D.U.P. NO. 91-8

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

In the Matter of

STATE OF NEW JERSEY
(VINELAND DEVELOPMENTAL CENTER)
& AFSCME, COUNCIL 71, LOCAL 2215,

Respondents,

-and- Docket No. CI-90-43

MABLE E. McLEOD,

Charging Party.

SYNOPSIS

The Director of Unfair Practrices refuses to issue a complaint on a charge that Local 2215 of AFSCME, Council 71 violated the duty of fair representation.

The Director found that the charging party failed to allege facts suggesting that the union's representation of her at an OAL hearing was "arbitrary, capricious or in bad faith". Vaca v. Sipes, 386 U.S. 171 (1967).

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Appearances:

For the Respondent State of New Jersey
Robert J. DelTufo, Attorney General
(Michael L. Diller, Deputy Attorney General)

For the Respondent AFSCME
Carolyn Holmes, Executive Director

For the Charging Party
Mable E. McLeod, pro se

REFUSAL TO ISSUE COMPLAINT

On January 12 and May 7, 1990, Mable McLeod filed an unfair practice charge and amendment alleging that AFSCME, Council 71 ("AFSCME") inadequately represented her at a termination hearing before an administrative law judge on June 27, 1989 and that the State of New Jersey (Vineland Developmental Center) ("Employer") unlawfully fired her. AFSCME's omissions allegedly violate

subsections subsections 5.4(b)(1), (2), (3), (4) and (5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). The State's act allegedly violates subsections 5.4(a)(1), (2), (3), (4), (5), (6) and (7) of the Act.[2/]

McLeod was charged with patient abuse in September 1988 while employed at Vineland Developmental Center. The recommended discipline was discharge. She transferred to another worksite,

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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."

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."

pending a pre-termination hearing which took place on November 3, 30 and December 8, 1988. McLeod was represented by AFSCME, Council 71 at the hearing. Although the hearing officer recommended that charging party not be fired, a higher-level officer overruled the decision and recommended discharge in February 1989, pursuant to Article V, Section E.3 of the parties' agreement.3/

McLeod spoke with AFSCME representatives who assured her that she would be represented by an attorney at any subsequent formal hearing. McLeod phoned the attorney in May 1989 and was advised by a secretary that the attorney would indeed speak with her.

On or about June 13, 1989, McLeod received a letter from OAL advising that "no appearance" had been made on her behalf. McLeod phoned AFSCME and was assured that the "appearance" would be filed and that an attorney would represent her at the hearing.

On June 27, 1989, McLeod met with AFSCME counsel about fifteen minutes before the hearing began. During the hearing, the attorney examined and cross-examined witnesses. A decision sustaining the discharge was issued in mid-August 1989 (OAL Dkt. No. CSV 2040-89). On September 11, 1989, the Merit System Board affirmed the administrative law judge's decision. When McLeod asked

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3/ The State submitted a copy of an arbitration decision between CWA and the State, Docket No. OER 2015, sustaining the State's interpretation of Article V, Section E.3. The arbitrator sustained the State's decision to reverse a hearing officer's recommendation and discharge an employee.

AFSCME to appeal the matter to the appellate division, an AFSCME representative allegedly advised her that AFSCME would not pay the costs of appeal.

On June 26, 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 the unfair practice charge.

On July 10, 1990, McLeod filed a letter, asserting that the attorney informed the administrative law judge on the day of hearing that "he had just found out the day before he was to represent me." She asserted that a feather duster (allegedly used in the "attack" on the patient) was not introduced into evidence, that the attorney did not examine certain witnesses and failed to examine others regarding inconsistencies in the State's case.

Unions must represent the interests of all unit members without 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. D'Arrigo v. N.J. State Bd. of Mediation, ___ N.J. ___ (1990); 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). Mere negligence, standing alone, does not prove a breach of the duty of fair representation. Fair Lawn Bd. of Ed., P.E.R.C. No. 84-138, 10 NJPER 351 (¶15163 1984). 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 a union 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 organizational matter and one not generally within the Commission's jurisdiction. See also Camden County College, D.U.P. No. 89-11, 15 NJPER 171 (¶20072 1989) (refusal of a union to provide legal assistance to a unit member for a Commission hearing).

McLeod has not alleged sufficient facts justifying the issuance of a complaint on a charge that AFSCME violated the duty of fair representation. Counsel represented charging party at the hearing, examined witnesses and argued orally. That counsel first spoke with McLeod minutes before the OAL hearing began does not suggest that it acted arbitrarily, capriciously or in bad faith. AFSCME's alleged failure to call or examine witnesses or raise evidence objections suggests at most, negligent representation.

AFSCME was not obligated to file an appeal of the Merit System Board decision; the decision to file such an appeal is an "internal organizational matter."

McLeod has not asserted any facts suggesting that the employer violated the Act. McLeod was provided a neutral forum to contest her discharge. This Commission must recognize facutal findings in other administrative forums. Hackensack v. Winner, 82 N.J. 1 (1980).

Accordingly, I dismiss the entire charge.

BY ORDEROF THE DIRECTOR
OF UNFAIR PRACTICES

Edmund G. Gerber, Director

DATED: August 24, 1990
Trenton, New Jersey