

D.U.P. NO. 96-22

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

In the Matter of

COMMUNICATIONS WORKERS OF
AMERICA, LOCAL 1033

Respondent,

-and-

Docket No. CI-95-45

CYNTHIA E. SMITH,

Charging Party.

SYNOPSIS

The Director of Unfair Practices refuses to issue a complaint on Cynthia Smith's allegations that CWA Local 1033 inadequately represented her by refusing to appeal a disciplinary suspension.

The Director finds that although Smith alleged that CWA refused to appeal her disciplinary suspension, that a CWA representative sent her letters requesting that she notify CWA if she desired union representation. There is no further record of Smith's actions after receipt of the letter and no evidence that CWA would not have pursued the grievance if Smith had responded.

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Appearances:

For the Respondent,
Charles Hendrix, Staff Representative

For the Charging Party,
Cynthia E. Smith, pro se

REFUSAL TO ISSUE COMPLAINT

On January 27, 1995, Cynthia E. Smith filed an unfair practice charge with the Public Employment Relations Commission against the Communications Workers of America Local 1033. Smith alleges that CWA violated subsections 5.4(b)(1) through (5) ^{1/} of

^{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. (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."

the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by failing to represent her, including refusing to appeal a disciplinary suspension.

Smith worked in the Hazardous Site Litigation section of the New Jersey State Division of Law. Smith states that from May to August 1994, she was the only employee in her section required to sign in and out of work. She states that on approximately July 19, 1994, she asked CWA representative Charles Hendrix to file an appeal of a disciplinary charge that would result in a one-day suspension without pay. Smith alleges that Hendrix refused to do so, claiming that she would "make him look bad" and that the discipline was her "own damn fault". She alleges that Smith also told her if she got fired, that it was her own damn fault. Smith states that Hendrix did not represent her during the summer of 1994 and that "he was not interested in taking her appeal".

Smith was on disability leave from August to November 1994. She was suspended upon returning to work on November 30 and/or December 1, 1994. Smith seeks reimbursement of money she lost. She also demands that Hendrix fulfill his duties as a union representative. Smith alleges that she contacted Hendrix on many occasions, but does not specify when they were, nor what she expected him to do.

Hendrix states that Smith contacted him on May 20, 1994 regarding discipline about to be imposed for chronic and excessive absenteeism and lateness. Hendrix requested copies of supporting

documentation and Smith faxed him a May 18, 1994 memorandum entitled "Lateness and Administrative Matters". The memorandum detailed Smith's lateness to work -- including arrival times between 9:15 and 9:35 a.m. -- and required her to sign in and out of work^{2/}. Additionally, the memorandum detailed instances when Smith failed to provide proper telephone coverage. Smith also provided a copy of a sign-in sheet for May 19, 1994.

Hendrix then discussed the matter with the employer, who provided him with other documentation regarding Smith's attendance. Hendrix reviewed Smith's leave time records and a sign in sheet from May 19 to June 3, 1994 that reflected arrival times at work ranging from 9:10 to 9:31 a.m.. Hendrix discussed this information with Smith, informed her that she had not provided him with correct information regarding the proposed discipline and told her that she could appeal any disciplinary action against her.

On June 16, 1994, Smith faxed Hendrix a copy of a written reprimand for chronic and excessive lateness^{3/} and her sign-in sheets from June 14 through June 29, 1994. On June 21, 1994, Hendrix sent Smith a letter informing her that he was aware of the written reprimand and stating that "If you desire Union representation in this matter, please notify this office within 48 hours upon receipt of this letter."

^{2/} Although the proper arrival time is not stated, it is apparent that the employer found these times inappropriate.

^{3/} The date of the reprimand does not appear on the copy submitted to us.

Hendrix had also received a copy of a June 17, 1994 memorandum detailing Smith's refusal to sign-in, which disregarded the directive of the May 18, 1994 "Lateness and Administrative Matters" memorandum. On July 26, 1994, Smith received a notice of minor discipline. The division imposed a two-day suspension for chronic and excessive lateness. Time sheets were attached indicating that Smith was late to work (arriving in excess of 15 minutes after the required starting time) 14 out of 25 work days.

On July 28, 1994, Hendrix sent a letter to Smith advising her that he had been informed of the disciplinary action. It stated that if she desired representation, she should contact the union within 48 hours of receipt of the letter. Hendrix states that Smith did not respond. On August 10, 1994, Smith was informed by the human resources department of the Division of Law that the appeal period for the notice of minor discipline dated and received on July 26, 1994 had lapsed and that no appeal had been received. The suspension was imposed for August 17 and 18, 1994. On November 23, 1994, Smith was advised by the employer that the suspension was rescheduled to be served on November 30 and December 1, 1994.

Hendrix states that an appeal of the June and July 1994 disciplinary actions against Smith was held in abeyance at her request and that she did not contact him concerning either to pursue them. Hendrix states that his last contact from Smith was when she informed him that she would get back to him in August 1994.

Smith's allegation that CWA failed to properly represent her and refused to appeal a disciplinary suspension falls under subsection 5.4(b)(1) of the Act,^{4/} which prohibits employee organizations, their representatives or agents from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act.

In OPEIU, Local 153, P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983), the Commission discussed the appropriate standards for reviewing a union's conduct in investigating, presenting and processing grievances:

In the specific context of a challenge to a union's representation in processing a grievance, the United States Supreme Court has 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, discriminatory, or in bad faith." Vaca v. Sipes, 386 U.S. 171, 190 (1967) (Vaca).

A union should attempt to exercise reasonable care and diligence in investigating, processing and presenting grievances; it should exercise good faith in determining the merits of the grievance; and it must treat individuals equally by granting equal

^{4/} Smith also alleges that CWA violated subsections 5.4(b)(1) through (5), she has not alleged any facts showing that CWA interfered with, restrained or coerced the public employer in the selection of its representative for the purposes of negotiations or the adjustment of grievances, refused to negotiate in good faith with the employer, or refused to reduce a negotiated agreement to writing and to sign such agreement. Smith has also not alleged facts indicating that CWA violated any of the Commission's rules and regulations. Therefore, I dismiss her allegations that CWA violated subsections 5.4(b)(2), (3), (4) and (5) of the Act.

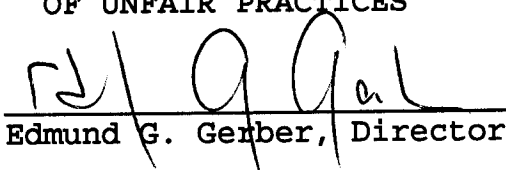
access to the grievance procedure and arbitration for similar grievances of equal merit. Mackaronis and Middlesex Cty. and NJCSA, P.E.R.C. No. 81-62, 6 NJPER 555 (¶11282 1980), aff'd. App. Div. Docket No. A-1455-80 (4/1/82), certif. den. 91 N.J. 242 (1982); New Jersey Turnpike Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979) ("Local 194"); and In re AFSCME Council No. 1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978). All the circumstances of a particular case, however, must be considered before a determination can be made concerning whether a majority representative has acted in bad faith, discriminatorily, or arbitrarily under Vaca standards. OPEIU Local 153 at 13.

Smith has not alleged any facts that show that Hendrix acted in a manner that was arbitrary, discriminatory or in bad faith. Smith alleges that she requested that CWA representative Hendrix appeal a one-day suspension and that he refused to do so. Smith contacted Hendrix in May 1994 regarding impending discipline for her absenteeism and lateness. Hendrix reviewed documentation given to him by Smith, met with the employer and investigated the incidents giving rise to the discipline. Smith was then given a written reprimand for lateness in June 1994 and received a notice of minor discipline with a two-day suspension for chronic and excessive lateness. Hendrix submitted letters dated June 21 and July 28, 1994 that he sent to Smith. The letters stated that he had been informed of the disciplinary actions and that "If you desire union representation in this matter, please notify this office within 48

hours upon receipt of this letter.". There is no further record of Smith's actions after receipt of the letters and there is no evidence that CWA would not have pursued the grievance had Smith responded to Hendrix' letters. See Rutgers University and AFSCME Local 1761 (Dros-Martinez), P.E.R.C. No. 91-33, 16 NJPER 538 (121242 1990)

Based upon the above, I find that the Commission's complaint issuance standard has not been met and I decline to issue a complaint on the allegations of this charge.^{5/} Accordingly, the charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES


Edmund G. Gerber, Director

DATED: April 12, 1996
Trenton, New Jersey