

H.E. NO. 2003-20

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

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF CORRECTIONS) AND
PBA LOCAL 105,

RESPONDENT,

-and-

Docket No. CI-2002-16

VICTOR R. KLIMA &
MARTIN N. ORTEGA, JR.,

CHARGING PARTY.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission grants the PBA's motion for summary judgment and dismisses the portion of the charge against the PBA. The Hearing Examiner concluded that the PBA did not violate its duty of fair representation to two unit members by concluding that the DOC's unilateral salary implementation for employees transferred from a county was preempted, and by refusing to support the employees grievance, deciding it was not likely to succeed and refusing to take it to arbitration.

The Hearing Examiner did not recommend the entire complaint be dismissed because the charge against the Employer was not included in the motion.

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Appearances:

For the Respondent, State of New Jersey
Peter Harvey, Acting Attorney General
(Karen M. Griffen, Deputy Attorney General)

For the Respondent, PBA Local 105,
Zazzali, Fagella, Nowak, Kleinbaum & Friedman,
attorneys
(Robert A. Fagella, of counsel; Colin M. Lynch, on the
brief)

For the Charging Party
Gibbons, DelDeo, Dolan, Griffinger & Vecchione,
attorneys
(Kelly Ann Guariglia, of counsel)

HEARING EXAMINER'S DECISION AND ORDER
ON MOTION FOR SUMMARY JUDGMENT

An unfair practice charge was filed with the New Jersey
Public Employment Relations Commission (Commission) by Victor R.
Klima and Martin N. Ortega, Jr. (Charging Party) on September 27,
2001, and amended on April 18, 2002, alleging that the State of
New Jersey, Department of Corrections (State) and PBA Local 105

(PBA), violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), specifically 5.4a(1), (2), (3) and (5), and 5.4b(1)^{1/}, respectively.

Background

Klima and Ortega are State correction officers employed by the Department of Corrections (DOC) and represented by the PBA in the State law enforcement unit. Pursuant to the State Intergovernmental Transfer Pilot Program (IGTP), the DOC in April 2001 hired a number of laid off/terminated or about-to-be-laid-off Union County correction officers and paid them the rate on the PBA salary guide closest to their Union County salary. Because the Union County salary guide was different than the DOC salary guide, several former County officers were paid at a higher salary level than certain continuously DOC employed

^{1/} These provisions 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; (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; b(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act."

officers with the same years of service. More specifically, approximately thirteen former County officers with six years of service were placed at step nine of the PBA guide while Klima and Ortega with six years of service were at step 5 of the PBA guide.

In July 2001, the Charging Party filed a grievance seeking to be moved to the same salary guide level as given to the former Union County officers with the same years of service. After an investigation, the PBA declined to participate in or support the Charging Party's request to assist in processing the grievance and denied its eventual request to proceed to arbitration.

The DOC rejected the Charging Party's request to adjourn the step 2 grievance hearing because the request was not made by the PBA. The DOC also denied the Charging Party's request for representation by private counsel. Eventually, the DOC denied the grievance, and the grievance was not moved to arbitration.

The Charging Party alleged in the charge that the PBA breached its duty of fair representation and violated the Act by refusing to provide assistance in processing the grievance; refused to move the grievance to arbitration; and, engaged in collusion with the DOC regarding the processing of the grievance. The Charging Party alleged that the State/DOC violated the Act by relying on a confidential PBA legal opinion to deny the grievance; interfered with the Charging Party's right to be represented by counsel; engaged in collusion with the PBA

regarding the processing of the grievance; discriminated against the PBA and its members by refusing to negotiate with the PBA; and, has interfered with, restrained or coerced employees for exercising their rights under the Act.

The Charging Party seeks "to be made whole for any losses sustained" and other remedies including costs and attorneys fees.

The PBA filed a position statement on November 27, 2001, an amended position statement on March 27, 2002, and a response to the amended charge on April 23, 2002. The State filed a position statement on April 5, 2002.

A Complaint and Notice of Hearing issued on October 22, 2002. The PBA filed a motion for summary judgment with the Commission's Chair on January 30, 2003, seeking dismissal of the charges filed against it. That motion was referred to me for consideration by letter of February 3, 2003, N.J.A.C. 19:14-4.8. The PBA submitted a supplemental certification on February 28, 2003, and the Charging Party submitted its response to the motion on April 1, 2003. The PBA filed a reply brief on April 7, 2003.

Summary judgement will be granted:

. . .if it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and the movant. . .is entitled to its requested relief as a matter of law. . . [N.J.A.C. 19:14-4.8(d)].

Rulings on motions for summary judgment require that all inferences be drawn against the moving party and in favor of the party opposing the motion—in this case, Klima and Ortega. No credibility determinations are made and the motion must be denied if material factual issues exist. N.J.A.C. 19:14-4.8(d).

Whether a "genuine issue" exists (which precludes summary judgment) depends on whether "the competent evidential material presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). A motion for summary judgment should be granted with extreme caution—the procedure may not be used as a substitute for a plenary trial. Baer v. Sorbello, 17 N.J. Super. (App. Div. 1981); Essex Cty. Ed. Serv. Comm., P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982); N.J. Dept. Of Human Services, P.E.R.C. No. 89-52, 14 NJPER 695 (¶19297 1988).

Applying these standards, and relying upon the record filed in this matter to date, I make the following:

Findings of Fact

1. The State and PBA are parties to a collective agreement effective July 1, 1999 through June 30, 2003 (Lynch Exhibit B, Klima Exhibit A). Article XI is the grievance procedure.

Section D(1) of Article XI provides that employees orally present and discuss their complaint with their immediate supervisor prior to filing a step 1 grievance. Section H provides that when a complaint cannot be informally resolved an employee or the union may file a step 1 grievance. The employee presumably may appear pro se or may be represented by a PBA officer, or by an employee or someone appointed by the local president. A grievance not resolved at step 1 may be appealed to step 2. There, an employee may appear pro se or may be represented by someone appointed by the local president, possibly including a non-employee representative.

Sections B(3) and H(3) of Article XI provide that only the PBA may bring a grievance to arbitration. The language in B(3) more specifically provides:

Nothing in this Agreement shall be construed as compelling the Association to submit a grievance to arbitration or to represent an employee before the Department of Personnel. The Association's decision to request the movement of any grievance at any step or to terminate the grievance at any step shall be final as to the interests of the grievant and the Association.

Article XIV is the salary compensation plan and program. It does not contain language specifically providing a salary level for transferees. Klima believed that salary equalization of the County officers violated Article XIV (Klima Affidavit §45).

2. In 1998, certain Mercer County correction officers were transferred to the DOC and placed at step one of the DOC salary guide regardless of their years of service with the County. Those transfers, and presumably the salary guide placement was negotiated. PBA Executive VP #1, Emanuel Nso was aware of the terms received by the transferred Mercer County officers (Ortega Affidavit §6).

3. Pursuant to N.J.S.A. 11A:2-11i, the Commissioner of the Department of Personnel created the Intergovernmental Transfer Pilot Program for one year effective from September 1, 1999 through August 31, 2000. The program was established to avoid the layoff of experienced employees. It allows for the permanent transfers of employees who hold civil service (Department of Personnel) ranking from one civil service appointing authority (employer) to another (employer) without a break in service and without the loss of their permanent status. The new appointing authority has the option of offering to credit employees with all their earned seniority, or treat them as a new employee for seniority purposes. (Klima Exhibit B).

N.J.A.C. 4A:4-7.1 sets forth Department of Personnel (DOP) rules regulating the transfer of permanent civil service employees within the same governmental jurisdiction. N.J.A.C. 4A:4-7.1A regulates the movement of permanent civil service employees between different governmental jurisdictions. Although

the IGTP originally expired in August 2000, on June 15, 2001, the Commissioner of Personnel issued a final administrative action relaxing N.J.A.C. 4A:4-7.1 et seq., to permit the permanent transfer, in lieu of layoff, of 21 Union County correction officers, eleven of whom were transferring to the New Jersey Department of Corrections. (Lynch Supp. Exhibit B).

4. In early February 2001, the DOP contacted the DOC inquiring whether DOC, pursuant to the IGTP was interested in hiring Union County correction officers who were otherwise going to be laid off. DOC advised DOP it was interested in participating in the IGTP to hire Union County officers. DOP and DOC officials attended a job fair at the Union County Jail on February 21 and 22, 2001, answering questions from the 75 attending County correction officers comparing the benefits between the County and the State (Lynch Exhibit C).

By participating in the IGTP, at least some Union County correction officers faced the possibility of a significant decrease in salary under the State correction officers salary guide. On February 23, 2001, officials of DOP and DOC met and discussed conditions for DOC employing the affected correction officers. Those conditions included employee discussion about equalizing the salaries of the Union County officers. Equalization meant placing the former County correction officers on the State/PBA salary guide as close to their County salary as

possible. (NSO Affidavit §5; Klima Affidavit §9). After meeting with DOC, DOP discussed the conditions of transfer with the Governor's office and the County and advised DOC on March 1 of the following transfer conditions:

1. Salary Equalization
2. Health Benefits - County benefits continue until State benefits become effective.
3. Working Test Period - up to four months
4. Training - up to 14 weeks
5. Seniority - Former county officers seniority begins with first day of State service. Transferred officers did not receive seniority over State correction officers regarding job bidding or seniority (NSO Affidavit §6).
6. Leave Time - Former county officers cannot carry over vacation, comp or AL balances. County must pay for that time. Sick leave balances can be carried over.
7. Clothing Allowance - eligible after 1 year of state service.

(Klima Exhibit C; Lynch Exhibit C)

5. Emmanuel Nso was the PBA's Executive Vice-President #1 at all times relevant to this matter. Nso met with DOC officials on March 1, 2001, at which time he was advised of the terms and conditions of employment the County officers would receive upon transfer to the state, including equalizing their salaries. But the terms and conditions for those former County officers were unilaterally imposed by DOC, they were not negotiated with the PBA (Nso Affidavit §4; Klima Exhibit C).

In his affidavit/certification, Nso states that the PBA did not negotiate terms and conditions for the former County officers. Klima, in his certification implies that Nso negotiated those terms with DOC based upon the State's April 5,

2002, statement of position from its attorney (Klima Exhibit C), wherein it states that the meeting between DOC officials and Nso on March 1 was "tantamount to a negotiation". But Klima did not write that he knew that the PBA and the State had negotiated the issue, he only referred to the State's position statement. Accordingly, Klima had no personal knowledge to contradict Nso's certified statement.

The State's position statement provides in pertinent part:

Executive Vice President Nso of PBA Local 105 met with DOC officials Burns, Gripp, Salamandra and Sawey on March 1, 2001, to discuss the terms of the IGTP including equalizing the salaries of the Union County officers. Nso was receptive to the various elements of the IGTP and did not offer any objections to the salary equalization plan.

The State of New Jersey, DOC, did not have an obligation to negotiate the terms of the transfer of the Union County officers because the transfer was governed by the IGTP. However, although not obligated to do so, DOC officials met with the Executive Vice President of PBA Local 105 in order to present the terms to him and allow for his input. This meeting was tantamount to a negotiation and when presented with the terms of the transfer, particularly the terms of the salary equalization, PBA Local 105 failed to object or present any opposition to the terms. Therefore, because the terms of the salary equalization plan were negotiated and PBA Local 105 agreed to these terms on behalf of their membership, Klima and Ortega should be precluded from challenging the terms of the plan.

The State apparently labeled the meeting as "tantamount to a negotiation" and later even claimed it "negotiated" with the PBA

because the PBA did not object to the terms presented by the State. The PBA does not claim it objected to the terms presented by the State and I infer as much. But the State's real purpose of the meeting is revealed in its statement, arguing that it had no obligation to negotiate, and met with Nso ". . .in order to present the terms to him and allow for his input." The presentation of terms even with input is not the give and take of negotiations as intended by the Act. The State's position statement does not alone prove negotiations, and it does not outweigh Nso's certified statement. Consequently, I cannot find on this record any legitimate dispute over whether Nso negotiated terms with the State.

On April 1, 2001, the DOC hired approximately eleven former Union County correction officers under the terms of the IGTP. They were subsumed within the PBA's negotiations unit. Pursuant to the salary equalization procedure unilaterally imposed by DOC, a number of former County officers with six years of service were transferred to a higher step on the State salary guide than officers Ortega and Klima who also had six years of service. Those former Union County officers earned approximately \$10,000 more than Klima and Ortega with the same years of service (Klima Affidavit §§8, 9, 10). None of the transferred officers received seniority over pre-existing correction officers regarding job bidding, or vacation selection (Nso Affidavit §6).

6. At its April 2001 general membership meeting, the PBA announced: the State's unilateral transfer of the former Union County officers to the PBA's unit; that compensation had not been negotiated; that seniority for former Union County officers would begin when they were first employed by DOC; and, that former County officers could not carry over compensatory or vacation time (Klima Affidavit §12). Later that month Klima and Ortega spoke with Nso and PBA Vice President Williams about the salary disparity with the former County officers. The PBA officials would not file or support a grievance challenging the salary disparity (Klima Affidavit §13).

At the PBA general membership meeting in mid May 2001, Union members expressed concern over the transferees salaries. Nso explained that the PBA could not challenge the transfer program, and that when the Union was told about the transfer package, its concern was about seniority. Nso further explained that he did not wish to divide the Union by filing a suit against fellow members (Klima Affidavit §15).

7. In reaction to its concern over the salary disparity effectuated by the transfers, the PBA apparently contacted its attorney and asked for advice on how to handle the matter. Its attorney responded by letter of May 24, 2001, to then Local 105 President James Goff (Klima Exhibit S, Lynch Exhibit D). He reiterated that the IGTP and the DOP authorized the transfers at

issue here, and that the State/PBA collective agreement did not contain any provision mandating the starting salary of a transferred officer. He advised he did not believe the salaries for the former County officers violated any law, regulation or contractual provision, and that any attack against those salaries was unlikely to succeed. He listed several reasons to support his advice, including that no specific contractual provision or DOC policy required that transferred officers start at a particular salary, and that there was no consistent past practice between the PBA and DOC regarding starting salaries for transferred employees. He noted that the DOC had never agreed to negotiate starting salaries for transferred officers, and concluded his remarks by suggesting it may not be wise to seek a reduction in the salaries of the new officers. The cc: section of the letter included Emanuel Nso; Patrick O'Brien, Larry Evans; and Michael Sharp, all of whom were PBA vice presidents at some point over the course of this matter (Klima Exhibit W).

8. Because of their dissatisfaction with the salary disparity in favor of the transferred correction officers, Klima and Ortega filed a grievance on July 30, 2001 (Klima Exhibit F) claiming the DOC had violated the PBA contract by failing to compensate them (Klima and Ortega) (and similarly situated officers) at the same level as the transferred County officers

with the same years of service. They sought an upward adjustment in their salaries.

The PBA investigated the merits of the grievance, consulted their attorney and concluded it was unlikely to succeed. Nso gave three reasons for declining to support the grievance: 1) the transfer did not appear to violate the parties collective agreement; 2) there was no consistent prior practice upon which to challenge the transfers; and 3) the PBA believed that terms and conditions of employment for employees transferred under the IGTP were neither negotiable nor arbitrable.

Nso also explained that the PBA saw no viable remedy in pursuing the grievance because it was unwilling to support a result that would reduce the salaries of the transferred officers because they were now members of the PBA unit, and it thought it extremely unlikely that an arbitrator would increase the salaries of the pre-existing officers because there was no contractual basis for such a result (Nso Affidavit §§10, 11 and 12; Lynch Exhibit D). Consequently, the PBA concluded it would not support the grievance and informed Klima and Ortega it would not provide them any assistance in processing the grievance (Nso Affidavit §13, Klima Affidavit §18).

On August 1, 2001, the DOC denied the grievance and it was moved to step 2 (Klima Affidavit §19 and Exhibit G). By letter of August 14, 2001 (Klima Exhibit H), Ortega asked then PBA

President Goff to represent he and Klima in their grievance. Goff did not respond. On August 24, 2001, Klima and Ortega sent a letter (Klima Exhibit I) to the personnel department of the East Jersey State Prison where they worked. The letter explained that the DOC had not responded to the step 2 grievance within the time provided by the contract, and Klima/Ortega sought to move the grievance to step 3, arbitration. The last line of the letter said:

We are requesting that SCO E. Williams and all PBA 105 elected officials help us in our quest to resolve this grievance.

Goff, Nso and Williams were listed on the cc portion of the letter, they did not respond to the letter, but there was no evidence they actually received a copy of the letter.

Later on August 24, 2001, Klima received a memorandum from DOC Hearing Officer Jason Strapp (Klima Exhibit J), notifying him (Klima) that his step 2 grievance was scheduled for hearing on September 4, 2001. By letter of August 29, 2001 (Klima Exhibit K), the attorney then representing Klima/Ortega (Joseph Maddaloni) asked Hearing Officer Strapp to adjourn the September 4, step 2 hearing. He said, in part, that he (Maddaloni) was unavailable for hearing on that date. That same day (8/29/01), attorney Maddaloni sent a letter to the PBA's attorney (Klima Exhibit L), requesting that the PBA pursue the grievance to arbitration.

On August 30, 2001, Hearing Officer Strapp sent a memo to Maddaloni (Klima Exhibit M) advising him that an employee bringing a contractual grievance could only be represented by the PBA and that his request for postponement would not be granted unless made by a PBA representative. Maddaloni responded to Strapp's memo, Exhibit M, later that same day (Klima Exhibit N), informing Strapp that the PBA had refused to assist Klima/Ortega in resolving the grievance, that they wanted counsel (Maddaloni) to represent them, and he again asked that the September 4th hearing be adjourned.

Strapp responded later that same date (Klima Exhibit O) informing Maddaloni that since he (Maddaloni) was not a representative on behalf of the PBA he could not represent Klima and Ortega on the grievance and he (Strapp) again denied the request for postponement.

On August 31, 2001, Strapp informed Klima that the hearing would not be adjourned and that he (Klima) was required to attend the hearing if he wanted to proceed with the grievance (Klima Affidavit §30). By letter of that same date (8/31/01) to Strapp (Klima Exhibit P), Maddaloni recognized that Klima and Ortega could represent themselves at the step 2 hearing if a PBA representative was present, and he also advised Strapp of case law permitting grievants to be represented by their own counsel when their positions conflicted with their union.

9. The step 2 grievance hearing was held on September 4, 2001. PBA Vice President Williams was present at the hearing but did not assist the grievants nor object to the conduct of the hearing or seek an adjournment (Klima Affidavit §§33; 36). Klima and Ortega considered themselves unrepresented at that hearing, they objected to the conduct of the hearing, argued they were forced to be present but were denied representation by counsel. Klima read a prepared statement (Klima Exhibit Q) which stated in part that the PBA would not represent them (he and Ortega) and that they were being denied representation by counsel of their choice. Klima read that they would not participate in the hearing without representation (Klima Affidavit §34).

On September 5, 2001, Hearing Officer Strapp issued his decision dated September 4, 2001, denying the grievance (Klima Exhibit R, Lynch Supp. Exhibit A). The decision reflected that the DOC had introduced the May 24, 2001, letter from the PBA's attorney to President Goff (Lynch Exhibit D, Klima Exhibit S) as an exhibit. The Hearing Officer noted that DOC management was relying on the letter from the PBA's attorney. The Hearing Officer held that the grievants failed to demonstrate a violation of any rule, regulation or contractual article and denied the grievance.

On September 10, 2001, Klima and Ortega again requested the PBA move the grievance to arbitration and also sought the PBA's

support for their use of their own lawyer (Klima Affidavit §38). By letter of September 13, 2001, (Klima Exhibit U), the PBA's attorney responded to Charging Party attorney Maddaloni's letter of August 29, 2001, (Klima Exhibit L) asking the PBA to move the grievance to arbitration. The PBA's lawyer explained that the PBA had explored all the issues in the case but could not determine a contractual basis supporting the Charging Party's contention. The attorney also noted that the PBA had an obligation to represent the transferred officers as well as the pre-existing officers, and decided it was best not to proceed to arbitration.

10. At the PBA's general membership meeting of November 13, 2001, Nso reiterated the PBA's position regarding the IGTP and transferred employees as concern over seniority, promotions, and layoffs. He noted nothing in the contract required a minimum or maximum pay rate for starting officers, but thought the PBA should have input on the salary for officers transferring from other departments (Klima Affidavit §42; Exhibit W).

11. Nso and other PBA executive board members have grown hostile to Klima and told other members they should stay away from Klima and Ortega if they wanted a future with the PBA (Klima Affidavit §§13, 43, Exhibit W; Ortega Affidavit §10).

ANALYSIS

The record presented in this case to date contains facts regarding actions taken by the State/DOC as well as those actions taken by the PBA. Since this motion was filed by the PBA alone, I will not analyze the facts pertaining only to DOC conduct or the legality of such conduct.

Issues of Fact

As explained earlier, summary judgment cannot be granted if there is an unresolved dispute regarding material facts of the case. In its brief in opposition to the motion, the Charging Party argued there were "issues" of material fact regarding the transfers and salary equalization, the PBA's obligations and conduct toward Klima and Ortega, and that the PBA's conduct and reasonableness of its actions were in dispute. Normally, I would decide whether there is a dispute on material facts before considering the Charging Party's legal argument on the PBA's duty of fair representation. But here the Charging Party has at times commingled its argument regarding disputed facts with disputed issues of law. In addressing the factual issues raised, I will only address the related legal issues as needed.

In its brief, the Charging Party listed the PBA's reasons for not negotiating over terms and conditions of employment for the transferred correction officers into four categories: 1) that it was not required or able to engage in negotiations; 2) it

believed that under the IGTP, terms and conditions for those officers were non-negotiable; 3) the DOC unilaterally imposed the terms and conditions without negotiations, and; 4) its collective agreement did not address transferees, nor was there a past practice for transferring employees. The Charging Party then addressed those categories arguing that the PBA "abdicated" its responsibility by merely accepting the DOC's implementation of terms; that it was "irrational" for the PBA to assume that the salary for those officers was not negotiable; and that it was "unreasonable" for the PBA to fail to object to the DOC's unilateral salary placement for those officers. I have considered the Charging Party's arguments. They lack merit. The Charging Party's characterizations of the PBA's conduct was both unfortunate and inaccurate.

The first two categories the Charging Party identifies are related and must be considered together. Neither raises disputed issues of fact. Rather, they raise issues of law which are addressed in my duty of fair representation discussion below. The record conclusively shows that the PBA did not believe it was required or able to negotiate with the DOC over terms and conditions of employment for the transferred officers because it believed the IGTP preempted such negotiations. Whether the pilot program preempted negotiations raises a legal issue, not a factual dispute. The Charging Party also raises an issue over

whether the PBA violated its duty of fair representation by not negotiating over the transferees salary placement presuming the IGTP did not preempt negotiations. That, too, raised a legal issue which is also addressed below.

The issue of whether Nso and the DOC negotiated the salary placement of the transferred officers has already been decided. The record shows the PBA did not believe salary for the transferred officers was negotiable, and Nso in his affidavit stated it was not a subject of negotiations between the PBA and DOC. The Charging Party did not offer equivalent evidence to contradict Nso and create a disputed fact. Klima did not say the subject had been negotiated, he had no personal knowledge of what was said at the March 1, 2001, meeting that Nso attended. Rather, he (Klima) merely referred to the State's statement of position which labeled Nso's meeting with DOC officials on March 1 as "tantamount to a negotiations". But the State's letter is self-serving. It is not a certification of the facts, and the Charging Party did not offer certifications of others who attended the March 1 meeting to contradict Nso. Consequently, there is insufficient basis upon which I could even infer that the salary was negotiated.

Additionally, the State's position statement noted that DOC officials met with Nso "in order to present the terms to

him. . . ." In that context the unilateral presentation of terms is not negotiations. That language more closely supports Nso's statement that the DOC unilaterally imposed the terms, that there were no negotiations, and it contradicts the State's subsequent claim of negotiations, tantamount or otherwise. The inconsistency in the State's own letter makes it unreliable to prove the truth of the matter asserted--that salary was negotiated--making it inherently insufficient to overcome Nso's certified statement.

The arguments raised by the Charging Party in its fourth category, whether the collective agreement addressed transferees, and whether a past practice for transferring employees existed, raises legal issues. The facts regarding those matters are not in dispute. The collective agreement is in evidence. Nso said the agreement did not address terms and conditions for transferred employees. Klima thought Article XIV was violated by the salary equalization but he did not directly contradict Nso that the agreement did not specifically address terms for transferees. Article XIV is the salary compensation plan and program. It does not contain specific reference to transferees. The words used in that article are not in dispute. Those words constitute the facts. Perhaps the parties differ on how to interpret those words, but the differing interpretations is not a

dispute of the facts. I found the contract silent regarding transferees.

Finally, the record does not support finding that a dispute of fact exists regarding whether a prior practice existed. The facts show that in 1998 correction officers from Mercer County were transferred to the DOC and placed at step one after negotiations. The PBA did not dispute those facts. Whether those facts constitute a practice that is relevant in this case, or whether the PBA violated its duty of fair representation by not seeking its enforcement if it was a relevant practice, raises a legal issue. It is what weight or meaning to give those facts that is in dispute, not the facts themselves.

Based upon the above discussion, I find no dispute of material facts exists that would justify dismissing the motion.

Issues of Law

In its brief, the Charging Party argued that the PBA breached its duty of fair representation to Klima/Ortega by: 1) failing to negotiate with the DOC over terms and conditions of employment for transferred employees; 2) failing to object to the DOC's unilateral imposition of terms and conditions of employment for transferees; 3) permitting or perhaps negotiating, better compensation for transferred employees than for existing officers; 4) failing to represent or assist Klima and Ortega in processing their grievance; 5) taking no action to prevent the

DOC from forcing Klima and Ortega to attend a step 2 hearing without representation; and 6) acting in concert with the DOC in any of the above alleged actions.

The standard for determining whether a union violated its duty of fair representation was first established by the United States Supreme Court in Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967). The Court in Vaca held that:

. . . 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 Supreme Court, subsequently, also held that to establish 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).

The Court applied the above Vaca standard in determining whether a union would violate its duty of fair representation by refusing to take a grievance to arbitration, finding that a refusal to proceed to arbitration, standing alone, would not violate the duty of fair representation. The Court held:

Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employee has an absolute right to have his

grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement.

. . . .
If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the individual grievant to the vagaries of independent and unsystematic negotiation.

386 U.S. at 191-192.

The Commission and the New Jersey courts have consistently embraced the Vaca standard in adjudicating fair representation cases. See Saginario v. Attorney General, 87 N.J. 480 (1981); Lullo v. IAFF, 55 N.J. 409 (1970); Belen v. Woodbridge Tp. Bd. Ed., 142 N.J. Super. 486, 491 (App. Div. 1976); Middlesex Cty., MacKaronis and NJCSA, P.E.R.C. No. 81-62, 6 NJPER 555 (¶11282 1980), aff'd NJPER Supp. 2d 113 (¶94 App. Div. 1982), certif. den. (6/16/82), recon. den. (10/5/82); Egg Harbor Twp. Ed. Assn. (Zelig), P.E.R.C. No. 2002-71, 28 NJPER 249 (¶33094 2002); Fair Lawn Bd. Ed., P.E.R.C. No. 84-138, 10 NJPER 351 (¶15163 1984); OPEIU Local 153, 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); New Jersey Tpk. Ees. 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 Commission has held that a union's good faith decision refusing to take a grievance to arbitration does not violate the Act. Rutgers University and AFSCME Council 52, Local 888, P.E.R.C. No. 88-130, 14 NJPER 414 (¶19166 1988); Distillery Workers Local 209, P.E.R.C. No. 88-13, 13 NJPER 710 (¶18263 1987); Council of N.J. State College Locals, D.U.P. No. 96-16, 22 NJPER 112 (¶27059 1996).

In OPEIU Local 153, the Commission explained what was expected of a union in assessing whether a grievance had merit and whether to take a grievance to arbitration. It held:

We have also stated that a union should attempt to exercise reasonable care and diligence in investigating, processing, and presenting grievances; it should exercise good faith in determining the merits of the grievance; and it must treat individuals equally by granting equal access to the grievance procedure and arbitration for similar grievances of equal merit. Middlesex County; Local 194. All the circumstances of a particular case, however, must be considered before a determination can be made concerning whether a majority representative has acted in bad faith, discriminatorily, or arbitrarily under the Vaca standards. 10 NJPER at 13.

In presenting its arguments, the Charging Party failed to address the Vaca standard or analyze the PBA's actions as the Commission explained in OPEIU. Rather, the Charging Party criticized the PBA for both certain actions and inactions because Klima and Ortega did not receive the same salary as the officers

who transferred from Union County with their same years of service.

Having considered the Charging Party's arguments and the Vaca duty of fair representation standard and its application in related cases, I find the Charging Party's arguments lack merit. After reviewing all of the circumstances presented, I find that the PBA's reaction to the DOC's salary implementation for the transferred officers, and its (PBA's) decision to refuse to assist Klima and Ortega in processing the grievance and rejecting their request for arbitration was not arbitrary, discriminatory or in bad faith.

A review of what the PBA did shows it acted responsibly, reasonably and rationally in deciding what to do about the transferees salary and the Charging Party's grievance. The State's unilateral transfer and salary implementation for the transferred officers was announced at the PBA's April meeting. Shortly thereafter, Klima and Ortega raised the salary disparity with PBA officials. Those officials sought legal assistance. The PBA's attorney, relying primarily upon Communication Workers of America v. New Jersey Dept. Of Personnel, 154 N.J. 121 (1998), and the PBA collective agreement concluded that the State/DOC unilateral salary implementation did not violate the law or any contractual provision. The Court in Communication Workers held in pertinent part:

We also note that appointing authorities who request a pilot program must consult with affected "negotiations representatives" before the submission of a proposal. N.J.A.C. 4A:1-4.3(c). This requirement, although it does not mandate negotiations with the negotiations representatives, requires notification of and, when requested, discussion with those representatives. Id. At 131.

It was reasonable for PBA counsel to conclude from the language in Communication Workers that salaries resulting from the IGTP were not negotiable and that the DOC's actions did not violate the collective agreement. It was, therefore, appropriate for the PBA to rely on its counsel's recommendation.

The problems resulting in the instant charge arose primarily due to the PBA's legal interpretation that the IGTP preempted negotiations over the salary for the transferred officers. The Charging Party in its brief vigorously challenged the PBA's interpretation of that program, argued it was not preemptive and had expired, and characterized the PBA's position as irrational and unreasonable. The Charging Party's arguments and descriptions are misplaced.

I need not decide whether the IGTP actually preempted negotiations in order to decide this case. Preemption is not the issue and cases on preemption are irrelevant here. The issue is whether the PBA's failure to object to the DOC's unilateral implementation of salaries for transferees or to seek negotiations over transferee salaries (assuming they were even

obligated to do so) or get better salaries for Klima and Ortega, and its decisions not to assist or support the Charging Party's grievance or move it to arbitration were arbitrary, discriminatory or in bad faith. The record shows the PBA acted responsibly and not arbitrarily in concluding that salaries for transferees were non-negotiable, and there was no evidence that Klima and Ortega were discriminated against, that is, treated differently than anyone else in their similar circumstance. The PBA's decision to withhold support for the Charging Party's grievance was reached after a good faith assessment that the agreement had not been violated; that the grievance seeking to increase the Charging Party's salaries was unlikely to succeed; and that the grievance would not be best for the unit as a whole in part because the transferees were now part of the unit. Similarly, the PBA acted reasonably and in good faith by rejecting the Charging Party's request for arbitration, concluding there was no contractual basis for paying Klima and Ortega the same salary as transferees with the same years of service. While the Charging Party suggested the transferee salaries violated the contract, it appears Klima and Ortega were paid in accordance with the contract. If the contract was violated it would suggest the salaries for the transferees be adjusted downward, and not, as the Charging Party seeks, an upward adjustment for Klima and Ortega.

Even if the PBA was mistaken about the preemptive effect of the IGTP or the meaning of the contract, its error would still not violate its duty of fair representation. A union is not obligated to guess correctly about the effect of specific legislation or how an arbitrator may interpret its contract. It is only expected to avoid making such determinations in an arbitrary or discriminatory manner.

The laws defining the duty of fair representation give a majority representative a wide range of reasonableness within which to act. A union is not required to represent one or all unit members to their complete satisfaction. Ford Motor Co. V. Hoffman, 345 U.S. 330, 337-338 (1953); Belen v. Woodbridge Tp. Bd. Ed., 142 N.J.Super. 486, 491 (App. Div. 1976); New Jersey Tpk. Auth., P.E.R.C. No. 88-61, 14 NJPER 111 (¶19041 1988) affirming H.E. No. 88-23, 14 NJPER 5, 11 (¶19002 1987). Where a union has exercised its discretion in good faith, even proof of mere negligence, standing alone, is insufficient to prove a breach of the fair representation duty. Service Employees Int'l Union, Local No. 579, AFL-CIO, 229 NLRB 692, 95 LRRM 1156 (1977); Printing and Graphic Communication, Local No. 4, 249 NLRB No. 23, 104 LRRM 1050 (1980), reversed on other grounds 110 LRRM 2928 (1982); Bergen Comm. Collg., P.E.R.C. No. 86-77, 12 NJPER 90 (¶17031 1985); Fairlawn B/E, P.E.R.C. No. 84-138, 10 NJPER 351

(¶15163 1984); Council of N.J. State College Locals, D.U.P. No. 96-16, 23 NJPER 112 (¶27059 1996).

In Belen, for example, a group of employees represented within the negotiations unit objected to parts of a negotiated agreement. The Court held:

. . .the mere fact that a negotiated agreement results, as it did here, in a detriment to one group of employees did not establish a breach of duty by the union. The realities of labor-management relations which underlie this rule of law were expressed in Ford Motor Co. V. Hoffman, 345 U.S. 330 (1953), where the court wrote:

Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. A major responsibility of negotiators is to weigh the relative advantages and disadvantages of different proposals.

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.
[at 337-338]

142 N.J. Super. at 491.

Despite the many arguments presented by the Charging Party, the preponderance of the evidence shows that the PBA acted in good faith. Its primary obligation was to the unit as a whole.

After advice from counsel and its knowledge of the collective agreement, the PBA concluded that the IGTP preempted negotiations, thereby relieving it (the PBA) of any negotiations obligation regarding transferee salaries. Any prior practice that was inconsistent with the preemptive effect of the IGTP would have been inoperable. I am not suggesting the Charging Party proved that the transfer of former Mercer County officers to the DOC in 1998 created a binding practice. Rather, I find that even if it did, once the PBA believed the IGTP preempted negotiations, any inconsistent prior practice would have been irrelevant. Similarly, once the PBA decided it could not represent the Charging Party in its grievance because it sought a result it (the PBA) could not support, the PBA was not obligated to represent Klima and Ortega at subsequent steps of the grievance procedure despite repeated requests to do so and even after possible DOC improper processing of the grievance.

The Charging Party's claim of collusion between the PBA and the DOC to deny its grievance also lacks merit. That claim is based upon the DOC's use and reliance upon the PBA attorney's letter of May 24, 2001, at the step 2 grievance hearing.

Although that was a letter between the PBA attorney and his

client, the PBA, the DOC's presentation and reliance on it does not prove they colluded to deny the grievance. The Charging Party offered no evidence showing how the DOC obtained the letter, and no evidence that demonstrates the Respondents actually communicated over or conspired to deny the grievance. The collusion argument is nothing more than an unsubstantiated allegation.

Although the record contains some evidence of hostility between the PBA officials and the Charging Party, there is no specific allegation in the charge that the PBA violated the Act by being hostile to Klima and Ortega as a result of their pursuit of the salary grievance. Allegations not plead in the charge will not normally be considered. State of N.J. and CWA, P.E.R.C. No. 85-77, 11 NJPER 74, 79 (¶16036 1985), aff'd NJPER Supp. 2d 162 (¶143 App. Div. 1986); Ocean County College, P.E.R.C. No. 82-122, 8 NJPER 372 (¶13170 1982). Such is the result here.

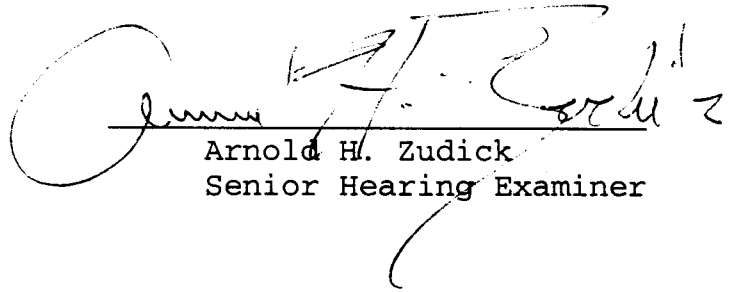
Accordingly, after considering all of the circumstances presented to me in this case, and based upon the above findings and analysis, the PBA's motion for summary judgment is granted.

Pursuant to N.J.A.C. 19:14-4.8(d), I **ORDER** that the charge against the PBA is dismissed in its entirety.

Since the complaint in this case includes the charge against the State/DOC which is not before me on this motion, this decision does not resolve all of the issues in the complaint.

Consequently, this ruling shall not be appealed directly to the Commission except by special permission. N.J.A.C. 19:14-4.8(e); 19:14-4.6.

The hearing against the State/DOC, minus the allegation of collusion, will be rescheduled under separate cover.



Arnold H. Zudick
Senior Hearing Examiner

Dated: June 12, 2003
Trenton, New Jersey

