P.E.R.C. NO. 88-32

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ESSEX COUNTY COLLEGE,

Respondent,

-and- Docket No. CI-87-21-132

ZENOBIA LITTLEJOHN,

Charging Party.

ESSEX COUNTY COLLEGE OFFICE WORKERS' ASSOCIATION,

Respondent,

-and- Docket Nos. CI-87-43-133

ZENOBIA LITTLEJOHN,

Charging Party

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by Zenobia Littlejohn against Essex County College and the Essex County College Office Workers Association. The charge alleges the College violated the New Jersey Employer-Employee Relations Act when it terminated Littlejohn, allegedly because she complained that she did not receive her paycheck on time. The charge alleges the Association violated the Act when it did not properly represent her in a grievance contesting her termination. The Commission finds that Littlejohn failed to establish that she had engaged in activity protected by the Act or that the Association acted arbitrarily, capriciously or in bad faith in representing her before the Board of Trustees.

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ZENOBIA LITTLEJOHN,

Charging Party

Appearances:

For the Respondent, Essex County College, Schwartz, Pisano, Simon & Edelstein (Nathanya G. Simon, of counsel)

For the Respondent, Essex County College Office Workers' Association, Sterns, Herbert, Weinroth & Petrino (Linda K. Stern, of counsel)

For the Charging Party, Carlton A. Lewis, Esq.

DECISION AND ORDER

On September 22, 1986, Zenobia Littlejohn filed an unfair practice charge against Essex County College ("College"). The charge alleges that the College violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4(a)(1), (2), (3), (4), (5), (6) and

(7),[1/] when it terminated Littlejohn, allegedly because she complained that she did not receive her paycheck on time.

On December 23, 1986, Littlejohn filed an unfair practice charge against the Essex County College Office Workers Association ("Association"). This charge alleges the Association violated the Act, specifically subsections 5.4(b)(1), (2), (3), (4) and (5),[2/] when it did not properly represent her in a grievance contesting her termination.

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; (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; (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; (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement; (7) Violating any of the rules and regulations established by the commission."

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; (2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances; (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; (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement; (5) Violating any of the rules and regulations established by the commission."

On April 1, 1987, a Complaint, Notice of Hearing and Consolidation Order issued. On April 16 and May 7, 1987, respectively, the College and the Association filed Answers denying the Complaint's allegations.

On July 6, 1987, Hearing Examiner Alan R. Howe conducted a hearing. Littlejohn examined witnesses and introduced exhibits. At the conclusion of her case, the College and Association moved to dismiss the Complaint. The Hearing Examiner granted these motions. First, he applied In re Bridgewater Tp., 95 N.J. 235 (1984) and determined that Littlejohn had not introduced evidence showing that she had engaged in activity protected by the Act or, if she did, that the College was hostile to any of her alleged protected activity. Therefore, he dismissed the allegations against the College. He then determined that Littlejohn had not presented any evidence showing that the Association did not fairly represent her in contesting her discharge. Therefore, he dismissed the allegations against the Association. On July 16, 1987, the Hearing Examiner issued a written decision dismissing the Complaint. H.E. No. 88-5, 13 NJPER ___ (¶ 1987).

On August 24, 1987, Littlejohn appealed the decision dismissing the Complaint. She contends that she was wrongfully terminated because she complained that it was unfair to require her to wait until the end of the day for her paycheck instead of giving it to her when her workday ended in the early afternoon.

We have reviewed the record. The Hearing Examiner's findings of fact (pps. 4-9) are accurate. We adopt and incorporate them here. We agree that the Complaint was properly dismissed at the conclusion of the charging party's case. First, Littlejohn failed to establish that she had engaged in activity protected by our Act. Section 5.3 protects the right of public employees to form, join and assist any employee organization. She, however, was not acting on behalf of any such organization. Moreover, she was not acting in concert with anyone; rather, her complaint was on behalf of herself individually and did not relate to enforcing a collective negotiations agreement or changing the working conditions of employees other than herself.[3/] Compare City of Margate, P.E.R.C. No. 87-145, 13 NJPER 498 (¶18183 1987); North Brunswick Tp. Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451 (1978).[4/] Therefore, we dismiss the Complaint against the College.

We also dismiss the Complaint against the Association. Littlejohn did not present any evidence that the Association acted arbitrarily, capriciously or in bad faith in representing her before the Board of Trustees, the terminal step in contesting discharges

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3/ We also note that her individual complaint to the President did not comply with the contract's procedure.

4/ In reaching this result, we do not find that the College had cause to dismiss her under the parties' collective negotiations agreement. Our jurisdiction does not extend to resolving such questions. State of New Jersey (Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

under the parties' contract. It represented her and advised her of her right to attend a hearing. She chose not to.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

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

DATED: Trenton, New Jersey
September 23, 1987
ISSUED: September 24, 1987

H.E. NO. 88-5

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

In the Matter of

ESSEX COUNTY COLLEGE & ESSEX COUNTY
COLLEGE OFFICE WORKERS ASSOCIATION,

Respondents,

-and-

Docket Nos. CI-87-21-132
and CI-87-43-133

ZENOBIA LITTLEJOHN,

Charging Party.

SYNOPSIS

A Hearing Examiner grants the motions of the Respondent College and the Respondent Association to dismiss the consolidated complaints at the conclusion of the Charging Party's case. The Complaint alleged that the Respondent College and the Respondent Association violated all subsections of 5.4(a) and 5.4(a) of the New Jersey Employer-Employee Relations Act. The Respondent College was alleged to have discharged the Charging Party on August 29, 1986, "without just cause." The Respondent Association was alleged to have failed to have fairly represented the Charging Party in connection with the circumstances surrounding her discharge.

The Hearing Examiner found that that Charging Party had not adduced even a scintilla of evidence that she had engaged in protected activity or, if she did so, the Respondent College based its discharge on the objective fact of Littlejohn's insubordinate conduct in confronting the President of the College on August 14, 1986, in the cafeteria. The Hearing Examiner concluded that Littlejohn's "activities" constituted nothing more than personal complaints and gripes which did not constitute protected activity under the Act. On the other hand, the Respondent Association fully and fairly represented Littlejohn in the grievance procedure following her termination and, after arranging a hearing before the College's Board of Trustees, on a second occasion, Littlejohn refused and failed to appear because she would not do so without legal representation. This occurred in December 1986, four months after her termination.

A Hearing Examiner's recommended decision to dismiss is not a final adiministrative determination of the Public Employment Relations Commission. The Charging Party has ten days to request review by the Commission or else the case is closed.

H.E. NO. 88-5

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

In the Matter of

ESSEX COUNTY COLLEGE & ESSEX COUNTY
COLLEGE OFFICE WORKERS ASSOCIATION,

Respondents,

-and-

Docket Nos. CI-87-21-132
and CI-87-43-133

ZENOBIA LITTLEJOHN,

Charging Party.

Appearances:

For the Respondent Essex County College
Schwartz, Pisano, Simon & Edelstein, Esqs.
(Nathanya G. Simon, Esq.)

For the Respondent Office Workers Association
Sterns, Herbert, Weinroth & Petrino, Esqs.
(Linda K. Stern, Esq.)

For the Charging Party
Carlton A. Lewis, Esq.

HEARING EXAMINER'S RECOMMENDED DECISION AND ORDER ON RESPONDENTS' MOTIONS TO DISMISS

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on September 22, 1986 [Docket No. CI-87-21-132], by Zenobia Littlejohn (hereinafter the "Charging Party" or "Littlejohn") alleging that Essex County College (hereinafter the "College") has 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 the "Act"), in that Littlejohn learned on August 14, 1986, that she would not be receiving her bi-weekly paycheck until 4 p.m. on that date whereas, as a part-time employee, she completed her work shift several hours prior thereto; and when she did not receive her check upon request at the conclusion of her work shift she confronted the President of the College in the cafeteria in the presence of others; when the President stated that she would not receive her check until 4 p.m. she "told him what I thought of him as a man...," adding that she did not use any abusive language or create any scene; and, after returning from vacation on August 27, 1986, Littlejohn was informed on August 29th that she was terminated because of "unprofessional and unbecoming" conduct in the cafeteria of the College on August 14, 1986, supra; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1) through (7) of the Act.[1/]

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; (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; (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,

Footnote Continued on Next Page

On December 23, 1986, Littlejohn filed a second Unfair Practice Charge with the Commission [Dockt No. CI-87-43-133], alleging that the Essex County College Office Workers Association (hereinafter the "Association") has engaged in unfair practices within the meaning of the Act, in that the President of the Association failed to defend Littlejohn, regarding her termination on August 29, 1986;[2/] all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(b)(1) through (5) of the Act.[3/]

It appearing that the allegations in the two Unfair Practice Charges, if true, may constitute unfair practices within the meaning of the Act, a Consolidated Complaint and Notice of Hearing was issued on April 1, 1987. Pursuant to the Complaint and

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1/ Footnote Continued From Previous Page

or refusing to process grievances presented by the majority representative; (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement; (7) Violating any of the rules and regulations established by the commission."

2/ Littlejohn failed to allege any specifics as to how the Association through its representatives failed to defend her.

3/ 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; (2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances; (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; (4) Refusing to reduce a negotiated agreement to writing and to sign such agreement; (5) Violating any of the rules and regulations established by the commission."

Notice of Hearing, a hearing was held on July 6, 1987 in Newark, New Jersey, at which time the Charging Party was given an opportunity to examine witnesses and present relevant evidence. At the conclusion of the Charging Party's case, the College and the Association made separate Motions to Dismiss on the record on July 6th. After hearing the oral argument of the parties, the Hearing Examiner granted the Motions to Dismiss on the record. The instant decision is being issued to memorialize and supplement the Hearing Examiner's oral decision on the record.

Upon the record made by the Charging Party only, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. Essex County College is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. Essex County College Office Workers Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. Zenobia Littlejohn is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

4. Littlejohn was hired as an Attendant in the Information Booth on October 26, 1981, and continued in that position until her termination on August 29, 1986. Littlejohn has at all times been a part-time employee, working initially 20 hours per week and in later years 21 hours per week. She has worked twelve months per year during the term of her employment and she became a permanent part-time employee on December 30, 1983.

5. Littlejohn as a permanent part-time is within the collective negotiations unit represented by the Association and is covered by the current collective negotiations agreement, effective during the term July 1, 1985, through June 30, 1988 (RC-3). As a permanent part-time employee Littlejohn has received fringe benefits under the collective negotiations agreement.

6. At the time of Littlejohn's termination on August 29, 1986, she was receiving $5.17 per hour, based on her most recent annual reappointment from July 1, 1986 through June 30, 1987 (RC-1).

7. Although Littlejohn worked 21 hours per week, as indicated above, this changed during July and August each year when she worked four days per week, Monday through Thursday, from 9 a.m. to 1:15 p.m. The fifth day of work on Friday from 9 a.m. to 1 p.m. was eliminated during July and August.

8. During the months between September and June of the school year employees such as Littlejohn were paid bi-weekly on Fridays and she never experienced a problem in obtaining her paycheck. However, during the months of July and August, the College paid its employees on Thursdays and the policy, at least during the summer of 1986, was that employees could not receive their paychecks until 4 p.m. on the Thursday bi-weekly payday.

9. Although Littlejohn was adamant that she had had no problem prior to 1986 in receiving her paycheck on alternate Thursdays during July and August at the end of her work shift of

1:15 p.m. (cf. RC-4), she did encounter a problem in July 1986. On the first payday in July 1986, which was July 17th, Littlejohn did not receive her paycheck at the end of her shift at 1:15 p.m. and went home without it and did not receive the check until she reported to work the following Monday.[4/]

10. On the next payday, July 31, 1986, Littlejohn received her check in a timely fashion from one Clarence Jones of the College administration but later in the day, before her shift ended, she was told by Jones to return the check to him and she did not receive it until the following Monday, August 4, 1986.

11. Littlejohn also testified that on July 31, 1986, after she had returned the check to Jones, she complained to Virginia Caswell, the President of the Association, who told Littlejohn that she should have kept the check but that she, Caswell, would attempt to obtain it for her. Caswell was unsuccessful in this attempt. Also, Caswell at some point told Littlejohn that the Association was going to try to insert into the agreement a provision for early distribution of paychecks for part-time workers.

12. Littlejohn never filed a grievance regarding her paycheck problems on the two paydays in July 1986.

4/ At some point between the payday of July 17, 1986, and the next payday on July 31st, Littlejohn complained about her paycheck problems to the President of the College, A. Zachary Yamba. Yamba told Littlejohn that she would not receive her check prior to 4 p.m. on any given payday.

13. On August 14, 1986,[5/] when Littlejohn had not received her paycheck by 1:15 p.m. she left the building at about 1:20 p.m. Littlejohn returned to the building at about 1:55 p.m. and went directly to the cafeteria where she encountered Yamba, who was seated and dining with two other persons. Littlejohn asked Yamba why she had not gotten her check by 1:15 p.m. and he stated that she was not going to get it prior to 4 p.m. Littlejohn's testimony was that she told Yamba "what she thought of him" but added that she did not do so in a loud or abusive manner. Littlejohn testified that she then went home and called Caswell, who said that she would get Littlejohn's check. Littlejohn herself obtained the check on August 19, 1986, from Betty Bunyan of personnel.

14. On August 25th, prior to returning to work at the end of her vacation on August 27th, Littlejohn called Caswell who told her that she had been terminated. After Littlejohn returned to work on August 27, 1986, she received a memorandum from Hector E. DeSoto, the Director of Personnel of the College, advising her of her termination (CP-1). The reason given was Littlejohn's conduct in the cafeteria on August 14th "...which was both unprofessional and unbecoming of the conduct expected of Essex County College

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5/ This was the first payday in August, which was also to be Littlejohn's last day of work prior to going on vacation through August 27, 1986.

employees..." This was formalized in a personnel action memorandum of August 29, 1986 (RC-2).[6/]

15. The Association promptly filed a grievance on behalf of Littlejohn based on her request of September 2, 1986 (CP-2).

16. On October 6, 1986, Caswell sent Littlejohn a letter by certified mail, advising her that she, Caswell, had been notified "today" regarding a hearing by the Board of Trustees on Littlejohn's termination, which was set for October 8, 1986 (CP-2).[7/]

17. Sometime in October 1986, but after October 8th, Littlejohn met with Caswell and Donald Nigro, an NJEA representative, in the cafeteria of the College. There were no College representatives present. Littlejohn testified that she attended this meeting because Caswell had written to her. At the meeting Caswell told her that the College's Board of Trustees had met and upheld her termination and that she, Caswell, did not think she could obtain another hearing.

18. However, on December 2, 1986, Caswell spoke to Littlejohn and informed her that her request for another hearing with the Board of Trustees had been granted. Caswell confirmed this

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6/ Littlejohn also testified that on August 27, 1986, her first day back from vacation, Caswell told her again that she was terminated for insubordination and then asked Littlejohn why she didn't retire and make things easy.

7/ Littlejohn testified that she did not receive Caswell's letter of October 6, 1986 (CP-2, supra) until after the hearing date of October 8, 1986.

conversation in a letter of the same date, December 2nd (CP-3), adding that, "We would like to meet with you prior to the hearing," which was scheduled for December 11, 1986.

19. Littlejohn did not appear at the December 11th hearing with Caswell and Nigro. Littlejohn testified that she was not going to attend any hearing without legal representation.

DISCUSSION AND ANALYSIS

The Applicable Standard On A Motion To Dismiss

The Commission in New Jersey Turnpike Authority, P.E.R.C. No. 79-81, 5 NJPER 197 (1979) restated the standard that it utilizes on a motion to dismiss at the conclusion of the Charging Party's case, namely, the same standards used by the New Jersey Supreme Court: Dolson v. Anastasia, 55 N.J. 2 (1969). The Commission noted the courts are not concerned with the worth, nature or extent, beyond a scintilla, of the evidence, but only with its existence, viewed most favorably to the party opposing the motion. While the process does not involve the actual weighing of the evidence, some consideration of the worth of the evidence presented may be necessary. Thus, if evidence "beyond a scintilla" exists in the proofs adduced by the Charging Party, the motion to dismiss must be denied.

The instant case represents a similar factual and legal situation to that of State of New Jersey, etc. and Littie Elise Rau, H.E. No. 85-48, 11 NJPER 425 (¶16147 1985), aff'd P.E.R.C. No 86-67, 12 NJPER 12 (¶17003 1985), aff'd App. Div. Dkt. No. A-2435-85T6

(1987). In that case, as in the case at bar, the Hearing Examiner utilized the analysis of the New Jersey Supreme Court in Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984) along with the scintilla standard in Dolson, supra, in adjudicating a motion to dismiss at the conclusion of the charging party's case.

In Bridgewater the Court adopted the analysis of the National Labor Relations Board in Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980) in "dual motive" cases, where the following requisites are utilized in assessing employer motivation: (1) the Charging Party must make a prima facie showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the employer's decision to discipline; and (2) once this is established, the employer has the burden of demonstrating that the same action would have taken place even in the absence of protected activity (95 N.J. at 242). The Court in Bridgewater further refined the test, supra, by adding that the protected activity engaged in must have been known by the employer and, also, it must be established that the employer was hostile towards the exercise of the protected activity (95 N.J. at 246).

The Respondent College's Motion To Dismiss Is Granted Since The Charging Party Has Failed To Adduce Even A Scintilla Of Evidence That Any Provision Of §§5.4(a)(1)-(7) Of The Act Was Violated By Her Discharge On August 29, 1986.

Aside from utilizing the "scintilla" and the Bridgewater tests to determine whether or not Littlejohn established a prima

facie case that the Respondent College was illegally motivated when it discharged her effective August 29, 1986, the Hearing Examiner notes that it is an established principle that an employer may legally discharge an employee for any cause, whatsoever others may think of its adequacy, so long as the motivation is not interference with rights protected under the Act: NLRB v. Eastern Smelting and Refining Corp., 598 F.2d 666, 669 (1st Cir. 1979). Similarly, an employer can fire an employee for good, bad, or no reason at all, so long as the purpose is not to interfere with union activities: NLRB v. Loy Foods Stores, Inc., 697 F.2d 798, 801 (7th Cir. 1983).

The Hearing Examiner is persuaded that when the testimony and the documentary evidence is viewed most favorably to Littlejohn as the Charging Party, she has failed to prove by even a scintilla of evidence that she engaged in protected activity during the course of her employment with the College. The Hearing Examiner concludes that the conduct that Littlejohn engaged in constituted nothing more than personal complaints or gripes, regarding her efforts to obtain her paycheck early on payday during the months of July and August 1986, prior to the 4 p.m. time set by the College for distribution of paychecks to all employees.

Consider the sources of employee rights in the public sector. First, there is the New Jersey Constitution, which provides in part, in Article I, Paragraph 19 that "Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or

agencies, their grievances and proposals through representatives of their own choosing." The Legislature, in amplifying upon the Constitution, supra, provided, in part, in Section 5.3 of the Act that "... public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity..."

The Commission in North Brunswick Tp. Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451 (1978) set forth a broad definition of individual employee conduct, which would constitute protected activity, citing several Federal Courts of Appeals decisions. In footnote 16 it is stated, "We find that individual employee conduct, whether in the nature of complaints, arguments, objections, letters or other similar activity relating to enforcing a collective negotiations agreement or existing working conditions of employees in a recognized or certified unit, constitute protected activities under our Act." (4 NJPER at 454). Note carefully the limitation placed by the Commission on protected individual conduct, namely, that it must occur in the context of enforcing an agreement or existing working conditions in a recognized or certified unit.

It is clear to the Hearing Examiner that Littlejohn does not fall within North Brunswick, supra, notwithstanding that Littlejohn is in a recognized or certified unit. Her complaint about not receiving a paycheck at the time that she wished at the end of her part-time shift at 1:15 p.m. in July and August 1986, did

not occur in the context of enforcing the collective negotiations agreement or any existing working condition. An examination of the collective negotiations agreement (RC-3) discloses that it contains no provision as to when an employee is paid whether part-time or full-time. Further, there is no existing working condition independent of the agreement which governs the time of day that an employee receives his or her paycheck on payday. The evidence adduced in the Charging Party's case established that the College had determined that employees were not to be paid until 4 p.m. irrespective of whether the employees were part-time or full-time. Thus, the gripe or personal complaint of Littlejohn to President Yamba in July 1986 and again, specifically, in the cafeteria on August 14, 1986, did not fall within the definition of protected activity under North Brunswick, supra.

Turning to the private sector, the Hearing Examiner cites the following cases decided by the National Labor Relations Board wherein individual employee conduct was deemed unprotected and the disciplined employees were not protected by the National Labor Relations Act. In Standard Brands, Inc., 196 NLRB No. 143, 80 LRRM 1227 (1972) an employee, who had made numerous pricing errors, was counseled on his work performance. Thereafter, he started to complain regarding a new supervisor and the supervisor's handling of the department. When the employee persisted in this activity, he was held to have been lawfully terminated. In Good Samaritan Hospital, 265 NLRB No. 92, 112 LRRM 1010 (1982) two employees were

terminated for having concertedly criticized a program coordinator. The discharges were deemed lawful since the employees were attempting to effect the direction and philosophy of management policy as to which there was no protection under the NLRA.

The Hearing Examiner also refers to several Courts of Appeals decisions, which sustained employer disciplinary action because of the absence of protected activity on the part of the employees. In Pelton Casteel, Inc. v. NLRB, 627 F.2d 23, 105 LRRM 2124, 2129 (7th Cir. 1980) an employee was protesting his overtime and job rates, which was deemed individual griping. The Court said that the public venting of personal grievances, even if shared by others, is not a protected activity. Lastly, in Koch Supplies, Inc. v. NLRB, 646 F.2d 1257, 107 LRRM 2108, 2109 (8th Cir. 1981) the Court recognized as lawful the discharge of a competent bilingual secretary, who was upset when she received no promotion. Thereafter, she constantly complained to supervision regarding her personal gripe over a new employee receiving vacation. The Court concluded that the discharge was because of persistent personal griping, which was not protected under the Act.

Applying the foregoing authorities to the facts established by Littlejohn in her case, it is clear to the Hearing Examiner that Littlejohn has failed to meet either the "scintilla" standard or the requisites of the Bridgewater test. One searches in vain for any evidence whatsoever that Littlejohn engaged in protected activity in the course of venting her displeasure over the fact that she did not

receive her paycheck on payday at the time that she wished during the months of July and August 1986. She acknowledged that she did not file a grievance which, if this had been done, might have afforded the Hearing Examiner some basis to conclude that she was engaged in protected activity by the filing of a grievance[8/] and that her subsequent discharge was retaliatory, assuming that a causal nexus had been established.

Bridgewater requires that an employee complaining of discriminatory conduct on the part of the employer must establish that he or she was engaged in protected activity, of which the employer had knowledge, and that the employer was hostile toward that employee's exercise of the protected activity. Even assuming that Littlejohn's complaints to President Yamba constituted protected activity, of which the College would have knowledge, there was plainly no hostility or anti-union animus manifested toward her by President Yamba or any other representative of the College. Thus, under the circumstances, Littlejohn did not meet the requirements of Bridgewater and, thus, no violation of §§5.4(a)(1)

8/ The Act protects the right of public employees to file grievances and, thus, if Littlejohn had filed a grievance regarding her failure to receive her paycheck in a timely fashion it would have been an activity protected under the Act: Dover Municipal Utilities Auth., P.E.R.C. No. 84-132, 10 NJPER 333, 338 (¶15157 1984).

or (3) of the Act occurred when the College decided to discharge her on August 29, 1986.[9/]

Finally, even though the Hearing Examiner has concluded that Littlejohn failed to adduce evidence "beyond a scintilla" sufficient to support an inference under Bridgewater that any activity of hers was a "substantial" or a "motivating" factor in the College's decision to discharge her, the result would be the same even if the Hearing Examiner was to assume arguendo that Littlejohn had satisfied the first part of Bridgewater by even a scintilla of evidence. This is so because the Hearing Examiner would be constrained to conclude that the College had met the burden of demonstrating by a preponderance of the evidence in the Charging Party's case that the discharge of Littlejohn would have taken place even in the absence of protected activity. The evidence adduced by the Charging Party established conclusively that the motivation of the College in discharging Littlejohn originated solely from her conduct in the cafeteria on August 14, 1986, when she approached President Yamba and two others at a table and told President Yamba what she thought of him. The fact that she claims she was not loud

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9/ Littlejohn in her unfair practice charge alleges that the College violated §§5.4(a)(1) through (7) of the Act. The preceding discussion pertained only to §§5.4(a)(1) and (3) of the Act since these are the only sections remotely applicable to the evidence adduced by the Charging Party in her case. Thus, the Hearing Examiner concludes that since no evidence whatever was adduced by Littlejohn as to any alleged violation by the College of §§5.4(a)(2), (4)-(7) of the Act these allegations in the Complaint must be dismissed.

or abusive is beside the point. No employee can expect to approach the highest official of an organization in public and berate him, in this case, for not having agreed to release his or her paycheck in advance of 4 p.m. on payday. Thus, the College has established clearly that its decision to discharge Littlejohn was based on legitimate business considerations, namely, conduct unbecoming an employee.

Accordingly, the Hearing Examiner grants the College's Motion to Dismiss the Unfair Practice Charge filed by Littlejohn against it.

The Respondent Association's Motion To Dismiss Is Granted Since The Charging Party Has Failed To Adduce Even A Scintilla Of Evidence That Any Provision of §§5.4(b)(1)-(5) Of The Act Was Violated Before Or After The Termination Of Littlejohn On August 29, 1986.

The evidence adduced by Littlejohn plainly implicated only a possible violation by the Association of §5.4(b)(1) of the Act, this being the subsection under which alleged breaches of the duty of fair representation by a public employee representative are adjudicated. There being no evidence whatsoever of an alleged violation by the Association of §§5.4(b)(2)-(5), these allegations are dismissed without more. Thus, the Hearing Examiner now sets forth the applicable law on what constitutes a breach of the duty of fair representation by a public employee representative under §5.4(b)(1) of the Act.

In adjudicating unfair representation claims 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); In re Board of Chosen Freeholders of Middlesex County, P.E..C. No. 81-62, 6 NJPER 555 (¶11281 1980), aff'd. Ap. 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); 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 also held that to establish 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).

However, 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).

As Findings of Fact Nos. 11, 15-19, supra, clearly indicate, the conduct of Caswell and Nigro, acting on behalf of Littlejohn before and after her termination on August 29th, compel the conclusion that Littlejohn did not adduce even a scintilla of evidence that the Association breached its duty of fair representation. For example, on July 31, 1986, the second payday in July, Caswell attempted to obtain Littlejohn's paycheck after she had been required to return it to Clarence Jones. Further, Caswell told Littlejohn at some point in or around that time that the Association was going to try to place into the collective negotiations agreement a provision for early payment for part-time workers.

After Littlejohn was terminated, effective August 29, 1986, the Association filed a grievance on Littlejohn's behalf on September 2, 1986 (CP-2). In pursuing Littlejohn's grievance, Caswell wrote to Littlejohn on October 6, 1986, advising her that a hearing on her case was scheduled for October 8, 1986 (CP-2). Admittedly, since it was sent by certified mail, Littlejohn did not receive Caswell's notice of the hearing for October 8th in time. Thus, Littlejohn did not appear.

However, shortly thereafter Caswell and Nigro set up a meeting with Littlejohn in the cafeteria in the College where she was informed that the Board of Trustees of the College had sustained her termination. At this same meeting in the cafeteria, Caswell told Littlejohn that the Association did not believe it could obtain a second hearing for her.

However, on December 2, 1986, Caswell spoke to Littlejohn and informed her that her request for another hearing before the Board of Trustees of the College had been granted and that the hearing was scheduled for December 11, 1986. Caswell, in a confirming letter, stated to Littlejohn that she and Nigro would like to meet with Littlejohn prior to the hearing (CP-3). However, Littlejohn did not attend the hearing and testified that she would not appear at any hearing without legal representation. With that the matter of further representation by the Association plainly ended.

It is abundantly clear to the Hearing Examiner that the Charging Party has not adduced a scintilla of evidence that the Association 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 is intentional, severe and unrelated to legitimate union objectives. The NLRB adds that the proof of "mere negligence," standing alone, does not suffice to prove a breach of the duty of fair representation. Utilizing these criteria in evaluating whether or not the instant Association breached its duty of fair representation, it seems abundantly clear that the Association's

conduct in the representation of Littlejohn was exemplary under the circumstances.10/

Thus, the Hearing Examiner concludes that the Association's Motion to Dismiss must be granted since there is not even a scintilla of evidence that the Association breached its duty of fair representation as to Littlejohn.

* * * *

Upon the testimony and documentary evidence introduced in this proceeding during the Charging Party's case, the Hearing Examiner makes the following:

RECOMMENDED ORDER

1. The Hearing Examiner concludes that the Charging Party failed to adduce even a scintilla of evidence that the Respondent College violated N.J.S.A. 34:13A-5.4(a)(1)-(7) and hereby grants the Respondent College's Motion to Dismiss. The Complaint as to the Respondent College is dismissed in its entirety.

2. The Hearing Examiner concludes that the Charging Party failed to adduce even a scintilla of evidence that the Respondent Association violated N.J.S.A. 34:13A-5.4(b)(1)-(5) and hereby grants

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

the Respondent Association's Motion to Dismiss. The Complaint as to the Respondent Association is dismissed in its entirety.

Alan R. Howe
Hearing Examiner

Dated: July 16, 1987
Trenton, New Jersey