

P.E.R.C. NO. 89-26

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNCIL OF NEW JERSEY STATE COLLEGE  
LOCALS, NJSFT/AFT, AFL-CIO, LOCAL  
NO. 2364,

Respondent,

-and-

Docket No. CI-H-88-30

THOMAS M. PATRICK,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated to him by the full Commission, dismisses a Complaint based on an unfair practice charge filed by Thomas M. Patrick against Council of New Jersey State College Locals, NJSFT/AFT, AFL-CIO, Local No. 2364. The charge alleges that AFT violated the New Jersey Employer-Employee Relations Act when it caused Patrick to be denied tenure and refused to arbitrate his grievance contesting that denial. The Chairman, in agreement with a Commission Hearing Examiner and in the absence of exceptions, finds that the Complaint should be dismissed.

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THOMAS M. PATRICK,

Charging Party.

Appearances:

For the Respondent, Dwyer & Canellis, Esqs.  
(Paul J. Burns, Esq.)

For the Charging Party, Thomas M. Patrick, pro se

DECISION AND ORDER

On December 2, 1987, Thomas M. Patrick ("charging party") filed an unfair practice charge against the Council of New Jersey State College Locals, NJSFT/AFT, AFL-CIO, Local No. 2364 ("AFT"). The charge alleges AFT violated subsection 5.4(b)(1)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it caused the charging party to be denied tenure and refused to arbitrate his grievance contesting that denial.

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<sup>1/</sup> This subsection prohibits employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act."

On January 25, 1988, a Complaint and Notice of Hearing issued. On February 10, AFT filed its Answer denying it violated the Act. It claims it carefully considered the facts, findings and possibilities of success in deciding not to arbitrate the charging party's grievance. It denies all allegations that it caused the charging party not to be promoted.

On March 16, April 12 and 22, 1988, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs by June 7, 1988.

On June 30, 1988, the Hearing Examiner recommended the Complaint's dismissal. H.E. No. 88-65, 14 NJPER \_\_\_\_ (¶ 1988). He found that AFT did not breach its duty to represent the charging party fairly.

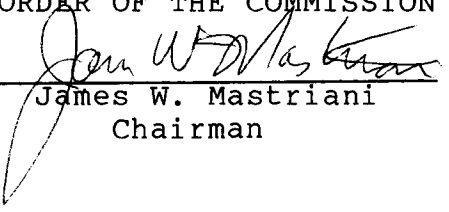
The Hearing Examiner served his report on the parties and informed them that exceptions were due on or before July 14, 1988. Neither party filed exceptions.

I have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-13) are accurate. I adopt and incorporate them. Acting pursuant to authority delegated to me by the full Commission in the absence of exceptions, I agree that the Complaint should be dismissed.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

  
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James W. Mastriani  
Chairman

DATED: Trenton, New Jersey  
September 7, 1988

H.E. NO. 88-65

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

In the Matter of

COUNCIL OF NEW JERSEY STATE COLLEGE  
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Docket No. CI-H-88-30

THOMAS M. PATRICK,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent did not violate Subsection 5.4(b)(1) of the New Jersey Employer-Employee Relations Act when it refused to proceed to arbitrate the Charging Party's promotion grievance. The Charging Party had applied for promotion from Associate Professor to full professor at Trenton State College during the 1986-87 academic year and at the meeting of the Faculty Promotions Committee on January 5, 1987, the Committee denied his application for promotion. Patrick claimed that the Promotions Committee and the Respondent were biased against him because of his non-membership in the AFT and his having held a 12-month contract as opposed to a ten-month contract, which enabled him to produce articles for publication and to work on other endeavors in aid of seeking a promotion.

The Hearing Examiner concluded that he could not involve himself in the promotional process and when he examined the conduct of the Respondent in its representation of Patrick during the two-step grievance procedure there was no breach of the duty of fair representation by the Respondent. Finally, the fact that the Respondent refused to arbitrate Patrick's promotion grievance was untainted by any illegality since the decision not to arbitrate was consistent with its past experience of having arbitrated only 50% of the promotion grievances since 1980.

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. 88-65

STATE OF NEW JERSEY  
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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COUNCIL OF NEW JERSEY STATE COLLEGE  
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Charging Party.

Appearances:

For the Respondent, Dwyer & Canellis, Esqs.  
(Paul J. Burns, Esq.)

For the Charging Party, Thomas M. Patrick, Pro Se

HEARING EXAMINER'S RECOMMENDED  
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on December 2, 1987, by the Thomas M. Patrick (hereinafter the "Charging Party" or "Patrick") alleging that the Council of New Jersey State College Locals, NJSFT/AFT, AFL-CIO, Local No. 2364 (hereinafter the "Respondent" or the "AFT") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter

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1/ As amended at the hearing.

the "Act"), in that in the fall of 1983 the President of the Local AFT refused to correct an omission wherein the faculty of the School of Business was not informed of a ratification vote on a contract, as a result of which Patrick wrote a letter to the editor of the school paper, complaining about the incident and that ever since then the AFT has sought revenge against him; that in June 1985, the President of the Local AFT met with a representative of the Academic Vice President, the purpose of which was to prevent Patrick from being granted tenure; that in January 1986, the President of the Local AFT, acting as an observer on the Faculty Promotions Committee ("FPC"), took an active role in its deliberations on promotions, as a result of which Patrick was not granted a promotion; that in January 1987, the President of the Local AFT was again successful in preventing the grant of a promotion to Patrick; that on February 4, 1987, Patrick filed a grievance, in which he maintained that the contract and the faculty handbook had not been followed in the consideration of his application for promotion; that during the processing of his grievance, the hearing officer ruled in his favor at the first step, directing that the FPC reconsider his application and that at Step 2, after reconsideration, it was ruled that the FPC had rendered a fair and just decision; that thereafter Patrick requested that his grievance be taken to arbitration but the AFT

voted not to do so; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(b)(1) of the Act.<sup>2/</sup>

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on January 25, 1988. Pursuant to the Complaint and Notice of Hearing, hearings were held on March 16, April 12 & 22, 1988, in Trenton, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by June 7, 1988.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Council of New Jersey State College Locals, NJSFT/AFL, AFL-CIO, Local No. 2364 is a public employee

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<sup>2/</sup> This subsection prohibits employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act."



representative within the meaning of the Act, as amended, and is subject to its provisions.

2. Thomas M. Patrick is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

3. Patrick is an Associate Professor in the School of Business at Trenton State College ("TSC") and is now in his seventh year. He obtained tenure during his sixth year and is currently the Chairman of the Department of Business Administration.

4. The AFT is the collective negotiations representative at all nine State Colleges, including TSC involved herein, and the current collective negotiations agreement is effective during the term July 1, 1986 through June 30, 1989 (J-1). The collective negotiations unit includes, inter alia, all full-time teaching and/or research faculty and department chairpersons (J-1, Art. I, p. 1).

5. This being a promotion case, the pertinent provisions of J-1 are as follows:

#### Article XIV

##### Promotional Procedure

- A. Faculty members whose qualifications meet or exceed the requirements for a higher academic rank...shall be eligible for promotional consideration to that rank.
- B. An eligible faculty member may make written application for promotional consideration on or before November 1...
- C. The procedures for promotional consideration ...shall be fairly and equitably applied to all applicants and...shall provide for consideration based on criteria established by the College... The current and

applicable procedures, including a statement of such criteria, shall be provided in written form for the understanding of all affected faculty members... (emphasis supplied).

- D. At each College the committee charged with the final evaluation of promotion applications will be informed by the President or his or her designee of the number of promotions available at the various ranks for that unit or the College as a whole, and will submit its recommendations to the President or his or her designee...

\* \* \* \*

- G. Within seven (7) days after receipt of the final recommendation to the President a faculty member may initiate a grievance at Step One concerning the application based on an allegation that, after timely filing of his or her application, the promotional procedure was violated... Such a claim, if sustained, will result in reprocessing of the application on an expedited basis... (emphasis supplied)

[J-1, pp. 22, 23].

#### ARTICLE VII

##### Grievance Procedure

\* \* \* \*

- E.(1) Matters pertaining to...promotion...shall be grievable under this agreement only upon the basis of claimed violations involving...promotion ...procedure specified in Article XIV... In all such cases the burden of proof shall be upon the grievant. In no case may an arbitrator recommend ...promotion...of a grievant. Rather, where appropriate, the remedy shall be to remand the matter to the proper level of the involved College for reconsideration of the matter and elimination of defects in the procedural process or elimination of impropriety in the decision making process. (emphasis supplied).
- E.(2) Where a matter is remanded is remanded pursuant to subparagraph 1. above, the arbitrator may, where appropriate, direct that the President of the College, in consultation with the UNION, appoint an ad hoc review committee to substitute for any

individual or committee which had been involved in the previous promotion...action. The purpose of such ad hoc committee will be for the purpose of reconsidering the involved matter and elimination of defects in the procedural process...and to make recommendations on the merits of the involved promotion...to the President...

[J-1, p. 9]

6. Applications for promotion are made on a TSC form (CP-13) and general directions for completing the application are provided in CP-18.

7. At TSC, in accordance with the agreement, there is a Faculty Promotions Committee ("FPC"). The FPC membership for the 1986-87 academic year consisted of nine members, only one of whom, Regina Sanchez-Porter, was an officer of AFT Local 2364, another, Raymond Fangboner, was an NJEA member and a majority of the remaining seven persons were members of the AFT (CP-5).<sup>3/</sup>

8. In the 1985-86 academic year and again in the 1986-87 academic year Patrick applied for promotion from an Associate Professor to a full professor in the School of Business; his name appears on the list of applicants for promotion, effective September 1987 (CP-17, p. 2). During 1986-87 academic year there were only two positions available in TSC for promotion from associate professor to full professor. Although Patrick was ranked number one by his department for promotion, his application was denied and

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<sup>3/</sup> One of Patrick's major contentions is that the FPC is AFT-dominated, and that AFT bias has been directed against Patrick, who is an "agency shop" representation fee payer.

instead the second ranked applicant, David Letcher (CP-17, p. 2), received the promotion.<sup>4/</sup>

9. In accordance with the TSC "Faculty Handbook" there are four criteria for promotion: teaching, scholarship, community service and professional activities. When Patrick appeared before the FPC on January 5, 1987, several members raised the subject of Patrick having a 12-month contract and his having received independent study reimbursement during the academic year. Specifically, Patrick testified that FPC Chairman, Joseph Smith, expressed dissatisfaction regarding Patrick's 12-month contract. Fred A. Oshel, Jr., another member of the FPC, testified that Patrick was questioned about his contract because he (Patrick) had raised the issue at the interview in the first instance.<sup>5/</sup> Arthur M. Steinman, an Associate Professor of Psychology and the President of the AFT for eleven years, was an AFT observer at the January 5th FPC interview. He testified that the subject of Patrick's 12-month contract arose and that the duration of the contract has an effect on the amount of time available to perform academic work. Neil Gaston, a Professor in the School of Business and the faculty

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<sup>4/</sup> At the instance of Patrick, Letcher became the AFT's representative from the School of Business as of October 17, 1987 (CP-15).

<sup>5/</sup> Oshel also testified that Letcher, who was recommended for promotion instead of Patrick, "stood out," based upon his computer and research work even though he had only been in the School of Business for three years, having coming from the Physics Department (2 Tr 49, 50).

representative to the FPC for the 1986-87 academic year, confirmed that Patrick's 12-month contract status was raised at the interview and that the contractual arrangement of any applicant for promotion had never previously been raised (CP-16). Finally, Anthony W. Hantjis, the Dean of the School of Business since 1980, testified that he has been involved in the promotional process at TSC since 1969; that the existence of a 12-month contract is not a part of the promotion application; and that the nature of an applicant's employment contract had never arisen prior to Patrick's experience in January 1987.

10. On or about January 15, 1987, Patrick was notified by the FPC that he was not being recommended for promotion to full professor. Immediately thereafter Patrick filed a letter appealing for reconsideration to the FPC, which was heard on January 28, 1987. He read a written statement to the Committee, which included a threat to file a grievance if his promotion was not favorably reconsidered (CP-1). On January 30, 1987, Patrick received a letter from the FPC that his appeal was denied (CP-2). On February 4th Patrick filed a written grievance, in which he sought, inter alia, promotion to full professor as of the fall of 1987 (CP-3 & CP-4).

11. On March 5, 1987, a Step One hearing was held before Hearing Officer Bernice R. Rydell. Present, in addition to Patrick, were Smith, Steinman and Grievance Officer Elizabeth Bernsten. Smith spoke on behalf of the FPC and explained why the Committee was interested in Patrick's 12-month contract, including what was done

by him for payment and whether Patrick obtained "release time" in order to publish his 15 articles (1 Tr 37-41).

12. On March 26, 1987, Rydell issued her Step One decision in which she found that the FPC's inquiry into Patrick's 12-month contract and his "...remuneration outside of learning..." were not relevant to the criteria for promotion. As a remedy, Rydell directed that the FPC "...reconvene to review your (Patrick's) application and discuss together the merits of the materials presented only in relation to the four stated criteria for promotion (CP-6, p. 2).

13. Patrick immediately filed an appeal to Step Two of the grievance procedure since he did not want the same members of the FPC to reconsider the denial of his promotion application. A Step Two hearing was held on April 30, 1987 before Hearing Officer Peter C. Hutchinson. At the outset, Patrick was informed of the results of the FPC's reconsideration, which occurred between April 15 and April 27, 1987. Smith, who was again present, stated that Daniel Hall, a current member of the FPC (CP-5), who had been hospitalized at the time of the initial interview on January 5, 1987, participated in the reconsideration along with Steinman. TSC contended that the participation of Hall in the reconsideration process had provided impartiality to the FPC's decision. The FPC, having acted on Rydell's directed reconsideration of Patrick's application, had again denied Patrick's application for promotion.

At the April 30th hearing Patrick read an 11-page statement (CP-7) and Bernsten was again present.<sup>6/</sup>

14. On June 24, 1987, Hearing Officer Hutchinson issued his Step Two decision, in which he decided that the conclusions of the Hearing Officer at Step One were "reasonable" and that the recommended remedy ordered was "appropriate." Finally, Hutchinson rejected Patrick's contention that the FPC, in reconsidering his application for promotion, was biased because the its members had been exposed to improper inquiries during the initial interview. In concluding that there was insufficient evidence to support this conclusion, Hutchinson adopted the position of TSC that the presence of Hall in the reconsideration process brought impartiality into it. [CP-8].<sup>7/</sup>

15. During the week of July 5, 1987, Patrick requested that Hoerner submit his grievance to arbitration under the agreement. Hoerner advised Patrick that the AFT's nine-member Grievance Committee, which makes the initial decision concerning the submission of grievances to arbitration, would not meet again until

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<sup>6/</sup> Patrick testified that Bernsten had counseled him on how to file the initial grievance and how to proceed at the hearings at Steps One and Two. Patrick had informed Bernsten that he wished to handle the presentation of his grievance at each step by himself and, thus, Bernsten did not speak at either hearing (2 Tr 59, 60). Barbara Hoerner, an AFT Staff Representative, testified extensively regarding the assistance that she gave to Bernsten, who was new, during the hearings at Steps One and Two of Patrick's grievance.

<sup>7/</sup> On July 21, 1987, Hutchinson reissued his initial decision of June 24th, in which he made a minor correction (CP-9).

the fall.<sup>8/</sup> When the matter was placed before the Grievance Committee in September 1987, the Committee voted unanimously against taking Patrick's grievance to arbitration. He was so advised by Hoerner in a letter dated October 1, 1987 (CP-10).

16. Hoerner testified that although Bernstein's opinion could not have been solicited, regarding the submission of Patrick's grievance to arbitration [due to her unavailability: 1 Tr 60], Bernstein's prior "input and opinion concerning the case" was used in Hoerner's presentation (3 Tr 34, 35). Patrick testified that on December 15, 1987, one and a half months after the decision of the Council not to arbitrate his grievance, he spoke to Bernstein who stated that she had not been asked about submitting Patrick's grievance to arbitration; that some members of the AFT had objected to Patrick's being a fee payer; that the AFT will go further for members; and that she would have voted to send Patrick's grievance to arbitration (1 Tr 78-81).

17. In a second letter of October 2, 1987, Hoerner advised Patrick that he could request an appeal by the local union to the Council, which consists of 45 delegates from the nine State Colleges (CP-11). On November 2, 1987, Patrick was advised by Hoerner that the Council at its meeting on October 30th voted to uphold the

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<sup>8/</sup> The written grievance processing policies of the AFT were received in evidence as Exhibit R-2.



Grievance Committee's decision not to appeal his case to arbitration (CP-12).<sup>9/</sup>

18. Hoerner testified credibly that between 1980 and 1987, of the 15 promotional grievances which were brought before the Grievance Committee and the Council for a decision on whether or not to arbitrate, one-half were not arbitrated and of those in which the AFT prevailed, the remedy was a remand for further consideration at the FPC or the President's level.<sup>10/</sup> An arbitrator has never ordered a promotion since the collective negotiations agreement does not permit it [J-1, Art. VII, Sec. E(1)].

19. Hoerner and Thomas H. Wirth, an AFT Staff Representative, each testified credibly that Patrick's non-membership in the AFT was never raised before the Grievance Committee or before the Council during the deliberations on Patrick's request for arbitration and, further, that his case was handled like all others.

20. Patrick testified that the denial of his request to arbitrate his grievance related back to events in the fall of 1983 when the faculty members of all schools at TSC, except the School of Business, received ballots for a vote on the ratification of a

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<sup>9/</sup> Steinman did not participate in the consideration of whether Patrick's grievance should proceed to arbitration even though he was a Council delegate.

<sup>10/</sup> The case of Gloria Dickinson, whose promotion grievance was denied at Steps One and Two, was taken to arbitration by the AFT. However, the arbitrator denied the grievance. This matter arose prior to Patrick's grievance. [3 Tr 34, 36, 37].

collective negotiations agreement. When Hantjis learned of this he advised Steinman, who had time to correct the problem but did not do so. Patrick testified that the origin of his problems with the AFT was a letter that he wrote to the TSC newspaper on November 2, 1983, in which he detailed the failure of the AFT to have provided for ratification ballots to the faculty members of the School of Business.

21. On August 22, 1985, Hantjis sent a memorandum to the Tenure and Reappointment Committee of the School of Business (CP-19). In this memo Hantjis stated that Steinman had on June 11, 1985, conveyed to the administration that he had heard a "rumor" that Patrick had "...used his cat and dog as deductions for federal tax purposes." Although it was considered only a rumor, the Tenure and Reappointment Committee was requested by Hantjis to discuss the matter with Patrick when it met with him in connection with his seeking tenure. Steinman, in his testimony, acknowledged that he had heard such a rumor but denied any knowledge beyond this fact. The recommendation of the Tenure and Reappointment Committee was unanimous and Patrick received tenure in his sixth year.

#### DISCUSSION AND ANALYSIS

The AFT Did Not Breach Its Duty Of Fair Representation In Violation Of Section 5.4(b)(1) Of The Act When It Refused To Arbitrate Patrick's Promotion Grievance.

Before proceeding to the legal analysis in this case, the following observations are noted:

1. Notwithstanding several of the facts found above, the Hearing Examiner may not appropriately involve himself in the internal promotional process at TSC, specifically, he may not make evaluative judgments on the manner and methods utilized by the FPC in discharging its responsibilities. Thus, the Hearing Examiner will not concern himself with the composition of the nine-member FPC during the 1986-87 academic year, notwithstanding that a majority were AFT members<sup>11/</sup> and that one of the members was the Vice-President of the Local AFT. Further, the Hearing Examiner will not concern himself with the criteria used by the FPC irrespective of whether it resorted to the four criteria contained in the TSC Handbook or any other criteria such as the presence or absence of a 12-month contract.<sup>12/</sup> The FPC only makes recommendations to the President, who alone makes recommendations for promotion to the Board of Trustees. The only obligation of the President to the FPC in the promotion process, as set forth in J-1, Art. XIV, Sec. D, is that the President, if he decides not to follow the recommendations

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<sup>11/</sup> This is to be expected when the membership of the FPC is necessarily drawn from faculty members within the collective negotiations unit.

<sup>12/</sup> Thus, the Hearing Examiner has disregarded as irrelevant to his consideration the fact that Patrick was ranked first by his department while Letcher was ranked second; that Letcher was a member of the AFT and was the AFT's representative in the School of Business during the 1986-87 academic year; and that Letcher was promoted to full professor while Patrick was not. Additionally, the Hearing Examiner has disregarded the testimony of all of the Charging Party's witnesses, which pertained to alleged disparate treatment of Patrick based upon his 12-month contract.

of the FPC, must provide his reasons for not following its recommendations.

2. What the Hearing Examiner must consider is whether or not the AFT, in refusing to arbitrate Patrick's promotion grievance, engaged in conduct which was arbitrary, discriminatory or in bad faith. In determining whether or not the AFT breached its duty of fair representation in this regard, the Hearing Examiner will consider the background evidence offered by Patrick from the fall of 1983 through 1985 as well as the quality of representation provided by the AFT to Patrick during the processing of his grievance through Steps One and Two and the AFT's decision-making process in having concluded not to proceed to arbitrate his grievance.

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It strains credulity to accept Patrick's contention that his having written a letter to TSC newspaper in November 1983, complaining about the failure of the Steinman to have provided ballots to the faculty in connection with the ratification of the contract, set in motion a chain of events wherein the conduct of the AFT was forever biased against Patrick from the date of his interview on January 5, 1987, through the decision of the Council not to arbitrate his grievance on October 30, 1987. The November 1983 letter-writing incident appears too inconsequential and remote in time to attribute any bias to the AFT in the subsequent processing of Patrick's grievance.

Further, the Hearing Examiner has concluded that Steinman's involvement in the perpetuation of the "rumor," which was the subject of the Hantjis memorandum of August 22, 1985 (CP-19), is largely irrelevant and was plainly dissipated by the fact that Patrick received tenure. Even if the Hearing Examiner were to give any weight to the 1985 "rumor" incident, it would appear to have been of little force at the time that the FPC interviewed Patrick on January 5, 1987.

The Hearing Examiner having discounted the letter-writing incident of 1983 and any relevant involvement of Steinman in the "rumor" incident of 1985, the inquiry turns now to the conduct of the AFT and its representatives vis-a-vis Patrick from January 1987 through October 1987. As noted previously, the Hearing Examiner will draw no negative inference from the composition and functioning of the FPC in its handling of Patrick's application for promotion, i.e., what the nine FPC members did or did not do on January 5, 1987 or thereafter is of no moment in resolving Patrick's unfair practice charge.

On January 30, 1987, Patrick was informed by letter that the FPC had denied his appeal from their initial decision, which refused to recommend him for promotion (CP-2). Patrick then contacted Bernsten, the AFT's newly designated Grievance Officer at TSC, for assistance in filing a grievance. Bernsten advised Patrick on how to file a grievance, the deadline for filing and with whom to file. Further, she made suggestions to Patrick regarding the

content of the grievance and the preparation for the Step One hearing. [2 Tr 59]. Patrick filed his formal grievance on February 4, 1987 (CP-3 & CP-4). Bernsten had earlier contacted Hoerner after Patrick's grievance was filed because of her need for guidance and assistance since this was her first year as Grievance Officer (3 Tr 3, 4). Hoerner spoke with Bernsten many times as to how she should represent Patrick, given the fact that he had decided to proceed on his own. Bernsten had also asked Hoerner for advice on preparation for the Step One hearing on March 5, 1987, at which Bernsten appeared with Patrick but without Hoerner. Steinman was present at Step One but did not participate. Patrick made the complete presentation with Bernsten providing advice upon request. Although Hoerner was not present at the Step One hearing, subsequent thereto, she had a lengthy telephone conversation with Bernsten as to what had transpired (3 Tr 5, 6).

Hoerner also received a copy of Rydell's Step One decision. Hoerner, having learned that Patrick was proceeding to Step Two of the grievance procedure, requested Bernsten to follow the same procedure with him by way of preparation and to report back to her on what transpired (3 Tr 6). Hoerner's last contact with Bernsten was immediately after the Step Two hearing when Bernsten apprised her of what had happened at the April 30, 1987 hearing. Bernsten then left immediately on a sabbatical from which she is not scheduled to return until September 1988. The testimony of Patrick was consistent with Hoerner's in that he, too,

stated that Bernsten was present with him at the Step Two hearing and that she spoke with him after the hearing before she "...set sail for the Caribbean..." (2 Tr 60).

Hoerner's undisputed testimony was that Patrick, or someone on his behalf, contacted her concerning Patrick's desire to seek arbitration of the denial of his grievance at Step Two. Since Patrick's appeal to arbitration could not be decided within the 20-day limitation, Hoerner obtained an extension (3 Tr 7). Hoerner brought Patrick's appeal before the nine-member Grievance Committee in September 1987 and the Committee voted unanimously to refuse to take the grievance to arbitration (3 Tr 8, 9). The undisputed testimony of Hoerner was that it was not unusual for the Grievance Committee to refuse to arbitrate promotion grievances and that in her preparation for the presentation of Patrick's grievance to the Grievance Committee she reviewed Committee decisions since 1980. Hoerner found that approximately 15 appeals to arbitrate promotion grievances had been considered and that one-half of these were rejected (3 Tr 9). In one case, that of Gloria Dickinson, which arose prior to Patrick's grievance, the AFT decided to take her case to arbitration even though she had failed to prevail at Steps One and Two. However, the arbitrator denied the grievance. In response to a question by Patrick, Hoerner testified that she did not ask Bernsten her opinion as to whether Patrick's grievance should be taken to arbitration because Bernsten was unavailable for

consultation after the end of April 1987 when her sabbatical commenced.<sup>13/</sup>

After Patrick learned of the decision of the Grievance Committee on October 1, 1987 (CP-10), he appealed to the 45-delegate Council with the assistance of Steinman as President of the Local AFT (CP-11; 3 Tr 14, 15). Steinman, although a delegate to the Council, declined to participate (3 Tr 16). Hoerner made the presentation to the Council on October 30, 1987. The Council "after a considerable discussion" decided to sustain the Grievance Committee's decision that Patrick's grievance not proceed to arbitration (CP-12; 3 Tr 16). Hoerner testified credibly that the fact that Patrick was not a member of the AFT was never brought to the attention of the Grievance Committee or the Council and that Patrick's case was handled in a manner consistent with that of any other case that Hoerner had handled (3 Tr 17, 18). Wirth testified in a forthright manner that he had been present at both the Grievance Committee and Council levels and that Hoerner's presentation at both levels was acceptable. Wirth stated further that he detected no bias or discrimination against Patrick and that there were no discussions concerning Patrick's union activities or non-union activities. [3 Tr 39, 44].

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<sup>13/</sup> Patrick's December 15, 1987, conversation with Bernsten constitutes an admission by Bernsten as an agent of the AFT and is, thus, within an exception to the hearsay rule. However, even if Bernsten's statements to Patrick are accepted as true, the simple fact is that Bernsten did not present her opinions and recommendations to the Grievance Committee in September 1987. Therefore, the Grievance Committee's decision not to arbitrate could not have been affected.



Both Hoerner and Wirth were adamant in their interpretation of the agreement, namely, that an arbitrator could not award a promotion but could only direct that there be a reconsideration on remand (3 Tr 10, 11, 39-44).

The above factual discussion must now be analyzed under the decisions of Commission and the courts, which have adjudicated the claims of a breach of the duty of fair representation by a labor organization. The courts of this State and the Commission have consistently embraced the standards established by the United States Supreme Court in Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967). See e.g., Saginario v. Attorney General, 87 N.J. 480 (1981); Distillery Workers Local 209 (Merricks), P.E.R.C. No. 88-13, 13 NJPER 710 (¶18263 1987); In re Board of Chosen Freeholders of Middlesex County, P.E.R.C. No. 81-62, 6 NJPER 555 (¶11281 1980), aff'd. Ap. Div. Docket No. A-1455-80 (1982), pet. for certif. den. (1982); New Jersey Turnpike Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979); and In re AFSCME Council No. 1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978). The Court in Vaca 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.

In fact, the U.S. Supreme Court has also held that to establish a claim of a breach of the duty of fair representation there must be adduced 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).

Further, 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).<sup>14/</sup>

It is abundantly clear to the Hearing Examiner that Patrick has not proven by a preponderance of the evidence that the AFT breached its duty of fair representation under the legal authorities set forth above. Vaca speaks in terms of arbitrary, discriminatory or bad faith conduct on the part of a union representative. Lockridge speaks further in terms of conduct that intentional, severe and unrelated to legitimate union objectives. The NLRB adds that proof of "mere negligence," standing alone, does not suffice to prove a breach of the duty of fair representation.

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<sup>14/</sup> See, also, Bergen Community College Adult Learning Center, H.E. No. 86-19, 12 NJPER 42, 45, 46 (¶17016 1985), aff'd P.E.R.C. No. 86-77, 12 NJPER 90 (¶17031 1985).

Finally, Vaca also holds that the decision to refuse to arbitrate a grievance is not in and of itself evidence of a breach of the duty of fair representation. See also, New Jersey Turnpike Employees Union Local 194 and Distillery Workers Local 209, supra and Rutgers, The State University et al. (Jennings), P.E.R.C. No. 88-130, 14 NJPER \_\_\_\_ (¶ \_\_\_\_ 1988).

The Hearing Examiner cannot conclude other than that the AFT, in its representation of Patrick in the grievance procedure through his request for arbitration, has not breached its duty of fair representation. First, the AFT's conduct in the representation of Patrick has neither been arbitrary nor discriminatory nor has the AFT manifested bad faith. Second, the United States Supreme Court's Amalgamated Ass'n. decision, supra, requires that there be substantial evidence of discrimination which is intentional, severe and unrelated to legitimate union objectives.

The Hearing Examiner, in evaluating the AFT's overall conduct toward Patrick in its representation of him in this matter, has concluded that the AFT did not engage in the type of discrimination which the United States Supreme Court dealt with in Amalgamated Ass'n. Further, the AFT appears at all times to have acted in furtherance of legitimate union objectives.

Finally, as the Commission has held in several decisions, the mere fact that a union refuses to arbitrate a grievance is not in and of itself evidence of a breach of the duty of fair representation. Thus, in N.J. Tpk. Employees Union, supra, the Commission stated that:

If in the past every discharge (here promotion) case had been processed through arbitration no matter how questionable the case, the Charging Party's allegation that the Union had breached its duty of non-discrimination would have been stronger...However, the Hearing Examiner found that in prior grievances the (Union)...had determined that some did not merit arbitration...Accordingly, the decision not to proceed to arbitration in this instance did not constitute unequal access to the grievance process...(emphasis supplied). (5 NJPER at 413, 414).<sup>15/</sup>

These conclusions necessarily follow from the fact that:

(1) Patrick was fully and fairly represented at Steps One and Two by Bernsten, who received adequate assistance from Hoerner even though Hoerner was not physically present at the two hearings; (2) the AFT was not responsible for the unavailability of Bernsten during the deliberations of the Grievance Committee and the Council on Patrick's appeal to arbitration; and (3) Patrick's contention that the decision of the Grievance Committee and the Council not to arbitrate his grievance was due to his non-membership in the AFT and/or his 12-month contract is too speculative to warrant drawing an inference that the AFT's motives were discriminatory.

To the contrary, it appears more likely that the AFT's decision not to arbitrate Patrick's grievance was in all probability based upon its past experience in deciding to arbitrate only one-half of the promotion grievances it considered. Also, it is

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<sup>15/</sup> Recall that of the 15 promotion grievances processed through Steps One and Two since 1980, only half were taken to arbitration. In the last promotion arbitration prior to the Patrick grievance, which involved Dickinson, the AFT did not prevail before the arbitrator.

reasonable to infer that Patrick's having obtained reconsideration of his promotion application, as a result of Rydell's March 26, 1987 decision at Step One, was given weight by the Grievance Committee and the Council although there was no direct evidence of this.

For all of the foregoing reasons, the Hearing Examiner must recommend that the Complaint be dismissed.

\* \* \* \*


Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSION OF LAW

The Respondent did not violate N.J.S.A. 34:13A-5.4(b)(1) when it refused to arbitrate the promotion grievance of Thomas M. Patrick on October 30, 1987.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.

  
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Alan R. Howe  
Hearing Examiner

Dated: June 30, 1988  
Trenton, New Jersey