

D.U.P. NO. 97-25

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

In the Matter of

AFSCME LOCAL 3407,

Respondent,

-and-

Docket No. CI-96-54

LISA MARIE MOORE,

Charging Party.

BOROUGH OF EATONTOWN,

Respondent,

-and-

Docket No. CI-96-55

LISA MARIE MOORE,

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SYNOPSIS

The Director of Unfair Practices refuses to issue a complaint on an unfair practice charge brought against AFSCME Local 3407 and the Borough of Eatontown. Moore was asked to resign as an employee of the Borough and was told she would be discharged if she did not resign. Moore sought union representation. The union advised Moore to accept a resignation. When Moore refused, the union filed a grievance on her behalf. Moore did not cooperate with the union and ultimately was dismissed. The union declined to take Moore's grievance to arbitration. The Director found that the acts alleged by Moore did not constitute any unfair practice within the meaning of the Act.

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Appearances:

For the Respondent AFSCME
Don Dileo, Staff Representative

For the Respondent Borough
Apruzzese, McDermott, Mastro & Murphy, attorneys
(James L. Plosia, of counsel)

For the Charging Party,
Ernestine Taylor, President, Greater Red Bank NAACP

REFUSAL TO ISSUE COMPLAINT

On March 5, 1996, Lisa Marie Moore filed unfair practice charges against AFSCME, Local 3407 and the Borough of Eatontown, alleging violations of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

Moore alleges that AFSCME violated subsections 5.4(b)(1), (3) and (5)^{1/} when it told her that she had a "no win" disciplinary appeal and attempted to coerce her to resign; failed to inform her of hearing dates, and refused to arbitrate her termination grievance. She also alleges that she was not given adequate notice of the scheduled date (January 9, 1996) for the fourth step hearing on her grievance.

Moore alleges that the Borough of Eatontown violated subsections 5.4(a)(1), (3), (4), (5), and (7)^{2/} by threatening through the union to terminate her from her position with the Borough if she did not resign, by terminating her for refusing to

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. (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. (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. (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. (7) Violating any of the rules and regulations established by the commission."

withdraw a civil rights complaint filed against the Borough, by giving her harsher penalties and offering a less favorable settlement than that given to other employees in similar circumstances and by placing her on paid administrative leave.

On March 21, 1966, AFSCME Council 73 filed a response, denying that it engaged in any unfair practices. It asserts that it acted properly in conveying an offer proposed by the Borough to settle termination charges against Moore and merely counseled her on the relative merits of her case. It denies that Moore was not notified of a scheduled hearing. Further, Council 73 states that at Moore's request, it reviewed AFSCME Local 3407's vote against taking her grievance to arbitration. It asserts that because Moore had refused to participate in the termination hearings, there was an incomplete record upon which to judge the merits of her case; therefore it decided not to overturn Local 3407's determination.

On April 4, 1996, the Borough filed a response, denying that it engaged in any unfair practice. It attached, among other documents, a copy of the disciplinary charges filed against Moore, the steps three and four hearing reports upholding Moore's discharge and a copy of a statement made by Moore at the step three hearing.

The Borough states that it negotiated with AFSCME over the settlement of Moore's case. It agrees that part of the settlement included her resignation, but it asserts that the offer was made after termination charges had been instituted against her. It admits that it did not offer Moore the same settlement given to a

former employee. Rather, it offered to pay the cost of her medical benefits to the end of the year if she resigned. It denies that it also demanded that she drop a civil rights complaint. It argues that putting Moore on paid administrative leave pending the final disposition of the charges was not discriminatory.

On June 5, 1996, the NAACP filed a response on behalf of Moore. On June 11, 1996, Moore filed a supplementary letter, detailing the circumstances of the incident for which she was disciplined. Neither the NAACP nor Moore dispute the facts asserted in the position statements submitted by AFSCME and the Borough.

Moore was a special officer who worked primarily as a dispatcher for the Borough's police department. On October 11, 1995, Moore was given a disciplinary notice of termination for the unlawful disclosure of juvenile information and for violations of police department rules.^{3/} She was placed on a paid leave of absence pending a final decision by the Council. Local 3407 filed a grievance on behalf of Moore. It discussed her case with the Borough's business administrator, who offered to settle the matter if Moore resigned. Local 3407 conveyed the offer to Moore, who rejected it.

Steps three and four of the grievance procedure in the collective negotiations agreement between the Borough and AFSCME

^{3/} The charges grew out of a dispute between Moore and a family residing in the Borough concerning a relationship between their teenage children. The incident occurred in July 1995 while Moore was off-duty, but still in uniform.

consist of hearings. At the beginning of the step three hearing, held on November 2, 1995, Moore read a statement that the Borough was retaliating against her because she had filed a sexual assault complaint against a Borough police captain. She left the hearing after stating that she would not participate in the proceeding without her attorney. Moore had not informed AFSCME of her intent to seek her own counsel. AFSCME continued with the hearing in her absence and appealed the hearing officer's decision to terminate Moore (effective December 1, 1995), to step four of the grievance procedure, the last step before arbitration.

The hearing date, January 9, 1996, had to be rescheduled due to severe weather (a blizzard). Moore alleges she was not given adequate notice of this date. In any event, the hearing date was rescheduled to January 23, 1996. Moore was notified of and attended that hearing. At the hearing, Moore demanded that the grievance be moved to arbitration. Local 3407 waived a hearing and notified the Borough that it would be making a decision whether the matter would be arbitrated. On February 6, 1996, the membership of Local 3407 reviewed the grievance and voted not to take her grievance to arbitration.

A majority representative 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 representative's conduct toward a unit member is "arbitrary, discriminatory, or in bad faith." OPEIU, Local 153, P.E.R.C. No.

84-60, 10 NJPER 12 (¶15007 1983); 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).

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. Mackaronis and Middlesex Cty. and NJCSA, P.E.R.C. No. 81-62, 6 NJPER 555 (¶11282 1980), aff'd NJPER Supp.2d 113 (¶94 App. Div. 1982), 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"); AFSCME Council No. 1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978).

Here, it appears that AFSCME's conduct did not constitute an unfair practice.

Moore alleges that AFSCME attempted to coerce her to accept the offer, subjecting her to "constant urgings" to resign. Such constant urgings do not amount to unlawful coercion. AFSCME could properly convey to her the Borough's offer to advise her of her options and could lawfully urge her to adopt that settlement offer. If she accepted the Borough's offer, her employment record would reflect a resignation in good standing and the Borough would pay the cost of her medical benefits until the end of the year. However, if she continued her grievance, which AFSCME thought was not winable, she stood to lose her pension if found guilty of a related misdemeanor charge.

Even if AFSCME was negligent in investigating Moore's allegations and, therefore, gave her faulty advice, mere negligence, standing alone, is insufficient to find that a union breached its duty of fair representation, when it exercises its discretion in good faith. 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). There are no facts here which indicate that Moore was harmed by AFSCME's insistence. Although Moore alleges that the offer was a "done deal" and that she had no input into the discussions between the Borough and AFSCME, she could and did elect to reject AFSCME's advice and the Borough's offer. Thereafter, AFSCME continued to process her grievance.

Moore does not allege facts which demonstrate that AFSCME's alleged refusal to communicate hearing dates was done deliberately, in bad faith or otherwise caused her harm. The January 9, 1996 hearing date was cancelled due to a blizzard. The harm, if any, resulting from the union's actions was de minimis. AFSCME Local 2293, P.E.R.C. No. 82-87, 8 NJPER 223 (¶13092 1982), adopting H.E. No. 82-27, 8 NJPER 160 (¶13071 1982). Moore was told of all other hearing dates, including January 23, 1996 (the reschedule date for January 9, 1996) and prepared for and attended both grievance proceedings.

Finally, Moore argues that her co-workers were hostile to her and did not want to pay the cost of arbitrating her grievance.

She alleges that given AFSCME's "vigorous campaign" that she should have resigned, Local 3407 voted against taking her case to arbitration.

Moore does not have an absolute right to have her grievance taken to arbitration. Vaca. Local 3407's negative vote does not, on its face, constitute a basis for concluding that it acted improperly. Moreover, AFSCME Council 73 reviewed Local 3407's denial of arbitration in accordance with its internal appeal procedures and made a good faith determination not to overturn the Local's vote. Employee organizations are entitled to a wide range of reasonableness in determining how to best service all of their members. Essex-Union Joint Meeting and Automatic Sales, Servicemen and Allied Workers, Local 575, D.U.P. No. 91-26, 17 NJPER 242 (¶22108 1991); Jersey City Bd. of Ed., D.U.P. No. 93-7, 18 NJPER 455 (¶23206 1992); RWDSU, Local 29, D.U.P. No. 94-47, 20 NJPER 268 (¶25134 1994).

It appears that Moore's allegations against the Borough fail to meet the Commission's complaint issuance standards and I will not issue a complaint for the reasons stated below.

Moore alleges that the Borough violated subsections 5.4(a)(1), (3), (5) and (7) of the Act.^{4/} Subsections 5.4(a)(1) and (3) prohibit public employers from retaliating against employees for the exercise of the rights guaranteed to them by the Act. Moore

^{4/} Moore also cites subsection 5.4(a)(4) of the Act, but makes no specific allegations to substantiate this claim.

asserts that the Borough discharged her for refusing to withdraw a civil rights complaint. The filing of a civil rights action is not protected activity under our Act. No other allegations indicate that she was discharged for protected activity.

Moore alleges that the Borough violated subsection 5.4(a)(5) by rejecting past practices, specifically, that it did not offer her the same settlement given to a former employee and imposed more stringent penalties on her than on other employees with similar disciplinary charges; and by putting her on a paid administrative leave.

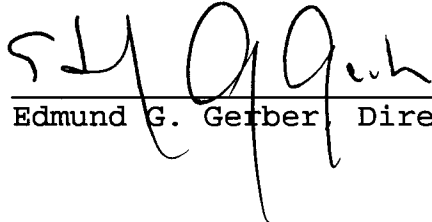
An individual employee normally does not have standing to assert a subsection 5.4(a)(5) violation, as the employer's duty to negotiate in good faith runs only to the majority representative. Beall and N.J. Turnpike Auth., P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980), aff'd NJPER Supp.2d 101 (¶85 App. Div. 1981). An individual employee/charging party may pursue a claim of a subsection 5.4(a)(5) violation only where the charging party has simultaneously alleged facts which constitute an unfair practice claim of a breach of the duty of fair representation against the majority representative. N.J. Turnpike Auth., P.E.R.C. No. 80-106, 6 NJPER 106 (¶11055 1980), aff'g in part, rev'g in part D.U.P. No. 80-10, 5 NJPER 518 (¶10268 1979).

Finally, there is no basis for issuing a complaint on the allegation that the Borough attempted to coerce Moore through the union to resign or be terminated. Processing such an allegation

must be grounded upon a factual allegation that the majority representative, in collusion with the employer, violated its duty of fair representation. N.J. Turnpike Authority, supra. Moore does not allege facts indicating that the Borough "colluded" with AFSCME concerning the discharge. The Borough correctly communicated its offer of settlement to Moore through her union. In the absence of any allegation that Moore was discharged because of protected activity, we dismiss all the charges filed against the Borough.^{5/}

Therefore, the Commission's complaint issuance standard has not been met and no complaint shall issue on the allegations of this charge.^{6/} The charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES


Edmund G. Gerber, Director

DATED: December 3, 1996
Trenton, New Jersey

^{5/} Although Moore alleges that the Borough violated subsection 5.4(a)(7), she does not plead any facts to substantiate this claim.

^{6/} N.J.A.C. 19:14-2.3.