P.E.R.C. NO. 86-146

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TRENTON EDUCATIONAL
SECRETARIES ASSOCIATION,

Respondent,

-and- Docket No. CI-84-86-105

RUBY SALTER,

Charging Party.

TRENTON BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-85-111-106

TRENTON EDUCATIONAL
SECRETARIES ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the Trenton Educational Secretaries Association violated the New Jersey Employer-Employee Relations Act when it failed to process Ruby Salter's grievance.

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SECRETARIES ASSOCIATION,

Charging Party.

Appearances:

For the Trenton Board of Education,
Lemuel H. Blackburn, Esq.

For the Trenton Educational Secretaries Association,
Katzenback, Gildea & Rudner, Esqs.
(Arnold M. Mellk, of Counsel)

For Ruby Salter, McLemore & McElroy, Esqs.
(Paul McLemore, of Counsel)

DECISION AND ORDER

On June 5 and 14, 1984, Ruby Salter filed an unfair practice and amended charge against the Trenton Educational Secretaries Association ("Association"). The charge, as amended,

alleged that the Association violated subsections 5.4(b)(1) and (5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it failed to process Salter's grievance against the Trenton Board of Education ("Board").

On October 23, 1984, the Association filed a charge against the Board. The charge alleged that the Board violated subsections 5.4(a)(1) and (3)[2/] when an assistant superintendent allegedly encouraged Salter to file a racial discrimination complaint against the Association's president.

On March 27, 1985, Complaints and Notices of Hearings issued and the cases were consolidated. The Association then filed an Answer denying that it breached its duty to represent Salter fairly and the Board filed an Answer denying that it encouraged Salter to complain about the Association's president.

On June 11, 1985, Hearing Examiner Arnold H. Zudick conducted a hearing. After Salter presented her case against the Association, the Association moved to dismiss. The Hearing Examiner

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1/ These subsections prohibit employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; and (5) Violating any of the rules and regulations established by the commission."

2/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; and (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

reserved decision and the Association waived its right to cross-examine Salter or call its own witnesses on her charge. The Association then called three witnesses on its charge against the Board and the Board called none. No post-hearing briefs were filed.

On November 8, 1985, the Hearing Examiner issued his report and recommended decision. H.E. No. 86-21, 12 NJPER 47 (¶17017 1985) (copy attached). With respect to Salter's charge, he concluded that the Association was constitutionally and statutorily required to present every grievance and its failure to present Salter's violated these obligations; he recommended a notice be posted. With respect to the Association's charge, he concluded there was insufficient evidence and recommended dismissal.

On November 19, 1985, Salter filed an exception. She asserts that her grievance (for additional compensation for out-of-title work) would have been successful and requests a monetary award.

On November 22, 1985, the Association filed exceptions to the Hearing Examiner's conclusions that it had a duty to present Salter's grievance and it violated that duty.

Salter and the Association filed responses to each other's exceptions.

No exceptions were filed concerning the recommended dismissal of the Association's charge.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 4-9) are accurate with one exception.[3/]. We adopt and incorporate them here.

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. (Emphasis supplied).

The statute thus expresses the duty of fair representation a majority representative in the New Jersey public sector owes all employees, members or non-members, in its negotiations unit. Compare Vaca v. Sipes, 386 U.S. 171 (1967) (majority representative in the private sector only breaches its duty of representation when it acts arbitrarily, discriminatorily or in bad faith). See also Fair Lawn Bd. of Ed., P.E.R.C. No. 84-138, 10 NJPER 351 (¶15163 1984); OPEIU, Local 153 (Thomas Johnstone), P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983).

The Hearing Examiner concluded that a majority representative in the New Jersey public sector has an absolute

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3/ The Hearing Examiner found that Salter filed the grievance on May 3. There is no evidence to support this finding. The record shows that Salter received a grievance from the Association's president on or before May 3 and the Board's assistant superintendent approved the grievance on May 4, but it appears that the president did not receive Salter's grievance until May 7.

constitutional and statutory obligation to present an employee's grievance, even if the employee is free to present the grievance and even if the majority representative declines to present it because it believes in good faith that the grievance lacks merit or contravenes its interests. He grounded this conclusion upon Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122 (1978) and Saginario v. Attorney General, 87 N.J. 480 (1981).

Red Bank and Saginario do contain strong language which, read literally, would obligate a majority representative to present every grievance upon demand, but their holdings are signally different from the present issue. Red Bank held that an employer may not insist that an employee pursue his grievance personally when the majority representative wished to present and process that grievance. Saginario held that a public employee who might be adversely affected by a grievance's outcome is entitled to be heard at some point within the grievance procedures either through his majority representative or, if his position conflicts with the majority representative, through his personal representative or pro se. These cases establish that a majority representative may not be excluded altogether from a grievance procedure and, in some cases, individual employees may not be excluded from some stages of a grievance procedure. They involve, in short, cases of compelled exclusion from a grievance procedure, not compelled inclusion. Neither case answers the question of whether a majority representative may be forced to present every grievance, no matter

how much and sincerely it opposes that grievance, no matter how lacking in merit it believes the grievance to be, and no matter how easily the employee may personally present the grievance. We believe that question is still open, although we doubt the answer is yes.4/

In any event, we need not definitively resolve that question here. Even if we assume such an obligation exists, we do not believe, under all the circumstances of this case, that Salter has shown by a preponderance of the evidence that the Association breached that obligation.

The parties' collective negotiations agreement provided that grievances "shall be waived" if not filed within 30 working days after the secretary knew or should have known of the basis for the grievance. On January 5, 1984, Salter was officially notified that, effective immediately, she would permanently perform the duties Angela Dinkins had performed as an Administrative III Secretary; after working 20 days, her contractual claim under Article 17 to extra compensation matured. Nevertheless, Salter did not ask the Association to represent her until May 3, 1985, a date

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4/ 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.

beyond the contractual time limits. In the meantime, the Board had abolished the position of Administrative III secretary and Salter had herself written Assistant Superintendent Page and formally requested extra pay; Page was in effect the first two steps of the grievance procedure since he was her immediate supervisor as well as the assistant superintendent. Under all these circumstances, we find Salter had already presented her grievance. She was really seeking to have the Association process the grievance to a higher level rather than merely present it.

Instead we treat this claim consistently with other claims of unfair representation. Applying the standards set forth in section 5.3 and Vaca v. Sipes, we are persuaded on this record that the Association breached its duty of fair representation.

The Association maintains that Salter's grievance was untimely and that it therefore did not violate the Act by failing to process it. See e.g. Brice v. McDonnell Douglas Corp., ___ F. Supp. ___, 111 LRRM 2031 (C.D. Ca. 1982) (no breach of duty where employee approached union beyond contractual time limits). There are circumstances, however, where an arbitrator will find that the employer waived a time limit violation by recognizing and negotiating a grievance without making a timely objection. Labor Relations Expediter ("LRX") 330 (BNA 1986); but see Duquesne School Dist. v. Duquesne Education Ass'n, 93 LRRM 2020 (Pa. Commw. Ct. 1976). In addition, arbitrators will treat an act complained of that is repeated from day to day as a "continuing violation" giving

rise to continuing grievances. LRX at 330; Manhatten Coffee Co. v. Teamsters Local 688, 571 F. Supp. 347, 117 LRRM 3129 (E.D. Mo. 1983).

In this case, Page both recognized and approved Salter's grievance. That fact raises the possibility of waiver. Also, Salter continued to perform the extra duties without additional compensation or an upgrading. That fact raises the possibility of a continuing violation. Together, these facts seriously weaken the Association's defense of untimeliness.

The Association maintains, also, that Salter's grievance was without merit. But Page, the Assistant Superintendent for Personnel/Support Services, found that Salter was entitled to the relief sought. While not dispositive, Page's concurrence is strong evidence that the grievance has merit. Telling a grievant that employer acquiescence means she has no grievance and must therefore proceed alone is illogical and the kind of arbitrary conduct the duty of fair representation is designed to curb. Thus, in light of these circumstances, we find that the Association breached its duty of fair representation by not processing Salter's claims.

As to remedy, we find that this case does not require a monetary award against the Association. When the National Labor Relations Board finds that a union violated its duty of fair representation in refusing to process a grievance, the NLRB will require the union to return to the employer to request it resolve the dispute through the grievance procedure. See e.g., NLRB v. Local 485, IUE, 454 F.2d 17 (2d Cir. 1972); cf, Steelworkers v. NLRB, 692 F.2d 1052 (7th Cir. 1982). 138, 117 LRRM 1420 (1984). We

agree with this approach under the circumstances of this case since there are no barriers to the Association returning to the Board to pursue a resolution of Salter's claims. The parties' grievance procedure provides that the Association may appeal the decision of the Assistant Superintendent for Personnel/Support Services within five (5) working days after the receipt of the decision. In this case, the Assistant Superintendent agreed with the grievance. The Association's next step should have been to approach the Assistant Superintendent concerning implementation. It failed to do so. The contract, however, imposes no time restriction on that action. We therefore order the Association to go back to the Board and pursue implementation of the Assistant Superintendent's recommendation.

Finally, in the absence of exceptions, we dismiss the Complaint based on the unfair practice charge the Association filed against the Board.

ORDER

The Trenton Educational Secretaries Association is ordered to:

A. Cease and desist from interfering with, restraining or coercing employees in the exercise of their right to pursue grievances, by denying them fair representation.

B. Submit Salter's grievance, approved by the Assistant Superintendent for Personnel/Support Services, to the Trenton Board of Education for its consideration.

C. Post on all bulletin boards where the Association ordinarily posts its notices, copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be 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.

D. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

All other allegations against the Association are dismissed. The Complaint based on the Association's unfair practice charge against the Trenton Board of Education is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Hipp and Reid abstained. Commissioner Horan was not present.

DATED: Trenton, New Jersey
June 25, 1986
ISSUED: June 26, 1986

APPENDIX "A"

NOTICE TO ALL 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 employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of their right to pursue grievances, by denying them fair representation.

WE WILL submit Salter's grievance, approved by the Assistant Superintendent for Personnel/Support Services, to the Trenton Board of Education for its consideration.

TRENTON BOARD OF EDUCATION

(Public Employer)

Dated _____ By _____

(Title)

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, Trenton, NJ 08608, (609) 292-9830.

H. E. NO. 86-21

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

In the Matters of

TRENTON EDUCATIONAL SECRETARIES ASSOCIATION,

Respondent,

-and-

Docket No. CI-84-86-105

RUBY SALTER,

Charging Party.

TRENTON BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-85-111-106

TRENTON EDUCATIONAL SECRETARIES ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the Trenton Educational Secretaries Association violated subsection 5.4(b)(1) of the New Jersey Employer-Employee Relations Act when it failed or refused to file Ruby Salter's grievance, and refused to represent her at the first appropriate step of the grievance procedure.

The Hearing Examiner also recommended that the Commission find that the Trenton Board of Education did not violate the Act against the Association when Ruby Salter filed a discrimination complaint against the Association. There was no credible evidence to show that the discrimination complaint was filed to harass the Association President in the exercise of her union responsibility, or that the Board or its representatives persuaded, assisted or coerced Salter in filing the complaint. It was, therefore, recommended that that Charge be dismissed.

H. E. NO. 86-21

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H. E. NO. 86-21

STATE OF NEW JERSEY
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Appearances:

For the Trenton Board of Education
Lemuel H. Blackburn, Jr., Esq.

For the Trenton Educational Secretaries Association
Katzenbach, Gildea & Rudner, Esqs.
(Arnold M. Mellk, of Counsel)

For Ruby Salter
McLemore & McElroy, Esqs.
(Paul McLemore, of Counsel)

HEARING EXAMINER'S

RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge (CI-84-86-105) was filed with the Public Employment Relations Commission ("Commission") on June 5, 1984, and amended on June 14, 1984, by Ruby Salter ("Salter" or "Charging Party") alleging that the Trenton Educational Secretaries Association ("Association") engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., ("Act"). Salter alleged that the Association violated subsections 5.4(b)(1) and (5) of the Act by failing to process a grievance she filed on May 3, 1984, which alleged that the Trenton Board of Education ("Board") violated Article 17, Section B of the collective negotiations agreement between the Board and the Association (Exhibit J-1), which provided that if a secretary is asked to assume responsibilities of a higher level secretary for more than twenty workdays, the Board shall pay her at a rate which includes a pro-rated promotional increment.[1/]

On October 23, 1984, the Association filed an Unfair Practice Charge (CO-85-111-106) against the Board alleging that it violated subsections 5.4(a)(1) and (3) of the Act. The Association alleged that on June 4, 1984 Arthur L. Page, the Assistant Superintendent of Personnel and Support Services, encouraged Salter to file a complaint of racial discrimination against the President of the Association, Patricia Vogt. The Association argued that by encouraging Salter to file the complaint, the Board discriminated

against Vogt in order to discourage her from exercising her duties as President of the Association.[2/]

Complaints and Notices of Hearing were issued on March 27, 1985 with an Order Consolidating the two cases for hearing. Both Respondents' denied the Charges against them. The Board filed an Answer on November 13, 1984 (Exhibit C-3), and the Association filed an Answer on April 3, 1985 (Exhibit C-2). Pursuant to the Complaint and Notice of Hearing, a hearing was held on June 11, 1985 in Trenton, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. The Charge by Salter aginst the Association proceeded first. After Salter completed her direct testimony, the Association made a Motion to Dismiss the Charge. I reserved any decision on the Motion and asked the Association to proceed with its cross-examination of Salter. However, the Association waived its right to cross-examine Salter, and despite Vogts presence at the hearing, the Association presented no witnesses and rested its case. (Transcript "T" p 55). All parties argued orally at some point during the hearing and no post-hearing briefs were filed. The transcript was received on June 24, 1985.

Two Unfair Practice Charges having been filed with the Commission, a question concerning alleged violations of the Act exists, and after hearing, and after consideration of the oral argument, these matters are appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, I make the following:

FINDINGS OF FACT

1. The Trenton Board of Education is a public employer within the meaning of the Act, and has employed Salter as a secretary for several years.

2. The Trenton Educational Secretaries Association is a public employee representative within the meaning of the Act, and is the majority representative of secretaries employed by the Board.

3. Ruby Salter is a public employee within the meaning of the Act, and is employed by the Board in the position of Senior Secretary.

4. The operative collective negotiations agreement between the Board and Association (Exhibit J-1), was effective from July 1, 1982 through June 30, 1984 (J-1). There are two Articles in J-1 that are relevant here. First, Article 17, Section B of J-1 provided that secretaries who assumed the responsibilities of a higher level secretary would be compensated at a higher rate. That Article provides:

> Should a secretary be asked to assume the responsibilities of a higher level secretary for more than twenty (20) workdays, the Board shall pay her at a rate which includes a prorated promotional increment from the initial date through the date on which she is relieved.

Second, the grievance procedure in J-1 is contained in Article 3. Steps one and two of the grievance procedure allow the employee to process the grievance, whereas step three is reserved for the Association, and it is not clear whether step four is

reserved for one party in particular.[3/] Pursuant to Article 3 subsection D, however, any employee may represent himself/herself at all stages of the grievance procedure.[4/]

5. On December 22, 1983 the Board relieved employee Angela Dinkins of certain duties which had not been included in her position responsibilities (Exhibit CP-1). On January 5, 1984, Assistant Superintendent Page assigned those extra duties previously performed by Dinkins, (known as Administrative III duties), to Salter (Exhibit CP-2).

6. After performing the additional duties for a period of time, Salter asked her immediate supervisor, who happened to be Assistant Superintendent Page, whether she could receive additional compensation for the extra duties as Dinkins had received. (T pp 25-26) Salter alleged that Page agreed that she was entitled to additional compensation, but that he could not help. (T p. 26). Since Page could not help her, Salter asked Association President Vogt for a grievance form to enable her to file a grievance. (T p. 26). On April 19, 1984, Salter wrote to Page formally requesting extra pay for performing the Administrative III duties previously performed by Dinkins (Exhibit CP-3). In that letter, Salter claimed that she had assumed between 60% and 80% of the duties previously assigned to Dinkins.

7. Having received no formal response to CP-3, Salter filed a grievance on May 3, 1984 (Exhibit CP-4) asking for earned compensation and promotion to an Administrative II or III position.

The grievance (CP-4) was addressed to Board internal Hearing Officer Julie Thomas, but Salter presented it to Vogt on May 3 for processing which included transmittal of the grievance to the Board or its agent. (T pp 29-30). Having received no response to her grievance, Salter, on May 17, 1984, wrote to President Vogt, complaining that her grievance had not been processed, and requesting that Vogt move the grievance to the appropriate step in a "timely and speedy manner." (Exhibit CP-5).[5/] Despite Salter's having received no response to her grievance, however, an examination of the actual grievance shows that Page somehow received the grievance because on May 4, 1984 Page wrote the following comment on CP-4:

> Based on the fact that Mrs. Salter has been performing Administrative III duties since January 3, 1984, she is entitled to the relief sought.

The record does not reflect that Vogt forwarded CP-4 to Page. Since Vogt's letter, Exhibit CP-6 (discussed infra), evidenced her (Vogt's) failure to file CP-4 with the Board, I can only find that CP-4 found its way to Page through Salter's efforts.

8. On May 20, 1984, Vogt wrote to Salter (Exhibit CP-6) and advised her that the Association was in the process of investigating whether the Administrative III position, which Salter was seeking by her grievance, was still in existence. Vogt stated in her letter that the Association's records indicated that the Board had abolished the Administrative III position on February 24, 1983. Vogt also added that there were two grievance decisions dated

January 13 and February 29, 1984, which indicated that the Administrative III position was abolished. Finally, Vogt invited Salter to telephone her concerning any questions she might have.[6/]

9. Salter responded to CP-6 by letter of May 25, 1984, (Exhibit CP-7) in which she indicated that she understood what Vogt was saying but reiterated her request that the grievance be processed, and emphasized that it be processed immediately.[7/]

10. On May 30, 1984, Vogt telephoned Salter and told her (Salter) that she (Vogt) was being advised by an NJEA representative.(T p 36; Exhibit CP-8) Vogt invited Salter to contact the NJEA representative.(T 34-36; CP-8). During the telephone conversation Vogt also told Salter that the Administrative III position was being abolished and that Salter did not really have a grievance (T p. 36). Salter testified without contradiction that she thought she was entitled to have her grievance processed and that any decision regarding the grievance "should come from the hearing officer, [Julie Thomas] not Vogt" (T p 36).[8/]

11. On the same date, May 30, 1984, Salter again wrote to Vogt (Exhibit CP-9), complaining that after three weeks her grievance had not been "filed", and Salter requested of Vogt a written statement of reasons why the grievance "has yet to be filed."[9/]

12. In response to CP-9, Vogt telephoned Salter twice on May 31, 1984. In the first telephone conversation that day Vogt reiterated that Salter had no grievance; that the position was abolished; and that she was awaiting some clarification. In the

second telephone call Vogt said that she had gone as far as she could go and that Salter could go to Page. (T 39, 40; CP-10).[10/]

13. As a result of the May 31 telephone conversations with Vogt, Salter wrote to Vogt once again, and then wrote to Page on June 1, 1984, (Exhibit CP-11) in which she recited the substance of her conversations with Vogt, namely, that Vogt told her that she did not have a grievance; that she should go to Page; and that the Administrative III position had been abolished.[11/]

14. Salter testified without contradiction that her grievance has never been heard by the Board internal hearing officer, Julie Thomas (T 43).

15. On June 4, 1984 Salter filed a discrimination complaint (Exhibit A-1) against Vogt with the Board's Affirmative Action Officer, Jeanne O. Pearson, alleging that Vogt discriminated against her in failing to file her grievance, and in making discriminatory comments regarding the method that she (Salter) followed in seeking to resolve her grievance. A hearing was held before Pearson on June 26, 1984, which was attended by Salter, Vogt, Page and Arnold M. Mellk, Esq., representing Vogt. Pearson, relying on evidence of disparate treatment vis-a-vis the processing of grievances of other secretarial employees over the prior three years, found that Salter was a victim of discrimination when Vogt failed to file her (Salter's) grievance. The statement of charges, findings and summary were forwarded by Pearson to the Superintendent on July 5, 1984, all of which were contained in A-1.

16. Exhibit A-1 was not placed in Vogt's personnel file (T p 87). There was no evidence adduced that Page caused the discrimination complaint to be filed against Vogt nor that he, Page, in any way assisted and/or encouraged Salter to file the complaint. Salter testified that she did not discuss the filing of a complaint with Page; that he did not tell her to file the complaint; and that he did not assist her in filing the complaint. (T pp 68, 75-77). Finally, there was no evidence adduced by the Association that Page was illegally motivated in any actions or conduct toward Vogt or the Association.[12/]

ANALYSIS

CI-84-86-105 Salter v. Association[13/]

The issues presented in this case are whether the Association failed and refused to process Salter's grievance, and if so, whether it violated its duty of fair representation. I find that the Association did fail to process Salter's grievance thereby violating its duty of fair representation in denying Salter her constitutional and statutory rights.

The standards for determining whether a labor organization violated its duty of fair representation were established by the United States Supreme Court in Vaca v.Sipes, 386 U.S. 171, 64 LRRM 2369 (1967)("Vaca"). In Vaca the Court held that:

> ...a breach of the statutory duty of fair representation occurs only when a union's conduct towards a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith. 386 U.S. at 190, 64 LRRM at 2376.

The Commission, and the courts in New Jersey have consistently embraced the Vaca standards in adjudicating fair representation cases. See e.g., Saginario v. Attorney General, 87 N.J. 480 (1981); In re Fair Lawn Bd.Ed., P.E.R.C. No. 84-138, 10 NJPER 351 (¶15163 1984)(Fair Lawn); In re OPEIU Local 153 (Thomas Johnstone), P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983)("OPEIU"); In re City of Union City, P.E.R.C. No. 82-65, 8 NJPER 98 (¶13040 1982)("Union City"); In re 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)("Middlesex County"); In re New Jersey Turnpike Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979)("Local 194"); In re AFSCME Council No. 1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978).

In two if its more recent cases, OPEIU and Fair Lawn, the Commission reiterated what it had previously adopted in Middlesex County and Local 194,

> ...That a union should attempt to exercise reasonable care and diligence in investigating, processing and presenting [emphasis added] grievances;...and it must treat individuals equally by granting equal access to the grievance procedure and arbitration for similar grievances of equal merit. OPEIU, 10 NJPER at 13; Fair Lawn, 10 NJPER at 352.

The facts of this case show that pursuant to the grievance procedure in J-1, Salter had the right to file and pursue her own grievance. Salter actualy began that process by sending CP-3 to Page, her immediate supervisor, and asking for extra compensation.

CP-3 was not a formal grievance, rather, it was an informal attempt, as contemplated by the first part of step 1 of J-1, to resolve a contractual dispute. When the matter was not resolved at that point, Salter prepared the grievance, CP-4, and gave it to Vogt for processing. By giving CP-4 to Vogt, Salter exercised her contractual option (as well as her constitutional and statutory option) as set forth in Art. 3 Sec. D of J-1, to have the Association represent her in the processing of the grievance.

The Association relied upon Art. 3 Sec. D of J-1 to support its position that Salter had the right to pursue the grievance on her own, and that, therefore, any failure by the Association to process the grievance could not have been a violation of the Act. Although Salter had the right to process the grievance by herself, she also had a constitutional, statutory (as well as contractual) option to require her majority representative to process the grievance on her behalf.

The constitutional requirement is contained in Article I, Paragraph 19 of the New Jersey Constitution (1947) which provides in pertinent part:

> Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing.

That guarantee may be read in conjunction with the statutory rights guaranteed to employees by subsection 5.3 of the Act which provides in pertinent part:

> Public employers shall negotiate written policies setting forth grievance procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements and administrative decisions affecting them, provided that such grievance procedures shall be included in any agreement entered into between the public employer and the representative organization.

The New Jersey Supreme Court in West Windsor Twp. v. PERC, 78 N.J. 98 (1978), and Red Bank Reg. Ed. Assn. v. Red Bank Reg. H.S. Bd.Ed., 78 N.J. 122 (1978) analyzed the above constitutional and statutory rights, upheld the language in 5.3 of the Act, and held that where a grievance concerns terms and conditions of employment a representative selected by the employees pursuant to the Act is their chosen representative for grievance presentation pursuant to Art. I Paragraph 19 of the State Constitution. 78 N.J. at 110, 135. The Court in Red Bank, supra, went on to conclude that although employees had the right to present their own grievances, they had the right, pursuant to Art. I Paragraph 19 of the Constitution and subsection 5.3 of the Act, to have their grievances presented through their majority representative. The option belongs to the public employee, and if the majority representative is asked to present the grievance they are required by law to proceed. The Court in that case held:

> We interpret N.J.S.A. 34:13A-5.3 to guarantee to each unit employee, the right to have his grievances presented through his majority representative if he so desires. This conclusion is essential to the employees' meaningful exercise of their constitutional right to present grievances through their chosen

> representatives. Arguments addressed to the asserted adequacy of personal presentation of grievances as a substitute for their presentation through a chosen representative overlook the fact that the Constitution has authoritatively resolved the issue by specifically according public employees a right to the latter. 78 N.J. at 136.

The Court reiterated that holding in Saginario v. Attorney General, 87 N.J. at 490-491.

Given the Supreme Court's interpretation of Art. I Para. 19 of the Constitution and subsection 5.3 of the Act, the Association's argument that Salter could have processed her own grievance is not an appropriate "defense" to this Charge. In Exhibits CP-5, CP-7, and CP-9 Salter clearly requested and told Vogt that she wanted the Assocition to present her grievance. Once that request was made, the Association should have formally filed CP-4 at the appropriate first step and should have represented Salter at that step even if it (the Association) did not believe that the grievance had merit. Neither the Court nor the Commission have ever interpreted the law to require a majority representative to represent a grievance at every step of the grievance procedure if the majority representative in good faith concluded that the grievance lacked merit. To satisfy the constitutional requirement the Association must at least present the grievance and represent the grievant at the first appropriate step of the grievance procedure. After that initial step has been completed a union may not necessarily be required to continue representing a grievant if it (the union) has demonstrated a good faith belief that the grievance lacks merit. In this case, the

Association did not "present" the grievance to the Board, nor did it represent Salter at the first step. Rather, it arbitrarily chose not to present the grievance, and it failed to represent Salter. Thus it violated the Act.

The confusing facts in this case were first, that Page, who would normally be the second step in the grievance procedure, was actually the first step because he was Salter's immediate supervisor. Second, that Page somehow (through Salter's efforts) did receive the grievance, CP-4, and on May 4, 1984 he actually signed the grievance and agreed with Salter. The record, however, does not establish what, if anything, Page did with CP-4 after he signed and agreed with it.

The fact that the instant grievance actually began at the second step of the grievance procedure is of no significance to the instant case. Page's knowledge and approval of CP-4, however, does affect the remedy herein, but it does not change the underlying violation by the Association because even if Salter filed the grievance with Page, and Page processed the grievance, the credible evidence shows that the Association still failed to present the grievance and represent Salter at the first (second) step of the grievance procedure.

Accordingly, I find that the Association violated subsection 5.4(b)(1) of the Act. However, Salter did not demonstrate that the Association violated any Commission rule or

regulation. Thus, the subsection 5.4(b)(5) allegation in the Complaint should be dismissed.

Remedy

Although Salter did not specifically request a monetary award against the Association, I considered, but rejected, granting such an award. Salter only filed a charge against the Association, consequently, I have no jurisdiction over the Board in CI-84-86-105 for remedy purposes. The facts clearly show that Page received and approved Salter's grievance, but there is no evidence as to what he did with the grievance, whether he presented it to the Board, or whether he failed to make any recommendation with respect thereto. Both Page and Vogt were present at the hearing, but Salter did not call either person as a witness. To have obtained a monetary award in this case the burden was on Salter to prove that but for the Association's illegal act(s), her grievance would have been successful. She failed to prove that by a preponderance of the evidence. Consequently, the appropriate remedy in this case is the posting of a notice demonstrating the Association's agreement to present grievances and represent grievants at the first appropriate step of the grievance procedure pursuant to constitutional and statutory mandates.

CO-85-111-106 Association v. Board

The Association's allegation that the Board, through Page, caused Salter to file the discrimination complaint must be dismissed. The Association failed to prove its case by a

preponderance of the evidence. I credited Salter's testimony that Page did not assist her in processing the discrimination complaint. I also drew no adverse credibility findings from A-1. Consequently, there was no credible evidence that Page motivated or caused Salter to file the complaint.

The standard for assessing employer motivation in unfair practice cases in this State is as set forth by the New Jersey Supreme Court in Bridgewater Twp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984). The Bridgewater test requires that the Association make a prima facie showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the conduct of the employer. Plainly, the Association has not made a prima facie showing that any activity it engaged in was a substantial or a motivating factor causing Page to assist Salter in filing the discrimination complaint. There was simply no reliable evidence that Page was responsible for the filing of A-1.

Accordingly, the Associatin's allegation must be dismissed.

Based upon the entire record and the above analysis, I make the following:

Recommended Order

I recommend that the Commission Order:

A. That the Association cease and desist from:

Interfering with, restraining or coercing employees who are unit members in the exercise of the rights

guaranteed to them by the Act, particularly, by failing to file (present) Ruby Salter's grievance, and by failing to represent her at the first appropriate step of the grievance procedure.

B. That the Association take the following affirmative action:

1. Immediately post or cause to be posted at all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A" indicating that it will not arbitrarily fail or refuse to file grievances to, or represent grievants at, the first appropriate step of the grievance procedure. Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof, and after being signed by the Respondent's authorized representative, shall be 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. Provide Ruby Salter with her own signed copy of Appendix "A."

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

C. That the subsection 5.4(b)(5) allegation in CI-84-86-105 be dismissed.

D. That the Complaint in CO-85-111-106 be dismissed in its entirety.

Arnold H. Zudick
Hearing Examiner

Dated: November 8, 1985
Trenton, New Jersey

1/ These subsections prohibit employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act and (5) Violating any of the rules and regulations established by the commission."

2/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act and (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

3/ Article 3, the grievance procedure in J-1 states as follows:

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

B. Procedures for Adjusting Complaints and Grievances. Since it is important that grievances be processed as rapidly as possible, the number of days indicated at each level should be considered as maximum and every effort should be made to expedite the process. The time limits specified may, however, be extended by mutual agreement. If the written grievance is not filed within thirty (30) working days after the secretary knew or should have known of the act or condition on which the grievance is based, then the grievance shall be waived. A dispute is based, then the grievance shall be waived. A dispute as to whether a grievance has been waived under the paragraph shall be subject to arbitration pursuant to Step Four.

STEP 1

The employee shall first discuss her complaint orally with her immediate supervisor, either alone or accompanied by an Association representative, with the objective of resolving the matter informally. In the event the complaint is not resolved informally, the employee shall present the grievance, in writing, to the supervisor, but not more than five (5) working days after the grievance meeting. The Supervisor must notify grievant of his decision within five (5) working days.

STEP 2

The Association and/or the employee may appeal the decision of the Supervisor to the Assistant Superintendent for Personnel/Support Services, or his designee, within seven (7)

(Footnote continued on next page)

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working days after receiving the decision of the immediate Supervisor. The Assistant Superintendent for Personnel/Support Services, or his designee, i.e., the Director "C" Field Services, shall hold a hearing within seven (7) working days and subsequently issue a decision in writing with supportive rationale not later than five (5) working days after the hearing to the aggrieved employee and the Association.

STEP 3

The Association may appeal the decision of the Assistant Superintendent for Personnel/Support Services, or his designee, within five (5) working days after the receipt of the decision to the Board. A hearing shall be held by the Board within fifteen (15) working days after receipt of the appeal. The appeal shall be in writing and accompanied by a copy of the decision of the Assistant Superintendent for Personnel/Support Services, or his designee.

STEP 4

If the Board has failed to render a decision within fifteen (15) working days from the date of the hearing, or the written decision is unacceptable to the aggrieved party, the grievance may be sumittted to arbitration. The decision of the arbitrator shall be final and binding upon the parties and the arbitrator shall be selected from the American Arbitration Association and adhere to their rules and procedures. The arbitrator shall limit himself to the issue submitted to him and shall consider nothing else. He can add nothing to, nor subtract anything from this Agreement.

MISCELLANEOUS PROVISIONS

A. Failure at any step of this procedure to communicate the decision on a grievance within the specified time limits shall permit the Association to proceed to the next step of this procedure.

B. If a grievance arises from an action of authority higher than the immediate supervisor, the Association may present the grievance at Step 2 of this procedure without Step 1 thereof.

4/ D. Any party in interest may be represented at any or all stages of the grievance procedure by himself, or, at his option, by a representative selected by the Association. When a party is not represented by the Association, the Association shall have the right to be present and to state its views at all stages of the grievance procedure.

5/ CP-5 provides as follows:

> I am am concerned that my grievance has not as yet been processed. Since it has been just about two (2) weeks since I presented it to you, I hereby request that it be moved to the appropriate step in a timely and speedy manner.
>
> Please note that as secretary that opens all mail, I am aware that grievances are usually processed within two or three days.
>
> May I hear from you within 24 hours as to what can and will be done with this grievance.

NOTE: It was in CP-5 that Salter established that she gave ("presented") CP-4 to Vogt for processing. The Association did not contradict that evidence, consequently, I accept the information contained therein as true.

6/ CP-6 provides as follows:

> On May 7, 1984 you gave me a packet of currespondence between you and Dr. Arthur L. Page whereby he assigned you additional duties which you felt were outside of your category as senior secretary.
>
> We are in the process of establishing whether the Board is recognizing that there is an Administrative III position vacant in the Personnel Department. Our records indicate hat the Board of Education abolished the Administrative III position on February 24, 1983 when they created the position of "confidential" secretary to Dr. Page. I also have a Level II decision dated January 13, 1984 and a Level III decision on February 29, 1984 indicating that the Administrative III position of which you are discussing was abolished. If, in fact, this position is recognized in the Personnel Department then this position would have to be advertised and screened according to contract.
>
> If you have any questions concerning this matter, please expedite your concern by calling me at 989-2599.

7/ CP-7 provides as follows:

> In regard to your letter of May 20, 1984, I understand what your are saying. However, I have a grievance that I would like to have processed.

(Footnote continued on next page)

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It is my understanding that my association, The Trenton Educational Secretaries Association, supports its members in all instances where they believe they have a legitimate grievance arising under the terms of their negotiated contract.

May I please have my grievance processed immediately.

8/ Exhibit CP-8 are Salter's notes of the May 30 telephone conversation with Vogt. The Association neither contradicted the notes, nor Salter's testimony regarding the telephone conversation. Consequently, I accept CP-8 as an accurate reflection of the May 30 telephone conversation.

9/ CP-9 provides as follows:

> Again, I understand what you are saying per your telephone call of Wednesday, May 20, 1984, but I cannot understand why my grievance has not been filed in a timely manner.
>
> My concern, at the moment, is the fact that after three (3) weeks my grievance has not been filed. Once it is filed, we can then ask the Grievance Officer to hold off on it for a while, but it first has to be filed before any action can be taken.
>
> Please state, in writing, the reason(s) why the grievance has yet to be filed.

10/ Exhibit CP-10 are Salter's notes of the May 31 telephone conversations with Vogt. Since the content of the notes was not disputed, I accept them as an accurate reflection of the May 31 telephone conversations.

11/ CP-11 provides as follows:

> In my conversation with Mrs. Patricia Vogt, president of TESA, via telephone on Thursday, May 31, 1984, I was told technically, I do not have a grievance. The fact that you, Dr. Page, agree with me, gives her (Pat) no reason to even come to you. She said, since you agree with me, it's up to you to put it on the agenda. Anything dealing with personnel must be put on the agenda by your office.
>
> She said the Administrative III position was abolished. I told her the position might have been abolished, but the duties were still there, someone has to do them. She said

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Administrative III duties should not have been given to a Senior Secretary, you have three (3) other secretaries in your office. She said I should have come to her when the duties were first given to me. I should not have waited this long.

She told me to call and talk to Ann Rowbotham. She also said I need higher consultation, she can't do anymore.

12/ I credit Salter's testimony that Page did not assist her in filing the discrimination complaint. The Association attempted to discredit Salter's testimony in that regard by showing that neither she (Salter) nor Page responded to certain questions at the discrimination hearing. The pertinent part of that hearing shows the following:

The issue raised by the Association in the above conversations concerned the number of grievances filed for white employees. It did not concern whether Page told Salter to file the complaint. Since I did not observe the discrimination hearing I can form no adverse opinion as to Salter's or Page's credibility from the above part of A-1. Rather, in my observation of both Salter and Page at the instant hearing I find that they were both credible witnesses. The Association did not present sufficient basis to challenge their credibility.

13/ Since the Association rested its case with no cross-examination of Salter, and without presenting any of its own witnesses, the decision on the Motion to Dismiss is merged with a decision on the whole.

Appendix "A"

NOTICE TO ALL 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

The Trenton Educational Secretaries Association hereby notifies secretaries and other unit members employed by the Trenton Board of Education that:

WE WILL cease and desist from interfering with, restraining or coercing employees who we represent in the exercise of the rights guaranteed to them by the State Constitution and by the Act, particularly, by failing and refusing to provide Ruby Salter with her constitutional and statutory right to, at her option, have us file (present) grievances on her behalf, and to have us represent her at the first appropriate step of the grievance procedure.

WE recognize that all unit members are entitled to exercise their constitutional and statutory option to have us file grievances and/or represent them at the first appropriate step of the grievance procedure. If unit members exercise their constitutional/statutory option WE WILL file grievances and/or represent them at the first appropriate step of the grievance procedure even if we believe in good faith that a grievance lacks merit.

TRENTON EDUCATIONAL SECRETARIES ASSOCIATION

Dated _____ By _____
(Title)

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 James Mastriani, Chairman, Public Employment Relations Commission, 495 W. State Street, Trenton, New Jersey 08618 - Telephone: (609) 292-9830