

D.U.P. No. 2008-8

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION  
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

FOP LODGE 12,

Respondent,

-and-

Docket No. CI-2008-015

SHARON DAVIS,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by an individual charging party against F.O.P. Lodge 12. The Director finds that the facts alleged do not indicate that F.O.P. Lodge 12 violated its duty of fair representation.

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Appearances:

For the Respondent,  
Markowitz & Richman, attorneys  
(Stephen C. Richman, of counsel)

For the Charging Party,  
Sharon Davis, pro se

REFUSAL TO ISSUE COMPLAINT

On October 26, 2007, Sharon Davis (Davis) filed an unfair practice charge against her majority representative, FOP Lodge 12 (Lodge 12). The charge alleges that Lodge 12 violated section 5.4b(1), (3), and (5)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). Davis alleges

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<sup>1/</sup> These provisions prohibit employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. (5) Violating any of the rules and regulations established by the commission."

that Lodge 12 unlawfully refused to provide her satisfactory legal counsel throughout internal departmental hearings and subsequent proceedings at the New Jersey Office of Administrative Law related to disciplinary charges levied against her by the City of Newark. The charges ultimately resulted in Davis' termination.

On November 16, 2007, Lodge 12 filed a reply, asserting that Davis, an FOP member, elected to participate in a legal defense plan administered and controlled by the New Jersey State Fraternal Order of Police. The plan provides legal representation by the firm of Fusco & Macaluso, P.A. Lodge 12 asserts that membership in the plan is available to any member of a New Jersey Fraternal Order of Police lodge paying the annual plan participation fee. The plan provides that the named firm will represent all covered FOP members for an array of legal matters, including disciplinary charges. In this case, Lodge 12 avers, Davis was provided legal counsel through the firm, pursuant to the terms of the plan. Lodge 12 argues that when Davis subsequently rejected the firm, it was not obligated to provide her with another attorney. Lodge 12 also asserts that Davis could have requested another attorney under the plan or retained another at her own expense.

The Commission has authority to issue a complaint where it appears that the Charging Party's allegations, if true, may constitute an unfair practice within the meaning of the Act.

N.J.S.A. 34:13A-5.4c; N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I may decline to issue a complaint. N.J.A.C. 19:14-2.3. On May 13, 2008, I wrote to the parties, advising that I was not inclined to issue a complaint and setting forth the reasons upon which I reached that conclusion.

On May 21, 2008, Davis filed a reply attacking the actions, statements or inaction of union president Derrick Hatcher, and referred to a newspaper article, allegedly stating that an attorney was hired by the union to represent other employees. If there is such an article, no evidence of those facts have been presented to us from which we could conclude that Lodge 12 acted inconsistently in this case. Here, Lodge 12 acted appropriately by providing an attorney to Davis through the State FOP Legal Defense Fund. Lodge 12 was not obligated to monitor the legal representation provided to Davis, and that representation remained available to her with a different attorney despite her unsuccessful ethics complaints against her first appointed attorney.

On March 26, 2007, Davis, accompanied by attorney Anthony Fusco of Fusco & Macaluso, P.A. attended a departmental hearing on charges of "communications" and "disobedience to orders/inaccessibility" for which she was suspended 12 days. According to Davis, Fusco did not communicate with her before the hearing date. He allegedly spent a few minutes before the

hearing trying to negotiate a settlement, and then, in her view, attempted to "coerce" her to accept the employer's settlement proposal, which Davis rejected. No decision was issued and the matter proceeded to the Office of Administrative Law.

On March 28, 2007, Davis telephoned Lodge 12 president Derrick Hatcher and told him that she was unhappy with the representation provided by the attorney and did not want him to continue as her counsel.

On April 23, 2007, Davis appeared for a second departmental hearing on another (unspecified) departmental charge, the penalty for which was termination. Attorney Fusco appeared in person to represent Davis, but she refused his counsel. She was either unrepresented or appeared pro se at the hearing, which resulted in her termination, effective July 1, 2007. She appealed the decision to the Merit System Board.

On May 15, 2007, Davis filed a complaint against Fusco with the Office of Attorney Ethics. On May 29, Davis received a letter from Fusco advising that in light of the filed ethics complaint, he could no longer represent her. The Supreme Court of New Jersey District XI Ethics Committee subsequently determined that the allegations in Davis' complaint, even if proved, would not constitute unethical conduct and the matter was dismissed.

On June 15, 2007, Davis attended a settlement conference at the Office of Administrative Law as part of the appeal process.

She appeared pro se. No settlement was reached, and the matter was scheduled for hearing on October 22, 2007. Davis claimed Hatcher failed to provide legal counsel for that June settlement conference. On July 1, 2007, Davis' employment was terminated. On November 1, 2007 Davis began receiving disability pension payments, which included monies retroactive to July 1, 2007.

On October 15, 2007, Davis received a letter from another legal defense plan attorney from the Fusco firm. The letter advised that the firm had been reinstated as her counsel inasmuch as the ethics complaint had been dismissed. The attorney wrote that he would appear on her behalf at the October 22, 2007 hearing. Davis appeared at the Office of Administrative Law on October 22 and learned that the attorney had requested and was granted an adjournment of the hearing.

On November 5, 2007, Davis personally hired counsel to represent her through her appeal of her termination for a fee of \$7,500, which was subsequently reduced to \$1,800.

#### Analysis

Section 5.3 of the Act empowers an employee representative to represent all unit employees fairly in negotiations and contract administration. The standards in the private sector for measuring a union's compliance with the duty of fair representation were set forth in Vaca v. Sipes, 386 U.S. 171 (1967). Under Vaca, a breach of the statutory duty of fair representation occurs only when a union's conduct towards a

member of the negotiations unit is arbitrary, discriminatory, or in bad faith. Id. at 191. That standard has been adopted in the public sector. Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976); see also Lullo v. International Ass'n of Fire Fighters, 55 N.J. 409 (1970); OPEIU Local 153 (Johnstone), P.E.R.C. No 84-60, 10 NJPER 12 (¶15007 1983).

It appears that the legal defense plan in which Davis enrolled is not administered, maintained, or controlled by Lodge 12. Under the plan, Davis was entitled to receive and was provided legal counsel for departmental hearings and New Jersey Office of Administrative Law proceedings related to the charges levied against her by her employer. Davis, at one point, refused representation by the designated law firm and filed an ethics complaint against the assigned attorney. After that complaint was dismissed, the law firm again sought to represent Davis at the next scheduled proceeding with a different attorney. No facts suggest that the asserted adjournment of the October 22, 2007 hearing date waived or harmed Davis' rights. While Davis subsequently chose to have her own attorney after October 22, it was not because the FOP provided attorney was unwilling to represent her.

The allegations regarding the events of April 23, 2007 and earlier are beyond the six-month statute of limitations. That the assigned attorney met Davis for the first time minutes before

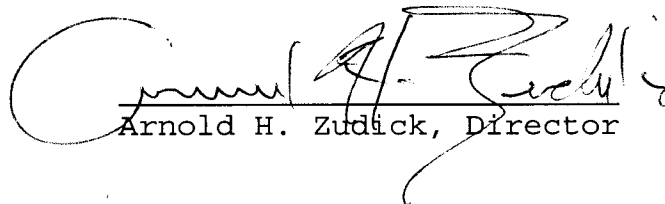
the scheduled March 26, 2007 hearing and sought her consent to a proposed resolution is not a failure of Lodge 12's duty of fair representation. Davis afterwards rejected the representation offered through the legal defense plan and voluntarily chose to retain her own counsel. Despite the one instance in June 2007 where Davis did not have an attorney at a settlement conference, her appointed attorney was available to represent her at the fall 2007 OAL hearing, but Davis rejected that representation. A review of all of the facts leading up to the OAL hearing do not suggest that Lodge 12 violated its duty of fair representation.

The Commission's complaint issuance standard has not been met and I refuse to issue a complaint on the allegations of this charge.<sup>2/</sup>

ORDER

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR  
OF UNFAIR PRACTICES



Arnold H. Zudick, Director

DATED: June 19, 2008  
Trenton, New Jersey

**This decision may be appealed to the Commission pursuant to N.J.A.C. 19:14-2.3.**

**Any appeal is due by June 30, 2008.**

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<sup>2/</sup> N.J.A.C. 19:14-2.3.