

D.U.P. NO. 90-1

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

In the Matter of

P.B.A., LOCAL #105,

Respondent,

-and-

Docket No. CI-89-45

LEE MICHAEL GIORDANO,

Charging Party.

SYNOPSIS

The Director of Representation declines to issue a complaint on the allegations that P.B.A. Local #105 refused to provide Lee Michael Giordano with legal counsel for a departmental hearing or to reimburse his legal fees. Giordano did not allege that these refusals were made arbitrarily, discriminatorily or in bad faith.

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Appearances:

For the Respondent
Samuel Love, Jr., President

For the Charging Party
Lee Michael Giordano, pro se

REFUSAL TO ISSUE COMPLAINT

On November 17, 1988, Lee Michael Giordano filed an unfair practice charge alleging that P.B.A., Local #105 (Local 105) violated subsections 5.4(b)(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act").^{1/} Giordano alleges that: on July 15, 1988 charges were brought against him and he asked Local #105 to provide him with an attorney; Local 105 advised him that it would not provide Giordano with an attorney until he was fired; Giordano retained an attorney;

^{1/} 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. and (5) Violating any of the rules and regulations established by the commission."

the charges brought against Giordano were later dismissed; Giordano asked Local 105 to reimburse him for his attorney's fees; and Local 105 refused.

N.J.S.A. 34:13A-5.4(c) sets forth in pertinent part that the Commission shall have the power to prevent anyone from engaging in any unfair practice, and that it has the authority to issue a complaint stating the unfair practice charged.^{2/} The Commission has delegated its authority to issue complaints to me and has established a standard upon which an unfair practice complaint may be issued. The standard provides that a complaint shall issue if it appears that the allegations of the charging party, if true, may constitute an unfair practice within the meaning of the Act.^{3/} The Commission's rules provide that I may decline to issue a complaint.^{4/}

Based on Giordano's allegations, it appears that the Commission's complaint issuance standards have not been met. Unions must represent the interests of all unit members without

^{2/} N.J.S.A. 34:13A-5.4(c) provides: "The commission shall have exclusive power as hereinafter provided to prevent anyone from engaging in any unfair practice.... Whenever it is charged that anyone has engaged or is engaging in any such unfair practice, the commission, or any designated agent thereof, shall have authority to issue and cause to be served upon such party a complaint stating the specific unfair practice charged and including a notice of hearing containing the date and place of hearing before the commission or any designated agent thereof...."

^{3/} N.J.A.C. 19:14-2.1.

^{4/} N.J.A.C. 19:14-2.3.

discrimination. N.J.S.A. 34:13A-5.3. A breach of the duty of fair representation occurs only when a union's conduct toward a unit member is "arbitrary, discriminatory, or in bad faith." Belen v. Woodbridge Tp. Bd. of Ed. and Woodbridge Fed. of Teachers, 142 N.J. Super. 486 (App. Div. 1976), citing Vaca v. Sipes, 386 U.S. 171 (1967). The Commission and New Jersey Courts have consistently applied the Vaca standard in evaluating fair representation cases. Saginario v. Attorney General, 87 N.J. 480 (1981); Fair Lawn Bd. of Ed., P.E.R.C. No. 84-138, 10 NJPER 351 (¶15163 1984); OPEIU Loc. 153 (Thomas Johnstone), P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983); City of Union City, P.E.R.C. No. 82-65, 8 NJPER 98 (¶13040 1982). The mere fact that a union decision results in a detriment to one unit member does not establish a breach of the duty. Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); see also Humphrey v. Moore, 375 U.S. 335 (1964).

In Bergen Community College Faculty Association, P.E.R.C. No. 84-117, 10 NJPER 262 (¶15127 1984), the Commission adopted a hearing examiner's grant of summary judgment in favor of an Association charged with withdrawing legal assistance from a unit employee pursuing a lawsuit in federal court. The Commission concluded that the issue of providing legal assistance to unit employees was an internal matter not within the Commission's jurisdiction. See also Camden County College, D.U.P. No. 89-11, 15 NJPER 171 (¶20072 1989). Private sector cases accord: No Court has adopted the rule that employees are entitled to independently

retained counsel in an arbitration proceeding.^{5/} Castelli v. Douglas Aircraft Co., 752 F.2d 1480, 118 LRRM 2717 (9th Cir. 1984); Grovner v. Georgia Pacific Corp., 625 F.2d 1289, 105 LRRM 2706 (5th Cir. 1980); Walden v. Teamsters, Local 71, 468 F.2d 196, 81 LRRM 2608 (4th Cir. 1972); Steed v. United Parcel Service, 512 F. Supp. 1088 (S.D. W.Va 1981). See Lullo v. Firefighters Local 1066, 53 N.J. 409 (1970).

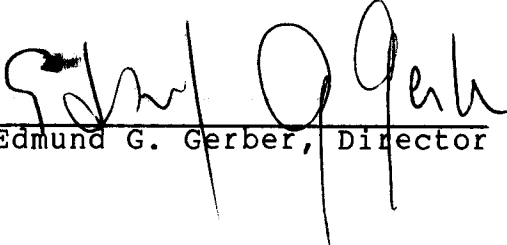
Giordano has not alleged facts suggesting that Local 105's refusal to provide him with an attorney for a departmental hearing or its refusal to reimburse his attorney's fee was arbitrary, discriminatory or made in bad faith. He has not alleged that Local 105 refused to represent him.^{6/} There is no statutory or regulatory requirement that a union provide an attorney to represent a unit member at a departmental hearing nor is there an allegation of such a contractual right here. Accordingly, absent allegations that such a refusal was arbitrary (e.g., that the union provided

^{5/} However, a union must provide nondiscriminatory representation to all negotiation unit employees. When a union customarily provides an attorney to union members in arbitration proceedings, the refusal to provide an attorney to a non-union employee is a breach of the duty of fair representation. National Treasury Employees Union v. F.L.R.A., 721 F.2d 1401 (D.C. 1983).

^{6/} Though not considered in evaluating Giordano's pleadings, Local 105 filed a position statement on December 27, 1988 indicating that it does not provide an attorney for departmental hearings. Instead, Local 105 provides institutional vice presidents and shift stewards to represent employees at this level. If an employee in one of Local 105 units prefers, he or she may elect to retain a private attorney. Attorney's fees are never reimbursed.

attorneys for other similarly situated employees, but not for Giordano) discriminatory or in bad faith, I decline to issue a complaint.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES



Edmund G. Gerber, Director

DATED: July 12, 1989
Trenton, New Jersey