P.E.R.C. NO. 89-105

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matters of

BERGEN COUNTY UTILITIES AUTHORITY &
UTILITY WORKERS UNION OF AMERICA,
LOCAL 534, AFL-CIO,

Respondents,

-and- Docket No. CI-H-88-47

CHARLES D'ARRIGO,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, pursuant to authority delegated by the full Commission in the absence of exceptions or a request for review, dismisses a Complaint based on an unfair practice charge and amended charges filed by Charles D'Arrigo against the Bergen County Utilities Authority and the Utility Workers Union of America, Local 534, AFL-CIO. The charge alleged that the Authority violated the New Jersey Employer-Employee Relations Act by discharging D'Arrigo and that Local 534 violated the Act by failing to arbitrate the discharge.

P.E.R.C. NO. 89-105

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matters of

BERGEN COUNTY UTILITIES AUTHORITY &
UTILITY WORKERS UNION OF AMERICA,
LOCAL 534, AFL-CIO,

Respondents,

-and- Docket No. CI-H-88-47

CHARLES D'ARRIGO,

Charging Party.

Appearances:

For the Respondent Authority, Giblin & Giblin, Esqs.
(Brian T. Giblin, of counsel)

For the Respondent Union, Fox & Fox, Esqs.
(Dennis J. Alessi, of counsel)

For the Charging Party, Traina & Traina, Esqs.
(Jack A. Traina, of counsel)

DECISION

On February 29, March 11 and June 10, 1988, Charles D'Arrigo ("charging party") filed an unfair practice charge and amended charges against the Bergen County Utilities Authority and the Utility Workers Union of America, Local 534, AFL-CIO. The charge alleges that the Authority violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (3) and (5),[1/] by discharging

---

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with,

Footnote Continued on Next Page

the charging party. It further alleges that Local 534 violated subsections 5.4(b)(1), (3) and (5)[2/] by failing to arbitrate the discharge.

On August 15, 1988, a Complaint and Notice of Hearing issued. On August 24, Local 534 filed an Answer claiming, in part, that N.J.S.A. 34:13A-5.3 prevented it from arbitrating this matter. On August 30, the Authority filed an Answer claiming that the discharge was in all respects proper and that the charging party abandoned his job.

On November 17, 1988, the Authority filed a motion to dismiss. On November 18, Local 534 filed a motion for summary judgment. On December 29, the charging party filed a letter brief in opposition. On January 11, 1989, Local 534 replied.

1/ Footnote Continued From Previous Page

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 and (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."

2/ These subsections prohibit employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit and (5) Violating any of the rules and regulations established by the commission."

On February 21, 1989, Hearing Examiner Alan R. Howe dismissed the allegations against the Authority and recommended that the allegations against Local 534 be dismissed. H.E. No. 89-25, 15 NJPER ___ (¶ 1989). The Hearing Examiner found that the charging party alleged no facts to support his charge against the Authority. He further found no basis for the claim that Local 534 had breached its duty of fair representation.

The Hearing Examiner served his report on the parties and informed them that exceptions were due March 6, 1989. No party filed exceptions, requested an extension of time, or sought review.[3/]

I have reviewed the record. Acting pursuant to authority granted to me by the full Commission in the absence of exceptions or a request for review, I agree with the Hearing Examiner that the Complaint should be dismissed in its entirety.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

DATED: Trenton, New Jersey
March 29, 1989

3/ N.J.A.C. 19:14-4.7 provides that a charging party may obtain review of a dismissal by filing with the Commission within 10 days from the order of dismissal. N.J.A.C. 19:14-7.3 provides that exceptions to a hearing examiner's recommended report, including recommendations granting summary judgment, must be filed within 10 days. See also N.J.A.C. 19:14-4.8.

H.E. NO. 89-25

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

In the Matters of

BERGEN COUNTY UTILITIES AUTHORITY &
UTILITY WORKERS UNION OF AMERICA,
LOCAL 534, AFL-CIO,

Respondents,

-and- Docket No. CI-H-88-47

CHARLES D'ARRIGO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss a Complaint against the Authority and the Union by granting their respective Motions to Dismiss and/or for Summary Judgment. The essential defense of the Authority and the Union was that the Charging Party when terminated had been arrested for four drug-related offenses, for which he was subsequently indicted, convicted and sentenced to a prison term of ten years. Thus, he was not available for employment and, pursuant to N.J.S.A. 2C:51-2 the Charging Party forfeited his employment by reason of conviction of a crime of the third degree or above. Also, in the case of the Union, the Union was not obligated to seek arbitration since the offense was greater than a five-day "minor" disciplinary action and, thus, the Union could not have sought binding arbitration under the 1982 amendment to §5.3 of our Act.

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. 89-25

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

In the Matters of

BERGEN COUNTY UTILITIES AUTHORITY &
UTILITY WORKERS UNION OF AMERICA,
LOCAL 534, AFL-CIO,

Respondents,

-and- Docket No. CI-H-88-47

CHARLES D'ARRIGO,

Charging Party.

Appearances:

For the Respondent Authority
Giblin & Giblin, Esqs.
(Brian T. Giblin, of counsel)

For the Respondent Union
Fox & Fox, Esqs.
(Dennis J. Alessi, of counsel)

For the Charging Party
Traina & Traina, Esqs.
(Jack A. Traina, of counsel)

HEARING EXAMINER'S RECOMMENDED DECISION
AND ORDER ON RESPONDENTS' MOTIONS TO
DISMISS AND/OR MOTIONS FOR SUMMARY JUDGMENT

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on February 29, 1988, and thereafter amended on March 11, 1988 and June 10, 1988, by Charles D'Arrigo ("Charging Party" or "D'Arrigo") alleging that the Bergen County Utilities Authority ("Authority") and the Utility Workers Union of America, Local 534, AFL-CIO ("Union") have engaged in unfair practices within the meaning of the New Jersey

Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"), in that D'Arrigo was employed by the Authority from August 1983 until December 10, 1985, and was a member of the Union and covered by a collective negotiations agreement, which provided for arbitration of grievances not resolved; on December 10, 1985, D'Arrigo received a Final Notice of Disciplinary Action from the Authority and thereafter he made numerous attempts to have the New Jersey State Board of Mediation submit a panel of arbitrators to the parties; D'Arrigo recently learned that the Union had never filed for arbitration and this situation has continued through June 10, 1988, the date of the second amendment to the original Unfair Practice Charge; and D'Arrigo alleges that the Union has not fairly represented him and that the Authority "denied him his job" because he was under indictment for a criminal offense, notwithstanding that he had notified the Authority as to the reason for his absence in excess of five working days; all of which is alleged to be a violation by the Authority of N.J.S.A. 34:13A-5.4(a)(1), (3) and (5) of the Act.[1/] Further, D'Arrigo has alleged a violation by the

---

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (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."

Union of N.J.S.A. 34:13A-5.4(b)(1), (3) and (5) of the Act. of the Act.2/

It appearing that the allegations of the Unfair Practice Charge, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on August 15, 1988. Pursuant to the Complaint and Notice of Hearing, initial hearing dates were scheduled for October 3, 20 and 21, 1988 in Newark, New Jersey. The Union filed its Answer to the Complaint on August 24, 1988, and the Authority filed its Answer on August 30, 1988. Thereafter, the parties mutually requested the adjournment of the original hearing dates and the matter was rescheduled to November 3, 4 and 7, 1988. These dates were adjourned, again at the joint request of the parties, one of the problems being the inability of the Charging Party to appear because of his incarceration, infra. Finally, on November 17, 1988, with advance notice, the Authority filed a Motion to Dismiss with a supporting brief and appendix and on November 18, 1988, the Union filed a separate Motion for Summary Judgment with a supporting

---

2/ These subsections prohibit employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. (5) Violating any of the rules and regulations established by the commission."

brief.[3/] Thereafter, D'Arrigo filed a letter brief in opposition on December 29, 1988, and the Union only responded on January 11, 1989. For reasons which will be apparent hereinafter, both of the filings by the Authority and the Union are being treated as Motions for Summary Judgment.[4/]

The decision which follows is in accordance with N.J.A.C. 19:14-4.7, and is based upon the following:

INTERIM FINDINGS OF FACT[5/]

1. The Bergen County Utilities Authority is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Utility Workers Union of America, Local 534, AFL-CIO is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. Charles D'Arrigo is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

4. D'Arrigo was employed by the Authority as a Sewage Plant Operator (Provisional) from August 1983 until an "Unauthorized

---

3/ The hearing has been adjourned indefinitely pending the disposition of these motions.

4/ The Union's request for oral argument is denied.

5/ These Interim Findings of Fact are based upon the allegations in the Unfair Practice Charge, as twice amended, the Answers of the Authority and the Union, and the attachments to the respective moving papers.

absence from position from 11/4/85 to present."[6/] On November 30, 1985, D'Arrigo had been served with a Preliminary Notice of Disciplinary Action and a hearing was held on this Preliminary Notice on December 10, 1985, at which D'Arrigo appeared. Following the hearing, the Final Notice of Disciplinary Action, supra, was served upon D'Arrigo. The disciplinary action taken against him was "Resignation not in good standing effective December 10, 1985." The Final Notice states clearly that D'Arrigo had a right to appeal to the Civil Service Commission (now the Department of Personnel) within 20 days of receipt. No appeal was taken.

5. At all times during D'Arrigo's employment with the Authority there was a collective negotiations agreement in effect between the Authority and the Union, to wit: from January 1, 1985 through December 31, 1986. [Authority's Brief and Appendix (Ra-5 through Ra-58)].

6. This agreement provided in Art. VII, Grievance Procedure, inter alia, that the parties shall use the New Jersey Board of Mediation for the selection of an arbitrator and that nothing contained in the Grievance Procedure Article "...shall limit the right of an employee to process his or her own grievance provided, however, the Union shall be notified by the Authority of

---

6/ This quotation is from the statement of charge, which appears on the Final Notice of Disciplinary Action, dated December 10, 1985 (see Authority's Brief and Appendix, Ra-1).

all such situations and shall have the right to be present during the same..." [Authority's Brief and Appendix (Ra-53)].7/

7. The Grievance Procedure also provides in Art. VII, Step 1, that a grievance must be filed within ten working days of the occurrence or it is deemed waived (Ra-51). Further, a demand for arbitration must be made within 30 business days of receipt of the answer at Step 3 (Ra-53). Although D'Arrigo has acknowledged receipt of his Final Notice of Disciplinary Action on December 10, 1985, no "grievance arbitration petition" was filed with the Board of Mediation until April 20, 1987, more than 16 months beyond the 30-day limitation in Art. VII of the agreement. [D'Arrigo's Affidavit ¶6 (Authority's Appendix, Ra-3)].

8. The "record" of the New Jersey Superior Court, Bergen County, Law Division [Criminal] indicates that D'Arrigo was arrested on November 1, 1985, and that he was indicted on December 15, 1986, for four major drug offenses. [Authority's Appendix (Ra-60)]. The Court "record" reveals further that on February 29, 1988, he pleaded guilty to distribution of a controlled dangerous substance, possession of a controlled dangerous substance, and possession of a controlled dangerous substance with intent to distribute. Finally, on April 8, 1988, he was sentenced to ten years imprisonment in a

---

7/ The reach of this grievance-arbitration provision was recently construed by the Appellate Division in a case involving D'Arrigo, decided October 18, 1988, and reported in 228 N.J. Super. 189, the holding of which is not material to the disposition of the instant motions of the Authority and the Union.

State Prison and has been incarcerated since that date. [Authority's Brief and Appendix (Ra-59, 60)].

DISCUSSION AND ANALYSIS

The Respondents in their moving papers seek either a Motion to Dismiss or a Motion for Summary Judgment in their favor. A motion to dismiss is governed by N.J.A.C. 19:14-4.7, which provides only that if the motion is granted by the Hearing Examiner before the filing of his Recommended Report and Decision, then the Charging Party may obtain review by the Commission, provided the request for such review is filed within ten days of the order of dismissal. This rule does not, however, provide guidance as to the standard to be applied by the Hearing Examiner in determining whether to grant or deny the motion to dismiss.

However, the Hearing Examiner is unable to perceive any significant difference between the standard for disposing of a motion to dismiss and that of a motion for summary judgment, which is provided for N.J.A.C. 19:14-4.8. This rule provides in Section (a) that "...Any motion in the nature of a motion for summary judgment may only be made subsequent to the issuance of the complaint and shall be filed with the chairman of the commission, who shall refer the motion to either the commission or the hearing examiner..." Thus, it appears to the Hearing Examiner that he may treat the Authority's Motion to Dismiss as a motion for summary judgment.

N.J.A.C. 19:14-4.8(b) establishes the standard which the Commission utilizes in deciding whether or not to grant a motion for summary judgment, namely, that "...there exists no genuine issue of material fact and the movant or cross-movant is entitled to its requested relief as a matter of law...," in which case summary judgment may be granted and the requested relief ordered.

The Commission has, in many cases, followed the New Jersey Civil Practice Rules (R.4:46-2) and a leading decision of the New Jersey Supreme Court in Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 73-75 (1954) in deciding motions for summary judgment under N.J.A.C. 19:14-4.8. Both the Civil Practice Rules and Judson apply the same standard.

But summary judgment is to be granted with extreme caution. The moving papers must be considered in the light most favorable to the opposing party, all doubts must be resolved against the movant, and the summary judgment procedure may not to be used as a substitute for a plenary trial. State of N.J. (Human Services), P.E.R.C. No. 89-52, 14 NJPER 695 (¶19297 1988), citing Baer v. Sorbello, 177 N.J. Super. 182, 185 (App Div. 1981); Essex Cty. Ed. Services Comm'n., 9 NJPER 19 (¶14009 1982).

It is first noted that counsel for D'Arrigo has, in his answering papers of December 29, 1988, not refuted any of the essential facts set forth in the moving papers of the Authority and the Union. Thus, none of the above Interim Findings of Fact made by the Hearing Examiner are in dispute. The Hearing Examiner attaches

no weight to the statement by counsel for D'Arrigo that at the time of a hearing in this matter, if held, he would call as a witness D'Arrigo's immediate supervisor at the time of his discharge since nothing is set forth in any affidavit or certification as to the relevance of such testimony. Even allowing for the fact that such testimony might corroborate the testimony of D'Arrigo that he complied with the notice requirement in effect at the time of his termination, the intention to call this supervisor as a witness does not prevent the disposition of these motions for summary judgment since, as was stated by the Appellate Division in Heljon Mgt. Corp. v. DiLeo, 55 N.J. Super. 306, 312 (1959):

> ...where there is a prima facie right to summary judgment the party opposing the motion is required to demonstrate by competent evidential material that a genuine of a material fact exists. This is to afford litigants protection against groundless claims and frivolous defenses...

See also, U.S. Pipe & Foundry Co. v. American Arbitration Ass'n, 67 N.J. Super. 384, 399, 400 (App. Div. 1961).

* * * *

The Hearing Examiner is persuaded, based upon the above Interim Findings of Fact, which derive from the pleadings and papers filed in support of and in opposition to the respective motions, that summary judgment must be granted in favor of the Authority and the Union for the following reasons:

AS TO THE RESPONDENT AUTHORITY

The Authority was brought into the case by the Charging Party's amendment of June 10, 1988, wherein it was alleged, inter alia, that:

> The Bergen County Utilities Authority wrongfully discharged Petitioner and denied him his job despite his attendance to all requirements of his employment, to wit: notifying employer as to reason for absence in excess of five working days.
>
> The Utilities Authority further denied Petitioner his job because he was under indictment for a criminal offense.

The Charging Party contends that by the alleged conduct of the Authority quoted above it violated §§5.4(a)(1), (3) and (5) of the Act. The full text of these subsections has been previously quoted above. It is immediately apparent that there is nothing in the Charging Party's allegations as to the Authority, which would constitute an independent violation of the Act within the meaning of N. J. Sports & Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 fn. 1 (¶10285 1979). The Charging Party's allegations are devoid of any element of coercion by the Authority or interference with the Charging Party's rights under the Act.

The next question to be resolved is whether or not the Charging Party's allegations as to the Authority are sufficient to support a violation of §5.4(a)(3) and, derivatively, (a)(1) of the Act. To constitute a sufficient allegation in this respect the Charging Party must demonstrate that he has engaged in protected activities under the Act, that the Authority knew that he had engaged in such protected activities and, finally, that the Authority manifested hostility or animus toward the Charging Party in his exercise of rights protected by the Act: Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984). Plainly, there

is no allegation whatsoever in the June 10, 1988 amended Unfair Practice Charge, which suggests that the Authority did other than, according to D'Arrigo, "wrongfully" discharge him "...despite his attendance to all requirements of his employment, etc." and that it did so "because he was under indictment for a criminal offense." There is no element of protected activity anywhere involved in the allegations in the amended Unfair Practice Charge of June 10, 1988, nor can hostility or animus as to any protected activities be inferred from the fact that the Authority may have denied D'Arrigo his job because he was under indictment for a criminal offense. Thus, it appears clear that there is nothing in the allegations of the Charging Party against the Authority that could constitute a violation of §§5.4(a)(1) and (3) of the Act.

Next, there is the question of D'Arrigo's allegation that the Authority violated §5.4(a)(5) of the Act by having wrongfully discharged him, notwithstanding that he notified the Authority of the reason for his absence in excess of five working days and further that the Authority denied him employment because he was under indictment for a criminal offense. The above Interim Findings of Fact establish that D'Arrigo was given a Final Notice of Disciplinary Action, terminating him on December 10, 1985, and that no grievance was filed under the collective negotiations agreement until on or about April 20, 1987. The agreement provides under its grievance procedure that a grievance must be filed within ten working days of the occurrence and that arbitration must be invoked

within 30 days of the receipt of the answer to the grievance at Step 3. Leaving aside the fact that it is for an arbitrator to determine the issue of timeliness in the filing of a grievance under an agreement, the Hearing Examiner takes note of the Authority's argument that it can hardly be charged with a violation of Section (a)(5) of the Act since it could not have refused to have processed a grievance which was not filed until 16 months after the date of D'Arrigo's termination.

The Authority cites Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122, 139 (1978) in support of its position. The Hearing Examiner goes one step further in concluding that there is no legally sufficient allegation that the Authority violated §5.4(a)(5) of the Act, namely, New Jersey Turnpike Authority (Jeffrey Beall), P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980) where the Commission rendered a definitive decision as to when and under what circumstances an individual may charge a public employer with having violated subsection (a)(5) of the Act. In order to understand the Commission's rationale in deciding Beall, it is important to consider the factual setting, which was, briefly, as follows:

Beall was terminated for failure to report to work when scheduled and for taking an unauthorized leave of absence. Beall filed a grievance, which was processed through the contractual grievance procedure to an administrative hearing, which was the last step prior to arbitration. The hearing officer sustained the

discharge and Beall requested that the union proceed to arbitration. However, the Executive Board of the union voted overwhelmingly against arbitration because it concluded there was little likelihood for success. The employer rejected Beall's request that it proceed to arbitration with Beall alone, notwithstanding his offer to arbitrate at his own expense. Finally, Beall contended that the employer and the union by their actions in combination with one another and had conspired to deprive him of his right to pursue his grievance to arbitration, i.e., the employer exerted improper influence on the union not to take Beall's case to arbitration and the union acceded to such pressure.[8/]

The Commission in Beall adopted the findings and conclusions of the hearing examiner, noting first that the allegation of a §5.4(a)(5) violation amounted to an attempt by Beall to have the merits of his discharge grievance adjudicated as an unfair practice, i.e., that his discharge was not for just cause under the agreement. The Commission then said that since the union had not improperly refused to take Beall's grievance to arbitration "...we must find that the Authority could not have violated N.J.S.A. 34:13A-5.4(a)(5)..." (6 NJPER at 561).

8/ The Hearing Examiner in Beall, in recommending dismissal of the Complaint, found that the union did not violate its duty of fair representation by refusing to take the case to arbitration and, additionally, that there was no collusion proven between the employer and the union in the decision not to pursue the grievance to arbitration: H.E. No 81-7, 6 NJPER 473, 476 (¶11241 1980).

The Commission next stated that the negotiations obligation in §5.3 of the Act permits majority representatives to file unfair practice charges alleging violations of §5.4(a)(5) based upon claimed breaches of collective negotiations agreements. Since Beall's unfair practice charge amounted to exactly such a claim, the Commission stated:

> As a general matter, we do not believe that an individual employee, in the absence of any allegations of collusion or unfair representation by the majority representative, can use the unfair practice forum to litigate an alleged breach of a collective negotiations agreement unrelated to union activity. The violation of the duty to negotiate terms and conditions of employment implied by such an allegation is more appropriately asserted by the majority representative. It is not an unfair practice for a public employer to refuse to negotiate with an individual employee or even a group of employees if they do not constitute the exclusive majority representative. Therefore, while the breach of a contract may violate certain rights of an individual employee, they are not normally vindicated in the unfair practice forum provided by this Act. (6 NJPER at 561).

The Commission's ultimate decision, in dismissing Beall's Complaint, was based upon the fact that the union had not breached its duty of fair representation and that there had been no proof of collusion by the employer in the decision of the union not to take Beall's termination to arbitration under the agreement.[9/]

9/ The Commission also concluded that Beall had failed to prove an independent violation of §5.4(a)(1) of the Act since an individual public employee has no absolute statutory right to process a grievance to arbitration when the union has refused to exercise that right for the employee.

The Hearing Examiner is fully satisfied that D'Arrigo has alleged no facts which would support the conclusion that there had been any collusion between the Authority and the Union in the matter of the refusal of the Union to process D'Arrigo's grievance to binding arbitration under the agreement. As will be apparent hereinafter, the Union did not breach its duty of fair representation as to D'Arrigo. Thus, the facts in this case are on all fours with Beall and the §5.4(a)(5) allegation against the Authority must also be dismissed.

However, the Authority advances several additional reasons in support of its motion for the dismissal of the Complaint against it. It cannot be gainsaid that D'Arrigo was indicted on December 15, 1986, on a series of drug-related counts and that on February 29, 1988, he entered a plea of guilty, for which he was sentenced on April 8, 1988, to a maximum term of ten years in State Prison (see Appendix to the Authority's Brief at Ra 60). The Authority cites N.J.S.A. 2C:51-2, which provides, in part, that:

> a. A person holding any public office position, or employment, elective or appointed, under the government of this State or any agency or political subdivision thereof, who is convicted of an offense shall forfeit such office or position if: (1) He is convicted under the laws of this State of an offense involving dishonesty or or a crime of the third degree or above...(emphasis supplied).

The Hearing Examiner accepts the Authority's argument that D'Arrigo plainly falls within the scope of this statutory provision as one who had held a "public office position, or employment," in an "agency or political subdivision" of the State. The Authority has

cited N.J. Tpk. Employees v. N.J. Tpk. Auth., 200 N.J. Super. 48 (App. Div. 1985), which held that this statutory provision applies to Turnpike Authority employees. The Hearing Examiner can perceive no distinction between employees of a Utilities Authority and those of the Turnpike Authority vis-a-vis the statutory provision for forfeiture of "such office or position." Also, the Hearing Examiner concurs with the Authority that the crimes or offenses to which D'Arrigo pleaded guilty on February 29, 1988, were of the third degree or higher [see N.J.S.A. 2C:43-46]. Finally, the Authority argues persuasively that the application of the forfeiture statute above is "self-executing" under State v. Musto, 188 N.J. Super. 106, 108 (App. Div. 1983). Thus, for these reasons D'Arrigo has forfeited by operation of law his former position with the Authority.

The last stated position of the Authority for dismissal is that Unfair Practice Charge against it is untimely under §5.4(c) of our Act. The Hearing Examiner sees no need to reach this defense for the reason that the above-stated grounds for dismissal are adequate and, thus, the Authority's Motion to Dismiss the Complaint is granted.

AS TO THE RESPONDENT UNION

The legal defenses of the Union are somewhat different from those of the Authority but one thing is immediately clear and that is that there is nothing in the Unfair Practice Charge, twice amended, which remotely suggests an alleged violation by the Union of §§5.4(b)(3) and (5) of the Act. Subsection (b)(3), which is

quoted in full above, pertains solely to a public employer who seeks to complain about the refusal of a public employee representative to "negotiate in good faith... concerning terms and conditions of employment of employees" in an appropriate unit. Plainly, only a public employer has standing to have adjudicated an alleged violation of §5.4(b)(3) of the Act. Further, the alleging of a §5.4(b)(5) violation pertains to the rules and regulations established by the Commission, which are in no way involved in the instant Unfair Practice Charge, as amended. There remains only the alleged violation by the Union of §5.4(b)(1) of the Act, which is deserving of serious analysis since it is germane to the thrust of D'Arrigo's charge of unfair practices against the Union.

D'Arrigo has charged that the Union breached its duty of fair representation as to him when it failed to institute arbitration under the collective negotiations agreement, specifically, by having failed to seek from the State Board of Mediation a panel of arbitrators. At first blush it might appear that D'Arrigo has alleged sufficient facts to warrant a hearing before the undersigned as to whether or not this conduct of the Union violated §5.4(b)(1) of the Act. However, D'Arrigo's problem is that he was terminated on December 10, 1985, and received at that time a Final Notice of Disciplinary Action, which stated that he had 20 days from that date to appeal the termination decision to the Department of Civil Service (now Department of Personnel). This he failed to do and, thus, his right of appeal was extinguished.

Further, the Union correctly argues that it could not have submitted his termination to arbitration since, as a result of the 1982 amendment to our Act, i.e., N.J.S.A. 34:13A-5.3, the Union was precluded from submitting D'Arrigo's termination to binding arbitration. Section 5.3 now provides that although the "...grievance and disciplinary review procedures..." such as those contained in the collective negotiations agreement involved herein "...may provide for binding arbitration..." the key portion of the 1982 amendment to §5.3 provides further that "...The procedures agreed to by the parties may not replace or be inconsistent with any alternate statutory appeal procedure nor may they provide for binding arbitration of disputes involving the discipline of employees with statutory protection under tenure or civil service laws..." (emphasis supplied). Thus, the Union was legally barred from submitting D'Arrigo's termination to binding arbitration under the agreement. His only recourse was to have appealed within 20 days of December 10, 1985, pursuant to N.J.A.C. 4A:2-2.8 and 4A:2-2.9.

The only exception to this absolute bar upon the Union from submitting discipline to binding arbitration is, as construed by our courts, instances of "minor" disciplinary action of five days or less: see Bergen Cty. Law Enforcement Group, etc. v. Bergen Cty. Bd. of Chosen Freeholders, 191 N.J. Super. 319 (App. Div. 1983) and C.W.A., AFL-CIO v. P.E.R.C., 193 N.J. Super. 658 (App. Div. 1984).

It is clear that D'Arrigo's discipline was a termination and not a disciplinary action of five days or less. Thus, the Union was precluded from invoking the arbitration provision of the collective negotiations agreement on behalf of D'Arrigo. As previously noted, the only recourse that D'Arrigo had was to have filed a letter of appeal with the then Civil Service Commission (now the Department of Personnel). Had such an appeal been timely taken it would have been forwarded to the Office of Administrative Law for a hearing before an Administrative Law Judge (N.J.A.C. 4A:2-2.9). Again, assuming that such a letter of appeal had been filed by D'Arrigo he might have then sought representation by the Union in processing that appeal. This, of course, was never done.

Under all of the circumstances set forth above, there is no basis whatsoever upon which D'Arrigo could succeed in claiming that the Union breached its duty of fair representation in this case. The courts of this State and the Commission have consistently embraced the standards established by the United States Supreme Court in Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967). See e.g., Saginario v. Attorney General, 87 N.J. 480 (1981); Distillery Workers Local 209 (Merricks), P.E.R.C. No. 88-13, 13 NJPER 710 (¶18263 1987); In re Board of Chosen Freeholders of Middlesex County, P.E.R.C. No. 81-62, 6 NJPER 555 (¶11281 1980), aff'd. Ap. Div. Docket No. A-1455-80 (1982), pet. for certif. den. (1982); New Jersey Turnpike Employees Union Local 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979); and In re AFSCME Council No. 1, P.E.R.C. No. 79-28, 5 NJPER 21 (¶10013 1978). 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.

In fact, the U.S. Supreme Court has also held that to establish a claim of a breach of the duty of fair representation there must be adduced 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).

Further, the National Labor Relations Board has held that where a majority representative exercises its discretion in good faith, proof of mere negligence, standing alone, does not suffice to prove a breach of the duty of fair representation. Service Employees Int'l Union, Local No. 579 AFL-CIO, 229 NLRB 692, 95 LRRM 1156 (1977); Printing and Graphic Communication, Local 4, 249 NLRB No. 23, 104 LRRM 1050 (1980), reversed on other grounds 110 LRRM 2928 (1982).10/

Vaca speaks in terms of arbitrary, discriminatory or bad faith conduct on the part of a union representative. Lockridge speaks further in terms of conduct that intentional, severe and unrelated to legitimate union objectives. The NLRB adds that proof

---

10/ See, also, Bergen Community College Adult Learning Center, H.E. No. 86-19, 12 NJPER 42, 45, 46 (¶17016 1985), aff'd P.E.R.C. No. 86-77, 12 NJPER 90 (¶17031 1985).

of "mere negligence," standing alone, does not suffice to prove a breach of the duty of fair representation.

Finally, Vaca also holds that the decision to refuse to arbitrate a grievance is not in and of itself evidence of a breach of the duty of fair representation. See also, New Jersey Turnpike Employees Union Local 194 and Distillery Workers Local 209, supra and Rutgers, The State University et al. (Jennings), P.E.R.C. No. 88-130, 14 NJPER 414 (¶19166 1988).

Thus, it is clear that even if the Union had had an obligation to pursue D'Arrigo's grievance petition to binding arbitration under the collective negotiations agreement, the Union's conduct with respect to D'Arrigo does not appear to have been arbitrary, discriminatory or in bad faith since the Union was not legally obligated to seek arbitration on behalf of D'Arrigo in the first instance. This is particularly evident under the statutory provision cited above, mandating the forfeiture of his "office or position" with the Authority by virtue of having been convicted of an offense involving a crime of the third degree or above, i.e., the four drug-related offenses. [See N.J.S.A. 2C:51-2 discussed above under the Motion to Dismiss by the Authority].

Finally, the Hearing Examiner rejects the contention of counsel for D'Arrigo in his answering paper of December 29, 1988, that, notwithstanding his acknowledgement that N.J.S.A. 2C:51-2 is applicable, D'Arrigo "...was wrongfully denied the entitlements of his position..." between the date of his discharge and the date upon

which he entered his plea of guilty. The Hearing Examiner can perceive no theory upon which D'Arrigo had any entitlement under the collective negotiations agreement, which obligated the Union to seek arbitration if, indeed, it could have done so.

Once again, the Hearing Examiner does not reach the question of timeliness in the filing of D'Arrigo's Unfair Practice Charge against the Union for the reasons previously stated as to that defense raised by the Authority.

* * * *

Based upon the foregoing, and upon the record papers and briefs filed in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Respondent Authority did not violate N.J.S.A. 34:13A-5.4(a)(1), (3) or (5) by its conduct herein.

2. The Respondent Union did not violate N.J.S.A. 34:13A-5.4(b)(1), (3) or (5) by its conduct herein.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Motions to Dismiss and/or for Summary Judgment by the Respondent Authority and the Respondent Union be granted and that the Complaint be dismissed in its entirety.

Alan R. Howe
Hearing Examiner

Dated: February 21, 1989
Trenton, New Jersey