

P.E.R.C. NO. 89-71

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

AFSCME, COUNCIL 52,
LOCAL 888,

Respondents,

-and-

Docket No. CI-H-87-54

ROBERT BRENNAN,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by Robert Brennan against AFSCME, Council 52, Local 888. The charge alleges that Local 888 violated the Act by failing to arbitrate Brennan's grievance seeking back pay after he was reinstated. The Commission concludes that Brennan failed to prove that Local 888 breached its duty of fair representation.

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

AFSCME, COUNCIL 52,
LOCAL 888,

Respondent,

-and-

Docket No. CI-H-87-54

ROBERT BRENNAN,

Charging Party.

Appearances:

For the Respondent, Oxfeld, Cohen, Blunda, Friedman, LeVine
& Brooks, Esqs. (Sanford R. Oxfeld, of counsel)

For the Charging Party, Purzycki & Gorney, Esqs.
(Edward W. Gorney, of counsel)

DECISION AND ORDER

On February 20, 1987, Robert Brennan filed an unfair practice charge alleging that Rutgers University ("Rutgers") violated subsections 5.4(a)(3) and (4),^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by firing him unjustly. He also alleged that AFSCME, Council 52,

1/ These subsections prohibit public employers, their representatives or agents from: (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act."

Local 888 ("Local 888") violated subsections 5.4(b)(1) and (3)^{2/} by failing to arbitrate his grievance seeking back pay after he was reinstated.

On March 9, 1987, Brennan amended his charge to allege that Local 888 refused to arbitrate his grievance because he had run for union president and because the union considered him a "renegade or trouble maker" for filing several grievances the year before he was fired. Brennan also alleged that during his termination hearings, the union failed to call a key witness.

On July 1, 1987, Brennan withdrew his charge against Rutgers.

On July 20, 1987, a Complaint and Notice of Hearing issued against Local 888.

On August 14, 1987, Local 888 filed a motion for summary judgment. The Chairman referred the motion to Hearing Examiner Richard C. Gwin. On October 8, he denied the motion concluding that material facts were in dispute and that Local 888 was not entitled to relief as a matter of law.

On January 28, February 16, March 3 and May 26, 1988, the Hearing Examiner conducted a hearing. The parties examined

^{2/} 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. (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit."

witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs by July 22, 1988.

On September 9, 1988, the Hearing Examiner recommended the Complaint's dismissal. H.E. No. 89-11, 14 NJPER 606 (¶19257 1988). He concluded that Brennan failed to prove that Local 888's review of Brennan's case had been arbitrary, discriminatory or motivated by bad faith.

On October 6, 1988, Brennan excepted to several findings of fact.^{3/} Brennan argues that the decision not to arbitrate was unreasonable and relies on his post-hearing brief.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-21) are generally accurate. We incorporate them with this modification. Brennan claims he resigned to protest Gillus' presidency. Her predecessor, Tony Papi, resigned his presidency in December 1984 and therefore Brennan may have resigned because of Gillus' presidency.

^{3/} Brennan claims that: (1) Local 888 President Tony Papi resigned in December 1984 and Brennan resigned to protest Gillus' presidency; (2) Brennan advised Gillus he was running for president; (3) Brennan was angered, not upset, by the mess at his work station; (4) Brennan did not threaten Familio; (5) Daniels testified credibly; (6) Brennan's demeanor at the hearing did not indicate he was not one for calm decisions; (7) Brennan was fired without being questioned; (8) Rutgers and Local 888 invited Familio to testify at Brennan's step two hearing; (9) the local president, not just Council 52, has input into a decision to arbitrate; (10) Gillus' [Gollin's] decision not to arbitrate was unreasonable, and (10) any misstatements in Brennan's affidavit were unintentional.

The issue is whether the union breached its duty of fair representation when it refused to arbitrate Brennan's four and one-half week suspension. Unions have power to negotiate terms and conditions of employment, but must represent the interests of all unit members without discrimination. N.J.S.A. 34:13A-5.3. A breach of the duty of fair representation occurs only when a union's conduct toward a unit member is "arbitrary, discriminatory, or in bad faith." Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976), citing Vaca v. Sipes, 386 U.S. 171 (1967). The Commission and New Jersey Courts have consistently applied the Vaca standard in evaluating fair representation cases. Saginario v. Attorney General, 87 N.J. 480 (1981); Fair Lawn Bd. of Ed., P.E.R.C. No. 84-138, 10 NJPER 351 (¶15163 1984); OPEIU Loc. 153 (Thomas Johnstone), P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983); City of Union City, P.E.R.C. No. 82-65, 8 NJPER 98 (¶13040 1982). The mere fact that a union decision results in a detriment to one unit member does not establish a breach of the duty. Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); see also Humphrey v. Moore, 375 U.S. 335 (1964). [All] the facts of each case must be scrutinized to determine whether a breach has been proven; there are no bright line tests." City of Union City, P.E.R.C. No. 82-65, 8 NJPER 98, 99-100 (¶13040 1982).

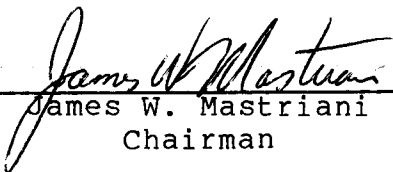
We conclude that Brennan failed to prove that Local 888 breached its duty of fair representation. Brennan alleges that Local 888 refused to arbitrate his grievance because he ran for

union office and because its leaders considered him a troublemaker. The record shows that Richard Gollin, the union representative that made the decision not to arbitrate, did not know that Brennan intended to run for union office. In fact, Brennan was allowed to run for office despite his failure to meet the union constitution's eligibility requirements. Gollin denied Brennan's request because of Brennan's history of altercations with co-workers, the lack of merit in a grievance seeking to overturn this suspension, and the Union's labor relations policy of not processing grievances it deemed to be without merit. Under all the circumstances, we find no breach of the duty of fair representation.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

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

DATED: Trenton, New Jersey
December 19, 1988
ISSUED: December 20, 1988

H.E. NO. 89-11

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

In the Matter of

AFSCME, COUNCIL 52, LOCAL 888,

Respondents,

-and-

Docket No. CI-H-87-54

ROBERT BRENNAN,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends dismissal of a complaint alleging that Local 888 violated its duty of fair representation when it refused to arbitrate the grievance of Robert Brennan, who had been reinstated without back pay following his termination.

H.E. NO. 89-11

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

In the Matter of

AFSCME, COUNCIL 52, LOCAL 888,

Respondents,

-and-

Docket No. CI-H-87-54

ROBERT BRENNAN,

Charging Party.

Appearances:

For the Respondent

Oxford, Cohen, Blunda, Friedman, Levine & Brooks, Esqs.
(Sanford R. Oxford, of counsel)

For the Charging Party

Purzycki & Gorney, Esqs.
(Edward W. Gorney, of counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On February 20, 1987, Robert Brennan filed an unfair practice charge alleging that Rutgers University ("University") violated subsections 5.4(a)(3) and (4),^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"),

^{1/} These subsections prohibit public employers, their representatives or agents from: (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act."

by firing him unjustly. He also alleged that AFSCME, Council 52, Local 888 ("Local 888") violated subsections 5.4(b)(1) and (3)^{2/} of the Act by failing to arbitrate his grievance seeking back pay after he was reinstated.

On February 25, 1987, a Commission Agent advised Brennan that his charge could not be processed because he failed to submit proof of service^{3/} and a concise statement of the unfair practice, including the time and place of the acts alleged.^{4/} The Commission Agent invited Brennan to file proof of service and amend his unfair practice charge.

On March 9, 1987, Brennan submitted proof of service, several documents and a "Statement of Facts" (C-3) amending his unfair practice charge. In the amendment, Brennan alleged that the union refused to arbitrate his grievance because he had run for union office (president) and because the union considered him a "renegade or trouble maker," a result of his filing several grievances during the year before he was fired. Brennan also alleged that during his termination hearings, the union failed to

^{2/} 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. (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit."

^{3/} N.J.A.C. 19:14-1.4.

^{4/} N.J.A.C. 19:14-1.3

call "Mr. Seymour Lyndell"^{5/} as a witness to the incident for which Brennan was fired.^{6/}

On July 20, 1987, the Director of Unfair Practices issued a Complaint and Notice of Hearing.

On August 14, 1987, Local 888 filed a Motion for Summary Judgment, seeking dismissal of the Complaint as untimely and failing to allege facts which, if true, show that Local 888 violated its duty to represent Brennan fairly.

On October 8, 1987, I denied the motion, concluding that if the allegations in Brennan's amendment were true, they might constitute an unfair practice.

I conducted a hearing on January 28, February 16, March 3 and May 26, 1988.^{7/} The parties examined witnesses and introduced exhibits. They waived oral argument but filed briefs by July 22, 1988. Based on the entire record, I make the following:

FINDINGS OF FACT

1. Robert Brennan has worked for Rutgers University since July 1979. In the summer of 1986 he was assigned to the Kilmer Campus physical plant as a high-voltage electrician (TA5-TA8).

^{5/} The man's name is Leopold Seymour (see findings 7 and 8, infra.).

^{6/} Brennan also made several allegations about the University's conduct. I do not mention them here because on July 1, 1987, Brennan withdrew his charges against the University.

^{7/} Transcripts are cited as follows: TA-January 28; TB-February 16; TC-March 3; and TD-May 26, 1988.

2. Brennan is represented in collective negotiations by Local 888. He was a union member until December 1984, when he resigned for approximately one year (TA5-TA8; TA68). Brennan describes his resignation as a protest to "Matti Gillus' ineptness [and] incompetence as a union president." (TA116).

Before his resignation Brennan had been active in the union (TA111-TA112). Under former president Anthony Papi, Brennan had been Chief Shop Steward and a member of the negotiations committee. In late 1984, Papi told Brennan that he did not want to serve another term and that he wanted Brennan to succeed him as president. To that end, Papi introduced Brennan to other union members. Against his wishes, Papi was nominated in November 1984. He was reelected president and Matti Gillus was elected vice-president. Papi resigned his presidency in April 1985, and Gillus was appointed to succeed him (TC8-TC10, TC19, TC28-TC32).

I therefore do not credit Brennan's testimony about his motive for resigning from the Union. Papi, not Gillus, was president of Local 888 in December 1984. Papi was reelected and held the presidency until he resigned in April 1985, five months after Brennan withdrew from the union. Brennan had resigned from his shop steward position approximately two months before he quit the union. He said he did not have the time to do the job properly because he was in night school. It is not clear from the record why Brennan resigned from the union but his resignation was not based on Gillus' performance as president.

3. Sometime during 1985 (it is not clear when, but probably between April and September) Papi, Bob Angelo of AFSCME Council 1, and six or seven Local 888 members, among them Brennan, went to AFSCME's Washington D.C. office in an attempt to persuade AFSCME international officials to reassign Local 888 from AFSCME Council 52 to AFSCME Council 1. These Local 888 members were dissatisfied with the representation they had received from Council 52 (TA45, TA46, TA111, TA112; TB211; TC15).

4. Sometime late in 1985, Brennan decided to run for union president in the 1986 elections. He was encouraged by Bruce Smith, who had agreed to run as vice-president. Smith advised Brennan that the AFSCME Constitution prevented those not members in good standing for one year to run for office. Brennan rejoined the union. By word of mouth he announced that he would run for president in 1986. In November 1986, despite his ineligibility, he was nominated. No one challenged his eligibility. The election was held in December 1986. Brennan lost to Matti Gillus in the election (TA47-TA53, TA70, TA73, TA113; TB6, TB16, TB19, TB40).

5. On July 14, 1986, Brennan was fired for harassing co-workers. Returning from vacation on the 14th, he arrived at the electrical shop at approximately 7:45 a.m. and discovered that his work station and personal lock had been covered with soy sauce. Someone had also written on an accident investigation memorandum that was posted on a bulletin board: "Dog face wrote this." The memorandum (CP-7) had been circulated approximately one month after

a physical plant electrician had been shocked while working in a breaker box. The memo was from the university safety engineer to several supervisors, advising them to share the accident investigation with their employees. Someone wrote Tom Familio's name on the memo. It was Familio who had had the accident. The "Dog face wrote this" remark was apparently written by someone believing that Brennan had written Familio's name on the memo (TA14, TA15; CP-7).

"Dog-face" is a derogatory nickname for Brennan used, though not to his face, by some of his co-workers. Someone had once painted "Dog-face Bob" on his truck (TA74-TA76).

Brennan, angered by the mess at his work station, said that he was "going to punch Baldeswilder in the mouth." (TA15). Brennan had a history of altercations with Pete Baldeswilder, another electrician at Kilmer campus (see finding 17). Someone told Brennan, however, that Baldeswilder was not responsible for the mess. Brennan then noticed the memorandum (CP-7) and assumed that Tom Familio had vandalized his work area (TA15). To Familio, Brennan said, "I want to see you at 4:30." (TA21).

Familio quickly went to foreman Bill Hylemon's office and told him that Brennan had threatened him. Hylemon called Brennan into the office with Familio and asked him what was going on. Brennan replied, "This guy here is the guy that's on the peripheral [sic] of all this bullshit that's going on. And he is the agitator in the background and I am blaming Pete and Ken and I'll bet you this guy [pointing to Familio]." (TA21).

6. Hylemon testified that while he was talking to Familio and Brennan, Brennan said to Familio, "Tom, I know that you did it, and I will meet with you after 4:00 anywhere from here to your house, tell me where" (TD21). This alleged second threat is mentioned by the hearing officers in the step-2 and step-3 termination hearing decisions (CP-11, CP-13). Brennan flatly denies making the statement (TA95).

Hylemon's recollection of the events of July 14, 1986 was selective. He did not remember that Brennan had a tape recorder with him at a later meeting with Diller (see finding 12). He remembered little of what occurred at the second meeting (TD34-TD37). He recalled quite clearly, however, Brennan's statement to Familio (TD42).

Brennan's credibility, on the other hand, has already been tarnished by the inconsistency of his testimony about resigning from the union (see finding 2). Brennan also admitted on the record that allegations in his amended unfair practice charge were untrue (see finding 22). I do not believe that Brennan was deliberately lying when he denied making the statement to Familio in Hylemon's presence. He was understandably upset. I am sure that he cannot accurately recall much of what was said at that meeting. I conclude, however, that he said it. Though Hylemon's memory was not precise about the events of that morning, a threatening statement is not easily forgotten. Further, such a statement would be consistent with Brennan's demeanor and his conduct that morning and during the previous year (see findings 5, 8, 17, 19, 22; R-2, R-6).

7. Hylemon ordered Brennan and Familio back to work. Familio left and called Diller. He also called the police to file harassment charges against Brennan and went to union president Matti Gillus' office to complain about Brennan's behavior. Leopold Seymour, who worked with Familio and Brennan and witnessed the incident, accompanied Familio to Gillus' office (TD13-TD15, TD22, TD23).

8. At approximately 9:30, Ira Diller, Hylemon's supervisor, called Hylemon about the incident (TD24). Diller later arrived at Hylemon's office and they questioned Seymour. Seymour told them that Brennan had threatened Familio. Seymour had been a few feet from Brennan and Familio when Brennan tried to arrange the 4:30 meeting (TD6, TD9). Seymour testified that Brennan "seemed like he was in a temper, a bad mood." (TD9). Seymour describes Brennan's conduct: "He was...he said, 'I see you at 4:30' and it was like a mean kind of--he was a mean kind of guy." (TD6). I credit Seymour's testimony. He was Brennan's witness. His description of Brennan's behavior is compatible with Brennan's admission that he was upset (TA20) and that he wanted to punch Baldeswilder in the mouth. Brennan also admitted telling Familio that he wanted to see him at 4:30 (TA21).

9. Brennan denies that he threatened Familio (TA124-TA126). He testified that he merely "wanted to find out if it was anything I said to him. You know, for instance if I said

you're a faggot, and his brother is gay" (TA127).^{8/} Brennan believed he had permission from Ira Diller to speak with co-workers about personal differences so long as he did it after work and off campus. Id.

10. Brennan called James Daniel as a witness. Like Seymour, Daniel worked in the electrical shop and said he was present during the incident. Daniel, however, stated he did not notice anything unusual and did not even realize anything had happened until Brennan told him later (TC35-TC38). His testimony is incredible. Brennan admitted and Seymour confirmed that he was angry and wanted to meet Familio. Given Brennan's understandable anger, his first reaction of wanting to punch the person he thought responsible, his subsequent invitation to "meet" Familio at 4:30, and his demeanor at hearing, I find it unbelievable that someone could have witnessed this incident without knowing that something was going on.

11. At approximately 10 a.m., a police officer arrived at the electrical shop and took a statement from Brennan (CP-8). The officer told Brennan that Familio had filed charges and that Brennan

^{8/} I quote Brennan's testimony here only because it is relevant to his credibility. It is his only explanation for wanting to "meet" Familio. The impression Brennan tried to create was that he wanted to calmly discuss his problem with Familio (TA-77). His demeanor at hearing is sufficient to convince me that he is not one for calm discussion. More important, however, is the fact that he wanted to punch Baldeswilder, the first person he suspected of the offense. I do not believe that he changed his mind and wanted simply to discuss the incident with Familio.

was going to be fired, probably the following Thursday when the director of physical plant returned (TA23-TA24; TD23). During a lunchroom discussion, a co-worker had told Brennan that "Whitehead [the Director] was after [his] ass." (TA98).

12. Shortly after lunch Hylemon sent all employees in the electrical shop out on assignment. He asked Brennan to stay. Brennan asked permission to go to his truck (TA25-TA26). He came back with a cassette recorder and was called into a meeting with Hylemon, Diller and shop steward Charles Gregory. Brennan explained his reason for having the tape recorder: "And I was told that I was going to be terminated Thursday. But, they [presumably Hylemon and Diller] figured they could get a star by their name so they fired me on Monday, which in fact prior to that I was told that Whitehead wants me fired. So what I did to make sure I wouldn't miss the opportunity of recording such an historic occasion, I carried that thing [the tape recorder] in my car for a month or two, probably three, really." (TA99, TA100). A transcript of that meeting, taken from Brennan's tape, is in evidence (CP-16).

At this meeting Hylemon told Brennan, "We've had quite a few problems I guess you know, all the way down the line, how people feel. It's time to let you go. As of today you are terminated" (CP-16 p. 1). Brennan denied threatening Familio: "I didn't threaten him. All I said was that I would like to see you at 4:30 and I don't think your giving me fair justice on this...what had me pissed, is my desk, [the] soy sauce... So I turned to Paul and I

said 'that goddamn Baldeswilder and I'm gonna punch him square in the mouth and Paul says it wasn't Pete. So when I turned around and seen Familio...when I seen this [CP-7] and the shit on my desk, I figured, umm, it probably is him. So instead of wasting your time...I said when he was walking by and I walked right up to him... 'I'd like to see you at 4:30...' (CP-16, pp. 2, 3).

Brennan then explained to them that he had tried to transfer several times and he asked Diller to help him transfer rather than fire him. Diller said he could not. Brennan asked Hylemon and Diller if they had seen the mess at his desk and the memo (CP-7). Hylemon had seen CP-7 but neither Hylemon nor Diller had seen Brennan's work area. When he showed them and asked if it changed their minds about firing him, Diller said no (CP-16). Brennan asked Hylemon and Diller not to touch his desk or lock. Before he left he photographed his work area (TA79). The photos and the soy-sauced lock that he cut from his locker are in evidence (CP-1 through 6).

13. Immediately after he was fired, Brennan filed a grievance and retained an attorney (TA27-TA28). The grievance alleged that he was fired unjustly and was signed by Brennan and

Local 888 shop steward Gregory (CP-9). Brennan gave the photographs, lock and tape to his attorney^{9/} (TA20).

14. On July 15, 1986, Diller prepared Brennan's notice of termination. It read: "On July 14, 1986, you once again threatened one of your fellow employees and were disruptive to the shop in general. You were warned previously that termination would result if this kind of behavior reoccurred. Therefore, as of July 14, 1986, your employment with Rutgers University is terminated." (CP-10).

15. A step-2 termination hearing was held July 18, 1986. Attending were Brennan, Gillus, Gregory, Diller, Hylemon and the Hearing Officer, Ronald Berger. Familio testified at the hearing. Brennan believes that Gillus called Familio as a witness (TA91, TA96) but Berger's report states that, "Since Mr. Familio was involved in the incident, we invited him to describe what had happened. (CP-11, emphasis added). I conclude that "we" refers to the Rutgers representatives. Berger denied the grievance. He concluded that Brennan had threatened Familio and he referred to similar problems that Brennan had with co-workers. Berger reported: "It seems that every problem between employees in that shop involved Bob Brennan. Last year you physically threatened a

^{9/} Brennan told Gillus and Baker that his attorney had this evidence. Brennan tried to contact the attorney, who eventually told Brennan he could not represent him, to obtain the tapes. Neither Baker nor Gillus obtained the tape, pictures and lock from Brennan's former attorney (TA20, TA35, TA36, TA80, TA81, TA105, TA106).

different employee by pulling him out of a University vehicle to the ground. At that time you were suspended...for three days. The University Police also have a long history of what appears to be an ongoing core of harassment and intimidation in the electrical shop. In nearly all cases, you appear to be at the center of the problem." (CP-11).

16. On July 24, 1986, Brennan and Gillus signed a step-3 grievance form, seeking Brennan's reinstatement with back-pay and overtime (CP-12). The step-3 hearing was held July 30, 1986. Attending for the physical plant were Diller, Berger and Hylemon. Gregory was present and Liz Baker, the Council 52 representative who presented Brennan's case. Just before the hearing, Brennan had an argument with Baker. Brennan describes the argument:

...we started off...Liz Baker and I, we fight. She fights with me constantly over things. I don't understand her at all. And we begin the meeting by her sitting down and asking me, she says like I want to establish what happened. She said, "I want to establish what happened." And I said, "I got fired." She said, "No start from the beginning..."

...This prefaced the meeting. Her attitude towards me prefaced the meeting. She asked me...if I was on a time clock to begin an investigation for termination and I says, "You think I live here? Of course I'm on a time clock. When I'm here, I'm on a time clock." Then she exploded.

She came all the way down here from Jersey City to represent me. I told her that I came from Highland Park. I told her that I got another flash for her that I'm not getting paid and she is.

And that kind of--well, there was a kind of eerie silence that fell over the place as soon as I said that (TA33, TA34).

17. Brennan testified at the step-3 hearing. Though Brennan could not remember it, Diller and Hylemon also testified (TA35, TA36). The Hearing Officer was Chris Mowry. She issued her decision on August 8, 1986 (CP-13). She reported three recent incidents about Brennan:

4/30/85 - Mr. Brennan was suspended for three days for pulling Mr. Baldeswilder from his vehicle.

2/7/86 - Mr. Brennan and Mr. Shepherd were involved in an incident, the upshot of which was that the police were called. At a meeting following that incident Mr. Diller warned that if such behavior did not cease, termination of the participants would result.

5/12/86 - Mr. Brennan and Mr. Shepherd came to Mr. Diller, with Mr. Brennan accusing Mr. Shepherd of writing slurs about him on the bathroom walls and Mr. Shepherd accusing Mr. Brennan of waiting for him at Metlar's Lane and making obscene gestures. Mr. Diller again warned them both that their attitudes would have to change, or termination would result. [Id. at p. 1]

The April 30, 1985 incident is also documented in a second-step decision dated May 31, 1985 (R-3) and third-step decision dated November 19, 1985 (R-1). In her step-3 ruling (R-1), Hearing Officer Betty Minor, though finding the grievance untimely, ruled on its merits and upheld the 3-day suspension, finding:

As far as whether or not the suspension was deserved, we must look to the testimony of the grievant himself. He stated that Baldeswilder was saying "Hi George"... and later "Bye George" to provoke him. He also stated that Mr. Baldeswilder swore at him when they passed each other in their trucks. Whether or not this is true, the real problem came about when Mr. Brennan went from his truck

to...Baldeswilder's...and put his hand on Baldeswilder's shoulder...If Mr. Baldeswilder was using profanity...Brennan had a right to complain to the supervisor...not...to put his hands on another employee. The three-day suspension was strong discipline but...there was a prior incident of a physical threat to another employee for which Mr. Brennan was reprimanded and warned that any further threat to another employee could lead to termination (R-1, pp. 4-5).

At the unfair practice hearing before me, Brennan explained his version of the Baldeswilder incident:

There was an incident that happened between me and a co-worker...the gentlemen and I were told that we can't associate with each other than hello and goodbye...by a superintendent...He says, "You guys can't get along. The only remedy for this is you don't say anything..." He said, "Is that all right, do you agree?" And I said, "Okay." About a month later, Pete Baldeswilder, he started nit-picking at me giving a little business, a barb here and a barb there. One day, I told him, keep this shit up and I am going to knock you on your ass. Then I went to work. That was the end of it I felt.

When we went out on the job...as he passed, he said something...to challenge me. And I stopped and I said, "Did you say that to me?" And he gave me the finger and he drove down and parked.

...I went over and he was in his truck and I opened up the truck door and in the process of him and I discussing these things, I thought he was jumping out at me and I backed up and he fell to the ground (TA58-TA59).

I cite this testimony as another example of Brennan's attitude, demeanor and believability. He later testified that he did place his hand on Baldeswilder's shoulder, as Minor found in her decision (TA65).

18. Mowry, like Berger, found that Brennan threatened Familio on July 14, 1986 (CP-13). Mowry reasoned that, "[c]oming so soon after repeated warnings by Mr. Diller, that [the threat] normally would be cause for outright termination" Id. She concluded however that, since "Brennan's co-worker(s) instigated this incident knowing full well that he would respond in some fashion upon discovering their welcome-back message to him...termination is too severe." Id. Mowry reinstated Brennan but without back-pay because "he (did) not have clean hands in this matter." Id.

19. Brennan says he did not tell Gillus that he was going to run for the union presidency but he described a conversation they had after the step-3 hearing: "after the meeting, we were outside and I told her...to do what she wants now because this is her last year as union president. And she laughed at me. I told her, I said 'you make all your mistakes now because as of the next election, you're out.'" (TA53, TA54).

20. Shortly after the step-3 hearing, Brennan asked Gillus to request arbitration of his four-and-a-half week suspension (TA43). The decision to arbitrate a grievance is made by Council 52, not Local 888, which had made the decision to move to step 3. Richard Gollin, Associate Director of Council 52, decides which grievances the union will arbitrate (TA70-TA72).

21. Gollin apparently needed time to consider Brennan's request. He asked Baker to obtain an extension of time in which to request arbitration (TD71, TD99). This is confirmed by a memo sent

by Mowry to Baker on August 19, 1986, confirming that the University had consented to give the union until September 5, 1986, to make its decision (CP-14).

On August 22, 1986, Gollin wrote Brennan advising him that his grievance would not be arbitrated (CP-15). Gollin's decision was based primarily on his conclusion that the third step result was reasonable, given Brennan's record of trouble with his co-workers. In reaching his decision, he considered the record of the third step decision, Brennan's record and Baker's evaluation of Brennan's case. Gollin also considered it bad labor relations to process meritless grievances (TD72, TD81, TD87-TD91, TD95-TD96). In August 1986, Gollin was not aware that Brennan intended to run for union office^{10/} or that Brennan had accompanied Papi and Angelo to Washington in 1985 (TD74-TD77, TD80, TD99, TD102).

22. On February 20, 1987, Brennan filed his unfair practice charge against the University and Local 888. He alleged that he was fired unjustly, reinstated without back-pay and his request to arbitrate his suspension was denied by Local 888. On February 25, 1987, Brennan was advised that the charge could not be processed unless he submitted proof of service and a clear and

^{10/} The only evidence of someone telling a Local 888 officer that Brennan intended to run for president came from Evelyn Smith. Smith, who works for dining services, told Gillus sometime around September 1986, of Brennan's intentions. Brennan had told Smith in April or May of 1986, that he intended to run (TB6). He also told Jay Daniels and a few other employees (TA49-TA50, TA53, TA69; TC40).

concise statement of the unfair practice, including the time and place of the acts alleged. Brennan amended his charge with a "Statement of Facts." I denied Local 888's Motion for Summary Judgment because I assumed as true Brennan's allegations that: (1) [he] had run for union President and lost by only 6 votes...The fact that [he] had run for union President influenced their decision;" and "(2) The union may consider [his] conduct that of a 'renegade or a troublemaker' and...therefore did not treat [him] as they would another union member" (C-3).

Brennan admitted at hearing that the first of these allegations was untrue. In August 1986, Gollin advised Brennan that his grievance would not be arbitrated. The union election did not occur until December 1986. Brennan was not nominated until November 1986. The only "running" Brennan had done by the summer of 1986 was telling some union members (he told no union officers) that he intended to run for president.^{11/} Gollin testified credibly that

11/ Brennan explained on cross-examination:

Q. In this affidavit, you state that you believe the Union failed to process to the fourth step grievance on the basis of the following unfair practice. And you say, "one, I have run for Union President and lost by only six votes. The fact that I had run for Union President influenced their decision."

Is it a fact that you had run for Union President at that time?

A. No, I had not run yet, but I was running.

Footnote Continued on Next Page

he had no knowledge of Brennan's intent to run for office when the decision not to arbitrate Brennan's grievance was made (TD74-TD76).

11/ Footnote Continued From Previous Page

Q. Nor had you lost by six votes at the time, had you?

A. Yes.

Q. Now is it a fact that your statement you made under oath in your affidavit is false, isn't it?

A. In part -- I think it was misconstrued. I think [my attorney] and I wrote that and the failure is in the last -- we only had X amount of days to rewrite this thing to get it back in.

And I think he must have misunderstood what I was saying.

Q. The answer is, yes, this is false and those are the reasons you're telling me its false?

A. Yes.

[TA-71, TA-72]

Brennan, still on cross-examination, later elaborated:

A. "...at the time I was more interested in saving my rights to this hearing than really, you know, really dissecting it, because you know, talking to a lawyer over time and time again, this thing has been delayed -- I think the initial charge was probably about two years ago.

That's why a lot of this stuff I have read because my lawyer has been handling it since I picked him and, for me to read every document -- you know -- I don't know, -- it could have been an oversight on my part.

But at the time that that was written, that was a true statement.

The election was over at that time. And, upon reading it, I would have read it as you know -- I didn't see anything wrong with it because the election was held prior to this and as I read it, I said, "Well shit, that's the truth." (TA123).

Brennan also alleged in his amendment that the union might consider him a "renegade or troublemaker" because he, "made 5 or 6 grievances in the year preceding July 14, 1986 incident...I believe that the actions stemming from the incident of July 14, 1986 was an outgrowth of those...grievances...in that, they were in effect 'evening up the score'" (C-3 p. 2). At hearing Brennan stated, however, that the revenge for his filing grievances came not from the union but from the co-workers with whom he was having trouble. The grievances involved work assignments. Shortly after he filed them, he began having trouble with Baldeswilder, Sheppard and Familio (TAll). There is no evidence that the union was involved, and Brennan did not use his grievance filing as a means of explaining his "renegade or troublemaker" stature at hearing. Rather, he testified that his participation in the trip to Washington with Papi and Angelo (the attempted succession from Council 52 -- see finding 3) labeled him a renegade to Council 52. Gollin, however, did not know that Brennan was a member of the group that went to Washington.^{12/} I find his testimony credible because he was also not aware that Idella Cooke accompanied the group that went to AFSCME headquarters (TD77, TD78). Gollin and Council 52 successfully arbitrated a grievance for Cooke, about her entitlement to a shift differential for a four-week period during the summer of 1986. The arbitration award, dated December 22, 1987, is in

^{12/} Gollin did know that Papi and Angelo lead the Washington trip.

evidence (R-1). There is no evidence in the record that the union treated those members involved in the Washington trip any differently than other union members.

ANALYSIS

Of all the union conduct about which Brennan complains, only its refusal to arbitrate his four-week suspension falls within the statute of limitations. N.J.S.A. 34:13A-5.4(c). Gollin wrote Brennan with Council 52's decision not to request arbitration on August 22, 1986. Brennan filed his charge on February 20, 1987, only days within the limitations period. Though relevant as background, facts about Local 888's conduct while processing Brennan's grievance cannot, independently, form the basis for finding an unfair practice.

In analyzing Brennan's claim that Local 888 violated its duty to fairly represent him when it refused to arbitrate his grievance, I am guided by the standard established by the United States Supreme Court in Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967):

...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 New Jersey Courts have consistently applied the Vaca standard in evaluating fair representation cases. Saginario v. Attorney General, 87 N.J. 480 (1981); 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); City of Union City, P.E.R.C. No. 82-65, 8 NJPER 98 (¶13040 1982); Middlesex County, P.E.R.C. No. 81-62, 6 NJPER 555 (¶11282 1980), aff'd App. Div. Docket No. A-1455-80 (April 1, 1982), pet. for certif. den. (6/16/82); New Jersey Turnpike Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979); AFSCME Council No. 1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978).

The United States Supreme Court has also held that establishing a claim of a breach of the duty of fair representation, "...carries with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." Amalgamated Assoc. of Street, Electric Railway and Motor Coach Employees of America v. Lockridge, 403 U.S. 274, 301, 77 LRRM 2501, 2512 (1971). In Lockridge, the Court held that a union is not liable for mere errors in judgment if they were made honestly and in good faith.

Similarly, the National Labor Relations Board has held that where a majority representative exercises its discretion in good faith, proof of mere negligence, standing alone, does not suffice to prove a breach of the duty of fair representation. Service Employees Int'l Union, Local No. 579 AFL-CIO, 229 NLRB 692, 95 LRRM 1156 (1977); Printing and Graphic Communication, Local 4, 249 NLRB No. 23, 104 LRRM 1050 (1980), reversed on other grounds 110 LRRM 2928 (1982).

Brennan alleged that his grievance was not arbitrated because he ran for union office and because the union considered him a troublemaker.

I conclude that Brennan's candidacy for union office had nothing to do with Gollin's decision not to arbitrate Brennan's grievance. Brennan did tell some union members that he intended to run for the presidency. Bruce Smith, Evelyn Smith, Jay Daniels and a few others knew. Brennan did not specifically tell Gillus, but did state to her after the step-three hearing that, "this was her last year as president" (finding 12). Gollin testified credibly, however, that he was not aware of Brennan's intentions. This is reasonable because Brennan, beyond the vague reference to Gillus, had told no union officers his intentions. More important is that Gollin decided not to arbitrate the grievance three months before the nominations and four months before the election.

Had the union wanted to take steps against Brennan, it could have prevented his nomination. The union constitution required that candidates be members in good standing for one year to be eligible for office. Though he was ineligible, the union did not try to prevent Brennan's nomination. Gollin was aware of Brennan's ineligibility but made no attempt to prevent his nomination, explaining that it was a local matter and Council 52 would not interfere. Brennan was nominated and lost in a close election to Gillus. Less than two months after the election, Brennan filed his unfair practice charge.

Brennan also alleged that Gollin's decision may have been influenced by Brennan's reputation as a "renegade or troublemaker." In his amended charge, Brennan alleges his reputation was earned by filing several grievances in 1985 about work assignments Hylemon gave to the employees that Brennan later had so much trouble with. At hearing, however, Brennan explained that his involvement in the trip to Washington with Papi and Angelo (the attempted succession from Council 52) gave rise to his reputation.

Accompanying Papi and Angelo on this trip to Washington were six or seven Local 888 members. Gollin testified credibly that he was aware only that Papi and Angelo lead the trip. He did not know that Brennan went with them. Nor was he aware that Idella Cooke made the trip. Gollin and Local 888 successfully arbitrated a grievance for Cooke, obtaining a shift differential for her for a four-week period during the summer of 1986. The arbitration award was issued in December 1987. It is therefore apparent that the union was not making discriminatory decisions about processing the grievances of members who made the Washington trip during the time between Brennan's termination, reinstatement and unfair practice filing.

Brennan's other explanation for his troublemaker image -- the grievances which apparently gave rise to his terrible relationship with his co-workers -- requires close scrutiny. Though neither specifically alleged by Brennan nor mentioned in his brief, the record requires that I consider that the union may have been

influenced by Brennan's attitude towards his co-workers (who are also represented by Local 888) and union officers.

Brennan has an extensive record -- dating to 1984, growing in 1985 and culminating in the July 14, 1986 incident -- of altercations with fellow employees. At least one of them, Familio, complained to the union (Gillus) about Brennan's behavior. Brennan insulted Gillus, who represented him at Step-2: "Make all your mistakes now, because as of the next election, you're out" (finding 12). And he started an argument with Baker before the step-3 hearing, rather than trying to help her prepare his case (finding 11). This evidence, standing alone, is enough to support an inference that the union could have decided not to arbitrate Brennan's suspension simply because he was abrasive and uncooperative -- or as Brennan puts it, "a troublemaker."^{13/} This

^{13/} Brennan argues in his brief that I should assume that Gillus and Baker are culpable because they did not testify and refute his allegations. He alleged in his amendment that Seymour should have been called as a witness at his termination hearings. He also emphasized that neither Baker nor Gillus obtained the tape, photos and lock from his former attorney to introduce as evidence.

Although inferences may be drawn from a witness' failure to testify, Brennan bears the burden of proving his allegations. Also, Baker and Gillus' involvement in Brennan's grievance occurred outside the limitations period.

Even if his allegations were timely, I find no fault in not calling Seymour as a witness at Brennan's termination hearings. Though Gillus did not arrange the meeting, she talked to Seymour the day of the Familio incident. I relied

inference, however, is refuted by Gollin's testimony about his reasons for not arbitrating the grievance. Gollin reasoned that, given Brennan's history of altercations and a review of the third-step record, the grievance lacked merit and the reduction of discipline from a termination to a suspension was reasonable. Gollin also reasoned that it was bad labor relations to process meritless grievances.

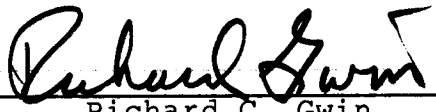
I do not rule on Gollin's judgment. Lockridge. I conclude only that Brennan failed to prove that Gollin was motivated by bad faith, that he discriminated against Brennan or that his decision was arbitrary. There is no evidence that the union arbitrated grievances of employees in situations similar to Brennan's. Nor is there any evidence of conflict between Brennan and Gollin or that Gollin based his decision on anything but his review of the merits of Brennan's case.

13/ Footnote Continued From Previous Page

heavily on Seymour's testimony in finding that Brennan threatened Familio. Seymour's testimony was that Brennan was upset and mean and that, when interviewed by Hylemon and Diller, Seymour told them Brennan threatened Familio. Seymour's testimony did not help Brennan's case.

Brennan also complained that Gillus and Baker did not produce the tape of his interview with Diller and Hylemon, and his photos at his hearings. Brennan himself was unable to contact his former attorney and obtain the evidence. It is true that the record does not show if Baker and Gillus tried to obtain the evidence. A review of the Mowry's step-three decision reinstating Brennan, reveals, however, that the information available from that evidence was brought out by Brennan's testimony.

Accordingly, I recommend that the Commission dismiss the Complaint.


Richard C. Gwin
Hearing Examiner

DATED: September 9, 1988
Trenton, New Jersey