D.U.P. NO. 91-6

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

In the Matter of

COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 1082 & MIDDLESEX COUNTY BOARD
OF SOCIAL SERVICES,

Respondents,

-and-

Docket No. CI-90-55

WILLIAM BROWN,

Charging Party.

SYNOPSIS

The Director of Unfair Practices refuses to issue a Complaint and Notice of Hearing on a charge alleging that CWA violated its duty of fair representation and that the Middlesex County Board of Social Services violated the Act by discharging him.

The Director found that the charging party failed to allege sufficient facts concerning "collusion" by the respondents and concerning CWA's decision to advance a "competing" grievance over the one Brown wished to file. The Director also found insufficient facts suggesting a conflict of interest in CWA's determination not to defend Brown in his discharge case on grounds that he was innocent.

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Appearances:

For the Respondent C.W.A.
David Sherman, attorney

For the Respondent Board of Social Services
Martin R. Pachman, attorney
(Evelynn Caterson, of cousnel)

For the Charging Party,
William Brown, pro se

REFUSAL TO ISSUE COMPLAINT

On February 14 and March 12, 1990, William Brown filed a charge and amended charge alleging that Communications Workers of America, Local 1082 ("CWA") violated subsections 5.4(b)(1), (2), (3), (4) and (5) of the New Jersey Employer-Employee Relations Act ("Act")[1/] and that his employer, Middlesex County Board of Social

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1/ These subsections prohibit employee organizations, their representatives or agents from: "(1) Interfering with,

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Services ("Board") violated subsections 5.4(a)(1), (2), (3), (4), (5), (6) and (7) of the Act.[2/]

Brown alleged that the CWA local president "advised [him] to resign" following the Board's filing of a disciplinary charge against him in February 1989. Brown asserts that the same local president advised him on the following day to accept the Board's recommendation that he take an unpaid mandatory medical leave.

1/ Footnote Continued From Previous Page

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."

2/ 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."

Brown took the leave, which ended, after an extension of time, on September 13, 1989. On September 22, he was given a "hearing," after which the Board fired him. Brown "believe[s] that [the local president] knew that [the Board] was going to fire [him] all along" and that the medical leave was a "smokescreen," the object of which was to constructively force him to leave his job. He also alleged that in November 1988, CWA failed to represent him in a matter concerning sexual harassment.

Brown alleged that the Board and the CWA "knew that they were going to fire [him] all along". He alleged that he was wrongfully charged with sexual harassment, based solely upon a co-worker's "word against [his]."

On February 28, CWA filed a response. It asserted that it represented Brown "numerous times" in disciplinary matters over the past five years, some of which concerned sexual harassment charges. Brown has been suspended twice.

CWA contends that in February 1989, it investigated the sexual harrassment charges against Brown and "determined that [they] were accurate." CWA further advised that it would "provide him with procedural advise and technical assistance but would not represent him in any appeal which contended that he was innocent of the charges."

CWA also asserted that the local union president's spouse represented some of Brown's co-workers in a December 1, 1988 grievance, asserting that management "failed to provide a safe

working environment and failure to enforce the sexual harassment policy." The grievance alleged that Brown had threatened and harassed employees. CWA advised Brown of these facts during the pendency of the February 1989 disciplinary charges. On or about February 23, 1989, Brown signed a one paragraph document stating:

> I have chosen David Hildreth to serve as my Union Shop Steward, and as my representative in all hearings concerning disciplibary action against me. I am aware that Beth Myers is serving in the same capacity on behalf of Gloria Rousey and Joan Banks.

Rousey and Banks are the employees on whose behalf the December 1, 1988 grievance was filed. Myers and Hildreth are married.

On or about October 3, 1989, after the hearing, CWA mailed a letter to Brown advising that the local is "convinced that the charges brought against [Brown] by management are valid." It also advised Brown that he had 20 days in which to file an appeal with the Merit System Board.

On or about March 8, 1989, the Board personnel officer advised Brown in writing of the general terms of the medical leave. He wrote:

> If you are able to return to work, you must still answer to the disciplinary charges presented to you on February 27, 1989. The departmental hearing will be rescheduled to correspond with the end of the leave without pay.

On March 20, 1990, the Board filed a letter asserting that Brown's charge is "no more than a rehash of [his] arguments as to the validity of his termination," which was pending before an Office

of Administrative Law Judge.[3/] The Board asserted that it was unaware of Mr. Brown's union activities and that no complaint should issue on his unfair practice charge.

On May 25, 1990, the Merit System Board issued a final administrative decision affirming the factual findings and conclusions of an administrative law judge's decision sustaining Brown's discharge (OAL Dkt. No. CSU8146-89). The administrative law judge found that Brown was employed by the Board as an income maintenance technician for four years, was suspended in 1987 for failing to "maintain courteous and cooperative relations with coworkers and supervisory staff" and suspended in September 1988 on the same charges. The decision included findings concerning the February 1989 disciplinary charges.

On June 1, Brown filed documents concerning the merits of the charges brought against him. He asserted that after CWA learned that two witnesses had corroborated the Board's allegations, it advised him to resign. Brown alleges he was "unjustly terminated and that the [Board] and [CWA] acted in concert to discriminate against me, due to my sexual gender and possibly to my race."

On June 29, 1990, we issued a letter advising the parties that a Complaint and Notice of Hearing would probably not be issued and that we intended to dismiss Brown's charges.

3/ Mr. Brown requested and was granted a postponement of processing of the charges pending the OAL decision. That decision was issued on April 4, 1990.

On July 17, 1990, Brown filed a response admitting that he had been suspended twice but denying that he had ever been charged with sexual harassment before February 1989. He asserted that the suspensions (one dating to April 1987) were "due primarily to union incompetence." Brown questioned what facts CWA relied upon to determine that the Februray 1989 disciplinary charge was accurate.

Brown asserts that he "initiated" sexual harassment charges against fellow employees in November 1988 and that CWA local president Hildreth advised him that nothing could be done. He contends that CWA did not advise him until February 1989 that Hildreth's spouse was representing other employees in "counter sexual harassment charges."

Brown also asserts that his March to September 1989 medical leave was "bogus," thereby making his allegations against CWA for its failure to properly represent him in November 1988, timely. He alleges that the Board had no more reason to terminate him in September than in March. He summarizes, "...That leave and the machinations behind it, is the essence of my charge citing the CWA and the Board acting concert to terminate me and quash my appeals thay I might pursue."

Finally, Brown contends that the Board negotiated in bad faith because he "maintained [his] end of the bargain and...the Board did not." He alleges that CWA acted in bad faith by coercing him to accept a mandatory medical leave.

A majority representative is responsible for representing the interests of all unit members without discrimination. Subsection 5.4(b)(1) requires that an employee organization fulfill its duty of fair representation. New Jersey has adopted the standard set forth in Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967), for deciding duty of fair representation cases. D'Arrigo v. N.J. State Bd. of Mediation, ___ N.J. __ (1990). In Vaca v. Sipes, the Supreme Court held:

> ...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, capricious or in bad faith. [Id. at 190, 64 LRRM 2376]

See also, Union County College Chapter of AAUP (Donahue), P.E.R.C. No. 85-121, 11 NJPER 374 (¶16135 1985).

Brown has failed to allege facts showing how the CWA and Board "conspired" against him by "requiring" his mandatory medical leave. Nor has he alleged facts suggesting what CWA and Board "bargain" resulted in his discharge. These allegations are merely conclusions -- nothing in the charge suggests that the respondents had any illicit agreement concerning Brown's employment status in 1989.

In February 1989, CWA informed Brown that Hildreth's spouse was representing other union employees in a grievance protesting Brown's "threats and harassment." Brown also signed a statement acknowledging the Hildreth/Myers situation and affirming his desire to have Hildreth represent him. Brown has not alleged any facts suggesting that before or during his medical leave CWA did not

provide him fair representation. Even if CWA should have removed even the appearance of some conflict of interest, Brown has not alleged any facts showing a "discrimination that is intentional, severe and unrelated to union objectives." Amalgamated Assoc. of Street, Electric Railway and Motor Coach EES of America v. Lockridge, 403 U.S. 274, 301, 77 LRRM 2501 (1971). From February to August 1989, Brown, a unit employee on medical leave, had the opportunity to address any perceived CWA impropriety. Accordingly, we dismiss any allegation concerning CWA's alleged improprieties in November 1988 as beyond our six month statute of limitations. N.J.S.A. 34:13A-5.4(c).

We also refuse to issue a complaint on the charge alleging that CWA failed to investigate Brown's potential sexual harassment case and that it had inadequate facts to determine that the grievance filed against him had merit. An employee organization may properly determine the relative merits of "competing" grievances. Jersey City Medical Ctr., P.E.R.C. No. 88-6, 13 NJPER 640 (¶18240 1987); N.J. Turnpike Employees Union, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979). Brown has not alleged facts showing how CWA's determination was arbitrary, capricious or made in bad faith. Furthermore, on May 25, 1990, the Merit System Board issued a decision adopting an Office of Administrative Law Judge's decision sustaining Brown's discharge. William Brown v. Middlesex Cty. Bd. of Social Services, OAL Dkt. No. CSU8146-89. The decision, containing findings of fact contrary to the bulk of Brown's allegations, ultimately confirms that CWA's determination was not made in bad faith. See also Hackensack v. Winner, 82 N.J. 1

(1980). Accordingly, we dismiss all allegations that CWA failed to fulfill its duty of fair representation.

We also find no basis for issuing a complaint against the Board. While an unfair pracrice charge filed against a public employer may be considered separately, the Commission has determined that processing of such a charge must be grounded upon a claim that the majority representative, either alone or in collusion with the employer, violated the duty of fair representation. N.J. Turnpike Authority and Jeffrey Beall, P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980), aff'd App. Div. Dkt. No. A-1263-80T3 (10/30/81).

Brown's allegations do not show that the Board "colluded" with CWA concerning the discharge. The Board personnel officer advised Brown in writing on or about March 8, 1989, that the February 1989 charges would be heard upon his return from the medical leave. When Brown returned from the leave, a hearing was conducted in September 1989. The Board's determination was sustained by an administrative law judge and affirmed by the Merit System Board. Under these circumstances and in the absence of any allegation that Brown was discharged because of protected activity, we dismiss all charges filed against the Board.

Accordingly, the complaint issuance standard has not been met and we refuse to issue a complaint and Notice of Hearing.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES

Edmund G. Gerber, Director

DATED: August 22, 1990
Trenton, New Jersey