P.E.R.C. No. 90-115

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

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

Respondents,

-and-

Docket Nos. CI-H-88-72
CI-H-88-73 & CI-H-89-57

LINDA JEAN OLIVER,

Charging Party.

SYNSOPSIS

The Public Employment Relations Commission dismisses a Complaint based on unfair practice charges filed by Linda Jean Oliver against the State of New Jersey (Vineland Developmental Center) and AFSCME, Local 2215. The charges alleged that the State and Local 2215 conspired to intimidate, harass, and coerce Oliver and to treat her unfairly. The Commission finds that the record does not support the charging party's allegations: there is no evidence of collusion and there is much evidence that Local 2215 followed its regular procedures in processing Oliver's grievances.

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LINDA JEAN OLIVER,

Charging Party.

Appearances:

For the Respondent, State of New Jersey
Robert J. Del Tufo, Attorney General
(Richard D. Fornaro, Deputy Attorney General

For the Respondent, AFSCME, Local 2215
Szaferman, Lakind, Blumstein, Watter & Blader, attorneys
(Daniel J. O'Donnell & Sidney H. Lehmann, of counsel)

For the Charging Party, Linda Jean Oliver, pro se

DECISION AND ORDER

On April 5, 1988, Linda Jean Oliver filed two unfair practice charges (CI-H-88-72; CI-H-88-73) against the State of New Jersey (Vineland Developmental Center) and AFSCME, Local 2215. Oliver is employed by the State as a resident living specialist and is represented for purposes of collective negotiations by Local 2215.[1/] On January 10, 1989, Oliver filed a third charge against the State (CI-H-89-57).

1/ Oliver amended CI-H-88-72 on April 20 and CI-H-88-72 and 73 on September 7, 1988.

Oliver alleges that the State violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) through (7),[2/] and that Local 2215 violated subsections 5.4(b)(1) through (5).[3/] The charges allege that the State and Local 2215 conspired to intimidate, harass, and coerce her and to treat her unfairly. The Hearing Examiner detailed the allegations. H.E. at 3-5.

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."

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. (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 Director of Unfair Practices consolidated the charges and, on April 10, 1989, issued a Complaint and Notice of Hearing.

The respondents filed Answers denying the factual allegations and raising defenses of timeliness, clarity and conciseness, and subject matter jurisdiction.

On May 16, 1989, Hearing Examiner Richard C. Gwin denied the State's request to stay the proceedings and granted in part and denied in part its motion to dismiss. He granted the motion to the extent allegations concerning events before October 5, 1987 were meant to form the basis for an independent unfair practice finding. He denied the motion concerning allegations about Oliver's loss of a favorable shift and Local 2215's handling of her related grievance. On May 19, the Hearing Examiner denied Local 2215's motion to dismiss and request to stay the proceedings.

On May 24, August 21 and 22, 1989, the Hearing Examiner conducted a hearing. The parties examined witnesses and introduced exhibits, but waived oral argument. The State filed a timely post-hearing brief. Local 2215 and Oliver filed untimely briefs, but the Hearing Examiner considered them.

On January 12, 1990, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 90-33, 16 NJPER 109 (¶21042 1990). He found that Oliver had not proved that the State and Local 2215 colluded to deny Oliver a favorable shift or that Local 2215 violated its duty to represent her fairly.

On February 16, 1990, after an extension of time, Oliver filed exceptions. We will address the exceptions later.

On February 26, 1990, the State filed a reply urging adoption of the recommended decision. On March 9, after an extension of time, Local 2215 filed a reply and cross-exceptions. It urges adoption of the recommended decision but objects to any inference that Local 2215 unfairly represented Oliver outside the statute of limitations period.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 7-20) are accurate. We incorporate them here. We make these responses to Oliver's factual exceptions: (1) finding no. 4 correctly reflects the testimony about the number of group homes in operation at the time; (2) the evidence does not support a conclusion in finding no. 5 that management's desire to punish Oliver motivated its decision to put supervisors in its group homes; (3) the evidence does not support a conclusion in finding no. 8 that the respondents knew in advance that Oliver would be reassigned to an unfavorable shift; (4) the evidence does not support a conclusion in finding no. 10 that management's decision that two homes did not need supervisors was part of a conspiracy against Oliver;[4/] (5) finding no. 11 accurately explains why Oliver was given a choice of two assignments; (6) the record does

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4/ New evidence is not admissible at this stage of the proceeding.

not support a conclusion in finding no. 12 that management and Local 2215 colluded to deny Oliver her rights under the contractual grievance procedure and, in fact, Oliver was given an opportunity to submit evidence on her own behalf; (7) finding no. 13 accurately reflects the procedure used to fill the vacancies at the Morton Avenue and Morias Avenue homes -- we reject the allegations that the Hearing Examiner determined the respondents' innocence before the hearing took place; (8) finding no. 14 accurately describes Oliver's grievances; (9) footnote no. 10 accurately describes a discrepancy in testimony about the use of seniority -- we reject the suggestion that the employer's minutes were fabricated; (10) finding no. 16 correctly states that Oliver's November 24 and December 11, 1987 grievances were consolidated for a step one hearing held March 17, 1988; (11) finding nos. 16 and 17 accurately recount Local 2215's efforts to represent Oliver at her step-one hearing -- Little argued Oliver's grievances under the harassment clause because Oliver insisted on processing them as contractual grievances; (12) finding no. 18 accurately recounts Local 2215's efforts to represent Oliver at her step-two hearing; (13) finding no. 19 accurately recounts the contents of Oliver's January 10, 1989 unfair practice charge (CI-H-89-57) -- there is no indication that the Hearing Examiner attempted to "whitewash this whole case" -- he accurately stated that Oliver was not permitted to introduce new evidence at a step-two hearing; (14) finding no. 21 accurately recounts a number of Oliver's 1983 disputes with Center supervisors and Local 2215 representatives, including her complaints about not being allowed to

run for union office; (15) finding no. 22 accurately recounts events that took place during the fall of 1985 -- the record does not support a finding that witness Garron testified falsely because she feared reprisals; (6) finding no. 23 accurately recounts the events surrounding Oliver's reassignment to a floater position and to the Chestnut Avenue home -- nothing in the record or the Hearing Examiner's report suggests that the Hearing Examiner did not properly consider all of the evidence or that the Director of Unfair Practices improperly consolidated these unfair practice charges.[5/]

We agree with the Hearing Examiner that Local 2215 and the Center did not collude to deny Oliver a favorable shift after a reorganization at the Center. We also agree that Local 2215 did not breach its duty to represent her fairly in processing her related grievances. The record does not support the charging party's allegations: there is no evidence of collusion and there is much evidence that Local 2215 followed its regular procedures in processing Oliver's grievances.[6/]

5/ The charging party has requested oral argument. We deny that request.

6/ We make no judgments, favorable or unfavorable, about Local 2215's conduct outside the limitations period.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Johnson, Reid and Wenzler voted in favor of this decision. None opposed. Commissioners Smith and Ruggiero were not present.

DATED: Trenton, New Jersey
June 25, 1990
ISSUED: June 26, 1990

H.E. NO. 90-33

STATE OF NEW JERSEY
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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

Respondent,

-and-

Docket Nos. CI-H-88-72
CI-H-88-73 & CI-H-89-57

LINDA JEAN OLIVER,

Charging Party.

SYNOPSIS

The Hearing Examiner recommends dismissal of Linda Oliver's Complaint alleging that AFSCME, Local 2215 and the Vineland Developmental Center colluded to deny her a favorable shift after a reorganization at the Center, and that Local 2215 breached its duty to fairly represent her in processing her related grievances. The Hearing Examiner found no evidence of collusion or of Union conduct that was discriminatory, arbitrary or tainted by bad faith.

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.

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Appearances:

For the Respondent, State of New Jersey
Hon. Peter Perretti, Attorney General
(Richard D. Fornaro, D.A.G.)

For the Respondent, AFSCME Local 2215
Szaferman, Lakind, Blumstein, Watter & Blader
(Dan O'Donnell & Sidney H. Lehmann, Esq.)

For the Charging Party, Linda Jean Oliver, pro se

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

This involves three unfair practice charges filed by Linda Jean Oliver, a resident living specialist employed by the State of New Jersey at the Vineland Developmental Center ("State" or "Center"). She filed the first two on April 5, 1988 against AFSCME, Local 2215, AFL-CIO ("Local 2215" or "Union") and the State. She amended these charges on April 20 and September 7, 1988. On January 10, 1989, Oliver filed a third unfair practice charge against the State.

On January 20, 1989, the Director of Unfair Practices consolidated Oliver's April 5, 1989 charges and their amendments. On April 10, 1989, the Director issued a Complaint and an order consolidating Oliver's January 10, 1989 charge with the others.

Oliver alleges that the State violated subsection 5.4(a)(1) through (7)[1/] and that Local 2215 violated subsections 5.4(b)(1) through (5)[2/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act").

1/ 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."

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. (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 charges include allegations that date from Oliver's first year of employment, 1980, and continue through November 30, 1988. Oliver alleges generally that the State and Local 2215 have conspired to intimidate, harass, coerce and treat her unfairly. She alleges that in 1983 she was harassed by a supervisor who accused her of not brushing a client's teeth, and that, although she was not on duty on the date of the alleged infraction, Local 2215 refused to process her related grievance. Oliver also alleges that in 1985 a conspiracy of five employees, lead by a Local 2215 shop steward, wrote letters to Oliver's supervisor falsely accusing her of sleeping on duty, falsifying a firedrill report, stealing papers from the Center and failing to do her share of work. Oliver alleges that her supervisor back-dated these false reports and that she consequently failed a probation period. She alleges that after the letter-writing conspiracy she received inadequate representation from Local 2215, had to hire her own attorney, and received an unwarranted five-day suspension for sleeping on duty.

Oliver also alleges that in September 1987 she hired another attorney because she had been threatened and assaulted at work. Her attorney allegedly wrote a letter to Oliver's supervisor complaining about unsafe working conditions. She alleges that shortly after this incident, the Center announced that a resident living specialist ("RLS"--Oliver's title) would be assigned to each Group Home as a provisional head cottage training technician (HCTS). Oliver alleges that, in order to accommodate the HCTS

assignments, the Center announced that all the RLS shifts would be changed. Oliver claims that Local 2215's President consequently colluded with administrators from the Center and arranged that only a few employees, Oliver among them, would receive new shifts and days off. Oliver alleges that as a result of this collusion, she was forced to choose among undesirable assignments and that when she asked a shop steward about filing a related grievance, she was told that no grievance could be filed. Ignoring this advice, Oliver claims she filed her own grievance. She adds that later, at the grievance hearing, the Union failed to present relevant evidence, relied on the wrong contract provisions, and essentially presented a case to prove that the State had acted properly when it arranged the new shifts.

Oliver complained that a Local 2215 shop steward was selected as an HCTS and received her shift and days off at a group home operated by the Center. Oliver also alleged that she was told by someone in the Union (which allegedly should not have known at the time) that she would lose her shift and days off. Oliver alleged in her January 10, 1989 charge that at her step-2 grievance hearing, the hearing officer unfairly refused to allow her speak or examine witnesses, and that the whole grievance process was prearranged by the Center and the Union.

Oliver also asserted that: she had complained about client abuse and cover-ups; she was the victim of racial discrimination; the Center unfairly promoted others who were less qualified; and

Civil Service improperly permitted certain employees to take Civil Service exams despite their lack of qualifications.

The State filed Answers on January 26, 1989 (to the Complaint on Oliver's consolidated April 5, 1988 charges, as amended) and April 26, 1989 (to the Complaint on Oliver's January 10, 1989 charge). The State denies any complicity in denying Oliver rights guaranteed by the Act. The Union filed an Answer on March 6, 1989 generally denying that it violated any duty it owed Oliver. The State and the Union denied Oliver's factual allegations and both raised affirmative defenses relating to timeliness, clarity and conciseness, and subject matter jurisdiction.

On May 3, 1989 the State filed a Motion to Dismiss the consolidated Complaint and a request to stay a hearing scheduled for May 24, 1989. The State argued that most of Oliver's allegations were untimely and those that were not involved Department of Personnel rather than PERC jurisdiction. The State also asserted that Oliver failed to allege facts which might show that the State unlawfully colluded with Local 2215 to deny Oliver a favorable shift when the HCTS's were assigned to the Center's group homes.

On May 16, 1989, I denied the State's Request to Stay and denied, in part, its Motion to Dismiss. I concluded that allegations concerning events that occurred outside the limitations

period contained in N.J.S.A. 34:13A-5.4(c)[3/] could not independently form the basis for finding an unfair labor practice. I ruled that the operative statute of limitations date for Oliver's April 5, 1988 charges was October 5, 1987.[4/] Taking Oliver's allegations as true and giving her the benefit of all favorable inferences,[5/] I concluded, however, that Oliver sufficiently plead a case about her loss of a favorable shift and the union's handling of her related grievance.

On May 19, 1989, Local 2215 filed a Motion to Dismiss the consolidated complaint, raising essentially the same arguments made by the State in its motion. The Union also filed a Request to Stay

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3/ N.J.S.A. 34:13A-5.4(c) provides that:

> The Commission shall have exclusive power as hereinafter provided to prevent anyone from engaging in any unfair practice listed in subsections a. and b. above. Whenever it is charged that anyone has engaged or is engaging in any such unfair practice, the commission, or any designated agent thereof, shall have authority to issue and cause to be served upon such party a complaint stating the specific unfair practice charged and including a notice of hearing containing the date and place of hearing before the Commission or any designated agent thereof; provided that no complaint shall issue based upon any unfair practice 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 months period shall be computed from the day he was no longer so prevented.

4/ Kaczmarek v. New Jersey Turnpike Authority, 77 N.J. 329 (1978); Local Lodge 1424, Int'l Assoc. of Machinists v. N.L.R.B., 362 U.S. 411, 80 S. Ct. 822, 4 L.Ed. 2d 832 (1960).

5/ Reider v. State of New Jersey Dept.of Transp., 221 N.J. Super. 547 (App.Div. 1987); Wuethrich v. Delia, 134 N.J. Super. 400 (Law Div. 1975), aff'd 155 N.J. Super. 324 (App. Div. 1978); City of Margate, H.E. No. 89-23, 15 NJPER 166 (¶20070 1989).

the hearing scheduled for May 24, 1989. I denied the Union's Request to Stay.

Opening the record on May 24, I stated that Oliver was not obliged to respond to interrogatories she received from the Union on May 19 or 20, 1989, some four or five days before the hearing. I then ruled on the Union's Motion to Dismiss. The ruling mirrored my response to the State's motion.

I convened the hearing May 24 and August 21 and 22, 1989. The parties examined witnesses and introduced documents. They waived oral argument. Briefs were due November 24, 1989. The State filed a timely brief. Oliver and the Union filed late briefs but, in the interest of fairness, I considered them for this report and recommended decision. The record closed December 4, 1989 with my receipt of the union's brief. Based on the entire record, I make the following:

FINDINGS OF FACT

1. The State is a public employer under the Act and subject to its provisions.

2. Local 2215 is an employee organization under the Act and subject to its provisions. It represents nonsupervisory health care employees at the Vineland Developmental Center.

3. Oliver is employed as a resident living specialist at the Center and is represented in collective negotiations by Local 2215.

4. The Center operates twelve group homes in three southern New Jersey counties. About half of the homes care for ambulatory patients and half for non-ambulatory patients. Before a reorganization in the fall of 1987, the Center staffed the (then eleven) homes with eighty-six resident living specialists ("RLS"). Seven RLS's were assigned to each home and a few worked as floaters, i.e., their assignments would change from day-to-day, depending on staffing needs (2T147; 2T174).[6/]

5. Randy Cerana is the Supervisor of Professional Residential Services for the Center's group homes and, prior to the fall of 1987, was the first line of supervision for all eleven homes. He decided that placing a supervisor in each of the homes would make the program more effective (1T66, 2T144-146). Cerana prepared a proposal and presented it to his supervisors, Personnel Officer Edward Gesty, and Center Superintendent Robert Smith. These administrators then scheduled a staff meeting to discuss the proposal with the Center's RLS's and the Union. (1T58; 2T65, 2T146-2T148).

6. The meeting was held on October 19, 1987 and many of the Centers RLS's attended. Also present were several Union shop stewards and Union President Ellen Sheared. Gesty announced that the Department of Civil Service had approved the placement of head cottage training supervisors ("HCTS's") in the group homes. Under

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6/ Transcripts are cited as follows: 1T refers to May 24, 1989; 2T to August 21, 1989; and 3T to August 22, 1989.

this proposed reorganization, the HCTS's would work a shift that overlapped the RLS shifts at the group homes. Also required by this proposal was a restructuring of RLS schedules. The proposal potentially resulted in every RLS acquiring a new shift or days off. (1T58, 2T15, 2T65, 2T147-2T148).

7. Neither the RLS's nor the Union liked the proposal. Carolyn Holmes -- Executive Director of AFSCME, Council 71 and Sheared's predecessor as President of Local 2215 -- promptly arranged a meeting with the Center's administrators. (2T17, 2T67, 2T148-2T149, U-3).

8. Holmes and Sheared met twice with Smith, Gesty and Cerana. The Union had two concerns. Under the proposal the new HCTS's, a supervisory title represented by another union, would receive favorable shifts and days off. In addition, potentially all of the AFSCME-represented RLS's would be displaced from their shifts. Based on the reaction of the RLS's, the Union's goal was to minimize the displacement of its members. To this end, Holmes and Sheared suggested that the Center simply assign the new HCTS's into an existing RLS schedule at each home. This way the reorganization would displace, at most, only eleven RLS's -- the one from each home who would be replaced by an HCTS. The parties also agreed that the HCTS's would be selected from RLS's then working in the group homes. (2T20-2T25, 2T68, 2T150, 2T153, U-3).

9. The Center called another staff meeting and on October 27, 1987 announced the new plan. The HCTS's would be

selected from RLS's working in the group homes and the new title would be slotted into an existing RLS schedule at each home. In ambulatory group homes the HCTS would have Friday and Saturday off and in the non-ambulatory homes Sunday and Monday.[7/] Displaced employees would be reassigned based on in-title seniority.[8/] At this time neither the Union nor the Center knew which employees would be displaced. No names had been discussed nor had any applications for the new title been received (2T32, 2T54-2T55, 2T71, 2T151, 2T154, 2T170-2T174; U-4).

10. Only five RLS's were displaced. The Center decided not to place an HCTS in two of its group homes, leaving nine slots to fill. Of the nine, four were filled by RLS's whose HCTS applications had been accepted and who simply retained their former RLS shift and days off (1T87, 2T72, 2T154).

11. Among the five RLS's who would be displaced was Oliver, who ranked fourth in in-title seniority. She therefore had to choose between two of the least desirable remaining RLS openings. The effect of the reorganization on Oliver was a reassignment from a day shift with Sunday and Monday off, to a rotating shift with Saturday and Sunday off. (2T156-2T157, 2T176).

7/ Under this revised scheme, if a new group home opened, it would be staffed consistent with Cerana's original plan (U-4).

8/ After the plan was presented, Oliver, who attended the meeting, rose and asked what would happen to employees being displaced.

12. Oliver was very unhappy about this turn of events. Her application for an HCTS position had been denied. She did not like her new shift and felt that she had been denied an opportunity to bid into a position at the Morton Avenue group home (1T62-1T64, 1T66, 1T80-1T81).[9/]

13. There had been a vacancy created by the reorganization at Morton Avenue. That position was filled by Yvonne Still, an RLS who had been displaced. Still had more seniority than Oliver. Still had also bid on a position at Morias Avenue, a group home that was due to open later that year. The Morias opening was not, however, part of the reorganization. The Center had accepted Still's bid for Morias but needed a place to put her until that home opened. The Center permitted Still to fill the Morton Avenue position -- which she had chosen by virtue of seniority under the reorganization. When Morias Avenue later opened and Still transferred, the vacant Morton Avenue position was posted and filled internally, which was consistent with past practice. This second Morton Avenue vacancy was not part of the fall-1987 reorganization, which had been completed by the time Morias Avenue opened. Oliver

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9/ Oliver ranked Number 17 on the list. Employees ranking higher than her were appointed and so were employees ranking lower. Other employees on the list were skipped. Oliver, however, apparently was the first on the list to be skipped. The record does not show, however, that the Center's decision not to promote her was related to her exercise of protected rights. Nor is there any evidence that the decision not to appoint her as an HCTS was the product of collusion between the Center and the Union.

contended that the Center used Still to prevent her from securing the first Morton Avenue vacancy and then later altered the bidding procedure to deny her the spot when Still transferred to Morias. The record does not support this contention. Still was given Morton Avenue consistent with the reorganization plan. She had more seniority than Oliver. Morias had not yet opened and was not part of the reorganization.10/ When Still later transferred to Morias, the reorganization had been accomplished and the Morton vacancy was filled, consistent with the practice of the Union and the Center, by in-title seniority within the group home. (1T66, 1T80-81; 2T26, 2T36, 2T157-2T159, 2T177-2T178, 2T183-2T184).

14. Shortly after her reassignment, Oliver filed two grievances. The first, filed November 24, 1987, alleged that a senior RLS "stole" her assignment at Chestnut Avenue group home. This grievance sought restoration of the Chestnut Avenue assignment as a remedy. (CP-36). The second grievance, filed December 11, 1987, alleged that "management arranged" to deny her a first shift, with Sunday and Monday off at Morton Avenue. The remedy sought was a comparable assignment at either Morton or Chestnut Avenue. (CP-24).

10/ There is a discrepancy in the record. The Union officials apparently thought that the five displaced employees would be reassigned based on their in-state seniority. Center officials, however, testified that the vacancies would be filled by in-title seniority. Minutes of the October 19 and 27, 1987 staff meeting confirm the Center officials. This discrepancy is unimportant, however, since it is undisputed that by either in-state or in-title seniority, Oliver ranked fourth on the list of five displaced employees and had less seniority than Still. (2T72, U-3, U-4).

15. Before filing her grievances, Oliver called Janet Molina, a shop steward and said she wanted to grieve the reassignment. Molina told Oliver she could not file the grievance because the reorganization was a "management movement" (Oliver's testimony, 1T68). Oliver disregarded this advice and filed the grievances without the Union's assistance. She filed both as contractual grievances but failed to cite the contract article allegedly violated. When advised by the Center that it would not process the contractual grievances unless the union participated, Oliver asked another shop steward, Virginia Reese, for help. Oliver trusted Reese. She did not trust Molina (See finding 22). (1T66-1T69, 1T72; CP-24, CP-36).

16. The grievances were consolidated and scheduled for a step-one hearing held March 17, 1988. Robert Little, a Council 71 Staff Representative, represented Oliver. Reese and Tracy Smith, both shop stewards, attended for the Union. Sheared was also present before the hearing. Cerana presented the case for the Center. Oliver met with Little about an hour before the hearing. Little informed Oliver that of eighty-six RLS's, she was the only to file a grievance about the reorganization. Because Oliver had not cited it on her grievance form, Little asked her which article of the contract had been violated. Oliver replied that it was his job to figure that out. (1T67-1T73, 1T108; 2T39-40, 2T121-2T123).

With this beginning, Little attempted to prepare a case for the step-one hearing. He asked Oliver to tell him what had happened and how she had been harmed. He discovered the details about the reorganization and the union's involvement and its agreement with the Center. Oliver told Little that she had been harassed by the Center and she described events going back to the early 1980's.[11/] Based on Oliver's contention that she had been harassed, Little amended the grievance to claim a violation of Article V, Section E, which provides:

> The State and the Union agree that the working environment should be characterized by mutual respect for the common dignity to which all individuals are entitled. It is agreed that verbal and/or physical harassment of an employee is inappropriate. (J-1, p. 4)

The union's argument at step-one was that Oliver's assignment to a rotating shift amounted to physical harassment. Little called Oliver as a witness and she testified for about half an hour. Oliver's testimony at the step-one hearing was apparently quite expansive, covering not simply her reassignment but events she considered examples of harassment going back several years. No one

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11/ Oliver also insisted that the grievance be contractual rather than non-contractual, though her reasoning is not entirely clear. The union represents all employees filing contractual grievances. Employees filing non-contractual grievances may retain their own counsel or represent themselves. Oliver had filed a non-contractual grievance a few years earlier and it had cost her a lot of money and she lost her grievance. This may explain her insistence on keeping the grievance contractual, which is how she originally filed. (1T54-1T55; J-1, Art. VII, p. 10).

limited Oliver's testimony. She was permitted to speak freely. (1T108; 2T39-2T42, 2T129-2T131, CP-36, J-1).

17. Oliver claimed that Little should have relied on different contract language when he amended her grievances at step one. She contended that a paragraph titled "Facilities Phase Out/Consolidation of Services," rather than the mutual respect and dignity clause was the appropriate article on which to base the grievances. Sheryl Gordon, who is Associate Director of AFSCME Council 1 and represented Oliver at her step-two hearing, thought that the grievance would more appropriately have been filed under a reassignment article. Both articles, however, appear in the contract's appendix and neither can form the basis for a contractual grievance. Little, of course, was faced with Oliver's insistence that her grievances be contractual. Moreover, the reorganization was neither a phase out nor a consolidation of services. Based on the information he had received from Sheared and Reese, he knew that the Center had followed its agreement with the Union about the reorganization. (1T107-1T108; 2T42-2T43, 2T58, 2T100-2T101, 2T118; J-1, p. 53).

18. Oliver's step-one grievance was denied on March 24, 1988. The grievance was moved to step-two and, after a scheduling delay, a hearing was held November 30, 1988.[12/] Sheryl Gordon

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12/ Oliver worked the rotating shift for eleven months. At the time of the step-two hearing she had obtained a day shift at Weymouth Home with Mondays and Tuesdays off. (CP-36).

represented Oliver. Holmes and Sheared also attended for the union. Gesty presented the Center's case. Like Little, Gordon met with Oliver before the hearing. Unlike Little, Gordon seemed to develop a good rapport with her. She made it a point, being aware of Oliver's rocky relationship with the Union. (Oliver's original unfair practice charges had been filed by then. And see findings 20-23). After she reviewed the file, Gordon's first inclination was to persuade Oliver to abandon the grievance -- she did not think Oliver had much chance of prevailing on the merits. Oliver, however, was adamant about proceeding. She told Gordon that they should change the contract article underpinning the grievances. Gordon explained that it was not possible to make that change at step-two unless management consented to an amendment. Gordon tried. She asked Gesty for the Center's consent to amend. Gesty refused. Gordon also tried unsuccessfully to negotiate a settlement of the grievances. She told Oliver to pass her a note if she wanted to caucus or raise a point during Gordon's step-two presentation. She told Oliver that she would have a chance to speak, if she desired, after Gordon presented the case. Presenting the case, Gordon argued that Oliver could have been reassigned to other vacancies which did not have rotating shifts; that it was a hardship for Oliver to work a rotating shift; and since she was the only displaced RLS to be assigned a rotating shift, the assignment amounted to physical harassment.

After Gordon presented the case, she asked Oliver if she had anything to add. Oliver replied that she did not. She also told Gordon that she had done a good job. Gordon asked her to lunch after the hearing -- an attempt to mend fences. The gesture was later interpreted by Oliver as an attempt to prevent her from complaining. (1T78, 2T48, 2T76-2T78, 2T96-2T100, 2T102-2T104, 2T110-2T112, CP-24, CP-36).

19. Departmental Hearing Officer Carl Natter issued his decision denying Oliver's step-two grievances on December 21, 1988. On January 10, 1989 Oliver filed her charge alleging misconduct at the step-two hearing. She complained that she was not permitted to introduce new evidence, testify or cross-examine Gesty. She also complained that the hearing officer simply issued a decision mirroring the step-one response and that the hearing was a "fixed, planned out sham." (C-2; CP-36).

Oliver did not speak at the step-two hearing. Gordon presented her case and Oliver declined Gordon's invitation to speak. Oliver was not permitted to present new evidence because, as Gordon told her, new evidence was not admissible at step-two. Neither Oliver nor anyone else was permitted to cross-examine Gesty because he was not a witness. There is not a shred of evidence in the record that Hearing Officer Natter behaved improperly at the hearing. Nor is there any evidence of collusion. (2T187-2T202).

20. Oliver began working for the Center in 1980 at Giles Cottage. It was in 1980 that she first met Carolyn Holmes,

Sheared's predecessor as President of Local 2215. Oliver was having a problem with a shop steward. When she went to Holmes about it, Holmes suggested that Oliver consult the employees advisory service. (1T13).

21. In 1983 Oliver had a number of encounters with Center supervisors and the Union. She and others circulated a petition protesting the Center's staffing levels. She wrote her senator and this apparently resulted in an investigation of her complaints. She attended a union meeting and was nominated for office but her nomination was removed after she left the meeting. The Union claims her nomination was invalidated because she was an agency fee payer. Oliver claims she was a dues paying member. In 1983 Oliver also had trouble with Linda Fields, her cottage training supervisor. Oliver claims that Fields falsely accused her of failing to brush a client's teeth (CP-2) but that she was not even on duty on the date of the alleged infraction. She filed a grievance which the union later decided not to process. The relationship between Oliver and Fields became so bad that an HCTS referred them both to the employees advisory service. Oliver claims that she tried to run for shop steward in 1983 but Fields told her she was not allowed to have a voting box at her work site. (1T14-1T28; CP-1 through CP-16).

22. Oliver apparently had little trouble again until Fall 1985, by which time she was working in the group homes. Oliver claims that, because she bumped her out of a group home assignment, Janet Molina, a shop steward, began harassing her. Oliver contends

that Molina encouraged other employees to write letters to Oliver's supervisor criticizing her job performance. Although Oliver could not prove that Molina organized this alleged letter-writing conspiracy, she did prove that Molina made inappropriate remarks about her at staff meetings. Oliver also demonstrated that she was suspended five days for sleeping on duty and was reprimanded for neglect of duty as a result of employee complaints. Oliver retained an attorney to challenge the disciplinary action. She also wrote AFSCME President Gerald McEntee, at his office in Washington, and complained about what she thought Molina did to her and about the reactions of Holmes and Bob Angelo to her complaints. (1T32, 1T38-1T43, 1T117-1T118, 1T125, 1T134; CP-26, CP-28, CP-38, CP-39).

23. In January 1986 Oliver asked Cerana for a reassignment to a floater position. Cerana told her to put her request in writing. Oliver was reassigned and worked as a floater, without incident, from March to October 1986. In October 1986 she moved to the recently opened Chestnut Avenue home. Shortly after her arrival, Oliver began having trouble with Kathy Williamson, a shop steward, and with other employees at the home. Oliver claims that one employee "pinned [her] to a chair" and another hit her with a log book. Oliver consequently retained an attorney who wrote a letter to Cerana threatening a lawsuit should anything happen to

Oliver. A short while later the Center announced its reorganization. (1T39, 1T47-1T49, 1T53, 1T55-1T57).[13/]

24. Over the objections of the State and the Union, I admitted as background, evidence of events well outside the limitations period. Much of the evidence was remote to Oliver's timely allegations but it provided a valuable description of her relationships with Union officers and shop stewards as well as with the Center's administrators and her peers.

At the time of the Center's reorganization in the fall of 1987, Oliver was certainly well-known to Union officials locally and at the State level -- perhaps even at the national level. (See CP-29, CP-30, CP-37(a), (b) and (c)). That relationship can be described as, at best, strained. In describing his (step-one) pre hearing meeting with Oliver, Little remarked "I'll say that everybody -- you could feel maybe some tension when Linda Oliver comes up." (2T125).

ANALYSIS

The only questions raised by Oliver's timely allegations are: 1) in negotiating and implementing the reorganization of the group homes, did the Union and Center collude to deny Oliver a favorable shift? and (2) did the Union fail in its duty to fairly represent Oliver in her related grievances? Based on the record, I conclude that the answer to both questions is no.

13/ The record suggests no connection between Oliver's trouble at Chestnut Avenue and the Center's reorganization. The reorganization resulted from Cerana's desire to add local supervision to the program (See finding 5).

In its negotiations with the Union about the reorganization, the Center's motivation was its perceived need for local supervision. The Union's motivation was to minimize the disruption of the reorganization on its members. Neither party knew how the new system would affect individual employees. No names were mentioned during negotiations and no one could have known how employees would be affected until applications had been received for the new HCTS openings. Both parties achieved their goals: the Center got its first-line supervisors and the Union reduced the number of displaced employees from a possible eighty-six to five. There is no evidence suggesting that during these negotiations the parties intended that Oliver come out of the reorganization with an undesirable shift. I find no evidence of collusion nor any suggesting that the Union, on its own, acted unlawfully by its conduct during the reorganization. (findings 5-13)..

Of a union's duty of fair representation in negotiations, the United States Supreme Court explained in Ford Motor Co. v. Huffman, 346 U.S. 330 (1953):

> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. 346 U.S. 338.

See also Humphrey v. Moore, 375 U.S. 335 (1984). Absent clear evidence of bad faith or fraud, unions may make compromises that adversely affect some members while resulting in greater benefits for others. The fact that negotiations result in a detriment to one group of employees does not establish a breach of the duty of fair representation. Belen v. Woodbridge Tp. Bd. of Ed., 142 N.J. Super 486 (App. Div. 1976); Lawrence Tp. PBA Local 119, P.E.R.C. No. 84-76, 10 NJPER 41 (¶15073 1983); Union City and F.M.B.A. Local 12, P.E.R.C. No. 82-65, 8 NJPER 98 (¶13040 1982); Hamilton Tp. Ed. Assn., P.E.R.C. No. 79-20, 4 NJPER 476 (¶4215 1978).

In analyzing Oliver's claim that the Union violated its duty to fairly represent her on the grievances, I am guided by the standard established by the United States Supreme Court in Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967):

> ...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. 386 U.S. at 190, 64 LRRM at 2376.

The Commission and New Jersey Courts have consistently applied the Vaca standard in evaluating fair representation cases. 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 Local 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); 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); New Jersey Turnpike Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979); AFSCME Council No. 1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978).

The United States Supreme Court has also held that establishing a claim of a breach of the duty of fair representation, "...carries with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." Amalgamated Assoc. of Street, Electric Railway and Motor Coach Employees of America v. Lockridge, 403 U.S. 274, 301, 77 LRRM 2501, 2512 (1971). In Lockridge, the Court held that a union is not liable for mere errors in judgment if they were made honestly and in good faith.

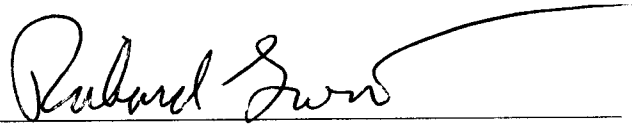
Similarly, the National Labor Relations Board has held that where a majority representative exercises its discretion in good faith, proof of mere negligence, standing alone, does not suffice to prove a breach of the duty of fair representation. Service Employees Int'l Union, Local No. 579 AFL-CIO, 229 NLRB 692, 95 LRRM 1156 (1977); Printing and Graphic Communication, Local 4, 249 NLRB No. 23, 104 LRRM 1050 (1980), reversed on other grounds 110 LRRM 2928 (1982).

The troubling aspect of Oliver's grievances was that Molina told her she could not file one. No harm resulted, however, because Oliver filed them anyway and Little and Gordon represented her at the step-one and step-two hearings. While Little had his difficulties with Oliver, there is nothing in the record showing

that he acted in bad faith, discriminatorily or arbitrarily in representing her. Though Oliver questioned his judgment in choosing a contract article on which to base the grievances, there was no evidence that his judgment was clouded by dishonesty or bad faith. Moreover, his discretion was limited by Oliver's own insistence that the grievances remain contractual. (Findings 15-17).

Similarly, there is no evidence suggesting that Gordon's conduct at the step-two hearing was arbitrary, discriminatory or tainted by bad faith. Like Little, she had little hope that the grievance would be sustained. She nevertheless put together and presented the best case she could under the circumstances. Oliver was pleased with Gordon's presentation until Natter issued the step-two decision on December 21, 1988. Contrary to Oliver's allegations in her January 10, 1989 charge, there were no improprieties at the step-two hearing. (Findings 18, 19).

I conclude that, despite the evidence of Oliver's strained relationships with the Union and Center employees and supervisors, she has failed to prove that the Union violated its duty to fairly represent her or that the Center and the Union colluded to deny her a favorable shift. I recommend that the Complaint be dismissed.



Richard C. Gwin
Hearing Examiner

Dated: January 12, 1990
Trenton, New Jersey