

**STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION**

In the Matter of:

MEA/NEA, LOCAL 1,
Respondent-Labor Organization,

Case No. CU99 H-36

-and-

VELINA PATTERSON,
An Individual Charging Party.

_____ /

APPEARANCES:

Amberg, McNenly, Firestone & Lee, P.C., by Michael K. Lee, Esq., for Respondents

Velina Patterson, In Pro Per

DECISION AND ORDER

On March 31, 2000, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service and no exceptions have been filed by any of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Maris Stella Swift, Commission Chair

Harry W. Bishop, Commission Member

C. Barry Ott, Commission Member

Date: _____

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
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In the Matter of:

MEA/NEA, LOCAL 1,
Labor Organization - Respondent

Case No. CU99 H-36

-and-

VELINA PATTERSON,
Individual Charging Party

APPEARANCES:

Amberg, McNenly, Firestone & Lee, P.C. by Michael K. Lee, for the Respondent

Velina Patterson, In pro per

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), as amended, MCL 423.210 & 423.216; MSA 17.455(10) & 17.455(16), this case was heard at Detroit, Michigan on October 20, 1999, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before December 14, 1999, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge and Background:

The charge was filed on August 5, 1999, by Velina Patterson, an individual, against her bargaining representative, MEA/NEA Local 1. Patterson was terminated from her employment as a food service employee with the Grosse Pointe Public Schools on September 22, 1997. Respondent filed a grievance over Patterson's termination. On May 29, 1999, an arbitrator issued an award upholding the discharge. In the charge filed on August 5, Patterson alleged that Respondent violated its duty of fair representation toward her by failing to present all pertinent information to the arbitrator. She also alleged that Respondent should have provided her with a notarized copy of the arbitration award.

On September 7, 1999, Respondent filed a motion for summary disposition, attaching a copy of the arbitrator's decision. In its motion Respondent asserted that Patterson had admitted that she had committed all the acts which the arbitrator found to have justified her termination. Patterson filed a response to the motion on September 21, 1999. Patterson asserted that she had not admitted that she was guilty of misconduct with respect to all of these acts. Patterson also made new

allegations. In her response, Patterson alleged for the first time that Respondent violated its duty of fair representation by failing to explain to her why approximately 30 months elapsed between her discharge and the date of her arbitration hearing. Patterson also alleged that Respondent breached its duty of fair representation when its agent, William Schmidt, failed to ask her the proper questions while interviewing her in preparation for her arbitration, and when Schmidt refused to show her his copy of her personnel file. In addition, Patterson alleged, without giving more specific detail, that at the time of the arbitration hearing Schmidt possessed written statements from other employees that might have made a difference in the outcome of the arbitration, that Schmidt refused to let her see copies of these statements, and that Schmidt did not use these statements at the arbitration hearing. Patterson concluded her response by stating that “she (had) much more to present . . . about (her) case.”

By letter dated September 30, 1999, I notified the parties that I would not grant Respondent’s motion for summary disposition. I also informed Patterson that if she wished to make additional allegations against Respondent, she must amend her charges before the hearing date. On October 12, 1999, Patterson added the following allegations to her charge: (1) that Respondent improperly failed to point out to the arbitrator that Patterson had received a positive evaluation from her supervisor in June 1997; (2) that Schmidt improperly failed to argue to the arbitrator that the employer disciplined Patterson in retaliation for her filing complaints with the Equal Employment Opportunity Commission (EEOC); (3) that Schmidt improperly failed to bring to the arbitrator’s attention the fact that Patterson was taking medication during the time of the offenses immediately preceding her discharge; (4) that Schmidt failed to adequately prepare for the arbitration hearing, as evidenced by the fact that on the day of that hearing he was not aware of and did not have copies of all the relevant documents from Patterson’s personnel file.

Facts:

Respondent represents a bargaining unit of employees, including food service employees, of the Grosse Pointe School District. Patterson began working for this Employer in 1986 as a cafeteria aide. In early 1995, Patterson bid on a cook-manager position. When she did not receive the position, she filed a charge with the federal Equal Employment Opportunity Commission (EEOC) alleging that her failure to receive the promotion constituted race discrimination. In settlement of her charge, Patterson was promoted to the position of cook-manager at Brownell Middle School in April 1995. As a cook-manager, Patterson was required by state regulation to satisfactorily complete a food sanitation course. On February 1, 1996, Patterson was demoted to her previous position as cook’s helper because she had failed the course and had not informed the Employer of any arrangements to retake the course or the test. No grievance was filed over Patterson’s demotion. On February 9, 1996, Patterson filed a second EEOC charge. This charge alleged that she had been discriminated against because of her race and because of her previous charge with the EEOC. In July 1996 Patterson received notice that the EEOC was dismissing her charge and issuing her a right-to-sue letter.

During the 1996-97 school year, Patterson worked as a cook’s helper at Grosse Pointe North High School. Between September and November of that year, Patterson received a written reprimand for an unreported absence, a three-day suspension for insubordination, and a ten-day suspension, also for insubordination. None of these actions were grieved. On November 25, 1996, Potteiger completed Patterson’s performance appraisal. Potteiger rated Patterson unsatisfactory in punctuality, productivity, cooperation with supervisors, adherence to rules and regulations,

completing assigned tasks without constant supervision, and showing initiative. Shortly thereafter, Patterson was placed on a performance improvement plan which, in effect, put her on probation. Under the terms of the plan, Patterson was required to contact Potteiger personally whenever she was unable to report for work, and to provide doctors' notes whenever she was absent because of her or her child's illnesses. No grievance was filed over the performance improvement plan.

In December 1996, Patterson was suspended for 12 days for failing to report to work and failing to properly report her absence. Patterson produced a letter from a judge stating that she had come to court to give evidence in a matter concerning her nephew. Respondent filed a grievance over this suspension, but dropped it after the Employer argued at the second step that the suspension was justified by Patterson's disciplinary history, and by the fact that she had failed to properly call in to report her absence as required by the performance improvement plan.

On June 12, 1997, Potteiger gave Patterson a written progress evaluation. The evaluation stated that Patterson had shown improvement in some areas but not in others, and that Patterson's overall job performance was still below expectations. Potteiger informed Patterson that the performance improvement plan would remain in effect for another year, and that a failure to improve in any of her areas of deficiency might lead to her termination.

In early September 1997, Potteiger gave Patterson a series of written reprimands. These reprimands addressed errors Patterson had allegedly made in totaling bank deposits during the previous school year, her failure to properly secure a safe on August 27, 1997, and allegedly hostile remarks made by Patterson when confronted by the Employer about the safe incident. On September 9, 1997, a meeting was held with Respondent representatives present to discuss these reprimands. At some time during this meeting Patterson passed out. When she remained unconscious, EMS was called and Patterson was taken to the hospital. Patterson was released from the hospital that day. She did not, however, return to work the next week.

On September 18, Patterson was called at home and told to attend a meeting at the school on September 22 to discuss violations of her performance improvement plan. At this meeting, the Employer gave Patterson a memo detailing her alleged violations of the plan, including her failure to properly report some of her absences since September 9, and her failure to provide medical verification for others. At the close of the meeting the Employer gave Patterson a notice of termination. The notice stated that Patterson's termination was the final step in the progressive disciplinary process.

Respondent filed a grievance protesting Patterson's termination. On October 31, 1997, Respondent made a demand for arbitration of the grievance to the American Arbitration Association (AAA), as required by the terms of its contract with the Employer. An arbitrator was selected on November 14, 1997. The AAA then attempted to find a date for the arbitration acceptable to both parties and the arbitrator. On January 14, 1998, William Schmidt, an executive director for Respondent, wrote Patterson to tell her he would be handling her case, and to inform her that the parties were still in the process of selecting a date. On March 4, 1998, the parties agreed to an arbitration date of December 17, 1998. The arbitration was postponed to March 16, 1999 after the Employer's attorney was killed in an automobile accident in the fall of 1998. At the time of the accident Schmidt informed Patterson that the Employer would probably ask for an adjournment, and assured her that he would get the quickest alternative date possible.

On October 26, and again on November 10, 1998, Schmidt wrote Patterson asking her to contact him to prepare for the hearing. Schmidt and Patterson met for the first time in early December. Between December 1998 and March 9, 1999, Schmidt and Patterson had three or four face-to-face meetings, each lasting several hours. They also had an extended telephone conversation on the night before the hearing.

At some point during his preparation for her arbitration, Schmidt asked the Employer to provide him with copies of documents from Patterson's personnel file. The documents he requested were those referenced in Patterson's termination letter. At one of their meetings, Patterson noticed that the pile of papers in front of Schmidt was thicker than the pile of documents she had received after she requested copies of her file. Patterson asked to look through Schmidt's pile of documents, but he refused. During the arbitration hearing, the Employer made reference to four documents of which Schmidt did not have copies. Patterson provided Schmidt with copies from her file.

During one of their meetings, Schmidt asked Patterson to provide him with examples of when she thought she had been singled out and treated differently, and also asked her to give him names of other employees who had witnessed management actions singling her out. Patterson could not do this. Schmidt also asked Patterson for the names of co-workers at North High School who might support her claim. Patterson gave Schmidt the names of her co-workers and a supervisor who had retired. Schmidt later talked to a number of the people whose names he had been given, including the retired supervisor. The retired supervisor told him that she believed that the school district was watching Patterson especially carefully. She also told him, however, that Patterson had done all of the things of which she was accused, and that she (the supervisor) would so testify if she was called as a witness. Schmidt concluded that the supervisor's testimony would not help his case. Schmidt did not take a written statement from the retired supervisor, or any other person he interviewed. In one of their later meetings, Patterson asked to see the statements Schmidt had taken from witnesses. Schmidt explained what the supervisor had said, and told Patterson that none of the witnesses had been helpful. Patterson and Schmidt then argued over whether the supervisor would make a good witness. While Patterson argued that the supervisor would show the arbitrator that she had been specially targeted, Schmidt told Patterson that he did not want to call the supervisor as a witness because she would end up confirming the Employer's allegations. Schmidt also told Patterson that he had talked to Steadman and other union officers about Patterson's situation. He told her that all of them believed that the Employer had been justified in giving Patterson all of the disciplinary actions she had received prior to September 1997.

At their meetings, Schmidt and Patterson reviewed the events immediately preceding her discharge. Schmidt asked Patterson if she had medical verification for her absences after June 9, 1997. Patterson had some doctor's notes, but none for two of these days. Sometime during their preparation meetings Patterson suggested to Schmidt that her alleged misconduct might be a result of the medication she was on. Schmidt asked Patterson to sign a release allowing him to look at her medical records. Patterson, however, would not agree to this.

Patterson's arbitration took place on March 16, 1999. At the arbitration Schmidt argued that the employer had not shown that Patterson had committed some of the misconduct cited by the Employer. This included misconduct for which Patterson had been disciplined during the 1995-96 school year. With respect to Patterson's alleged failure to properly report and provide medical verification for her absences in September 1997, Schmidt argued that there were mitigating circumstances. He asserted that Patterson's performance improvement plan was unreasonable in

requiring her to personally report her absences to Potteiger, since Potteiger might not be available to receive Patterson's phone calls. He also argued that even though Patterson did not provide doctors' notes for some days of her absence, the district knew that Patterson was experiencing medical difficulties at this time. Schmidt also argued that Patterson was not hostile and uncooperative on August 27, 1997, as the Employer had alleged. Schmidt argued that Patterson's discharge was unreasonable in light of her seniority, the mitigating circumstances, and the lack of any egregious misconduct on her part. Schmidt did not argue that the employer discharged or disciplined Patterson because of her EEOC charges. However, Patterson, testifying on her own behalf, raised this issue with the arbitrator.

The arbitrator issued her award denying the grievance on May 29, 1999. The arbitrator concluded that she had no authority to determine whether just cause existed for discipline issued prior to September 1997. She held that since this discipline had never been grieved, she was required to accept it as valid. She also noted that the grievance was untimely as to these prior disciplinary actions. The arbitrator discussed whether the employer had just cause for the discipline it gave Patterson in September 1997. She noted that Patterson had admitted failing to secure the safe on August 27 of that year. The arbitrator held that even if Patterson did not make hostile remarks, her failure to secure the safe was just cause for the reprimand. Next, the arbitrator discussed the written reprimand issued to Patterson in September 1997 for a series of inaccurately totaled bank deposits made the previous June. The arbitrator noted that the evidence indicated that Patterson had made these deposits, that Patterson did not deny it, and that this misconduct was just cause for the reprimand. The arbitrator then found that Patterson was absent on September 12, 15, 16, & 17; that on these dates she failed to personally notify Potteiger, by phone or voicemail message, as she had been clearly instructed to do; that Patterson's doctor's note indicated that she was able to work on September 12; and that Patterson had failed to supply a doctor's note to support her absences on September 15 and 16. The arbitrator next discussed whether the penalty of discharge was appropriate for the proven offenses. She concluded that in light of her disciplinary history prior to September 1997, Patterson's failure to report and verify her absences during that month constituted insubordination. The arbitrator noted that the contract provided that insubordination constituted just cause for discharge. She also noted that the contract provided that where an employee had received two written reprimands for the same conduct within the previous two years, a repetition of that conduct constituted just cause for discharge, and that Patterson had received three written reprimands for failing to call in within the year prior to her discharge. Finally, the arbitrator held that there was no evidence that the district was hostile to Patterson because she had filed the EEOC charges. She concluded that the record did not show that Patterson was terminated in retaliation for filing these charges.

Discussion and Conclusions of Law:

I first note that Patterson's post-hearing brief is, in large part, devoted to attacking conduct which occurred prior to September 1997. This conduct includes Respondent's failure to file a grievance over her February 1996 demotion, as well as its failure to grieve disciplinary actions she received between the date of that demotion and September 1997. With the exception of Patterson's 12-day suspension in December 1996, the disciplinary actions which Patterson received during that period were not grieved. This fact clearly had an impact on the arbitrator's decision. However, Section 16(a) of PERA prohibits the Commission from remedying an unfair labor practice occurring more than six months prior to the filing of the charge. The six month period begins when the charging party knows of the act which caused his injury and has good reason to believe that the act

was improper or done in an improper manner. *Huntington Woods v Wines*, 122 Mich App 650, 652 (1983). Patterson knew that Respondent had not grieved these disciplinary actions after Patterson received them. Therefore, any allegation that Respondent breached its duty of fair representation by failing to file grievances in 1996 and 1997 is untimely.

Patterson argues that Schmidt was negligent in preparing for her arbitration hearing. She also asserts that Schmidt failed to present all pertinent information about her case to the arbitrator. These are the principal allegations of her charge. However, she also alleges that Respondent breached its duty of fair representation by failing to explain to her why approximately 30 months elapsed between her discharge and the date of her arbitration hearing. Finally, Patterson alleges that Respondent breached its duty of fair representation by failing to provide her with a notarized copy of the arbitration award.

As set out in *Goolsby v Detroit*, 419 Mich 651,679 (1984), a union's duty of fair representation under PERA encompasses three separate duties. First, the union must serve the interests of all its members without hostility or discrimination toward any. Secondly, a union must act in good faith. Finally, it must avoid arbitrary conduct. According to *Goolsby*, a union acts in bad faith when it commits an intentional act or omission undertaken dishonestly or fraudulently, while "arbitrary conduct" is conduct which is "impulsive, irrational or unreasoned." Arbitrary conduct also includes "inept conduct undertaken with little care or with indifference to the interests of those affected," and "extreme recklessness or gross negligence." *Goolsby*, at 682.

With respect to Respondent's preparation for her hearing, Patterson alleges that Schmidt failed to ask her pertinent questions during their pre-arbitration meetings. However, she does not explain what Schmidt failed to ask, or why she did not bring the information to Schmidt's attention herself. Patterson also asserts that Schmidt failed to examine her personnel file in preparing for the hearing. Her evidence for this is the fact that Schmidt refused, during their preparation meetings, to let her look at his pile of documents. She also draws this conclusion from the fact that Schmidt did not have copies of all relevant documents on the day of the arbitration. However, Schmidt's un rebutted testimony was that prior to the hearing he requested and received from the Employer copies of all the documents in Patterson's personnel file that he believed were relevant to her case. Schmidt explained that he did not want Patterson to look through his stack of documents because they included his handwritten notes. The fact that Schmidt did have most of the relevant documents in his possession at the hearing supports Schmidt's testimony.

Patterson also alleges that Schmidt negligently failed to present all pertinent information about her case to the arbitrator. She asserts that Schmidt improperly failed to argue to the arbitrator that the Employer was retaliating against her for filing charges with the EEOC. She asserts that Schmidt failed to call a witness who would have supported this claim. However, Schmidt testified without contradiction that he interviewed the witness in question and that he made a reasoned decision that that her testimony would not support Patterson's retaliation claim but would harm her case in other ways. Patterson also claims that Schmidt improperly failed to argue to the arbitrator that the medication she was taking affected her ability to comply with the performance improvement plan. However, the record indicates that Schmidt decided not to bring up Patterson's medication as an issue after Patterson refused to let him see her medical records. In addition, Patterson claims that Schmidt improperly failed to point out to the arbitrator that Patterson had received what Patterson viewed as a favorable evaluation in June 1997. The evaluation, however, was presented to the arbitrator by the Employer. This evaluation, while noting improvement in some areas, clearly stated that Patterson's

overall performance was seriously deficient.

I conclude that Patterson has not demonstrated that Schmidt made impulsive or unreasoned decisions in the course of his preparation for or presentation of her case. I also conclude that Patterson has not established that Schmidt's conduct in this matter was "inept . . . undertaken with little care or with indifference to her interests," that Schmidt was guilty of gross negligence, or that he acted in bad faith. Prior to the hearing, Schmidt obtained copies of documents from Patterson's personnel file. Schmidt and Patterson had at least three or four long meetings about her case. Schmidt spoke to a number of potential witnesses before concluding that none of them could help Patterson's case. During his preparation, Schmidt decided not to make certain arguments to the arbitrator because he felt they were not supported by the evidence. Although Patterson did not agree with these decisions, they had a rational basis. The arguments Schmidt did present were the ones which he, after assessing the facts, concluded could be supported by the evidence.

In January 1998, Schmidt sent Patterson a letter explaining that Respondent and the Employer had chosen an arbitrator and were attempting to select an arbitration date. Schmidt did not explain to Patterson the AAA's system for picking a date, or why it was taking so long, and Patterson did not ask. When the hearing was postponed from December 1998 to March 1999, Schmidt informed Patterson of the reasons for the postponement. I conclude that Respondent did not act in bad faith and that it was not guilty of arbitrary conduct in failing to provide Patterson with more information about the reasons for the length of time it took to schedule her arbitration date.

Finally, despite the fact that the cover page of the award had a space for a notary's signature, the award was never notarized. Respondent clearly had no obligation to provide Patterson with a document which never existed.

In accord with the findings of fact and discussions and conclusions of law above, I find that Patterson did not establish that Respondent violated its duty of fair representation in this case. I therefore recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is hereby is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern

Administrative Law Judge

Dated: _____