

D.U.P. NO. 2020-16

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

In the Matter of

AFSCME NEW JERSEY COUNCIL 63,

Respondent,

-and-

Docket No. CI-2020-007

BILLIE HAYES,

Charging Party.

**SYNOPSIS**

The Director of Unfair Practices dismisses an unfair practice charge alleging violations of section 5.4b(1) and (5) of the New Jersey Employer-Employee Relations Act (Act). Billie Hayes (Hayes) alleged AFSCME New Jersey Council 63 (Union) violated the Act by refusing to represent him in an appeal of his disciplinary removal/resignation not in good standing to the New Jersey Superior Court Appellate Division (Appellate Division). The Director finds the charge was time-barred. Even assuming the charge was timely filed, the Director also finds that the Union's failure to provide legal counsel to Hayes, beyond his administrative remedy, did not breach its duty of fair representation because such a decision is an internal organizational matter beyond the Act's jurisdiction, and no facts indicate that the decision was arbitrary, discriminatory, or in bad faith. Instead, the Union treated Hayes no differently than similarly situated members since it does not represent members in appeals to the Appellate Division.

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Appearances:

For the Respondent,  
(Robert C. Little, IV, AFSCME New Jersey Council 63)

For the Charging Party,  
(Billie Hayes, pro se)

**REFUSAL TO ISSUE COMPLAINT OR DECISION**

On September 20, 2019, Billie Hayes (Charging Party or Hayes) filed an unfair practice charge against AFSCME New Jersey Council 63 (Union or AFSCME). The charge alleges that on March 21, 2019, AFSCME violated section 5.4b(1) and (5)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., by failing to provide Hayes with counsel to file an appeal of his disciplinary removal/resignation not in good

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<sup>1/</sup> These provisions prohibit public 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."

standing with the New Jersey Superior Court Appellate Division (Appellate Division).

On January 30, 2020, AFSCME served a position statement on Hayes. AFSCME denies violating the Act and contends that it does not represent members beyond the filing of exceptions to a Final Administrative Action issued by the Civil Service Commission (CSC).

The Commission has authority to issue a complaint where it appears that a 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; CWA Local 1040, D.U.P. No. 2011-9, 38 NJPER 93 (¶20 2011), *aff'd*, P.E.R.C. No. 2012-55, 38 NJPER 356 (¶120 2012).

I find the following facts.

Hayes was a Quality Control Reviewer for the Division of Medical Assistance and Health Services, Department of Human Services. AFSCME is the majority representative of the State-wide Health, Care and Rehabilitation Services Unit, of which Hayes was a member. The applicable collective negotiations agreement (CNA) extended from July 1, 2015 to June 30, 2019.

In 2016, Hayes was disciplined and issued a number of Final Notices of Disciplinary Action (FNDA) relating to charges of absence from work without permission; abandonment of job as a result of absence from work; and chronic absenteeism. Pursuant to the FNDAs, Hayes was issued the penalties of removal/administrative resignation not in good standing from his position effective April 18, 2016.

Following Hayes's removal/resignation not in good standing, AFSCME appealed Hayes's disciplinary charges to the CSC on his behalf<sup>2/</sup>. AFSCME provided Hayes with legal representation for his appeal; said representation was provided by the Nash Law Firm. Thereafter, CSC transferred the matter to the Office of Administrative Law for a hearing. Prior to the hearing, Hayes's employer, the Department of Human Services, filed a Motion for Summary Decision. The Nash Law Firm filed opposition to the Motion for Summary Decision on behalf of Hayes. The Administrative Law Judge (ALJ) issued her Initial Decision on

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2/ Pursuant to Article 8 of the CNA, following a departmental disciplinary hearing resulting in an employee's discharge, the employee is afforded two avenues of appeal. The employee can either appeal the disciplinary action through the advisory disciplinary arbitration process provided for by the CNA or the employee may request to petition the Merit System Board (currently known as the Civil Service Commission) for a hearing. In the event that the employee elects the Merit System Board procedure, such election is considered final and binding and constitutes a waiver of the option to appeal through the arbitration process described above. In this matter, Hayes elected the Merit System Board (a.k.a. Civil Service Commission) avenue of appeal.

September 15, 2017 wherein the employer's Motion for Summary Decision was granted and Hayes's removal/administrative resignation not in good standing was upheld and his appeal was dismissed. On the same date, the Nash Law Firm sent Hayes a letter advising him of the ALJ's decision and the applicable appeal process. In the letter, the Nash Law Firm specifically advised Hayes that in the event an appeal to the Appellate Division became necessary, the firm would not provide him representation with respect to the appeal and he would need to retain private counsel. The Nash Law Firm filed exceptions to the ALJ's Initial Decision with the CSC. The CSC issued its Final Administrative Action on March 29, 2018 upholding the ALJ's decision. Thereafter, on April 3, 2018, the Nash Law Firm sent Hayes a letter providing a copy of the CSC's decision and indicating the firm was closing its file. The April 3, 2018 letter again advised Hayes of his right to appeal the CSC decision to the Appellate Division and reiterated that the Nash Law Firm would not represent him in that appeal.

On May 9, 2018, the Nash Law Firm filed a Request for Reconsideration with the CSC on Hayes's behalf. The CSC denied Hayes's Request for Reconsideration on January 18, 2019; Hayes was copied on the decision. On February 11, 2019, the Nash Law Firm sent Hayes a letter, including the CSC's decision denying his Request for Reconsideration and again advising Hayes of the

appeal process. The letter also provided: "As we have previously informed you, our services do not include filing any appeals with the New Jersey Superior Court Appellate Division. You may do so yourself or retain private counsel to do so."

On March 20, 2019, Hayes sent the Nash Law Firm an email regarding its inability to represent him at the Appellate Division. Hayes wrote that he was aware that the Nash Law Firm had "previously informed" him that it would not represent him in an appeal to the Appellate Division.

#### **ANALYSIS**

Hayes's unfair practice charge is time-barred because it was filed after the six-month statute of limitations expired. N.J.S.A. 34:13A-5.4(c) establishes a six-month statute of limitations period for the filing of unfair practice charges.

The statute provides in a pertinent part:

[No] complaint shall issue based on any unfair practice charge occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the 6-month period shall be computed from the day he was no longer so prevented.

The Nash Law Firm first notified Hayes that it would not represent him in an appeal to the Appellate Division in September, 2017, after the Initial Decision issued. The CSC Final Administrative Decision issued on January 18, 2019, a copy of which Hayes received. The Nash Law Firm forwarded, via email,

another copy of the CSC Final Administrative Decision to Hayes under cover letter dated February 11, 2019. In that cover letter, the Nash Law Firm again advised Hayes of his appeal rights and reiterated that it would not represent him in an appeal to the Appellate Decision. Hayes did not file the instant charge until September 20, 2019.

Hayes has not set forth any fact(s) or reason(s) why he was prevented from filing an unfair practice charge within the statutory period. See Kaczmarek v. New Jersey Turnpike Auth., 77 N.J. 329 (1978) (case transferred to Commission where employee filed court action within six months of alleged unfair practice). Hayes even conceded in a March 20, 2019 email that the Nash Law Firm had advised him "previously" that it would not represent him in an appeal to the Appellate Division. Accordingly, I find that the unfair practice charge is untimely and must be dismissed.

If I assume that Hayes's allegations are timely, they would have to be dismissed because they fail to meet the complaint issuance standard. The charge does not include any facts that would suggest a violation under Section 5.4b(1) or (5) of the Act.

AFSCME did not breach its duty of fair representation by failing to provide Hayes with legal counsel for his appeal to the Appellate Division. In Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903, 64 LRRM 2369 (1967), the United States Supreme Court ruled that unions owe a duty of fair representation, which is breached ". . .

only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith." New Jersey courts have consistently adopted and applied the Vaca standard. See e.g., Lullo v. International Ass'n of Fire Fighters, 55 N.J. 409 (1970); Belen v. Woodbridge Tp. Bd. of Ed., 142 N.J. Super. 486 (App. Div. 1976), certif. den. 72 N.J. 458 (1976).

A majority representative's decision to provide legal counsel to a unit member has long been held to be an internal organizational matter beyond our Act's jurisdiction, and does not amount to an unfair practice, absent facts demonstrating that that decision was arbitrary, discriminatory or in bad faith. See Bergen Community College Faculty Ass'n, P.E.R.C. No. 84-117, 10 NJPER 262 (¶15127 1984) (Commission finding no unfair practice when Association withdrew legal assistance from an employee pursuing a federal court case); P.B.A. Local 105 (Giordano), D.U.P. No. 90-1, 15 NJPER 457 (¶20186 1986) (charge dismissed where Local refused to provide legal counsel or reimburse legal fees for employee's departmental hearing); Newark Teachers Union, D.U.P. No. 95-32, 21 NJPER 194 (¶26128 1995) (charge dismissed where union did not provide legal representation to contest involuntary transfer).

The facts as alleged do not establish that AFSCME breached its duty of fair representation. AFSCME provided legal representation to Hayes for his disciplinary charges through the



full administrative process. Hayes was also repeatedly informed that AFSCME's representation of him would not extend to an appeal to the Appellate Division. Hayes was first advised by letter dated September 15, 2017 that the Nash Law Firm was not authorized to appeal to the Appellate Division on his behalf and he would need to retain private counsel if he chose to do so. Thereafter, each time a decision was rendered by the CSC, the Nash Law Firm reiterated its position that Hayes would need to retain private counsel if he wished to appeal to the Appellate Division. AFSCME has also averred that when deemed appropriate, it represents all members through the full administrative appeal process for disciplinary charges, up to and including filing exceptions to a Final Administrative Action issued by the CSC. It maintains that it doesn't represent members in appeals to the State of New Jersey Appellate Division, and has treated Hayes no differently than other members in substantially similar situations. No asserted facts contradict AFSCME's representations. See FOP Lodge 12, P.E.R.C. 2010-14, 35 NJPER 345 (¶115 2009) (Union's conduct found not to be arbitrary, discriminatory or in bad faith if all members are treated in the same manner). Based on all of the circumstances, I find that the charge doesn't indicate that AFSCME's actions were arbitrary, discriminatory or in bad faith.

Accordingly, the complaint issuance standard has not been met and I dismiss the charge. N.J.A.C. 19:14-2.1.

**ORDER**

The unfair practice charge is dismissed.

/s/Jonathan Roth  
Jonathan Roth  
Director of Unfair Practices

DATED: June 9, 2020  
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 19, 2020.**