P.E.R.C. NO. 89-29

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEW JERSEY TRANSIT
BUS OPERATIONS, INC.,

Respondent,

-and- Docket No. CO-86-278-173

NEW JERSEY STATE COUNCIL,
AMALGAMATED TRANSIT UNION,
AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that New Jersey Transit Bus Operations, Inc. violated the New Jersey Employer-Employee Relations Act when it refused to meet at any second or third step grievance hearings if the grievant was not present. The Complaint was based on an unfair practice charge filed by the New Jersey State Council, Amalgamated Transit Union, AFL-CIO.

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NEW JERSEY STATE COUNCIL,
AMALGAMATED TRANSIT UNION,
AFL-CIO,

Charging Party.

Appearances:

For the Respondent, Cary Edwards, Attorney General (John F. Ward, Deputy Attorney General)

For the Charging Party, Weitzman and Rich, Esqs. (Richard P. Weitzman, of counsel)

DECISION AND ORDER

On March 31, 1986, the New Jersey State Council, Amalgamated Transit Union, AFL-CIO ("ATU") filed an unfair practice charge against New Jersey Transit Bus Operations, Inc. ("NJT Bus"). The charge alleges that NJT Bus violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (2) and (5),[1/] when it refused

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1/ 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; (2) Dominating or interfering with the formation, existence or administration of

Footnote Continued on Next Page

to participate in second and third step grievance hearings and refused to process grievances filed by Divisions 820 and 825.

On May 2, 1986, a Complaint and Notice of Hearing issued. On May 23, NJT Bus filed its Answer asserting a contractual defense.

On February 25 and June 23, 1987, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses and introduced exhibits. They argued orally and filed post-hearing briefs on November 9, 1987.

On December 3, 1987, the Hearing Examiner recommended the Complaint's dismissal. H.E. No. 88-24, 14 NJPER ___ (¶_____ 1988). He concluded that NJT Bus had a contractual right to refuse to participate in second and third step hearings if it determined a grievant's presence was necessary; refusals in turn were subject to an arbitrator's review. He relied, in part, on arbitration awards interpreting the parties' contract. He also found that where a contract provides for a self-executing grievance procedure ending in binding arbitration, it is not an unfair practice for the employer to fail to act at an intermediate step of the grievance procedure.

On December 21, 1987, ATU filed exceptions. It claims the Hearing Examiner erred when he: (1) found that James Vergari most

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1/ Footnote Continued From Previous Page

any employee organization; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

often handles second steps; (2) credited Rossi's testimony that neither Vergari nor Corrigan attempted to dominate or interfere with ATU's administration; (3) placed any significance on an award (R-2) that found that either party has a right to decide if a grievant's presence is "necessary"; (4) found that "each party has the [contractual] right to determine, initially, whether a grievant's presence is necessary"; (5) relied on an arbitrator's ruling (J-4) when deciding whether the union must be put to the inconvenience, delay and expense of proceeding to arbitration on grievances where there allegedly is no basis for a claim that a "named grievant" is necessary at second and third step levels; (6) found that NJT Bus had fulfilled its negotiations obligation; (7) found that a self-executing grievance procedure relieves NJT Bus of its obligations, under both private and public sector labor law, to process grievances, and (8) stated that to decide otherwise, the Commission would have to interpret the contract to make it different or better. It also attached its post-hearing brief and requested oral argument.2/

On December 28, 1987, NJT Bus filed the same brief it had filed with the Hearing Examiner.

We have reviewed the record. The Hearing Examiner's finding of fact (pp. 3-13) are accurate. We incorporate them. We add that NJT Bus would not give ATU the opportunity to demonstrate

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2/ We deny that request.

that a union representative could provide all information necessary to process any particular grievance. NJT Bus maintains that the grievant must always be present at the second and third step of the grievance procedure (TB4-TB5). George Corrigan, Manager of Labor Relations for NJT Bus, could not conceive that a grievant's presence would ever not be necessary (TB56-TB57; TB69). We modify finding no. 2 to indicate that Vergari usually holds third step hearings (TB75).

A public employer must negotiate policies setting forth grievance and disciplinary review procedures. N.J.S.A. 34:13A-5.3. It may not refuse to process grievances presented by a majority representative pursuant to those procedures. N.J.S.A. 34:13A-5.4(a)(5). But the employer may invoke contractual waivers of the majority representative's right to present grievances.[3/] A good faith dispute over the interpretation of a contractual waiver is not an unfair practice. Repudiation of a grievance procedure is. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

ATU has a statutory right to process grievances without employer interference or control. N.J.S.A. 34:13A-5.4(a)(1), (2) and (5). The parties agreed to a grievance procedure providing that:

> An employees' grievance shall cease to exist in the event that the Union or the grievant, or both

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3/ Time limits and requirements that grievances be in writing are two such waivers.

> if the attendance of both is necessary, are not available within such...period or within 5 days thereafter...unless for emergent reasons.

The clause has been interpreted by many arbitrators. None has found that the clause gives NJT Bus blanket authority to refuse to process grievances if a grievant is not present. Arbitrator Haber, for example, stated:

> The contract is silent, however, with respect to the basis or the authority for the determination of such necessity and I find none for concluding that it lies exclusively with the Company or that, given the context of the language, necessity may be stretched into a blanket requirement. Rather, it must be established on a case by case basis and thus, in each instance in which the Company raises the issue of grievant appearance at the 3rd step, and the Union objects, a dispute subject to arbitration, arises, with the burden on the Company to establish the necessity of the grievant's appearance at the third step.

Arbitrator Kerrison concurred. He concluded:

> 1. The third step of the contractual grievance procedure quoted above neither requires that a grievant be present for hearing on that step nor spells out when a grievant's presence is necessary.[4/]

We find that the clause does not give NJT Bus the unilateral right to require a grievant's presence at every proceeding. Neither the clause's language nor the arbitrators' interpretation give NJT Bus that blanket right. We will defer to arbitration disputes over the clause's application to a particular grievance proceeding. See, e.g., East Windsor Bd. of Ed., E.D. No.

4/ Two other arbitrators commented on the importance of each step being held, but did not decide disputes over a grievant's presence.

76-6, 1 NJPER 59 (1975); Human Services; cf. Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J 122, 138 (1978)(requiring individual to put self on line inherently contrary to concept of collectivity). The Hearing Examiner's analysis is correct in that regard. But, the blanket refusal to comply with the procedure is another matter. Contrast City of Trenton, D.U.P. No. 87-7, 13 NJPER 99 (¶18044 1986)(business administrator allegedly rubber-stamped earlier grievance denials); Bor. of Mountainside, D.U.P. No. 85-17, 11 NJPER 6 (¶16003 1984)(no answer to one grievance); Tp. of Rockaway, D.U.P. No. 83-5, 8 NJPER 644 (¶13309 1982)(no answer to one grievance); Rutgers Univ., D.U.P. No. 82-28, 8 NJPER 237 (¶13101 1982)(alleged refusal to process certain grievances); Tp. of Millburn, D.U.P. No. 81-24, 7 NJPER 370 (¶12168 1981)(alleged refusal to process one grievance); Essex Cty. Voc. School Bd. of Ed., D.U.P. No. 88-11, 4 NJPER 222 (¶4112 1978)(no answer to one grievance); City of Pleasantville, D.U.P. No. 77-2, 2 NJPER 372 (1976)(no answer to one grievance); Englewood Bd. of Ed., E.D. No. 76-34, 2 NJPER 175 (1975)(refusal to participate in arbitration).

Here, NJT Bus has declared that it will refuse to meet at any second or third step hearings if the grievant is not present. It maintains that position despite arbitral opinions rejecting it regardless of whether a grievant could add anything to a particular proceeding.[5/] This blanket policy, as opposed to a case-by-case

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5/ For example, the "part-timers" grievance involved the right of NJT Bus to use part-timers to do certain work. One named grievant appeared at the second step but did not contribute anything. Vergari refused to meet at the third step without the two grievants who were working at the time of the meeting.

determination based on the circumstances of each grievance, is a repudiation of the negotiated grievance procedure and a violation of the duty to process grievances.

In the absence of exceptions, we dismiss the subsection 5.4(a)(2) allegation.

ORDER

New Jersey Transit Bus Operations, Inc. is ordered to:

A. Cease and desist from

1. Maintaining a blanket policy of refusing to process all second and third step grievances unless the named grievant is present.

2. Refusing to process grievances presented by the Amalgamated Transit Union, AFL-CIO.

B. Take the following affirmative action:

1. Process grievances in accordance with the parties' negotiated procedure.

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

The remaining allegations of the Complaint are dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: Trenton, New Jersey
September 29, 1988
ISSUED: September 30, 1988

H.E. NO. 88-24

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

In the Matter of

N.J. TRANSIT BUS OPERATIONS, INC.,

Respondent,

-and- Docket No. CO-86-278-173

N.J. STATE COUNCIL, AMALGAMATED
TRANSIT UNION, AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that N.J. Transit Bus Operations did not violate the New Jersey Employer-Employee Relations Act when it would not hold second and/or third step grievance hearings unless a named grievant was present. Pursuant to language in the parties collective agreement the Company was entitled to take that position, and the Company did not prevent the matter from proceeding to binding arbitration for a final determination.

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. 88-24

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

In the Matter of

N.J. TRANSIT BUS OPERATIONS, INC.,

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-and- Docket No. CO-86-278-173

N.J. STATE COUNCIL, AMALGAMATED
TRANSIT UNION, AFL-CIO,

Charging Party.

Appearances:

For the Respondent, W. Cary Edwards, Attorney General
(John F. Ward, DAG of counsel)

For the Charging Party, Weitzman and Rich, Esqs.
(Richard P. Weitzman, of counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on March 31, 1986, by the New Jersey State Council, Amalgamated Transit Union, AFL-CIO ("ATU") alleging that New Jersey Transit Bus Operations, Inc. ("Company") violated subsections 5.4(a)(1), (2) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

("Act").[1/] The ATU alleged that the Company violated the Act by refusing to schedule or conduct second and third step hearings as provided for in the parties' grievance procedure. The ATU further alleged that the Company had thus refused to process grievances filed by Divisions 820 and 825. The ATU explained that the issue arose as a result of language in steps two and three of the parties' grievance procedure which provides that a grievance shall cease to exist if the attendance of the grievant at the hearing is "necessary," and the grievant is not made available within the required time period. The ATU argued that the above contract language did not mean that the Company could require a named grievant to be present at second and/or third step hearings.

A Complaint and Notice of Hearing was issued on May 2, 1986. The Company filed an Answer on May 23, 1986, denying that it violated the Act. The Company asserted a contractual defense and alleged that it has processed grievances and acted within the terms of the parties' agreement. The Company argued that an arbitrator should decide whether a named grievant should be present at the second and third steps of a particular grievance.

1/ 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; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

Hearings were held in this matter on February 25 and June 23, 1987.[2/] Both parties filed post-hearing briefs on November 9, 1987.

Based upon the entire record, I make the following

FINDINGS OF FACT

1. The Company is a public employer and the ATU is an employee representative within the meaning of the Act.[3/]

2. The Company and ATU are parties to a collective agreement (J-1) which contains a lengthy grievance procedure clause. The clause includes four steps. The first step is before an employee's supervisor or department head; the second step is before a division manager or department head, most often James Vergari, Assistant Manager of Labor Relations; the third step is before the Company's general manager, most often George Corrigan, Manager of Labor Relations; and the fourth step is a two part

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2/ As set forth in the Complaint and Notice of Hearing, this case was originally scheduled for hearing on July 15 and 16, 1986. The ATU requested a postponement due to the illness of a witness, and the matter was eventually rescheduled for December 1986. In December, the ATU requested that the hearing be rescheduled for February 1987 which resulted in the February 25th hearing. Due to the illness of the Company's attorney, the second day of hearing was delayed until June 1987.

The transcripts from the two hearing days will be referred to as TA and TB respectively.

3/ In stipulating that the Company was an employer within the Commission's jurisdiction, the ATU maintained a position that it has taken in other cases before the Commission, that Federal labor law, not New Jersey public sector labor law, should apply in cases involving the Company (TA6-TA7).

arbitration. The first part includes only Company and ATU "arbitrators" who try to informally resolve the grievance; if they cannot, a third, impartial, arbitrator is selected, a formal arbitration is held and a decision issued.

The grievance clause contains the following language in both the second and third steps of the grievance procedure.

> The second step hearing shall be held within 48 hours (excluding Saturdays, Sundays, and holidays) and if a Company representative is not available within that period, the Union may deem the second step waived. An employees' grievance shall cease to exist in the event that the Union or the grievant, or both if the attendance of both is necessary, are not available within such 48-hour period or within 5 days thereafter (excluding Saturdays, Sundays, and holidays), unless for emergent reasons.
>
> The third step hearing shall be held within 96 hours (excluding Saturdays, Sundays, and holidays) after the written request for such third step hearing and if a Company representative is not available within that period, the Union may deem the third step waived. An employee's grievance shall cease to exist in the event that the Union or the grievant, or both if the attendance of both is necessary, are not available within such 96-hour period or within 5 days thereafter (excluding Saturdays, Sundays, and holidays), unless for emergent reasons.

3. The Charge alleges that the Company refused to process two grievances filed by ATU Division 820, and two grievances by Division 825 because it would not hold second and third step grievance hearings without a named grievant. The Charge also alleged that the Company failed to respond to requests by Division 825 to hold second and third step hearings in four other grievances.

One grievance by Division 820 was the "part-timers" grievance involving employees Hutchins and Connors. Division 820 President Louis Sneyers presented the grievants at the first step and presented one grievant at the second step (TA41-TA42, TA46; CP-7). After the second step, the parties agreed to the scheduling of a third step hearing (CP-1, CP-2), but Sneyers presented neither grievant at the third step (TA46). Sneyers testified that the grievants added nothing to the hearing (TA42). When Sneyers appeared at the third step hearing(s) without the grievants, James Vergari, Assistant Manager of Labor Relations, denied the grievance(s) because the grievant(s) was(were) not produced (CP-3, CP-4). Sneyers had decided that it was not necessary to bring the grievants to the third step (TA69-TA70), but he did not know whether the Company had a need for them at that step (TA70).

Sneyers then requested a fourth step (the informal arbitration) (TA51), but Labor Relations Manager, George Corrigan, indicated in CP-5 that the request for arbitration would be held in abeyance until the third step hearing was held. Sneyers responded in CP-6 that Vergari had denied the grievance at the third step. Corrigan in CP-7 responded to CP-6 indicating that the Company felt that the grievant(s) appearance was necessary and that he (Corrigan) now took the position that the grievance(s) ceased to exist. Sneyers then moved that grievance to binding arbitration (TA55).

The second grievance filed by Division 820 involved safety shoes for employee Michelson and others. Sneyers presented

Michelson at both the first and second steps of the grievance procedure (TA59). A third step hearing was held but Vergari denied the grievance because Michelson did not appear (CP-10). Sneyers again had decided on behalf of the Union that it was not necessary to bring the grievant(s) to the hearing, but he also knew that Vergari never said that the Company thought it was unnecessary to bring the grievant(s) to that hearing. Sneyers requested informal arbitration (CP-8), but Corrigan in CP-11 informed Sneyers that the request for arbitration would be held in abeyance until the third step hearing was held. Sneyers then moved that grievance to the binding arbitration step, but it was resolved prior to arbitration (TA65).

The two main grievances filed by Division 825 involved cushion time and charter pay.[4/] Louis Rossi, President of Division 825, explained that the cushion time grievance involved operator Barino and at least 35 other operators (TA143-TA146). That grievance involved all part-time operators at Rossi's location and he took operator Barino to the first step hearing (TA147). The grievance was denied at that step and Rossi proceeded to the second step before department head O'Malley without Barino. Rossi had decided that Barino's presence at that step was unnecessary; he

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4/ Cushion time refers to a period of time a bus driver is being driven to the starting point of his particular run (TA144-TA145). Charter pay refers to the amount of hourly pay a driver receives for driving a bus that was chartered as opposed to a regular run.

thought Barino could add nothing to the grievance (TA148, TA183). Rossi knew, however, that O'Malley thought that Barino's presence was necessary (TA184). O'Malley refused to hold the second step grievance hearing because a named grievant was not present (TA148-TA149).

Rossi then requested a third step hearing before Vergari, but Vergari refused to hold a third step hearing because Rossi had not produced a grievant at the second step hearing (TA149). Rossi then processed the grievance to binding arbitration (TA150).

The charter pay grievance involved employee Gardner and four or five other operators (TA151). The issue involved whether the employees should receive charter pay or the regular "line" pay for particular work. The facts of the grievance were not in dispute (TA151). Rossi presented Gardner at the first and second step hearings (TA152-TA153). When the grievance was denied Rossi scheduled a third step hearing with Vergari. Rossi decided that Gardner was not needed at the third step and he (Rossi) appeared without a named grievant (TA153). Vergari told Rossi that without a named grievant there was no grievance and he did not hold the hearing (TA154-TA155, TA196).

Rossi requested a fourth step hearing on that grievance before Corrigan, but Corrigan explained that since there was no third step there could be no fourth step (TA156). That grievance then proceeded to binding arbitration (TA156).

The four other grievances filed by Division 825 were separate grievances involving employees Roach, Murphy, Serrano and McClellan respectively (TA158). Those grievances were processed through the first step and denied. Pursuant to Rossi's request, O'Malley then scheduled a date for a second step hearing in those and other grievances (TA159-TA161). On the day of those hearings the four above grievants either were late or could not appear and Rossi sought to reschedule those hearings (TA161-TA162), but O'Malley would not agree to reschedule those grievances (TA162).

O'Malley usually agrees to reschedule such hearings (TA161), but he gave no reason to Rossi for not rescheduling the hearings in those instances (TA162). The record shows, however that those particular second step grievances had already been rescheduled once or twice (TA166-TA167).

Rossi then requested a third step hearing for each of those grievances, but Vergari would not hold third step grievances because the second step grievances were not held (TA162). When Vergari refused the third step hearings the ATU filed the instant Charge (TA163).[5/]

5/ There was also evidence that Anthony Corio, President of Division 822, attempted to process a grievance at the third and fourth steps without a named grievant and that the particular grievance was denied, but the grievance proceeded to binding arbitration (TA129-TA131). That item was not alleged on the face of the Charge, however, and will not be considered as an additional allegation.

4. While ATU Divisions 820, 822, 823 and 825 have not always produced grievants at the second and third steps of the grievance procedure, Divisions 819 (the largest Division) and 880 have nearly always produced the grievants at those steps of the grievance procedure (TB12-TB14).

When grievants have been produced at second and/or third steps of the grievance procedure they have been questioned by Vergari and/or Corrigan (TA82, TA170), and where grievants have been produced at those steps both Vergari and Corrigan have often resolved grievances in the ATU's favor (TA82-TA84, TA112-TA116, TA186-TA188, TB5, TB25). In some grievances only the grievant can provide the information requested in the third step hearing (TA86).

Finally, Veto Forlenza, President of Division 823, testified that he has seen no indication of anti-union animus by Vergari or Corrigan (TA114-TA115), and Rossi testified that neither Vergari nor Corrigan have attempted to dominate or interfere with the administration of the ATU (TA190-TA191). I credit that part of their testimony since there was no evidence to contradict them.

5. There have been four binding arbitration awards issued interpreting some or all of the relevant language in the second and third steps of the grievance procedure. The first award (J-2) was issued on September 10, 1984 by Arbitrator Weitzman. The grievance concerned holiday pay for employee LoFaro. It proceeded through the second step and the ATU sought a third step hearing at a time of day more convenient to the employee. The Company scheduled the third

step at a time it thought was appropriate, but the ATU disagreed and no third step hearing was held. Pursuant to the third step language in the grievance procedure the Company argued that the ATU did not make itself available for the third step and it therefore concluded that the grievance ceased to exist. The matter proceeded to binding arbitration and the Company first argued that the grievance was not arbitrable because the ATU did not appear at the third step.

Arbitrator Weitzman held that the grievance was arbitrable because the issue of when to hold third step hearings had not previously arisen and there was a legitimate disagreement over the meaning of "mutually satisfactory time." She held that:

> By refusing to participate in a third step hearing, the Union simply lost the opportunity to have its grievance heard and adjusted short of arbitration. Management had ruled negatively on the grievance at the first and second steps. The Union's refusal to meet a Step III, in effect, meant management's decision would stand unless and until the Union tried to achieve a favorable result in arbitration.

Although she found the grievance to be arbitrable, Arbitrator Weitzman cautioned the ATU and held:

> This holding should not be interpreted, however, as a general condonation of a party's unilateral elimination of a step in the grievance procedure. In other circumstances, a different conclusion might be warranted.

The second arbitration award (J-3) was issued on June 3, 1985 by Arbitrator Kerrison. The grievance concerned the issuance of disciplinary notices to two employees. In addition to a dispute over the merits of the grievance, however, the Company argued that the grievance was not arbitrable because the grievants were not

presented at the third step. The Company argued that the grievants' appearance at the third step was essential, but the ATU argued that the grievants' appearance was not a prerequisite to a third step hearing. The matter proceeded to binding arbitration and the arbitrator held that the grievance was arbitrable. The pertinent part of his decision is as follows:

> 1. The third step of the contractual grievance procedure quoted above neither requires that a grievant be present for hearing on that step nor spells out when a grievant's presence is necessary.
>
> 2. Company testimony admitted that grievants are not always present at third step hearings.
>
> 3. Second step hearing into the instant matter was conducted in the absence of the involved grievants.
>
> From careful study of exhibits submitted during the course of the hearing, and from his observations, the chairman finds the matter to be arbitrable and turns to the merits.

The third arbitration award (J-4) was issued on November 4, 1985 by Arbitrator Haber. The grievance concerned the discipline of employee Campbell. Campbell appeared at the first and second step hearings but not at the scheduled third step hearing. The Company declined to hold a third step hearing without the grievant and the ATU moved for informal arbitration. The Company denied informal arbitration until the third step hearing was held. The ATU then moved for binding arbitration. Arbitrator Haber noted that similar issues of procedural arbitrability were raised in J-2 and J-3, and he concluded that it was not necessary to present the grievance in this matter. But Arbitrator Haber also concluded that when an issue

is raised regarding the necessity of presenting a named grievant at a third step hearing it should be decided on a case by case basis by the arbitrator before whom the grievance is brought:

> The contract between the parties requires the presence of the grievant at the 3rd step only "when necessary." The contract is silent, however, with respect to the basis or the authority for the determination of such necessity and I find none for concluding that it lies exclusively with the Company or that, given the context of the language, necessity may be stretched into a blanket requirement. Rather, it must be established on a case by case basis and thus, in each instance in which the Company raises the issue of grievant appearance at the 3rd step, and the Union objects, a dispute subject to arbitration, arises, with the burden on the Company to establish the necessity of the grievant's appearance at the third step. In each such dispute that arises, the resolution of the question of the grievant's appearance, within the context of that substantive grievance to which it relates, will lie with the arbitrator before whom the matter is brought.

The fourth arbitration award (R-2) was issued on May 30, 1986 by Arbitrator Mitrani. The grievance involved employee Lumford. After the first grievance hearing a second step hearing was scheduled and Lumford was available but the ATU Division President did not appear and attempted to waive the second step hearing and move to a third step. The Company, however, was unwilling to hold a third step until the second step was held. The matter was eventually moved to binding arbitration and the Company raised a threshold issue of arbitrability since the second and third step grievances were not held. The Arbitrator concluded that waiving a second and/or third step hearing should normally not be condoned, but he concluded that there were mitigating circumstances

in that matter which led him to conclude that the grievance was arbitrable. The pertinent language in the award is as follows:

> ... given the nature of the grievance procedure, it is important that a grievant be present at the second and third steps if either the Company or Union think that the grievant's presence is necessary. The third step has the following language which is the same as in the second step except for the reference to the 96 hour period.
>
> > An employee's grievance shall cease to exist in the event that the Union or the grievant, or both if the attendance of both is necessary, are not available within such 96 hour period or within 5 days thereafter (excluding Saturdays, Sundays and holidays), unless for emergent reasons.
>
> This sentence puts an extra importance on conducting the various steps of the grievance procedure so that the grievant can be available if either side thinks it is "necessary." Both parties have the obligation to make sure that the second and third steps of the grievance procedure are held. After October 7, 1985, the Company tried to impress upon Coiro the importance of holding these steps of the grievance procedure. It is the Arbitrator's opinion that these steps should have been held. But the Arbitrator also believes that there were mitigating factors on October 7, 1985 and Coiro was acting under difficult pressure with the grievant waiting around for a number of hours. Coiro wanted to service the grievant on October 7, 1985. But it was Moreno's postponement that really caused the problem. There is no evidence that Bertan willfully and deliberately wanted to stall the hearing. After all, he was available at 10:00 A.M. on October 7, 1985 and Bertan also offered another date for the hearing. However, as stated before, the Arbitrator is willing to give consideration to the mitigating factors in this case and rule that the grievance is arbitrable. But the Arbitrator also wishes to go on record that waiving a second or third step of a grievance procedure is a very serious matter which should never be condoned unless there is a clear and willful violation of the language of the second and third steps of the grievance procedure.

Analysis

The Company did not violate the Act by deciding, during the processing of several grievances, that grievants needed to be present at second and/or third steps of the grievance procedure.

The 5.4(a)(1) and (5) Allegations

At hearing and in its post-hearing brief the ATU alleged that the Company violated the Act by insisting that grievants be presented at second and third steps of the grievance procedure, and by refusing to process grievances. Those allegations are based upon the ATU's argument that the Company acted as if it had the sole right to determine whether it was necessary to present grievants at second and third steps of the grievance procedure. The ATU further argued that it has the right to decide how to present its grievances, and in its post-hearing brief (p. 19) it argued that it was more reasonable for it to be the entity to determine whether a grievant's presence at grievance hearings was necessary. The ATU's allegations and arguments are without merit.

I agree with the ATU that it has the right to decide how to present its grievances, i.e., which witnesses to call and what questions to ask, and that the Company does not have the sole right to determine whether a grievant's presence at grievance hearings is necessary. But neither does the ATU have the sole right to determine whether a grievant's presence at a grievance hearing is necessary.

The issue here involves the interpretation of the language in the second and third steps of the parties' grievance procedure where it says:

> ...an employee's grievance shall cease to exist in the event that the Union or the grievant or both if the attendance of both is necessary are not available....

There is no language in J-1 explaining how it will be determined or who will decide whether it is "necessary" for a grievant to be present at a grievance hearing. It is only logical to conclude, therefore, that each party has the right to determine, initially, whether a grievant's presence is necessary. When the parties agree on that determination no problem arises. But where the parties disagree as to the necessity of a grievant's presence at a grievance hearing, it should be resolved by an impartial arbitrator in binding arbitration.

I agree with the Arbitrator's holding in J-4 that where the Company raises the grievant's presence (or lack thereof) at the hearing it must be decided on a case-by-case basis whether the grievant's presence was necessary. I further agree with that Arbitrator that where the Company raises that issue, the Company has the burden to establish the necessity of the grievant's presence, and the arbitrator should make the final determination.

The ATU's argument that the Company could not insist upon a grievant's presence at a grievance hearing fails to consider the Company's contractual right to decide that a grievant's presence is necessary. In fact, the ATU exercised its right to insist that a grievant's presence at grievance hearings was unnecessary. Once the Company decided that a grievant's presence was necessary--and a grievant was not produced at hearing--then pursuant to the contract language the Company had the right to conclude that the grievance ceased to exist. At that point if the Company's position was

correct, it was under no contractual obligation to process the original grievance to a third step or to the informal arbitration. Of course, the ATU had the right to disagree with the Company's decision and force the matter to binding arbitration for a final determination.

The Company's defense is that it complied with the parties' collective agreement. The Commission has held on several occasions that it is not a violation of the Act, and a public employer meets its negotiations obligation, when it acts pursuant to the language in its collective agreement. Pascak Valley Bd. of Ed., P.E.R.C. No. 81-61, 6 NJPER 554, 555 (¶11280 1980); Randolph Twp. Bd. of Ed., P.E.R.C. No. 83-41, 8 NJPER 600 (¶13282 1982); Bound Brook Bd. of Ed., P.E.R.C. No. 83-11, 8 NJPER 439 (¶13207 1982). In this case the Company has acted pursuant to its collective agreement, and did not repudiate the grievance procedure of that agreement. Whether the Company was correct in deciding that the presence of the grievants was necessary, and in deciding that the grievances ceased to exist, is an issue for an arbitrator to decide and not this Commission. State of N.J. (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984) (Human Services).

An employer will not be found to have refused to negotiate in good faith simply because its interpretation of a contract clause may ultimately be proven wrong, as long as the contract provides specific grievance procedures for resolving contract disputes and the employer is willing to abide by those procedures. See Atlantic

City, H.E. No. 86-36, 12 NJPER 160 (¶17064 1986), aff'd P.E.R.C. No. 86-121, 12 NJPER 376 (¶17146 1986).

It is important here to distinguish between the Company's contractual right to argue that due to the ATU's failure to present a grievant a grievance ceased to exist, and its legal obligation to process grievances. By operation of the contract language, the Company could not be forced to hold second or third step hearings when a grievant was not present and the Company thought his/her presence was necessary. At that point, the Company was entitled to argue that the grievance ceased to exist, pending a binding arbitration decision. The Company met its legal obligation by agreeing to and not impeding the ATU's ability to move the grievances to binding arbitration for a final determination.

Where a contract provides for a self-executing grievance procedure ending in binding arbitration, it is not an unfair practice for the employer to fail to act at an intermediate step of the grievance procedure. Manchester Reg. H.S. Bd. Ed., P.E.R.C. No. 88-17, 13 NJPER 715 (¶18267 1987); City of Northfield, P.E.R.C. No. 82-95, 8 NJPER 277 (¶13123 1982); N.J. Transit Bus Operations, D.U.P. No. 87-14, 13 NJPER 383 (¶18154 1987); City of Trenton, D.U.P. No. 87-7, 13 NJPER 99 (¶18044 1986).

The ATU's consistent argument in its post-hearing brief that the Company did not have the right to insist on a grievant's presence at grievance hearings is indicative of the ATU's frustration over the language in the second and third steps of the

grievance procedure. That language gives both parties the same right to determine the necessity of presenting a grievant at the second and third steps. If the parties cannot agree, an arbitrator, not the Commission, must make the final determination. Human Services. Although such arbitrations cost the ATU (and the Company) time and money, the ATU should take that into consideration when it decides not to present named grievants at the second and third steps. Unless the parties change the relevant contract language, the ATU must live with it on an equal basis with the Company. The Commission will not give a meaning to that contract language which is at variance with the language in the agreement, Casriel v. King, 2 N.J. 45 (1949), and which is at variance with three arbitrators, selected by these parties, who held that an arbitrator should make the ultimate determination. The Commission will not interpret the contract to make it a different or a better contract than the parties have entered into. Washington Construction Co., Inc. v. Spinella, 8 N.J. 212, 217 (1951).

In this case the Company had proper cause to conclude that the ATU's grievances ceased to exist. It is not for me or the Commission to decide whether it was necessary for the grievants involved in the instant grievances to appear at the respective grievance hearings. Human Services. It was only appropriate for me to consider whether the Company's actions were unlawful or unlawfully motivated, but I find that they were protected by the parties' collective agreement and were absent any unlawful

motivation. Thus the 5.4(a)(1) and (5) allegations should be dismissed.

The 5.4(a)(2) Allegation

Certain ATU witnesses testified that there was no animus shown by Vergari and Corrigan in the manner in which they processed the grievances, and that neither Vergari nor Corrigan interfered with ATU rights. In addition, none of the relevant facts show that the Company's actions interfered with the ATU's administration of the Divisions involved in this proceeding. Therefore, the 5.4(a)(2) allegation should be dismissed.

Based upon the above analysis I make the following:

Recommended Order

I recommend that the Complaint be dismissed.

Arnold H. Zudick
Hearing Examiner

DATED: December 3, 1987
Trenton, New Jersey