

H.E. NO. 90-40

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

In the Matter of

NEW JERSEY STATE PBA and  
PBA LOCAL 105,

Respondents,

-and-

Docket No. CI-H-90-11

ROBERT FRANKLIN,

Charging Party.

SYNOPSIS

A Hearing Examiner grants in part and denies in part respondents' motion for partial summary judgment on charges that they violated the New Jersey Employer-Employee Relations Act when they expelled officer Franklin solely due to his status as a dual member. The Hearing Examiner granted summary judgment on the allegation that Franklin's dues were not applied solely to collective negotiations because respondents have no obligation to use dues only for changeable activities. She denied the motion to dismiss the State PBA as a proper party because it is the majority representative authorized to collect dues.

The parties may appeal the Hearing Examiner's decision by filing exceptions by special permission. N.J.A.C. 19:14-4.8(e), (f); N.J.A.C. 19:14-4.6(b).

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Appearances:

For the Respondent, Zazzali, Zazzali, Fagella & Nowak, Esqs.  
(Paul L. Kleinbaum, of counsel)

For the Charging Party, A.J. Fusco, Jr., P.A.  
(Steven A. Varano, of counsel)

HEARING EXAMINER'S DECISION ON  
MOTION FOR SUMMARY JUDGMENT

On July 21, 1989, Robert Franklin filed an unfair practice charge alleging that the New Jersey State PBA ("State PBA") and PBA, Local 105 ("Local 105") violated subsections 5.4(b)(1) and (5) of the New Jersey Employer-Employee Relations Act when it expelled Franklin from Local 105.<sup>1/</sup> Specifically, the charge asserts that Franklin was expelled only because he was a member of the Fraternal Order of Police, Lodge 55 and that the expulsion was arbitrary,

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<sup>1/</sup> 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."

capricious and discriminatory. Franklin also asserts that Respondents continue to deduct full dues from his pay and that they are not entitled to dues or an agency fee. He contends that his dues are not being applied solely to collective negotiations. On September 15, 1989, the Director of Unfair Practices issued a Complaint and Notice of Hearing.

The charge alleges the following facts: Robert Franklin was a member of PBA Local 105 and FOP Lodge 55. On March 28, 1989, Local 105's Judiciary Committee, including Chairman Murphy and Committeemen Ellis, Mayfield, Gurtler and Ken voted to expel Robert Franklin. Franklin was expelled because he was a member of FOP, Lodge 55. On May 12, 1989, Franklin's expulsion was affirmed on appeal by the State PBA Judiciary Committee. Since Franklin's expulsion, the PBA has continued to deduct full dues from his pay.

On November 1, 1989, the Respondents filed an Answer admitting that Franklin was expelled from membership in Local 105, but asserting that the charge should be dismissed because it is untimely and because the charging party's "hands" are "unclean". It also argues that the State PBA is not a proper party and that the Commission does not have jurisdiction over the amount of the representation fee.

On December 14, 1989, Respondents filed a Motion to Dismiss the Complaint against the State PBA because it is not a proper party. Respondents also moved to dismiss the portion of the Complaint challenging the amount of the representation fee. The

Motion was accompanied by the affidavit of Samuel Love, president of Local 105. A copy of Local 105's Constitution and By-Laws was attached to the affidavit. Love states that Local 105 represents about 4400 State corrections employees. Approximately 500 employees in Local 105 pay a representation fee. The State PBA is the majority representative of the State law enforcement unit comprised of twelve locals.

Article VI of Local 105's Constitution and By-Laws states:

Section 1. Any individual member of any local association who shall join or become a member of any other police or law enforcement organization in or outside of the police department or law enforcement agency of which he is a member, a purpose of such organization being to represent policemen or law enforcement officers in matters affecting their employment or economic welfare, shall be expelled from this association and the local association. This section shall be inapplicable to the New Jersey Chiefs Association and the National Association of Police Officers. In determining whether membership in any other police or law enforcement organization is violative of this section, a member shall submit a written inquiry to the President of this Association and any determination of the President relating to any other organization shall constitute a sufficient basis for preferring charges.

The State submits payroll deductions for dues and representation fees directly to Local 105. Local 105 does not transfer dues or fees to the State PBA. The State deposits fees into Local 105's account.

On February 5, 1990, Franklin responded to the Motion to Dismiss, asserting that respondents are not entitled to collect dues or representation fees. Franklin argues that if respondents are not

entitled to dues or fees, his challenge to the amount of the fee becomes moot. Therefore, he did not file a Petition challenging the amount deducted with the Public Employment Relations Commission Appeal Board ("Appeal Board"). Franklin asserts that the Commission should retain jurisdiction over the amount of the fee for the sake of judicial economy. He argues that he was expelled from both Local 105 and the State PBA. He asserts that the charge against the State PBA should not be dismissed since the State PBA and Local 105 have identical Constitutions and By-Laws and he was allegedly expelled for violating PBA By-Laws. According to Franklin, the State PBA receives funds from the locals on a per capita basis. Franklin asserts that a plenary hearing is necessary to determine whether the State PBA receives funds from Franklin through Local 105.

#### ANALYSIS

The Respondents' motion to dismiss before hearing under N.J.A.C. 19:14-4.7 is similar to a motion to dismiss for failure to state a claim upon which relief may be granted under R.4:6-2(e); City of Margate, H.E. 89-23, 15 NJPER 166 (¶20070 1989). It is a motion for judgment on the pleadings which raises only issues of law, while admitting all of the facts plead by the opponent. Reider v. State of New Jersey Dept. of Transp., 221 N.J. Super 547 (App. Div. 1987).

In Reider v. State of New Jersey Dept. of Transp., 221 N.J. Super 547 (App. Div. 1987), the court stated:

On a motion made pursuant to R. 4:6-2(e) "the inquiry is confined to a consideration of the

legal sufficiency of the alleged facts apparent on the face of the challenged claim." P. & J. Auto Body v. Miller, 72 N.J. Super 207, 211 (App. Div. 1962). The court may not consider anything other than whether the complaint states a cognizable cause of action. Ibid. For this purpose, "all facts alleged in the complaint and legitimate inferences drawn therefrom are deemed admitted." Smith v. City of Newark, 136 N.J. Super 107, 112 (App. Div. 1975). See also Heavner v. Uniroyal, Inc., 63 N.J. 130, 133 (1973); Polk v. Schwartz, 166 N.J. Super 292, 299 (App. Div. 1979). A complaint should not be dismissed under this rule where a cause of action is suggested by the facts and a theory of actionability may be articulated by way of amendment. Muniz v. United Hsps. Med. Ctr. Pres. Hsp., 153 N.J. Super 79, 82-83 (App. Div. 1977). However, a dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted.

Reider, at 552.

A motion for judgment on the pleadings is distinguished from a summary judgment proceeding. A party seeking a motion for summary judgment claims there is no genuine issue of material fact and it is entitled to judgment on the undisputed facts and applicable law. Heljan Management Corp. v. Dileo, 55 N.J. Super 307 (App. Div. 1959); Baldwin Const. Co. v. Essex Cty. Bd. of Taxation, 24 N.J. Super 253 (Law Div. 1952). On a summary judgment motion, a court considers matters outside the pleadings only where they are undisputed. Hackensack Water Co. v. No. Bergen Tp., 103 F.Supp 133 (D.N.J. 1952), aff'd. 200 F.2nd 313 (3rd Cir. 1952). If matters outside the pleadings are considered, the motion is treated as one for summary judgment. Enourato v. N.J. Building Auth., 182 N.J. Super 58, 64-65 (App. Div. 1981), aff;d 90 N.J. 396 (1982).

R.4:6-2, 4:46-1. In P. & J Auto Body v. Miller, 72 N.J. Super 207 (App. Div. 1962), the court stated:

While the court has the power to enlarge the scope of said motion and treat the same as "one for summary judgment," this may be done only if on said motion "matters outside the pleading are presented." However, such matters must be presented by depositions, admissions or affidavits. They cannot be raised, without verification, in oral arguments of counsel or in briefs filed with the court.

P. & J. Auto Body, at 211. See also Comment, R. 4:6-2.

Local 105 and the State PBA have filed an affidavit with their Constitution and By-Laws attached.<sup>2/</sup> Franklin disputes the facts stated in the affidavit only to the extent that he alleges that the State PBA receives funds from the local PBAs on a per capita basis. Accordingly, I treat the motion as one for partial summary judgment. N.J.A.C. 19:14-6.3(a)(8).<sup>3/</sup>

N.J.A.C. 19:14-4.8(d) provides the standard a Hearing Examiner must follow in evaluating a motion for summary judgment. The motion may be granted,

...if it appears from the pleadings, together with the briefs and other documents filed, 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.

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<sup>2/</sup> Respondents also refer to the collective negotiations agreement between the State PBA and the State.

<sup>3/</sup> A Motion for Summary Judgment is properly filed before the Commission. N.J.A.C. 19:14-4.8(a).

In Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 73-75, (1954), the New Jersey Supreme Court stated that the movant must remove any reasonable doubt of a genuine issue of material fact and that "[a]ll inferences of doubt are drawn against the movant in favor of the opponent of the motion. The papers supporting the motion are closely scrutinized and the opposing papers indulgently treated..." See also New Jersey Civil Practice Rules, 4:46-2.<sup>4/</sup>

I first address whether the State PBA is a proper party to the Complaint. The State PBA is the majority representative of a unit of State law enforcement personnel, which includes Franklin. (Affidavit of Samuel Love).<sup>5/</sup>

N.J.S.A. 34:13A-5.3 provides:

A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership.

Subsection 5.5 empowers the majority representative to negotiate over a representation fee in lieu of dues. Subsection 5.6 prohibits

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<sup>4/</sup> If I consider the motion as one to dismiss a complaint for failure to state a claim on which relief can be granted, I must take the allegations of the complaint as true and draw all inferences in the charging party's favor. Wuethrich v. Delia, 134 N.J. Super 400 (Law Div. 1975), aff'd 155 N.J. Super 324 (App. Div. 1978); Sayreville B/E, H.E. No. 78-26, 4 NJPER 117 (¶4056 1978).

<sup>5/</sup> See also State of New Jersey, H.E. 90-30, 16 NJPER 72 (¶21031 1989) finding the State PBA the majority representative of the state law enforcement unit including Local 105.



collection of a representation fee unless, "membership in the majority representative is available to all employees in the unit on an equal basis." cf. Bergen Cty. Sheriff (Neely), P.E.R.C. No. 88-9, 13 NJPER 645 (¶18243 1987), aff'd 227 N.J. Super. 1 (App Div. 1988), recon. den. 3/15/88, certif. denied, 111 N.J. 591 (1988)

The charge alleges that Franklin was expelled from PBA Local 105 solely due to his membership in FOP, Lodge 55. The State PBA Judiciary Committee reviewed and affirmed Local 105's decision to expel Franklin.

The financial relationship between the State PBA and Local 105 is disputed. Respondents assert that dues and representation fees are submitted directly to its bank account. Franklin asserts that the State PBA receives a per capita amount from each local. The State continues to deduct dues from Franklin's pay. The State PBA's recently expired agreement with the State provides that dues deductions "shall be limited to the PBA, the duly certified majority representative." (Article VII, section 2). I find the State PBA, as the majority representative authorized to collect dues from unit members, is a proper party to this proceeding. I also find a plenary hearing is necessary to determine the financial relationship between the State PBA and Local 105.

Respondents argue that only the Appeal Board has jurisdiction over the allegation that Franklin's "dues are not being applied, in total, to collective bargaining pursuant to the applicable New Jersey Statutes." (Complaint, paragraph 4).

Franklin argues that I should consider the issue (1) for the sake of judicial economy and (2) if the respondents are not entitled to collect dues or a representation fee from his salary, the issue will be moot.

Franklin suggests that I retain jurisdiction over the portion of the case challenging the amount of the fee for the sake of judicial economy. Franklin also suggests that the Commission could transfer the portion of the matter concerning the amount of the representation fee to the Appeal Board.<sup>6/</sup>

Both parties' arguments concerning the amount of the representation fee are premature. The Complaint alleges that Franklin continues to pay dues; the Act does not require that unions use dues solely for collective negotiations and other activities legitimately charged to non-members. N.J.S.A. 34:13A-5.5, 5.6.

Subsection 5.5(b) distinguishes a representation fee from dues:

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<sup>6/</sup> The Commission and the Appeal Board are separate agencies. The Appeal Board was created specifically to avoid having the Commission determine the amount of a representation fee. See Assembly Labor Committee Statement, Assembly Bill No. 688, June 19, 1978. Boonton Bd. of Ed. v. Kramer, 99 N.J. 523 (1985), cert. den. 106 S. Ct. 1388 (1986).

The Commission has unfair practice jurisdiction over allegations of discrimination against representation fee payers and against dual members, N.J.S.A. 34:13A-5.4(b)(1); N.J.S.A. 34:13A-5.7. It also has jurisdiction to determine the adequacy of a union's demand and return procedure. N.J.S.A. 34:13A-5.6; Boonton, Bacon. Only the Appeal Board has jurisdiction over the amount of the representation fee. Boonton.

The representation fee in lieu of dues shall be in an amount equivalent to the regular membership dues, initiation fees and assessments charged by the majority representative to its own members less the cost of benefits financed through the dues, fees and assessments and available to or benefiting only its members, but in no event shall such fee exceed 85% of the regular membership dues, fees and assessments.

Respondents have no obligation to use Franklin's dues solely for chargeable activities. I therefore dismiss the allegation that Franklin's dues "are not being applied, in total to collective bargaining pursuant to the applicable New Jersey Statutes." (Complaint, paragraph 4) (Emphasis added).<sup>7/</sup>

#### CONCLUSION

I grant Local 105's and the State PBA's Motion for Summary Judgment on the allegation that Franklin's dues are not being applied solely to collective bargaining.

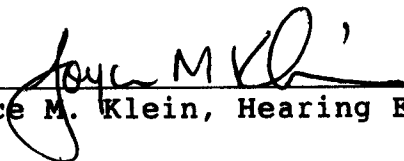
I deny Local 105's and the State PBA's motion to dismiss the State PBA as a party. I find the State PBA is a proper party to the Complaint.

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<sup>7/</sup> I do not address the issue of whether Franklin has an obligation to pay dues or a representation fee.

ORDER

Accordingly, I ORDER that a HEARING take place on the remaining issues at the Commission offices in Trenton, New Jersey, on April 4, 1989, at 9:30 a.m.

  
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Joyce M. Klein, Hearing Examiner

DATED: March 12, 1990  
Trenton, New Jersey