.

Further, the contract between the old Union College and the AAUP gives faculty certain collegial rights in the selection of staff, as Wheeler testified.

The AAUP argues that the reference to the protection of contractual rights in the statute creates negotiating rights more expansive than those granted to other public employees.

However, the statute cannot be read so expansively. The pertinent language of § 64 states:

> The employees of the private institution and the full-time employees of the institute shall be employees of the county college and shall be subject to the provisions of P.L.1941, c. 100 (C. 34:13A-1 et seq.). Existing tenure rights, contractual agreements, and all rights or protections provided employees under any pension law or retirement system or any other law of this State shall be fully protected by the board of trustees of the college. (Emphasis supplied)

As can be seen, the legislature expressly provided that P.E.R.C. law is to govern in matters of employer-employer relations. The grievance brought by the AAUP centers around a dispute as to whether or not the appointment of Donahue constituted a transfer or a new hire. In either case, such activity constitutes an action which is an inherent managerial prerogative and, therefore, is not arbitrable. See, In re Brookdale Community College, P.E.R.C. No. 84-84, 10 NJPER 111 (¶ 15058 1984) which held that the criteria for hiring are non-negotiable managerial prerogatives. See also, Teaneck Bd. of Ed. v.

Teaneck Teachers Assn., 94 N.J. 9 (1983); North Bergen Twp. Bd. of Ed. v. North Bergen Fed. of Teachers, 141 N.J. Super 97 (App. Div. 1977). As to the non-negotiable right of an employer to effectuate transfers, see, In re Ridgefield Park Ed. Assn. v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978); In re South River Bd. of Ed. v. South River Ed. Assn., P.E.R.C. No. 83-135, 9 NJPER 274 (¶ 14126 1983) aff'd App. Div. No. A-4669-82T2 (2-29-84).

Since the underlying issues in dispute are not arbitrable, the Commission has a duty to restrain said arbitration. The AAUP disputes such action and argues that Donahue has no standing to bring such an issue before the Commission or otherwise attack the arbitration.

By permitting Donahue to so attack the arbitration, he is effectively bringing a Scope of Negotiations Petition. However, § 5.4(d) of the Act provides that "the Commission shall at all times have the power and duty, upon the request of any public employer or majority representive to make a determination as to whether a matter in dispute is within the scope of collective negotiation."

As can be seen, the statute makes specific reference only to the majority representative or public employer and not to an individual employee.

The AAUP also argues that the Commission's own rules provides that only a "public employer or exclusive representative may bring a scope petition." See, N.J.A.C. 19:13-2.1.

It is argued that the failure to name individual employees in either the Commission's Rules or the statute demonstrates the premise

that individuals have no standing to bring, or argue, scope issues before the Commission.

The intent of the Scope of Negotiations procedure is to aid the negotiation process. Individual employees are not part of that process and normally have no standing to challenge or intervene in the ongoing negotiations process between an employer and a majority representative, so long as those negotiations take place in good faith. See, N.J. Turnpike Authority and Jeffrey Beall, P.E.R.C. No. 81-84, 6 NJPER 560 (¶ 11284 1980) where the Commission held an individual employee could not challenge the interpretation of an agreement arrived at in good faith between the employer and majority representative.

In the private sector, an arbitration proceeding concerning the interpretation of a contract provision is strictly a matter between the employer and the union. Although an individual employee may attack the results of the grievance process, including arbitration, he or she has no standing to force his or her participation in those proceedings. See Vaca v. Sipes, supra and Hines v. Anchor Motor Freight Inc., 424 U.S. 554 96 S. Ct. 1048 (1976).

If this were so in the New Jersey Public Sector, it would follow that Donahue had no standing to attack an arbitration on the basis of a scope of negotiations determination.

However, in Saginario, supra, the New Jersey Supreme Court intentionally departed from the private sector model so as to allow an individual employee the right to directly participate at some stage in the grievance and/or arbitration process to make his or her personal interests known, where the individual's interests are adverse to the position being taken by the majority representative. Here, similar to

the plaintif in Saginario, Donahue had no chance to participate in the earlier stage of the grievance procedure. He, therefore, would have the right here to intervene in the arbitration hearing. It would be inconsistent to hold that he has a right to participate in the arbitration, but has no right to attack the underlying illegality of that very arbitration proceeding. Although the issue of arbitratibity is raised in an unconventional forum, it is the only one available to the Charging Party.

Further, the Commission rules at N.J.A.C. 19:10-3.1 provides that:

> "Whenever the Commission or a designated officer finds that unusual circumstances or good cause exist and that strict compliance with the terms of these rules will work on injustice or unfairness, the Commission or such officer shall constrain these rules liberally to prevent injustice and to effectuate the purpose of the act (N.J.S.A. 34:13A-1 et seq.)"

Given the impermissable subject matter of the arbitration, the Commission must construe § 5.4(d) of the Act, in accordance with Saginario, address the substantive issues here and permanently restrain the arbitration.

Accordingly, it is hereby recommended that the temporary restraint in this matter be made permanent. However, it is further recommended that the complaint in this matter be dismissed in its entirety.

Edmund G. Gerber

DATED: March 1, 1985
Trenton, New Jersey