P.E.R.C. NO. 91-33

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY OF
NEW JERSEY and AFSCME LOCAL 1761,

Respondents,

-and- Docket No. CI-H-89-22

ROSA IRIS DROS-MARTINEZ,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by Rosa Iris Dros-Martinez against Rutgers, the State University of New Jersey and AFSCME Local 1761. The charge alleged that Rutgers violated the New Jersey Employer-Employee Relations Act by terminating Dros-Martinez and that AFSCME violated the Act by not following through on a grievance contesting her discharge. The Commission finds no breach of the duty of fair representation and no evidence that Rutgers violated any subsections of the Act.

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ROSA IRIS DROS-MARTINEZ,

Charging Party.

Appearances:

For the Respondent, Rutgers, The State University
Christine B. Mowry, Assistant Vice-President for Staff Affairs

For the Respondent, AFSCME Local 1761
Szaferman, Lakind, Blumstein, Watter & Blader, attorneys
(Sidney H. Lehmann, of counsel)

For the Charging Party, James L. Barrett, Jr., attorney

DECISION AND ORDER

On September 16, 1988, Rosa Iris Dros-Martinez filed an unfair practice charge against Rutgers, the State University of New Jersey and AFSCME Local 1761. The charge alleges that Rutgers violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsection 5.4(a)(7),[1/] by terminating her. The charge also alleges that AFSCME violated

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1/ This subsection prohibits public employers, their representatives or agents from: "(7) Violating any of the rules and regulations established by the commission."

subsections 5.4(b)(1) and (5),[2/] by not following through on a grievance contesting her discharge.

On April 14, 1989, a Complaint and Notice of Hearing issued. Rutgers filed an Answer claiming that the termination was for just cause and that the allegations constitute a breach of contract claim that do not warrant the exercise of our unfair practice jurisdiction. AFSCME filed an Answer claiming that it performed every duty it owed to the charging party.

On September 27 and November 15, 1989 and January 12, 1990, Hearing Examiner Stuart Reichman conducted a hearing. The parties examined witnesses, introduced exhibits, and filed post-hearing briefs.

On July 10, 1990, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 91-1, 16 NJPER ____ (¶ ___ 1990). He found that AFSCME did not breach its duty of fair representation in not pursuing the charging party's discharge grievance. He concluded that, at most, AFSCME was negligent in allowing the grievance to lapse, but that mere negligence is not a breach of the duty of fair representation. Given that finding, he also concluded that the charging party lacked standing to allege that the employer violated the contract. He further found that the charging party failed to prove that AFSCME or Rutgers violated any of the Commission's rules and regulations.

2/ 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. (5) Violating any of the rules and regulations established by the commission."

On July 30, 1990, the charging party filed exceptions to certain findings of fact and the Hearing Examiner's conclusions. She also relies on her post-hearing brief.

On August 13, 1990, AFSCME filed a reply to each of the factual exceptions. It urges adoption of the recommended decision.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 2-12) are accurate. We incorporate them here. In response to the charging party's exceptions, we find that: (1) finding no. 2 accurately reflects that there were no problems with the charging party's work performance at the Graduate School of Management; (2) finding no. 7 accurately reports that Brancato brought numerous work deficiencies at the Physical Plant Department to the charging party's attention; (3) finding no. 8 accurately reflects that the charging party's performance problems persisted through March 11, 1988; (4) finding no. 11 accurately recounts the incident concerning the undelivered telephone message -- while the charging party testified that she did not remember the incident (1T60), Brancato testified that she recognized the charging party's handwriting (2T105); (5) finding no. 14 accurately reports that Ancrum indicated to the charging party that the only remedy which could be obtained was reinstatement to her position in the physical plant department -- we add that Ancrum did not specifically know why the charging party could not be reinstated to a position

other than at the physical plant (2T26-2T29), but that AFSCME Local 1761 president Arlene Hartley testified that reinstatement is to the position the employee held when terminated (3T87-3T88); (6) finding no. 16 accurately reflects how the charging party's grievance was diverted to the personnel office where the employment manager agreed to help her find another job at the University; (7) finding no. 17 accurately reports that the charging party was able to use the University's internal bidding procedure despite being terminated -- there is no evidence that the charging party was stigmatized because she had been terminated; (8) the record does not support an inference that the charging party should have known that there would be a second interview at the Neurological Science Department; (9) finding no. 19 accurately reflects the testimony about the charging party's contact with the personnel office after her termination; and (10) finding no. 21 accurately reflects the evidence concerning AFSCME's failure to further process the charging party's grievance.

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 Vaca standard governs fair representation cases. Saginario v. Attorney General, 87 N.J. 480 (1981); Newark Teachers Union, P.E.R.C. No. 90-87, 16 NJPER 252 (¶21101 1990); 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). "[All] the facts of each case must be scrutinized to determine whether a breach has been proven; there are no bright line tests." City of Union City, P.E.R.C. No. 82-65, 8 NJPER 98, 99-100 (¶13040 1982).

The charging party filed a grievance contesting her discharge and AFSCME's representative, in good faith, attempted to resolve the grievance by arranging for the charging party to bid on other jobs within the University. In fact, the Hearing Examiner found that the charging party would likely have found a comparable position in the University through AFSCME's efforts had she not failed to follow up on a job interview. There is no evidence that AFSCME would not have pursued the grievance had the charging party expressed her desire that it do so, or that AFSCME's conduct in settling the grievance was arbitrary, discriminatory or in bad faith. Accordingly, we find no breach of the duty of fair representation.

We also find no evidence that Rutgers violated subsection 5.4(a)(7) or any other subsection of the Act. In light of our finding that AFSCME did not breach its duty of fair representation, the charging party cannot contest the merits of her discharge through an unfair practice proceeding. N.J. Turnpike Authority (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).

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Ruggiero, Smith and Wenzler voted in favor of this decision. None opposed. Commissioner Reid abstained from consideration.

DATED: Trenton, New Jersey
September 27, 1990
ISSUED: September 28, 1990

H.E. NO. 91-1

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY OF,
NEW JERSEY, and AFSCME LOCAL 1761,

Respondents,

-and- Docket No. CI-H-89-22

ROSA IRIS DROS-MARTINEZ,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission dismisses an unfair practice charge filed against AFSCME, Local 1761 and Rutgers, The State University of New Jersey. The Hearing Examiner finds that AFSCME, Local 1761 did not breach its duty of fair representation owed to the charging party when it allowed a grievance contesting the discharge of the charging party to lapse, since the grievance was resolved. The Hearing Examiner also finds that no facts were adduced to show that Rutgers violated the portion of the Act claimed by the charging party to have been violated.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 91-1

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BEFORE A HEARING EXAMINER OF THE
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For the Respondent, Rutgers, The State University
Christine B. Mowry, attorney

For the Respondent, AFSCME Local 1761
Szaferman, Lakind, Blumstein, Watter & Blader, attorneys
(Sidney H. Lehmann, of counsel)

For the Charging Party, James L. Barrett, Jr., attorney

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On September 16, 1988, Rosa I. Dros-Martinez ("Charging Party") filed an unfair practice charge (C-4)[1/] against Rutgers, The State University of New Jersey ("Rutgers") and the American Federation of State, County and Municipal Employees, Local 1761 ("AFSCME"). The Charging Party alleged that Rutgers violated the

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1/ Exhibits received in evidence marked "C" refer to Commission exhibits, those marked 'CP" refer to Charging Party exhibits and those marked "R" refer to Respondent's exhibits. Transcript citations "1T1" refers to the transcript developed on September 27, 1989 at p. 1; transcript citations "2T" and "3T" refer to the transcripts developed on November 15, 1989 and January 12, 1990, respectively.

New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically Section 5.4(a)(7)[2/] by wrongfully discharging her. Dros-Martinez also alleged that AFSCME violated the Act, specifically Section 5.4(b)(1) and (5)[3/] by allowing a grievance filed on her behalf to lapse and thereby breach its duty of fair representation owed to her.

On April 14, 1989, the Director of Unfair Practices issued a Complaint and Notice of Hearing (C-1). Hearings were conducted on September 27, November 15, 1989 and January 12, 1990, at the Commission's offices in Newark, New Jersey. The parties were afforded an opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. The parties filed timely post-hearing briefs. Upon the entire record, I make the following:

FINDINGS OF FACT

1. Rutgers is a public employer, AFSCME is a public employee representative and Dros-Martinez, during the time relevant

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2/ This subsection prohibits public employers, their representatives or agents from: "(7) Violating any of the rules and regulations established by the commission."

3/ 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. (5) Violating any of the rules and regulations established by the commission."

to this unfair practice charge, is a public employee within the meaning of the Act.[4/]

2. On April 1, 1987, Dros-Martinez began work at Rutgers' Graduate School of Management as a word processing secretary (1T21-1T22). Her job duties included typing memoranda, preparing course outlines and exams, answering telephones and arranging appointments for faculty members (1T22). No problems with her work performance arose during the time she worked at the Graduate School of Management (1T23; 3T6; 3T12).

3. After approximately eight months at the Graduate School Management, Dros-Martinez decided to apply for a promotion in the Physical Plant Department (1T25-1T26). She had two interviews at Physical Plant; the first with Helen Luketzis and the second with the Director of Physical Plant, Eric Snyder (1T27-1T28). The collective agreement (CP-7) requires that an individual be employed for at least six months before being eligible to bid on a promotion

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4/ AFSCME refused to stipulate that it was a public employee representative and that Dros-Martinez was a public employee within the meaning of the Act. I take administrative notice of a Certification of Representative issued to AFSCME on November 11, 1971 (Docket No. RO-343) naming AFSCME as the exclusive representative of all salaried clerical office, laboratory and technical employees of Rutgers, The State University. I further note that AFSCME and Rutgers are parties to a collective agreement covering employees included in titles in which Dros-Martinez served (CP-7). On the basis of the testimony contained in the record in this matter, it is evident to me that Dros-Martinez was a public employee within the meaning of the Act during the time relevant to this unfair practice charge. Accordingly, I find that AFSCME is a public employee representative and Dros-Martinez is a public employee within the meaning of the Act.

and limits a successful bidder to wait six months before bidding on another position.

4. On December 7, 1988, Dros-Martinez began work as a principal clerk typist in the Physical Plant Department (1T29). Patricia Brancato was her immediate supervisor (1T31). Brancato reported to Snyder (2T94).

5. Within a few weeks of Dros-Martinez's transfer into the Physical Plant Department, she experienced difficulties with the job (1T39; 1T83). In early January, 1988, she met with Michael Iannarone, Employment Manager for the Newark Campus, in order to discuss the possibility of a transfer out of the department (1T85; 1T139). She also expressed her unhappiness with her job to Brancato and co-worker Joan Orner (2T98; 3T75).

6. Since Dros-Martinez had not served the requisite six months in her Physical Plant Department job, it was necessary to obtain a specific agreement between Rutgers and AFSCME allowing her to bid on posted positions. On January 27, 1988, Rutgers and AFSCME agreed to allow her to bid on available positions, notwithstanding the length of service in her principal clerk typist position (CP-2A). As a principal clerk typist, Dros-Martinez was eligible to bid on all secretarial, principal clerk, secretarial word processing and principal secretarial positions (3T114). Between February 3, 1988 and December 19, 1988, over 40 positions for which Dros-Martinez would be eligible to bid were posted for the Newark Campus (R-2). Dros-Martinez did not bid on any of the job postings (3T119).

7. During January and February, 1988, numerous work deficiencies were brought to Dros-Martinez's attention by her supervisor, Patricia Brancato. These deficiencies included assignments not timely completed, proofreading problems with material she typed, maintenance of the Director's daily calendar and future use file, and mail distribution (1T50; 2T100). On February 29, 1988, Brancato gave Dros-Martinez a memorandum (CP-3) detailing the deficiencies in work performance set forth above and other problems which needed improvements.

8. Between the delivery of CP-3 on February 29, 1988 and March 11, 1988, Dros-Martinez's work performance problems persisted. She failed to make appointments, deliver messages, sort the mail and maintain the Director's future use file (2T106; 2T132).

9. Some of Dros-Martinez's problems derived from the fact that she had indicated in January, 1988, that she wished to transfer out of the Physical Plant Department. For example, while Dros-Martinez had problems working on the computer, the department did not send her to computer training school because of her expressed intention to leave (2T131). Additionally, Dros-Martinez was not instructed to do the PSE&G bills, a function normally assigned to her position, because she intented to leave (2T133).

10. In February 1988, Director Snyder asked Dros-Martinez to do some personal typing for him related to the Boy Scouts of America. Initially, Dros-Martinez did not object to doing the work. Later, she spoke to Marilyn Johnson, AFSCME Vice President,

who told her that she should perform such personal work only after hours and for an additional hourly fee. Dros-Martinez then told Snyder that she would charge him for personal work, at which point, Snyder typed the work, prepared the envelopes and brought the letter to the mailroom himself. Dros-Martinez's refusal to perform Snyder's personal work other than on the terms advised by Marilyn Johnson angered Snyder (1T54-1T55; 1T143-1T144).

11. On March 11, 1988, Dros-Martinez was absent from work. Snyder asked Brancato for some papers which Brancato thought would be found on Dros-Martinez's desk. As Brancato looked for the papers on the desk, she found a telephone message from a person who had returned Snyder's call. Snyder was waiting for this person to call him and was upset to discover that the return phone call had been placed several days earlier. Additionally, Supervisor of Building and Grounds Patterson asked Dros-Martinez to set up appointments for interviews with three individuals interested in a vacant position. Brancato discovered that the individuals had not been contacted and appointments had not been arranged.[5/] Brancato then decided to terminate Dros-Martinez and prepared a memorandum of termination (CP-4; 2T101-2T103). Since Brancato was going to serve on jury duty the following week, it was decided that Director Snyder would give CP-4 to Dros-Martinez on March 14, 1988 (1T62; 2T103).

5/ There may have been a misunderstanding between Patterson and Dros-Martinez regarding the due date by which the appointments were to be arranged. Dros-Martinez believed that she had until the end of the week to arrange the interviews whereas Patterson may have wanted the interviews to be concluded by the end of the week (1T59).

12. Upon receipt of CP-4 on March 14, 1988, Dros-Martinez contacted Marilyn Johnson for assistance. Johnson referred Dros-Martinez to Chief Shop Steward Della Ancrum (1T63). Ancrum and Dros-Martinez met only briefly, since Ancrum wanted to discuss the matter with Johnson before proceeding, and Johnson was not available at that time (1T63).

13. On March 16, 1988, Ancrum and Dros-Martinez met again to discuss the case (1T63; 1T104; 2T52). On Johnson's advice, Ancrum and Dros-Martinez filled out a grievance form and filed it at Step 2 (1T63; 1T104; CP-5). Ancrum told Dros-Martinez that she had a strong case because Rutgers did not provide her with sufficient time to improve her work performance and thus violated Rutgers' disciplinary policy (1T63; 1T68; 2T19-2T20; CP-6). Dros-Martinez told Ancrum that she did not like the work in the Physical Plant Department, was having problems with its Director and that she already applied for a transfer (1T107).

14. On March 16, 1988, Ancrum told Dros-Martinez as a result of filing the grievance a meeting between Rutgers and AFSCME would be arranged. Ancrum also indicated that the only remedy which could be obtained for Dros-Martinez would be reinstatement to her position in the Physical Plant Department and that there would be no purpose to having a grievance meeting if Dros-Martinez did not want to go back there (2T56).

15. While admitting that she did not wish to continue working in the Physical Plant Department, Dros-Martinez testified

that she told Ancrum that if her grievance were successful, and she had to, she would return there (1T66; 1T106). Ancrum's version of the conversation differs. Ancrum testified that she told Dros-Martinez that the only purpose for a grievance meeting would be to allow Dros-Martinez to return to her position in the Physical Plant Department (2T26-2T27). Ancrum further testified that since Dros-Martinez did not wish to return to that job, she (Ancrum) would call Michael Iannarone in an effort to obtain his agreement to arrange job interviews in other departments for her (2T29). Ancrum believed that the grievance was resolved by obtaining Iannarone's agreement to refer Dros-Martinez to job interviews outside of the Physical Plant Department (2T30; 2T41, 2T43). I credit Ancrum's testimony. It is undisputed that Dros-Martinez wanted to transfer out of the Physical Plant Department and already took steps to accomplish that objective. Ancrum's actions accomplished precisely what Dros-Martinez wanted. Moreover, allowing Dros-Martinez to use the employee bidding process to find a position, although she was no longer an employee, was a "special accommodation," in the nature of a settlement, effectuated for Dros-Martinez. I conclude that the implementation of such "special accommodation" was be in return for the resolution of the grievance. Additionally, I found Ancrum to be a more reliable witness than Dros-Martinez. Dros-Martinez admitted to lying regarding information supplied in order to obtain unemployment compensation (1T121), and, on two occasions, wrongfully obtaining advance pay-checks from Rutgers when she transferred from

the Graduate School Management to the Physical Plant Department (1T122).

16. A meeting between Rutgers and AFSCME concerning Dros-Martinez's grievance was never conducted (2T26-2T28). Instead, on March 18, 1988, Ancrum contacted Michael Iannarone in the Rutgers personnel office (2T57). Ancrum told Iannarone about Dros-Martinez's grievance, but indicated that the manner in which the union wished to pursue the grievance was by finding Dros-Martinez a job outside of the Physical Plant Department (2T58). Iannarone agreed to help Dros-Martinez find another job (3T39). Since Dros-Martinez's telephone was disconnected around this time, Ancrum told her to remain in contact with Iannarone regarding job opportunities (2T59-2T60).

17. Rutgers' employees must use the established bidding procedure in order to move between jobs (3T27). The bidding procedure gives priority to current employees over outside applicants. Thus, the bidding process enhances the current employee's opportunity for promotion (3T113). Notwithstanding the fact that Dros-Martinez was terminated on March 18, 1988, the arrangement agreed upon between Ancrum and Iannarone continued to allow Dros-Martinez to use the internal bidding procedure to apply for job vacancies and thus provided her with a headstart over other non-employee job applicants (3T109; 3T113).

18. On March 25, 1988, Iannarone arranged for Dros-Martinez to be interviewed for a position in the Graduate

School Management's professional accounting program as a principal secretary (1T145-1T146). On March 29, 1988, Iannarone arranged for Dros-Martinez to interview for a position in the Neurological Science Department (1T149). The position in Neurological Science was for a full-time, permanent job (3T42). While the initial interview went well, Dros-Martinez was not offered the position because she did not appear for a second interview. While it is unclear whether anyone at Rutgers told Dros-Martinez that a second interview was scheduled, it is clear that Dros-Martinez did not contact anyone in the personnel office or in the Neurological Science Department regarding the status of the position (1T125).[6/] Dros-Martinez did returne for second interviews when she was initially hired in the Graduate School Management and subsequently hired in the Physical Plant Department (1T27; 1T82).

19. Dros-Martinez testified that she called Ancrum at least once or twice a week after she was terminated (1T70). She also testified that she frequently called Iannarone in the personnel office (1T113). Ancrum and Iannarone testified that Dros-Martinez did not keep in close communication with either of them (2T60; 2T65-2T66; 3T44). Since Dros-Martinez was not aware that a second interview was scheduled in the Neurological Science Department, I conclude that she did not maintain regular telephone contact with either Ancrum or Iannarone regarding job opportunities.

6/ Dros-Martinez's telephone was disconnected during this time making it difficult for her to be contacted.

20. Ancrum and Iannarone had several follow up conversations concerning the status of Dros-Martinez's job search. Ancrum periodically called Iannarone in order to find out if work was available for her. On one occasion Ancrum met Iannarone on the street and discussed temporary work for Dros-Martinez (2T44; 2T59-2T60; 3T45-3T46).

21. In August, 1988, Mary Bean, a semi-retired shop steward, contacted Dros-Martinez and told her that her grievance was out of time and, therefore, could no longer be pursued (1T73-1T74; 1T115; 2T63). Shortly, thereafter, Dros-Martinez contacted Ancrum in order to discuss the grievance. Dros-Martinez had not contacted Ancrum regarding the grievance since the end of March, 1988 (2T65-2T66).[7/] Dros-Martinez told Ancrum that she was willing to go back to the Physical Plant Department and, therefore, wished to formally pursue her grievance (2T41; 2T46; 2T64). Believing that it was too late to reinstate the grievance, Ancrum sought advice from Local 1761 President, Arlene Hartley (2T41; 2T66; CP-9). Hartley indicated that in accordance with the time limits provided in the collective agreement's grievance procedure, it was impossible to reinstate Dros-Martinez's grievance (3T92). In August, 1988, Dros-Martinez told Ancrum that perhaps she (Ancrum) misunderstood her. Dros-Martinez told Ancrum that she (Dros-Martinez) was willing

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7/ I previously found that Dros-Martinez did not keep in contact with Ancrum. Accordingly, I credit Ancrum's testimony that she did not hear from Dros-Martinez until August, 1988.

to return to the Physical Plant Department. By this time the grievance had already lapsed (1T116-1T117).

22. Dros-Martinez conceded that on all occasions where she sought AFSCME's assistance, either through Johnson or Ancrum, her questions were always answered and the Union always tried to help her (1T124-1T125).

ANALYSIS

The Unfair Practice Charge Against AFSCME

Dros-Martinez alleged that AFSCME breached its duty of fair representation which it owed her by failing to process the grievance filed on March 16, 1988.

In articulating this State's standard of a union's duty to fairly represent unit employees, the Commission has looked both to the Act and to compatible private sector case law. N.J.S.A. 34:13A-5.3 provides in part that:

> A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership.

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). The courts and this Commission have consistently embraced the standards of Vaca in adjudicating such unfair representation claims. See, e.g., Saginario v. Attorney General, 87 N.J. 480 (1981); In re Board of Chosen Freeholders of Middlesex County, P.E.R.C. No. 81-62, 6 NJPER 555 (¶11282 1980), aff'd App. Div. Docket No. A-1455-80 (April 1, 1982), pet. for certif. den. (6/16/82) ("Middlesex County"); New Jersey Turnpike Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979) ("Local 194"); In re AFSCME Council No. 1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978). [footnote omitted]
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> We have also stated that 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 access to the grievance procedure and arbitration for similar grievances of equal merit. Middlesex County; Local 194. 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.]

The U.S. Supreme Court has also held that to establish a claim of a breach of the duty of fair representation, such claim "...carried with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." Amalgamated Assn. of Street, Electric, Railway and Motor Coach Employees of American v. Lockridge, 403 U.S. 274, 301, 77 LRRM 2501, 2512 (1971). Further, the National Labor Relations Board has held that where a majority representative exercises its discretion in good faith, proof of mere

negligence, standing alone, does not suffice to prove a breach of the duty of fair representation. Service Employees International Union, Local No. 579, AFL-CIO, 229 NLRB 692, 95 LRRM 1156 (1977); Printing and Graphic Communication, Local No. 4, 249 NLRB No. 23, 104 LRRM 1050 (1980), reversed on other grounds 110 LRRM 2928 (1982).

The facts in this case establish that Dros-Martinez began having problems in the Physical Plant Department almost immediately after beginning work there. After only a few weeks in that department, she sought a transfer.[8/] Over the next few months problems continued and her performance deteriorated. Dros-Martinez was then terminated.

Immediately after her termination, Dros-Martinez sought AFSCME's assistance. In discussions with Della Ancrum, Dros-Martinez certainly indicated that she did not like working in the Physical Plant Department and preferred not to return there. Although AFSCME, on behalf of Dros-Martinez, filed a grievance seeking reinstatement, Ancrum knew that the successful resolution of the grievance would only result in Dros-Martinez's return to her position in the Physical Plant Department. In an effort to accommodate Dros-Martinez's desire not to return to the Physical Plant Department, Ancrum worked out a special arrangement with

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8/ Dros-Martinez's problems in the Physical Plant Department began well before Snyder requested that she do personal work for him.

Iannarone in an attempt to place Dros-Martinez in a comparable position in a different department.

The actions taken by AFSCME demonstrate anything but arbitrary, discriminatory, or bad faith conduct towards a member of the collective negotiations unit. Indeed, the facts indicate that Dros-Martinez would likely have found a comparable position in the Neurological Science Department through the arrangements orchestrated by AFSCME, had she not failed to follow up on that job.

Even assuming arguendo, that Dros-Martinez made it clear to Ancrum in March, 1988, that she was willing to immediately return to the job in the Physical Plant Department, notwithstanding the difficulties she was experiencing there, I still find no unfair practice. Believing that the arrangement with Iannarone resolved Dros-Martinez's grievance, Ancrum allowed the grievance to lapse. Since there is no factual dispute about Dros-Martinez's unhappiness with the job in the Physical Plant Department, and that such unhappiness was expressed to Ancrum during their meetings, it is reasonable to conclude that a misunderstanding developed concerning any further processing of the grievance. At most, Ancrum could be found to be negligent in allowing the grievance to lapse due to such misunderstanding. However, mere negligence, standing alone, does not suffice to prove a breach of the duty of fair representation. Service Employees International Union, Local No. 579; Printing and Graphic Communication.

Accordingly, based on all of the circumstances in this case, I conclude that AFSCME did not breach its duty of fair representation which it owed to Dros-Martinez and thus committed no unfair practice.

Dros-Martinez has also alleged a violation of N.J.S.A. 34:13A-5.4(b)(5). However, Charging Party has failed to adduce any facts which indicate that AFSCME has violated any of the rules and regulations established by the Commission.

The Unfair Practice Charge Against Rutgers

Dros-Martinez alleges in her unfair practice charge (C-4) that Rutgers has violated N.J.S.A. 34:13A-5.4(a)(7).[9/] Dros-Martinez has failed to adduce any facts which show that Rutgers has violated any of the rules and regulations established by the Commission. Accordingly, I find no violation of the Act and recommend that the charge against Rutgers be dismissed.

The nature of the facts set forth by Dros-Martinez imply an allegation of violation of Section 5.4(a)(5). Dros-Martinez

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9/ Charging Party's brief contains a statement which alleges that Rutgers violated Section 5.4(a)(1) of the Act. Subsection (a)(1) prohibits 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." The unfair practice charge only alleged a violation of subsection (a)(7). No motion was made by the Charging Party during the hearing to amend the charge. Therefore, I do not consider any allegation of violation of subsection (a)(1), and find any application to modify the charge now as untimely.

contends that she was terminated without just cause in violation of Article 8, paragraph 12 of the collective agreement (CP-7). Even if the unfair practice charge were to be treated as a subsection (a)(5) violation, I find that Dros-Martinez lacks standing to bring such action against Rutgers because she has failed to establish that AFSCME violated its duty of fair representation. N.J. Turnpike Authority (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).

Accordingly, based upon the entire record and the analysis set forth above, I make the following:

CONCLUSIONS OF LAW

AFSCME Local 1761 did not violate N.J.S.A. 34:13A-5.4(b)(1) or (5) by allowing the grievance filed on behalf of Rosa Dros-Martinez to lapse.

Rutgers, The State University of New Jersey, did not violate N.J.S.A. 34:13A-5.4(a)(7) when it discharged Rosa Dros-Martinez.

RECOMMENDED ORDER

I recommend the Commission **ORDER** that the Complaint against AFSCME Local 1761 and Rutgers, The State University of New Jersey, be dismissed.

Stuart Reichman
Hearing Examiner

DATED: July 10, 1990
Trenton, New Jersey