STATE OF CONNECTICUT
LABOR DEPARTMENT
CONNECTICUT STATE BOARD OF LABOR RELATIONS

IN THE MATTER OF

A.C.E.S. EDUCATION ASSOCIATION

DECISION NO. 3329

-and-

AUGUST 2, 1995

CONNECTICUT EDUCATION ASSOCIATION

-and-

JOAN E. KRAJEWSKI

Case No. TUPP-15,901

APPEARANCES:

William J. **Dolan,** Esq.
For ACES

Brian Mangines, Esq.
For Joan Krajewski

DECISION AND DISMISSAL OF COMPLAINT

On November 8, 1993 a complaint was filed with the Connecticut State Board of Labor Relations (the Labor Board) by Thomas Krajewski on behalf of his wife, Joan Krajewski, against A.C.E.S. Education Association and Connecticut Education Association. The complaint was amended on August 26, 1994 to specify that Joan Krajewski was the actual complainant.

The complaint alleged that the A.C.E.S. Education Association (AEA), under the direction of the Connecticut Education Association (CEA) violated the duty of fair representation in its dealings with Joan Krajewski, and, thereby, violated the Act Concerning School Board-Teacher Negotiations (the Act or the TNA). Specifically, the complaint alleged that **AEA** deprived Krajewski of arbitration of her grievances because she elected to pay the AEA a service fee in lieu of becoming a member; allowed, sanctioned and/or caused the employer to discriminate against Krajewski; and failed to enforce clear contract terms.

After the requisite preliminary administrative steps had been taken, the parties appeared before the Labor Board for hearings on August 23, August 26 and December 22, 1994. At such times, the parties were provided full opportunity to adduce evidence, examine and cross-examine witnesses, and make argument. Post-hearing briefs and reply briefs were filed by both parties, the last of which was received by the Labor Board on March 10, 1995.

Based on the whole record before us, we make the following findings of fact and conclusions of law, and we dismiss the complaint.

FINDINGS OF FACT

1. Area Cooperative Educational Services (ACES) is a Regional Educational Service Center established pursuant to Conn. Gen. Stat. § 10-66a and is an Employer within the meaning of the Act. ACES is a cooperational supplier of special education services, receiving students from school systems that elect to send their students to ACES rather than to educate the students within the local system.

2. ACES Education Association (the AEA) is the exclusive collective bargaining representative for the unit of teachers employed by ACES, pursuant to certification in May, 1990. Its first collective bargaining agreement was for the term July 1, 1991 to June 30, 1993, and was executed on June 11, 1991.

3. The Connecticut Education Association (CEA) is the parent organization of ACES Educational Association, but it is not the exclusive collective bargaining representative of the ACES employees. The CEA provides assistance to the AEA, including services with respect to collective bargaining, negotiation of contracts, and grievance processing. Much of this assistance is provided by a CEA field representative, who frequently acts as an agent of AEA.

4. Wanda Williams-McCormack is the CEA field representative who served the AEA unit and was involved with the grievances of teacher Joan Krajewski at all times material herein. At all times material herein, she was an agent of the AEA.

5. Joan Krajewski is a teacher at ACES. She first worked for ACES in a certified position in 1987, and subsequently held a variety of intermittent positions including that of temporary substitute, permanent substitute and regular teacher. Her employment was not continuous until April 10, 1989.

6. As related more fully below, Krajewski was removed from active employment by what ACES claimed was a "seniority override" associated with a reduction in force in June, 1993.

7. In the spring of 1993, ACES informed AEA that it anticipated that it would be laying off a number of teachers because one large school system was withdrawing its students from ACES.

8. The 1991-1993 collective bargaining agreement contained provisions dealing with procedures for reduction in force. The provisions included a definition of seniority and specified the order in which certain categories of employees would be subject 'to layoff. The contract contained an exception to that order, which is generally referred to as the "seniority override". The pertinent contract provisions are as follows:

ARTICLE XVII REDUCTION IN FORCE

C. In the event it becomes necessary to lay off teachers, it shall be done in the following order:

1. attrition, voluntary retire, voluntary or involuntary transfers, terminations;

2. non-tenured; by seniority;

3. part time (less than 1.0 certified FTE) which shall be prorated;

4. tenured; by seniority.

D. Should it be necessary to lay off certified staff, the least senior staff member will be laid off first. Seniority at ACES is counted from date of hire at ACES in a certified position. Seniority is minus leaves other than sabbaticals. Program and staff groupings are to be considered.

1. Program groupings are designated by distinct budget units

2. Staff groupings consist of:

a. classroom teachers
b. physical education teachers
c. vocational teachers
d. school psychologists
e. social workers
f. speech and language clinicians
g. linking agents

E. A staff member with more seniority than a staff member in another program may be able to displace the junior staff member.

F. The Executive Director may have an override option to seniority, if these conditions exist:

1. The override option will ensure optimum staffing vis-a-vis student/program needs;

2. The junior staff member possesses unique characteristics for the program;

3. To effectuate a seniority override, the Executive Director shall demonstrate that the staff members retained in a program are superior in their qualifications;

4. The decision of the Executive Director to modify the strict application of seniority, shall not be a subject for the grievance procedure.

5. The standard by which the decision of the Executive Director shall be judged is whether the decision is arbitrary and capricious. A decision that is not arbitrary and capricious shah be upheld.

9. As reflected in an addendum to the contract, page **45a,** Section H contained the following recall procedure:

H. Recall Procedure

1. Should a position in ACES become available, the Executive Director shall offer the position to the individual on the recall list who was most recently terminated subject to consideration of program and staff groupings as noted in Section D of the Reduction in Force Procedure and subject to an override option based on the criteria listed in Section F of the Reduction in Force Procedure.

2. A separated teacher shall remain on the recall list for one school year.

3. If recall occurs for a position with an FTE less than it was at the time of separation, the teacher accepting the reduced position shall remain on the recall list until the original FTE is available or one additional school year, whichever occurs first.

4. Refusal to accept reduced **FTE** does not make the teacher ineligible for recall.

5. The teacher must notify ACES of any change in address and telephone number.

6. All notices to and from staff are to be sent certified mail.

7. A recalled teacher must accept, in writing, the position within ten working days from the date of mailing of the recall notice and must assume the position within ten days from the date of acceptance.

8. Association President will regularly receive status reports on the recall list.

10. In anticipation of layoffs, which were the first layoffs under the contract, **Williams-McCormack** met with the local AEA President in late April or early May, 1993 to determine the actual meaning of the contract language concerning seniority. The clause read as follows:

> Seniority at ACES is counted from date of hire at ACES in a certified position. Seniority is minus leaves other than sabbaticals.

They concluded that the above language meant "Continuous certified service".

11. Thereafter, AEA met with the ACES Director of Unit Relations, Dr. Saloom, to discuss the seniority issue. Saloom concurred with the AEA's view that the seniority date would reflect continuous certified service. This interpretation was not set down in any written document.

12. Subsequently, ACES provided the AEA with a seniority list.

13. AEA held a meeting with approximately 15 teachers whom ACES had listed as possible subjects for reduction in force, and it discussed the layoff situation. At this meeting, the AEA presented the teachers with the seniority list and asked them to check its accuracy.

14. Krajewski's seniority date was listed as 8/27/90. She informed Williams-McCormack that this seniority date was incorrect. Williams-McCormack met with Saloom on the subject, and AEA and Saloom agreed to revise the date to 4/10/89, which reflected the starting date of Kmjewski's continuous service in a certified position.

15. When Williams-McCormack met with Krajewski to inform her of therevision, Krajewski stated that the date was still incorrect as she had had prior employment contracts.

16. Williams-McCormack again met with Dr. Saloom concerning Kmjewski's seniority date. Their investigation of her employment history established that there had been breaks in the employment that occurred before April 10, 1989. Williams-McCormack concluded that the April 10, 1989 date accurately reflected the start of Krajewski's unbroken employment in a certified position, and, therefore, was the correct seniority date.

17. Williams-McCormack again met with Krajewski and explained to her that she believed that the April 10, 1989 seniority date was correct. Kmjewski expressed disagreement. Williams-McCormack also told Tom Krajewski (Joan's husband) that AEA disagreed with Mr. Krajewski's computation of the seniority date. (Tr. 122)

18. In May or June, 1993, Williams-McCormack met with Dr. Saloom several times concerning the list of 15 employees who might be laid off. At one of these meetings, Saloom indicated that Executive Director Young intended to override Krajewski's seniority using the procedure set forth in Article VII, Section F procedure and lay her off.

19. Williams-McCormack immediately called Kmjewski and informed her about the intended override.

20. Williams-McCormack offered to arrange a meeting for Krajewski, Williams-McCormack, and AEA President Carol Macarelli with ACES administrative personnel concerning why ACES wanted to override her seniority. Krajewski declined the meeting, stating that she felt a meeting with Dr. Saloom would be a waste of time.

21. Since the start of the 1992-1993 school year, Krajewski had been working in the Severe Communication and Behavior Disorder department as the result of a reduction in positions in the Multiply Handicapped department (MH) where she had worked previously

for many years. In the MH assignment, she had always received favorable evaluations. Once she was transferred to the SCBD, she had had many difficulties with her supervisor, Joy St. Leger, and had received various memoranda criticizing her performance.

22. Williams-McCormack spoke with Mr. Krajewski concerning the override. Krajewski raised the possibility of filing a grievance. Williams-McCormack pointed out the contract language, concerning overrides, was not subject to the grievance procedure, and stated that the matter was not grievable. In the alternative, she suggested that Krajewski seek a hearing pursuant to Conn. Gen. Stat. § 10-151 (The Teacher Tenure Act), and explained the burdens of proof under that procedure. At the end of the conversation, Mr. Krajewski expressed his view that the grievance/arbitration process was appropriate, and Williams-McCormack repeated that he should use the Section 10-151 process.

23. Williams-McCormack told Mr. Krajewski that the CEA would provide legal counsel for this process. She offered to arrange a meeting with legal counsel to pursue this avenue.

24. In keeping with the ACES stated intention, on or about June 15, 1993, Krajewski was notified by ACES that her contract was under consideration for termination.

25. Krajewski did formally initiate an inquiry to ACES under Conn. Gen. Stat. § 10-151. (Section 10-151 is structured so that terminations are "proposed". If a teacher requests a hearing, then the actual decision concerning termination is deferred until completion of that process.)

26. Krajewski never pursued a meeting with CEA counsel with respect to Section 10-151(d).

27. No hearing, as set forth in the statute, was ever held due to the fact that as of July, 1993 Krajewski was notified of recall to a regular teaching position for the 1993-1994 school year.

28. According to the testimony of Williams-McCormack, at a meeting sometime between June 18 and June 24, 1993, Dr. Saloom stated to Williams-McCormack that she intended to deny Krajewski recall rights if a position became available over the summer.

29. The reduction in force provisions in the collective bargaining agreement allows management to override seniority on recalls.

30. In response to Saloom, Williams-McCormack expressed strong opposition to any denial of recall rights to Krajewski and expressed the view that ACES was improperly merging "layoff" with a "performance based-dismissal".

31. Williams-McCormack promptly phoned Krajewski, related the conversation and stated that AEA was prepared to do anything to assist her to make sure that her recall rights were not denied.

32. The following day, Krajewski's husband, who by this time had become Krajewski's spokesperson, phoned Williams-McCormack about the recall issue. Williams-McCormack told him that a grievance on the recall issue would be premature. She stated that before a grievance could be filed, Krajewski would need to go on the recall list and then be denied the right to recall. Mr. Krajewski disagreed, indicating that he felt a grievance could be filed in advance of the event.

33. On June 24 and June 25, Krajewski filed three grievances - the "seniority override" grievance, the "denial of future recall" grievance, and the "seniority date" grievance.

34. Krajewski sent copies of these grievances to AEA President Macarelli. Neither Krajewski nor her husband actually asked the AEA or Williams-McCormack to file these, and did not solicit AEA assistance in representing Kmjewski on these matters, other than by virtue of their initial contacts and conversations with Williams-McCormack about the underlying issues, and much later by Krajewski's requests that AEA arbitrate the grievance.

35. Kmjewski made the decision not to seek the AEA's assistance on the "override" grievance at the lower steps based on the advice of her husband.

36. The "seniority override" grievance claimed the seniority override option could not be utilized because the Executive Director had not met the contractual preconditions of this option, and, thereby, violated the contract. Krajewski's requested remedy was for "full restoration of my seniority, my teacher's employment contract for both the 1993 summer session and future school years" and for make-whole relief.

37. The "denial of future recall" grievance claimed that ACES stated intention, not to recall Krajewski in accordance with seniority, went beyond the terms of the contract concerning override found at Article XII, Section E, "Reduction in Force". The grievance claimed this was an attempt at summary discharge. The requested remedy was for "full restoration of my seniority, my teacher's employment contract for the 1993 summer session and future school years" and for make-whole relief.

38. The "seniority date" grievance claimed that the April 10, 1989 seniority date was incorrect, because her date of hire in a certified position was October 20, 1987. The requested remedy was full restoration of her proper seniority "as well as restoration of my position as a tenured teacher in the MH unit from which I now believe I was improperly 'reduced' in June 1992. Any wages, benefits or other conditions of employment lost by me as a result of your utilization of an improper seniority date, past or present, are requested to be fully restored/reimbursed to me." [1]

39. On June 25, 1993, AEA President Macarelli sent a letter to Krajewski noting that she had received two grievances from Krajewski, setting forth the procedure at the lower level, and offering the AEA's assistance in presenting her claim. The letter also recapped the right of a tenured teacher to a statutory hearing concerning termination, gave advice about the

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[1] **The 1992 event involved a "bumping" situation where Krajewski had been reassigned from the MH unit to the SCBD unit under St. Leger.**

procedure to be followed and stated: "Please contact me when you decide to request a hearing, so I might arrange a legal consultation to review the reasons for termination, and any evidence designed to defend your claim." Macarelli invited Krajewski to contact her or Williams-McCormack with questions.

40. Krajewski did not request the assistance.

41. The three grievances were all denied at the lower steps by ACES.

42. In late July, ACES notified Krajewski by phone that she would be transferred to Unit II. On July 23, ACES Executive Director Young followed with a letter notifying Krajewski that she and 3 other teachers were being recalled due to resignations and projected increases in enrollment. He advised that he was requesting that the ACES Board of Governors revoke its decision to consider her contract for termination. Young also specified her new assignment.

43. On July 7, 1993, Krajewski appealed the "seniority override" and the "future recall" grievance to the ACES Board of governors, which is Step 3 of the contracted grievance procedure.

44. On August 10, 1993, Counsel for the Board of Governors sent Krajewski a letter that stated that ACES rejected the "seniority override" and "recall" grievances and refused to hear them based on the claim that the "seniority override" was not subject to the grievance procedure (Article XV, Section F, paragraph 4). Counsel also stated that he understood that she had been offered a position for the 1993-94 school year, and that, therefore, her grievance was moot.

45. On September 16, 1993, the Aces Board of Governors held a hearing on the "seniority date" grievance. The Krajewskis presented Joan Krajewski's case. Krajewski did not ask the Union to represent her at this Level 3 hearing based on her husband's view that the Union was not acting in her best interest. The AEA and CEA Representatives were present, pursuant to their contractual right under Article XIX, Section F that specifies: "When a teacher is not represented by the Association, the Association shall be notified and have the right to be present and to state its views at any level of the grievance procedure." The AEA and CEA did not make a presentation or comment.

46. On September 21, 1993, the Board of Governors denied Krajewski's grievance, based on the assertion that:

> ". . . the seniority list is based on date of hire into a regular permanent position. After many meetings, and much work it was decided between the union and the ACES' administration that permanent substitute and temporary substitute work would not be given full credit as regular full-time certified positions. The union and the ACES' administration worked through each and every employee's file to formulate a seniority list together. The parties employed careful, deliberate procedures to insure utmost fairness.

It is our belief that you were treated no differently than other employees in creating the seniority list. We therefore find no merit in the claims you made alleging unfair treatment. In addition, the formulation of the seniority list did not violate the collective bargaining agreement. "

47. On August 13, 1993, Krajewski asked the AEA to submit her "seniority override" and "future recall" grievances to arbitration.

48. On August 23, 1993, Williams-McCormack notified Krajewski by letter on behalf of AEA, that it would not submit the "seniority override" or the "future recall" grievances to advisory arbitration, based on the AEA's assessment that these grievances lacked merit. (Ex. 16). Williams-McCormack advised AEA President Macarelli that the seniority override grievance should not be a grievance and was more appropriately raised at a Section 10-151 hearing. She advised that the "future recall" grievance was moot at the time of the request for arbitration, since Krajewski had been recalled. This determination not to arbitrate these grievances was made by the AEA after discussions among AEA officials.

49. On September 24, 1993, Krajewski submitted to AEA a request that it arbitrate her "seniority date" grievance. Williams-McCormack advised the AEA that the grievance lacked merit due to the breaks in Krajewski's service. AEA President informed Williams-McCormack that she had discussed the seniority date issue with other AEA officials, including the negotiating chairman and another member of the negotiating committee.

50. The AEA made a good faith determination that the grievance lacked merit because seniority was based on continuous employment in a certified position. This position was communicated to Krajewski by Williams-McCormack on behalf of AEA, in a letter of October 12, 1993.

51. Krajewski was not employed in the summer teaching program in 1993, although the student to whom she was assigned during the school year was going to attend the summer session. Had Krajewski been slated for continued employment as of June, 1993, and if the past practice had been followed, she would have been asked if she wanted to teach her regularly assigned student in the summer program and would not have been the one to initiate an application for this work. She was not contacted by ACES with respect to her interest in this employment in 1993, and she did not submit an application for this employment.

52. Williams-McCormack did not know Krajewski was an agency fee payer, rather than a member of AEA, until during Krajewski's hearing before the Board of Governors in September, 1993. Neither Krajewski's agency fee status nor Krajewski's decision to file the initial grievances on her own were tied to Williams-McCormack's advice about the merits of the grievances or to the AEA's decision not to arbitrate.

53. Once Krajewski elected to file the three grievances, the AEA did not conduct a separate investigation on these grievances or meet again with Krajewski before reaching its decisions concerning arbitration.

54. The AEA bylaws provide that the Executive Board, which consists of the officers of the AEA (president, vice-president for negotiations, vice-president for grievances, secretary and treasurer), has the function of approving grievances for submission to arbitration.

55. The AEA's decision was based on its good faith assessment of the grievances.

CONCLUSIONS OF LAW

1. A certified exclusive collective bargaining representative has a statutory obligation of fair representation that requires that it serve the interests of all members without hostility or discrimination, that it exercise its discretion with complete good faith and honesty, and that it avoid arbitrary conduct.

2. A bargaining representative has discretion whether to file a grievance and how far to pursue it, provided the representative acts in good faith and without discrimination, and does not act in an arbitrary or perfunctory fashion.

3. The AEA did not breach its duty of fair representation to Joan Krajewski by its conduct dealing with several of Kiajewski's grievances during 1993.

DISCUSSION

This complaint involves a claim that the ACES Education Association (AEA) and the Connecticut Education Association (CEA) breached their duty of fair representation by conduct involving three grievances filed by Joan Krajewski. Krajewski focuses particularly on the AEA's decision not to arbitrate the grievances, and on its alleged failure to investigate the grievances fully before reaching its decision. Among other things, Krajewski claims that the Union's conduct was tainted by hostility at her status as an agency fee payer, and/or at her conduct initiating the grievances independent of the AEA.

We have set forth the facts in great detail because they leave little question that the AEA's actions were reached in good faith and were based on its reasoned assessment of the merits of the grievances, In fact, AEA's extensive contacts with Krajewski, which it initiated when it learned of the threat of the seniority override demonstrates a serious effort to help Krajewski and a commitment to fulfill its responsibility to members of the bargaining unit. The AEA simply cannot be faulted for a lack of active involvement in grievances when Krajewski did not seek the AEA's involvement except at the outset, when they discussed whether the grievances should be filed.

With respect to Krajewski's theory that the Union's lack of support for her grievances was based on her agency fee payer status and/or on hostility against her for pursuing her own grievances, we note that the CEA's representative, Williams-McCormack, did not even know Krajewski was an agency fee payer until her third step hearing in September, 1993, which was a month after it rejected her request to arbitrate the "seniority override" and "recall" grievances. Yet Williams-McCormack's theories about the lack of merit to the grievances

were formulated before the grievances were even filed, and these theories remained constant. Thus, the motivations could not have been as alleged.

Before addressing the complaint, we note at the outset that we have some doubts as to whether CEA can actually be subject to a charge of breach of DFR because CEA is not technically the exclusive bargaining representative. However, we do not need to reach a conclusion of this matter. To the extent that CEA is responsible as the "parent organization" of AEA, our conclusions regarding AEA apply to CEA. We also note that no evidence was presented concerning any CEA activity in this matter other than Williams-McCormack's role as CEA service representative.*

Having made some general comments about Krajewski's complaint, we set forth the standard by which we assess the claims.

THE LEGAL STANDARD

This is the first case before this Board involving the duty of fair representation since the General Assembly extended jurisdiction over these matters to us under the School Board-Teacher Negotiating Act.[3]

However, our standard for assessing a claim of a breach of the duty of fair representation is well-established. It is based on the reasoning of the United States Supreme Court in *Vuca v. Sipes, 386* U.S. 411, 87 S.Ct. 903, 17 L.Ed. 2d 842 (1967). In *Vuca, the* Court enunciated the principle that the exclusive authority granted to unions to represent employees within the bargaining unit is accompanied by:

> a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. (386 U.S. 171, 177)

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[2] The Complainant would have us draw a negative inference from the absence of testimony of AEA officers before this Labor Board, based on the principles set forth in *Secondino* v. New *Haven Gas* Co., 147 Conn. 672, 674-676 (1960). We agree with the AEA that the complainant is not entitled to an adverse inference in this regard, among other reasons because there is no showing that the AEA officers or executive board members were witnesses who AEA would naturally produce in addition to Williams-McCormack, and that they had material or substantial testimony that was not cumulative or inferior to what was offered. *Fontaine v. Coyle*, 174 Conn. 204, 209-212 (1978). We note that since Williams-McCormack was the AEA's agent, was intimately involved in the processing of the grievance, and testified extensively, there is considerable evidence of the basis of the AEA's action.

[3] Prior to 1993, complaints could not be filed by individuals under the Teachers Act, and duty of fair representation cases involving teachers could only be pursued by court litigation. PA 93-426 amended Conn. Gen. Stat. § 10-153e(c) by addiig a new subsection (3) prohibiting an organization of certified professional employees from "breaching its duty of fair representation pursuant to Section 10-153a, as amended by Section 5 of this Act."

In Vuca the Court also stated:

> Though we accept the proposition that a Union may not arbitrarily ignore a meritorious grievance or process in a perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement. Id. at 191

We adopted and applied the ***Vaca*** standard in ***City of New Britain (Henry Kosinski),*** Decision No. 1131 (1973). We reaffirmed it and voiced approval of the reasoning and standards of other key federal cases in ***Teamsters Union Local No. 677 and Ida Singer,*** Decision No. 1141 (1973). These cases involved the Municipal Employee Relations Act. Our cases, and the federal cases on which we rely, have addressed the nature of this duty in two settings, namely contract negotiations and processing of grievances arising during the term of a collective bargaining agreement.

In ***Teamsters*** Local 677, ***supm, we*** found no violation of the duty under the Municipal Employee Relations Act, stating:

> " . . . a bargaining representative has discretion whether to file a grievance and how far to pursue it, provided the representative acts in good faith and without discrimination. "

We have continued to utilize these standards in cases arising under the MERA and the State Employee Relations Act. See e.g. State ***of Connecticut (Vera McGregor),*** Decision No. 2638 (1988). Our standard retains its validity, and we continue to apply it in all our statutory settings. We find no differences in the wording of the Teacher Negotiation's Act that would warrant application of some other standard. We note that in ***Masto v. Board of Education,*** 200 Conn. 482, 487 (1986) our Connecticut Supreme Court approved the standard we espouse when it stated:

> While a "union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion", an individual has no "absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement". ***Vaca v. Sipes, 386*** US 171, 17 L.Ed. 2d 842 (1967). In fulfilling its duty to process fairly the legitimate grievances of individual employees, the union must be given the discretion to winnow out frivolous claims prior to the most costly and time consuming step in the grievance procedures. [citations omitted]

As we approach the instant case against this background, and in response to some of the analysis contained in the parties' briefs, we stress that our ultimate focus is not whether or not a grievance has merit, but whether the union processed it in good faith, without arbitrary or discriminatory considerations. Certainly, the reasonableness of a union's

position may be one factor in measuring whether its conduct met those criteria.' But this is

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[4] The Connecticut Supreme Court in *Masto* v. *Board of Education of the Town of Hamden,* 200 Conn 482,487 (1986), stated:

> "The union in this case processed the grievance through the first three steps and determined for itself that the grievance lacked merit. Without suggesting that a union must be correct in such a determination if it is later to avoid liability for failure to process a grievance; . . . we do note that an employee has no cause of action whatsoever against his union where the employer has not breached the collective bargaining agreement. " [citations omitted]

We take the Court's initial comment in *Masto* about not "suggesting that a union must be correct" in its determination as to the merits is not inconsistent with the concept that a complainant does not win a fair representation case simply by proving a grievance has merit. Neither do we take its statement that there is no cause of action against a union where there is no contract breach to require us to focus on the merits of the grievance. The Connecticut Supreme Court, which in *Masto repeatedly* cited federal precedent including *Vaca,* said nothing that directs us to cast ourselves as arbitrators ruling on the merits of the grievance, or to create a forum to substitute for the arbitration process. It should be noted that *Masto* involved an action against the employer for specific performance of the contract, so that the Court was already ruling on the claim of contract breach. We have no jurisdiction over simple contract breaches, so that issue is not before us for determination in fair representation cases.

We note that the Complainant has cited *Tedesco* v. Stamford, 222 Conn. 233 (1992) for the proposition that "If an employee's grievance has merit, the union must proceed to arbitration". We do not believe this sentence *in Tedesco, supm* is dispositive of the case before us since this sentence appears in the context of an extensive reaffirmation of *Vaca v. Sipes* and the criteria of "good faith", and in juxtaposition to a reference to the obligation of a union not to "arbitrarily ignore a meritorious grievance or process it in a perfunctory manner". [emphasis added]. The comment that the union "must proceed to arbitration" is puzzling because it does not match the rest of the Court's opinion which centers around the union's right to exercise discretion and the need to settle grievances short of arbitration to avoid overburdening the arbitration process. Also, the Court in *Tedesco* does not make clear whether the phrase "if an employee's grievance has merit" references a good faith determination by a union as to the merits of the grievance or a determination by a tribunal. Given the prior comments of the Court in *Masto* about not "suggesting that a union must be correct" in its determination of whether a grievance has merit, we doubt that this one sentence of dicta was intended to abandon prior case law and to change the focus of inquiry in a fair representation case to whether or not a grievance has merit. If that were the case, the Court's ruling would be at odds with the United States Supreme Court's ruling in *Vaca* where the Court expressly rejected a standard that would have found a breach of the duty of fair representation, if a jury or Judge later found a grievance meritorious.

Second, we note that *Tedesco* was not a case alleging a breach of the duty of fair representation, rather the legal issue presented to the court was whether the City of Bridgeport violated an employee's due process rights under the test articulated in *Loudermill* v. *Cleveland Board of Education, 430* U.S. 532 (1985). Thus, we have some doubt as to whether the court's discussion of the duty of fair representation in *Tedesco, supm* was essential to its determination and, thus, should be considered anything other than obiter dicta. Third, we have always understood the duty of fair representation to arise from the Union's status as exclusive bargaining agent under various collective bargaining statutes; thus, it is a duty imposed by statute. In *Vaca, supm,* the U.S. Supreme Court noted that the NLRB and the federal courts had concurrent jurisdiction over duty of fair representation cases arising under the NLRA; NLRB's deriving from § 8(b)(1)A of the NLRA, while the federal courts having jurisdiction by virtue of § 301 of the NLRA. There is no section in any of the public sector collective bargaining statutes, which we administer, that is comparable to § 301. Thus, the decisions rendered by

(continued.. .)

not to say that we must rule on whether or not a grievance has merit, or that it is the key to our analysis.

We now turn to the actual issues involved in the separate grievances, and expand on our assessment that there is no evidence of bad faith, arbitrary or discriminatory conduct.

The seniority date grievance

The essence of Krajewski's claim is that the contract language concerning the definition of seniority, admits of only one interpretation; that regardless of whether subsequent employment is continuous, the seniority date is based on the first date of being hired into a certified position. We describe this as her initial position because she expresses this view in testimony at one point, but later Krajewski concedes that periods without employment of any sort should be deducted, and an adjusted seniority date established.[5]

The contract provides: "Seniority at ACES is counted from date of hire at ACES in a certified position. Seniority is minus leaves other than sabbaticals." We believe that this definition admits of more than one interpretation, particularly given the second clause. A superficial reading of the first clause makes a simplistic reading tempting. However, if the clauses are read together, it is arguable that since the parties were deducting most leave time, they did not intend to ignore other more pronounced breaks in service.

Even if a contract clause is unambiguous on its face, we believe parties to a collective bargaining agreement are entitled to agree to clarify language, which originally was too simplistic to deal with the reality of the workplace, or which produces unforeseen, unfair results. A collective bargaining agreement is a document that is given life by the parties' interactions. If both parties to that agreement find that they chose language that failed to reflect their mutual intent, failed in its strict reading to anticipate their real needs, or failed to permit reasonable applications, they must have the leeway to make refinements within the collective bargaining process. The contract is not between the individual and the employer, but between the union and the employer. It would undermine collective bargaining to deny those parties the right to make adaptations. Thus, here the parties were entitled to agree on the way the contract definition would be applied. The fact that there is no actual oral or written document does not render their agreement void. In any case, the agreement of ACES and AEA on a seniority list demonstrated their mutual understanding.

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[4](...continued)
the court in *Masto* and *Tedesco* arose under a different jurisdictional basis than the TNA. On the other hand, we have primary jurisdiction to determine violations of the duty of fair representation under our collective bargaining statutes. We must keep this fact in mind as we apply the case law we believe to be pertinent to our statutory grant of power.

[5] Counsel for Kmjewski attempts to persuade us that the later testimony is not her statement of what the contract requires, but what Joan Kmjewski thinks is fair. We find the record unclear on this point. We do note that there appeared to be a difference in interpretation by Mr. Krajewski and Joan Kmjewski. Of course, this is Joan Krajewski's complaint, and it involves her grievances.

Additionally, we emphasize that there is absolutely no evidence that the parties' agreement on the meaning of the existing contract language sprang from any desire to "cut out" particular individuals. Rather, the unrebutted evidence is that the AEA was trying to apply seniority equitably to a variety of employment histories, and AEA reached agreement with ACES before it was even clear which individuals would be subject to layoff. We also are aware that the concept of "continuous service", as a component of seniority, is a widely accepted approach in labor relations, warranting no inference of improper motives.[6]

In view of the above, we conclude that the evidence demonstrates that the AEA acted in good faith in assessing the merits of Kmjewski's seniority date grievance, determining not to arbitrate it, and in adhering to what it believed was the correct definition of seniority.'

The seniority override grievance

Similarly, with respect to the AEA's posture on the seniority override grievance, we find no violation of the Act. The AEA clearly made a good faith evaluation of the question of grievability of the override. Its view that the matter was not grievable was clearly reasonable in view of the contract language, which expressly states: "The decision of the Executive Director to modify the strict application of seniority shall not be subject for the grievance procedure. " The Krajewskis had a contrary view, which was understandable as the override provision is an odd amalgam, in that it contains extensive details about the criteria for an override, specifies that the standard by which the Executive Director's decision shall be judged, and yet contains the language about exempting the matter from the grievance process. However, the undeniable existence of that specific exemption makes the Krajewski's position tenuous at best.

The Union's good faith is also demonstrated by the fact that it suggested the alternative of the statutory hearing process under Conn. Gen. Stat. § 10-151, and it initiated the offer of assistance via that route. We conclude that the AEA genuinely believed that this alternative was far more viable, given the contract language that precluded the Association from grieving. Further the AEA's offer of assistance was substantive, not illusory; it offered a meeting with management and a meeting with the CEA legal staff. With respect to the meeting with management, we think the complainant is distracted by the factual issue of

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[6] **The Kmjewski's point to the seniority date of "09-0172-77" assigned to William Jaekel as demonstrating an inconsistency in application of the definition. However, no evidence was present to indicate what this notation signified, or that it did represent inconsistency. The "mystery" does not prove disparate treatment.**

[7] **The fact that the AEA's representative did not actively support Krajewski at the third step hearing is not a breach of its duty. The AEA support would have been illogical since its position was contrary to Kmjewski's. We also note that Krajewski never asked the AEA to represent her at the third step, and had elected throughout processing of the grievance to pursue the grievances on her own because her husband did not feel AEA represented her interests adequately. We find nothing inappropriate in the AEA's demeanor during that hearing.**

whether Director Young was going to be present.* Clearly, any meeting was a sensible starting point. Although Krajewski had the right to judge the meeting valueless, the Union should be credited for having made the offer. Moreover, the AEA clearly took the matter seriously as it had one or two meetings with management concerning the intention to lay off Krajewski.

With respect to Krajewski's contention that the AEA did not probe sufficiently the reasons for the proposed override, we note that the process became truncated when Krajewski elected not to utilize AEA's assistance in the pursuit of the Section 10-151 process. Although the Krajewskis focus extensively on whether or not Williams-McCormack announced that a co-counsel arrangement proposed by the Krajewski's was unacceptable, this distracts the parties from the underlying issue of the assistance offered by AEA -- it offered counsel, and Krajewski chose not to accept this offer. We do not believe the duty of fair representation requires a Union to permit an employee to have private co-counsel. Here even the contract that provides that a grievant, in the grievance process, may be represented in the grievance process by a person of her choosing does not require the Union to participate in a co-counsel arrangement. For that matter, we question whether the duty of fair representation extends to representation of an employee in a Conn. Gen. Stat. § 10-151 procedure (a question we do not answer), which is a statutory rather than contractual process.

In sum, we find no bad faith, arbitrary, capricious or discriminatory conduct by the AEA in reaching its assessment that the seniority override was not grievable, and therefore should not be arbitrated.

The recall grievance

Turning to the recall grievance, we conclude that the AEA's view that the grievance was premature, was not unreasonable, given the provisions of the contract concerning notice of recall, and the fact that no formal action denying recall to Krajewski had been taken. Certainly, Krajewski's view was not unreasonable either, i.e., the claim that a grievance was triggered by the administration's expression of its intent not to recall Krajewski. However, our task is not to determine who was correct, but to ascertain whether the AEA's view was arbitrary, discriminatory or asserted in bad faith. The fact that its position was not unreasonable, and that it was forthcoming communicating its views, contributes to our conclusion that its conduct was not tainted.

With respect to the decision not to arbitrate the grievance, the AEA's position that that grievance was moot was not unreasonable, since Krajewski had been recalled as of the time of the request for arbitration, resolving the essence of the grievance. However, Krajewski asserts that the aspect of the grievance that dealt with summer school was not moot because she still lost summer employment. The summer school issue is complex, as it appears to have had the potential to involve the initial seniority override (which was arguably

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8 **We note that Krajewski herself testified that she was not sure whether she was told that Young would he at the meeting.**

not grievable), the recall issue (which also involved an override clause) and the seniority date issue, although the interplay between these issues was not clearly delineated by either party before us. Significantly, the summer school issue was not the subject of the recall grievance, nor was the subject ever filed as a separate grievance; the summer school issue is only identified tangentially in requested remedy on the recall grievance and the seniority override grievance.

We find it impossible to conclude that the Union's failure to identify the summer school matter as an outstanding issue that might not be moot, amounted to a breach of the duty of fair representation. We understand that Krajewski believes that the AEA should have conducted an investigation of the substance of the grievance at the point that she requested arbitration, an investigation which she believes would have revealed that she was inappropriately deprived of summer employment. However, since the AEA was not actively involved in the lower steps of the grievance, due to Krajewski's choice to pursue the grievances on her own, and since the summer school issue was only mentioned in the remedy section, it is understandable that the AEA did not focus on this issue. In this setting, Krajewski had some responsibility to highlight for the AEA what she felt was an unresolved issue. In these confusing circumstances, we find that the union's conduct cannot be characterized as arbitrary, discriminatory or conducted in bad faith.

In sum, we conclude that the evidence fails to establish that the AEA breached its duty of fair representation. While individual aspects of events may have prompted concern by the Krajewskis, particularly in the context of the major threat to Krajewski's career, which was represented by the override, it is important not to lose sight of the overall picture in this case. The overall picture of the conduct of the AEA and its agent, Williams-McCormack, reflects that the AEA made numerous efforts in Kmjewski's behalf, but simply did not share her views as to the merits of the grievances. The evidence does not support a finding that its conduct was perfunctory or that its position was based on any arbitrary, capricious, bad faith or discriminatory considerations.[9] Accordingly, we dismiss the complaint.

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[9] **One of the elements of Krajewski's theory here was that the AEA's decision not to arbitrate the grievances was arrived at by AEA officials other than those called for in the by-laws. The record is not at all clear on this point. Williams-McCormack testified about the officials with whom she communicated, and she did not have full knowledge of the communications within the AEA on these grievances. Krajewski called no witnesses to demonstrate that the by-laws were violated. In any case, our role is not to enforce union by-laws, as that is an internal union matter outside our jurisdiction. Most importantly, we find nothing in the record evidence to indicate that even assuming there was some deviation from the by-laws, such was tied to any arbitrary or discriminatory response to Krajewski's grievance. For example, there is no evidence that biased officials acted on the grievance, that the AEA departed from a customary procedure, nor is there any other evidence to warrant a negative inference.**

ORDER

By virtue of and pursuant to the power vested in the Connecticut State Board of Labor Relations by the Act Concerning School Board-Teacher Negotiations, it is hereby ORDERED, that the complaint filed herein be, and the same hereby is, DISMISSED.

CONNECTICUT STATE BOARD OF LABOR RELATIONS

s/Margaret A. Lareau 7/28/95
Margaret A. Lareau,
Chairman

s/Anthony Sbona
Anthony Sbona,
Board Member

s/Antonia C. Moran
Antonia C. Moran,
Board Member

CERTIFICATION

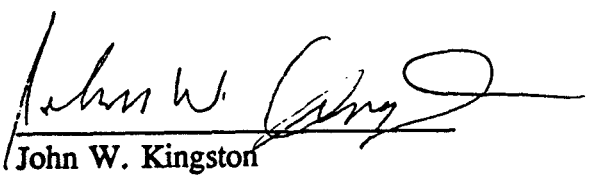
I hereby certify that a copy of the foregoing was mailed postage prepaid this 2nd day of August, 1995 to the following:

William J. Dolan, Esq. RRR
Capitol Place, Suite 500
21 oak street
Hartford, Connecticut 06106

Brian Mangines, Esq. RRR
Mangines & Mangines
1375 Kings Highway East
Fairfield, Connecticut 06430

Joan E. Krajewski RRR
154 Northwood Drive
Guilford, Connecticut 06437

Wanda Williams-McCormack
CEA UniServ
325 South Main Street
Cheshire, Connecticut 06410



John W. Kingston
Agent
Connecticut State Board of Labor Relations