P.E.R.C. NO. 92-81

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matters of

PBA LOCAL NO. 183,

Respondent,

-and- Docket No. CI-H-91-9

BRIAN MORIARTY,

Charging Party.

ESSEX COUNTY SHERIFF,

Respondent,

-and- Docket No. CI-H-91-10

BRIAN MORIARTY,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by Brian Moriarty against P.B.A. Local No. 183 and the Essex County Sheriff. Under the circumstances, the Commission cannot find that the Union acted arbitrarily, discriminatorily or in bad faith when it declined to arbitrate Moriarty's grievance. Accordingly, it dismisses the Complaint.

P.E.R.C. NO. 92-81

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BRIAN MORIARTY,

Charging Party.

Appearances:

For the Respondent PBA, Whipple, Ross & Hirsh, attorneys (Dennis M. Cavanaugh, of counsel)

For the Respondent Essex County Sheriff, Stephen J. Edelstein, County Counsel (Lucille LaCosta-Davino, of counsel)

For the Charging Party, Balk, Oxfeld, Mandell & Cohen, attorneys (Nancy I. Oxfeld, of counsel)

DECISION AND ORDER

On August 13, 1990, Brian Moriarty filed unfair practice charges against PBA Local No. 183 and the Essex County Sheriff. The charges allege that the PBA violated subsections 5.4(b)(1) and

(5),[1/] and the employer violated subsections 5.4(a)(1) and (3)[2/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. The employer allegedly violated its collective negotiations agreement with the PBA by suspending Moriarty for three days and the PBA allegedly breached its duty of fair representation by refusing to arbitrate Moriarty's grievance contesting the suspension.

On November 14, 1990, a Consolidated Complaint and Notice of Hearing issued. The employer's Answer denies that it violated the contract and incorporates an earlier statement of position claiming that we have no jurisdiction to find a contract violation. The PBA's Answer denies the substantive allegations and relies on its statement of position claiming that Moriarty was treated fairly and equitably.

On May 10 and August 12, 1991, Hearing Examiner Alan R. Howe conducted a hearing. At the outset, the employer moved to dismiss the charge against it, claiming that the contract grants the PBA the sole authority to bring a grievance to arbitration.

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. (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."

Moriarty argued that since both the employer and the union were respondents, the motion should be decided under New Jersey Turnpike Auth., P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980). The Hearing Examiner denied the motion and, over Moriarty's objection, bifurcated the hearing. Moriarty would first proceed against the PBA on his fair representation claim. Only if it proved that claim could he proceed against the employer. Pursuant to the Hearing Examiner's order, the parties examined witnesses and introduced exhibits on the fair representation claim only. They waived oral argument and Moriarty and the PBA filed post-hearing briefs.

On October 22, 1991, the Hearing Examiner recommended dismissing the Consolidated Complaint. H.E. No. 92-10, 17 NJPER 518 (¶22258 1991). He found that the PBA acted within its discretion and in complete good faith when it refused to arbitrate Moriarty's grievance. Having found no breach of the duty of fair representation, he dismissed the allegations against the employer.

On December 3, 1991, after an extension of time, Moriarty filed exceptions. He objects to bifurcating the proceeding. He claims that there can be no finding that a union breached its duty of fair representation unless the charging party also proves a breach of contract. In addition, he excepts to several factual findings and claims that the Hearing Examiner was forced to make findings as to the merits of his breach of contract claim despite the fact that he had not put on his case against the employer.

Moriarty urges that we find that he proved, prima facie, that the PBA breached its duty of fair representation and that the employer should now have the burden of justifying its actions. The PBA's request to file an untimely reply to the exceptions was denied.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 5-17) are generally accurate. We incorporate them with these changes.

We modify finding nos. 5 and 23 to show that the PBA decided to waive its contractual right to collect any fees because of the cost involved in collecting agency fees from only six nonmembers. At the end of 1988 or the beginning of 1989, Moriarty realized that fees were no longer being deducted from his pay and he arranged with the payroll department to have deductions resumed. In April 1990, the PBA realized that Moriarty had had his deductions restored. It wrote to the payroll department and had those deductions stopped. The letter stated, "unless this Local contacts your office, regarding any manner of dues deduction or the like, the wishes of any individual officer are not to be honored." We specifically adopt the statement in finding no. 21 that there was no proven link between Moriarty's lawsuits against individual Sheriff's officers and the cessation of fee deductions.

In finding no. 12, the Hearing Examiner found that Frederick R. DeMayo, a PBA officer, testified that Moriarty asked him if the PBA would provide a lawyer at his departmental hearing and that DeMayo replied that the PBA did not supply lawyers at such hearings. Moriarty testified that he and DeMayo did not discuss "having an attorney" at that time.

Resolution of this conflict in testimony is not material to the outcome of this case.

Sanford Oxfeld, the attorney who represented Moriarty at the departmental hearing, wrote to the PBA's attorney and the substance of the letter is summarized in finding no. 16. We clarify that finding to indicate that Oxfeld's letter did not state that Moriarty should have abided by the order to get a doctor's note. Oxfeld was asked on cross-examination whether it would have been better for Moriarty to obey the order and Oxfeld replied that "in the abstract forgetting the penalties involved that the best procedure would always be better to do it and file a grievance later (2T25)."

We add to finding no. 17 that the grievance form which indicated that Oxfeld would represent Moriarty was filled out by a PBA representative, not Moriarty (1T42). We accept the finding concerning PBA President Casey's response to Moriarty's request for a PBA lawyer. According to Moriarty, when he expressed his hope that the PBA would provide its lawyer, Casey responded, "You're not a member of the PBA (1T42-1T43)." When Moriarty told Casey that he paid agency fees, Casey told him that no money was being deducted and Moriarty should adjust the matter with payroll. While we accept this finding, we wonder why Casey would tell Moriarty to adjust the matter with payroll when the PBA's policy at that time was not to collect agency fees from any nonmembers.

We believe that finding no. 18 correctly characterizes DeMayo's testimony that DeMayo believed that Moriarty had incorrectly interpreted the contract's sick leave provisions (2T54-2T57). DeMayo also believed, based on the documents provided by the employer, that Moriarty was suspended because he refused to obey Flynn's legal order (2T84-2T85). We make no finding as to the merits of any discipline imposed.

Moriarty claims that he denied that he was invited to the PBA membership meeting where the decision was made not to arbitrate his grievance. He has not cited to a portion of the record to support that assertion. See N.J.A.C. 19:14-7.3(b). We therefore adopt recommended finding no. 20 which is based on DeMayo's testimony (2T66).

We add to finding no. 21 that DeMayo appeared at Moriarty's deposition during Moriarty's second lawsuit (1T52-1T54). Moriarty objected to DeMayo's presence (1T54).

We modify finding no. 23 to delete the reference to an April 19, 1990 action by the PBA membership to end Moriarty's agency fee deductions. The record citations do not support that reference. We also delete the statement that the April 19 letter to payroll ending Moriarty's fee deductions was sent after the membership voted not to arbitrate his grievance. The letter carries the same date as the membership meeting and the record does not indicate which happened first.

In considering a union's duty of fair representation, certain principles can be identified:

> The union must exercise reasonable care and diligence in investigating, processing and presenting grievances; it must make a good faith judgment in determining the merits of the grievance; and it must treat individuals equally by granting equal access to the grievance procedure and arbitration for similar grievances of equal merit. [N.J. Turnpike Employees Union, Local No. 194, IFPTE, P.E.R.C. No. 80-38, 5 NJPER 412, 413 (¶10215 1979)]

See also Vaca v. Sipes, 386 U.S. 171 (1967). On this record, Moriarty has not proven that the PBA breached any of these obligations. Specifically, he has not proven that the PBA ended his representation fee deductions and then used his nonmember, non-feepayer status to refuse to assign him a PBA attorney or arbitrate his grievance.

We reject Moriarty's contention that his lawsuits against individual Sheriff's officers motivated the PBA to cease representation fee deductions. A PBA representative testified without contradiction that fee deductions were stopped for all nonmembers. The PBA's decision to stop Moriarty's deductions after he acted to have them restored was consistent with the PBA's overall policy. We are troubled by the PBA president's response to Moriarty's request for representation by the PBA's attorney. A union cannot lawfully discriminate against non-members. But we must view that statement in the context of the entire case.

When Moriarty informed the union that he faced discipline, a union representative joined his attorney at the disciplinary hearings. When Moriarty asked that a grievance be filed contesting his suspension, the union complied. The PBA ultimately decided not

to arbitrate Moriarty's grievance, but only after discussion before its Executive Board and general membership. Moriarty was invited to attend the membership meeting but did not.

The record does not support a finding that Moriarty's grievance was processed any differently than those of PBA members. In fact, two PBA members had their arbitration requests denied at the same time. Under these circumstances, we cannot find that the union acted arbitrarily, discriminatorily or in bad faith when it declined to arbitrate Moriarty's grievance.

Moriarty claims that the Hearing Examiner erred in bifurcating the hearing. Moriarty asserts that he should have been permitted to go forward with his breach of contract claim against the employer. We disagree. This procedural ruling was within the Hearing Examiner's discretion to conduct a hearing. N.J.A.C. 19:14-6.3. In this case, it was not unreasonable to determine whether there was a breach of the duty of fair representation before considering, if necessary, the merits of the grievance.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Grandrimo, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: January 30, 1992
Trenton, New Jersey
ISSUED: January 31, 1992

H.E. NO. 92-10

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matters of

PBA LOCAL NO. 183,

Respondent,

-and- Docket No. CI-H-91-9

BRIAN MORIARTY,

Charging Party.

ESSEX COUNTY SHERIFF,

Respondent,

-and- Docket No. CI-H-91-10

BRIAN MORIARTY,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss charges of unfair practices contained in a Consolidated Complaint where the Charging Party alleged that the Respondent PBA had breached its duty of fair representation when it refused to arbitrate his grievance. The PBA found that the grievance lacked merit. The Hearing Examiner also recommends the dismissal of the Unfair Practice Charge against the Respondent County (Sheriff), which alleged a violation of Sections 5.4(a)(1) and (3) of the Act when a three-day suspension was imposed upon Moriarty for failure to comply with an order that he produce a doctor's certificate.

A Motion to Dismiss on the first day of hearing by the Respondent County was resolved on the basis of the ordering of a bifurcated hearing wherein the Charging Party and the Respondent PBA would present their proofs and, if the PBA was found not to have breached its DFR, then there would be no hearing held with respect to the Respondent County and thereafter both charges would be dismissed. This is exactly what occurred.

The basis for proceeding in this manner was the Commission's decision in New Jersey Turnpike Authority (Beall), P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980).

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.

H.E. NO. 92-10

STATE OF NEW JERSEY
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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PBA LOCAL NO. 183,

Respondent,

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Appearances:

For the Respondent PBA Local No. 183, Whipple, Ross & Hirsh, Attorneys (Dennis M. Cavanaugh, of Counsel)

For the Respondent Essex County Sheriff, Stephen J. Edelstein, County Counsel (Lucille LaCosta-Davino, of Counsel)

For the Charging Party, Balk, Oxfeld, Mandell & Cohen, Attorneys (Nancy I. Oxfeld, of Counsel)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on August 13, 1990, by Brian Moriarty ("Charging Party" or "Moriarty") alleging that PBA Local No. 183 ("Respondent PBA" or PBA") has engaged in unfair

practices within the meaning of New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"), in that on February 27, 1990, Moriarty was ordered suspended for three days, which action violated the collective negotiations agreement between the County of Essex and the PBA; that on March 9, 1990, a grievance was filed by Moriarty protesting his suspension; that on March 29, 1990, the PBA decided not to proceed to arbitration on Moriarty's grievance; prior to his suspension, Moriarty had on two separate occasions filed lawsuits against other members of the PBA; that unbeknownst to Moriarty, the PBA had determined to expel him from membership and to cease having his representation fee deducted, which action was taken without any notice to Moriarty; all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(b)(1) and (5) of the Act.[1/]

Moriarty also filed an Unfair Practice Charge with the Commission on August 13, 1990, alleging that the County of Essex ("Sheriff of Essex County")["Respondent County" or "Sheriff"] has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act. Moriarty's allegations in his Unfair Practice Charge against the Sheriff are identical in all respects to the allegations made by Moriarty against the PBA, supra,

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1/ These subsections prohibit public employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Violating any of the rules and regulations established by the commission."

and will not be repeated herein. By its conduct, the Respondent County is alleged to have violated N.J.S.A. 34:13A-5.4(a)(1) and (3) of the Act.[2/]

It appearing that the allegations of the Unfair Practice Charges, if true, may constitute unfair practices within the meaning of the Act, a Consolidated Complaint Notice of Hearing was issued on November 14, 1990. Pursuant to the Complaint and Notice of Hearing, and following several adjournments by agreement, hearings were held on May 10 and August 12, 1991, in Newark, New Jersey. On the first day of hearing, counsel for the Sheriff made a Motion to Dismiss on the ground that no relief could be granted against it since the collective negotiations agreement vests the sole authority to bring a grievance to arbitration in the PBA (1 Tr 12-15). Counsel for the Charging Party contended that since both the employer and the union were parties respondent, the motion should be decided under New Jersey Turnpike Authority (Beall), P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980) [1 Tr 15-18].

The Hearing Examiner concluded that the appropriate and efficient way to dispose of the Sheriff's Motion to Dismiss was to bifurcate the hearing as follows: the Charging Party and the

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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."

Respondent PBA shall proceed with their proofs in phase one in order to determine whether or not there was a breach of the duty of fair representation ("DFR") by the PBA under Section 5.4(b)(1) of the Act with the Sheriff thereafter proceeding to defend in phase two only if a violation had been found against the PBA. This procedure was consistent with Beall where the Commission held that finding a DFR breach by the union was a condition precedent to determining whether or not there was a "just cause" violation under the contract by the employer within the meaning of Section 5.4(a)(5) of the Act. [1 Tr 19-24].

In bifurcating the hearing process, the Hearing Examiner committed himself to determine initially, in a written decision, whether or not a breach of the DFR by the PBA had occurred. If so, the hearing would reconvene with the Sheriff being afforded the opportunity in the second phase to present his evidence. However, if no DFR breach was found based on the evidence adduced in phase one, then the Hearing Examiner would recommend that the Unfair Practice Charge against the Respondent PBA be dismissed and, under Beall, a plenary hearing would not be scheduled on the Charge against the Respondent County/Sheriff, which would also be dismissed. [1 Tr 18-24].

Finally, after colloquy among the Hearing Examiner and counsel for the parties, it was agreed that counsel for the Sheriff would be present during phase one of the hearing between the Charging Party and the PBA, with the right to participate in a

manner consistent with the bifurcated structure of the hearing described above (1 Tr 30-33).

The first phase of the hearing was completed in the two scheduled days above. The Charging Party and the Respondent PBA were given an opportunity to examine witnesses, present relevant evidence and argue orally. The participation of counsel for the Sheriff was necessarily limited during this phase of the hearing. All parties waived oral argument. Only the Charging Party and the Respondent PBA filed post-hearing briefs by October 7, 1991.

Unfair Practice Charges having been filed with the Commission, questions concerning alleged violations of the Act, as amended, exist and, following the conclusion of the first phase of the hearing between the Charging Party and the Respondent PBA, and after consideration of their post-hearing briefs, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record made during the first phase of this, a bifurcated hearing, involving only the evidence adduced by the Charging Party and by the Respondent PBA, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The County of Essex (Sheriff of Essex County) is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. PBA Local No. 183 is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. Brian Moriarty is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

4. The PBA is recognized by the Sheriff as the exclusive collective negotiations represents for all permanently appointed Sheriff's personnel, including Sheriff's Officers. The relevant collective negotiations agreement between the contracting parties was effective during the term January 1, 1987 through June 30, 1989. [CP-4, pp. 1, 2; 1 Tr 68].

5. Moriarty has been employed by the Sheriff for 15 years and his title is Sheriff's Officer (1 Tr 34, 35). Initially, he did not belong to any union, but in or around 1978 or 1979 he became and remained a member of the PBA for about two years (1 Tr 36). After attempting to "drop" his PBA membership in 1984, he was contacted by an officer of the PBA, the result of which was that Moriarty had an agency fee deducted from his salary thereafter (1 Tr 36-38).[3/] In October or December 1988, Moriarty's agency fee deduction ceased without explanation. However, upon inquiry to the payroll department the deduction was resumed at some point (1 Tr 38-41).

3/ Frederick R. DeMayo, an officer of the PBA, testified that Moriarty has not been a PBA member for some years, having been dropped from the rolls for non-payment of dues (2 Tr 47, 48).

6. Article XI, "Grievance Procedure," of the agreement provides under "Binding Arbitration," inter alia, that "...(b) the PBA and only the PBA may filed for arbitration..." (CP-4, p. 14).

7. The collective agreement provides, in part, in Article XIV, "Sick Leave," as follows:

* * * *

> 5. Employees absent for five (5) or more consecutive working days may be required by the Sheriff to present a medical certificate to their supervisor upon return to work. The certificate shall state the nature of the sickness, accident, or injury and shall certify that the employee is capable of performing his/her normal employment activities and that his/her return will not jeopardize the health of other employees.
>
> 6. The Sheriff may request a medical certificate for absence of less than five (5) working days if he believes an employee is abusing sick time.
>
> [CP-4, pp. 18, 19]

8. The Rules and Regulations of the Sheriff Department provide, in part, with respect to Sick Leave, Order, Obedience to Orders, Right of Subordinates to Disobey, Insubordination and Acts of Insubordination, respectively, as follows:

> Sec. 7:4.8 Sick Leave:
>
> Sick leave may be granted to an employee for personal illness, injury off the job, exposure to a contagious disease or attendance upon an immediate member of the employee's family who is seriously ill. The Sheriff may require medical certification from any employee on sick leave at any time [CP-3, p. 63].
>
> Sec. 2:4.3 Order:
>
> An order is:
>
> (1) A written or oral directive issued by a superior officer to any subordinate or group of subordinates in the course of official duties.

(2) A command requiring compliance [CP-7, p. 27]

Sec. 5:4.1 Obedience to Orders:

> Officers and civilian employees shall promptly and fully obey any lawful order directed to them by a superior officer or civilian supervisor [CP-8, p. 45].

Sec. 5:4.3 Right of Subordinates to Disobey:

> An officer subordinate in rank is not required to obey any order which violates a Federal or State Law, or County Resolution. However, the subordinate must justify his refusal to obey. Where justification is not shown, the subordinate will be subject to charges [CP-8, pp. 45, 46].

Sec. 2:1.10 Insubordination:

> Willful disobedience of any order lawfully issued by a superior officer, or any disrespectful, mutinous, insolent, or abusive language or action directed toward a superior officer [CP-6, p. 16].

Sec. 6:8 Acts of Insubordination:

> Members shall not commit acts of insubordination or disrespect toward superior officers [CP-9, p. 54].

9. Early in January 1990, Moriarty was in need of eye surgery. On January 18th, he informed Capt. Dominick Minni that he would be in a New York hospital for a few days, commencing January 22nd and would return to work on or about January 25th. Minni's response was that Moriarty should have some type of verification from his doctor, which Moriarty agreed to provide. He was operated upon on January 22nd. Upon returning home on January 24th he received a telephone call from Lt. Michael Flynn.

When Moriarty attempted to explain to Flynn that he had spoken with Minni, Flynn's response was to press Moriarty as to why he had been in the hospital, to which Moriarty stated he had no obligation to do so under the contract.[4/] The next day Moriarty returned to work. [1 Tr 54-57; CP-14].

10. When Moriarty signed in for work on January 25th at 8:30 a.m., Flynn asked him to take off his eye glasses. An exchange then occurred with Flynn questioning whether an operation had taken place. At about 10:30 a.m. Flynn stated that he wanted a letter from Moriarty's doctor. Moriarty again responded that he was under no contractual obligation to do so for a three-day absence.[5/] At that point Flynn said that a superior officer had "ordered" him to get a letter from a doctor but that Moriarty insisted that the contract insulated him from having to do so.[6/] Flynn directed Moriarty to write a report on the position he had taken under the contract, which Moriarty did.[7/] Shortly thereafter, Flynn produced Rule 7:4-8 (supra) and directed Moriarty to read it with emphasis on the last sentence ["The Sheriff may require medical

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4/ Moriarty acknowledged on cross-examination that although he had had a copy of the collective agreement (CP-4, supra), he had never read it prior to his disciplinary hearing on February 27, 1990. [1 Tr 110-112; Finding of Fact No. 14, infra].

5/ Id.

6/ Id.

7/ See Rule and Regulation, Sec. 5:4.3, supra.

certification from any employee on sick leave at any time"]. Moriarty's response was that he was not on "sick leave" and, thus, the rule did not apply.[8/] On the same date, Flynn sent a memorandum to Capt. Arthur Hudock, which recited all of the events of that day, adding his belief that Moriarty was in violation of five sections of the Rules and Regulations [see Finding of Fact No. 8, supra]. [1 Tr 57-66; CP-15, CP-16].[9/]

11. On January 26, 1990, two memoranda issued with respect to Moriarty: (a) Capt. Hudock addressed Capt. Bernard S. Zucker, advising him that on the prior day he had received a report from Flynn, adding that he concurred with Flynn's findings, and then recommending that some form of disciplinary action be taken so that compliance with the Rules and Regulations might be obtained (CP-11); and, (b) Capt. Zucker sent a memorandum to Chief James F. Critchley, in which he recommended that Moriarty be disciplined, based on the reports submitted by Hudock, Flynn and Moriarty, and then stated specifically that the five Rules and Regulations of the Sheriff's Department (cited above) had been violated by Moriarty (CP-12).[10/]

8/ Frederick R. DeMayo, a PBA officer, testified credibly that Moriarty's reading of the collective agreement was erroneous (see Finding of Fact No. 18, infra).

9/ Capt. Minni had also sent a memorandum to Capt. Hudock on January 25th, setting forth his knowledge of the prior events (CP-10).

10/ Although Moriarty did obtain a note from his doctor a few days thereafter, it did not forestall the disciplinary process (1 Tr 74).

12. On February 13th, Flynn met Moriarty and told him to be in the office of Deputy Chief Timothy Gearty on February 14th to face departmental charges. Moriarty immediately went to a telephone and spoke with his attorney, Sanford R. Oxfeld, who advised him to contact the PBA and insist that a representative be at the hearing. Moriarty then called Frederick R. DeMayo, a PBA officer, who at that time had no information relative to the charges but who stated that a representative would be present at the departmental hearing. DeMayo asked Moriarty to obtain any written documentation so that he, DeMayo, could review it. DeMayo also testified that Moriarty asked him if the PBA would provide a lawyer, to which DeMayo replied that the PBA did not supply lawyers at departmental hearings. He then added that he had no objection to Moriarty bringing his own lawyer and that he, DeMayo, would be present to assist him. [1 Tr 74-77, 119-121; 2 Tr 49-51].

13. The disciplinary hearing before Gearty was convened on February 14th and Oxfeld and DeMayo were present on behalf of Moriarty. However, Gearty was unable to produce a written copy of the charges against Moriarty. The hearing was adjourned until February 22nd after Oxfeld and DeMayo both objected to proceeding in the absence of written charges. [1 Tr 77-83, 121, 122; 2 Tr 9, 10, 51, 52]. Before the parties left Gearty's office on February 14th, a memorandum from Deputy Chief Timothy Gearty to Moriarty was produced, in which Moriarty was charged with violating four of the five rules previously set forth, namely, Sec. 5:4.1 (Obedience to

Orders); Sec. 5:4.3 (Right of Subordinates to Disobey); Sec. 6:8 (Acts of Insubordination); and Sec. 7:4.8 (Sick Leave). [CP-5; 2 Tr 10].11/

14. On February 27, 1990, a disciplinary hearing was conducted by Gearty as the hearing officer. Capt. Zucker was present on behalf of the Sheriff's Office but played no role. Oxfeld was present on behalf of Moriarty as was the PBA President, James J. Casey. [1 Tr 91, 92, 123; 2 Tr 13]. Gearty read the charges and Moriarty responded (1 Tr 92, 93). According to Moriarty, Casey was "silent" and, since Casey did not testify at the hearing, Moriarty's testimony stands uncontradicted as does Oxfeld's to the same effect. Moriarty also claimed that Casey's only assistance was to provide him with "...a cup of water..." Further, Moriarty considered Casey's silence "...to be against me..." since Casey had offered no support to Oxfeld at the hearing and had not interviewed Moriarty previously as to what had led to the charges. Thus, while Oxfeld's representation of Moriarty met with his satisfaction, Moriarty felt that Casey should have taken part in the

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11/ The hearing scheduled for February 22nd was also adjourned because of the unavailability of Oxfeld (1 Tr 91, 122, 123). The hearing was rescheduled and finally held on February 27, 1990 (1 Tr 122; 2 Tr 52).

hearing and should have made some supporting arguments at the end of the case. [1 Tr 92, 94, 124-126; 2 Tr 14, 16].[12/]

15. At the conclusion of the February 27th hearing, Gearty announced his decision, namely, that Moriarty was guilty of all charges. A suspension of three working days was imposed. Formal notice of discipline was served upon Moriarty under two dates, February 27 and March 2, 1990, each of which stated that he was suspended for three working days. In the latter notice the actual dates of suspension were set forth as March 6, March 7 and March 8, 1990. [1 Tr 94, 101-103; 2 Tr 14, 15; CP-17, CP-18].

16. Oxfeld wrote to the attorney for the PBA on March 1st, urging that Moriarty's grievance be processed to arbitration but no response was ever received (2 Tr 16, 17; CP-13). In this letter of March 1st Oxfeld agreed that Casey represented Moriarty on behalf of the PBA (2 Tr 20; compare: 2 Tr 14, 16, supra). Oxfeld also acknowledged that Moriarty should have abided by Flynn's order of January 25th for a doctor's letter, which Moriarty had refused to obey, and that he should have then filed a grievance (2 Tr 22, 25). In the final paragraph of Oxfeld's March 1st letter he noted that Moriarty had discussed the case with Casey, who advised that Oxfeld should contact the union attorney to see that a grievance is filed.

12/ This is in contradistinction to Moriarty's testimony about the conduct of DeMayo at the initial hearing on February 14th where he had no fault with DeMayo, who had requested a copy of the charges and concurred in the request for an adjournment, i.e., unlike Casey, DeMayo "...was not delinquent at all..." (1 Tr 76-79, 81, 127, 128; 2 Tr 26).

Yet Oxfeld insisted that Casey did not want to "help" Moriarty, urging instead that the matter shall be taken up with the attorney for the PBA. [(2 Tr 27, 28][13/]

17. On March 5th, Moriarty, at the suggestion of Oxfeld, spoke to Casey and informed him that he wished to file a grievance. Moriarty testified that Casey was "very cooperative," in that Casey stated that he would file the grievance and would place the matter under the heading of "suspension was without good and just cause..." Thereafter, Casey had a grievance form prepared for Moriarty's signature on March 9th. When Moriarty signed the grievance on that date, he urged that Casey have the PBA's law firm represent him, notwithstanding that the grievance form provided that he would be represented by Oxfeld. When Moriarty insisted on representation by the PBA's law firm, Casey stated that he was not a member of the PBA. At that point Moriarty said that he was paying the agency fee, to which Casey stated that there was no money being deducted from Moriarty's salary and that he should adjust the matter with the payroll department. Moriarty acknowledged that the PBA, in assisting him with the filing of his grievance, had not treated him differently from any other PBA member. [1 Tr 42-45, 94, 95, 104, 142, 143; 2 Tr 15, 16; CP-1].

13/ Oxfeld later stated correctly that Moriarty had no unilateral right to bring the attorney of his choice into the arbitration process (2 Tr 30-33).

18. DeMayo testified without contradiction that prior to February 27th, he had an opportunity to review all of the documentation provided by the Sheriff together with the Rules and Regulations and the collective agreement. Based upon this review, it was DeMayo's belief that Moriarty had incorrectly interpreted the sick leave provisions of the agreement by having failed to observe that the Sheriff may request sick leave documentation for absences of less than five working days. In connection with the Rules and Regulations, it was DeMayo's opinion that Moriarty had violated the rule which mandates that he obey the order of a superior officer regardless of its merits since the order of Flynn for a doctor's letter was a lawful order and Moriarty would not have been placed in any jeopardy by obeying it. Moriarty had available to him PBA representation on the matter and could have at that time filed a grievance over the issuance of the order. DeMayo testified credibly that the suspension of Moriarty was solely because of his refusal to obey the legal order of Flynn to produce a letter from his doctor and not that Moriarty had been an abuser of sick time. [2 Tr 52-61, 84, 85; CP-3, CP-6, CP-7, CP-8].

19. Moriarty's grievance was denied at the first step and Moriarty learned of this from Capt. Zucker. The contractual grievance procedure provides that the next step is arbitration, which may be invoked only by the union. Moriarty requested that the PBA take his grievance to arbitration. The Executive Board of the PBA thereafter held a meeting on March 29th to decide whether to

arbitrate Moriarty's grievance and those of two other PBA members. Ten members of the Executive Boards were present. The Executive Board unanimously decided to recommend at the next membership meeting that the cases of Moriarty and those of the two PBA members not proceed to arbitration No minutes are taken at Executive Board meetings but minutes are taken at membership meetings. [1 Tr 106; 2 Tr 62-65, 74, 84, 85; CP-4, pp. 13-15].

20. Moriarty was notified of the decision of the Executive Board by letter dated March 29, 1990, the date of the above Executive Board meeting. Although attendance at PBA meetings is limited to members, DeMayo invited Moriarty to attend the next membership meeting where the Executive Board's recommendation would be considered. This meeting was held on April 19th. On April 19th the Executive Board's action was presented both as to the case of Moriarty and the other two PBA members. The membership concurred in the Executive Board's decision not to arbitrate any of the three cases. Moriarty, although previously invited by DeMayo to attend, did not appear. [2 Tr 64, 66, 85, 86, 91-95; CP-19].

21. Moriarty initiated two lawsuits against members of the PBA, none of whom were or are involved in the instant proceeding. In 1980 or 1981, a federal lawsuit was first instituted. In 1988, a state court proceeding was instituted. It was Moriarty's testimony that Casey appeared at the deposition of a litigant and when asked by Moriarty why he was there, Casey said: "Because I have to get lawyers for the officers. For the officers who are defendants..."

(1 Tr 53). Casey then left before the deposition commenced. Moriarty's agency fee deduction ceased in or around December 1988. The Hearing Examiner finds as a fact that no causal connection has been established between Moriarty's institution of two lawsuits and the cessation of his agency fee deduction in or around December 1988. [1 Tr 48-54; 2 Tr 66, 67].

22. DeMayo testified credibly that neither of Moriarty's lawsuits affected the PBA's decision not to take his grievance of March 9, 1990, to arbitration (2 Tr 68).

23. DeMayo explained that because of confusion and litigation over the agency fee, and its amount, the PBA decided that it would discontinue this deduction for all non-members. Following approval of this action by the PBA membership at a meeting on April 19, 1990, the PBA thereafter sent a written notice to the Sheriff to cease agency fee deductions. Upon learning that Moriarty had undertaken to have his agency fee deduction restored, the PBA, also on April 19th, sent a letter to the Payroll Department, directing that Moriarty's deduction cease. This action by the PBA occurred after the decision of the Executive Board and the membership not to proceed to arbitration on Moriarty's grievance. [1 Tr 46-48; 2 Tr 68-70; 76-78; CP-2].

ANALYSIS

The Respondent PBA Did Not Breach Its Duty Of Fair Representation To Brian Moriarty Nor Violate The Act When It Refused To Authorize Arbitration Of His March 9, 1990 Grievance.

In having concluded that the PBA did not breach its duty of fair representation to Moriarty, the Hearing Examiner has drawn upon

various decisions of the Commission, which in turn have relied upon precedent from the federal courts and the National Labor Relations Board ("NLRB").

Historically, "DFR" cases have originated from two distinct factual settings, namely, the conduct of the majority representative in negotiating terms and conditions of employment or the conduct of the majority representative in administering the negotiated grievance procedure. Since the instant case falls within the latter category, here the refusal of the PBA to take Moriarty's grievance to arbitration, then only those cases relevant to this area, beginning with Vaca v. Sipes[14/] will be referred to hereafter.

Vaca has become the most significant of the United States Supreme Court's DFR decisions. It involved, inter alia, the refusal of a union to process a grievance to binding arbitration, the final step of the grievance procedure. Among the Vaca tenets most frequently cited in analyzing DFR cases are these:

> 1. ...Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct... (386 U.S. at 177, 64 LRRM at 2371). (Emphasis supplied).

14/ See 386 U.S. 171, 64 LRRM 2369 (1967).

2. A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith... (386 U.S. at 190, 64 LRRM at 2376). (Emphasis supplied).

3. Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration... (386 U.S. at 191, 64 LRRM at 2377). (Emphasis supplied).

Five years prior to Vaca, the NLRB had decided the case of Miranda Fuel Co.,[15/] where, for the first time, the Board found that a breach by a union of its duty of fair representation was an unfair labor practice under Sec. 8(b) of the National Labor Relations Act. A Board majority held that:

> Section 7...gives employees the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment...[T]he Act...prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair...
>
> (140 NLRB at 185, 51 LRRM at 1587)(Emphasis supplied).

The Board has consistently followed Miranda over the years: see Brown Transport Corp., 239 NLRB No. 91, 100 LRRM 1016, 1019 (1978); Graphic Communications Int'l Union, etc., 287 NLRB No. 107, 128 LRRM 1176 (1988); and OCAW, Local 5-114, 295 NLRB No. 76, 131 LRRM 1734 (1989).

15/ 140 NLRB 181, 51 LRRM 1584 (1962), enf. den. 326 F.2d 172, 54 LRRM 2715 (2nd Cir. 1963).

Two years after enactment, our Supreme Court sustained Chapter 303 in Lullo v. IAFF, 55 N.J. 409 (1970) where it relied broadly upon federal precedent, particularly, the 35-year history of decisions interpreting the NLRA. The Court focused upon Section 5.3 of our Act, particularly, the responsibility of the majority representative to represent the interests of all employees without discrimination or regard to organization membership (55 N.J. at 419).

The Court in Lullo specifically embraced the "DFR" doctrine, citing Vaca and other sources. The Court held that although the exclusive representative:

> ...has the sole right to...[process]...grievances for all employees in the unit, the right to do so must always be exercised with complete good faith, with honesty of purpose and without unfair discrimination against a dissident employee or group of employees...Vaca v. Sipes, supra...
>
> (55 N.J. at 427, 428). (Emphasis supplied). [See also, 55 N.J. at 429].16/

In 1981, the New Jersey Supreme Court in Saginario v. Attorney General, 87 N.J. 480 again reviewed federal DFR precedent, noting that nowhere did Vaca suggest that an employee should be allowed to intervene in an arbitration since "...it would undercut the legitimacy of the arbitration..." (87 N.J. at 488).

* * * *

16/ The New Jersey Supreme Court most recently returned to Lullo when it discussed the Vaca standards in analyzing DFR cases: D'Arrigo v. N.J. State Board of Mediation, 119 N.J. 74, 77-79 (1990).

The Commission's first "grievance procedure" decision was that of AFSCME Council No. 1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978),[17/] which was followed by N.J. Turnpike Employees Union, Local No. 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979), where the Commission found no breach of the DFR but "identified" certain principles in considering the DFR:

> ...The union must exercise reasonable care and diligence in investigating, processing and presenting grievances; it must make a good faith judgment in determining the merits of the grievance; and it must treat individuals equally by granting equal access to the grievance procedure and arbitration for similar grievances of equal merit...
>
> (5 NJPER at 413)

The Commission relied upon Local No. 194, supra, and Vaca in Willingboro Ed. Ass'n, P.E.R.C. No. 82-61, 8 NJPER 38 (¶13018 1981) in deciding that no breach of DFR had occurred when the association, after processing an employee's grievance, declined to proceed to arbitration. See also: OPEIU Local No. 153, P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983)[no breach of DFR where a union unsuccessfully used a stratagem in the grievance procedure to gain the reinstatement of an employee with a poor record];[18/] Fair

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17/ Relying essentially on Vaca, no breach of DFR was found where a non-member's grievance was settled at Step 2.

18/ The Commission noted in this case that Vaca has been interpreted by the NLRB to mean that mere proof of negligence, standing alone, does not establish a breach of the duty of fair representation: Local 8-398, OCAW, 282 NLRB No. 61, 124 LRRM 1048 (1986)[no violation].

Lawn Ed. Ass'n, P.E.R.C. No. 84-138, 10 NJPER 351 (¶15163 1984)[no violation where union in good faith refused to take non-member's compensation grievance to arbitration since it lacked merit]; Distillery Workers Local No. 209, P.E.R.C. No. 88-13, 13 NJPER 710 (¶18263 1987) [no DFR violation where the union processed an employee's grievance but, after a vote of membership, decided not to proceed to arbitration]; and ATU, Local No. 821, D.U.P. No. 90-12, 16 NJPER 256 (¶21106 1990)[union did not violate its DFR by voting to pursue one employee's grievance to arbitration but not that of another].

* * * *

Having set forth the state of the law of DFR with respect to the conduct of a majority representative in administering the contractual grievance procedure, it remains to analyze the factual record as to whether or not Moriarty has proven by preponderance of the evidence that the PBA breached its duty of fair representation when it refused to take his grievance of March 9th to arbitration.

I.

Moriarty's problems with respect to the PBA and the discontinuance of his agency fee deduction on two occasions in no way satisfies the requisites of Vaca that a breach of the DFR occurs only when the conduct of the majority representative, here the PBA, "...is arbitrary, discriminatory or in bad faith..." (386 U.S. at 190, 64 LRRM at 2376). The Hearing Examiner has previously found as

a fact that Moriarty failed to prove any causal connection between Casey's appearance at a deposition in connection with Moriarty's 1988 state court lawsuit and the subsequent cessation of his agency fee deduction in December 1988 (Finding of Fact No. 21). The second instance of discontinuance of Moriarty's agency fee occurred on April 19, 1990, the precise date on which the PBA membership approved the recommendation of the Executive Board that Moriarty's grievance not be arbitrated. The absence of suspect timing, in fact, the coincidence of the occurrence of the two events, would appear to obviate any possible finding of a discriminatory causal connection between the two.

The membership at the same April 19th meeting approved a change in PBA policy, requiring the discontinuance of the agency fee deduction for all non-members (Finding of Fact No. 23). The PBA's letter of April 19th to the Payroll Department, directing that Moriarty's fee deduction cease, was consistent with the policy adopted on the same date. Significantly, it occurred after the alleged discriminatory action against Moriarty by the PBA Executive Board on March 29th when it refused to authorize the arbitration of his March 9th grievance.

Finally, the Hearing Examiner has no problem in concluding that the PBA was within its contractual right to adopt the above policy, requiring the discontinuance of the deduction of the agency fee for non-members. This is so, notwithstanding the provision in Article XXIV, "Fair Share Representation Fee," in which the "County"

agreed to deduct a fair share representation fee, etc. [CP-4, p. 26, 27]. This provision plainly exists for the financial benefit of the PBA. If it wishes to waive income, what standing does Moriarty, a non-member, have to complain since he is a wealthier man by virtue of the PBA's largesse.

II.

Since the Hearing Examiner has previously credited the testimony of DeMayo that neither of Moriarty's lawsuits affected the PBA's decision not to take Moriarty's March 9, 1990 grievance to arbitration (Finding of Fact No. 22), it follows that he must reject the contention of the Charging Party that his prior litigation against PBA members only affords a basis for inferring hostility, arbitrariness or discrimination by the PBA against Moriarty.

It will be recalled that the federal lawsuit was instituted by Moriarty in or around 1980 or 1981 and that the state court proceeding was instituted in 1988. The events surrounding the PBA's refusal to arbitrate Moriarty's grievance all occurred in the early part of 1990, about two years later. Thus, the fact that a substantial lapse of time had occurred between Moriarty's 1988 State court proceeding and the December 1988 agency fee cessation on the one hand, as against the PBA's action in refusing to arbitrate Moriarty's grievance in March and April 1990, strengthens the Hearing Examiner's conclusion that the Vaca requisites have not been met.

III.

The record is clear that DeMayo and Casey, acting on behalf of the PBA, provided fair representation at the disciplinary hearings on February 14th and February 27, 1990 within the meaning of the legal authorities discussed above. Arguably, the quality of the representation by DeMayo on behalf of Moriarty on February 14th was better than that provided by Casey on February 27th (compare Finding of Fact No. 13 with Finding of Fact No. 14). However, the Hearing Examiner cannot conclude under the authorities, beginning with Vaca, that the PBA breached its duty of fair representation by the relative inactivity of Casey on February 27th.[19/]

It must be emphasized that Moriarty had requested that Oxfeld represent him in the disciplinary hearing process before Gearty and that Oxfeld was present on both dates and provided active and competent representation on behalf of Moriarty.

IV.

The Charging Party erroneously contends that the term "County Resolution," contained in Sec. 5:4.3 of the Rules and Regulations of the Sheriff Department, may be construed to include the collective negotiations agreement (CP-4). If this were so, then it would follow that Moriarty was relieved from obeying the order of

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19/ Under the present state of the law, even if Casey's conduct was deemed negligent, that fact standing alone would not establish a breach of the DFR: see Local 8-398, OCAW, 282 NLRB No. 61, 124 LRRM 1048 (1986).

Lt. Flynn on January 25, 1990, which directed Moriarty to produce a letter from a doctor. Further, the Charging Party argues that when he responded to Flynn's request that he write a report on the position that he had taken under the contract (CP-16), Moriarty had fulfilled the requirement in the second sentence of Sec. 5:4.3, supra, in that he had justified "...his refusal to obey..." Flynn's order.

Under the Charging Party's theory, which the Hearing Examiner cannot accept, Moriarty acted within and under the Rules and Regulations of the Sheriff Department on January 25th. Thus, it was Lt. Flynn who was wrong in ordering Moriarty to produce a letter from his doctor. Because of the illogic of such a result, the Hearing Examiner must reject the Charging Party's argument that the phrase "County Resolution" in the Rules and Regulations was ever intended to include the parties' labor contract.

V.

The Hearing Examiner was impressed by the testimony of DeMayo that, based upon his review of the Rules and Regulations and the collective negotiations agreement, Moriarty had misread the sick leave provisions of the agreement. DeMayo also offered his opinion that Moriarty had violated Rule 5:4.1, which mandates that he obey the order of a superior officer regardless of its merits since Flynn's order to Moriarty to produce a doctor's letter was a lawful order as to which Moriarty would not have been placed in jeopardy by

obeying it. Also, Moriarty had available to him PBA representation on the issue and could have filed a grievance at that time over Flynn's issuance of the order of January 25th. Finally, it appears clear from the credited testimony of DeMayo that Moriarty's three-day suspension derived solely from his refusal to obey Flynn's order and did not result from Moriarty's use of sick time. [Finding of Fact No. 18].

VI.

Given the persuasive testimony of DeMayo as to how and why Moriarty had erred in the course he pursued through the filing of the grievance on March 9th, the Hearing Examiner has little difficulty in discerning why the PBA Executive Board unanimously declined to take Moriarty's grievance to arbitration. [Moriarty should have grieved Flynn's order and not his own claim that the Sheriff's personnel violated the sick leave provisions of the agreement].

The proceedings of the Executive Board, and subsequently the membership, appear to have been fair and regular, according to the uncontradicted testimony of DeMayo. Although minutes are not taken at Executive Board meetings they are taken at membership meetings and, thus, there exists a record of the ultimate decision made by the PBA.

It is noted that the unanimous decision of the Executive Board on March 29th involved not only the refusal to arbitrate

Moriarty's grievance but, also, a like refusal as to the grievances of two members of the PBA. The Executive Board's even-handed action in this respect certainly tends to undermine Moriarty's allegation that the PBA was discriminatorily motivated in its conduct as between non-members such as Moriarty and members. [Finding of Fact No. 19].

VII.

It is significant that between the Executive Board's meeting on March 29th and the meeting of the membership on April 19th, DeMayo invited Moriarty to attend the membership meeting at which the Executive Board's prior action was to be voted upon. This invitation was extended by DeMayo to Moriarty, notwithstanding that attendance at PBA meetings is limited to members. However, Moriarty failed to appear and the membership concurred in the decision of the Executive Board not to arbitrate.[20/] [Finding of Fact No. 20].

* * * *

The Hearing Examiner's analysis of the factual record in this case and the above-cited decisional authorities, leads ineluctably to the conclusion that the PBA did not breach its DFR as to Moriarty when it refused to arbitrate his grievance of March 9th,

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20/ The Commission found a DFR violation in ATU, Local No. 819, P.E.R.C. No. 89-135, 15 NJPER 419 (¶20173 1989), P.E.R.C. No. 90-46, 16 NJPER 3 (¶21002 1989) where the union had failed to inform a grievant at the terminal step of the grievance procedure of his right to appeal the Executive Board's refusal to arbitrate his grievance to the general membership.

i.e., the PBA fulfilled its obligation under Vaca "...to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct... (386 U.S. at 177, 64 LRRM at 2371). (Emphasis supplied).

Finally, as the Commission has noted many times, the Court stated in Vaca that "...we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration... (386 U.S. at 191, 64 LRRM at 2377). (Emphasis supplied). So, too, does the Hearing Examiner concur and conclude that Moriarty had no absolute right to have his grievance arbitrated and that the PBA acted within its discretion and in complete good faith when it refused his request to arbitrate.

There Having Been No Breach Of The Duty Of Fair Representation By The PBA As To Brian Moriarty, The Unfair Practice Charge Filed by Moriarty Against The Respondent County Must Be Dismissed.

As previously stated at pages 3 and 4 of this Decision, the Hearing Examiner initially disposed of the Respondent County's Motion to Dismiss by ruling that under New Jersey Turnpike Authority (Beall), supra, the hearing would be bifurcated. If the Hearing Examiner thereafter found that the Respondent PBA had breached its duty of fair representation then the hearing would reconvene with the Sheriff being afforded the opportunity to present his evidence.

However, the Hearing Examiner also ruled that if no DFR breach was found, based upon the evidence adduced by the Charging

Party and the PBA, then he would recommend that the Unfair Practice Charge against each Respondent be dismissed. [1 Tr 15-24].

The Hearing Examiner having now concluded that the PBA did not breach its duty of fair representation as to Moriarty, the Hearing Examiner must recommend dismissal of both Unfair Practice Charges under Beall.[21/]

* * * *

Based upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Respondent PBA did not violate N.J.S.A. 34:13A-5.4(b)(1) or (5) when it refused to arbitrate the March 9, 1990, grievance of Brian Moriarty by the action of its Executive Board on March 29, 1990, as ratified by its membership on April 19, 1990.

2. The Respondent County (Sheriff) did not violate N.J.S.A. 34:13A-5.4(a)(1) or (3) as a matter of law, no factual hearing having taken place under the bifurcated ruling of the Hearing Examiner on the first day of hearing, May 10, 1991: New

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21/ For historical purposes only, the Hearing Examiner notes here that the Charging Party did not allege a violation by the Respondent County of Section 5.4(a)(5) of the Act such as was the situation in Beall. The Charging Party here alleged only a violation by the County of Sections 5.4(a)(1) and (3) of the Act which, had the Charging Party prevailed against the PBA would have given the Hearing Examiner a problem as to whether or not Beall was applicable, i.e., whether Moriarty could have established a "just cause" violation under the parties' contract (see 6 NJPER at 561).

Jersey Turnpike Authority (Beall), P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980).

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission **ORDER** that the Consolidated Complaint against the Respondent PBA and the Respondent County (Sheriff) be dismissed in its entirety.

Alan R. Howe
Hearing Examiner

Dated: October 22, 1991
Trenton, New Jersey